DIGEST

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ALL REPORTED CASES DECIDED BY ALL FEDERAL AND PROVINCIAL COURTS OF CANADA, AND BY THE PRIVY COUNCIL ON APPEAL THEREFROM AND INCLUDING DOMINION LAW REPORTS VOLS. 1 TO 50 INCLUSIVE

DURING THE YEARS 1911 TO JANUARY 1, 1920

BY

THE EDITORIAL DEPARTMENT OF THE CANADA LAW BOOK COMPANY, LIMITED

C. E. T. FITZGERALD
A. H. O'BRIEN
J. T. HARRIS
F. FLYNN

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MAR

CONTENTS OF VOLUME I.

DIGEST

OF

CASES UNDER CLASSIFIED HEADINGS

ABATEMENT

TO

INSTRUCTIONS TO JURIES

PREFACE

This digest includes all the reported cases in the Courts of all the provinces of Canada from January 1st, 1911 to January 1st, 1920 inclusive, and all appeals to the Privy Council from Canadian decisions.

The Canadian Reports which are digested are as follows:—

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Vol. 16 B. C. R. to Vol. 26 to p. 337.
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Vol. 24 Rev. Leg. to Vol. 25.
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The classified system used is that adopted by us, and is the standard law classification system, a full explanation of which is given at the end of the preface.

A complete system of cross references makes it an easy matter to at once find the similar cases without inconvenience or loss of time.

At the beginning of each subject a list of valuable annotations will be found.

This Digest will be continued from year to year by yearly Digests known as the "Canadian Annual Digest," in which the present system of classification will be adhered to, making it an easy matter for the practitioner to at once locate and trace all similar cases upon the point of law involved.

Section 91 of the British North America Act gives the Parliament of Canada power over the following subjects:—

1. The Public Debt and Property.
2. The Regulation of Trade and Commerce.
3. The Raising of Money by Any Mode or System of Taxation.
4. The Borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The Fixing of and Providing for the Salaries and Allowances of Civil and Other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coasts and Inland Fisheries.
13. Ferries between a Province and Any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands Reserved for the Indians.
25. Naturalization and Aliens.
27. The Criminal Law, Except the Constitution of Courts of Criminal Jurisdiction, but Including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as Are Expressly Excepted in the Enumeration of the Classes of Subjects by This Act Assigned Exclusively to the Legislatures of the Provinces.

It will be seen from the above list the great number of subjects which have a uniform law over the whole of the Dominion of Canada, and are of interest to all the members of the profession regardless of the particular province in which they reside.

STANDARD LAW CLASSIFICATION

INSURES EXPEDITIOUS FINDING OF SIMILAR CASES WITHOUT INCONVENIENCE OR LOSS OF TIME.

This system of law classification was inaugurated by us in 1912. Its purpose is to enable you to find quickly and easily all parallel cases, by reference to the permanent classification number at the commencement of the headnote enunciating the principal decided.

Take, for example, the case of Smith v. Spencer, 42 D. L. R. 269, which deals with the point of "sufficiency of writing in contract." This case is classified under the general title "Contracts" and bears the classification number (1 E–95). By looking in this, and subsequent Canadian Annual Digests under this title and classification number, all cases dealing with this particular point may be found.

Each case, where necessary, is cross-referenced, as a beneficial guide to finding analogous principles treated under different branches of the law.

Cases reversed, affirmed, followed or distinguished, are indicated and indexed.

Annotations contained in the Dominion Law Reports from vols. 1 to 52 inclusive, are classified under the respective titles to which they relate. Almost every subject contains references to a number of annotations, thereby adding to the Digest an index to the first Encyclopædia of Canadian Law.

CANADA LAW BOOK CO., LIMITED.

Toronto, July, 1920.

TABLE OF ABBREVIATIONS

OF CANADIAN LAW REPORTS, JOURNALS, DIGESTS, AND STATUTES.

[1917] A. C.	Law Reports, Appeal Cases, of the year indicated in brackets.
A. L. R.	Alberta Law Reports.
A. R. (Ont.)	Ontario Appeal Reports.
Allen	Allen's New Brunswick Reports (same as 6–11 N. B. R.).
B. C. R.	British Columbia Reports.
B. N. A. Act.	British North America Act.
Bert. R.	Berton's Reports (same as 2 N. B. R.).
C. C. (Que.)	Civil Code (Quebec).
C. C. P.	Code of Civil Procedure (Quebec).
C. L. Ch.	Common Law Chambers Reports (Ontario).
C. L. J.	Canada Law Journal.
C. L. P. Act.	Common Law Procedure Act (Ontario).
C. L. T.	Canadian Law Times.
C. R. [1] A. C.	Canadian Reports Appeal Cases, 1–13 vols.
C. R. [1906] A. C.	Canadian Reports Appeal Cases (1906–1913).
C. S. A.	Consolidated Statutes of Alberta (1915).
C. S. B. C.	Consolidated Statutes of British Columbia (1888).
C. S. N. B.	Consolidated Statutes of New Brunswick (1903).
Cam. Cas.	Cameron's Supreme Court Cases.
Can. Com. R.	Canadian Commercial Reports (1903–4), 3 vols.
Can. Cr. Cas.	Canadian Criminal Cases (1898–1920), 31 vols.
Can. Ex.	Canada Exchequer Court Reports, 18 vols.
Can. Ry. Cas.	Canadian Railway Cases (1904–1920), 24 vols.
Can. S. C. R.	Canada Supreme Court Reports, 58 vols.
Cart.	Cartwright's Cases on the British North American Act, 1867.
Ch. Cham. or Ch. Ch.	Chancery Chamber Reports (Ontario).
Chip. R.	Chipman's Reports, New Brunswick (same as 1 N. B. R.).
Clarke & Sc.	Clarke & Scully, Drainage Cases.
Cochran's R.	Cochran's Reports (vol. 3, same as 4 N. S. R.).
Con. Ord. N. W. T.	Consolidated Ordinances of North-West Territories, 1898.
Corp. Jur.	Corpus Juris.
Cr. Code	Criminal Code (Canada).
D. C. A.	Decisions de la Cour d'Appel.
D. L. R.	Dominion Law Reports (1912–1920), 50 vols.
Dorion	Decisions of the Court of Appeal (Quebec).
Dra.	Draper's Reports (Ontario).
E. & A.	Upper Canada Error and Appeal Reports (Ontario).
E. L. R.	Eastern Law Reporter (1905–1915), 14 vols.
El. Cas. (Ont.)	Election Cases (Ontario).
Gel. & Russ. R.	Geldert & Russell's Nova Scotia Reports (same as 31–45 N. S. R.).
Gr.	Grant's Chancery Reports (Ontario).
H. E. C.	Hodgins' Election Cases (Ontario).
Han. (N. B.)	Hannay's New Brunswick Reports (same as 12–13 N. B. R.).
James R.	James Reports (same as 2 N. S. R.).
Kerr R.	Kerr's Reports, New Brunswick (same as 3–5 N. B. R.).
L. C. G.	Local Courts Gazette (Ontario).
L. C. J.	Lower Canada Jurist.
L. C. L. J.	Lower Canada Law Journal.
L. C. R.	Lower Canada Reports.
M. C. R.	Montreal Condensed Reports (1854), 1 vol.
M. L. R. Q. B.	Montreal Law Reports, Queen's Bench (1885–1891), 7 vols.

M. L. R. S. C. ..... Montreal Law Reports, Superior Court (1885–1891), 7 vols.
M. M. C. ..... Martins Mining Cases.
Man. L. R. ..... Manitoba Law Reports.
Mun. Code ..... Municipal Code (Quebec).

N. B. Eq. ..... New Brunswick Equity Reports.
N. B. R. ..... New Brunswick Reports.
N. S. D. ..... Nova Scotia Decisions (same as 7–9 N. S. R.).
N. S. R. ..... Nova Scotia Reports.
N. W. T. Ord. ..... Ordinances of the North-West Territories (Canada).
N. W. T. R. ..... North-West Territories Reports.

O. L. R. ..... Ontario Law Reports, 45 vols.
O. R. ..... Ontario Reports.
O. W. N. ..... Ontario Weekly Notes, 16 vols.
O. W. R. ..... Ontario Weekly Reporter (1902–1914), 27 vols.
Oldr. R. ..... Oldright's Nova Scotia Reports (same as 5–6 N. S. R.).
Ord. Alta. 1911 ..... Territories Ordinances (Ordinances of North-West Territories, 1911), in force in Alberta as reprinted, 1911.

P. E. I. R. ..... Prince Edward Island Reports.
P. R. (Ont.) ..... Practice Reports (Ontario).
Perrault ..... Perrault's Quebec Reports (1726–1759), 1 vol.
Pugs. ..... Pugsley's Reports (same as 14–16 N. B. R.).
Pyke ..... Pyke's Quebec Report (1810), 1 vol.

Q. L. R. ..... Quebec Law Reports.
Que. P. R. ..... Quebec Practice Reports.
Que. Q. B. or K. B. ..... Quebec Reports, Queen's Bench or King's Bench.
Que. S. C. ..... Quebec Reports, Superior Court.

R. E. D. ..... Russell's Equity Decisions (Nova Scotia).
R. J. R. ..... Mathieu's Revised Judicial Reports (Quebec).
R. S. B. C. ..... Revised Statutes of British Columbia (1911).
R. S. C. ..... Revised Statutes of Canada (1906).
R. S. M. ..... Revised Statutes of Manitoba (1902), (1913).
R. S. N. S. ..... Revised Statutes of Nova Scotia (1900).
R. S. O. ..... Revised Statutes of Ontario (1914).
R. S. Q. ..... Revised Statutes of Quebec (1909).
R. S. S. ..... Revised Statutes of Saskatchewan (1909).
Ramsey ..... Ramsey's Appeal Cases (Quebec).
Rev. de Crit. ..... Revue de Critique, Quebec (1871–1875), 3 vols.
Rev. de Jur. ..... Revue de Jurisprudence (Quebec).
Rev. Leg. ..... Revue Legale (Quebec).
Russ. & Ches. ..... Russell & Chesley's Reports (same as 10–12 N. S. R.)
Russ. & Geld. ..... Russell & Geldert's N. S. R. (same as 13–27 N. S. R.).
Russ. E. R. ..... Russell's Election Reports (Nova Scotia).

S. C. Cas. ..... Supreme Court Cases (Cameron's) (1905).
S. L. R. ..... Saskatchewan Law Reports.
Stew. Adm. R. ..... Stewart's Admiralty Reports (Nova Scotia).
Stock. Adm. ..... Stockton's Admiralty Reports (New Brunswick).
Stuart's Adm. ..... Stuart's Vice-admiralty Reports, Quebec, (1836–1874), 2 vols.
Stuart K. B. ..... Stuart's King's Bench Reports, Quebec (1810–1835), 1 vol.

Tay. ..... Taylor's Upper Canada K. B. Reports (1823–1827), 1 vol.
Terr. L. R. ..... Territories Law Reports.
Thom. R. ..... Thomson's Reports (same as 1 N. S. R.)

U. C. C. P. ..... Upper Canada Common Pleas Reports.
U. C. L. J. ..... Upper Canada Law Journal (1885–1865), (now Canada Law Journal).
U. C. Q. B. } ..... Upper Canada Queen's Bench Reports.
U. C. R. }

W. L. R. ..... Western Law Reporter.
W. W. R. ..... Western Weekly Reports.
Wood's R. ..... Wood's Manitoba Reports (1875–1883), 1 vol. (prior to Manitoba Law Reports).

Young's Adm. ..... Young's Nova Scotia Admiralty Reports (1865–1880).

DIGEST

of

CANADIAN CASE LAW

1911–1920.

INCLUDING ALL REPORTED CASES DECIDED BY THE FEDERAL AND PROVINCIAL COURTS OF CANADA, AND BY THE PRIVY COUNCIL ON APPEAL THEREFROM DURING THE YEARS 1911 TO JANUARY 1ST, 1920

and

A COMPLETE DIGEST OF THE CONTENTS OF VOLUMES 1 to 50 INCLUSIVE OF THE

DOMINION LAW REPORTS

Cited "D.L.R."

ABANDONMENT.

Of expropriation proceedings, see Expropriation.

Of property in insolvency proceedings, see Assignments for Creditors.

Of contract, see Contracts.

As ground for alimony, see Divorce and Separation.

Of highways, see Highways V.

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ABATEMENT.

Of nuisance, see Nuisance.

Of legacies, see Wills.

ABATEMENT AND REVIVOR.

I. By death.

II. Pendency of prior action.

III. Revivor.

I. By death.

Death of party.

The filing of an intervention, while a suit was suspended by the death of a party, is not prejudicial within the meaning of art. 174, C.P., and is not open to an objection to the form on that ground, but it may be proceeded upon when the suspension ceases. An intervention, filed after the expiration of the delay allowed by art. 272 C.P. for contesting a petition for the continuance of the suit after the death of the plaintiff, is not open to an exception to the form on the ground that there were not two parties to the action at the time the intervention was filed, the filing of the petition itself being an act of continuance which the adverse party may or may not contest.

Breakey v. Bernard, 6 D.L.R. 312, 18 Rev. de Jur. 318, 22 Que. K.B. 30.

Death of party pending action — Necessity for direction of court—Rules 304, 512—Appeal from master's report—Refusal to hear until representative of deceased appointed and order of revivor made.

Roos v. Swarts, 10 O.W.N. 446, 11 O.W.N. 166.

Dealings with properties transferred as security for an endorsement—Death of defendant—Motion by executrix of deceased for order staying proceedings.

Hull v. Allen, 2 O.W.N. 897, 18 O.W.R. 609.

Executors and administrators—Action to set aside will—Survival of cause of action without aid of trustee act.

Blatchford v. Willis, 15 O.W.N. 355.

II. Pendency of prior action.

Stay of proceedings — Two actions brought for same cause—Stay of earlier action.

Milloy v. McGill, 4 S.L.R. 399, 19 W.L.R. 745.

III. Revivor.

Action launched by attorney-in-fact after plaintiff's death—Subsequent knowledge of his decease—Substitution of executor as plaintiff.

Rakha Ram v. Tina, 16 B.C.R. 317, 1 W.W.R. 35.

EXECUTION—JUDGMENT FOR COSTS RECOVERED BY PLAINTIFF AGAINST DEFENDANTS—DEATH OF PLAINTIFF AFTER JUDGMENT—PRECIPE ORDER CONTINUING ACTION IN NAME OF EXECUTRIX AS PLAINTIFF—ISSUE, BY PLAINTIFF BY REVIVOR, OF EXECUTION FOR COSTS—PROBATE OF WILL NOT YET GRANTED TO EXECUTRIX—STAY OF PROCEEDINGS IN ACTION UNTIL CONTEST IN SURROGATE COURT AT AN END—RULES 391, 566—DEFENDANTS DISCHARGED FROM LIABILITY UPON PAYMENT OF TAXED COSTS INTO COURT.

Smith v. Ontario and Minnesota Power Co., 16 O.W.N. 187.

ABDUCTION.

See Criminal Law.

See also Seduction.

INDUCEMENT OR PERSUASION.

To constitute the crime of abduction of a girl under sixteen years (Cr. Code s. 315), it is necessary to prove that the accused had taken an active part, through persuasion or otherwise, to induce the girl to leave. [R. v. Jarvis, 20 Cox C.C. 249, R. v. Olifier, 10 Cox C.C. 402, applied. See also R. v. Blythe, 1 Can. Cr. Cas. 263; Re Johnson, 8 Can. Cr. Cas. 243; R. v. Holmes, 16 Can. Cr. Cas. 7; R. v. Yorkema, 16 Can. Cr. Cas. 189.]

R. v. Weinstein, 28 D.L.R. 327, 26 Can. Cr. Cas. 50.

ELOPEMENT WITH GIRL UNDER SIXTEEN AT GIRL'S SUGGESTION.

It is an offence under Cr. Code s. 315 to taken an unmarried girl under sixteen years of age out of the constructive possession of her father by meeting her by prearrangement and marrying her without the father's consent, and it is no defence that the girl was infatuated with him and asked him to marry her, nor that he might reasonably have thought her to be over sixteen; the effect of the clause declaring it to be immaterial whether the girl is taken "at her own suggestion" or not (s. 315 (2)), is that a persuasive inducement from the accused is no longer a material ingredient of the offence. [R. v. Jarvis, 20 Cox C.C. 249, distinguished.]

R. v. Meyers, 24 Can. Cr. Cas. 120.

UNLAWFUL TAKING OR ENTICEMENT OF CHILD—OFFENCE COMMITTED BY FATHER—DECREE OF FOREIGN COURT AWARDING CUSTODY TO MOTHER.

R. v. Hamilton, 22 O.L.R. 484, 17 Can. Cr. Cas. 410, 17 O.W.R. 809.

ABORTION.

Annotation.

Abortion by physician's operation; justification; rebuttal; other offences; 42 D.L.R. 439.

SUPPLYING DRUGS—ATTEMPT.

If there is sufficient evidence to justify a reasonable inference that an accused attempted to obtain noxious substances for the purpose of causing a miscarriage; that he believed he had obtained them, and that he tried to administer them, he may be properly convicted of an "attempt" under s. 72 of the Criminal Code. It is immaterial whether the substances obtained in fact contained noxious ingredients or not.

R. v. Pettibone, 41 D.L.R. 411, 13 A.L.R. 463, 30 Can. Cr. Cas. 164.

SUPPLYING DRUG OR NOXIOUS THING.

The requirements of s. 305 of the Criminal Code, prohibiting the unlawful supplying or procuring of any drug or other noxious thing with knowledge that it is intended to be unlawfully used or employed with intent to procure a miscarriage, are satisfied if the substance supplied be a drug, even though the quantity supplied be so small as to be incapable of doing harm; if not a drug, the substance must be proved to be a noxious thing, and noxious in the quantity supplied. Yellow jasmine or gelsemium is a drug or noxious thing the supplying of which for illegal purposes may constitute an offence under Cr. Code, s. 305.

R. v. Scott, 4 D.L.R. 850, 19 Can. Cr. Cas 370, 3 O.W.N. 1167, 22 O.W.R. 9.

ABSTRACTS.

Of title, see Registry Laws; Land Titles (Torrens system); Vendor and Purchaser.

ABUSE OF PROCESS.

See False Imprisonment; Malicious Prosecution.

ACTION FOR—EVIDENCE—TERMINATION OF PROCEEDINGS—NECESSITY OF SHEWING.

In an action for abuse of criminal process by causing an arrest in order to coerce payment of a debt, it is necessary to shew that the proceeding terminated in the plaintiff's favour.

Cockburn v. Kettle, 12 D.L.R. 512.

EXAMINATION OF WITNESS—ATTEMPTED DISCOVERY OF EVIDENCE.

It is an abuse of the process of the courts for a plaintiff by means of the examination of a witness on a pending interlocutory motion to seek to obtain discovery of the defendant's witnesses and the evidence upon which he intends to rely at the trial, but which is not relevant to the motion itself.

D. v. W., 3 D.L.R 293, 21 O.W.R. 853.

DEMAND FOR JUDICIAL ABANDONMENT OF PROPERTY—INSOLVENCY—PRÊTE-NOM—GOOD FAITH.

When a debtor is notoriously insolvent, a demand for judicial abandonment of property made to him by a bookkeeper as prête-nom of a person who considers himself the real creditor but who is not, which demand is rejected by the court, gives no right to an action for damages against them if they have acted in good faith, the demand

for abandonment not affecting his credit nor causing him any damages.

Freidenberg v. Frisching, 47 Que. S.C. 389.

ABUTTING OWNER.

See Easements; Highways; Waters.

For compensation in expropriation proceedings, see Expropriation, III C; Damages, III L.

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ACCEPTANCE.

Of bills of exchange, see Bills and Notes.

Of offer, see Contracts, I D.

Of goods, see Sale.

ACCESSION AND CONFUSION.

As to land, see Accretion and Alluvion.

Mixture of goods transferred by debtor, see Fraudulent Conveyances, II—8.

FURS SKINS MADE INTO COAT—REPLEVIN.

Where beaver skins belonging to a wife have been wrongfully taken from among her effects by her husband, who has them made up into a fur coat which he makes a gift of to a third person, the property in the coat is in the wife under the principle of "accession," and the coat may be recovered by her in an action of replevin.

Jones v. De Marchant, 28 D.L.R. 561, 26 Man. L.R. 455, 34 W.L.R. 739, 10 W.W.R. 841.

CONFUSION AND INTERMIXING OF GOODS IN BULK—SALVAGE SALE—CONVERSION.

Where a part of a quantity of grain stored in a grain elevator was sold to the plaintiff without severance or actual delivery of the part so sold, and where, after the sale and before severance or delivery, the greater part of the entire bulk was destroyed by fire, but a portion equal to the quantity so sold was merely damaged if injured at all, it appearing that an adjustment of the resulting insurance claims under a "blanket policy," between the seller and his insurers was made with a proviso for a salvage sale, the plaintiff is entitled to select his quantity out of the salvage, and if, at such salvage sale, his original seller buys in the whole of such grain, both damaged and undamaged, he is liable in damages for conversion in a case where the subject-matter involved had been excluded from the protection of the "blanket policy."

Inglis v. Richardson & Sons, 14 D.L.R. 137, 29 O.L.R. 229, reversing 10 D.L.R. 158.

LANDSLIP FROM HIGHER TO LOWER LAND—RIGHTS OF THE RESPECTIVE OWNERS.

In the case of a subsidence or landslip through natural causes, from a high level land to a contiguous lower one, the proprietor of the part carried away, who, though notified to remove it, fails to do so, and when aware of its removal by the owner of the land on which it has fallen, stands by without objection or protest, is estopped, after the expiration of nearly two years, from suing to recover the value of it.

Bells' Asbestos Mines v. The King's Asbestos Mines, 21 Que. K.B. 234.

ACCESSORY.

See Accomplice.

ACCIDENT.

Insurance against, see Insurance.

For railway accidents, see Railways; Street Railways; Carriers.

For accidents to employees, see Master and Servant.

For accidents generally, see Negligence; Highways; Municipal Corporations; Automobiles.

ACCOMPLICE.

See Criminal Law.

ACCORD AND SATISFACTION.

TORRENS TITLE AS MERGER OF ORIGINAL AGREEMENT—ENCUMBRANCES.

A certificate of title issued under the Torrens system (Real Property Act, R.S.M. 1913, ch. 171), does not operate as a merger nor as accord and satisfaction of the liability under the original agreement to give title free of all encumbrances.

Freeman v. Calverley, 27 D.L.R. 394, 26 Man. L.R. 330, 34 W.L.R. 514, 10 W.W.R. 567.

WHAT CONSTITUTES—TAKING NOTE OF THIRD PERSON.

A promissory note signed by a third party as a joint maker and which is taken by the seller of a car as payment of the balance of purchase price due thereon operates as an accord and satisfaction.

Wyton v. Hille, 25 D.L.R. 89, 25 Man. L.R. 772, 32 W.L.R. 925, 9 W.W.R. 591.

CHEQUE MARKED IN FULL—ENDORSEMENT AND CASHING—EXTINGUISHMENT OF OBLIGATION — ESTOPPEL — FINDINGS OF FACT OF TRIAL JUDGE—MERCANTILE LAW AMENDMENT ACT, R.S.O. 1914, CH. 133, S. 16.

Shearer v. Reeder, 9 O.W.N. 155.

RELEASE—COMPROMISE AND SETTLEMENT OF ACTION—PROCEEDINGS TO WIND UP.

McPhee v. Bell, 33 D.L.R. 773.

ACCEPTANCE, BEFORE ACTION, OF SUM OF MONEY IN SETTLEMENT OF CLAIM FOR INJURIES—ABSENCE OF FRAUD.

Gissing v. T. Eaton Co., 25 O.L.R. 50.

PROMISE ALONE AS SATISFACTION—ABSENCE OF CONSIDERATION.

An accord and satisfaction is a contract and requires consideration to support it.

DeSalis v. Jones, 11 D.L.R. 228.

PROMISE ALONE AS SATISFACTION.

To constitute a bar to an action on an original claim or demand the accord must be fully executed, unless the agreement or promise, instead of the performance thereof,

is accepted in satisfaction. [See also 7 Halsbury's Laws of England, p. 443; Stewart v. Hawson, 7 U.C.C.P. 168, and Macfarlane v. Ryan, 24 U.C.Q.B. 474, specially referred to.] A document, made after the execution of an executory agreement for the sale of engine, stating that it was mutually agreed between the seller and the purchaser that whereas the purchaser complained that the engine was defective in certain specified parts and whereas the seller, while not admitting the alleged defects, desired to adjust all differences, therefore in consideration of the seller supplying the purchaser with certain specified new parts of the engine and crediting him with a specified sum on his account, the purchaser admitted full satisfaction of his complaint as to defects and the complete fulfilment of all warranties made by the seller and thereby released and waived all liability on the part of the seller, arising out of the original transaction, such document, however, not containing any promise on the part of the seller to supply the parts or to give the credit mentioned, will not operate as a satisfaction of the purchaser's right of action under the original contract in default of the actual delivery and acceptance of the engine parts but merely as an "accord" that if the seller did supply the parts and give the credit then the document should operate as a release to the seller of the claims of the purchaser arising from any defects in the engine.

Rumely v. Gorham, 1 D.L.R. 825, reversing 4 A.L.R. 216, 1 W.W.R. 1204.

ACCOUNTING.

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(I—1) — Company — Assets — New company acquiring — Trustee — Cestui que trust—Value of property—Reference to local registrar.

McLeod v. Fisher, 48 D.L.R. 764.

By officer of municipal corporation—Items.

In an action en reddition de compte against a secretary treasurer of a municipality, the plaintiff cannot demand that the defendant be obliged to include in the list of his receipts a certain amount the proceeds of a loan received by the secretary treasurer, such demand being pertinent only in an action to correct or reform the account, and this allegation can be defeated en inscription en droit.

Pérodeau v. Richard, 26 Que. K.B. 206.

Division of interests in syndicate property—Advances by one member of syndicate.

Vogel v. McLeod, 22 D.L.R. 902.

Mortgagor and mortgagee—Sale by mortgagee's agent—Ratification.

Ratification by the mortgagor of an agreement of sale made by the mortgagee's agent with a stipulation that, failing execution of formal agreement, money should be repaid, may be shewn from the accounting by the mortgagee to the mortgagor whereby the money received by the mortgagee's agent was credited on the mortgage debt, and by the subsequent transfer of the mortgagee's right and title to the mortgagor's nominee expressly subject to the rights of the purchaser. [Edgar v. Caskey, 7 D.L.R. 45, referred to.]

McDonald v. Leadlay, 20 D.L.R. 157.

The court in which an action is brought by the assignee of rights of succession against the curator of the property of his auteurs who, as such curator and mandatory ought to account to the said auteurs or their representatives, can before proceeding to trial on the merits of the litigation order that an account be rendered by the defendant of his administration in the aforesaid capacity.

Durocher v. Girouard, 22 Que. K.B. 225.

Action by simple debt creditor.

Action for an account can only be brought by the person whose affairs or whose property have been managed by a third party, and consequently he alone is bound to render an account who has managed the property or affairs of the owner. A simple debt creditor cannot bring an action for an account against his debtor for the sole purpose of removing any difficulties which would present themselves in the liquidation of his debts by an ordinary action.

Boivin v. Rock Shoe Manufacturing Co., 49 Que. S.C. 24.

Reddition de compte—Plea.

A plea to an action en reddition de compte that the defendant had rendered an account after being placed en demence, which was not accepted (and which was filed with his defence) concluding for dismissal of the action with costs is bad and will be rejected on inscription en droit.

Archambault v. Laurence, 12 Que. P.R. 237.

Reddition de compte—Delivery of company shares.

Saint Aubin v. Desmarteau, 20 Que. K.B. 398.

Pledge of rentals and revenues—Obligation to account—Insurance moneys.

Whitney v. Kerr, 20 Que. K.B. 289.

The defendant ordered to render an account is not obliged to serve the plaintiff with a copy of his reddition de compte nor give him any notice of it, he being merely obliged to verify it under oath within the time fixed by the judgment which ordered it and to file it, with the documentary evidence supporting it, with the prothonotary when the plaintiff must take cognizance of it.

Girouard v. Durocher, 14 Que. P.R. 362.

In general — Company — Diversion of assets — Account — Reference — Report—Findings of Master—Debits and credits — Agreement—Quantum meruit—Appeal—Costs.

Richards v. Lambert, 5 O.W.N. 388.

(§ I—3)—Between directors and corporation.

A director of a company cannot file a bill for an accounting against the company and his codirectors unless special circumstances are shewn. The report of a Royal Commission whose duties were inquisitorial and not judicial, finding that a sum of money received by the directors was unaccounted for and the fact that the complaining director was the Attorney-General of the Province at the time the money was received and as such an ex-officio director of the company by the act of incorporation, are not such special circumstances as would support a bill for such an accounting.

Pugsley v. Bruce, 40 N.B.R. 515; Pugsley v. The New Brunswick Coal & R. Co., 4 N.B. Eq. 327.

Dissolution of company—Sale of dredging stock—Profits.

By an agreement entered into between the plaintiff and the defendant, the defendant agreed to sell the plaintiff the profits of twenty shares of dredging stock for $2,000. This agreement further provided that on the winding up or the selling out of the company, the plaintiff was to share in its profits or losses on the basis of twenty shares. After carrying on the business for a season, the company sold its plant. At the time of the sale the plaintiff had paid $1,500 on account of the purchase price. After the sale was concluded the defendant paid the plaintiff $1,500 which he claimed was all the latter was entitled to, as he had failed to pay the full amount of the purchase price although frequently asked to do so. On an action for an accounting:—Held, that the plaintiff was entitled to an account of the profits of twenty shares of the stock of the company and also for an account of the money received by the defendant for the twenty shares on the sale of the plant.

Stocker v. Smith, 43 N.B.R. 37.

(§ I—6)—Quebec practice.

A defendant who fails to file the account ordered by a judgment, and upon whose failure the plaintiff files an account under the provisions of article 568 C.P., cannot compel plaintiff to furnish the very details he had in his possession and which plaintiff had been endeavouring to obtain, but he may contest the account and supplement it with such details as he deems should go before the court, and if he fails to do so, he is precluded from later attacking the account as irregular, after it has been approved by a judgment of the court.

Frank v. Forman, 2 D.L.R. 8, 41 Que. S. C. 511.

In an action for accounting, a motion by plaintiff that all the items of the accounts which are unsupported by written orders, contrary to a judgment to that effect, be rejected, will not be granted, if defendant declares the nonexistence of written orders and vouchers for such items.

Gagnon v. St. Maurice Lumber Co., 15 Que. P.R. 17.

If the report of an accountant is liable to be incomplete because said accountant did not take cognizance of all the documents filed, it will not be rejected on a motion to that effect, but it will be referred back to the accountant for a supplementary report.

Gaudet v. Dupaul, 14 Que. P.R. 385.

ACCOUNTS.

(§ I—1)—Surety—Lien on goods for storage—Loss of goods by fire—Liability.

Creed v. Jones Bros. & Co. (Sask.), 39 D.L.R. 767.

Account rendered nominately—Service Que. C.P. 567, 568, 569, 572.

The word "nominately" in art. 567 Que. C.P. is not absolute, and it is sufficient for the account to be rendered by the party bound to do so to the party asking for it. The party rendering the account is not bound to have a copy of it served, but the party to whom the account is rendered is bound to take communication of it at the prothonotary's office, together with the vouchers in support of it.

Labelle v. Labelle, 16 Que. P.R. 208.

Judgment — Reference — Report — Opening up—Appeal—Further directions—Costs—Shares in ship—Disbursements.

Johnson v. McKay, 17 O.W.N. 115.

Open contracts—Settled account—Opening up—Absence of fraud or mistake—Scope of reference—Construction of judgment—Appeal from Master's certificate.

Snitzler Advertising Co. v. Dupuis, 15 O.W.N. 408.

(§ I—2)—Opening—Correcting—Review of.

Ontario Asphalt Block Co. v. Cook, 4 O.W.N. 591, 23 O.W.R. 744.

Refund of payment under settlement not condition precedent to fresh accounting.

In an action by the plaintiff against his agent and partner for an accounting, where a settlement between the parties is set aside because of the fraudulent concealment by the defendant of material items of his indebtedness, the accounting may be ordered without requiring the plaintiff as a condition precedent to pay back a certain sum paid to him by the defendant as due under the settlement on the grounds (a) that the defendant's payment prima facie carried with it an admission that it was owing to the plaintiff, and (b) that the defendant's fraud disentitles him to such consid-

eration. A principal is not estopped from demanding an accounting of his agent by reason of a prior settlement of their account, though a release was given by the principal to the agent, where it appears that the principal was over-reached and over-borne by the improper conduct of the agent who did not faithfully account at the time of the settlement.

Corelli v. Smith, 10 D.L.R. 382, 23 W.L.R. 381, 4 W.W.R. 114.

OPENING UP—FRAUD—PARTIES—CORPORATE OFFICERS.

In an equitable action by an executrix to open up, on the grounds of fraud and misrepresentation, a settled account of dealings by the testator with the credit of a company of which he was manager, paid by her, judgment should not be given for the amount claimed, but proper accounts should be ordered taken upon a reference as between the company and the estate of the testator. The pleadings were ordered to be amended by adding the treasurer of the company as defendant where he appeared to be involved with the testator in manipulations of the company's credit for their personal advantage. [Judicature Rules, N.S., O. 16, r. 10, referred to.]

Sutherland v. Victoria Steamship Co., 27 D.L.R. 622, 50 N.S.R. 146.

PARTNERSHIP—PRACTICE—REGISTRAR'S OFFICE.

Order LV. has no application to a reference to a District Registrar to take partnership accounts. The office of the Registrar or a District Registrar is not "Chambers" within the meaning of the B.C. Rules of Court. The proper practice on an appeal from a District Registrar's report upon a reference for the taking of partnership accounts is set out in Order XXXVI. (rules 54 and 55). The practice of applying under M.R. 794 for an order to proceed with the taking of accounts upon a judgment nisi in foreclosure proceedings disapproved.

Paulson v. Hathaway, [1917] 2 W.W.R. 760, 24 B.C.R. 178.

OPENING—CORRECTING—REVIEW OF.

A defendant who fails to file the account ordered by a judgment and upon whose failure the plaintiff files an account under the provisions of art. 568 C.P. cannot compel plaintiff to furnish the very details he had in his possession and which plaintiff has been endeavouring to obtain for years. The defendant's only course is to contest the account and supplement it with such details as he deems should go before the court. Failing to do so, he is foreclosed from later attacking the account as irregular, after it has been confirmed by a judgment of the court. (2) Semble —An account rendered should be broadly and liberally interpreted and objections thereto on merely technical and formal grounds should be disregarded. [Evans v. Wilson, 1 Que. P.R. 186.]

Frank v. Forman, 13 Que. P.R. 29.

REFERENCE—PROCEDURE—DIRECTION TO FILE STATEMENT OF ACCOUNT—SETTLED ACCOUNT—SURCHARGE.

Snitzler Advertising Co. v. Dupuis, 11 O.W.N. 323, affirming 11 O.W.N. 165.

REFERENCE—REPORT OF REFEREE—APPEAL—QUESTIONS OF FACT.

Berlin Lion Brewery v. D'Onofrio, 12 O.W.N. 55.

(§ I—3)—RENDERING—AMENDMENT OF—VALUATION—REPORT OF VALUATOR—INQUIRY—FORMALITIES—CONTESTING OF REPORT — ACQUIESCENCE — RES ADJUDICATA—PROHIBITION—C.C.P. ARTS. 50, 196, 392, 394, 396, 399, 400, 404, 405, 407, 408, 409, 415, 416, 1042, 1043, 1209 —CUSTOMS OF PARIS, ART. 184—13 VICT. [1850], C. 38—S. REF. [1909], ARTS. 4226, 4644.

The conclusions of an action asking that the defendant be condemned to render an account of his administration, that the so-called account produced should be rejected as false and wrong and that the defendant be bound to add $1,000 to his balance of account is an action for amendment of account

Birtz alias Desmarteau v. St. Aubin, 55 Que. S.C. 378.

(§ I—5)—BETWEEN INSURANCE COMPANY AND ITS AGENTS.

An account between an insurance company and one of its agents, wherein the agent is charged with each premium due by him on policies he has obtained and where credits are given him for specific premiums paid, is not a running account within the meaning of the law, even though extensions of time may have been afforded the agent to make his remittances.

London & Lancashire Fire Ins. Co. v. Hart, 8 D.L.R. 332, 43 Que. S.C. 28.

ACTION.

I. NATURE AND RIGHT.
  A. In general; what actionable.
  B. Premature; conditions precedent; notice.
II. UNION, CHOICE, OR FORM OF REMEDIES.
  A. Kind; name.
  B. Consolidation.
  C. Splitting; successive suits.
  D. Joinder.

See also Pleading.
Costs and fees, see Costs.
Limitation of time for bringing, see Limitation of Actions.
Parties to action, see Parties.
As to removal of causes, see Certiorari; Courts.
Venue of, see Venue.
Ordering stay, see Stay of Proceedings.
Arising out of contracts, see Contracts.

Annotations.

Effect of war on actions by alien enemies: 23 D.L.R. 375, 380.

How affected by moratorium: 22 D.L.R. 865.

I. Nature and right.

A. In general; what actionable.

Action by alien enemy, see Aliens, III—19.

(§ I A—1)—Definition — Statutory proceedings under Land Titles Act.

An objection filed in the land titles office against an application to bring land within the Land Titles Act, 1 Geo. V. (Ont.) c. 28, by one claiming an interest in the land adverse to the applicant, is not an "action" within s. 2, subs. 2, of the Ontario Judicature Act R.S.O. 1897, c. 51, 3 Geo. V. c. 19, R.S.O. 1914, c. 56, declaring that the term "action" shall mean "a civil proceeding commenced by writ or in such manner as may be prescribed by rules of court."

Re Woodhouse, 14 D.L.R. 285, 5 O.W.N. 148, affirming in part, 10 D.L.R. 759.

Right to trial—Vindication of character.

A defendant charged with a technical breach of trust is not entitled to go to trial merely in order to have his character vindicated.

Elliott v. Hatzic Prairie (No. 2), 13 D.L.R. 238, 18 B.C.R. 668, 24 W.L.R. 974.

Petitory action—Litigious rights—Judicial officer.

A right is only considered litigious if it is susceptible of a serious contestation which renders it uncertain. A commissioner of the Superior Court is not a judicial officer forbidden by law to acquire litigious rights relating to the jurisdiction of the court in the business of which he exercises his functions.

St. Pierre v. Girard, 48 Que. S.C. 535.

Vexatious proceedings—Motion to dismiss as frivolous and vexatious—Judgment in previous action by barring rights of plaintiff—Dismissal of action with costs.

Hill v. Lambton Golf & Country Club, 14 O.W.N. 143.

Notice of action—Sufficiency of —Time and place of accident in negligence action.

Young v. Bruce, 3 O.W.N. 89, 24 O.L.R. 546, 20 O.W.R. 87.

(§ I A—4)—Notice of—Sufficiency—Municipalities Act.

A letter giving notice of action required by s. 104 of c. 165 (C.S.N.B., 1903) is sufficient, although only the signature of the solicitor, without any addition, appears at the end of the notice. If such solicitor's name appears on the letterheading as attorney and counsellor-at-law, and the notice states that he will bring action "at the suit of" the plaintiff, naming her, the fact that the plaintiff threatened an action "for trespass" and in fact brought an action for trover is immaterial if the notice gave the defendant a clear idea of the grounds upon which the action would be brought and the reason therefor.

Murphy v. McMillan, 43 D.L.R. 25, 46 N.B.R. 88.

B. Premature; conditions precedent; notice; demand.

(§ I B—5)—Prematurity—Terms of credit—Surety.

Allen v. Grand Valley R. Co. (No. 2), 14 D.L.R. 496, 5 O.W.N. 197 and 239, affirming 12 D.L.R. 855, 4 O.W.N. 1578.

Conditions precedent—University governors—Attorney-General's fiat for bringing action.

The fiat of the Attorney-General of the Province of Ontario which is required under the provisions of s. 45 of the University Act, 1906, 6 Edw. VII. c. 55, before action shall be brought against the Board of Governors of the University of Toronto, does not confer any right of action but merely removes the legislative bar to the commencement of any action without such leave. [See University Act, 1906, 6 Edw. VII. (Ont.) c. 55, ss. 20 to 46.]

Scott v. Governors of University of Toronto, 10 D.L.R. 154, 4 O.W.N. 994.

Subcontract for railway construction work — Terms of contract — Inclusion of terms of principal contract.

Finlayson v. O'Brien, 11 D.L.R. 846, 4 O.W.N. 1440, 24 O.W.R. 727.

Preliminary arbitration.

Under the Arbitration Act, Man. 1911, c. 1, a stay of proceedings should be ordered before defence in an action against a municipality for the price of the supply and installation of pumping machinery where no arbitration had taken place in pursuance of a stipulation in the contract to the effect that any dispute arising by reason of the contract having been entered into, should be referred to and determined by the award of the city engineer, if such application to stay proceedings has not been answered by evidence indicating bias or other ground of disqualification of the arbitrator so named or leading to an inference that the arbitration clause of the contract no longer applied.

Northern Electric & Manufacturing Co. v. Winnipeg (No. 2), 13 D.L.R. 251, 23 Man. L.R. 225, 24 W.L.R. 547, 4 W.W.R. 862, reversing 10 D.L.R. 489, 23 Man. L.R. 225.

Conditions precedent.

Where an extra-provincial corporation contracts outside of British Columbia for the sale of plant and machinery to be delivered in that province and there erected and installed by the vendor corporation, after which it is to test the plant and demonstrate its capacity to the purchaser, such extra-provincial corporation is thereby "carrying on business" in British Columbia so as to require an extra-provincial company's license under the Companies Act,

R.S.B.C. 1911, c. 39, in order to be entitled to bring action in the courts of that Province.

Kominick Co. v. B.C. Pressed Brick Co., 8 D.L.R. 859, 22 W.L.R. 526. [Reversed 41 D.L.R. 423, 56 Can. S.C.R. 539.]

PREMATURE — CONDITIONS PRECEDENT — ARBITRATION BEFORE ACTION — EFFECT ON RIGHT OF ACTION.

Where a statute provides for indemnity to be fixed by arbitration, such recourse does not deprive the injured party of his common-law recourse, if he has any, and thus he may sue in damages without any reference to arbitration. [Williams v. Township of Raleigh, 21 Can. S.C.R. 103, 131, referred to.]

City of Hull v. Bergeron, 9 D.L.R. 28.

SALE OF LANDS — AGENT'S COMMISSION — PURCHASE PRICE PAYABLE IN STOCK — WRIT ISSUED BEFORE ALLOTMENT.

Where an agreement between an owner of real estate and an agent employed to sell the same provides that the agent's commission "shall be due and payable and shall be made out of the first instalment of the purchase price when and as the same is received by the owner," an action against the owner who has sold the property for stock in a corporation to be formed, is prematurely brought if, at the date of the writ no allotment of shares had been made to the owner, nor had he yet become entitled to demand the shares.

Kennerley v. Hextall, 9 D.L.R. 609, 5 A.L.R. 192, 23 W.L.R. 205, 3 W.W.R. 699.

NOTICE AS PRECEDENT TO RIGHT OF ACTION — PUBLIC OFFICERS.

Failure to give the notice of action required by art. 88, C.C.P. (Que.), before suing a public officer for damages by reason of an act performed by him "in the exercise of his functions," cannot be set up where there is an absence of good faith by reason of the fact that the officer knew at the time that his act was illegal. [Pacaud v. Quesnel, 10 L.C. Jur. 207, referred to.]

Asselin v. Davidson, 16 D.L.R. 285, 20 Rev. Leg. 193, 23 Que. K.B. 274.

CONDITIONS PRECEDENT—VENDOR AND PURCHASER—DEFECTIVE TITLE—RIGHT TO SUE FOR PURCHASE PRICE.

An action by a vendor of realty for the purchase price is premature if launched before the vendor himself had title or the right to title enabling him to convey, although during pendency of suit his title was perfected, and the action will be dismissed accordingly. [Hartt v. Wishard, 18 Man. L.R. 376, applied.]

Baskin v. Linden, 17 D.L.R. 789, 24 Man. L.R. 459, 28 W.L.R. 418, 6 W.W.R. 1053.

CONDITIONS PRECEDENT—ENGINEER'S DECISION "TO PREVENT ALL DISPUTES AND LITIGATION"—EFFECT.

Where the contractor undertakes construction work for a municipality under terms by which the municipality is to supply the material necessary to carry on that work continuously thus forming together the entire undertaking, and the contract contains a clause whereby "to prevent all disputes and litigation," both parties agree that the engineer shall in all cases determine all questions in relation to the work and construction thereof and that his decision shall be a condition precedent to the commencement of any action by the contractor to recover any moneys under the contract or "any damages on account of any illegal breach thereof," an action by the contractor for damages for alleged delay of the municipality in supplying materials is premature and cannot be maintained where there has been no decision of the engineer and the latter's capacity as an arbitrator is not impugned.

McDougall v. Pentieton, 20 D.L.R. 247, 20 B.C.R. 401, reversing 16 D.L.R. 436.

CONDITIONS PRECEDENT — DISMISSAL WITHOUT PREJUDICE.

On dismissal of an action for the price of an engine for nondelivery of a material part thereof, leave may be reserved to plaintiff to bring another action on completing the contract.

British Canadian Agricultural Tractor v. Earle, 20 D.L.R. 319.

CONDITIONS PRECEDENT—PURCHASE INSTALMENTS ACCRUING PENDENTE LITE.

In an action upon an agreement of sale of lands upon deferred payments, the vendor suing for payments in arrear and for enforcement by foreclosure or by personal judgment for the arrears, the plaintiff cannot add a cause of action which has arisen after the writ was issued, ex. gr. a claim on the default in paying another instalment which accrued pendente lite. [Atty.-Genl. v. Avon, 3 DeG. J. & S. 637, and Evans v. Bagshaw, 5 Ch. App. 340, followed.]

Hargreaves v. Security Investment Co., 19 D.L.R. 677, 7 S.L.R. 125, 29 W.L.R. 317.

CONDITIONS PRECEDENT—ARBITRATION AS TO DAMAGES.

A clause in a city charter which provides for ascertainment of damages by arbitration in the event of injury to a private citizen resulting from a nuisance against the public health maintained by the city does not bar the injured party from bringing an action merely for an injunction restraining the nuisance.

Clare v. Edmonton Corp., 15 D.L.R. 514, 5 W.W.R. 1133, 26 W.L.R. 678.

CONSTITUTIONAL LAW—ACTION AGAINST ATTORNEY-GENERAL FOR DECLARATION THAT ORDER IN COUNCIL ULTRA VIRES — ORDER SETTING ASIDE WRIT OF SUMMONS ON SUMMARY APPLICATION.

Electrical Development Co. of Ontario v. Att'y-Gen'l for Ontario, 15 O.W.N. 329.

ACTION FOR ATTORNEY'S FEES—PREMATURITY.

An advocate is entitled to sue for his fees and disbursements while the case is still

pending in a higher court where the case has been taken out of his hands and inscribed before the higher court by another attorney.

Duff v. Upton, 25 D.L.R. 466, 48 Que. S.C. 503.

ACTION AGAINST HYDRO-ELECTRIC POWER COMMISSION OF ONTARIO — NECESSITY FOR FIAT OF ATTORNEY-GENERAL—POWER COMMISSION ACT, R.S.O. 1914 c. 39, s. 16 — CONSTITUTIONAL VALIDITY —JUDICATURE ACT, ss. 20, 33 — MOTION TO SET ASIDE WRIT OF SUMMONS.

Electric Development Co. of Ont. v. Attorney-General for Ont. & Hydro-Electric Power Com. of Ont., 11 O.W.N. 17.

AFFIDAVIT IN SUPPORT (QUE.)—ARTS. 1163, 1173, 1177 C.P.Q.—AFFIDAVIT—FAILURE TO FILE—DEFENCE AU FOND.

The litigant whose case comes within any of the cases provided for by arts. 1163, 1173 and 1177 C.P.Q. can exercise the recourse thereby given by action, within the prescribed delays, as well as by opposition, review, on requête civile. Failure to file an affidavit in support of the action cannot be taken advantage of by a defence to the merits but by exception to the form only.

Stather v. Bennett, 22 Que. K.B. 290.

BUILDING CONTRACT—PREMATURITY.

When an action brought by a contractor for payment of his work has been dismissed as premature, the work not being finished, and the contractor proceeds with the work and afterwards the owner himself changes, increases and repairs the work done, a second action brought by the contractor for the amount of his account cannot be declared premature but the court may itself proceed to finally adjust the mutual account of the parties.

Lalonde v. Fickler, 50 Que. S.C. 453.

VEXATIOUS PROCEEDINGS—APPEAL—COSTS.

A creditor, who refuses offers made to him by his debtor and hastens to take vexatious proceedings against the latter, cannot avail himself of irregularities in the form of the offers in order to have them declared insufficient. In such case a Court of Appeal is justified in reversing a judgment which leaves to each party the burden of paying his own costs and in condemning the plaintiff to pay all the costs of the litigation.

Bourret v. Huot, 51 Que. S.C. 128.

PENAL ACTION — RAILWAY COMMISSION — JURISDICTION.

An action to recover a fine of $20 imposed by art. 1682d, C.C. (Que.), for breach of art. 1682c, may be brought without the permission of the railway commission. Such action is within the jurisdiction of the Circuit Court.

Giroux v. Quebec, Montreal & Southern R. Co., 19 Que. P.R. 357.

(§ I B—7) — ACCEPTING OFFER TO SELL AFTER ISSUING WRIT.

A cause of action must be complete before an action upon it is commenced; and, therefore, an action cannot be maintained upon a contract, where the offer was made before, but was not accepted until after, the issue of the writ.

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

(§ I B—10)—RIGHT OF ACTION—RESTORATION OF BENEFITS—ATTACKING PRIOR RELEASE.

In an action brought under the Families Compensation Act, R.S.B.C. 1911, c. 82, by the widow and children of a deceased person, for damages for injuries resulting in the death of such person through the negligence of the defendants, where the defendants' statement of defence sets up that the deceased during his lifetime accepted compensation from them in full satisfaction of the injuries and signed an agreement releasing the defendants from all present or future liability to himself or to his heirs, the plaintiffs may, without bringing in the personal representative of the deceased as a party, attack the validity of such release on the ground that it was obtained by fraud.

Trawford v. B.C. Electric R. Co. (No. 2), 9 D.L.R. 817, 18 B.C.R. 132, 15 Can. Ry. Cas. 39, reversing 8 D.L.R. 1026. [Affirmed, 18 D.L.R. 430, 49 Can. S.C.R. 470.]

(§ I B—17)—STATUTORY NOTICE OF ACTION—VALIDITY OF WHEN GIVEN BY PLAINTIFF'S ATTORNEY—SERVICE.

Where a statutory enactment requires notice of suit to be given to a city corporation before an action in damages can be instituted, such notice, in the absence of any contrary stipulation, may be given by the plaintiff's attorneys and may be validly served by bailiff.

City of Westmount v. Hicks, 8 D.L.R. 488.

NOTICE OF—NEGLIGENCE OF CIVILIAN RIFLE ASSOCIATION.

The provision of the Militia Act, requiring at least one month's notice in writing to be served upon defendant or left at his usual place of abode before action can be brought against any officer or person acting in pursuance of that statute, applies where an action is brought against members of a civilian rifle association for alleged negligence while engaged in an act done in pursuance of the Militia Act, R.S.C. 1906, c. 41.

Webster v. Leard, 7 D.L.R. 429.

NOTICE TO REVENUE OFFICER—CERTIORARI.

Certiorari proceedings to quash a summary conviction made on the complaint of an excise officer do not constitute a "suit entered against him" so as to require a month's notice of action under the Inland Revenue Act, R.S.C. 1906, c. 51, s. 94, although he is made a respondent to the motion to quash.

Ex parte Richard, 30 D.L.R. 364, 26 Can. Cr. Cas. 166.

CONDITION PRECEDENT—NOTICE OF ACTION —INJUNCTION TO RESTRAIN ALLEGED ULTRA VIRES CONTRACT OF MUNICIPALITY.

Section 125 of the Calgary municipal charter making it a condition precedent that one month's notice in writing shall be given before action against the city is not limited to damage claims, but applies to actions from any cause; and consequently a preliminary notice is essential in an action for a restraining order against the municipality to prevent its carrying out a land purchase claimed to be ultra vires.

Dick v. Calgary, 16 D.L.R. 415.

NOTICE OF ACTION—PUBLIC OFFICERS.

The provisions of art. 88 C.P. (Que.) as to the giving of a preliminary notice of action to a public officer sued for damages by reason of an act done in the exercise of a public function or duty do not apply to an action brought against a notary public in Quebec simply for the return of money entrusted to him for investment on real estate security, and which it is alleged was lost by his investing the same upon new terms not authorized by his instructions.

Dufresne v. Desforges, 10 D.L.R. 289, 47 Can. S.C.R. 382, 12 E.L.R. 210.

NOTICE.

While a notice of action, under s. 84 of 49 Vict. (N.B.) 1886, c. 25, in a false imprisonment case brought jointly against the officers who issued the warrant and the constable who executed it may be objectionable on the ground that the notice does not set forth the grounds of each officer's liability, yet, if it clearly states the part which each took in the commission of the wrong, the joint notice is sufficient, because the arrest and imprisonment of the plaintiff were in law the joint act of both officers. [McGilvery v. Gault, 17 N.B.R. 641, 19 N.B.R. 217, referred to.] The notice of action required under s. 84 of 49 Vict. (1886) c. 25 (N.B.), in respect of a claim for damages for false imprisonment is to be construed liberally, and it is sufficient if the notice substantially informs the defendant of the ground of complaint. [Jones v. Bird, 5 B. & Ald. 837; Howard v. Remer, 2 El. & Bl. 915, 23 L.J.Q.B. 60, referred to.] Under s. 84 of 49 Vict. (1886) c. 25 (N.B.), prescribing that the name and place of abode of the attorney shall be endorsed on the notice of action, it is sufficient if they appear anywhere in the notice.

Markey v. Sloat, 6 D.L.R. 827, 41 N.B.R. 234.

NOTICE OF ACTION—NOTARY.

A notary, sued for an act committed in the exercise of his professional duties, is entitled to a written notice of action at least a month before the issue of the writ according to the provisions of art. 88 C.P.Q.

Lefebvre v. Chartrand, 52 Que. S.C. 160.

AGAINST STREET RAILWAY—INSUFFICIENT NOTICE OF.

A failure to give a sufficient notice of action, under the provisions of the street railway charter, does not entail a loss of the right of action; it only gives to the company the right to stay the action by dilatory exception.

Kazaransky v. Montreal Tramways Co., 48 Que. S.C. 76.

POSSESSORY ACTION—PRINCIPAL AND AGENT.

A possessory action should be brought directly against all those who by their personal acts interfere with the possession of another even when in doing so they claim to act in the capacity of officials or agents of a joint stock company.

Duchaine v. Mercier, 26 Que. K.B. 570.

A constable who arrests a person without a warrant, but on the order of his superior the chief of police, although the arrest may be illegal, acts in the exercise of his functions as a peace officer and is a person performing a public duty within the meaning of art. 88, C.P.Q., and as such is entitled to a month's notice of action under that article. The objection of want of notice should be taken by exception to the form and if taken only in the pleas the action will be dismissed, but with the costs of a preliminary exception only. A justice of the peace who signs a warrant in blank is not liable in damages for so doing if he had nothing to do with the use made of the document; he is not entitled to notice of action, but the action against him will be dismissed without costs. A chief of police who causes the arrest of a person by a subordinate without a warrant, and such person's imprisonment in the common gaol and detention there under a commitment previously signed in blank by a justice of the peace, but executed by the chief without the justice's knowledge, does not act in the bona fide exercise of his functions and is not entitled to the notice of action required by art. 88, C.P.Q.

Asselin v. Davidson, 13 Que. P.R. 423.

NOTICE — PARTICULARS — DILATORY EXCEPTION.

In an action against the Montreal Tramways Co., preceded by a notice of action which appears sufficient, a dilatory exception for the purpose of obtaining particulars of fault alleged in the notice and pleaded in the declaration, will be refused.

Maurizio v. Montreal Tramways Co., 19 Que. P.R. 254.

If a notice of action does not contain sufficient details, a delay of a month will be granted to the defendant to obtain information and to come to a conclusion upon the plaintiff's claim.

Alexander v. Montreal Tramways Co., 19 Que. P.R. 262.

II. Union, choice, or form of remedies.

A. KIND; NAME.

(§ II A—35)—FORM OF REMEDY—INGRESS AND EGRESS UPON ABUTTING STREET.

The right of an owner of land to have access to his property from the street is a

private right and any wrongful interference with such right gives rise to a cause of action against the wrongdoer.

Forster v. City of Medicine Hat, 9 D.L.R. 555, 5 A.L.R. 36, 23 W.L.R. 200, 3 W.W.R. 618.

EXCEPTION TO FORM—CONTESTATION OF RIGHT OF ACTION—QUE. C. P. 174.

A defendant who does not object to the form of action, but who wishes to contest the very right of the plaintiff to take an action under the common law, and who thus pleads to the merits, cannot succeed by an exception to the form.

Trottier v. Marcotte, 16 Que. P.R. 117.

An action based on notes the loss of which is alleged, is nevertheless properly taken as a summary matter. (2) If, in an action founded upon notes, a foreign judgment on such notes is alleged, action is nevertheless a summary matter. [Riordan v. McLeod, 13 Que. P.R. 64, 67.] (3) The fact that a nonresident defendant has been called by other newspapers than those mentioned in the order is no ground for exception to the form.

Traders Bank of Canada v. James Bell Klock, 13 Que. P.R. 177.

INTERVENTION—WITHDRAWAL OF PRINCIPAL ACTION.

An intervention cannot subsist independently of the principal action of which it is an incident. Consequently it cannot be based upon an action which the plaintiff has withdrawn. The various incidents of a litigation should be susceptible of the same procedure.

Boutin v. Doyle, 48 Que. S.C. 432.

PRACTICE—STAYING PROCEEDINGS IN ONE ACTION UNTIL ANOTHER ACTION TRIED—PARTIES AUTHORIZED TO DEFEND ON BEHALF OF CODEFENDANT.

Where issues between the parties interested were, or might be, fully and fairly defined by the pleadings in one action that had been brought and a judgment in it would effectually dispose of matters raised in a subsequent action, the latter was stayed. Executors of F. estate claiming as against certain purchasers from F. the right of subrogation as to a mortgage which had been paid off, brought action against the mortgagee and said purchasers to determine their rights. Said purchasers subsequently brought action against the mortgagee for a discharge. The second action was stayed, reversing the decision of the Master in Chambers who had refused a stay and given judgment to the purchasers on the pleadings; otherwise said executors would have been forced into the position of applying for an injunction to restrain the purchasers from registering a discharge of the mortgage which was unnecessary under the circumstances. R. 20 applied in authorizing parties to defend on behalf of codefendant having a common interest and who could not be found and had not been served with the statement of claim.

The Standard Trusts Co. v. Canada Life Ass'ce Co.; Balfour v. Canada Life Ass'ce Co., [1919] 2 W.W.R. 364.

(§ II A—40)—CHOICE OR FORM OF REMEDIES—SET-OFF OR COUNTERCLAIM—CONVERTING CLAIM—RES JUDICATA.

A plaintiff cannot convert a claim of the defendant, recoverable in the plaintiff's action only by way of set-off or counterclaim, into a payment on account, and thereby compel defendant either to put in a defence or lose the unallowed balance of his account as res judicata.

Gamblin v. Myers, 42 N.B.R. 280.

POSSESSORY AND PETITORY ACTIONS—TERM OF POSSESSION—CUTTING TIMBER.

Where the sale of lands composed of two distinct parts has been made en bloc, the possession of one part thereof is possession sufficient to enable the possessor to exercise a petitory action in respect of the whole of the land. As the remedy asked for in a petitory action includes what would be demanded in a possessory action, the defendant, in the latter action, whereby the plaintiff asks to be reintegrated instead of being restored into possession, cannot oppose the action by demurrer. In virtue of the Code of Civil Procedure (Que.), as well as under the law as it formerly existed, it is only the person who has had possession of lands for a year and a day who can exercise the possessory or petitory action. Where a person cuts the wood on lands in which he has no title, doing so in good faith and as the result of error, such an act does not give rise to a possessory action.

Veilleux v. Murray-Gregory Co., 50 Que. S.C. 154.

WARRANTY—BORNAGE—REVENDICATION.

There may be warranty against the action en bornage when it contains petitory conclusions. Per Lemieux, C.J., and Dorion, J. —An action en bornage by which the plaintiff complains of encroachments on the part of the defendant upon a strip of land of which each claims to be owner, is not an action en bornage pure and simple, but an action en bornage and in revendication in which there may be a recourse in warranty. Per Dorion and Desy, JJ.—The recourse in warranty under danger of eviction should be exercised by means of an incidental or accessory demand by which the warrantee brings the warrantor into the cause in an action for eviction and not by a distinct and independent action. Before a judgment of eviction the direct action in warranty cannot be taken.

Julien v. Perron, 52 Que. S.C. 299.

An action praying that the defendant be ordered to deliver shares of the capital stock of a mining company, and for the payment of an additional sum on a promissory note, is governed by the rules concerning summary matters.

Simpson v. Reeves, 13 Que. P.R. 192.

When by error the words "summary procedure" appear on the copy of the writ while they have been struck in the orig-

inal, an exception to the form will not lie on account of this informality, especially if plaintiff before service of said exception, notified defendant that it was not his intention to proceed summarily. (2) The absence of details is matter for a motion for particulars, not for an exception to the form.

Ménard v. Leduc, 13 Que. P.R. 199.

HYPOTHECARY AND PERSONAL ACTION.

An hypothecary action, when exercised, against a personal debtor, is an accessory of the personal action and cannot be taken when the court has no jurisdiction over the personal debt.

School Com. of St. Joseph-de-Bordeaux v. Gagnon, 51 Que. S.C. 175.

EFFECT OF DEATH—CONTINUATION OF PROCEEDINGS.

The nullity declared by art. 269, C.C.P., with regard to proceedings had subsequently to notice given of the death of one of the parties, is not absolute. When there are several parties, and the purpose of the action is divisible, the death of one of the parties not followed by a continuance of the proceedings by the heirs, does not prevent the proceedings being carried on against the other parties, but reserving the rights of the heirs of the deceased party. It does not apply to the representatives of a deceased codefendant.

La Ville de Beaconsfield v. Martin, 20 Que. P.R. 125.

POSSESSORY ACTION—REALTY—DEFENCE.

A defendant sued in a possessory action, who claims to have rights of property in the real estate subject of the litigation, ought to enforce them by a petitory action, and not by a defence to the action.

La Village de Ste. Geneviève v. O'Leary, 54 Que. S.C. 158.

CONFESSORY ACTION—SERVITUDE—PASSAGE — LANE — OBSTRUCTIONS — LESSEES —COSTS.

When a defendant admits in his defence and has admitted before action, the right of the plaintiff to the servitude which he claims, a confessory action is useless and aimless. A confessory action based upon the acts of a lessee should be brought against the latter and not against the owner of the servient land. Even if some lessees should have sometimes hung linen in a lane over which one-third had a right-of-way, this fact would not constitute an obstruction sufficiently serious to justify the latter in bringing a confessory action against the proprietor of the servient land.

Sénécal v. Charest, 27 Que. K.B. 133.

ACTION FOR CANCELLATION OF CONTRACT—NOTE—SUMMARY PROCEDURE.

An action for cancellation of a contract for services is not summary in its nature, even if in the conclusion, there is claimed the amount of a note given at the time the contract was made. An objection to an action taken by mistake as "summary" can be raised by exception to form.

Pellerin v. Blanchard, 19 Que. P.R. 149.

POSSESSORY ACTION—ALLEGATIONS—CHARACTER OF POSSESSION—OTHER REMEDIES.

On the return of a possessory action directed against him, a defendant may produce, in support of his conclusions, allegations to establish his ownership, and he may also allege that he is not only holder but owner. A defendant may also plead his rights of ownership in order to determine the nature of his possession, and whether art. 2200, C.C. (Que.), relating to joinder of possession, applies. There can be no possessory action when the possession of the parties has ceased to be exclusive and certain, and has become mixed. The plaintiff must shew clearly an exclusive and certain possession during the year and a day which preceded the action. In such case, the plaintiff must proceed by action for setting of landmarks, or other legal remedy, but not by way of possessory action.

Bourbonnais v. Denis, 24 Rev. de Jur. 104.

WARRANTY—MATTERS OF OFFENCE AND CONVENTION.

There is an action in warranty in matters of offence or quasi offence, as well as in matters of convention, but it is only on condition that the facts on which rests the demand in warranty, be the same as those on which the principal action is based.

Darragh v. Coté, 48 Que. S.C. 478.

(§ II A—43)—PENAL OR REMEDIAL.

An action under art. 1834 C.C., as amended, against one who has failed to declare his matrimonial status, is well brought by a plaintiff suing alone in his own name exclusively. [Comp. Cardinal v. Geoffroy, 13 Q.P.R. 44, 413; Lamontagne v. Galbraith, 13 Q.P.R. 397.]

Morse v. Langston, 14 Que. P.R. 70.

(§ II A—44)—UNDER FACTORIES ACT OR UNDER EMPLOYERS' LIABILITY ACT.

It was the intent of the legislature that a violation of the statutory duty imposed by the Nova Scotia Factories Act, which requires that all dangerous parts of millgearing, machinery, etc., shall be, so far as practicable, securely guarded, should create a liability, independent of the Employers' Liability Act, for the benefit of a servant who sustained injuries as a result of such violation of the Factories Act. [Vallance v. Falle, 13 Q.B.D. 109; Groves v. Lord Wimborne, [1898] 2 Q.B. 402, and Sault Ste. Marie Pulp & Paper Co. v. Myers, 33 Can. S.C.R. 23, specially referred to.]

Kizer v. The Kent Lumber Co., 5 D.L.R. 317, 46 N.S.R. 83.

SQUATTER—POSSESSION—PUBLIC DOMAIN —DEFEASIBILITY—POSSESSORY ACTION —QUE. C.P. 1064, 1066.

Although possession cannot be invoked concerning things in their nature inde-

feasible, yet even a precarious possessor of things defeasible in themselves, although not defeasible according to law, may prescribe against any one except against the owner or the one from whom he holds his title, and he may take an action in disturbance, if he is, later, disturbed by a third party. The party invoking precariousness or indefeasibility against the owner of a domain, excepting the Crown itself, rejects any one else's right. The possession of a squatter gives him a right against the Crown if he has fulfilled the formalities and conditions required by law; he may claim his concession, and if he has not yet fulfilled such formalities but wishes to fulfill them, he should be granted the preference. As Que. C.P. 1066 prohibits the mixing of petitory and possessory actions, the defendant cannot, as a plea to an action in disturbance, file a title to establish his ownership. A party who acquires a lot from the Crown has no greater privilege than if he had acquired it from an individual; and should he find such lot in possession of a third party, he has no right to take it back by force, but he must take a petitory action.

Aubut v. April, 46 Que. S.C. 476.

B. Consolidation.

(§ II B—45)—Consolidation.

In Con. Rule (Ont.) 1897, 435, providing that actions may be consolidated by order of the court or a judge in the manner in use in the superior courts of common law prior to the Judicature Act 1881, the true meaning of the expression "in the manner in use," etc., is not to continue the practice enforced before the Act, but is to require that, if an order is made, it should be treated in the same manner as before. [Martin v. Martin & Co., [1897] 1 Q.B. 429, followed.] The consolidation of four actions, each by a different plaintiff against the same defendants, cannot, upon the motion of the common defendants, be granted either in the strict sense of the word "consolidation," to stay absolutely the proceedings in three actions and to require the plaintiffs to unite all their claims in one action, or, in the looser and less accurate sense, to select one action as the test action and stay the trial of the others pending the determination of the test action, as the particular issues in each case would be distinct from the issue in the others, though each action was based upon an alleged injury to the premises of the plaintiff, caused by the spread of the same fire negligently set out by the defendants on their land and negligently allowed to spread to the plaintiff's land. [Amos v. Chadwick, 4 Ch.D. 869, affirmed, 9 Ch.D. 459; Westbrooke v. Australian Royal Mail Steam Navigation Co., 23 L.J.N.S. C.P. 42; Lee v. Arthur, 100 L.T.R. 61; Williams v. Tp. of Raleigh, 13 P.R. (Ont.) 50, specially referred to.]

Kuula v. Moose Mountain (No. 2), 5 D.L.R. 814, 26 O.L.R. 332.

Unity of cause of action—Breach of contract—Procuring breach.

Gas Power Agency v. Central Garage Co., 19 W.L.R. 193. [Affirmed 21 Man. L.R. 496, 19 W.L.R. 442.]

Consolidation of—Order 49, r. 1, British Columbia—Rule absolute.

Order 49, r. 1, of the British Columbia rules, by which "causes, matters or appeals may be consolidated by order of the court or judge, in such manner as to the court or judge may seem meet," is absolute and leaves the matter so far as ultra vires is concerned entirely in the hands of the judge.

Re Arnold Estate; Dominion Trust Co. v. New York Life Ins. Co; Dominion Trust Co. v. Mutual Life Ass'ce Co. of Canada; Dominion Trust Co. v. Sovereign Life Ass'ce Co. of Canada, 44 D.L.R. 12, [1919] A.C. 254, affirming in part 32 D.L.R. 33. [See 32 D.L.R. 301, 35 D.L.R. 145.]

Consolidation—Judgment entered in one case—Other case just commencing—Practice.

There is no practice which justifies a judge in ordering the consolidation of an action in which judgment has been entered with one which has just been commenced, where such order makes it necessary to try the substantial question over again along with other questions, and in effect sets aside a judgment of the same court. [Bake v. French, [1907] 1 Ch. 428, distinguished.]

Buscombe v. Windibank, 48 D.L.R. 301. [See 26 B.C.R. 323, 25 B.C.R. 441.]

Consolidation of actions—Joinder of Parties — Attorney-General — Ratepayers—Judicature Act, R.S.O 1914, c. 56, s. 16 (h)—Rules 66-69, 134, 320.

Ottawa Separate School Trustees v. Quebec Bank; Ottawa Separate School Trustees v. Bank of Ottawa; Ottawa Separate School Trustees v. Murphy, 35 D.L.R. 134, 39 O.L.R. 118. [See 13 O.W.N. 369, also [1917] A.C. 62, 32 D.L.R. 1, affirming 24 D.L.R. 475, 34 O.L.R. 335; [1917] A.C. 76, 32 D.L.R. 10, reversing 30 D.L.R. 770, 36 O.L.R. 485; see also 45 D.L.R. 218, 50 D.L.R. 189.]

Common defendant—Distinct causes of action—Direction as to trial.

Lyon v. Gilchrist, 2 D.L.R. 902, 3 O.W.N. 1086.

Consolidation at instance of plaintiff—Several actions brought against same defendant.

Where several actions are brought by different plaintiffs against the same defendant, alleging that the plaintiffs were induced to purchase shares by fraudulent misrepresentations, consisting of oral

statements made at different interviews, the case is not one for consolidation. The court will not order, at the instance of the plaintiffs, consolidation of actions brought by different plaintiffs against the same defendant upon claims that they were fraudulently induced to subscribe for shares in a company, where the alleged fraudulent statements were not covered by any common prospectus or other representation made generally to all of such plaintiffs as distinguished from the separate representations made to each of them.

Carter v. Foley-O'Brien Co., 5 D.L.R. 28, 3 O.W.N. 888.

CONSOLIDATION OF ACTIONS FOR SAME DEMAND—PREMATURE ACTION BY SAME PLAINTIFFS.

An order may be made consolidating two actions brought by the same plaintiffs to recover the loss under a fire insurance policy, where the second action was brought within the statutory period of limitation to prevent the lapse of the claim in case it should be held that the first action was premature. [Martin v. Martin, 1 Q.B. 429, applied.]

Strong v. Crown Fire Ins. Co., 1 D.L.R. 111, 3 O.W.N. 481, 20 O.W.R. 901. [Reversed, 4 D.L.R. 224.]

CONSOLIDATION OF ACTIONS — ORDER FOR TRIAL OF ACTIONS TOGETHER—TERMS—COSTS.

Clarkson v. McNaught (No. 3), 1 D.L.R. 918, 3 O.W.N. 808.

PARTIES COMMON DEFENDANT—DISTINCT CLAIMS OF DIFFERENT PLAINTIFFS FOR DAMAGES ARISING FROM FIRE SET OUT BY DEFENDANT—DIRECTION AS TO TRIAL—MULTIPLICITY OF PROCEEDINGS—EXAMINATIONS FOR DISCOVERY.

Kuula v. Moose Mountain, 2 D.L.R. 900, 3 O.W.N. 1015. [Affirmed, 5 D.L.R. 814.]

CONSOLIDATION—SETTING DOWN SEVERAL ACTIONS FOR TRIAL TOGETHER.

Olson & Johnson Co. v. McLeod, 13 D.L.R. 945, 25 W.L.R. 472.

CONSOLIDATION.

Where a tenant in the one action sues two of his subtenants under two separate causes of action and it appears that the plaintiff's rights in both causes depend on the construction of the lease from the plaintiff's landlord, the actions will, on motion, be consolidated for trial.

Allen v. Johnston (No. 2), 13 D.L.R. 640, 25 W.L.R. 397, 5 W.W.R. 85.

SEVERAL ACTIONS BY SAME PLAINTIFF AGAINST DIFFERENT DEFENDANTS—APPEAL FROM ONE ACTION—STAY OF OTHER ACTIONS UNTIL DETERMINATION OF APPEAL—COSTS—NOTICE OF MOTION FOR STAY.

Flexlume Sign Co. v. Globe Securities Co., 10 O.W.N. 380.

JOINDER OF CAUSES OF ACTION—CLAIMS ARISING OUT OF THE SAME OCCURRENCE.

Laister v. Crawford, 2 O.W.N. 547.

MISJOINDER OF PLAINTIFFS — SEPARATE CAUSES OF ACTION.

Harris-Maxwell Larder Lake Mining Co. v. Gold Fields Limited, 23 O.L.R. 625, 19 O.W.R. 246. [Appeal varied by consent in some details, but otherwise dismissed, 23 O.L.R. 629n.]

CONSOLIDATION—QUEBEC PRACTICE.

If, in the course of an action on a promissory note on which the defendant had presented une demande reconventionnelle in order to be discharged from liability, the plaintiff brings action on another note, the defendant is not entitled to have the inscription of the first struck out pending an application to have them consolidated to enable him to set up the compensation in his demande to the second, connection between the two and between the second and his demande being absent. The above conditions do not warrant the court to permit the defendant's counsel to withdraw under rule 43 of the Rules of Practice.

Rousseau v. Cliche, 44 Que. S.C. 179.

HYPOTHECARY ACTION — ANNULMENT — LIS PENDENS.

There is no identity between an action to enforce an hypothecary obligation and an action to annul the said obligation and to avoid opposing judgments; the remedy is consolidation of the actions under art. 291 C.P.Q. and not the exception of lis pendens.

Reaycraft v. Little, 17 Que. P.R. 436.

ACTIONS FOR LIBEL.

Three actions in damages for libel between the same parties may conveniently be consolidated.

Villeneuve v. Martin, 18 Que. P.R. 475.

QUEBEC PRACTICE.

Two or more actions may be consolidated for the purposes of enquête hearing and judgment if they are between the same parties and the questions to be decided are in substance the same. The consolidation of two or more causes in which the parties are not the same can only be ordered when these causes can be heard and decided at the same time and when the same evidence can be used in them all.

Soucisse v. Maybury, 18 Que. P.R. 165.

JOINING ACTIONS ON INSCRIPTION IN REVIEW.

Peloquin v. Woodley, 12 Que. P.R. 219.

C. SPLITTING; SUCCESSIVE SUITS.

(§ II C—50)—SPLITTING—CAUSE OF ACTION—SUCCESSIVE SUITS.

An action for the unlawful detention of horses may be maintained notwithstanding a former suit between the same parties for the rental of horses, where, in the later action, a different right is asserted as to animals that were not the subject of the former action, although both actions grow out of the same contract of rental.

McCutcheon v. Johnson, 13 D.L.R. 41, 23 Man. L.R. 559, 24 W.L.R. 868.

D. JOINDER.

See Pleading; Parties.

(§ II D—60)—JOINDER.

In an action for an instalment of $300, past due on a mortgage, and for the repayment of $105 of insurance on the mortgaged premises as agreed, $200 for goods sold and delivered and $37.50 for insurance thereon, where the evidence shews that, by an agreement between the defendant and the plaintiff, the defendant assumed the liability of $542.97 due by the plaintiff to a third party, of which $200 was to be applied in satisfaction of the goods sold and the balance on the mortgage, and the defendant set out a statement of account between the parties shewing a balance due the plaintiff $175, which the defendant paid into court, the claim for insurance paid on the goods fails and, the defendant's statement of account being correct, judgment will be rendered for the balance due the plaintiff for $175.

Chapdelaine v. Wilkinson, 4 D.L.R. 290.

JUDGMENT FOR DEBT AND SETTING ASIDE FRAUDULENT CONVEYANCE—JOINDER.

A simple contract creditor suing on behalf of himself and all other creditors of his debtor to set aside an alleged fraudulent conveyance by the latter may join the debtor as a defendant and recover judgment against him for the amount of his claim.

Burns v. Matejka, 1 D.L.R. 837, 4 A.L.R. 58, 19 W.L.R. 868, 1 W.W.R. 431.

JOINDER—CAUSE OF ACTION NOT AFFECTING A CODEFENDANT.

Two separate causes of action, in one of which one of the defendants has no concern, cannot be joined.

Ney v. Ney (No. 2), 1 D.L.R. 641, 3 O.W.N. 927, 21 O.W.R. 524.

JOINDER—CLAIM AGAINST PURCHASER OF LAND AND AGENT EFFECTING SALE—ALLEGATIONS OF FRAUD.

Where a vendor seeking rescission of an agreement for the sale of lands is unable to ascertain the exact legal relations existing between the two defendants against whom he makes his claim alternatively and pleads that he was induced to sign the agreement, of which he asked the rescission by the fraud of both defendants, one of the defendants being a company dealing as real estate agents, which had acted as agents for the vendor, and the other defendant being the person in whose name the land was purchased, who was also vice-president of the defendant company; the cause of action is a single one, viz., the breach of trust arising out of the alleged fraud, and the statement of claim is not irregular as for misjoinder of two causes of action. [Smurthwaite v. Hannay, [1894] A.C. 494, 10 Times L.R. 649, followed; Thomas v. Day, 4 D.L.R. 238, distinguished; Phosphate Sewerage Co. v. Hartmont, 5 Ch. D. 394, and Kerr on Fraud and Mistake, 14th ed., 412, specially referred to.]

Pringle v. Dwyer, 6 D.L.R. 446, 5 A.L.R. 449, 22 W.L.R. 158, 2 W.W.R. 1049.

JOINDER OF SEPARATE CLAIMS—CONSPIRACY TO COMMIT BREACHES OF SEVERAL AGREEMENTS—SEPARATE BREACHES BY DIFFERENT DEFENDANTS—SEPARATE TRIALS.

Grip Ltd. v. Drake, 10 D.L.R. 803, 4 O.W.N. 1000, 24 O.W.R. 333.

JOINDER — TORT AND CONTRACT — "SMALL DEBT PROCEDURE"—SEVERANCE.

A small debt summons under the "small debt procedure" should not be entirely set aside, under the Saskatchewan practice, because some of the claims therein are in tort and hence not within the purview of rule 4 of the District Court rules (Sask.) allowing small claims and demands for debt to be brought in one action, but those claims in tort should be struck out and the other issues which do come within rule 4 should be allowed to stand. [Paradis v. Hotton, 3 W.L.R. 317, criticized; Fitzsimmons v. McIntyre (1869), 5 P.R. (Ont.) 119, applied.]

Whitchelo v. Colvin, 10 D.L.R. 635, 6 S.L.R. 214, 23 W.L.R. 542, 3 W.W.R. 1135.

JOINDER OF CAUSES OF ACTION—PARTIES—DIFFERENT CAPACITIES.

Jackman v. Worth, 4 O.W.N. 911.

PARTIES—JOINDER OF PARTIES AND CAUSES OF ACTION—SEVERAL CLAIMS—UNITY.

Ash v. Ash, 16 O.W.N. 144.

PLAINTIFFS JOINING IN ACTION—EXCHANGE OF SHARES—SEPARATE CAUSES OF ACTIONS — ELECTION — TRANSFER — REGISTRATION.

MacKay v. Mason, 4 O.W.N. 354.

CONVENTIONAL DEMAND—INCIDENTAL DEMAND.

The incidental demand by the plaintiff unlike the conventional demand by the defendant, forms a whole with the principal demand, although a contestation independent of the contestation upon the principal action may be joined with the incidental demand; the proceedings taken and the documents filed in the one are common to the other, and one party can with impunity abandon his pleas.

St. Jerome Power & Electric Light Co. v. Town of St. Jerome, 18 Que. P.R. 377.

OF ACTIONS OF DIFFERENT PARTIES.

The joinder of actions between different parties can only be allowed if they were heard and decided in the same time and on the same evidence or when the evidence in one case can be used in the other.

Brodeur Co. v. Merrill, 18 Que. P.R. 386.

ACTION IN WARRANTY.

The principal action in the action in warranty cannot be joined for the purpose of hearing and judgment, when the principal plaintiff has no interest in the issue raised by the action in warranty, and the

principal action has no connection with the defendants in warranty.

McDonald v. Montreal Tramways Co., 18 Que. P.R. 136.

Possessory and petitory actions—Warranty—Defence.

The general principle that there cannot be a demand in warranty in an action for recovery of possession of lands is subject to exception in the case of a purchaser against whom an action is brought in regard to disturbance of which the vendor has been the cause. In a possessory action, the plaintiff who has the right to take recourse in warranty against a third person, after the filing of a defence in which it is contended that the possessory action has been joined with a petitory action, is not bound to file an answer to such defence before exercising his recourse in warranty; it is left to the warrantor to raise this question. Beyond the actions of formal warranty and of simple or personal warranty in regard to which provision is made in arts. 183, etc., C.C.P. (Que.), which entitle the plaintiff in warranty to have a stay of proceedings in the principal action, there is also the direct and independent action which is given under art. 1508 of the Civil Code.

Montreal Tramways Co. v. Town of St. Laurent, 50 Que. S. C. 57.

Different causes of action—Amendment.

When a plaintiff has prayed that the defendant be ordered to render him an account of the sale of goods from which the defendant has derived the proceeds, without paying the plaintiff the commission to which he was entitled, the plaintiff cannot ask, by way of amendment, that the defendant be ordered to pay a sum of $200 for commission due on the sale of a certain quantity of copper for the defendant. These two causes of action lead to different judgments, and should be heard at different trials.

Beaudoin v. Gagnon, 15 Que. P.R. 343.

(§ II D—62)—Joinder of defendants—Negligence action.

Anderson v. Buckham, 14 D.L.R. 518.

ADJOINING OWNERS.

See Abutting Owner.

Party wall, see also Easements.

Rights to lateral and subjacent support—Liability for removing sand from adjoining lot.

The rights of adjoining landowners to the free use and enjoyment of the land in its natural condition, not only as regards lateral but also subjacent support, are rights incident to the land itself and not a mere easement; hence, the act of such owner in removing sand from a sandy beach of an adjoining lot, thereby facilitating the action of the wind and water in washing away a portion of the land, will render him liable for damages occasioned thereby. [Dalton v. Angus, 6 App. Cas. 740; Jordeson v. Sutton, etc., Co., [1899] 2 Ch. 217; Trinidad, etc., Co. v. Ambard, [1899] A.C. 594, applied.]

Cleland v. Berberick, 25 D.L.R. 583, 34 O.L.R. 636. [Affirmed 29 D.L.R. 72, 36 O.L.R. 357.]

Improper use of fence—Possessory action.

The possessory action en complainte lies to repress the improper use of a boundary fence by the neighbouring owner. To use such fence for drying clothes and hanging linen and other clothing constitutes an abusive use of the fence and a hindrance to the possession of the neighbour.

Bouchard v. Tremblay, 51 Que. S.C. 68.

Damage from falling tree—Neighbouring property—Land in its natural state.

An owner of land which has been left in its natural state and on which a decaying forest tree remains is under no obligation, apart from negligence or nuisance being shewn, to cut down the tree to prevent its being blown over upon the house of an adjoining owner, although notified by the latter of the danger, particularly where on receiving notice he offered to allow the house owner to enter and cut it down. [Smith v. Giddy, [1904] 2 K.B. 448; Giles v. Walker (1890), 24 Q.B.D. 656; Crowhurst v. Amersham Burial Board (1878), L.R. 4 Ex. D. 5, referred to.]

Reed v. Smith, 17 D.L.R. 92, 19 B.C.R. 139, 27 W.L.R. 190, 6 W.W.R. 794.

Boundaries—Overlapping.

In proving the possession of adjoining lots of land referred to as boundaries in a given instrument concerning a lot of woodland, it is not necessary to prove a title that reaches back to the Crown, occupation with colour of title in the case of such land being sufficient.

Boehner v. Hirtle, 6 D.L.R. 548, 46 N.S.R. 231.

ADMINISTRATION.

Of decedents' estates, see Executors and Administrators.

Of lunatics' estates, see Insane Persons.

Of infants' estates, see Infants.

ADMIRALTY.

I. Jurisdiction.

II. Practice; pleading and procedure.

As to matters peculiar to vessels and navigation, see Shipping; Carriers; Collision; Seamen.

Annotations.

Liability of a ship or its owners for necessaries supplied: 1 D.L.R. 450.

Collisions on high seas; limitation of jurisdiction: 34 D.L.R. 8.

I. Jurisdiction.

Jurisdiction of Prize Court, see Prize Court.

(§ I—1) — Necessaries and repairs — Towage—Maritime lien.

By virtue of ss. 4 and 5 of the Admiralty

Court Act, 1861, where a ship is not under arrest and its owner is domiciled in Canada, the Exchequer Court of Canada has no jurisdiction over an action for repairs or necessaries supplied to the ship.

2. Towage performed in connection with the repairs, not at the owner's special request, is not within the purview of "claims and demands for services in the nature of towage," within the meaning of s. 6 of the Admiralty Court Act, 1840, as would give the court jurisdiction over the claim; neither claim for towage nor for necessaries is the subject of a maritime lien.

3. An objection to the jurisdiction will hold good even if made after the trial.

Stack v. The Barge "Leopold," 45 D.L.R. 595, 18 Can. Ex. 325.

THEFT FROM ADMIRALTY NAVAL STATION.

An objection to a conviction by a Criminal Court of a person for receiving property stolen from the navy, on the ground that such an offence should be dealt with by a Naval Court, is bad.

R. v. Day, 16 B.C.R. 323.

PRACTICE.

It is no objection to the jurisdiction conferred by s. 34 of the Admiralty Act, 1861, because that section relates to practice only, particularly where r. 228 provides the practice in respect of Admiralty proceedings, in cases not specially provided for by the rules, to be that of the High Court of Justice in England.

The King v. The "Despatch," 25 D.L.R. 221, 22 B.C.R. 365, 16 Can. Ex. 314, reversing 23 D.L.R. 351.

COLLISION—CLAIMS FOR LIFE AND PROPERTY.

The proceeds of the sale of a ship sold under an order of the court to satisfy claims for loss of life and property arising from a collision on the high seas, should be distributed in accordance with the provisions of the Imperial Merchant Shipping Act (1898, s. 503), under which the claimants for loss of life or personal injury are entitled to seven-fifteenths of the fund paid into court and must rank pari passu with the claimants for loss of property for the balance of their claims.

Canadian Pacific R. Co. v. S.S. "Storstad," 40 D.L.R. 615, 56 Can. S.C.R. 324, varying 34 D.L.R. 1. [Reversed by Privy Council, 51 D.L.R. 94.]

APPEAL—JURISDICTION—LEAVE OF COURT.

The Exchequer Court, sitting in appeal, cannot entertain an appeal from an interlocutory decree without leave having previously been obtained from either the local Judge in Admiralty or from the Judge of the Exchequer Court, as required by s. 70 of the Admiralty Act (R.S.C. 1906, c. 141).

Johnson & Mackay v. The "Neff" (No. 1), 17 Can. Ex. 155.

(§ I—2)—JURISDICTION OVER SUBJECT-MATTER GENERALLY.

The master of a ship is only entitled to a reasonable notice terminating his contract for employment; what is reasonable notice is a question of fact for the trial judge, who in an action in rem for wages in lieu of notice of dismissal may condemn the ship or its bail for such wages in the nature of damages for wrongful dismissal. [See also 1 Halsbury's Laws of England, p. 69; The Great Eastern, L.R. 1 A. & E. 384.]

Kane v. The Ship "John Irwin," 1 D.L.R. 447, 13 Can. Ex. 502.

JURISDICTION OF SUBJECT-MATTER—ARREST OF SHIP FOR SEAMAN'S WAGES—EFFECT OF UNCERTAINTY OF OUTCOME ON ACTION FOR EQUIPPING SHIP.

Where a ship is under arrest for a seaman's wages, an action for equipping the vessel may be maintained under s. 4 of the Admiralty Court Act, 24 Vict. c. 10, irrespective of whether the seaman claiming for less than fifty pounds will be able to succeed under s. 165 of the Merchant Shipping Act of 1894, 57 & 58 Vict. (Imp.) c. 60, in his action; since it is the present fact of the arrest and not the probable future result of the seaman's action that is to determine the question of jurisdiction under the former Act.

Momsen v. "The Aurora," 13 D.L.R. 429, 18 B.C.R. 353. [See 14 D.L.R. 31, 17 D.L.R. 759.]

JURISDICTION—WAGES CLAIMS—JOINDER.

Claims for seamen's wages with less than $200 due to any one claimant may be joined in an action in admiralty against the ship and the Exchequer Court will have jurisdiction where the aggregate of the claims so joined is more than $200. [Beaton v. "The Christine," 11 Can. Ex. 167, approved.]

Burke v. "The Vipond," 14 D.L.R. 396, 14 Can. Ex. 326.

Water supplied to a ship for the use of her engines and crew is not "equipping a ship" within the meaning of s. 4 of the Admiralty Courts Act, 1861, which gives the Admiralty jurisdiction over any claim for the building, equipping or repair of any ship if at the time of the institution of the cause the ship or the proceeds thereof are under the arrest of the court. The scope of the Act is to protect material men who build, equip or repair a ship as a ship, and to extend a limited lien to men who furnish necessaries in foreign ports, the latter term meaning anything necessarily supplied to the ship in the prosecution of her work.

Peter Judge & Sons v. The Ship "John Irwin," 14 Can. Ex. 20.

JURISDICTION—ACTION IN REM FOR WRONGFUL DELIVERY OF GOODS—OWNERS DOMICILED IN CANADA—COLONIAL COURTS OF ADMIRALTY ACT, 1890 (IMP.), S. 2—"BRITISH POSSESSION."

McGregor v. The Ship "Strathlorne," 9 E.L.R. 119.

JURISDICTION OF SUBJECT-MATTER — ADDITIONAL EQUIPMENT TO VESSEL—WHEN CONSIDERED "NECESSARIES."

Making alterations and additions to the structure and equipment of a fishing vessel in order to change her from a trawler so as to permit fishing from small boats, is to be regarded as "necessaries" for the cost of which a judgment may be rendered against a vessel in admiralty proceedings. [Williams v. "The Flora," 6 Can. Ex. 137; and "The Riga," 1 Asp. 246, L.R. 3 A. & E. 516, specially referred to.]

Victoria Machinery Depot v. "The Canada" and "The Triumph," 14 D.L.R. 318, 18 B.C.R. 515, 15 Can. Ex. 142.

FOREIGN SHIPS — COLLISION IN FOREIGN WATERS.

A proceeding in an American court, for the limitation of liability of ships of American registry for the consequences of a collision in American waters, does not oust the jurisdiction of the Canadian courts to proceed in an action in rem upon a subsequent seizure of the ships in Canadian waters.

"A. L. Smith" and "Chinook" v. Ont. Gravel Freighting Co., 23 D.L.R. 491, 51 Can. S.C.R. 39, affirming 22 D.L.R. 488, 15 Can Ex. 111.

(§ I—3)—SHIPPING—JURISDICTION—CONTRACT MADE WITHOUT REFERENCE OR APPLICATION TO COURT—SECURITY FOR RETURN OF SHIP.

Heater v. Anderson, 13 Can. Ex. 41.

(§ I—4) — EXCHEQUER COURT — CONDEMNATION OF SHIP—INJURY TO BRIDGE.

A ship may be sued and condemned in damages in the Exchequer Court in favour of a municipality whose bridge over a river has been injured by the ship running into it through bad navigation amounting to negligence. [Jones v. C.P.R. Co., 13 D.L.R. 900, 906, 83 L.J.P.C. 13, referred to.]

City of New Westminster v. The "Maagen," 21 D.L.R. 73, 21 B.C.R. 97.

SEAMEN'S WAGES—JURISDICTIONAL AMOUNT —RIGHT AGAINST SHIP.

Since under s. 194 of the Canada Shipping Act, c. 113, R.S.C., a master of a ship is put upon the same basis as a seaman in respect of recovery and remedy as well as of substantive rights, a claim of a master for wages less than the jurisdictional amount is within the restriction of s. 191, which the Admiralty Court has no jurisdiction to enforce against the ship of the defendant.

Beck v. The "Kobe," 24 D.L.R. 573.

JURISDICTION OVER PERSON—APPEARANCE TO CONTEST LIABILITY.

Where owners appear and contest the liability of ships they become parties to the action and subject to have personal judgment pronounced against them for the amount of damages properly recoverable for the negligence of their servants. [Ont. Gravel Freighting Co. v. The "A. L. Smith," 22 D.L.R. 488, 15 Can. Ex. 111, affirmed.]

"A. L. Smith" and "Chinook" v. Ontario Gravel Freighting Co., 23 D.L.R. 491, 51 Can. S.C.R. 39.

JURISDICTION OVER PERSONS AND VESSELS.

Where the master of a ship, which is in its home port, acting under instructions from the owners' manager, purchased certain supplies for repairing the ship prior to her sailing, which, following the customary practice of the firms furnishing the goods, were charged to the ship or to its owners, the credit will be presumed to have been given to the owners and not to the master, and the master having incurred no personal liability, is not entitled to enforce a maritime lien for such supplies. [The Ripon City, [1897] P. 226, distinguished.]

Kane v. The Ship "John Irwin, 1 D.L.R. 447, 13 Can. Ex. 502.

II. Practice; pleading and procedure.

(§ II—5)—SALVAGE—LIABILITY OF SHIP AND CARGO.

The rule upon a claim in admiralty proceedings for salvage is, that unless there is a specific agreement for a sum certain, the interests in the ship and cargo are only severally liable each for its proportionate share of the salvage remuneration. [The "Mary Pleasants," Swab. 224; The "Pyrennee," Br. & L. 189; The "Raisby," 10 P.D. 114, referred to.]

Peninsular Tug & Towing Co. v. The "Stephie," 22 D.L.R. 600, 15 Can. Ex. 124.

TRANSFER OF CAUSE—COMITY.

On the ground of comity, the Exchequer Court will not entertain an application for the transfer of a cause from one admiralty district to another without the application having first been made before the local judge.

Johnson & Mackay v. The "Neff" (No. 2), 17 Can. Ex. 158.

PRACTICE — CROWN — SECURITY — STAY OF PROCEEDINGS — CONSOLIDATION OF ACTIONS.

The King v. The "Despatch" (No. 1), 23 D.L.R. 351, 16 Can. Ex. 310, 21 B.C.R. 503.

WAIVING PRELIMINARY PROCEEDINGS.

Nosler v. The "Aurora," 17 D.L.R. 13, 18 B.C.R. 449, 15 Can. Ex. 31.

COLLISION ACTION—FOREIGN PROCEEDINGS—RULE AS TO.

The rule as to restraining a collision action in the domestic forum because of an action relating to the same matter in a foreign court is one of convenience and fair dealing, but can only be invoked by the defendant where the plaintiff is in some way responsible for or a party to the foreign proceedings; so, if the defendant has given a bond to pay the damages awarded, if any, and has thereupon obtained the release of the ship arrested in Canada, it is not open to the defendant to object to the

jurisdiction on the ground of a pending action taken by one of the defendant ships in a United States Court to limit her liability, although the collision occurred in American waters and the defendant ships are both of American register. [St. Clair v. Whitney, 38 Can. S.C.R. 303, distinguished.]

Ontario Gravel Freighting Co. v. "A. L. Smith" and "Chinook," 22 D.L.R. 488, 15 Can. Ex. 111. [Affirmed in "A. L. Smith" and "Chinook" v. Ont. Gravel Freighting Co., 23 D.L.R. 491, 51 Can. S.C.R. 39.]

(§ II—6)—Injuries to ship—Parties—Assignee — Mortgagee — True owner.

The assignee of a ship, to whom a ship is assigned for the purpose of enabling him to execute a valid mortgage thereon on behalf of a foreign subject, cannot maintain an action for injuries to the ship, where his certificate of British registry, to establish his ownership, had not been obtained until after the occurrence of the accident; and such mortgagee cannot by virtue of s. 45 of the Canada Shipping Act, be deemed the owner, nor may the foreign assignor be added as a party to such action without his written consent.

Strong v. C.P.R. Co., 25 D.L.R. 51, 22 B.C.R.224.

Parties.

In an action in Admiralty by ship owners to recover salvage remuneration for rescuing a disabled ship in response to her call for aid, the court may, upon consent of the master and crew of the salving vessel entitled to participate with the owners in the distribution of the salvage remuneration, join as parties at the hearing, and determine the amount of salvage remuneration and its apportionment.

Pickford & Black v. Steamship "Lux," 8 D.L.R. 924, 14 Can. Ex. 108.

(§ II—7)—Collision with Crown ship—Cross-cause—Security by Crown.

An action in personam against the master of a government tug, for his negligence in a collision with the plaintiff's ship, is neither an action in rem or in personam against the Crown; nor can it be considered a cross-cause to a proceedings in rem by the Crown against the plaintiff's ship, so as to permit a stay of the Crown's proceedings, under s. 34 of the Admiralty Act, 1861, until it furnishes security to answer the judgment which may be obtained in the cross-cause. [The King v. The "Despatch," 23 D.L.R. 351, 8 W.W.R. 1253, 32 W.L.R. 13, reversed.]

The King v. The "Despatch," 25 D.L.R. 221, 16 Can. Ex. 314, 22 B.C.R. 365. [See also 28 D.L.R. 42, 16 Can. Ex. 319, 22 B.C.R. 496.]

(§ II—8)—Practice—Seizure of res—Rearrest of vessel released on bail—Nonsatisfaction of judgment.

A warrant may issue for the rearrest of a vessel to answer an unsatisfied judgment for the claim on which it was originally arrested, where the vessel had been released on bail and execution against the defending owner and sureties had been returned nulla bona. ["The Freedom" (1871), L.R. 3 A. & E. 495, followed.]

Momsen v. The "Aurora" (No. 2), 14 D.L.R. 31, 18 B.C.R. 355.

Arrest of ship—Tug hire.

No greater sum than 10 cents per mile can be taxed to the marshal for boat-hire and traveling expenses in executing a warrant to arrest a ship under the Exchequer Court Admiralty tariff. [For previous decisions in the same proceedings, see 13 D.L.R. 429, and 14 D.L.R. 31.]

Momsen v. The "Aurora," 17 D.L.R. 759, 15 Can. Ex. 25, 20 B.C.R. 210.

Effect of arrest on repairs subsequent thereto — Beneficial repairs — Possessory lien—Priority.

A shipwright has a possessory lien for repairs done to a ship, and should be paid, in priority, not alone for such as were done to a ship, previous to her arrest, but also for such as were done after, and which are beneficial and necessary to and upon the ship. A reference should be made to the registrar to ascertain the extent to which the repairs after arrest are beneficial.

Halifax Shipyards & Montreal Dry-docks Co. v. The "Westerian," 50 D.L.R. 543, 19 Can. Ex. 259.

Ship—Seizure to enforce lien for necessaries.

The fact that the statutory lien for necessaries supplied to a ship away from her home port and in a country where her owner is not domiciled, may have to be postponed to a prior charge, is not a ground for setting aside the warrant of arrest in an admiralty action and does not prevent the enforcement of the lien for necessaries in so far as may be lawful upon the facts which may develop afterwards upon the trial or further disposition of the case. [The "Scio," L.R. 1 A. & E. 353, applied.]

Victoria Machinery Depot Co. v. The "Canada" and the "Triumph," 17 D.L.R. 27, 18 P.C.R. 511, 15 Can. Ex. 136.

Fishing tackle on vessel—"Necessaries"—What constitutes.

Fishing stores such as hooks, gaffs, nippers, and knives used by a boat in the halibut fishing trade are as much "necessaries" in admiralty law as are sailing stores to a vessel engaged only in transportation. [Victoria Machinery Co. v. The "Canada," 17 D.L.R. 27, 18 B.C.R. 511, referred to; The "Dundee," 1 Hag. Adm. 109, 2 Hag. Adm. 137, followed.]

Pichon v. "The Alliance No. 2," 20 D.L.R. 70, 20 B.C.R. 560.

Prize Court—Agreement of purchase by neutral prior to war—Subsequent completion by bill of sale—Detention order.

The "Bellas," 20 D.L.R. 989.

SEIZURE AND CUSTODY OF THE RES.

A warrant for the arrest of a ship for supplies furnished, may be issued by the deputy registrar, notwithstanding the affidavit therefor omitted the material allegations of the national character of the ship and that the aid of the court was necessary, as, under Rule 39 (Admiralty Rules, Canada, 1892), the registrar has power to dispense with some of the prescribed particulars for the issuance of a warrant, without disclosing his reason for so doing, and without laying his discretion open to review.

Letson v. "The Tuladi," 4 D.L.R. 157, 17 B.C.R. 170, 15 Can. Ex. 134.

SEIZURE FOR TOWAGE—"SHIP."

A vessel built for show and not for transportation is a "ship" within the meaning of admiralty law and is subject to seizure for towage.

Neville Canneries v. "Santa Maria," 36 D.L.R. 619, 16 Can. Ex. 481.

ADMIRALTY LAW — SHIP WRONGFULLY SEIZED BY CREW—CAUSE AND WRIT OF POSSESSION—POSSESSION—RELEASE.

A writ of possession will issue to restore to her owner a ship which has been wrongfully seized by her crew.

Pacific Great Eastern R. Co. v. The "Clinton," [1919] 1 W.W.R. 947.

(§ II—9)—BAIL—SALVAGE CLAIM FOR EXCESSIVE AMOUNT—COSTS.

Costs of furnishing bail in an admiralty salvage case may be set off in favour of the unsuccessful defendant where the claim upon which the boat was arrested was extravagantly large.

Grand Trunk Pacific Coast S.S. Co. v. The Launch "B.B.," 17 D.L.R. 757, 15 Can. Ex. 389.

SALVAGE—RELEASE ON BAIL—COMPETENCY OF SURETY.

Held, that in a salvage case arising in the Quebec Admiralty District, an incorporated company duly authorized by law to carry on the business of suretyship may be accepted as bail for the purpose of releasing the property salved.

Re 251 Bars of Silver and Canadian Salvage Assn. (No. 2), 15 Can. Ex. 370.

(§ II—11)—GARNISHEE ORDER FROM PROVINCIAL COURT — EFFECT — UNNECESSARY PROCEEDINGS—COSTS—BAIL—DEPOSIT.

The Admiralty Court, in Canada, is bound to recognize garnishee proceedings in other courts of the province. The court should not encourage or countenance unnecessary proceedings and costs; its duty being to administer the law between the parties and not be influenced by mere technicalities occasioned by a welter of proceedings and costs which may in the circumstances of any particular case operate as a denial of justice. The plaintiff in an action by accepting bail, where a vessel is released upon bail, must not be taken to be in a worse position than if the vessel, the res itself, had remained under or within the control of the court. Semble the provisions of art. 1486 and 1487 R.S.Q. 1909, whereby one may deposit with the Provincial Treasurer any sum of money demanded of him by contending claimants, do not apply to cases where the contestation between the parties has been decided by the judgment of a court of competent jurisdiction.

Beaudette v. "Ethel Q.," 16 Can. Ex. 281, varying 30 D.L.R. 529, 22 Rev. de Jur. 450.

(§ II—12)—CRIMES ON HIGH SEAS.

The restrictions of Code, s. 591 as to obtaining the leave of the Governor-General before taking proceedings for the trial of offences within the admiralty jurisdiction are specially applicable to offences committed upon foreign ships within British and Colonial territorial waters; they do not apply to prosecutions for offences committed on British ships on the high seas. Cases as to which s. 686 of the Merchant Shipping Act confers trial jurisdiction on Canadian courts in like manner as if the offence on the high seas had been committed within Canadian territory are not subject to Code, s. 591. [R. v. Heckman, 5 Can. Cr. Cas. 242, considered by Longley, J., and Ritchie, E.J.]

R. v. Neilson, 40 D.L.R. 120, 30 Can. Cr. Cas. 1, 52 N.S.R. 42.

LIMITATION OF LIABILITY—NECESSITY OF PLEADING.

There is no right to a limitation of liability under American or Canadian statutes, if not pleaded nor any evidence of it produced. [Ont. Gravel Freighting Co. v. The "A. L. Smith," 22 D.L.R. 488, 15 Can. Ex. 111, affirmed.]

"A. L. Smith" and "Chinook" v. Ontario Gravel Freighting Co., 23 D.L.R. 491, 51 Can. S.C.R. 39.

(§ II—18)—AMENDMENT—OF PROOFS TO LEAD WARRANT.

The court may allow the respondent to an application to vacate warrants to arrest a ship in an action for necessaries, to file supplementary affidavits so as to shew jurisdiction in conformity with the Exchequer Court Rules in Admiralty, rules 35 and 36, and to establish that the case was one in which the registrar could properly exercise his discretion in granting the warrants. [Letson v. The "Tuladi," 4 D.L.R. 157, 17 B.C.R. 170, considered.]

Victoria Machinery Depot Co. v. The "Canada" and the "Triumph," 17 D.L.R. 27, 18 B.C.R. 511, 15 Can. Ex. 136.

AMENDMENT.

In Admiralty proceedings, alterations or amendments will not be allowed in the "preliminary acts" at the instance of the party who filed such "preliminary act." [The "Miranda" (1881), 7 P.D. 185, fol-

lowed; 1 Halsbury's Laws of England, 94, referred to.]

Pallen v. "The Iroquois," 6 D.L.R. 527, 15 B.C.R. 156.

(§ II—19)—JOINDER OF CLAIMS—COSTS.

Where several seamen having unpaid wages claims, each of which being less than $200 might have been the subject of summary proceedings before a magistrate join their claims aggregating more than $200 in one action in admiralty, they are entitled to their costs in the Exchequer Court.

Burke v. "The Vipond," 14 D.L.R. 396, 14 Can. Ex. 326.

ADMISSIONS.

See Evidence.

ADULTERY.

AS CRIME—JURISDICTION OF MAGISTRATE.

Adultery, although a misdemeanour under an old unrepealed New Brunswick statute (R.S.N.B. 1854, c. 145), is not a crime under the Criminal Code, and a New Brunswick magistrate has no jurisdiction under Part XVI. of the Code to try such offence.

Ex parte Belyea, 39 D.L.R. 24, 45 N.B.R. 308.

PROCEDURE APPLICABLE.

The repeal in 1886 by the Dominion Parliament of parts of certain preconfederation statutes of New Brunswick, which regulated procedure in prosecutions for adultery under R.S.N.B., 1854, c. 145, leaves that offence punishable in New Brunswick under the procedure applicable to indictable offences generally under the Criminal Code of Canada. [R. v. Buchanan, 8 Q.B. 883, referred to.] Adultery is an indictable offense in the Province of New Brunswick under the preconfederation statute of that province, R.S.N.B. 1854, c. 145, s. 3, which has not yet (1915) been repealed by the Dominion Parliament.

R. v. Strong, 26 D.L.R. 122, 43 N.B.R. 190, 24 Can. Cr. Cas. 430.

OFFENCE IN NEW BRUNSWICK—R.S.N.B. 1854, C. 145, S. 3—EVIDENCE OF ACCOMPLICE—INSTRUCTION TO JURY.

On a charge of adultery in New Brunswick, where it is an indictable offence under a preconfederation law, it is the duty of the judge where there is no corroboration of the evidence of the person with whom the adultery was committed to point out that fact to the jury and to warn them of the danger of finding a verdict of guilty on the testimony of an accomplice. The failure to so warn the jury is a ground for a new trial. [As to offence of adultery, indictable in New Brunswick, see R. v. Strong, 26 D.L.R. 122, 24 Can. Cr. Cas. 430, 43 N.B.R. 190.]

R. v. Ackerley, 30 Can. Cr. Cas. 343, 46 N.B.R. 195.

ADVERSE POSSESSION.

I. WHAT CONSTITUTES.
- A. In general.
- B. On boundary.
- C. Vendor and purchaser.
- D. Landlord and tenant.
- E. As to dower; mortgage or trust.
- F. As to tenants in common and by entirety.
- G. As to remaindermen or reversioners.
- H. As to public; highway, canal, or tide land.
- I. Colour of title.
- J. Claim; hostility.
- K. Extent and kind of possession.

II. EFFECT; TIME REQUIRED.

III. WHO MAY HOLD ADVERSELY.

Prescriptive rights, see Easements; Waters.

See also Limitation of Actions.

Annotation.

Tacking; successive trespassers: 8 D.L.R. 1021.

I. What constitutes.

A. IN GENERAL.

(§ I A—1)—PRESCRIPTION—DISTINCTION BETWEEN.

The distinction in English law between prescription and adverse possession is that prescription relates to an incorporeal hereditament, while adverse possession is in respect of a thing corporeal.

The King v. Tweedie, 22 D.L.R. 498, 15 Can. Ex. 177. [Reversed in 27 D.L.R. 53, 52 Can. S.C.R. 197 on another point.]

WHAT CONSTITUTES—LAND—ELEMENTS OF ABSOLUTE, ACTUAL, NOTORIOUS POSSESSION.

Where an adverse claimant by possession has held beyond the period prescribed by the Nova Scotia Statute of Limitations and such possession has been (a) open, visible and continuous; (b) not equivocal or occasional; such elements of absolute, actual, notorious possession clearly establish the class of possession imposed by the statute.

Blank v. Romkey, 11 D.L.R. 661, 47 N.S.R. 127.

IN GENERAL—TITLE TO LAND—POSSESSION—EVIDENCE.

Poulin v. Eberle, 4 O.W.N. 1545, 24 O.W.R. 792.

JURISDICTION OF COURT TO CONFIRM TITLE.

The discretion which exists in the court under sec. 16(b) of the Judicature Act, R.S.O. 1914, c. 56, to grant or withhold a mere declaration of right, is not to be exercised to confirm a title to land claimed by possession under the Statute of Limitations (R.S.O. 1914, c. 75). [Miller v. Robertson, 35 Can. S.C.R. 80, followed; Foisy v. Lord, 2 O.W.N. 1217, 3 O.W.N. 373, dis-

tinguished; Ottawa Y.M.C.A. v. City of Ottawa, 15 D.L.R. 718, referred to].

Réaume v. Coté, 26 D.L.R. 524, 35 O.L.R. 303.

ACTS OF POSSESSION—EVIDENCE—FINDING OF FACT OF TRIAL JUDGE.

Godson Contracting Co. v. Grand Trunk R. Co., 13 O.W.N. 241.

TITLE BY POSSESSION:—CONVEYANCE BY OWNER WHEN DISSEISED—QUESTIONS TO JURY—FAILURE TO SUBMIT QUESTION—NEW TRIAL.

In an action of trespass to land, brought to try title, both parties claimed title by possession. The jury found the plaintiff had twenty years' adverse, exclusive, continuous and uninterrupted possession, but, were not asked to find as to defendants' title. On motion by defendants to set aside the verdict:—Held, per Landry and Barry, JJ. There was evidence sufficient to support the verdict. Per McLeod and White, JJ. The evidence was not sufficient to support the verdict, and as there was no finding on defendants' title there should be a new trial. Per White, J. It was the defendants' duty to submit a question as to their title, and not having done so, they should pay the costs of the trial and of the motion to set aside the verdict. Per Barry, J. It was the defendants' duty to submit a question as to their title, and not having done so when the opportunity was given, they are not entitled to a new trial in order to submit such question. A deed of land by a grantor who is disseised will convey his right of entry, under s. 17 of the Property Act, C.S. 1903, c. 152.

Miller v. Rundle, 41 N.B.R. 591.

WHAT CONSTITUTES.

The defendant has no title by possession where his possession is not open, notorious and exclusive; and where the plaintiff company and its predecessors in title exercised their rights and occupancy during the whole of the defendant's alleged possession.

Turnbull Real Estate Co. v. Segee et al., 4 N.B. Eq. 372.

ENCROACHMENT—INTENTION.

One who encroaches on land to the prejudice of the possession of another cannot meet the possessory conclusions of the party prejudiced, by declaring that he never had the intention to dispute his possession when in spite of the protestations of the latter he persists in the same acts.

Lortie v. Wright, 26 Que. K.B. 18.

(§ I A—2)—WHAT CONSTITUTES—"POSSESSIO PEDIS"—SQUATTER TRESPASSING ON LAND—STATUTE OF LIMITATIONS.

A "squatter" trespassing upon land and holding same cannot invoke the Statute of Limitations to bar the right of the true owner except as to the land of which there has been "pedal possession" as by fencing or cultivating for the statutory period. [Harris v. Mudie, 7 A.R. (Ont.) 414, followed; Coffin v. N.A. Land Co., 21 O.R. 80; Piper v. Stevenson, 12 D.L.R. 820, 28 O.L.R. 379, referred to; and see McConaghy v. Denmark, 4 Can. S.C.R. 609.] An acknowledgment of title by the squatter in possession for the statutory period must be in writing under the Limitations Act, but his oral agreement to act as caretaker of the rightful owner will nevertheless be effective as to portions of the land in question upon which there was no pedal possession sufficient to bar the rightful owner's claim. [Ryan v. Ryan, 5 Can. S.C.R. 387; Greenshields v. Bradford, 28 Gr. 299, referred to.]

Cowley v. Simpson, 19 D.L.R. 463, 31 O.L.R. 200.

POSSESSIO PEDIS.

Entry upon and cultivation of a plot of land claimed under a grant from the Crown is not sufficient to give title by constructive possession of the whole as against a prior grantee also in possession and exercising acts of ownership over a portion of the land described in his grant. Where the land claimed under both grants is woodland, occasional acts of cutting and cultivation by one of the parties will not suffice to give a statutory title as against the other, such acts amounting to no more than a mere possessio pedis.

McInnes v. Stewart, 45 N.S.R. 435.

B. ON BOUNDARY.

(§ I B—5)—FENCING IN LOT AROUND BLACKSMITH SHOP — DEED — DESCRIPTION OF LAND.

Sulis v. Armstrong, 36 D.L.R. 778, 51 N.S.R. 315.

ON BOUNDARY.

A blazed line running around the whole of the land in question, run by a private surveyor at the instance of the occupant, will not establish in his favour a title by possession, although no disturbance thereof was made for the statutory period as such act lacks publicity and conveys no sufficient intimation that the occupant is claiming title to the whole of the area included within the blazed lines. (Per Graham, E. J.) [Wood v. Leblanc, 34 Can. S.C.R. 627, followed.]

Swinehammer v. Hart, 5 D.L.R. 106, 46 N.S.R. 194.

ON BOUNDARY — POSSESSION OF LAND — FENCES—ENCROACHMENT.

Kovinski v. Cherry, 5 O.W.N. 167.

TITLE BY POSSESSION—UNCULTIVATED LAND—BOUNDARY—ACTS OF POSSESSION.

Jackson v. Cumming, 12 O.W.N. 278.

In an action en bornage merely without a demand for revendication of land or establishment of a specified boundary line, each party is at the same time plaintiff and defendant. The one who is named as defendant may, at an ex parte hearing, establish his right to a line indicated by a fence up to which he has had possession for thirty years, but he cannot set it up

when the action is contested and he has asked that it be dismissed with costs.

Barrette v. Ampleman, 42 Que. S.C. 218.

(§ I B—6) — Possessory action — Land surveyor — Boundary stakes — Division line.

One who, after having requested a land surveyor to delimit his land, planted stakes upon land in the possession, up to that time, of his neighbour, to indicate the division line, and who, instead of then bringing an action to settle the landmarks, on the refusal of the neighbour to draw a line and to sign a proces-verbal, forbids the neighbour to take up the stakes, and even has him arrested for taking them out, commits an act of violent dispossession, and gives grounds for possessory action.

Plourde v. Fortin, 46 Que. S.C. 368.

Occupation by permission of true owner—Payment of taxes for owner—Estoppel.

Dominion Improvement & Development Co. v. Lally, 24 O.L.R. 115.

D. Landlord and tenant.

(§ I D—15)—Adverse holding by tenant—Payment of taxes as rent.

The continued and uninterrupted possession of land for the statutory period, but entered on under an agreement to pay the taxes thereon as rent, and no other rent having been stipulated for, the payments of such taxes operate as an acknowledgement of title which will prevent the Limitation Act, R.S.O. 1914, c. 75, s. 6 (7), from accruing. [Finch v. Gilray, 16 A.R. (Ont.) 484, distinguished.]

East v. Clarke, 23 D.L.R. 74, 33 O.L.R. 624.

E. As to dower; mortgage or trust.

(§ I E—20) — Mortgage — Redemption — Dower — Limitations Act — Evidence.

The validity of a mortgage sale cannot be attacked by the mortgagor, and his wife, as dowress, after the purchaser and those claiming under him have been in undisputed adverse possession of the land as of right sufficiently long to bar the relief claimed, under the Limitations Act.

Girardot v. Curry, 33 D.L.R. 272, 38 O.L.R. 350.

(§ I E—22)—Mortgage.

The title of a registered owner of land registered under the Torrens system or new system of registration in Manitoba is not extinguished by adverse possession of the land held by his mortgagee and persons claiming under him for the statutory period which by R.S.M. 1902, c. 100, s. 20, is applicable to lands not so registered. [Compare s. 29 of the Ontario Land Titles Act, 1 Geo. V. c. 28; and see Belize Estate v. Quilter, [1897] A.C. 367.]

Smith v. National Trust Co., 1 D.L.R. 698, 45 Can. S.C.R. 618, affirming 20 Man. L.R. 522.

Limitations against mortgagee—Effect of payments.

The Limitations Act, R.S.O. 1914, c. 75, s. 23, is inoperative against a mortgagee or any person claiming under him, to whom the land was conveyed by a deed absolute in form but intended only as security for a loan and on which payments were being made.

East v. Clarke, 23 D.L.R. 74, 33 O.L.R. 624.

One who acquires in good faith, and by title transferring the ownership, an immovable burdened with hypothecs, and who has the useful possession of it under this title for ten years, is discharged of liability for these hypothecs by prescription.

Samson v. Larochelle, 48 Que. S.C. 261.

F. As to tenants in common and by entirety.

(§ I F—25)—Possession by one—Guardian of cotenants.

The relationship of a widow as bailiff of her husband's property for her husband's children may be dissolved by circumstances where the widow pays all taxes, improves the property and clears it of encumbrances at her own expense, and the children put in no adverse claim for several years after they come of age. Such facts are sufficient to warrant a finding that the relationship of bailiff had ceased, and the widow was justified in treating the property as her own. [Snider v. Carlton, 25 D.L.R. 410, [1916] 1 A.C. 266, referred to.]

Fry & Moore v. Speare, 30 D.L.R. 723, 36 O.L.R. 301, affirming 26 D.L.R. 796, 34 O.L.R. 632.

Possession against—Rights of purchaser.

No title as against the cotenants is acquired by a purchase of lands from a tenant in common who has not the possession of the lands against the cotenants as required by s. 14 of the Statute of Limitations (N.S.).

Miller v. Halifax Power Co., 24 D.L.R. 29, 48 N.S.R. 370.

Prescription—Husband and wife.

Art. 2233 C.C.Q., which provides that husband and wife cannot prescribe against each other, cannot be invoked for the benefit of third parties.

Boivin v. Chicoutimi Water & Electric Co., 25 D.L.R. 361, 24 Que. K.B. 394.

Possession of land — Conveyance to partners—Death of partner—Acts of ownership by survivor — Payment of taxes—Lease of land—Statute running against heirs of deceased partner—Limitations Act, R.S.O. 1914, c. 75, s. 12—Declaration of title—Costs.

Réaume v. Coté, 9 O.W.N. 17.

G. As to remaindermen or reversioners.

(§ I G—31)—Life tenants—Heirs of reversioner.

The continued occupation of land by the successors in title, in which their predecessors had a life estate as tenants in common, for a period more than 35 years between the death of the life tenant and the commencement of action for its recovery by the heirs of the reversioner, is within the purview of s. 7 (3) of the Limitations Act, R.S.O. 1914, c. 75, barring recovery where lands are held adversely for a period of 10 years.

Stuart v. Taylor, 22 D.L.R. 282, 33 O.L.R. 20.

Life tenant against remainderman.

Where a devise of land may be rendered inoperative by the subsequent execution of a deed to the same property, still, where the grantee elects to take under the will instead of making entry under the deed, a person holding a life estate to the land cannot set up the Statute of Limitations as against the remainderman for his failure to make entry under the deed within the statutory period. [Board v. Board, L.R. 9 Q.B. 48, followed.]

Connors v. Myatt, 24 D.L.R. 537, 49 N.S.R. 139.

H. As to public; highway, canal, or tide land.

(§ I H—35)—Tacking period against Crown grantee.

Adverse possession does not begin to run until the date of the Crown grant; the period in which Crown lands are adversely held will not enure against the Crown grantee.

Ouellet v. Jalbert, 27 D.L.R. 459, 43 N.B.R. 599.

(§ I H—41)—Continuous user of tide lands—Foreshore—Lost grant.

Continuous user of a foreshore adjoining one's land for booming purposes, for upwards of forty years, affords as strong an instance of adverse possession as can be had of tide lands, from which a prior like user may be inferred or a lost grant presumed.

Tweedie v. The King, 27 D.L.R. 53, 52 Can. S.C.R. 197, reversing 22 D.L.R. 498, 15 Can. Ex. 177.

I. Colour of title.

(§ I I—49)—Deeds, generally—Subsequent grant from Crown.

Where land was divided into 300-acre lots, also into tiers of 30-acre lots and the allotment proceedings, as well as the registry thereof, by the commissioners appointed by the Crown to apportion the land among the grantees named in a township grant, clearly shewed but three tiers of 30-acre lots, a subsequent grantee from the Crown of lots in a fourth tier thereof, which would overlap one of the 300-acre lots, did not by such subsequent grant, acquire title to the overlapping land, since the rule is that the first grantee in point of time and possession takes all of the land called for in his allotment. [Boehner v. Hirtle, 9 E.L.R. 258, reversed on appeal.]

Boehner v. Hirtle, 6 D.L.R. 548, 46 N.S.R. 231.

Tax sale deed—Cloud on title—Proofs of adverse possession.

Re National Trust Co. and Ewing, 2 O.W.N. 801, 18 O.W.R. 770.

Colour of title—Possession under deed—Boundaries of land described within—Trespasser.

A person in possession under a deed of lands described by metes and bounds has a colourable title and is deemed to be in possession of all the lands within the boundaries of the deed although not enclosed. A trespasser to acquire a statutory title against him must not only take possession so as to disseise the owner, but such possession must be continuous, exclusive, open, visible, and notorious for the statutory period, of all the land to which adverse title is claimed.

Gooden v. Doyle, 42 N.B.R. 435.

Wild land—Constructive possession under colour of title.

Borden v. Jackson, 45 N.S.R. 81.

J. Claim; hostility.

(§ I J—50)—Claim—Hostility—Fencing land—Residence on.

Where one who, before receiving a conveyance, enclosed with a fence not only the land bargained for but also lots to which he had no claim, and plowed and cropped them for more than ten years, although he did not erect buildings or reside on the land until five years after the enclosure, his possession of the two lots was open, obvious, exclusive and continuous so as to come within the Limitations Act, 10 Edw. VII. (Ont.) c. 34 [R.S.O. 1914, c. 75.]

Piper v. Stevenson, 12 D.L.R. 820, 28 O.L.R. 379.

Possessory title to land—Evidence—Building—Encroachment—Retention of land encroached upon—Improvement under mistake of title—Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, s. 37—Compensation—Damages for trespass—Costs.

Harrison v. Schultz, 7 O.W.N. 758.

K. Extent and kind of possession.

(§ I K—55)—Extent and kind of possession.

The "actual, constant, and visible occupation," necessary to possessory title to land is not shewn by the fact that the land has been fenced for thirty years and by a statement by the claimant of the land that for twenty years off and on he had stored lumber and other stuff there, even when supplemented by a further statement that some material remained

there continuously. [Campeau v. May, 2 O.W.N. 1420, specially referred to.]

Re Hewitt, 3 D.L.R. 156.

EXERCISE OF STATUTORY RIGHTS.

A user of a riparian right as authorized by statute does not give title by adverse possession.

The King v. Power, 34 D.L.R. 257, 16 Can. Ex. 104. [Reversed in 42 D.L.R. 387, 56 Can. S.C.R. 499.]

PUBLIC USER — MUNICIPAL CORPORATION — BOUNDARIES.

The user permitted to the public, by simple tolerance of the owner, of a platform adjacent to a municipal sidewalk, and constructed by an individual in connection with the convenient use of his lands, does not constitute possession which can avail for the purposes of prescription, nor can such user be invoked by a municipal corporation as giving rise to a possessory action. Where there has been promiscuous possession of a strip of land between adjacent proprietors there ought to be a reference for the establishment of boundaries before either one or the other can have recourse to either petitory or possessory actions.

Village of Ste. Anne de Beaupré v. Bilodeau, 25 Que. K.B. 119.

FISHERMAN'S OCCUPATION—RIGHT-OF-WAY.

[Piper v. Stevenson, 12 D.L.R. 820; Cowley v. Simpson, 19 D.L.R. 463, referred to.]

McLean v. Wilson, 31 D.L.R. 260, 36 O.L.R. 610.

DESCRIPTION — PLANS — EVIDENCE — TITLE BY POSSESSION — LIMITATIONS ACT — ACT OF OWNERSHIP — CULTIVATION AND CROPPING.

Fox v. Ross, 3 D.L.R. 878, 3 O.W.N. 1347, 22 O.W.R. 244.

ACQUISITIVE PRESCRIPTION—QUALITIES OF POSSESSION — DEFECT ARISING FROM EQUIVOCAL POSSESSION — ACTS DONE SINE ANIMO DOMINI.

A defendant, in an action denying a right-of-way, who sets up, as a ground of defence, that he has acquired, through prescription, the land which he passes over, and that he uses it as owner of it, must establish his acquisition by a thirty years unequivocal possession as owner. The fact that he alone, during the required period of time has passed over land which was used for no other purpose, and was separated from the plaintiff's land by a fence, the care of which fence was left to both plaintiff and defendant; the fact also that he felled a tree on the land and cut the grass, and kept both as his property, and that he paved the way, are acts which he may have done sine animo domini, and therefore are not sufficient to set aside the defect resulting from equivocal possession. Such a defect affects the intention of a party to possess exclusively for himself, and the existence of that defect is a pure question of fact to be decided by the courts.

Paquet v. Blondeau, 23 Que. K.B. 330.

ACTS OF OWNERSHIP—OVERHANGING EAVES — BAY WINDOW — GASPIPE — LIMITATIONS ACT.

McFarland v. Carter, 9 O.W.N. 356.

The possession which would give a right to the possessory action en réintégrande must be exclusive and when there is between two parties a dispute as to the title to land of which they have joint possession the remedy is an action au petitoire or en bornage.

Tremblay v. Parish of St. Alexis, 21 Que. K.B. 284.

RECOVERY OF POSSESSION OF FARM.

Fencing in land is not enough to give a trespass title as against the rightful owner.

Campeau v. May, 2 O.W.N. 1420.

DECLARATION THAT PLAINTIFF AND HIS PREDECESSOR IN TITLE HAD ACQUIRED TITLE BY POSSESSION—MORTGAGE—ASSIGNMENT—ACCOUNT.

Fletcher v. Roblin, 3 O.W.N. 155, 20 O.W.R. 148.

OWNERSHIP OF LAND — POSSESSION — EVIDENCE—FINDINGS OF MASTER—APPEAL.

Re Shields, Shields v. London and Western Trust Co., 13 O.W.N. 13.

POSSESSION OF LAND—OWNERSHIP—DEVISE.

Shea v. Dore, 11 O.W.N. 270.

REAL PROPERTY LIMITATION ACT—ACTION FOR POSSESSION—ACTS OF OWNERSHIP.

Cosbey v. Detlor, 2 O.W.N. 668, 18 O.W.R. 479.

TITLE TO LAND—ADVERSE POSSESSION.

Turnbull Real Estate Co. v. Segee, 10 E.L.R. 234.

EXTENT OF POSSESSION.

To an action negatoire of servitude the defendant may plead that he is owner, by a prescriptive title, of the lands subjected to the servitude, but the fact that he was in the habit of passing over it for thirty years, that he had cut the grass on the road through it, that he had kept up the road, had cut down a tree and used the lumber, and that he had contributed to the maintenance of a fence dividing the land (during all of which time the plaintiff paid the taxes and maintained the front road which bounded it) are not unequivocal acts of possession, under title of owner, which will produce acquisition by prescription.

Blondeau v. Paquet, 44 Que. S.C. 83.

(§ I K—56)—OF SURFACE.

The harvesting of natural fruit establishes the possession of land in him who does it and gives him a right of action en complainte against those who interfere with such possession.

Couillard v. Bolduc, 42 Que. S.C. 282.

Surface rights in land, being proprietary rights, cannot be lost by nonuser as in the case of a servitude; therefore a third

party may acquire it by prescription as his possession has all the necessary elements and they exist in respect to the possession of surface rights. The party in adverse possession can then obtain title by prescription against the owner of the subsoil without obtaining it against the owner of the surface and vice versa as the two titles are distinct and divisible.

Goldstein v. Allard, 14 Que. P.R. 36.

(§ I K—58)—Under deed or colour of title.

Where a grantee of wild land in British Columbia under a conveyance intended only as security has for more than 20 years performed the only act of possession of which it is capable, namely, paid all the taxes upon it, while the grantor although aware of this and under an obligation to make periodical payments of interest, has done and paid nothing, the grantee has had such possession as to give him the benefit of the Statute of Limitations, R.S.B.C. 1897, c. 123 [see now R.S.B.C. 1911, c. 145], and an action for redemption by the grantor is barred by that statute.

Kirby v. Cowderoy, 5 D.L.R. 675, [1912] A.C. 599, 2 W.W.R. 723.

Title by unregistered deed—Not to take effect as present conveyance—Acts of grantee not assertions of ownership—Inequitable to give effect to deed.

The evidence shewed that certain deeds of property were executed without consideration, and were not intended to take effect as present conveyances but were only to become operative as effective conveyances to the grantee upon the death of the grantor, if at all and such deeds were held by the grantee for many years without being registered.

Ritchie E.J., and Mellish, J., held that the acts of the grantee in reference to the property could not be regarded as assertions of ownership over it, and it being clearly inequitable to give effect to such deeds under the circumstances, the title by adverse possession should be upheld and the appeal dismissed.

Harris, C.J., and Drysdale, J., following East v. Clark, 23 D.L.R. 74, held that there being possession by the grantee in common with the adverse claimant the possession followed the title. The payment of taxes could be regarded as payment of rent and amounted unequivocally to an acknowledgment of the grantee's title.

Matheson v. Murray, 46 D.L.R. 264.

Adverse occupancy.

Possession follows the title unless there be an actual adverse occupancy. [Pride v. Rodger, 27 O.R. 320; Doe d. Cuthbertson v. McGillis, 2 U.C.C.P. 124, referred to.]

Berard v. Bruneau, 22 D.L.R. 83, 25 Man. L.R. 400.

Title acquired by — Mortgage — Pleadings.

Noble v. Noble, 3 O.W.N. 146, 20 O.W.R. 168.

(§ I K—59)—Extent and kind of possession—Entry without title.

Where a purchaser of a quarter section of land went into possession of the adjoining quarter section, which was enclosed with the section purchased, and he continued in uninterrupted and quiet occupation thereof for more than twelve years, using the land as pasturage, repairing fences, establishing a roadway through it, fencing the same, and planting shade trees along part of it, and breaking up and cultivating a large tract of the land, the requirements of the Statute of Limitations in force in the Province of Alberta are fully satisfied so as to give him a title by adverse possession, and such occupant may, in an action against the registered owner, be declared to be the owner in fee simple.

Wallace v. Potter, 10 D.L.R. 594, 6 A.L.R. 83.

Possession—Payment of taxes—Fencing—Cutting timber.

Open, visible, exclusive and continuous possession is necessary to acquire title to land under the Statute of Limitations (R.S.O. 1914, c. 75, ss. 5 & 6), payment of taxes, fencing, cutting and removing timber held in the circumstances not to be sufficient to shew such possession, but to be mere acts of trespass.

McLeod v. McRae, 43 D.L.R. 350, 43 O.L.R. 34.

II. Effect; time required.

(§ II—60)—Nullum Tempus Act—Interruption — Judgment — Acknowledgment.

A default judgment obtained in an ejectment action by the Crown, which was never enforced, or an acknowledgment of title in writing, will not interrupt the adverse possession of Crown lands or prevent it from ripening into a title under the Nullum Tempus Act. A statute (Ontario Limitations Act, 1902) making an acknowledgment an interruption of possession of Crown lands is not retroactive.

Hamilton v. The King, 35 D.L.R. 226, 54 Can. S.C.R. 331, reversing 16 Can. Ex. 67.

Effect—Time required — Commencement of running of limitations.

On sale of land by a mortgage under power of sale, his interest being a life estate only, the Statute of Limitations did not commence to run in favour of those claiming under such sale, until the death of the mortgagee.

Millard v. Gregoire, 11 D.L.R. 539, 47 N.S.R. 78.

Possession — Prescription — Interruptive acknowledgment—Evidence.

Cap Rouge Pier, Wharf and Dock Co. v. Duchesnay, 44 Can. S.C.R. 130.

MINERAL LANDS—RESERVATION IN DEED—ESTOPPEL — TENANCY — PAYMENT OF TAXES.

Dodge v. Smith, 40 O.L.R. 362, 2 O.W.R. 561, reversing 3 O.L.R. 305.

POSSESSION OF LAND—TENANCY—PAYMENT OF RENT BY PAYMENT OF TAXES AND WORK DONE UPON LAND—LENGTH OF POSSESSION — COMPENSATION FOR IMPROVEMENTS MADE UNDER MISTAKE OF TITLE.

Mathieu v. Lalonde, 13 O.W.N. 186, reversing 12 O.W.N. 373.

PRESCRIPTION—REGISTERED TITLE.

A party in possession of property may gain title by possession in ten years against a registered title without his own title being registered.

Hoy v. Malette, 52 Que. S.C. 258.

(§ II—61)—TIME REQUIRED—INTERRUPTION OF STATUTE OF LIMITATIONS—ABSENCE FROM LAND DURING WINTER.

The fact that, for a portion of the time, one claiming land by adverse possession, did not reside thereon during the winter months does not amount to an interruption of the running of the Limitations Act, 10 Edw. VII. (Ont.) c. 34, R.S.O. 1914, c. 75, where, for more than ten years, he plowed and cropped the land and kept it enclosed with fences since his possession was open, obvious, exclusive and continuous. The fact that one claiming land by adverse possession did not reside on it continuously does not shew an intention to abandon it, where, during all of the time, he kept the land completely enclosed with fences, and plowed and cropped it from year to year. [Worssam v. Vanderbrande (1868), 17 W.R. 53, referred to.]

Piper v. Stevenson, 12 D.L.R. 820, 28 O.L.R. 379.

EFFECT—CONTINUITY AND INTERRUPTIONS—TRESPASS.

A prescriptive title to land can be acquired as against the owner of the paper title, only by an actual, continuous and visible occupation or possession for the statutory period; and where the person having the paper title took actual possession of the disputed strip of land before the statutory period had elapsed without such a shew of force as would constitute "forcible entry," the former occupant is ousted and cannot maintain an action of trespass.

Greaves v. Carruthers, 13 D.L.R. 199, 18 B.C.R. 264.

TENANT AT WILL—PRIOR MORTGAGEE—STATUTORY EFFECT.

A person admitted into possession as tenant at will and remaining in possession without acknowledgment for ten years after the lapse of one year from being placed in possession will not acquire a title by adverse possession against the mortgagee of the lands claiming under a mortgage made prior to the tenancy at will unless a ten year period has elapsed under the statute, 10 Edw. VII. (Ont.) c. 34, s. 23, from the last payment of any part of the principal money or interest secured by the mortgage. Where a mortgage registered under the Ontario Registry Act, 10 Edw. VII. c. 60, is paid off by the mortgagor, and a discharge thereof is registered in the statutory form, the effect is to discharge the mortgage as against a person claiming title by adverse possession against the mortgagor since the making of the mortgage, and the effect is not to convey or reconvey to the mortgagor his original title in fee with the right to possession as from the date of the repayment. [Noble v. Noble, 1 D.L.R. 516, 25 O.L.R. 379, reversed on appeal in part; Brown v. McLean, 18 O.R. 533, applied; Henderson v. Henderson, 23 A.R. 577; Thornton v. France, [1897] 2 Q.B. 143; Doe d. Baddeley v. Massey, 17 Q.B. 373; Heath v. Pugh, 6 Q.B.D. 345, 7 App. Cas. 235; Ludbrook v. Ludbrook, [1901] 2 K.B 96; Cameron v. Walker, 19 O.R. 212, referred to.]

Noble v. Noble (No. 2), 9 D.L.R. 735, 27 O.L.R. 342, affirming in part, 1 D.L.R. 516.

CONTINUITY AND INTERRUPTION.

If a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. [Trustees, Executors and Agency Co. v. Short, 13 App. Cas. 793, followed.]

Robinson v. Osborne, 8 D.L.R. 1014, 27 O.L.R. 248.

LOST DOCUMENT — UNSATISFACTORY EVIDENCE OF CONTENTS—ADVERSE POSSESSION OF SMALL ENCLOSED PORTION OF LAND—LIMITATIONS ACT—PAYMENT OF TAXES—UNENCLOSED LAND—RECOVERY OF POSSESSION BY REGISTERED OWNER.

Lefevre v. Le Duc, 11 O.W.N. 152.

(§ II—62)—TACKING.

In making up the period of sixty years' adverse possession, the possessions of two or more parties who have been in possession continuously and without any break may be tacked. [See Robinson v. Osborne, 8 D.L.R. 1014, and Annotation to same, 8 D.L.R. 1021, on the subject of Successive Trespassers.]

McGibbon v. McGibbon, 9 D.L.R. 308, 46 N.S.R. 552.

TACKING.

A buyer cannot add the possession of his predecessors in title to arrive at a thirty years' prescription unless he be their ayant-cause by universal or particular title. [Butler v. Legare, 8 Que. L.R. 307, and Stoddart v. Lefebvre, 11 L.C.R. 481, followed.] Where certain cadastral lots are acquired by deed of sale the owner cannot acquire territory beyond such lots by alleging that his deed gives him a larger area, by a ten years' acquisitive prescription, as this

would constitute acquiring beyond his title. In such case he could only acquire the ownership of territory beyond such lots by a possession as owner for thirty years.

Hamel v. Ross, 3 D.L.R. 860.

Exclusive possession—Prescriptive title—Oral evidence.

Oral evidence, given without objection, to establish that a possession of land is as tenant at will and not as owner, is effective. One who invokes title to an immovable by possession jointly with a former owner, must prove that he is the legal representative of the latter.

Lemoine v. Dorval, 44 Que. S.C. 382.

(§ II—63)—Between claimants by right of possession.

Where two parties claim to be entitled to land as possessing it, and the possession of neither has been uninterrupted, unequivocal and exclusive, the proper remedy consists in a petitory action, or an action to determine boundaries (en bornage) and not a possessory action (en réintégrande).

Tremblay v. Parish of St. Alexis, 3 D. L.R. 552.

(§ II—64)—Grantee from Crown—Ejectment.

A person claiming under the title of persons who have been in the possession of land between twenty and sixty years cannot be put out of possession by the grantee of a grant from the Crown. [Emmerson v. Maddison, [1906] A.C. 569, distinguished.] The Statute of Limitations will run against the grantee of the Crown, not from the date of the grant, but from the commencement of adverse occupation as against the Crown.

Walsh v. Smith, 43 D.L.R. 648, 52 N.S. R. 375.

Time required against Crown.

Adverse possession extending over a period of sixty years is sufficient to give the holder title as against the Crown or any one claiming under the Crown.

McGibbon v. McGibbon, 9 D.L.R. 308, 46 N.S.R. 552.

Declaration on land, proof of—Under what circumstances admissible—Proof of what facts—Possession against the Crown—What must be proved — Conveyance by Crown — How made.

A declaration of one in adverse possession, made upon the land by its then occupant, is evidence in support of a claim of title by adverse possession; provided, such declaration is apparently made in good faith and goes to shew, (a) the character, or (b) the extent, of the declarant's occupancy; but:—Semble, such a declaration is not admissible to prove simply the date when the declarant first acquired possession, or for how long a time he held it. [Rundle v. McNeil, 38 N.B.R. 406, considered.] The period of sixty years' possession is essential to establish a claimant's right against the Crown, and the evidence must shew exclusive, continuous, open, visible adverse possession for the sixty-year period, and when the land claimed is neither bounded by a fence or other visible boundary, nor its limits defined by deed, the doctrine of constructive possession does not apply; and the claimant can establish title by possession to so much only of the land as he had held in actual adverse possession for the requisite statutory period. There is no mode by which the Crown, apart from statutory authority, can convey land, otherwise than by its grant under the Great Seal, and it would not therefore be barred by acquiescence or adoption or recognition of a line to which one claims to hold adversely.

Mersereau v. Swim, 42 N.B.R. 497.

III. Who may hold adversely.

(§ III—65)—Realty—Who may hold adversely—Prima facie evidence of seisin in fee.

The fact of possession by the plaintiff and his predecessors in title is prima facie evidence of seisin in fee, and the defendant can only oust the plaintiff by shewing a better title. [Perry v. Chissold, [1897] A.C. 73, and Asher v. Whitlock, L.R. 1 Q.B. 1, referred to.]

Jones v. Sullivan, 18 D.L.R. 404.

AFFIDAVITS.

On Motions, see Motions and Orders.

(§ I—1)—What constitutes—Declaration with jurat added.

A document in the form of a statutory declaration under the Canada Evidence Act except that the justice had certified that it was "sworn" before him, is not a valid affidavit; the word "oath" or some equivalent in the body of the document is essential to make it an affidavit. [Phillips v. Prentice, 2 Hare 542; Re Newton, 2 DeG. F. & J. 3; Allen v. Taylor, L.R. 10 Eq. 52, 39 L.J. Ch. 627, referred to.]

R. v. Marshall, 24 Can. Cr. Cas. 180.

(§ I—5)—Sufficiency of.

Where an affidavit for a garnishee summons purported to verify a statement of claim said to be marked as an exhibit to the affidavit, a statement of claim not in fact marked as an exhibit cannot be read as part of the affidavit.

Clokey v. Huffman, 1 D.L.R. 679, 5 S.L.R. 127.

Sufficiency of.

The description of the Commissioner subscribing the jurat to an affidavit being incomplete, or even incorrect as to the territory over which his commission extends, does not vitiate the document, his commissionership being actually in esse and the court having power to satisfy itself on this point. [Ex parte Johnson, Re Chapman, 26 Ch. D. 338, 50 L.T. 214, followed.]

Buchman v. McLeod, 17 D.L.R. 489, 48 N.S.R. 121.

OF DEBT—REQUISITES—COMMISSIONERS FOR TAKING.

The authority for taking an affidavit of debt out of New Brunswick for use in N.B. is found in c. 62, C.S.N.B., 1903, s. 3, which provides that when any person shall take any oath under said section his act shall be certified or authenticated in the same manner and with the same formality in all respects as though such act were the taking by him of the proof or acknowledgment of a conveyance. A jurat, as follows: "Sworn to at the City of Toronto in the County of York in the Province of Ontario this day before me. , a Notary Public in and for the Province of Ontario," does not comply with the requirements of this statute.

Murphy v. McMillan (N.B.), 43 D.L.R. 25, 46 N.B.R. 88.

AFFILIATION.

See also Bastardy, Illegitimate Child.

ILLEGITIMATE CHILDREN'S ACT.

Where a County Judge hearing an appeal from the dismissal of an information under the Illegitimate Children's Act, R.S.M. 1913, c. 92, has compelled the accused respondent to give evidence on behalf of the prosecution on the rehearing of the case on appeal pursuant to Cr. Code, s. 752, made applicable by the provincial law, that fact does not furnish any ground for prohibition against his decision in the event of such ruling not being justifiable, as to which quere.

Re Sigurdson (No. 1), 28 D.L.R. 375, 25 Can. Cr. Cas. 291, 25 Man. L.R. 832.

STATUTORY PROCEEDINGS—COMMITMENT.

Affiliation order made under the Illegitimate Children's Act, R.S.M. 1913, c. 92, may direct payment of a lump sum for past maintenance, a monthly allowance for future maintenance for a fixed term, and the giving of a bond for the fulfilment of the order, or in default the payment of a fixed sum in lieu of the maintenance allowance; and imprisonment may be imposed for default in complying with such order. [Davis v. Feinstein, 24 D.L.R. 798, 24 Can. Cr. Cas. 160, 25 Man. L.R. 507, and R. v. Book, 25 Can. Cr. Cas. 89, 25 Man. L.R. 480, referred to.]

Re Sigurdson (No. 2), 28 D.L.R. 376, 25 Can. Cr. Cas. 313, 26 Man. L.R. 209.

AGENCY.

See Principal and Agent.

AGREEMENTS.

See Contracts; Sale; Vendor and Purchaser.

AGRICULTURAL SOCIETIES.

(§ I—1)—AGRICULTURAL SOCIETIES AS CORPORATIONS.

A number of persons purported to organize themselves as a corporate body, by the name of the "Brooklyn Agricultural Society," under the provisions of c. 56 of the Revised Statutes of Nova Scotia. No special act of incorporation was sought or obtained:—Held, that the Legislature did not intend to confer corporate powers upon agricultural societies by the provisions of the enactment in question, and, furthermore, that c. 127 of such revised statutes only defines the powers and privileges of incorporated companies and does not provide for their creation.

Brooklyn Agricultural Society v. Reagh, 10 East. L.R. 295.

ALIENS.

I. IN GENERAL; IMMIGRATION; DEPORTATION.
II. NATURALIZATION.
III. DISABILITIES AND CAPACITIES; PROPERTY RIGHTS.

Foreign corporations, see Companies.

Foreign executors, see Executors and Administrators.

Annotations.

Deportation; exclusion from Canada of British subjects of Oriental origin: 15 D.L.R. 191.

Their status during war: 23 D.L.R. 375; 22 D.L.R. 865.

I. In general; immigration; deportation.

(§ I—1)—IMMIGRATION—REGULATION OF—DOMINION PARLIAMENT.

The British North America Act vested in the Parliament of Canada sovereign power over immigration into Canada, and that power includes the right to exclude British subjects, not even excepting those born in the United Kingdom.

In re Immigration Act & Munshi Singh, 6 W.W.R. 1347, 29 W.L.R. 45.

(§ I—3)—DEPORTATION—FUGITIVE FROM JUSTICE—DOMICILE.

A fugitive criminal unlawfully entering Canada cannot acquire a domicile therein, and is subject to deportation by the immigration authorities, even after 3 years' residence.

Degridakis v. Reginbald, 36 D.L.R. 367, 23 Rev. de Jur. 375. [See 19 Que. P.R. 300.]

ADMISSION TO CANADA UNDER DOMINION ACT—DEPORTATION.

A person having gained admission to Canada under the provisions of the Chinese Immigration Act (R.S.C. 1906, c. 95), can be deported, if at all, only under s. 7b of the same Act, as enacted by 7 & 8 Geo. V. c. 7. [See also The King v. Alamazoff, 47 D.L.R. 533.]

Re Jeu Jang How, 47 D.L.R. 538, 31 Can. Cr. Cas. 341, [1919] 3 W.W.R. 271.

DETAINED IN CUSTODY FOR DEPORTATION—IMMIGRATION ACT — JURISDICTION OF COURT TO ADMIT TO BAIL.

A court not seized of the inquiry has no

inherent jurisdiction to admit to bail an alien detained in custody under the Immigration Act (9-10 Edw. VII. c. 27 (Dom.)) for the purpose of being deported. [See also Re Jeu Jang How, 47 D.L.R. 538.]

The King v. Alamazoff, 47 D.L.R. 533, 31 Can. Cr. Cas. 335, [1919] 3 W.W.R. 281.

DEPORTATION—LACK OF FUNDS—SUFFICIENCY OF ORDER.

A deportation order made by an immigration officer which states the reason of deportation as "lack of funds, required to have $25; but only had $21.50," is insufficient in form to shew jurisdiction on its face, and the immigrant will be released on habeas corpus.

Re Gardner, 12 D.L.R. 610, 13 E.L.R. 147.

IMMIGRATION ACT (CAN.)—RIGHT TO TEST CONSTITUTIONALITY OF HABEAS CORPUS.

The provisions of the Immigration Act (Can.) depriving an alien ordered to be deported of any right to apply to the courts to review, quash, reverse, restrain, or otherwise interfere with an order of deportation made "under the authority and in accordance with the provisions of the Act" may prevent a writ of prohibition to the immigration officers, but it does not remove the right of the person detained to obtain a writ of habeas corpus to test the constitutionality of the statute; on due service of such writ the immigration officers would be bound, under penalty for contempt, to make return thereto with reasons assigned for the detention. [Re Gaynor and Greene (No. 8), 9 Can. Cr. Cas. 496, referred to.]

Re Harry K. Thaw, Thaw v. Robertson (No. 3), 13 D.L.R. 715, 22 Can. Cr. Cas. 8, 15 Que. P.R. 133.

IMMIGRATION — FALSE NATURALIZATION PAPERS—STATUTES OF CAN. 9-10 EDW. VII. c. 27, s. 33, SUBS. 8.

One who, for a money consideration, furnished false naturalization papers to be sent by another to a person living in the United States, in order to permit the latter to enter Canada by misrepresentation, in violation of the Immigration Act, 9 and 10 Edw. VII. c. 27, 1910, as amended by 1 and 2 Geo. V. c. 12, 1911, is guilty of a violation of s. 33 (8) thereof, which declares any person guilty of an offence who shall knowingly and wilfully land or assist to land or attempt to land in Canada any immigrant or person whose entry is forbidden by such Act. S. 33 (8) of the Immigration Act, 9 and 10 Edw. VII. c. 27 (D), which declares it an offence for any person or transportation company to knowingly and wilfully land or to assist to land or to attempt to land in Canada any prohibited immigrant or person whose entry is forbidden by the Act, is not restricted to the prohibited classes mentioned in s. 3 of the Act, but applies also to persons who are assisted to enter by misrepresentation.

R. v. Palangio, 4 D.L.R. 611, 19 Can. Cr. Cas. 372, 3 O.W.N. 1440, 22 O.W.R. 540.

VOLUNTARY ENTRY INTO CANADA AT HIS OWN EXPENSE — NOTICE POSTED IN NEW YORK — "WAITERS WANTED" — ALIEN LABOUR ACT, R.S.C. 1906, c. 97, ss. 2 & 12.

It is not a violation of ss. 2 and 12 of the Alien Labour Act, R.S.C. 1906, c. 97, for the proprietor of a hotel to employ aliens who have come into Canada at their own expense, in response to a notice written on a blackboard in an employment office in New York, to the effect that six waiters are wanted at once at such hotel in Montreal, with the display of which the hotel proprietor was in no way connected, since the notice did not amount to a promise of employment. The importation of aliens for employment as waiters in hotels conducted on the European plan, is expressly permitted by s. 9 of the Alien Labour Act, c. 97, R.S.C. 1906.

Windsor Hotel Co. v. Hinton (No. 1), 5 D.L.R. 224.

CONSENT OF JUDGE — REQUISITES — RECOVERY OF PENALTY—R.S.C. 1906, c. 97, s. 4.

The written consent of the judge of the court in which it is intended to bring an action to recover a penalty under the Act respecting the Importation and Employment of Aliens, as required by s. 4 of c. 97, R.S.C. 1906, must shew the name of the person in respect of whom the offence is alleged to have been committed, give the time and place thereof, and shew also that such person was an alien or foreigner, with sufficient certainty to identify the particular offence intended to be charged, although not in the same technical form required in an information. [R. v. Breckenridge, 10 O.L.R. 459, followed; R. v. Johnson & Carey Co., 2 O.W.N. 1011, 18 O.W.R. 985, specially referred to.]

Ririazes v. Langtry, 3 D.L.R. 824.

CHINESE IMMIGRATION — ENTRY TAX — EXEMPTION OF CHINESE MERCHANTS.

Re Lee Him (No. 2), 17 Can. Cr. Cas. 19, 15 B.C.R. 390, affirming 16 Can. Cr. Cas. 383, 15 B.C.R. 163.

CONVICTED PERSON VISITING TEMPORARILY OUT OF CANADA—WHEN CONVICTION NO GROUND FOR EXCLUSION.

Re Murphy, 17 Can. Cr. Cas. 103, 15 B.C.R. 401.

IMMIGRATION—DEPORTATION.

Applicant, a Hindu, came to British Columbia in January, 1910, not by continuous voyage from his own country, and was admitted as a tourist, in which capacity he traveled in Canada, reaching British Columbia again in October following. The law governing immigration had been changed in the meantime, and he was held under the new law for deportation, but without any inquiry being held as to his status as provided by the amended law:—Held, that the act was not retrospective in this regard and did not apply; and as the old act contained no provision for the deportation of such a

person he could not be deported thereunder.

In re Rahim (No. 1), 16 B.C.R. 469.

The Immigration Act, 1910 (Dominion), does not apply to an alien tourist who entered Canada before the passage of the Act. Therefore an order-in-council passed since the coming into force of the Act could not be held to deal with such a person.

In re Rahim (No. 2), 16 B.C.R. 471.

II. Naturalization.

(§ II—5)—Naturalization — State of war—Enemy subjects—Civil rights —R.S.C. c. 77.

In this country, the commissioner who receives the applications for naturalization, takes oaths of allegiance and makes inquiries, the judge who directs the reading of the certificates given by the commissioner and their filing in the proper office, and the court which puts its seal on the certificate of naturalization, all exercise administrative and not judicial functions. According to the principles of public international law recognized in England in time of war, the subjects are enemies as are the states, "jus standi in judicio," but if the subjects of a belligerent state are allowed to remain in this country, they are relieved of their disability. The proclamation of the Governor-General, dated the 15th August, 1914, which confirmed to Germans and Austro-Hungarians residing in Canada the enjoyment of all rights which the law had accorded them in the past, upon condition of their good conduct, is in conformity with art. 23 b of the Hague Conference of 1907, and consequently Germans and Austro-Hungarians who live in this country during the present European war preserve their civil rights and particularly that of applying for naturalization.

In re Herzfeld, 46 Que. S.C. 281.

(§ II—7)—Alien enemies.

An alien enemy is not within the provisions of the Naturalization Act, R.S.C. 1906, c. 77; and an application for naturalization under that Act, if it appears that the applicants are alien enemies, may be refused upon the judge's own initiative, though no opposition has been filed and no objection offered. [The King v. Lynch, [1903] 1 K.B. 444, and Porter v. Freudenberg, [1915] 1 K.B. 857, followed; In re Herzfeld, 46 Que. S.C. 281, disapproved.]

Re Cimonian, 23 D.L.R. 363, 34 O.L.R. 129.

Requirements of naturalization act—Particulars—Copy—Posting.

Re Cabulak, 19 W.L.R. 171 (Alta).

(§ II—13)—Naturalization — Effect — Discrimination as to civil rights.

Notwithstanding his naturalization in Canada, a man born in China and of Chinese parents is a "Chinaman" within the meaning of the statute 2 Geo. V. (Sask.), c. 17, prohibiting employment of white women in restaurants and other places of business kept by "a Chinaman."

Quong Wing v. The King, 18 D.L.R. 121, 49 Can. S.C.R. 440, 23 Can. Cr. Cas. 113.

(§ II—14)—Status of persons naturalized.

The Naturalization Act, R.S.C. 1906, c. 77, s. 24, bestows upon persons naturalized under it the status of British subjects, and not merely the rights incidental to British subjects. This status continues to exist not only while such person is physically within Canada, but so long as he does not reside in his original country.

Re Solvang, 43 D.L.R. 549, 14 A.L.R. 84.

III. Disabilities and capacities; property rights.

(§ III—15)—Alien enemy residents — Rights and privileges.

Aliens residing in Canada, but who are subjects of countries at war with the British Empire, are granted, by the Royal Proclamations (September 12 and 29, 1914) the protection of our laws, and, unless they are guilty of hostile acts, are to be left in the enjoyment of their rights and privileges, and the person alleging an act of hostility must prove it. An alien, resident of Quebec, although born in a country at war with the British Empire, is not necessarily an enemy.

Viola v. Mackenzie, Mann & Co., 24 D.L.R. 208, 24 Que. K.B. 31.

Alien Labour Act (Can.)—Offence of soliciting to enter Canada under contract.

It is an offence under the Alien Labour Act, R.S.C. 1906, c. 97, for a subsidiary company incorporated under Ontario law, but operating under the control of a foreign company with headquarters in the U. S. A., to solicit the bringing into Canada of an American citizen to take charge of its fruit commission business as manager.

R. v. Gamble-Robinson Fruit Co., 15 D.L.R. 144, 22 Can. Cr. Cas. 152, 5 O.W.N. 598.

When deemed enemies—Hostile acts.

The subjects of enemy nations residing in Canada are not necessarily "alien enemies." Residence in the enemy's country is the deciding factor. They cannot be deprived of civil rights and privileges until some definite act of hostility by them is proven. [Canadian Stewart v. Perih, 25 Que. K.B. 158, distinguished; Viola v. Mackenzie Mann & Co., 24 D.L.R. 208, followed.]

Ragusz v. Harbour Commissioners of Montreal, 30 D.L.R. 662, 18 Que. P.R. 98.

Trading with enemy—Recovery by indorsee of drafts not payable to enemy.

Radley v. Garber, 30 D.L.R. 528, 50 Que. S.C. 264.

Public office.

An alien is disqualified from being a

special constable, under art. 3287 R.S.Q., that being a ministerial office.

Haeck v. Clermont & Chabot (Que.), 39 D.L.R. 495.

ALIEN ENEMY—RIGHT TO MONEY IN HANDS OF TRUSTEE—PROPOSED WITHDRAWAL FROM PROVINCE—NATURALIZATION IN UNITED STATES SINCE ACTION BEGUN—REVIEW OF FORMER ORDER—RULE 523.

Myers v. Teller, 8 O.W.N. 414.

TRADING WITH THE ENEMY—PROPERTIES VESTED IN RECEIVER-GENERAL FOR CANADA—ORDER OF JUDGE IN CHAMBERS—COSTS OF DEBTORS—DISCRETION.

Re Consolidated Orders (1916), Respecting Trading with the Enemy, 16 O.W.N. 251. [See also 19 Can. Ex. 382.]

INTERNED ENEMY—INVENTORY OF COMMUNITY.

The taking of an inventory of the property of the community heretofore existing between the parties, will not be suspended on the ground that defendant is an interned enemy. [See Harasymczuk v. Montreal Light, Heat & Power Co., 25 Que. K.B. 252.]

Swail v. Trieber, 17 Que. P.R. 428.

PAROLING INTERNED ENEMY—CIVIL RIGHTS—ASSIGNMENT.

A foreigner of an enemy nationality who, after having been confined as a prisoner of war, has been liberated on parole, recovers the exercise of all his civil rights and may validly transfer to a third person his title to a debt.

Fabry v. Finlay, 50 Que. S.C. 14.

(§ III—16)—NATION AT WAR WITH GREAT BRITAIN—RIGHT OF SUBJECT TO BRING ACTION FOR DAMAGES.

Oskey v. Kingston, 20 D.L.R. 959; 31 O.L.R. 190.

ALIEN LABOUR ACT—WRITTEN CONSENT OF JUDGE TO PROSECUTION.

R. v. Johnson & Carey Co., 2 O.W.N. 1011, 18 O.W.R. 985, 20 Can. Cr. Cas. 319.

FAMILIES COMPENSATION ACT—ACTION FOR BENEFIT OF ALIEN ENEMY NOT MAINTAINABLE.

An action brought under the Families Compensation Act for the benefit of the mother of the deceased, she being an alien enemy, cannot be maintained.

Cremidas v. B.C. Electric R. Co., [1919] 2 W.W.R. 549.

(§ III—19)—ACTIONS BY—STAY OR DISMISSAL.

An action commenced under the Fatal Accidents Act by an alien enemy, who pays money into court as security for costs, will not be dismissed but merely stayed until after the restoration of peace. [Dumenko v. Swift, 32 O.L.R. 87, distinguished; Porter v. Freudenberg, [1915] 1 K.B. 857, followed.]

Luczycki v. Spanish River Pulp & Paper Mills Co., 25 D.L.R. 198, 34 O.L.R. 549, reversing 8 O.W.N. 616.

ACTION BY ADMINISTRATOR—BENEFIT OF ALIEN ENEMIES.

An action under the Fatal Accidents Act, R.S.O. 1914, c. 151, brought by the administrator of the estate of a deceased person, cannot be maintained if brought for the benefit of alien enemies of the King. [Continental Tyre and Rubber Co. v. Daimler Co., [1915] 1 K.B. 893, distinguished; Dumenko v. Swift Canadian Co., 32 O.L.R. 87, followed.]

Dangler v. Hollinger Gold Mines, 23 D.L.R. 384, 34 O.L.R. 78

ALIEN ENEMY—SUITS BY OR AGAINST.

An alien enemy may be sued although under a disability to sue during a state of war, and if the action against him is dismissed as unfounded, the court may award him costs.

Rydstrom v. Krom, 21 D.L.R. 118, 21 B.C.R. 254.

ALIEN ENEMIES—ACTIONS BY—RESIDENCE IN NEUTRAL COUNTRY.

Newman v. Bradshaw, 28 D.L.R. 769, 22 B.C.R. 420.

SUSPICION THAT PROCEEDS OF ACTION INTENDED FOR ALIEN ENEMY.

Mere suspicion that the amount sued for may, if recovered, be paid to an alien enemy does not justify an order staying all proceedings until the termination of the war.

White v. T. Eaton Co., 30 D.L.R. 459, 36 O.L.R. 447.

ENEMY RESIDENTS—CIVIL RIGHTS—ACTIONS.

An alien subject of a country at war with Great Britain resident in Canada, peacefully carrying on his ordinary vocation, is not under disabilities in the civil courts, but may sue in his own name, or may assign his claim, and the assignee may recover judgment.

Fabry v. Finlay, 32 D.L.R. 673, 50 Que. S.C. 14.

IN WAR TIME—SUITS BY OR AGAINST—STATUS OF ALIEN ENEMY.

A citizen of a nation at war with this country who institutes a civil action will have his action stayed unless and until in the first place he establishes as a condition precedent to the right to sue that, although technically an alien enemy, he is "in protection" in such sense that he is not a man professing himself hostile to this country nor in a state of war against it.

Bassi v. Sullivan, 18 D.L.R. 452, 32 O.L.R. 14.

ALIEN ENEMIES—DISABILITIES AND CAPACITIES—SUITS BY OR AGAINST—RESIDING HERE BY LICENSE.

The common law rule strictly limiting an alien enemy in his civil rights is now modified in his favour when he resides in this country by license or under protection of the Crown. [Order-in-Council of August 15, 1914, considered.]

Topay v. Crow's Nest Pass Coal Co., 18 D.L.R. 784, 20 B. C. R. 235.

ALIEN ENEMIES—ARREST BY MILITARY AUTHORITIES.

In performing the duty of arresting and detaining (inter alia) persons of a nationality at war with Great Britain who attempt to leave Canada and in regard to whom there is reasonable ground to believe that their attempted departure is with a view to assist the enemy (Proclamation of August 15, 1914) a wide discretion is left to the military commanding officers, which will not ordinarily be reviewed or interfered with by the courts under habeas corpus process.

Re Chamryk, 19 D.L.R. 236, 25 Man. L.R. 50.

ALIEN ENEMY IN NEUTRAL COUNTRY—SPECIFIC PERFORMANCE.

In reference to civil rights an "enemy" is a person of any nationality residing and carrying on business in an enemy country; an Austro-Hungarian residing in a neutral country is entitled to specific performance of an agreement for sale of land, but the court will impound the purchase money to prevent it being used to assist the enemy.

Lampel v. Berger, 38 D.L.R. 47, 40 O.L.R. 165.

ALIEN ENEMY—RIGHT TO MAINTAIN ACTION.

An alien resident in Ontario is, although his country is at war with ours, so long as he conducts himself peaceably, and is within the proclamation of the 15th August, 1914, entitled to enjoy the protection of the law; and this includes the right to bring and maintain an action in any court in Ontario. [Wells v. Williams, 1 Salk. 46; Schaffenius v. Goldberg, [1916] 1 K.B. 284, followed.]

Kristo v. Hollinger Consolidated Gold Mines, 41 O.L.R. 51.

ALIEN ENEMY RESIDING IN PROVINCE—SUITS BY.

An alien residing in the Province of Quebec is not necessarily an enemy because he was born in a state which is at war with the British Empire, and does not lose his right of recourse in the courts. A fortiori, the suspension of an action of an Armenian Christian cannot be demanded, as the latter were specially exempted by Order-in-Council of November 20, 1914, from registering themselves as enemy aliens.

Sap v. Picard, 20 Que. P.R. 178.

RIGHT OF ALIEN ENEMY TO SUE—CAVEAT—FORFEITURE OF LAND FOR TAXES—STAY OF PROCEEDINGS.

Reventlow v. Rur. Mun. of Streamstown (Alta.), 37 D.L.R. 394, [1917] 3 W.W.R. 546.

IN WAR TIME—SUITS BY OR AGAINST—STATUS OF ALIEN ENEMY.

A person of German or Austro-Hungarian nationality, domiciled in Canada, as to whom there is no reasonable ground for believing that he is engaged in hostile acts or is contravening the law, may by virtue of the Orders-in-Council (Can.) of August 7 and 15, 1914, maintain an action in negligence against his employer for personal injuries sustained in following his avocation where such action would lie were his country not at war with Great Britain; and, semble, the onus is not upon the alien to prove, on the defendant's motion to stay proceedings in an action brought before war was declared, that he had not contravened the restrictions specified in the Royal Proclamation of August 15, 1914 (Can.). [Bassi v. Sullivan, 18 D.L.R. 452, 50 C.L.J. 539, 7 O.W.N. 38, criticized; Topay v. Crow's Nest Pass. Coal Co., 18 D.L.R. 784, followed.]

Pescovitch v. Western Canada Flour Mills Co., 18 D.L.R. 786, 24 Man. L.R. 783.

PRACTICE—ALIEN ENEMY—APPLICATION TO STAY PROCEEDINGS.

Jarosz v. G.T.P.R. Co., 7 W.W.R. 816.

ACTION BY INTERNED ENEMY.

A stranger, a subject of an enemy country interned during wartime in Canada on account of his having no employment and that he would become a burden on the public, retains the right to institute an action for damages which he has sustained by reason of the death of his son.

Harasymczuk v. Montreal Light, Heat & Power Co., 25 Que. K.B. 252.

ALIEN ENEMY—INTERNMENT—STAY OF PROCEEDINGS.

An alien enemy plaintiff, in an action which has been suspended by judgment on the ground that he was interned as a suspected person, has a right if he obtains his freedom to demand the rescission of the order staying the proceedings.

Gusetu v. Laing, 18 Que. P.R. 371.

ALIEN ENEMY—SUSPENSION OF APPEAL.

An alien enemy who has been the plaintiff in the Superior Court and who is the respondent in the Court of Appeal, cannot force the appellant to proceed with his appeal, and a motion to suspend proceedings on the appeal from such time as the war may continue between the two countries will be granted.

Canadian Stewart Co. v. Perih, 25 Que. K.B. 158.

PEREMPTION—ALIEN ENEMY.

The suspension of actions, brought by an alien enemy in time of war being of public order, a motion for peremption against the action of such alien will be dismissed with costs.

Korziwiski v. Harris Construction Co., 18 Que. P.R. 97.

ACTIONS UNDER WORKMEN'S COMPENSATION ACT—STATUTORY PERIOD.

A mother residing in a foreign country and depending partly upon the earnings of her son for her living, can sue before the courts of the Province of Quebec, under the Alberta Workmen's Compensation Act, where her son has been killed in the service of a railway company having its principal place of business in the city of Montreal. Under this latter Act, the employer

becomes liable to pay an indemnity to his employee by the sole fact of his being killed during his services, and the claim dates from the date of the accident. Under the same Act, the absence in a foreign country far away is a justification for not filing a claim within the delay fixed by law.

Johansdotter v. C.P.R. Co., 47 Que. S.C. 76.

ACTION BY—WAR—RESIDENCE IN HOSTILE COUNTRY—SECURITY FOR COSTS—STAY OF PROCEEDINGS—DISMISSAL OF ACTION.

The plaintiffs, residing in Austria and subjects of the Emperor of Austria, began this action before a state of war existed between the Emperor and his Britannic Majesty, and were ordered to give security for costs. Their solicitor, not being able to communicate with them after the war began, and no further proceedings having been taken, applied for an extension of time and for a stay of proceedings, in order to avoid the dismissal of the action which followed upon failure to give security. This was refused; and it was held (upon an application in Chambers by the defendants), that the plaintiffs, having become alien enemies, ought to be barred from further prosecution of the action, which was dismissed; but, semble, the dismissal of the action at this stage would not be a bar to a subsequent action after the termination of the war. [Le Bret v. Papillon, 4 East 502; and Brandon v. Nesbitt, 6 T.R. 23, followed.]

Dumenko v. Swift Canadian Co., 32 O.L.R. 87.

ALIEN ENEMY—ACTION BY—SUSPENSION OF PROCEEDINGS BY DILATORY EXCEPTION—QUE. C.P. 177.

If the plaintiff is domiciled in a country in a state of war with England, she cannot, so long as that state of war lasts, be required to furnish security for costs or obtain time to furnish such security; but the court must suspend all proceedings in the case until peace is restored.

De Kozarijouk v. B. & A. Asbestos Co., 16 Que. P.R. 213.

SUITS BY AND AGAINST.

In an application for an award for compensation upon the death of a workman, under the Workmen's Compensation Act (B.C.), 2 Edw. VII. c. 74, now R.S.B.C. 1911, c. 244, while an alien dependent, whether resident or nonresident, has the same status as a resident British subject for recovery of the compensation, the legal personal representative of the deceased, or other person suing in a representative capacity for the dependent's claim, is required to be a resident of the province. Upon an application for an award of compensation for the death of a workman under the Workmen's Compensation Act, 2 Edw. VII. (B.C.) c. 74, now R.S.B.C. 1911, c. 244, where the dependent of the deceased workman is an alien nonresident, the personal representative may claim such compensation although he would hold it if recovered, for the benefit of such alien nonresident dependent. [Krzus v. Crow's Nest Pass Coal Co., 16 B.C.R. 120, 17 W.L.R. 687, reversed; Jefferys v. Boosey, 4 H.L.C. 815, and Tomalin v. S. Pearson & Son, Ltd., [1909] 2 K.B. 61, distinguished; Baird v. Birsztan, 8 F. 438, and United Collieries Co. v. Simpson, [1909] A.C. 383, referred to. See advance report of the present case, 4 D.L.R. 253.]

Krzus v. Crow's Nest Pass Coal Co., 8 D.L.R. 264, [1912] A.C. 590.

TAXATION—TAXATION OF LAND OF NONRESIDENT ALIEN ENEMY—RURAL MUNICIPALITY ACT—TAXATION ENFORCEMENT RETURN—FORFEITURE OF LAND—PROVISIONS OF ACT INTENDED FOR TIMES OF PEACE—PRESUMPTION OF NOTICES UNDER THE ACT REACHING PARTIES AFFECTED—OUTBREAK OF WAR CHANGING SITUATION—PROCEEDINGS HAVING LOST FOUNDATION UPON WHICH THEY WERE BASED—ALIEN ENEMY ENTITLED TO PAY ARREARS, ETC., AND RECEIVE BACK PROPERTY.

The provision contained in the Rural Municipality Act for the assessment of owners and occupants of property and proceedings thereunder were intended for times of peace. A state of war was not contemplated by the Act. The provisions as to notice are based upon the presumption that notices will be likely to reach the person to whom they are sent and that such person will be able either to appear at the court or to instruct some one to appear for him and will be able to send money, if he possesses the necessary financial means, to pay up the arrears and costs. The situation, so far as it concerned alien enemies resident in one of the enemy countries (with whom communication was forbidden by law) was completely altered by the outbreak of the recent war, which destroyed all those presumptions upon which the statute was based. An order of confirmation and the consequent forfeiture against such nonresident alien enemy was held therefore to have lost the very foundation upon which they were based and such person was held entitled to pay all taxes in arrears, interest, penalties and costs and receive back her property.

Reventlow-Criminil v. Rural Municipality of Streamstown, [1919] 2 W.W.R. 478.

RIGHT TO SUE—EFFECT OF NATURALIZATION.

The plaintiffs (brothers), who were Germans by birth, emigrated to the United States, where the older became naturalized. Some time later they came to British Columbia, where they lived a number of years, acquired property, and became naturalized citizens of Canada. In 1913, they sold their property under an agreement of sale, and returned and made their home in the United States, the younger brother later declaring his intention of becoming an American citizen. In an action for the

moneys due under the aforesaid agreement of sale:—Held, on appeal that the fact of their living permanently in the United States, and the younger brother declaring his intention of becoming an American citizen, does not affect their status as British subjects, and they are entitled to bring this action.

Newman v. Bradshaw, 23 B.C.R. 492, [1917] 1 W.W.R. 1223, reversing 10 W.W.R. 1332. [See also 28 D.L.R. 769, 22 B.C.R. 420.]

(§ III—20)—Interest in assets of estate—War Measures Act, 5 Geo. V., 1915, c. 2, (Dom.) — Consolidated Order 28—Trading with enemy—Will—Citizen of United States—Trusts for benefit of wife and daughter—Equal shares—Provision in will authorizing alteration of trusts by consent—Legal document drawn accordingly—Approved by foreign court—Daughter married to alien enemy—Her interest treated as such—Attempt to allocate Ontario assets to wife—Daughter's interest—Transferred to public custodian—Effect of foreign court order—Leave to appeal—Persona designata—R.S.O. 1914 c. 79, ss. 2 & 4.

The assets of an Ontario estate which belong to or are held or managed for an alien enemy, may, on application to a Judge of the Supreme Court of Ontario, be vested in "the Custodian" appointed under the Consolidated Orders respecting trading with enemy 1916. A document brought into existence by agreement of persons interested as devisees or legatees under the will and made subsequent to the death of the testator, even though in pursuance of a power conferred in the will, cannot be admitted to probate in Ontario, and even though a foreign court ratified such a document, this decision cannot be treated as effective and binding. A beneficial interest had passed from the testator to his daughter on his death, and that interest has not passed from the daughter by reason of the document already referred to, and so still remained liable to forfeiture under the Consolidated Orders. The theory of the comity of nations should be modified or restricted when it conflicts with matters of public policy, which was essentially the case. The order was made by a judge as "persona designata" and an appeal, if any, would lie with special leave under the Judges' Orders Enforcement Act, R.S.O. 1914, c. 79, ss. 2 and 4.

Re Walker, 49 D.L.R. 415, 46 O.L.R. 86.

(§ III—24)—"Assisting"—Knowledge of intention to leave.

Where an alien enemy starts for the boundary line with the intention of leaving Canada he is to be considered as in the act of leaving Canada on every part of the journey, and any person knowing such intention on his part and doing any act in furtherance of that intention thereby assists such alien enemy within the meaning of Cr. Code, s. 75A, whether the latter got across the boundary line or not. [Compare R. v. Nerlich, 25 D.L.R. 138, 24 Can. Cr. Cas. 256.] A jury trying a charge under Cr. Code, s. 75A, for assisting an enemy alien to leave Canada may properly infer that the person assisted is an alien enemy on his testimony that his earliest recollections are of residence in the enemy country and proof that he had registered in Canada as an alien enemy. [Guerin v. Bank of France, 5 Times L.R. 160, referred to.]

R. v. Oma, 25 D.L.R. 670, 25 Can. Cr. Cas. 73, 8 S.L.R. 395.

ALIMONY.

See Divorce and Separation; Husband and Wife.

ALTERATION OF INSTRUMENTS.

I. In general.
II. Bills and notes.
  A. In general.
  B. What alterations are material.

I. In general.

(§ I—2)—Contracts—Materiality.

The alteration which will avoid a written contract when made without the privity of the obligee, must be as to a material point thereof, and the insertion in a broker's "bought note" of the name of the plaintiff claiming thereon as the principal for whom the other broker named had contracted with notice to the issuing broker of the name of such principal would not be held to be a material alteration even if there was not evidence of assent thereto by the obligee, where the insertion of the name made no attempted change in the plaintiff's rights. [Cooke v. Eshelby, 12 App. Cas. 271; Suffell v. Bank of England, 51 L.J.Q.B. 401; Pattinson v. Luckley, L.R. 10 Ex. 330, referred to.]

Baker v. MacGregor, 16 D.L.R. 371, 20 B.C.R. 15.

(§ I—4)—Hire of chattel — Personal liability of defendant—Liability of incorporated company—Material alteration in written contract.

Flexlume Sign Co. v. Vise, 11 O.W.N. 44.

II. Bills and notes.

B. What alterations are material.

(II B—10)—Signature.

Altering a promissory note by adding the words "Cohen Frères, per" before the signature M. Cohen is not a material alteration rendering the note void, inasmuch as the liability of the maker remains unchanged.

Rabinovitch v. Cohen, Marks v. Cohen, British Canadian Fur Trading Co. v. Cohen, 39 D.L.R. 320, 53 Que. S.C. 174.

Promissory note — Material alteration —Holder in due course—Effect.

When the words "this note to follow

agreement," written in the left hand corner of a promissory note, are altered so as to read "this note to fall due for payment, May 9th 1913" such alteration is material and voids the note. If the alteration is apparent, no person who subsequently takes the note can be a holder in due course.

Gourre v. Voskoboinik, 45 Que. S.C. 101.

VOIDING NOTE BY MATERIAL ALTERATION—RIGHT TO SUE ON ORIGINAL CONSIDERATION.

A material alteration in a note renders the same void, and a holder, who has fraudulently altered the note, cannot succeed in an action based on the consideration for the note.

O'Brien v. Brennan, 9 W.W.R. 277.

(§ II B—11)—MATURITY OF NOTE.

Changing a note, to make it become payable in two months instead of one month, is a material alteration which will void the note as against an obligor who has not assented thereto.

Union Bank of Canada v. West Shore & Northern Land Co., 35 D.L.R. 575, 23 B.C.R. 64.

LIEN NOTE—AGREEMENT TO EXTEND—NO CONSIDERATION FOR—ALTERATION OF DATE—FORGERY.

Altering the word "Nov." to "Sept." in an unsigned memorandum made on the back of an overdue lien note, agreeing to extend the time for payment of the note, such agreement being made without consideration and there being no evidence of fraudulent intent is not forgery.

The King v. Hannah, 46 D.L.R. 122, 31 Can. Cr. Cas. 159, 12 S.L.R. 145, [1919] 1 W.W.R. 973.

(§ II B—12)—BILLS AND NOTES—STRIKING OUT INTEREST CLAUSE—EFFECT.

Striking the interest clause from a promissory note is such a material alteration as will vitiate the instrument, irrespective of whether the change is beneficial or prejudicial to the maker. [Suffell v. Bank of England, 9 Q.B.D. 568; and Gardner v. Walsh, 5 El. and Bl. 83, followed.]

Langley v. Lavers, 13 D.L.R. 697, 13 E.L.R. 141.

BILLS AND NOTES—CHANGING ILLEGAL RATE OF INTEREST TO LEGAL—MATERIALITY OF ALTERATION.

Changing the rate of interest in a promissory note taken by a money lender for less than $500, by the holder after delivery, from 2 per cent per month to 12 per cent per annum is a material alteration which vitiates the note.

Bellamy v. Porter, 13 D.L.R. 278, 28 O.L.R. 572.

CHANGING RATE OF INTEREST—RIGHT TO SUE UPON ORIGINAL CONSIDERATION.

Where a promissory note is taken in satisfaction of payment of a car, the amount of the purchase price represented by it cannot be sued upon after an avoidance of the note by a fraudulent alteration by the holder of the rate of interest therein.

Wyton v. Hille, 25 D.L.R. 89, 25 Man. L.R. 772.

FILLING IN RATE OF INTEREST.

Filling in a rate of interest in a lien note without the maker's authority after it has been signed is a material alteration, and voids the instrument.

Allen v. Gray, 38 D.L.R. 41, 10 S.L.R. 393.

(§ II B—14)—CHANGING NAME AFTER ACCEPTANCE.

Changing the name of the payee, after acceptance of a draft, without the acceptor's assent, is a material alteration under ss. 145, 146 of the Bills of Exchange Act, R.S.C. 1906, c. 119, and voids the bill.

Asch v. Dufresne, 33 D.L.R. 540, 49 Que. S.C. 508.

(§ II B—16)—PROMISSORY NOTE—ADDING NEW MAKER.

An alteration of a promissory note, after its issue, by the addition of the name of another maker, a member of a syndicate, who signed the note in accordance with the evident intention of all the signatories, does not invalidate the note; signature of an additional maker is not a "material alteration."

Bolster v. Shaw, 31 D.L.R. 773, 11 A.L.R. 76.

(§ II B—17)—ABSENCE OF PRESUMPTION AS TO DATE—RELATION TO EXECUTION—PAYEE'S NAME.

In the event of an apparent alteration in a negotiable instrument or the like, there is no presumption one way or the other as to the time when the apparent alteration was made, that is, whether prior or subsequent to its execution.

Langley v. Joudrey (No. 2), 15 D.L.R. 10, 47 N.S.R. 451.

ASSIGNMENT OF NOTE FOR COLLECTION—SUBSTITUTION OF HOLDER'S NAME AS PAYEE—NOT MATERIAL ALTERATION.

Altering a promissory note after it has become due and in virtue of an assignment for the purpose of collecting the amount thereof by the holder substituting his own name as payee in place of that of the bank in whose hands it was first placed for collection, is not a material alteration and the last payee is a holder for collection, subject to any defences the maker may have against the original payee.

Henderson v. Maher, 46 D.L.R. 143, 55 Que. S.C. 175.

(§ II B—19)—CHANGING PLACE OF PAYMENT—MATERIALITY.

An acceptance of an offer to sell, which varies the amount of the cash payment, and increases the amounts of the deferred payments, is merely a counter offer to purchase and no contract is made by it although the total price is not thereby changed.

Pearson v. O'Brien, 11 D.L.R. 175, 22 W.L.R. 703, affirming 4 D.L.R. 413, 22 Man. L.R. 175, which affirmed 18 W.L.R. 503.

AMENDMENT.

Of judgment, see Judgment.

Of pleading, see Pleading, I N.

Of information, see Summary Conviction; Criminal Law; Certiorari.

AMUSEMENTS.

RIGHTS OF SPECTATORS—SCOPE OF LICENSE —EJECTMENT.

One entering upon amusement premises under a paid license enjoys a contractual privilege to remain there undisturbed during the performance, and if forcibly ejected, he is entitled to recover against the owners for breach of contract and for the assault committed upon him. [Wood v. Ledbitter, 13 M. & W. 838, distinguished; Hurst v. Picture Theatre, [1915] 1 K.B. 1, followed.]

Barnswell v. National Amusement Co., 23 D.L.R. 615, 21 B.C.R. 434.

ANIMALS.

I. RIGHTS AND LIABILITIES CONCERNING.
- A. Rights of owners generally.
- B. Liability for killing or injuring.
- C. Liability for injuries by.
- D. Running at large.
- E. Animals with infectious diseases.
- F. Tax on dogs.

II. CRUELTY TO.

Annotations.

Animals at large through "wilful act or omission of owner:" 32 D.L.R. 397; 33 D.L.R. 423; 35 D.L.R. 481.

I. Rights and liabilities concerning.

A. RIGHTS OF OWNERS GENERALLY.

Liability under Railway Act for injury to animals by trains, see also Railways, II D.

(§ I A—1)—ACCIDENT — ANIMAL — DAMAGES—LIABILITY—QUE. C.C. 1054, 1055.

According to the terms of Que. C.C. arts. 1054, 1055, the owner of an animal or of a thing is responsible for damages caused by them when they are out of his control and that the wrong happened without his being concerned in it, but when, at the time of the accident they are under his control and direction, or moved by him, his liability is that of Que. C.C. art. 1053, and one who claims damages must prove fault, negligence, or carelessness on his part.

Denis v. Kennedy, 46 Que. S.C. 459.

(§ I A—5)—DUTY OF AGISTER.

An agister is bound to take reasonable care of animals in his charge. If an owner demands an animal and the agister is not able to produce it, the onus is on him to shew that he took all reasonable care for the animal's safety. [Pye v. McClure, 22 D.L.R. 543, 21 B.C.R. 114, followed.]

Comstock v. Ashcroft Estates, 23 B.C.R. 476.

WHILE IN PASTURE.

The owner of an animal is liable for injury which it causes while in the pasture of a third party, even if the latter is in fault; but in the latter case he has an action for indemnity against the owner of the pasture whose negligence occasioned the injury. An owner of pasture land is answerable for animals he takes to pasture as if they were his own.

Marier v. Fréchette, 52 Que. S.C. 485.

(§ I A—6)—FERÆ NATURÆ—ESCAPED FOX —PROPERTY RIGHTS.

A fox escaped from the premises of his breeder, and at large for a week without the owner knowing of the escape, is an animal feræ naturæ, and belongs to the persons who reduce it to their possession. [Game and Fisheries Act, R.S.O. 1914, c. 262, and s. 345 of Crim. Code, considered.]

Campbell v. Hedley, 37 D.L.R. 289, 39 O.L.R. 528.

PROPERTY RIGHT IN—PROGENY.

There is a common-law presumption of property in the progeny of domestic animals, running to the owner of the dam as against the owner of the sire. [Dillaree v. Doyle, 43 U.C.Q.B. 442; Roper v. Scott, 16 Man. L.R. 594, referred to.]

Graf v. Lingerell, 16 D.L.R. 417, 7 A.L.R. 340.

(§ I A—7)—NEGLIGENCE — CUSTOMER OF RAILWAY COMPANY LOADING ORES IN COMPANY'S PREMISES—PARTICLES FALLING ON GROUND THROUGH SHUNTING OF CARS — SUBSEQUENTLY UNLOADING GRAIN AT SAME PLACE — GRAIN DROPPED—CATTLE STRAYING ON PREMISES AND EATING GRAIN—SWALLOWING PARTICLES OF ORE AND DYING—NO LIABILITY.

Dawson v. The Paradise Mine & The C.P.R. Co., [1919] 1 W.W.R. 499, reversing judgment of Thompson, C.C. J.

(§ I A—8)—LIABILITY OF OWNER FOR INJURIES FROM VICIOUS HORSE.

In an action for injuries caused by a vicious horse belonging to a corporation, scienter is established against the corporation, if it be proved that the servant of the corporation having charge of the horse was informed of its vice. [Stiles v. Cardiff Steam Navigation Co., 33 L.J.Q.B. 310, applied.]

Nadeau v. City of Cobalt Mining Co., 3 D.L.R. 495, 3 O.W.N. 1126.

NEGLIGENCE—INJURY CAUSED BY ANIMAL—PRESUMPTION.

Gagne v. Cloutier, 20 Que. K.B. 502.

B. LIABILITY FOR KILLING OR INJURING.

(§ I B—10)—INJURY TO COW BY DOG—DOGS' ACT.

The Dogs' Act (Imp.), 1865, c. 60, is

not in force in Alberta. In an action for damages for injuries caused a cow by defendant's dog the plaintiff is not required to establish negligence on the part of the defendant.

McCormick v. Childs (Alta.), [1917] 3 W.W.R. 731.

(§ I B—13)—Dogs running at large.

Where a by-law passed under the authority of subs. 1 and 2 of s. 540 of the Consolidated Municipal Act, 1903 justifies the killing of any dog found running at large more than half a mile from the premises of its owner, a dog is to be deemed "found" within the meaning of the by-law where it is first seen by its pursuers and it cannot lawfully be killed if, having been first seen less than half a mile from its owner's premises, it subsequently goes beyond that distance.

McNair v. Collins, 6 D.L.R. 510, 27 O.L.R. 44.

Injury caused by dog—Collision.

Caron v. Kleinberg, 39 Que. S.C. 121.

(§ I B—14)—Criminal liability — Defences.

On a charge under Code s. 537 for wilfully killing a dog, reference may be had to the rules of the common law under Code s. 16 for ascertaining whether the dog was killed under circumstances amounting to a legal justification or excuse, and by Code s. 541 a conviction is not to be made unless the killing of the dog was done not only without legal justification or excuse but without colour of right.

O'Leary v. Therrien, 27 D.L.R. 701, 25 Can. Cr. Cas. 110.

C. Liability for injuries by.

(§ I C—20)—Knowledge of vicious disposition.

One who owns a dog that was in the habit of running out and barking at passers-by on the highway, is liable for injuries sustained by a skilled horsewoman, who, while exercising care, was thrown from her horse by reason of its becoming frightened and unmanageable at the barking of the dog, which ran into the highway as she was passing.

Carlson v. McEwen, 3 D.L.R. 787.

Injury to servant by kick of master's horse—Habit of kicking—Scienter—Imputed knowledge of master—Incorporated company—Negligence.

Nadeau v. City of Cobalt Mining Co. (No. 2), 3 D.L.R. 885, 3 O.W.N. 1379.

Liabilities for injuries by—Trespass—Savage monkey—Kept in yard adjoining theatre where performance given—Liability of proprietors of theatre—Yard no part of theatre premises.

Connor v. Princess Theatre, 4 O.W.N. 502.

Vicious animal—Liability of owner—Presumption as to.

The owner of an animal is liable for injury caused by it, just as every person is responsible for things in his care, only when he cannot prove that he was unable to prevent the act which caused the injury; in other terms, he is allowed to rebut the presumption of fault established against him by art. 1055 C.C.

Du Tremble v. Poulin, 48 Que. S.C. 121.

Liability of owner of an animal for injury caused by it—Presumption.

Collas v. Langevin, 40 Que. S.C. 441.

(§ I C—25)—Stray Animals Act—Distraint—Injuries by.

An estray distrained within a municipality may, under part 3 of the Stray Animals Act (Sask.), be impounded in the nearest accessible or available pound either within or without such municipality. No action will lie for damage caused by estrays to stacks not enclosed by a lawful fence as defined by part 6 of the Stray Animals Act (Sask.).

Fogde v. Parsenau, 37 D.L.R. 758, 10 S.L.R. 423.

Injuries by—Stray Animals Act—Distraint.

Smith v. Parsenau (Sask.), 37 D.L.R. 806.

Blacksmith's shop — Injury by horse kicking—Scienter.

A blacksmith is liable for injuries to a horse inflicted by a stallion, and occasioned by leading into his shop the horse within reach of the stallion's hind feet without taking precaution to avoid the danger of his kicking. This is by reason of the common knowledge of persons accustomed to horses, that stallions, though in a sense domestic animals, are dangerous, and not from any application of the doctrine of scienter.

Layzelle v. Proctor, 8 A.L.R. 156.

Negligence — Presumption — Injury by animal.

Gingras v. Bélanger, 39 Que. S.C. 484.

Bull at large—Liability for accident.

Charette v. Huneault, 39 Que. S.C. 88.

Death of boy from goring by bull—Evidence of vicious disposition and knowledge thereof by owner—Liability of owner—Action under Fatal Accidents Act.

Smith v. Blake, 10 O.W.N. 26.

(§ I C—26)—While trespassing or running at large generally.

A husband is responsible for the damages caused by the trespass of a cow which is kept in his custody and control and of the use of which he gets the benefit although his wife may have the title or ownership of same.

Broderick v. Forbes, 5 D.L.R. 508.

Injury by trespassing—Liability of owner.

The owner of an animal in which by law the right of property can exist, is bound to take care that it does not stray onto the land of his neighbour, and is liable for any

trespass it may commit, and for the ordinary consequences of that trespass.

Whalley v. Vandergrand, 44 D.L.R. 319, 12 S.L.R. 14, [1919] 1 W.W.R. 87.

Open Wells Act—Open well on premises—Duty to fence—Want of knowledge.

The duty imposed by the Open Wells Act (Sask.), to fence an open well, is an absolute one, and want of knowledge of the well is no defence to an action for damages to an animal which while lawfully at large falls into the well. An agent's knowledge of an open well on premises occupied by him will be imputed to the principal. [Baldrey v. Fenton, 20 D.L.R. 677; Watson v. Guillaume, 42 D.L.R. 380, followed.]

Silzer v. Hudson, 49 D.L.R. 125, [1919] 3 W.W.R. 575.

Different owners—One herd boy—Trespass — Damage — Liability — Joint tort feasors.

Where several owners put their animals in charge of one herd boy, and such animals stray onto land and destroy grain, the owners are liable as joint tort feasors. The damage sustained should be based upon the value of the grain at the time of the injury.

Besana & Hango v. Althouse, 49 D.L.R. 158, 12 S.L.R. 452, [1919] 3 W.W.R. 725.

Trespassing—Entire Animals Ordinance (Alta.)—Damage—Liability of owner—Lawful fence.

The owner of an animal which is prohibited from being at large by the Entire Animals Ordinance (Alta.), is liable for any damage such animal may do while trespassing. The absence of a lawful fence within the meaning of the Fence Ordinance, enclosing the premises where the trespass is committed, is no defence to an action for damages.

McLean v. Brett (Alta.), 49 D.L.R. 162, [1919] 3 W.W.R. 521.

Open Wells Act—Noncompliance with—Animals at large—Damages.

One who has not complied with the provisions of s. 3 of the Open Wells Act (R.S.S. 1909, c. 124), providing that "no person shall have or store on his premises or on any premises occupied by him any kind of threshed grain accessible to stock of any other person which may come or stray upon such premises," must make good the damage to the owner of animals which are lawfully at large under the Stray Animals Act, and stray onto his premises and are killed by eating grain improperly left accessible to them.

Watson v. Guillaume, 42 D.L.R. 380, 11 S.L.R. 348.

Impounding — Damages — By-law — Validity — Right of owner against distrainor.

The defendant seized the plaintiff's horses damage feasant in his oat field and impounded them, claiming $1,000 damages, which amount the plaintiff paid under protest. Held, that the damages claimed were excessive and that $50 would cover all the damage done on the occasion of the impounding, but that such claim of excessive damage did not render the seizure and impounding illegal. [Buist v. McCombe, 8 A.R. (Ont.) 598, and Graham v. Spettigue, 12 A.R. (Ont.) 261, distinguished.] That the fact that the municipal by-law restraining animals from running at large had been passed by a prior council did not render the by-law ultra vires or invalid. That [following Fogde v. Parsenau, 10 S.L.R. 423] an action lay by the owner of the animals against the distrainor for the excess damages paid to the pound keeper.

Campbell v. Halvorsen, 11 S.L.R. 58.

Open Wells Act (Sask.)—"Any premises occupied by him"—Meaning of.

The Open Wells Act, which prohibits any person from having "on his premises" as well as "any premises occupied by him" any open well, applies to the owner as well as the occupant, and the owner is liable in damages for injuries to an animal lawfully running at large caused by its falling into an open well on his premises, although the premises are at the time in actual occupation of a tenant.

Brotherson v. Kennedy, 47 D.L.R. 131, 12 S.L.R. 304, [1919] 2 W.W.R. 803.

(§ I C—30)—Vicious dog—Liability of owner — Knowledge — Use of highway.

The owner of a dog which, to the owner's knowledge, had a propensity for running after and barking at horses and carriages traveling upon highways, is liable for an accident from a runaway of horses frightened by the dog; a kennel for the dog built on a highway is not a lawful use of the highway, though by an owner lawfully employed thereon.

Birdsall v. Merritt, 35 D.L.R. 260, 38 O.L.R. 587.

Dangerous dog—Liability of owner.

The owner cannot escape liability for damages caused by the bite of his dog, on the ground that at the time of the accident he had entrusted his animal to the care of a child. Similarly, he is responsible if he leaves his dog unmuzzled to run about a public street, when it is the nature of such dog to bite strangers who approach him or seek to caress him.

Laurencelle v. Coomber, 54 Que. S.C. 370.

Dog barking at horses—Horses running away—Liability of dog's owner.

While plaintiffs were driving in a democrat past defendant's automobile defendant's dog jumped from the fender and ran at plaintiffs' horses and barked causing the horses to jump sideways, the pole strap to break, and the team to run away causing loss and bodily injuries. The court found that the dog had, to defendant's knowledge, the mischievous propensity of doing such

acts and defendant was held liable in damages.

Spat v. Hogson, [1919] 3 W.W.R. 210.

(§ I C—34)—Liability for injuries by—Animals ferae naturae.

Where wild animals are kept for some purpose recognized as not censurable, all that can be demanded of the keeper is that he shall take that superior precaution to prevent their doing mischief which their propensities in that direction justly demand of him. [Cooley on Torts, 3rd ed., vol. 2, par. 411, approved; Harper v. Marcks, [1894] 2 Q.B. 319; May v. Burdett, 9 Q.B. 101; Baker v. Snell, [1908] 2 K.B. 352, and in appeal, [1908] 2 K.B. 825, referred to.] Not only the owner of animals ferae naturae, but also anyone who keeps or harbours them upon his premises is liable for injuries done through their breaking loose. [Jackson v. Smithson, 15 M. & W. 563; Shaw v. Creary, 19 O.R. 39, and Wood v. Vaughan, 28 N.B.R. 472, considered.]

Connor v. Princess Theatre, 10 D.L.R. 143, 27 O.L.R. 466.

D. Running at large.

(§ I D—35)—Railway Act—Negligence—Leaving grain unguarded—Injury to horses.

Every person must be taken to know that horses are likely to consume grain to excess, if the opportunity to do so is afforded them; therefore if it be left in such an unguarded condition as to permit of horses being attracted by it and eating it to their injury, the owner of the grain will be liable for the resulting damage, even though the horses are trespassers. [Cooke v. Midland G.W.R. Co., [1909] A.C. 229, applied.] S. 294 of the Railway Act, R.S.C. 1906, c. 37, is available only to a railway company.

Fulton v. Randall, Gee & Mitchell (Alta.), [1918] 3 W.W.R. 331.

Barbed wire fence—Injury to cattle—Liability.

Where there is a by-law permitting cattle to run at large and such cattle are injured by the barbed wire of a fence which has fallen down through the rottenness of its posts, the owner of the fence is liable for the injury to cattle lawfully on the highway and injured thereon; quære on the land of the owner of the fence. [McLean v. Rudd, 9 W.L.R. 283, distinguished.]

Chase v. Coleridge (Sask.), [1917] 2 W.W.R. 736.

E. Animals with infectious diseases.

(§ I E—40)—Animal Contagious Diseases Act—Right of action.

In Ward v. Hobbs, 4 App. Cas. 13, the House of Lords expressly refused to extend to contagious or infectious diseases the principle imposing on persons having in their custody or charge dangerous substances a special duty commensurate with the danger.

O'Mealey v. Swartz, 11 S.L.R. 376.

(§ I E—42)—Liability of seller.

In the matter of sales of horses, a sickness known under the name of "weaving," or "weaver," or motion of the head, neck and body of the animal, from one side to the other, which cannot be easily noticeable and where the observation is necessary, and where in this case the animal had to be placed under a constant inspection to discover the sickness such sickness will constitute a hidden defect which will give rise, in favour of the purchaser, to an action to rescind the sale.

Cullen v. Picard, 18 Rev. de Jur. 210.

II. Cruelty to.

(§ II—55)—Cruelty to animals—Furious driving—Jurisdiction of two justices—Cr. Code, s. 542.

R. v. Nelson (Ont.), 28 Can. Cr. Cas. 276.

ANNUITIES.

See Wills.

Under Workmen's Compensation Act, see Master and Servant, V—340.

Trust to pay annuities, see Trusts, I.

(§ I—1)—Life rent—Guarantee by hypothec — Judicial sale — Loss—Right of rentee.

The debtor of a life rent, who, after having secured its payment by hypothec, allows one of the hypothecated properties to be judicially sold, diminishes, by his own act, the securities he had given by the contract, and accordingly he loses the benefit of the delay. Under such circumstances, the person entitled to the rent is not bound to protect himself by means of an opposition to secure charges; but he may claim from the debtor the capital of the rent.

Massicotte v. Bourassa, 54 Que. S.C. 37.

(§ I—3)—Apportionment.

Where a settlement terminated with the death of the settlor, and by the terms of his will the income from the principal thereof was payable to annuitants therein named, such income cannot be diverted to the payment of annuities which the testator charged generally upon the income of his estate.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936.

Apportionment—Wills.

Where a will provides that certain annuities shall be paid "about the first half of January in each year," and certain other of the annuities in two equal instalments "in each year about the first half of January and the first half of July," the annuities are to be computed from the date of the testator's death.

Chisholm v. Journeay, 15 D.L.R. 495.

(§ I—4)—Paying previous deficiencies from surplus.

The surplus income from an estate for any one year, after the payment of all annuities for that year chargeable thereon is

available for the payment of arrearages of annuities for previous years.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936.

PAYMENT OF DEFICIENCY—FROM GENERAL ESTATE—WHAT AVAILABLE FOR.

On a deficiency of income from a fund from which an annuity is payable, if recourse cannot be had to the corpus thereof, the deficit is payable only from the portion of the testator's general estate which is not specifically devised. [Gee v. Mahood, 11 Ch.D. 891, sub. nom. Carmichael v. Gee, 5 App. Cas. 588, and Re Plaetzer Estate, 2 O.W.N. 1143, referred to.]

Re Mackenzie, 18 D.L.R. 277, 30 O.L.R. 173.

(§ 1—7)—CHARGE ON INCOME.

Where by will an annuity is payable primarily from a designated fund the securities belonging thereto will be marshalled and the annuity paid from the income thereof before resort will be permitted to the income of the testator's general estate. Where arrearages in the payment of annuities are due to the income upon which they are expressly charged not being sufficient to pay them in the order of priority established by will, they do not remain a charge upon the income of the estate after the time fixed for distribution until they can be paid in full. A gift of an annuity as an express charge upon the income of an estate is not enlarged so as to create a charge upon the corpus thereof by loose expressions in a will to the effect that it shall be a charge upon the estate or its investments.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936.

GIFT OF ANNUITIES—POWER TO GIVE CAPITAL BY WILL—DIVIDING ESTATE AFTER DEATH OF ANNUITANTS.

Re McDonald, 2 O.W.N. 605.

(§ 1—8)—PAYMENT—INCOME AND REVENUE.

What would otherwise be an absolute gift of an annuity is not necessarily cut down to the lesser income obtainable from certain securities out of which by a subsequent clause the annuity is directed to be paid; the intention of the testator as evidenced by the entire will must control. [Kimball v. Cooney, 27 A.R. (Ont.) 453; and Carmichael v. Gee, 5 App. Cas. 588, referred to.]

Re Mackenzie, 11 D.L.R. 818, 4 O.W.N. 1392, 24 O.W.R. 678.

INCOME AND REVENUE—APPORTIONMENT BETWEEN CAPITAL AND INCOME.

Leadlay v. Leadlay, 3 D.L.R. 487, 3 O.W.N. 1218.

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Of convictions, see Summary Convictions; Certiorari; Habeas Corpus; Criminal Law.

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ANTENUPTIAL CONTRACT.

See Husband and Wife.

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I. Right of appeal; what cases reviewable.

A. IN GENERAL.

(§ I A—1)—TO PRIVY COUNCIL—ORDERS OF RAILWAY BOARD—REVIEW BY COURTS.

Re Toronto R. Co. and City of Toronto, 25 D.L.R. 841, 34 O.L.R. 465.

MUNICIPAL ELECTIONS—FIATS—ORDERS OF COUNTY COURT.

There is no right of appeal, with or without leave, from an order of the County Court Judge dismissing a motion to set aside fiats granted by him under s. 162 of the Municipal Act, R.S.O. 1914, c. 192, respecting the determination of the validity of an election to municipal offices.

R. ex rel. Boyce v. Ellis, 24 D.L.R. 118, 33 O.L.R. 575.

EXPROPRIATION AWARD.

No appeal lies from an award made under the expropriation clauses of the City Act, Sask., nor does the "Act respecting Judges' Orders in matters not in court," R.S.S. c. 55, apply to an award made by a district judge acting as arbitrator under the City Act.

Yager & Western Trust Co. v. Corp. of Swift Current, 22 D.L.R. 801, 7 W.W.R. 978.

RAILWAY ORDERS—ADDING SPECIFIC DIRECTIONS.

An order of the Superior Court directing the construction of drainage to prevent the overflooding of lands by railway ditches, which is rendered more specific by a judgment of the Superior Court in adding thereto recourse for future damages in case of default, is in effect a confirmation of the judgment of the court of first instance, and therefore appealable to the Supreme Court of Canada by virtue of s. 40 of the Supreme Court Act, R.S.C. 1906, c. 139. [Hull Electric Co. v. Clement, 41 Can. S.C.R. 419, followed.]

Canadian North. Que. R. Co. v. Gilbert Gignac, 22 D.L.R. 626, 51 Can. S.C.R. 136.

SUBSTANTIVE RIGHTS—JUDGMENT FOR REFERENCE, BUT NOT VARYING DAMAGES.

The judgment of a Provincial Supreme Court which does not determine adversely the quantum of damages, but merely orders the case back for a further reference, constitutes no deprivation of a "substantive right in controversy in the action" within the meaning of ss. 2 (e) and 36 of the Supreme Court Act, R.S.C. 1906, c. 139, as amended by Act, 1913, from which an appeal will lie. [16 D.L.R. 361, 30 O.L.R. 44, affirmed.]

Wood v. Grand Valley R. Co., 22 D.L.R. 614, 51 Can. S.C.R. 283.

INTERPLEADER ISSUE.

An appeal lies without leave from a County Court judgment in an interpleader issue where the value of the property involved is over $100, under O. 13, r. 7, of the B.C. County Court Rules, 1912. [Re Tarn, [1893] 2 Ch. 280, applied.]

Ritchie Contracting Co. v. Brown, 21 D.L.R. 86, 21 B.C.R. 89.

FROM REFUSAL TO REMOVE CAUSE.

An appeal lies to the Court of Appeal from the refusal of a Judge of the Court of King's Bench to remove a cause to that court.

Jones v. Momberg, 21 D.L.R. 863, 25 Man. L.R. 504.

FROM ORDERS UNDER WINDING-UP ACT—"FUTURE RIGHTS."

When "future rights," widely interpreted, are involved, an appeal lies, under s. 101 of the Winding-up Act, R.S.C. 1906, c. 144, from the order of a judge under s. 22, giving leave to bring an action against a company in the course of winding-up, and the appeal will be heard on its merit; the order permitting the appeal is itself unappealable, but if no appeal lies, the Appellate Court will, of its own motion, refuse to entertain it.

Re J. McCarthy & Sons Co., 32 D.L.R. 441, 38 O.L.R. 3.

FROM MUNICIPAL AWARD — COMMENCEMENT OF PROCEEDINGS.

There is a right of appeal to the Supreme

Court of Saskatchewan under s. 379 of the City Act (Sask. 1915, c. 16), from an arbitrator's award in a proceeding under the Act, notwithstanding that the proceedings had been commenced prior to the passage of s. 379.

Cassidy v. City of Moose Jaw, 33 D.L.R. 86, 10 S.L.R. 51.

FROM AN ORDER OF A MINING COMMISSIONER.

An order of a Mining Commissioner under s. 85 of the Ontario Mining Act (R.S.O. 1914, c. 32) is appealable to a Divisional Court of the Appellate Division.

Re Watson and Monahan, 37 D.L.R. 333, 39 O.L.R. 358.

FROM SUMMARY CONVICTION—PETTY THEFT —QUASHING.

R. v. Sinclair, 32 D.L.R. 796, 38 O.L.R. 149, 28 Can. Cr. Cas. 350, quashing appeal from 31 D.L.R. 265, 36 O.L.R. 510, 27 Can Cr. Cas. 327.

COMPANY—REVOCATION OF CHARTER — EFFECT.

At the time leave to appeal to the Supreme Court was granted, the letters patent of the company appellant had been canceled under s. 77 of the Manitoba Companies Act; but subsequently its charter was revived under s. 130 of the same act. Per Fitzpatrick, C.J., Davies, Anglin and Brodeur, JJ. —The revocation of the charter operated as a mere suspension of the powers and functions of the company and the order-in-council reviving the letters patent of incorporation restored the company to its legal position at the time of the revocation as to the proceedings instituted between such revocation and the reinstatement of the company for an order allowing the present appeal to the Supreme Court of Canada. Per Duff, J.—Without deciding whether acts of the officers of the company during the interregnum are in all respects to be deemed acts of the company, it is clear that the company, by virtue of the statute, is to be deemed to have been in possession of its powers during that period, and the act of its officers in applying for the order allowing the appeal, done in the name of the company, could be and has been ratified. So long as there is no Dominion legislation inconsistent therewith, the capacity of a provincial corporation, as a legal persona to initiate and carry on an appeal in this court, is determined by the provincial law.

Kildonan Investments Limited v. Thompson, 38 D.L.R. 96, 55 Can. S.C.R. 272, affirming 21 D.L.R. 181, 25 Man. L.R. 446.

FROM JUDGMENTS ORIGINATING IN SURROGATE COURT.

Under s. 37 (d) of the Supreme Court Act, R.S.C. 1906, c. 139, an appeal to the Supreme Court of Canada from a judgment of the Appellate Division of the Supreme Court of Ontario, in a case originating in a Surrogate Court, is maintainable.

Trusts and Guarantee Co. v. Rundle, 26 D.L.R. 108, 52 Can. S.C.R. 114, affirming 32 O.L.R. 312.

EXPROPRIATION AWARD — PUBLIC UTILITIES ACT.

The right of appeal from an expropriation award provided by the Municipal Act (R.S.O. 1914, c. 204, Part XVI.) also exists in the case of an expropriation under the Public Utilities Act (R.S.O. 1914, c. 204).

Re Perram and Town of Hanover, 31 D.L.R. 142, 36 O.L.R. 582.

FROM DISCRETIONARY ORDERS UNDER MORATORIUM ACT—MORTGAGORS AND PURCHASERS RELIEF ACT. [George v. Lang, 30 D.L.R. 502, referred to.]

Re George and Lang, 30 D.L.R. 504, 36 O.L.R. 382.

RIGHT OF APPEAL—MARRIED WOMEN'S PROTECTION ACT (MAN.).

The right of appeal given under the Married Women's Protection Act, R.S.M. 1902, c. 107, to a single Judge of the Court of King's Bench from any order made thereunder in like manner as on an appeal from a County Court, has not been taken away by reason of s. 337 County Courts Act, R.S.M. 1902, c. 38, being amended and an appeal to the Court of Appeal substituted on appeals from County Courts by the Man. Statutes, 1906, c. 16; the provisions of s. 15 of the Interpretation Act, R.S.M. 1902, c. 89, provide that a repealed Act or any part thereof remains in force where there is no provision in the substituted Act relating to the same subject matter, and in consequence the appeal is governed by the law as it stood when the Married Women's Protection Act of 1902 was passed. [Attorney-General v. Sillem, 10 H.L.C. 704, referred to.]

Brizard v. Brizard, 15 D.L.R. 578, 24 Man. L.R. 113.

FROM JUDGMENT OF SURROGATE COURT.

Under the terms of s. 37 (d) of the Supreme Court Act an appeal lies to the Supreme Court of Canada from the judgment of the Appellate Division of the Supreme Court of Ontario in a case originating in a Surrogate Court of that province. On the merits the judgment of the Appellate Division, 32 O.L.R. 312, was affirmed.

Re Rundle, 26 D.L.R. 108, 52 Can. S.C.R. 114.

JURISDICTION—JOINDER OF SEVERAL ACTIONS —SEPARATE CONDEMNATIONS—SUPREME COURT ACT, S. 40, ARTS. 68-69 C.P.Q.

"L'Autorite" Ltd. v. Ibbotson, 43 D.L.R. 761, 57 Can. S.C.R. 340.

RESERVATION OF APPEAL PENDING ANOTHER ACTION.

The Appellate Division will, where circumstances render it convenient, reserve the right of appeal in one action, until the appeal in a second action between the same parties has been disposed of.

Cromwell v. Morris, 12 A.L.R. 107. [See 34 D.L.R. 305.]

APPEAL FROM ASSESSMENT—JURISDICTION OF SUPREME COURT.

Under s. 41 of the Supreme Court Act,

R.S.C. 1906, c. 139, the Supreme Court of Canada has jurisdiction to entertain an appeal from a judgment of the local government board of Saskatchewan fixing an assessment; the duty of the court, if the evidence satisfies it that the assessment appealed against exceeds the "fair actual value," or the "true value," of the property to a "substantial" extent is to allow the appeal and reduce the assessment to such "fair actual value" as is disclosed by the evidence. [Pearce v. Calgary, 9 W.W.R. 668, referred to.]

Rogers Realty Co. v. Swift Current, 44 D.L.R. 309, 57 Can. S.C.R. 534.

RIGHT OF APPEAL — WINDING-UP ACT — AMOUNT INVOLVED IN THE APPEAL.

Parent v. Matte, 24 Rev. de Jur. 140.

FROM LEAVE TO SUE.

There is neither review nor appeal from a judgment granting permission to sue.

Dufresne v. Crown Life Assurance Co., 19 Que. P.R. 263.

CONTEMPT OF COURT — SCANDALIZING THE COURT.

Fournier v. Attorney-General, 17 Can. Cr. Cas. 108.

MORTGAGE—ORDER OF LOCAL JUDGE AUTHORIZING COMMENCEMENT OF ACTION FOR FORECLOSURE AND ON COVENANT—MORTGAGORS AND PURCHASERS RELIEF ACT, 1915, ss. 2 (2), 5 (2)—NOTICE OF APPLICATION FOR ORDER NOT GIVEN TO MORTGAGOR LIABLE ON COVENANT—SERVICE OF NOTICE DISPENSED WITH—ORDER IMPROPERLY MADE EX PARTE—POWER OF JUDGE IN CHAMBERS TO RESCIND—RR. 217, 505 (1)—ACTION COMMENCED PURSUANT TO ORDER—WRIT OF SUMMONS SET ASIDE.

A mortgage made to the plaintiff by the defendant M., dated Nov. 1, 1913, being in arrear, the plaintiff on Dec. 24, 1918, obtained leave from a local judge to make a motion before him, returnable on Dec. 27, for an order for leave to commence an action for foreclosure. A notice of the motion was sent by registered post to a solicitor who had on behalf of M. been corresponding with the plaintiff's solicitor; the solicitor received the notice on Dec. 26, but he was not authorized to accept nor did he accept service for M. On Dec. 27, the local judge made an order permitting the plaintiff to commence an action for foreclosure and for judgment against M. on his covenant and for possession. The order provided that service of notice of the application on M. be dispensed with. Under the Mortgagors and Purchasers Relief Act, 1915, 5 Geo. V. c. 22, an order authorizing the commencement of an action on the mortgage was necessary:—Held, that the order was an ex parte one, and improperly made without notice to M.: ss. 2 (2) and 5 (2) of the Act; also, that a Judge in Chambers had power, under r. 505 (1) or r. 217, to rescind the order. [Re George and Lang, 36 O.L.R. 382, distinguished.] The order was rescinded and the writ of summons issued pursuant thereto set aside.

Copeland v. Merton, 44 O.L.R. 645.

TO COURT OF APPEAL—FROM TRIAL JUDGE DIRECT—CASE FOR FURTHER APPEAL TO SUPREME COURT OF CANADA—UNDER S. 48 (a) OF THE SUPREME COURT ACT.

Toronto and Niagara Power Co. v. Town of North Toronto, 3 O.W.N. 164.

TO PRIVY COUNCIL—"MATTERS OF PUBLIC IMPORTANCE" — MUNICIPAL ASSESSMENTS.

An application for a writ of mandamus directed to the members of a Court of Revision to hear an appeal from an assessment in the manner provided by s. 38 of the Vancouver Incorporation Act, 1900, is not "a matter of public importance" within the meaning of subs. (b) of rule 2 of the Rules regulating appeals to the Privy Council. [See Charleson v. Byrne, 22 D.L.R. 240, 21 B.C.R. 281.]

Re Charleson Assessment (No. 2), 21 B.C.R. 372.

JUDGMENT — ACTION ON CONTRACT — ACCOUNTS AGREED TO ON BASIS OF JUDGMENT — CONSENT JUDGMENT — JURISDICTION.

The judgment in an action on a contract for work done and material supplied allowed two certain items as extras, the amount to be determined by a reference. The parties then agreed as to the amount of the items. The formal judgment, on being drawn, was assented to by the defendant, and recited: "The parties hereto having settled the entire accounts between them on the basis of this judgment, and after making all proper deduction and allowances on both sides and it appearing from said accounts that the defendant is indebted to the plaintiffs in the sum of," etc. The defendant appealed from the judgment and the plaintiff took the preliminary objection that the judgment as drawn was a consent judgment and there was no appeal. Held, that as the judgment states that the parties have settled the entire accounts after making proper deductions and allowances, the result of which a certain amount is owing, the judgment must be construed as a consent judgment, and there is no appeal.

Royal Bank of Canada v. Skene & Christie, 25 B.C.R. 318.

FROM TAXATION OF COSTS.

Under rule 681 of The King's Bench Act, an appeal will lie from the taxation of costs between party and party as to items which have been objected to before the taxing officer, although such objections have not been put in writing and carried in before the officer as provided for in Rules 972 and 973. [Cooney v. Jickling (1912), 22 Man. L.R. 468, followed in preference to Caron v. Bannerman, 22 Man. L.R. 24, and Re Phillipps & Whitla (No. 1), 22 Man. L.R. 150.] In any event the rules requiring the carrying in of writ-

ten objections do not apply when the general principle of the taxation is objected to.

Robin Hood Mills Co. v. Maple Leaf Milling Co., 27 Man. L.R. 303.

UNDER SUMMARY CONVICTIONS ACT.

The Court of Appeal Act being subsequent in date of passage to the Summary Convictions Act, the provisions of s. 6 of the late Act prevail over s. 92 of the earlier one. The Court of Appeal has therefore jurisdiction to hear an appeal from the decision of a Supreme Court Judge on a stated case from a conviction by a magistrate, under the Summary Convictions Act. The provisions of subs. 4 of s. 7 of the Summary Convictions Act Amendment Act, 1914, that the appellant shall, within 3 days after receiving the case stated, transmit it to the court, is a condition precedent to the jurisdiction of the court to hear the appeal, and it cannot be waived. The provisions of the subsection not having been complied with, the court, notwithstanding strong circumstances shewing waiver, struck out the appeal.

R. ex rel, Burrows v. Evans, 23 B.C.R. 128.

INTERPLEADER BEFORE LOCAL MASTER.

The decision of a Master in an interpleader proceedings is subject to an appeal to a Judge in Chambers.

Douglas v. Vivian, 7 S.L.R. 80.

CROSS-APPEAL.

A cross-appeal cannot be asserted by merely giving a notice under rule 100 against persons who are not parties to and who are nowise concerned in the main appeal; under the circumstances of this case such notice might properly be given.

Pierson v. Crystal Ice Co. (Can.), [1917] 2 W.W.R. 1175, 1253, affirming 29 D.L.R. 569, 28 D.L.R. 759.

QUESTIONS OF VALUATION.

Unfavourable criticism of the existence of a right of appeal to the Supreme Court of Canada, where the sole question is one of valuation, and the Provincial Legislature has withheld a right of appeal to the Appellate Court of the province.

Pearce v. City of Calgary, 9 W.W.R. 668.

COURTS — JUDGMENTS — STAY OF PROCEEDINGS AFTER JUDGMENT PENDING APPEAL IN FOREIGN COURT FROM FOREIGN JUDGMENT SUED UPON.

Campbell v. Morgan, [1919] 1 W.W.R. 644.

IN GENERAL—QUEBEC.

No appeal lies to the Court of King's Bench (Que.) from a judgment of the Superior Court granting an application to set aside the collection roll of a town under the Cities and Towns Act. It makes no difference that, in the interval between the making of the application and the judgment the town whose roll is attacked has become annexed to and incorporated with the city of Montreal.

City of Montreal v. St. Denis Land Co., 22 Que. K.B. 238.

IN GENERAL—QUEBEC.

Art. 4614 of R.S.Q. 1909, does not apply to judgments rendered in cases brought under the Cities and Towns Act (arts. 5256 et seq.) and art. 5551 does not apply to judgments given by the Superior Court in proceedings under art. 50 C.P.Q. to quash a by-law of a city or town. There is, therefore, a right of appeal to the Court of King's Bench from final judgments of the Superior Court in such actions.

Ricard v. Town of Grand Mère, 22 Que. K.B. 272.

MUNICIPAL ASSESSMENTS.

There is no appeal to the Court of King's Bench from a judgment of the Circuit Court of the District of Montreal, which has dismissed an action for the reduction of a municipal valuation of immovables made by a municipal council.

Marcil Trust Co. v. Town of Dorval, 25 Que. K.B. 333, 17 Que. P.R. 405.

MUNICIPAL LAW—BRIDGES—DRAINAGE.

An appeal lies to the Circuit Court from the decision of a county council in respect to the petition of a town corporation regarding the regulation of works upon a bridge across a river which, at the same time, drains the lands of rural municipalities and of the town.

Town of Baie St. Paul v. Corp. of Charlevoix, 50 Que. S.C. 380.

ACQUIESCENCE IN JUDGMENT.

A letter of the secretary of a company, in answer to a demand made by the attorneys of a judgment creditor for the payment of their law costs, to the effect that he will take this up at once with the managing director and arrange for a settlement of the account, is not an acquiescence in the judgment which takes away the right of appeal.

Eastern Canada Fisheries v. McIntosh, 26 Que. K.B. 450.

FROM JUDGMENT REDUCING DAMAGES.

When the Court of Review reduces the amount of damages awarded by the lower court, it is a confirmation of the judgment for the reduced amount and the party who has inscribed in review has no right of appeal from the judgment rendered by the Court of Review.

Lachine, Jacquies Cartier and Maisonneuve Ry. Co. v. Kelly, 26 Que. K.B. 27.

ORDER ALLOWING DISCONTINUANCE OF EXPROPRIATION PROCEEDINGS — RIGHT OF APPEAL.

Re Lafontaine Park; City of Montreal v. Cushing, 40 Que. S.C. 1.

COURT OF REVIEW—WINDING-UP ACT (CANADA).

La Banque de St. Jean v. Bienvenu, 12 Que. P.R. 353.

COMBINES INVESTIGATION ACT—ORDER BY A JUDGE DIRECTING AN INVESTIGATION.

United Shoe Machinery Co. v. Drouin, 20 Que. K.B. 459.

TO COURT OF REVIEW — LIQUOR LICENSE CASES—MUNICIPAL BUSINESS.

There is no right of appeal to the Court of Review from the judgment of the Superior Court granting a motion for a declaration that the evocation to the Superior Court in a case in which the petitioner demands the annulment of a resolution granting a license for sale of intoxicating beverages is illegal and void. The inscription in such case should be dismissed on motion. When the Code of Procedure, by arts. 43 and 1006, declares that there will be no right of appeal in municipal matters that should be understood to apply to cases instituted pursuant to the provisions of the Code. This does not mean that there can be no appeal when a municipal question is in litigation and raised in an action brought under the common law.

Desjardins v. Village de Ste. Rose, 48 Que. S.C. 414.

CONFIRMATION OF LICENSE BY MUNICIPAL COUNCIL.

There is no appeal either to the Court of Review or the Court of King's Bench from a judgment dismissing a petition to quash a resolution of a municipal council confirming a certificate for a license presented according to the provisions of arts. 100 and 698 to 708 of the Municipal Code.

Pilon v. City of Lachine, 47 Que. S.C. 200.

EXPROPRIATION AWARD.

There is no appeal to the Court of Review from an award made by a Judge of the Superior Court under the provisions of the act for expropriation of the lands required for operation of hydraulic power. This appeal should be taken by action in the Superior Court under the provisions of art. 7294 of the Revised Statutes notwithstanding the amendment by 4 Geo. V. c. 55.

Quebec Development Co. v. Rousseau, 48 Que. S.C. 522.

(1 A—2)—TO PRIVY COUNCIL—CRIMINAL CODE.

S. 1025 of the Criminal Code, which purports to limit the right of appeal to the Judicial Committee of the Privy Council in criminal matters, does not apply to a prosecution by indictment for a noncriminal offence such as the class of noncriminal nuisances referred to in Cr. Code, s. 223.

Toronto Railway Co. v. The King, 38 D.L.R. 537, [1917] A.C. 630, 29 Can. Cr. Cas. 29, reversing 25 D.L.R. 586, 25 Can. Cr. Cas. 183, 23 Can. Ry. Cas. 183, 34 O.L.R. 589.

HABEAS CORPUS.

Notwithstanding the Habeas Corpus Act, R.S.O. 1897, c. 83, there is no appeal to the Ontario Court of Appeal from the unanimous judgment of the court below refusing to discharge the prisoner on habeas corpus where he is held under a conviction under the Ontario Liquor License Act, unless the Attorney-General certifies under s. 121 of the latter statute (R.S.O. 1897, c. 245), that the point in dispute is of sufficient importance to justify an appeal.

Re Leach and Fogarty, 18 Can. Cr. Cas. 487, 21 O.W.R. 919.

BAIL—HABEAS CORPUS.

The defendants were convicted by the Police Magistrate for a city, under s. 773 (f) of the Criminal Code, for keeping a disorderly house, and were sentenced to 30 day's imprisonment. On their behalf an appeal was lodged to the Court of General Sessions, under s. 749 of the Code; and an order was made by a Judge at Sessions that, upon the defendants entering into recognizances (of which he approved), they should be released from gaol. A Justice of the Peace went with the bondsmen to the gaol to have the recognizances properly entered into; but did not proceed, being informed by the gaoler that the defendants were not to be released:—Held, that, although the bondsmen had signed the bail-bonds, and although the defendants were ready and willing to enter into the recognizances, they had not in fact done so—assuming that s. 750 (c) of the Code was applicable; and were not entitled to be discharged upon habeas corpus. An appeal from the conviction to the sessions did not lie: The change in the Criminal Code, R.S.C. 1906, c. 146, s. 797, by 3 & 4 Geo. V. c. 13, s. 28, takes away the right of appeal which was given by s. 797, and limits it to the special case of two Justices of the Peace. [R. v. Dubuc, 16 D.L.R. 318, 22 Can. Cr. Cas. 426, approved.]

R. v. Merker & Daniels, 37 O.L.R. 582, 10 O.W.N. 452.

(§ 1 A—3)—PROHIBITION — COURT OF FINAL RESORT OF PROVINCE — SUPREME COURT ACT, R.S.C. c. 139, ss. 39 (c) AND 48 AS AMENDED BY 8 & 9 GEO. V. c. 7, s. 3.

There is no appeal to the Supreme Court of Canada from the court of final resort of any province except Quebec in a case of prohibition under the Supreme Court Act, R.S.C. c. 139, s. 39 (c), where the case does not come within some of the provisions of s. 48, as amended by 8 & 9 Geo. V. c. 7, s. 3. [Re McNutt, 10 D.L.R. 834, 47 Can. S.C.R. 259; Desormeaux v. Ste. Thérèse, 43 Can. S.C.R. 82; Bouchard v. Sorgius, 38 D.L.R. 59, 55 Can. S.C.R. 324, 29 Can. Cr. Cas. 245, followed; Trusts Corp. v. Rundle, 26 D.L.R. 108, 52 Can. S.C.R. 114, distinguished.]

Mitchell v. Tracey and Fielding, 46 D.L.R. 520, 58 Can. S.C.R. 640.

(§ 1 A—5) — WORKMEN'S COMPENSATION ACT.

Any decision or order of a judge under

the Workmen's Compensation Act. (Man.), based on an erroneous conclusion from the evidence, is appealable to the Court of Appeal.

Holland v. Rumely Products Co., 31 D.L.R. 426, [1917] 1 W.W.R. 454.

B. FINALITY OF DECISION.

(1 B—5)—REMITTING CASE FOR WANT OF AUTHORITY TO SUE.

A judgment which without deciding the merits remits the case to the Court of first instance for the production of authority to the wife by the husband for the purpose of prosecuting the action is final in its nature from which an appeal will lie. [Chiniquy v. Begin, 20 D.L.R. 347, reversed; 7 D.L.R. 65, varied.]

Chiniquy v. Begin, 24 D.L.R. 687, 24 Que. K.B. 294.

RIGHT OF APPEAL—ORDER OF SURROGATE COURT JUDGE—CONDITIONS OF ORDER—PERSONA DESIGNATA — SURROGATE COURTS ACT, S. 34 AND 69.

An order made by a Surrogate Court Judge under the provisions of the Surrogate Courts Act, R.S.O. 1914, c. 62, s. 69(7) directing an action to be brought in the Supreme Court is made by him as persona designata, and there is no right of appeal therefrom.

Re Morrow, 50 D.L.R. 24, 46 O.L.R. 231.

ORDER OF REFERENCE.

Questioned whether an order directing a reference is a "final judgment" to give the court jurisdiction to entertain an appeal on the merits of the case.

Jones v. Tucker, 30 D.L.R. 228, 53 Can. S.C.R. 431, affirming 25 D.L.R. 278, 8 S.L.R. 387.

FINALITY OF DECISION.

An order which does not finally dispose of the substantial issues in an action is not, for the purposes of appeal, a final order, but is to be regarded as interlocutory.

Bleasdell v. Spencer, 11 D.L.R. 75.

FINAL JUDGMENT — REFERENCE — RESERVATION OF FURTHER DIRECTIONS AND COSTS.

Crown Life Ins. Co. v. Skinner, 44 Can. S.C.R. 616.

ORDER IN CHAMBERS—"FINALLY DISPOSE OF ACTION"—LEAVE TO APPEAL.

An appeal by the plaintiffs from the order of Middleton, J., setting aside order of the Master in Chambers, whereby two British companies were added as defendants in this action and permission was given to serve process upon them out of the jurisdiction, was dismissed, upon the ground that the order appealed from did not "finally dispose of the whole or any part of the action," and leave to appeal had not been obtained: Rule 507 (2).

Boston Law Book Co. v. Canada Law Book Co., 43 O.L.R. 233, affirming 43 O.L.R. 13.

SHERIFF'S INTERPLEADER—FINAL ORDER.

Held, that an order of a District Court Judge summarily determining in Chambers the validity of a claimant's claim in a sheriff's interpleader proceeding is a final order, and that therefore no appeal lies therefrom to a Judge of the Supreme Court in Chambers under s. 56 of the District Courts Act.

Walton v. Berry, 11 S.L.R. 66, [1918] 1 W.W.R. 564.

MOTION FOR JUDGMENT ON REPORT VARIED ON APPEAL—PROPOSED APPEAL TO SUPREME COURT OF CANADA—PREJUDICE—STAY OF PROCEEDINGS—SUPREME COURT ACT, R.S.C. 1906, c. 139, s. 2 (E)—3 & 4 GEO. V. c. 51, s. 1—4 & 5 GEO. V. c. 15, s. 1—"FINAL JUDGMENT."

Harrison v. Mathieson, 10 O.W.N. 117, 190.

FINALITY OF DECISION—MASTER'S REPORT—ITEMS OF CLAIM.

Re Murdock Brothers' Estate, (Donovans Claim), 6 O.W.N. 377.

COMPANY — WINDING-UP — CONTRIBUTORIES — ORDER OF MASTER REVERSED BY JUDGE IN COURT — MOTION FOR LEAVE TO APPEAL TO DIVISIONAL COURT — IMPORTANCE OF QUESTION — CONFLICTING DECISIONS — DOUBT AS TO CORRECTNESS OF ORDER.

Re Port Arthur Waggon Co.—Tudhope's Case—Sheldon's Case, 16 O.W.N. 297.

INTERPLEADER — EXTENSION OF TIME — GROUNDS.

The decision of a judge on an interpleader issue is not a final judgment and an appeal must be taken within 15 days. Upon an application to extend the time for appealing from a judgment on the grounds that the solicitor's agent was lax in giving information as to the entry of judgment and that judgment had not been given on a supplementary application by the respondent to include in the judgment a special clause as to costs. Held, that no distinction can be drawn between the laxity of an agent and that of the solicitor and as the supplementary motion could be disposed of by a separate order and did not in any way affect the completeness of the judgment appealed from, the extension should not be granted.

Frumento v. Shortt, Hill & Duncan, 22 B.C.R. 427.

FINALITY OF DECISION.

When, to a complaint to the Public Utilities Commission, relating to excessive charges by a public utility, an objection is taken by the latter that the complaint does not set forth the pendency of a contestation, nor an interest in the complainant, a decision by the Commission that overrules the objection, is not a "final" decision as to its jurisdiction or upon a "question of law" (art. 763, R.S.Q. 1909), from which an appeal will lie to this court. Per Carroll, J.:—The Commission has the power to entertain and dispose of such a complaint, made by a person between whom

and the public utility, no contestation on the matter exists.

Montreal Light, Heat & Power Co. v. Gribble, 21 Que. K.B. 193.

A judgment by which the Superior Court maintains a declinatory exception in an action for recovery of penalties for alleged violation of the Public Health Law, and refers the cause to the Circuit Court as having exclusive jurisdiction in the matter, is a judgment which definitively disseizes the Superior Court of the cause, and that in consequence an appeal to the King's Bench from such judgment may be taken "de plano" and without having to be allowed under art. 1121 C.P. [Benoit v. Corp. St. Denis, K.B., Montreal, unreported, followed.]

Goudreau v. Corp. Montmagny, 18 Rev. de Jur. 372.

FINALITY OF DECISION.

A judgment which, on motion therefor, quashes a writ of saisie-arrêt before judgment is final and an appeal lies therefrom as of right.

Moffatt v. Montgomery, 14 Que. P.R. 229.

AS TO PARTICULARS.

A judgment ordering or refusing particulars in an action is not appealable to the Court of Review.

Garon v. Girard, 52 Que. S.C. 253.

ORDERS OF PUBLIC UTILITIES COMMISSION.

There is an appeal to the Court of King's Bench from every final judgment of the Public Utilities Commission whether the Commission sits in first instance or in appeal.

Montreal Light, Heat & Power Co. v. City of Montreal, 26 Que. K.B. 202.

PRIVY COUNCIL—JURISDICTIONAL AMOUNT.

The judgment herein of the Appellate Division, 37 D.L.R. 589, held to be a final judgment within the meaning of the rules governing appeals to His Majesty in Council and the matter in dispute held to be of the value of £1,000 or upwards.

Calgary Milling Co. v. American Surety Co. and Tromanhauser (Can.), [1917] 3 W.W.R. 552; application for leave to appeal to Privy Council from 37 D.L.R. 589, [1917] 2 W.W.R. 1253, reversing 31 D.L.R. 549.

FINAL JUDGMENT—CROSS-APPEAL—RULE 100 OF SUPREME COURT RULES—CAN. STATS., 1913, c. 51, s. 1; R.S.C. 1906, c. 139, s. 2 (e).

The rule as to the right to the Supreme Court of Canada in cases pending when the 1913 amendment to the Supreme Court Act was passed is that except in equitable proceedings and other cases specially provided for, an appeal to the Supreme Court of Canada will not lie from any order or judgment pronounced in the course of an action brought in the courts of a province, where the procedure is modelled on the English system, although it may have the effect of disposing of substantial rights, unless it finally determines and concludes the action itself of some distinct claim or ground of action. [Hesseltine v. Nelles, 47 Can. S.C.R. 230, and Doran v. Jewell, 49 Can. S.C.R. 88, followed.] The amendment to the Supreme Court Act of 1913 was assented to on June 6, 1913, and provides that save as regards appeals from the Province of Quebec, "final judgment" means any judgment, rule, order or decision which determines in whole or in part any substantive right of any of the parties in controversy in any action, suit, cause, matter or other judicial proceeding, and, as regards appeals from the Province of Quebec "final judgment" means as heretofore, any judgment, rule, order or decision whereby the action, suit, cause, matter or other judicial proceeding is finally determined and concluded. Cross-appeals under r. 100 of the Supreme Court Rules, upon the failure of the main appeal for want of jurisdiction, fall with such main appeal.

Picard v. Lindmark, 6 W.W.R. 986.

(§ I B—6)—ORDERS OF COUNTY COURT—STRIKING OUT PLEADINGS.

An order of a senior Judge of the County Court setting aside an order of the junior judge which granted leave to file a statement of defence under r. 56 (5) (Ont.), and striking out a counterclaim filed thereunder, is final in its nature from which an appeal will lie. [County Court Act, R.S.O. 1914, c. 59, s. 40 (2); Smith v. Traders Bank, 11 O.L.R. 24; Brennen & Sons v. Thompson, 22 D.L.R. 375, followed.]

Davis Acetylene Gas Co. v. Morrison, 23 D.L.R. 871, 34 O.L.R. 155.

DISMISSAL—OBJECTIONS TO FORM.

A judgment dismissing an opposition to judgment founded entirely upon objections to form is a final judgment and appealable de plano.

Larue v. Liontos, 17 Que. P.R. 373.

(§ I B—7)—DISMISSAL—ALIEN ENEMY—NEW TRIAL.

A trial judge dismissed an action, the defences in which were a plea that the plaintiff was an alien enemy and a denial of the debt sued on, on the ground that the plaintiff was an alien enemy with leave to bring further action after the war. The Court of Appeal of B.C. held that the plaintiff was not an alien enemy and ordered a new trial:—Held, that the judgment of the Court of Appeal was a final judgment and an appeal lay to the Supreme Court of Canada under s. 38 of the Supreme Court Act.

Newman v. Bradshaw (Can.), [1917] 2 W.W.R. 743. [See 23 B.C.R. 492, [1917] 1 W.W.R. 1223, reversing 10 W.W.R. 1332. See also 28 D.L.R. 769, 22 B.C.R. 420.]

(§ I B—11)—ACTION FOR NEWSPAPER LIBEL—ORDERS FOR SECURITY FOR COSTS.

By virtue of subs. 4 of s. 12 of the Libel and Slander Act, R.S.O. 1914, c. 71, no appeal lies from a substantive order for security for costs against a plaintiff in an action for newspaper libel made by a Judge

in Chambers in review of the Master's Order in reference thereto.

Augustine Automatic Rotary Engine Co. v. "Saturday Night," Ltd., 24 D.L.R. 767, 34 O.L.R. 167.

COSTS.

The Court of Appeal will not reverse a judgment upon a question of costs only, when no principle has been violated.

Roy v. Denis, 20 D.L.R. 982, 23 Que. K.B. 517.

COSTS — TAXATION — RIGHT OF REVIEW BY LOCAL MASTER.

Application by defendant to review the plaintiff's bill of costs as taxed by the local registrar, is in the nature of an appeal and the local Master has no authority to entertain it. [Rule 620, s. (c) Saskatchewan Rules of Court, 1911, referred to.]

Clarke v. Fox, 9 D.L.R. 1, 6 S.L.R. 21.

AS TO COSTS.

It is not necessary that the "special reasons," for which the court refuses to award costs to a successful defendant against the plaintiff, should rest upon grounds of legal responsibility. If the reasons for such refusal do not disclose an error in principle, the decision should not be reversed on appeal.

Van-Felson v. Bourdreau, 18 Rev. de Jur. 216.

(§ I B—12)—RIGHT OF APPEAL—RESTRAINING ORDER—FINALITY—CONTINUITY.

An order obtained by an intervening assignee for the benefit of creditors enjoining the receiver appointed at the instance of a judgment creditor by way of equitable execution in respect of the debtor's property generally from collecting rents in respect of which the assignee had the superior claim, is interlocutory and not final as regards the right of appeal, although it may have a continuous effect for an indefinite time. [Blakey v. Latham (1889), 43 Ch.D. 23, and Norton v. Norton (1900), 99 L.T. 709, referred to.]

Bleasdell v. Spencer, 11 D.L.R. 75.

INJUNCTION.

When a Judge of the Superior Court, on the production of a detailed petition supported by an uncontested affidavit, orders the issuance of a writ of interlocutory injunction, the Court of Appeal will not allow an appeal from that interlocutory judgment.

Corporation de la Ville de Joliette v. Pellant, 27 Que. K.B. 78.

A judgment dismissing a petition for interlocutory injunction is a final judgment which may be appealed, de plano.

Cowansville Hotel Co. v. Beatty, 19 Que. P.R. 144.

(§ I B—15)—INTERLOCUTORY ORDER—MOTION FOR DISMISSAL.

An order overruling a motion for the striking out of a statement of claim and the dismissal of an action based thereon against a principal after judgment had been recovered against the agent is "final in its nature," and not "merely interlocutory" within the meaning of s. 40 (2) of the County Courts Act, R.S.O. c. 59, from which an appeal properly lies.

M. Brennen & Sons v. Thompson, 22 D.L.R. 375, 33 O.L.R. 465. [Followed in Davis Acetylene Gas Co. v. Morrison, 23 D.L.R. 871.]

DISMISSAL OF MOTION TO SET ASIDE SERVICE.

As the right to serve a summons out of the jurisdiction is not a substantive right, an order dismissing a motion to set aside the service of a writ of summons out of the jurisdiction is not a final judgment within the Supreme Court Act (R.S.C. 1906, c. 139, s. 2 (e), as amended by 1913, c. 51, s. 1) and, therefore, no appeal lies to the Supreme Court of Canada from a judgment refusing to set aside such a service.

St. John Lumber Co. v. Roy, 29 D.L.R. 12, 53 Can. S.C.R. 310, quashing appeal from 44 N.B.R. 88.

FINAL DECISION.

The refusal of a District Court Judge to confirm a referee's report under an order of reference is not a "final decision" within the purview of s. 48 of the Alberta District Courts Act, 1907, c. 4, where the decision from which the appeal is taken does not in fact determine the rights of the parties. [Baby v. Ross (1892), 14 P.R. (Ont.) 440; and Ward v. Serrell, 3 A.L.R. 138, applied.]

Bennefield v. Knox, 17 D.L.R. 398, 7 A.L.R. 346.

FINALITY OF DECISION—CONTROVERTED ELECTION—REGULARITY OF PETITION.

An appeal to the Manitoba Court of Appeal lies from an order in a controverted election proceeding under the Controverted Elections Act, R.S.M. 1902, c. 34, from an order setting aside, as having been made without jurisdiction, prior orders extending the time for service of the petition and for substitutional service where the setting aside of those orders if allowed to stand would end the entire proceedings as the statutory period for service apart from the extension order had expired when the order appealed from was made. [Re Shoal Lake Election, 5 Man. L.R. 57, discussed.]

Re Gimli Election, Rejeski v. Taylor (No. 2), 14 D.L.R. 414, 23 Man. L.R. 678.

INTERLOCUTORY JUDGMENT.

A judgment in an action for boundary which dismisses a plea of prescription, sets aside the report of a surveyor, previously appointed, based on a prescriptive title, and appoints a new surveyor to make a fresh report, is an interlocutory and not a final judgment, and an appeal therefrom to the Court of Review can only be taken in accordance with the provisions of arts. 1202a and following (C.P. Que. 8 Edw. VII. c. 74, s. 6). [Mercier v. Barrette, 25 Can. S.C.R. 94, specially referred to.]

Bohl v. Caron, 4 D.L.R. 772, 41 Que. S.C. 236.

ORDER OF JUDGE IN CHAMBERS—FINAL OR INTERLOCUTORY—NECESSITY FOR LEAVE—RULE 507.

Morrison v. Morrison, 11 O.W.N. 359.

An order of the County Court Judge setting aside a judgment and allowing the defendant to come in and defend on terms is not a decision upon a point of law and there is no appeal from such an order under s. 80 of the County Courts Act, C.S. 1903, c. 116. [Ex parte McCulley, 20 N.B.R. 87, followed.]

Joiens v. Lockhart, 40 N.B.R. 455.

INTERLOCUTORY JUDGMENT.

There is no appeal from an interlocutory order requiring a witness to file in court a document which he has in his possession.

Dubee v. Vipond, 14 Que. P.R. 386.

INTERLOCUTORY ORDER—NOTICE OF APPEAL.

Judgment having been entered by default and damages ordered to be assessed, the plaintiff gave notice of the date upon which the damages were to be assessed. On the hearing the defendant moved to set aside the judgment and that he be allowed in to defend. This motion was dismissed, and the damages were then assessed and final judgment entered. Thirty-five days later the defendant gave notice of appeal, both from the final judgment and from the order refusing to reopen the case. On the hearing of the appeal respondent raised the preliminary objection that the order refusing to reopen was interlocutory; that the notice of appeal was, therefore, out of time and the appeal should be dismissed. Held, that the order refusing to reopen the case being an interlocutory order, the notice of appeal was out of time, and the appeal should be dismissed.

Chilliwack Evaporating & Packing Co. v. Chung, 25 B.C.R. 90, [1918] D. 1 W.W.R. 870.

A judgment dismissing an exception to form, which raises a question of delay, is not an interlocutory judgment from which an appeal should be allowed.

Caressa v. David, 20 Que. P.R. 225.

MOTION FOR INTERROGATORIES.

A judgment dismissing a motion to have certain interrogatories on articulated facts held pro confessis, is not an interlocutory judgment on which appeal will be allowed.

Bergeron v. O'Brien, 20 Que. P.R. 233.

FROM CONVICTION FOR INDICTABLE OFFENCE.

An appeal lies to the Court of King's Bench, appeal side, from a judgment of a court or judge upon a charge of an offence triable on indictment, and not shewn to have been treated by way of summary conviction.

Rex v. Morisset, 26 Que. K.B. 481.

SEPARATION DE CORPS—INTERLOCUTORY JUDGMENT FOR TEMPORARY MAINTENANCE.

There is no appeal to the Court of Review from an interlocutory judgment delivered by the Superior Court in an action en séparation de corps granting a temporary elementary maintenance and a provision for costs.

Dansereau v. Beausoleil, 47 Que. S.C. 393.

INTERLOCUTORY JUDGMENT—ADJOURNMENT.

There is no appeal to the Court of King's Bench for an interlocutory judgment refusing to adjourn the hearing of a case on account of the absence of an indispensable witness.

Choquette v. Rousseau, 25 Que. K.B. 185.

INTERLOCUTORY JUDGMENT — MOTION TO STRIKE OUT ALLEGATION IN REPLY.

An interlocutory judgment, dismissing a motion asking that the allegations of fact in a reply to a defence may be struck out as illegal and tending to reform the action, is not susceptible of appeal within the terms of art. 46 of the Code of Procedure.

Beauchemin v. Versailles, 24 Que. K.B. 549.

PROCEDURE—APPEAL TO THE COURT OF APPEAL — INTERLOCUTORY DECREE — DECISION ON THE EXAMINATION AS TO THE ADMISSIBILITY OF THE EVIDENCE—REQUEST FOR LEAVE TO APPEAL—C.C.P. ART. 53A.

There is no appeal to the Court of Appeal from decisions rendered by the Superior Court in the course of an examination of a case, admitting or rejecting the evidence offered by one of the parties.

Frawley v. Roux, 56 Que. S.C. 254.

INTERLOCUTORY JUDGMENT.

A judgment ordering preuve avant faire droit is not an interlocutory judgment subject of appeal.

Bourassa v. Bourassa, 26 Que. K.B. 521.

(§ I B—16)—ORDERING ARREST OF BAILIFF FOR FAILURE TO MAKE RETURN—INSCRIPTION IN REVIEW.

A judgment, authorizing the curator to a judicial abandonment of property to continue certain proceedings and granting a rule nisi for arrest of a bailiff who has not made his return into court of the money, is not a final judgment and cannot de plano be inscribed in the Court of Review.

Laurentides Brique et Sable Co. v. Charron, 48 Que. S.C. 4.

AS TO ATTACHMENT OR ORDER FOR SEQUESTRATION.

When the carrying out of a judgment of sequestration will effect a disposal of the rights of either party such as cannot be recalled or rectified by the final judgment on the merits, such judgment of sequestration is a final judgment from which an appeal lies de plano and without leave.

The Chicoutimi Pulp Co. v. The Jonquieres Pulp Co., 18 Rev. de Jur. 83.

INSCRIPTION IN REVIEW—JUDGMENT DECLARING SEIZURE BINDING—GARNISHMENT.

A judgment of the Superior Court declaring a seizure by garnishment binding is not a final judgment; and an inscription in review made of such judgment without

leave of the court may be dismissed on motion.

Kaine v. Morgan, 48 Que. S.C. 424.

(§ I B—18)—Eminent domain.

An appeal lies, under s. 58 of the King's Bench Act, to the Court of Appeal from an order setting aside an award of damages made by an arbitrator in a proceeding to open a public street over private property, notwithstanding that the provisions of the city charter, under which the proceedings were instituted, did not provide for an appeal from the order of the Court of King's Bench. The power of the Court of King's Bench, under s. 823 of the charter of the city of Winnipeg, pertaining to the award by arbitrators of compensation for land taken for a public street, is not exhausted upon that court setting aside an award, and an appeal lies from such order to the Court of Appeal, which, thereupon, has all the powers set forth in that section upon the Court of King's Bench.

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305.

Right of appeal from award by arbitration under Ontario Ry. Act, R.S.O. 1914, c. 185—Judge of High Court Division—Further appeal to Divisional Court.

Compensation for land compulsorily taken by a railway under the Ontario Railway Act is fixed by arbitration as provided for in this statute. An appeal from the arbitration award lies, first of all to a judge of the High Court Division in the Supreme Court of Ontario, and a further appeal from his order to a Divisional Court of the Appellate Division. [Bireley v. T. H. & B. R. Co. (1898), 25 A.R. (Ont.), 88, distinguished.]

Re Russell and Toronto Suburban R. W. Co., 50 D.L.R. 726.

Homologation of arbitrators' report.

A judgment of the Superior Court homologating an arbitrators' report of the amount of damages caused to property by a municipality is interlocutory from which no appeal "de plano" lies to the Supreme Court of King's Bench without leave.

Riopelle v. City of Montreal, 24 D.L.R. 511, 24 Que. K.B. 148.

Motion for leave to appeal from decision of County Court Judge upon appeal from award under School Sites Act, R.S.O. 1914, c. 277, s. 20—Refusal of leave.

Re McBeath and Public School Board of Section 16 Scarborough, 16 O.W.N. 180.

Expropriation award—Inscription in review—R.S.C., c. 37, art. 209.

Although there is an appeal from the award of arbitrators, under the Railway Act of Canada (R.S.C., c. 37, art. 209), to the Superior Court, the judgment of this last court cannot be inscribed in review, whether the Superior Court maintained or set aside the award.

Lachine, Jacques Cartier and Maisonneuve Railway Co. v. Dame Theberge and L. A. Bedard, mis en cause, 46 Que. S.C. 521.

(§ I B—19)—Rule nisi—Contempt.

A judgment ordering a rule nisi against a defendant for contempt of court is an interlocutory judgment from which there is no appeal de plano.

Martin v. Tourangeau, 25 Que. K.B. 161.

(§ I B—21)—Prorate decrees—Surrogate discretion under will.

Where a Surrogate Court Judge has exercised reasonable discretion in fixing a sum for support and maintenance of a legatee under the provisions of a will, where the question of amount was referred to him by an order of the High Court, his decision will not be interfered with on an appeal therefrom. An appeal lies to the Ontario Supreme Court from an order of a Surrogate Court Judge adjusting an allowance for maintenance under a will, which, adjustment was referred to the Surrogate Judge by the court on disposing of an application made by the executors under Con. Rule 938 (Ont.), for the construction of the will. [Re Corkett (No. 1), 4 D.L.R. 561, 3 O.W.N. 1134, referred to.]

Re Corkett (No. 2), 9 D.L.R. 135, 4 O.W.N. 632, 23 O.W.R. 732.

Surrogate order—Passing executor's accounts—Executor's compensation.

An appeal lies to the King's Bench in Manitoba from that part of an order made in the Surrogate Court fixing and allowing the executor's compensation on the passing of his accounts. [Re Alexander, 31 O.R. 167, referred to.]

Re Paterson Estate, 17 D.L.R. 466, 24 Man. L.R. 217.

C. Criminal cases.

(§ I C—25)—Refusal of certiorari in summary conviction.

No appeal lies in British Columbia from the refusal of a certiorari in respect of a summary conviction under the Criminal Code.

R. v. Kwong Yick Tai, 22 D.L.R. 323, 24 Can. Cr. Cas. 28, 21 B.C.R. 127.

Question of law—Corroborative evidence.

Where corroborative evidence is not required by statute and there is nothing to shew that the judge trying a criminal charge without a jury had misdirected himself upon a matter of law, it is irregular to reserve for the Court of Appeal the question whether the evidence disclosed sufficient corroboration of an accomplice's evidence, such not being in such circumstances a "question of law" within Cr. Code, s. 1014. [R. v. Bechtel, 5 D.L.R. 497 and 9 D.L.R. 552, 19 Can. Cr. Cas. 423 and 21 Can. Cr. Cas. 40, referred to.]

R. v. McClain, 23 D.L.R. 312, 23 Can. Cr. Cas. 488, 8 A.L.R. 73, 30 W.L.R. 388.

POLICE MAGISTRATE—ORDER MADE UNDER MASTERS AND SERVANTS ORDINANCE—RIGHT OF APPEAL—SUMMARY CONVICTIONS.

Foster v. Hope, 22 D.L.R. 906, 8 W.W.R. 997.

RESERVED CASE—PERJURY—EXAMINATION FOR DISCOVERY.

R. v. Howley, 8 D.L.R. 1025, 22 Can. Cr. Cas. 108.

CRIMINAL LAW—ORDER REFUSING MOTION TO QUASH SUMMARY CONVICTION.

Where a motion to quash a summary conviction has been dismissed and the conviction ordered to be amended under Code, s. 1124 as to a defect in form, leave to appeal from the dismissal should be refused, if the evidence warranted all the amendments necessary to make a good conviction.

The King v. Demetrio, 1 D.L.R. 515, 20 Can. Cr. Cas. 318, 3 O.W.N. 602.

RIGHT OF APPEAL—SEC. 15 OF THE CR. CODE, 1906, MADE APPLICABLE BY PROVINCIAL STATUTE — JURISDICTION OF COURT OF KING'S BENCH, QUEBEC.

Since sec. 3982 (j) of c. 35, of 1 Geo. V. of Quebec, regulating the sale of cocaine, morphine and their compounds, expressly provides that s. 15 of the Criminal Code regulating appeals should apply to prosecutions thereunder, the Court of King's Bench has, by virtue of such act, as well as under judicial authority, jurisdiction to entertain an appeal from a conviction under such act. [The King v. Bigelow, 8 Can. Cr. Cas. 132; The King v. McLeod, 12 Can. Cr. Cas. 73; Scottstown Corporation v. Beauchesne, 5 Que. K.B. 554; Superior v. City of Montreal, 3 Can. Cr. Cas. 379; subs. 27 of s. 91 of British North America Act, 1867; subs. 14 of s. 92 of the same Act, and s. 749 of the Criminal Code, specially referred to.]

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

RIGHT TO APPEAL IN CRIMINAL CASES—ACCEPTANCE OF CASH BAIL WITHOUT AUTHORITY—EFFECT ON THE APPEAL.

Even though a County Court does not possess jurisdiction to permit the giving of cash bail on an appeal from a conviction by a police magistrate under Cr. Code (1906), s. 797, upon a summary trial, an appeal is not lost where the attorney for the prosecution assents to the acceptance by the court of such bail, receives payment of the money, and permits the prisoner to go at large.

Robinson v. District of Saanich and Aikman, 7 D.L.R. 499, 20 Can. Cr. Cas. 241.

CRIMINAL CASES—APPEAL—OTHER REMEDY—STATED CASE.

The Ontario Court of Appeal, on a criminal appeal, has no jurisdiction to intervene in a case of error or misunderstanding, its jurisdiction being limited by s. 1014 of the Criminal Code in a stated case to questions of law; the application for relief in a case of error or misunderstanding being to the Minister of Justice, under s. 1022 of the Criminal Code (1906).

R. v. Pilgar, 8 D.L.R. 830, 20 Can. Cr. Cas. 507, 27 O.L.R. 337, 23 O.W.R. 433.

CRIMINAL CASES.

A Court of Criminal Appeal has the right to order a new trial when new evidence discovered before the rendering of the verdict is not allowed to be placed before the jury. After verdict rendered, however, only the Minister of Justice could order a new trial.

R. v. Manconi, 3 D.L.R. 112, 20 Can. Cr. Cas. 81.

JURISDICTION—SUMMARY TRIAL BY MAGISTRATE—SECRET COMMISSIONS ACT, 8-9 EDW. VII. (CAN.) C. 33.

Where a prosecution before a police magistrate for an offence under the Secret Commissions Act, 8-9 Edw. VII. (Can.) c. 33, is brought as for an indictable offence and is tried on the defendant's election under the Summary Trials clauses of the Cr. Code, 1906 (Part 16), and the charge, while triable in either method, is not brought under the Summary Convictions clauses of the Code (Part 15), there is no right of appeal by the prosecutor from the dismissal of the charge.

Re Buchanan, 15 D.L.R. 232, 23 Man. L.R. 943, 26 W.L.R. 447.

QUALIFICATION OF JUROR—CRIMINAL LAW—OBJECTION NOT TAKEN TILL AFTER VERDICT.

The question of qualification of a juror in a criminal case is a question of fact which cannot be raised after verdict rendered and the Court of Appeal has no jurisdiction to entertain a reserved case thereon.

R. v. Battista, 9 D.L.R. 138, 21 Can. Cr. Cas. 1.

RIGHT OF APPEAL—CRIMINAL CASES—ESTREAT ORDERS.

Whether or not the process in execution thereof is civil and not criminal process, the order of estreat made by a County Judge presiding in a criminal court on the forfeiture of bail given for the appearance of the accused before a magistrate in proceedings under the Fugitive Offenders Act, R.S.C. 1906, c. 154, is in itself a proceeding in a criminal matter, and no appeal lies therefrom to the Court of Appeal (B.C.). [Re Talbot's Bail, 23 O.R. 65; R. v. Creelman, 25 N.S.R. 404, and R. v. Starkey, 7 Man. L.R. 489, distinguished.]

R. v. Harvie, 9 D.L.R. 432, 20 Can. Cr Cas. 369, 18 B.C.R. 5, 23 W.L.R. 26.

REHEARING IN DISORDERLY HOUSE CASE.

The intention of Cr. Code, 797, as amended 1913, c. 13, is to limit the right of appeal by way of rehearing in respect of summary trial convictions for keeping a disorderly house so that there should be no such appeal where a police magistrate or other functionary having the powers of two justices had made the conviction; and the right of appeal given by s. 797 is limited to cases where two persons who are justices of the peace are

sitting together as a summary trial court under Part XVI. for the trial of an offence within subss. (a) or (f) of Cr. Code, s. 773, i.e., theft or receiving where under $10 or keeping a disorderly house.

R. v. Brown, 30 D.L.R. 645, 26 Can. Cr. Cas. 97, 9 A.L.R. 494, 34 W.L.R. 575.

CRIMINAL CASES—KEEPING DISORDERLY HOUSE—LIMITED RIGHT OF APPEAL.

R. v. Dubuc, 16 D.L.R. 318, 22 Can. Cr. Cas. 426.

CRIMINAL CASES — INDICTMENT — STATUS OF PRIVATE PROSECUTOR.

The right of the "prosecutor" to appeal on a question of law by case reserved under Cr. Code, s. 1014 (3) or by leave under Cr. Code, s. 1015, on an acquittal of the accused, is limited to the Crown when the proceedings on the indictment are conducted by the Crown counsel; and where the Crown counsel was refused a reserved case at the trial, whereupon the informant, who had been bound over to prefer the indictment and had done so, also applied and was refused, the latter has no locus standi to make a subsequent application under Code, s. 1015 for leave to appeal where the Crown makes no application. [R. v. Gilmore, 7 Can. Cr. Cas. 219, 6 O.L.R. 286, and R. v. Patteson, 36 U.C.Q.B. 129, referred to.]

R. v. Fraser, 19 D.L.R. 470, 23 Can. Cr. Case. 140, 30 O.L.R. 598.

RIGHT OF APPEAL—DISCHARGE ON HABEAS CORPUS UNDER EXTRADITION COMMITMENT.

In the absence of Federal legislation permitting it, an appeal does not lie from an order discharging on habeas corpus a person from custody under a commitment for extradition. [Cox v. Hakes, 15 App. Cas. 506, and R. v. Carroll, 14 Can. Crim. Cas. 338, 14 B.C.R. 116, followed; Barnardo v. Ford, [1892] A. C. 326, and Re Hall, 8 A.R. (Ont.) 135, distinguished.]

Re Tiderington, 5 D.L.R. 138, 19 Can. Cr. Cas. 365, 17 B.C.R. 81, 20 W.L.R. 355.

ERROR IN INSTRUCTION AS TO CORROBORATION OF ACCOMPLICE.

A new trial will be ordered on the ground of a mistrial where the trial judge erroneously states to the jury that there was corroboration of the testimony of an accomplice and also fails to direct the jury as to the danger of convicting on an accomplice's evidence unless corroborated. [R. v. Baskerville, [1916] 2 K.B. 658, applied.]

R. v. Morrison, 38 D.L.R. 568, 51 N.S.R. 253, 29 Can. Cr. Cas. 6.

KEEPING DISORDERLY HOUSE—TWO JUSTICES.

There is no appeal under Code, s. 797, as amended by Can. Stat. 1913, c. 13, from a conviction on summary trial for keeping a disorderly house when made by a city police magistrate trying the case without the consent of the accused under Code, ss. 773 (f) and 774. [R. v. Brown (1916), 26 Can. Cr. Cas. 97, 30 D.L.R. 645, 9 A.L.R. 494, referred to. See R. v. Merker and Daniels, 27 Can. Cr. Cas. 113, 37 O.L.R. 582.]

R. v. Berenstein, 29 Can. Cr. Cas. 435, 24 B.C.R. 361.

AGGRIEVED PARTY IN SUMMARY CONVICTION.

The effect of the words "the prosecutor or complainant as well as the defendant" which are used in Cr. Code, s. 749, in reference to the appeal given to "any person who thinks himself aggrieved" is to limit the right of appeal from the dismissal of an information in a summary conviction proceeding to the prosecutor or complainant.

Gates v. Renner, 24 Can. Cr. Cas. 122, 9 W.W.R. 190.

QUESTION OF LAW RESERVED.

A question depending upon the weight or insufficiency of the evidence where there is legal evidence on the point cannot properly be made the subject of a reserved case, although where the evidence merely points to a suspicion of guilt and lacks the material ingredients necessary to constitute proof of the offence the question becomes one of the lack of legal evidence to support it (which is a question of law) rather than one as to the weight of evidence. [R. v. McIntyre, 3 Can. Cr. Cas. 413, 31 N.S.R. 422; R. v. Winslow, 3 Can. Cr. Cas. 215, 12 Man. L.R. 649, referred to.]

R. v. Howe, 24 Can. Cr. Cas. 215, 42 N.B.R. 378.

STATED CASE IN REVIEW OF SUMMARY CONVICTION—NO FURTHER APPEAL.

Where an appeal by stated case from a summary conviction and forfeiture of a recognizance to keep the peace, has been taken on a point of law under Cr. Code, s. 761, there is no further appeal from the decision affirming such conviction and forfeiture; Cr. Code, ss. 1013 et seq., do not give jurisdiction to the Court of Criminal Appeal to grant leave to appeal and to receive a case stated by the Superior Court of Criminal Jurisdiction hearing the appeal from the magistrate's decision.

Waller v. The King, 24 Can. Cr. Cas. 393, 24 Que. K.B. 127.

SUMMARY CONVICTION—DISTRICT COURTS.

The court has not to take judicial notice of the distance from one place to another, and the appellant has therefore to prove on an appeal in Saskatchewan under Cr. Code, s. 749, subs. (f), from a summary conviction, that the District Court sittings for which he gives notice are the nearest to the place where the cause of the information or complaint arose.

Collison v. Kokatt, 24 Can. Cr. Cas. 151, 8 S.L.R. 167, 32 W.L.R. 245.

SUMMARY CONVICTION—STATED CASE BY JUVENILE COURT.

An appeal by stated case under Cr. Code, s. 761 may be taken in respect of the summary conviction of an adult by a Juvenile Court under the Juvenile Delinquents Act, 1908, Can., c. 40, for an offence under Cr. Code, s. 220 A. (Code amendment of 1918)

in causing a child to be in danger of becoming immoral, dissolute or criminal by reason of defendant's immoral conduct with the child's mother and thereby rendering the home of the child an unfit place for the child to be in.

R. v. Ducker, 31 Can. Cr. Cas. 357, 45 O.L.R. 466.

CRIMINAL LAW—KEEPING COMMON GAMING HOUSE—SUMMARY TRIAL BY POLICE MAGISTRATE—JURISDICTION WITHOUT CONSENT—REFUSAL OF MAGISTRATE TO STATE CASE—APPEAL—CRIMINAL CODE, SS. 226, 228, 773, 774—5 GEO. V. C. 12, S. 8—8 & 9 GEO. V. C. 16, S. 2.

R. v. Griffiths, 16 O.W.N. 277.

MOTOR VEHICLE ACT (QUE.)—PROSECUTIONS "GOVERNED" BY CR. CODE, PART XV.—RIGHT OF APPEAL.

The King v. Labbe, 17 Can. Cr. Cas. 417 (Que.).

STATED CASE ON APPEAL FROM SUMMARY CONVICTION.

R. v. Weatheral, 18 Can. Cr. Cas. 372.

STATED CASE—UNREPEALED CRIMINAL LAW OF ONTARIO—LORD'S DAY ACT, C.S.U.C. C. 104.

The King v. Wells, 18 Can. Cr. Cas. 377, 24 O.L.R. 77.

SUMMARY CONVICTION UNDER PROVINCIAL STATUTE—PROSECUTIONS "GOVERNED" BY CRIMINAL CODE, PART XV.—INCORPORATION OF RIGHT OF APPEAL.

The King v. Hyndman, 17 Can. Cr. Cas. 469 (Que.).

SUMMARY CONVICTION—APPEAL FROM—CONSENT TO QUASH—NO REVERSAL BY AGREEMENT.

The King v. McCabe, 18 Can. Cr. Cas. 217.

WITHHOLDING RIGHT OF APPEAL.

R. v. McMurrer; McMurrer v. Jenkins, 18 Can. Cr. Cas. 385 (P.E.I.).

KEEPING DISORDERLY HOUSE—LIMITED RIGHT OF APPEAL.

An appeal under Code, s. 797, as amended in 1913, does not lie from a summary trial for keeping a disorderly house except in the special case of two Justices of the Peace sitting together; the amended s. 797 does not permit an appeal from a Police Magistrate or other functionary having the powers of two justices. [R. v. Dubuc, 22 Can. Cr. Cas. 426, 16 D.L.R. 318, followed.]

R. v. Merker and Daniels (Ont.), 27 Can. Cr. Cas. 113, 37 O.L.R. 582.

SUMMARY CONVICTION—VIOLATION OF PROVINCIAL LORD'S DAY ACT.

An appeal from a summary conviction under the N.S. Lord's Day Act, a preconfederation measure, lies only under the provisions of the Criminal Code and not under the N.S. Summary Convictions Act, R.S. N.S. 1900, c. 161.

The King v. Bellefontaine, 22 Can. Cr. Cas. 140.

SECOND APPEAL ON NEW GROUNDS.

After the dismissal of a case reserved on the application of the accused, a second application, although upon new grounds, is to be discouraged; and quære, whether the Court of Appeal has jurisdiction to hear a second appeal from the same conviction.

R. v. Bela Singh, 27 Can. Cr. Cas. 40, 22 B.C.R. 321.

CRIMINAL CASE—QUESTION OF LAW OR FACT—INDICTABLE OFFENCE.

Whether or not there was evidence upon which the trial tribunal might make a conviction is a question of law, but where there is an acquittal on the facts in respect of a charge of an indictable offence, whether by a jury or by a judge trying the case without a jury, the question of the sufficiency of the evidence to prove the charge is a question of fact and not of law, and cannot be raised by the prosecution as a "question of law," on an appeal under Cr. Code, ss. 1014 and 1015.

R. v. White, 24 Can. Cr. Cas. 74.

FROM SUMMARY TRIAL.

The words "two justices of the peace sitting together" as used in s. 797 of the Criminal Code (amendment of 1913) do not include a police magistrate exercising the power of two justices on a summary trial of an indictable offence; consequently, no appeal lies from a conviction made by a police magistrate where the accused was charged under Code, s. 228, with being the keeper of a disorderly house.

R. v. Robertson, 26 Can. Cr. Cas. 239, 22 B.C.R. 13.

CRIMINAL LAW—STATED CASE—SUFFICIENCY OF—MENS REA—CRIMINAL CODE, S. 454 (C).

A case reserved for the Court of Appeal must contain all the findings of fact upon which the judge below based his decision.

R. v. Steers, 26 B.C.R. 334.

ORDER QUASHING MAGISTRATE'S CONVICTION—STATUS OF MAGISTRATE AS APPELLANT.

R. v. Roy, 18 W.L.R. 464 (B.C.).

CRIMINAL LAW—PRAIRIE AND FOREST FIRES ACT—APPEAL FROM CONVICTION—CR. CODE, S. 750 (C)—SUM NOT DEPOSITED WITH JUSTICE—APPEAL IMPROPERLY LAID.

An appeal from conviction under the Prairie and Forest Fires Act whereby accused was condemned to pay a fine was dismissed with costs because accused failed to deposit with the justice (in accordance with the Criminal Code, s. 750 [c]) the sum adjudged to be paid, although he entered into a recognizance. Reference to authorities.

Switzer v. Foichuk, [1919] 1 W.W.R. 396.

(§ I C—26)—RIGHT OF COURT OF KING'S BENCH, QUEBEC, TO REFER TO COURT OF APPEAL — AMENDMENT OF SENTENCE.

The Quebec Court of King's Bench cannot, in lieu of quashing a sentence upon a writ of habeas corpus and discharging the prisoner, refer the matter to the Court of

Appeal for amendment of the sentence, since that would amount to forcing an appeal upon the accused for the benefit of the Crown.

Hoolahan v. Malepart, 5 D.L.R. 479, 19 Can. Cr. Cas. 405.

RIGHT OF CROWN TO APPEAL.

The question whether an indictment was properly quashed on a motion made before pleading thereto and before trial, may be reserved at the instance of the Crown for the opinion of the Court of Appeal under s. 1014 of the Criminal Code, which will be liberally construed so as to prevent a miscarriage of justice. [Brisbois v. The Queen (1888), 15 Can. S.C.R. 421, and Morin v. The Queen (1890), 18 Can. S.C.R. 467, distinguished.]

The King v. Lynn (No. 2), 19 Can. Cr. Cas. 129, 4 S.L.R. 324.

SUMMARY CONVICTION—PROVINCIAL LEGISLATIVE AUTHORITY OVER OFFENCE.

The right of appeal in a summary conviction matter conferred by ss. 749 et seq. of the Cr. Code is limited by the effect of Cr. Code, s. 706, to matters over which the Parliament of Canada has legislative authority; this refers to the Dominion Parliament and, in the absence of provincial legislation adopting the code provisions as to appeal or making other provision therefor, an appeal will not lie from the dismissal of a charge under a statute of the former Province of Canada in force in the present Province of Quebec which relates wholly to matters over which the Quebec Legislature now has exclusive jurisdiction. [Reg. v. Joseph, 6 Can. Cr. Cas. 144, 11 Que. Q.B. 211; R. v. Superior; Superior v. Montreal, 3 Can. Cr. Cas. 379, 9 Que. Q.B. 138; R. v. Racine, 3 Can. Cr. Cas. 446, 9 Que. Q.B. 134; Lecours v. Hurtubise, 2 Can. Cr. Cas. 521, 8 Que. Q.B. 439, referred to.]

Burroughs v. Paradis, 24 Can. Cr. Cas. 343, 24 Que. K.B. 318.

The License Commissioners of the City of Montreal who appeal to the Court of King's Bench from a judgment of the Superior Court maintaining a writ of prohibition against them are not obliged to place stamps on their proceedings nor to give security for costs since they act for and in the name of the Crown. An appeal even by the Crown or the state, in actions under c. 40 of the Code of Procedure, that is quo warranto, mandamus or prohibition, should be brought within thirty days, if not the appeal will be dismissed on motion.

Choquet v. Demers, 13 Que. P.R. 223

(§ I C—27)—WHERE THERE IS SUFFICIENT EVIDENCE TO CONVICT.

Where there was evidence before a magistrate trying a prosecution for an offence forbidden by law on which he might have convicted the accused, this conviction will not be disturbed, as the magistrate is the judge of the weight to be attached to the evidence. [R. v. St. Clair, 3 Can. Crim. Cas. 551, 27 A.R. (Ont.), 308, at p. 310 followed.]

R. v. Riddell, 4 D.L.R. 662, 19 Can. Cr. Cas. 400, 3 O.W.N. 1628, 22 O.W.R. 847.

CRIMINAL LAW—CASE RESERVED—THEFT—PROOF — C.C. ARTS. 69, 690, 746, 752, 999.

When on a motion of an accused found guilty before a court of special sessions of the peace, demanding that four questions be reserved for the decision of the Court of King's Bench, the presiding judge of the trial can only reserve one of them and allow the accused to present another motion before the Court of Appeal to have the other questions also reserved. This tribunal may in summarizing these three questions only reserve one for the purpose of ascertaining whether or not there was any proof whatever for finding the accused guilty of theft.

Ménard v. The King, 25 Rev. Leg. 73.

(§ 1 C—28)—RESERVED CASE—RULING PRIOR TO DISPOSAL OF CRIMINAL CASE.

A reserved case is prematurely granted before a decision for or against the guilt of the accused; and a case reserved for a Court of Criminal Appeal on the application of the Crown at a "speedy trial" in respect of a ruling that the prior commitment for trial was irregular must be quashed where it appears that the case was not disposed of by the County Judge upon the ruling but was adjourned in order to have the reserved case determined, bail being taken for the appearance of the accused.

The King v. Lantz, 15 D.L.R. 651, 47 N.S.R. 495, 22 Can. Cr. Cas. 212.

APPLICATION TO JUSTICE FOR STATED CASE

Under the Alberta Crown Rules (Alberta Rules of Court 816-823) as to cases stated by justices on questions of law in summary conviction matters, the written application to the justice for a stated case must state whether the appeal is to be heard by the Appellate Division or by a judge in Chambers, in pursuance of the option which the rules give to the appellant. Failure to do so within the time limited is fatal to that mode of appeal, notwithstanding the Alberta rule 823 curing slight deviations, as the justice is required, r. 822, to forward the recognizance in the one case to the registrar and in the other to the clerk of the court at the place where the appeal is to be heard. [Foss v. Best (1906), 2 K.B. 105, applied.]

R. v. Dean (Alta.), 37 D.L.R. 511, 28 Can. Cr. Cas. 212, [1917] 2 W.W.R. 943.

RESERVED CASE—QUESTION OF LAW.

The trial judge should not grant a reserved case under Cr. Code, s. 1014, unless he has some doubt upon the point sought to be raised. [R. v. Létang, 2 Can. Cr. Cas. 505; R. v. Brindamour, 11 Can. Cr. Cas. 315, followed.]

R. v. Batterman, 24 Can. Cr. Cas. 351, 34 O.L.R. 225.

By Crown on question of law—Evidence.

The notes of the decision of a judge holding a speedy trial without a jury may be filed at a later date than that of the delivery of the oral judgment and must be given credence on a motion to the Appellate Court for leave to appeal as to the grounds on which the decision rested; the court will not take into consideration in contradiction of such notes the affidavits of counsel for the appellant, even of the Crown counsel where the Crown asks leave to appeal, nor can the Crown be given leave to appeal as on a question of law when the case was dismissed for insufficiency of the evidence adduced to prove an essential ingredient of the offence.

R. v. Jacobs, 30 Can. Cr. Cas. 80, 26 Que. K.B. 382.

Right of appeal—Restriction by statute while prosecution pending.

A liquor law amendment passed during the currency of a prosecution under the principal act and providing that no appeal shall lie, is a statute relating to procedure and will apply to the pending prosecution.

R. v. Glassey, 22 Can. Cr. Cas. 73.

D. Modes of review.

(§ I D—30)—Modes of review—Decision of Immigration Board—Review by Minister of Interior.

A decision of a properly constituted Board of Inquiry, acting within its jurisdiction and in accordance with the provisions of the Immigration Act, which decision is not impeached on the ground of fraud, is not open to review except by the Minister of the Interior.

In re Immigration Act and Munshi Singh, 20 B.C.R. 243.

Ex parte order for injunction—Notice.

An appeal from an ex parte order made at Chambers granting a mandatory injunction on the ground that the judge acted without jurisdiction was refused, because the appellant had not, before taking his appeal, applied to the judge to vary or rescind his order, and it was held that the necessity for such an application was not obviated by O. 58, r. 3, of the Judicature Act, 1909, giving an appeal on notice from any judgment final or interlocutory, and providing that "every judgment or decision made by a judge in court or in Chambers, except orders made in the exercise of such discretion as by law belongs to him, may be set aside or discharged upon notice by the court." [Bell v. Moffat, 18 N.B.R. 151, and Jackson v. McLellan, 19 N.B.R. 494, not followed.]

St. John R. Co. v. City of St. John, 43 N.B.R. 498.

Orders of local Master in interpleader—Notice.

A claimant who is served with notice of appeal from an order made by a local Master in connection with an interpleader action in which he is interested, but who has given no notice of appeal from the order, may be heard in appeal. Such appeal is a rehearing and the whole case can be gone into. [Chitty's Archbold's Pleading, p. 1417, and Shearer v. Trimble, an unreported decision of Newlands, J., April 1, 1910, followed.]

Macdonald v. Nicholson, 31 W.L.R. 510, 8 S.L.R. 187.

Modes of review—Order of local Master—Application to review—Rules Supreme Court.

Where an order is made ex parte by a local Master, and an application is made to him to review such order, such application is not an appeal, or a motion in the nature of an appeal within r. 620 so as to deprive the local Master of jurisdiction in the matter.

Royal Bank of Canada v. Lee and Girard, 7 W.W.R. 675.

Right of appeal to Appellate Division from order of High Court Division on appeal from award under Ontario Railway Act—R.S.O. 1914, c. 185, s. 90 (15), (16)—Interpretation Act, R.S.O. 1914, c. 1, s. 29 (dd)—Arbitration Act, R.S.O. 1914, c. 65, s. 17.

Re Russell & Toronto Suburban R. Co., 17 O.W.N. 219.

Appeal direct to Court of Appeal—Order of single judge—Taxation of costs.

Re Solicitors, 19 O.W.R. 936, 2 O.W.N. 1495.

Civil application—Case where it is admitted—Ancient law—Opposition to judgment—Wrong judgment—Fraud—Negligence of attorneys—Costs—C.C. art. 2013, 2015—C.C.P. (old), art. 480, 481, 505—C.C.P. (new), art. 1163, 1177, 1184, 1630—34 Geo. III. [1826] c. 6, art. 8—S.R.B.C. [1861], c. 78, art. 6—12 Vict. [1849], c. 26, art. 4—46 Vict. [1883], c. 26, art. 4—S. ref. [1909], art. 3085—Declaration of 1685 and 1732—Regulation of C. sup. 22nd Aug. [1732]—Ordinance of 1667, art. 35—Edict of July 1679.

The old French Law has fixed the principle and rules for a civil application considering it always as an extreme remedy on an extraordinary recourse, in special cases determined and absolutely limited, contrary to the "supplicatio in praeces" and the "institutio in integrum" of the Roman Law, recourse to which was unlimited. The modern French Law has likewise rejected, on this point, the principle of Roman Law.

Ethier v. de Limbourg & Royal Bank of Canada & Chouinard, 55 Que. S.C. 179.

(§ I D—31)—Equitable relief—Supreme Court Act, s. 38 (c)—Appeal from referee—Final judgment.

Clarke v. Goodall, 44 Can. S.C.R. 284.

(§ I D—32)—Alternative rights of appeal—Effect of proceedings begun in exercise of alternative remedy—Abandonment.

City of Montreal v. John Layton & Co., Ltd. (No. 2), 10 D.L.R. 849, 47 Can. S.C.R. 514.

II. Jurisdiction of particular courts.

A. Of Supreme Court of Canada.

(§ II A—35)—Jurisdiction of Supreme Court of Canada.

Where an action is brought for specific performance of an agreement to deliver certain securities, or, in the alternative, for damages, and it appears that the defendant has rendered himself temporarily unable to deliver the securities, and the Court of Appeal by its judgment gives to the plaintiff his choice between specific performance as soon as the securities are available for delivery, and an immediate reference as to damages, an appeal lies as of right to the Supreme Court from the judgment of the Court of Appeal under subs. (c) of s. 38 of the Supreme Court Act, R.S.C. c. 139, inasmuch as the action is in the nature of a suit or proceeding in equity.

Nelles v. Hesseltine; Windsor, Essex and L.S. Rapid R. Co. v. Nelles (No. 4), 6 D.L.R. 541, 27 O.L.R. 97.

Title to land—Fraudulent conveyance.

An action to set aside a conveyance of land as a fraud on creditors involves no question of title to real estate within the meaning of s. 48 (a) of the Supreme Court Act (R.S.C. 1906, c. 139), so as to give the Supreme Court of Canada jurisdiction to entertain an appeal.

Bateman v. Scott, 29 D.L.R. 369, 53 Can. S.C.R. 145.

Assessment matters.

Appeals from the Court of Revision under s. 80 of the Assessment Act (R.S.O. 1914, c. 195), taken by consent of the parties direct to the Railway and Municipal Board and later heard and decided by the Appellate Division (Ont.), in the ordinary way, may be taken to the Supreme Court of Canada under s. 41 of the Supreme Court Act, R.S.C. 1906, c. 139. [Re Ont. & Minn. Power Co. and Fort Frances, 22 D.L.R. 701, referred to.]

Tp. of Cornwall v. Ottawa & New York R. Co., 30 D.L.R. 664, 52 Can. S.C.R. 466, affirming 23 D.L.R. 610, 34 O.L.R. 55, 20 Can. Ry. Cas. 91.

Concurrent jurisdiction of inferior courts.

An appeal under s. 37 (b) of the Supreme Court Act, R.S.C. 1906, c. 139, lies from a provincial court of first instance only where the inferior court is given concurrent jurisdiction with the Superior Court in matters which, without some express provision, would alone be cognizable by the Superior Court. [Champion v. World Building Co., 22 D.L.R. 465, referred to.]

Tait v. B.C. Electric R. Co., 54 Can. S.C.R. 76, 35 W.L.R. 544, 1093, quashing appeal from 27 D.L.R. 538, 34 W.L.R. 684.

Cause originating in inferior court.

No appeal lies to the Supreme Court of Canada from a cause originating in a District Court, even if subsequently removed to a court of superior jurisdiction, and the proceedings, after the issue of the writ, carried on as if a new writ had been issued therein. [Tucker v. Young, 30 Can. S.C.R. 185, followed.]

Hillman v. Imperial Elevator & Lumber Co., 29 D.L.R. 372, 53 Can. S.C.R. 15.

[See also 23 D.L.R. 420, 8 S.L.R. 91.]

Judgments of court of review—Jurisdictional amount.

The judgments of the Court of Review (Quebec) are appealable to the Supreme Court of Canada under s. 40 of the Supreme Court Act (R.S.C. 1906, c. 139) and arts. 68 and 69, C.C.P. (Que.), as amended by 8 Edw. VII. c. 75, where the amount or value claimed in the declaration exceeds $5,000.

Beauvais v. Genge, 30 D.L.R. 625, 53 Can. S.C.R. 353.

Jurisdictional amount—Adding costs.

Montreal Tramways Co. v. McGill, 30 D.L.R. 487, 53 Can. S.C.R. 390, quashing appeal from 49 Que. S.C. 326.

Jurisdictional amount—Title to land.

An appeal from an order for injunction restraining the defendant from carrying on dangerous operations in a quarry, the amount of damages awarded being merely $50, does not involve a title to land nor otherwise fall within the provisions of s. 46 of the Supreme Court Act, R.S.C. 1906, c. 139, and which the Supreme Court of Canada has, therefore, no jurisdiction to maintain. [Price Bros. v. Tanquay, 42 Can. S.C.R. 133; Hamilton v. Hamilton Distillery Co., 38 Can. S.C.R. 239, applied; Shawinigan Hydro-Electric Co. v. Shawinigan Water and Power Co., 43 Can. S.C.R. 650, distinguished.]

Lachance v. Cauchon, 26 D.L.R. 744, 52 Can. S.C.R. 223, quashing appeal from 24 Que. K.B. 421.

Damages—Amount—Jurisdiction of Supreme Court of Canada.

An action was brought to recover the sum of $3,615.35 as damages representing the value of timber cut on timber limits, the boundaries of which were in dispute. At the trial and before enquête the amount of the claim was by consent reduced to $1,369.45. The court held, that the Supreme Court of Canada had jurisdiction to hear an appeal.

Shives Lumber Co. v. Price Bros. & Co., 44 D.L.R. 390, 58 Can. S.C.R. 21.

From Court of Appeal, Manitoba—Final judgment—Supreme Court Act—Jurisdiction of Supreme Court of Canada.

A judgment of the Court of Appeal, Manitoba, on an appeal from the Court of King's

Bench on a stated case, declaring that a certain document is a promissory note, and disposing of substantive rights of the parties is a final judgment within the meaning of s. 2 (e) of the Supreme Court Act.

Lecomte v. O'Grady, 44 D.L.R. 756, 57 Can. S.C.R. 563, [1919] 1 W.W.R. 339, affirming 40 D.L.R. 378.

ASSESSMENT OF PROPERTY—DISTRICT COURT JUDGMENT—JURISDICTION OF SUPREME COURT OF CANADA TO HEAR—SUPREME COURT ACT, S. 41.

The Supreme Court of Canada has jurisdiction under s. 41 of the Supreme Court Act, to hear an appeal from a District Court Judge of Alberta, in matters concerning the assessment of property under the provisions of the charter of the City of Edmonton, 3 Geo. V, c. 23 (Alta.). [Pearce v. Calgary, 32 D.L.R. 790, 54 Can. S.C.R. 1, followed.]

Grierson v. Edmonton, 45 D.L.R. 70, 58 Can. S.C.R. 13, [1917] 2 W.W.R. 1138.

FATAL ACCIDENTS ACT—ACTION FOR ENTIRE DAMAGES — APPORTIONMENT OF — AMOUNT IN CONTROVERSY—JURISDICTION OF COURT.

Under the Fatal Accidents Act (R.S.O. 1914, c. 151) the cause of action is single and is for the entire damages sustained by the whole class for whose benefit it may be recovered and an appeal to a divisional court is necessarily from the judgment as a whole notwithstanding that judgment appealed from has apportioned the amount between different members of the class.

Magill v. Tp. of Moore, 46 D.L.R. 562, 59 Can. S.C.R. 9, affirming 44 D.L.R. 489, 43 O.L.R. 372.

PROHIBITION—FUTURE RIGHTS.

In an application for a writ of prohibition no appeal lies to the Supreme Court of Canada; it does not fall within any of the classes of s. 46 of the Supreme Court Act. [Desormeaux v. Ste. Thérèse, 43 Can. S.C.R. 82; Olivier v. Jolin, 36 D.L.R. 729, 55 Can. S.C.R. 41, followed.]

Bouchard v. Sorgius, 38 D.L.R. 59, 55 Can. S.C.R. 324, 29 Can. Cr. Cas. 245, reversing 26 Que. K.B. 242.

COURT OF KING'S BENCH—PUBLIC UTILITIES COMMISSION.

Under s. 37 of the Supreme Court Act (R.S.C. 1906, c. 139) an appeal lies to the Supreme Court of Canada from a judgment of the Court of King's Bench, Que., in an appeal from an order of the Quebec Public Utilities Commission overruling an objection as to its jurisdiction to permit the Intercolonial Railway to run its engines and cars over the railway line of the Canada Gulf Terminal Railway Co. Fitzpatrick, C.J., and Idington, J. (dissenting), held that the constitution of a Public Utilities Commission in Quebec did not create a court in the sense of that word in the Supreme Court Act and s. 37 of that Act could not be applied.

Canada & Gulf Terminal R. Co. and Charles J. Fleet v. The King, 43 D.L.R. 291, 57 Can. S.C.R. 140.

JURISDICTION OF CANADA SUPREME COURT—HOW AFFECTED BY PROVINCIAL STATUTE—ASSESSMENT AND TAXATION—FINALITY—SUPREME COURT ACT, R.S.C. 1906, c. 139, s. 41.

Pearce v. City of Calgary, 32 D.L.R. 790, 54 Can. S.C.R. 1.

EXCHEQUER COURT—PATENT—AMOUNT IN CONTROVERSY.

A judgment of the Exchequer Court overruling an objection to its jurisdiction in a patent controversy is appealable to the Supreme Court of Canada; the "amount in controversy" to entertain the appeal under s. 82 of the Exchequer Court Act (R.S.C. 1906, c. 140) may be established from the value of the patent right.

Burnett v. Hutchins Car Roofing Co., 36 D.L.R. 45, 54 Can. S.C.R. 610, overruling a motion to quash appeal from 16 Can. Ex. 391.

JURISDICTIONAL AMOUNT — CONSOLIDATED ACTION.

Where there has been one action against three defendants, upon independent claims arising out of three separate contracts, and subsequently upon appeal judgment has been given in favour of the plaintiff, the judgment against each defendant being for less than $1,000, although the aggregate of judgments amounted to more than that amount, the defendants are in the same position as if separate actions had been brought against each, and the amount in each case being less than $1,000, there is no appeal to the Supreme Court of Canada. [Bennett v. Havelock Electric Light Co., 8 D.L.R. 954, 46 Can. S.C.R. 640, followed.]

Glen Falls Insurance Co. v. Adams, 32 D.L.R. 399, 54 Can. S.C.R. 88.

COUNTY COURT ACTION.

An appeal does not lie to the Supreme Court of Canada from the judgment of the B.C. Court of Appeal, on an appeal from a County Court in an action for damages within its jurisdiction. [Champion v. The World Building Co., 22 D.L.R. 465, referred to.]

Tait v. B.C. Electric R. Co., 32 D.L.R. 378, 54 Can. S.C.R. 76, [1917] 1 W.W.R. 544, quashing 27 D.L.R. 538, 20 Can. Ry. Cas. 408, 22 B.C.R. 571.

TITLE TO LAND—AGREEMENT OF SALE.

The Supreme Court of Canada has no jurisdiction to hear an appeal under s. 46 of the Supreme Court Act, R.S.C. 1906, c. 139, where the only dispute is as to the fulfilment of a vendor's obligation to deliver a property free from certain mortgages. [Carrier v. Sirois, 36 Can. S.C.R. 221, referred to.]

Montarville Land Co. v. Economic Realty Ltd., 33 D.L.R. 117, 54 Can. S.C.R. 140, quashing appeal from 26 Que. K.B. 51.

FUTURE RIGHTS—REVENUE.

A dispute between legatees as to which

of them is liable to pay the succession tax does not involve a question of revenue or sum of money payable to His Majesty "where rights in future might be bound," within the meaning of s. 46 (b) of the Supreme Court Act (R.S.C. 1906, c. 139), and is therefore not appealable to the Supreme Court of Canada; the phrase applies conjunctively to each of the class of cases enumerated in the section.

Olivier v. John, 36 D.L.R. 729, 55 Can. S.C.R. 41, quashing 25 Que. K.B. 532.

TO SUPREME COURT OF CANADA—AMOUNT IN DISPUTE—WORKMEN'S COMPENSATION CASES.

An appeal to the Supreme Court of Canada from the King's Bench (Que.) is not shewn to be within the jurisdiction as involving a matter in controversy to the sum or value of two thousand dollars [R.S.C. 1906, c. 139, s. 46], and will be quashed for want of jurisdiction, where the defendant employer is the appellant from a provisional judgment under the Workmen's Compensation Act (Que.) for $450, loss of the workman's earnings for six months, and for an annuity to the workman of $337 payable only so long as his physical condition as affected by the injury justifies the continuance of the compensation, and subject to change within a four-year period, if the appellant advances no proof of its actuarial or commercial value in view of the contingencies of the payments and the inalienability of the compensation itself; no capitalization of the "rent" payable to the workmen under the Workmen's Compensation Act, 9 Edw. VII. (Que.), c. 66, can be considered on the question of jurisdiction until the exercise of the option as to payment to an insurance company of a sum not exceeding $2,000 on the measure of permanent incapacity being ascertained. [Lapointe v. Montreal Police Benevolent Society, 35 Can. S.C.R. 5, and Aqueduct Co. v. Verrett, 42 Can. S.C.R. 156, referred to; McDonald v. C.P.R., 7 D.L.R. 138, 22 Que. K.B. 207, appeal therefrom quashed.]

C.P.R. Co. v. McDonald, 16 D.L.R. 830, 49 Can. S.C.R. 163.

TO SUPREME COURT (CAN.)—CRIMINAL CASE WHERE DISSENT IN COURT BELOW.

While the jurisdiction of the Supreme Court of Canada on a criminal appeal may be limited to the points on which there was a dissent in the court appealed from, a reasonable latitude should be permitted to counsel on the argument of the appeal to go fully into the whole conduct of the trial for the purpose of elucidating the appealable ground and the limitations imposed by Cr. Code, s. 1019 on the appellate jurisdiction to interfere unless there has been a substantial wrong or miscarriage at the trial or an improper disallowance of a challenge. [Elerts v. The King, 20 Can. Cr. Cas. 273, 47 Can. S.C.R. 1, referred to.]

Minchin v. The King, 18 D.L.R. 340, 23 Can. Cr. Cas. 414.

JURISDICTION—APPEAL FROM SURROGATE COURT—RIGHT OF APPEAL BY ADMINISTRATORS—AMOUNT—SURROGATE COURTS ACT, R.S.O. 1914, c. 62, s. 69, SUBS. 6.

Re Kirk, 17 D.L.R. 833, 6 O.W.N. 346.

SUPREME COURT OF CANADA—APPEALABILITY OF JUDGMENT INVOLVING MERELY COSTS.

The Supreme Court of Canada will not entertain an appeal from any judgment for the mere purpose of deciding a question of costs. (Dictum per Idington, J.) [Schlomann v. Dowker, 30 Can. S.C.R. 323; Moir v. Huntington, 19 Can. S.C.R. 363, referred to.]

International Casualty Co. v. Thomson (No. 2), 11 D.L.R. 634, 25 W.L.R. 256, 48 Can. S.C.R. 167.

SUPREME COURT (CAN.)—DOMINION ELECTIONS APPEALS.

An order made by an election court constituted under the Dominion Controverted Elections Act, R.S.C. 1906, ch. 7, refusing an enlargement of the time for commencement of the trial, which would expire on the next day, or to fix a day for hearing of preliminary objections remaining undisposed of, is not an order of a final and conclusive nature within s. 64 of that statute, so as to permit of an appeal being taken therefrom to the Supreme Court of Canada. [L'Assomption Election Case, 14 Can. S.C.R. 429, and Halifax Election Case, 39 Can. S.C.R. 401, followed.]

Temiscouata Dominion Election; Plourde v. Gauvreau, 9 D.L.R. 257, 47 Can. S.C.R. 211.

JURISDICTION OF CANADA SUPREME COURT—EQUITY AND COMMON-LAW PLEADING—COMMON-LAW TRIAL—REFERENCE—ABSENCE OF FINAL JUDGMENT OR ORDER.

Although the plaintiff sued for equitable relief, by way of rescission of agreements, repayment of moneys paid on account, a receiver, and an injunction, and in the alternative common-law relief by way of damages for deceit, if it appears that the cause of action which was really tried and for which relief was given was that of deceit as to common-law action, in which the trial judge, although determining generally on the question of fraudulent misrepresentation as between the parties, did not attempt to assess the damages, but referred these and other matters to a referee, and reserved to the court the final judgment which should be given after the referee had made his report, an appeal to the Supreme Court of Canada will be dismissed for want of jurisdiction. [Wenger v. Lamont, 41 Can. S.C.R. 603; Crown Life Ins. Co. v. Skinner, 44 Can. S.C.R. 616; Clark v. Goodall, 44 Can. S.C.R. 284, followed; Eaton v. Dunn, 5 D.L.R. 604, 11 East L.R. 52, considered on appeal.]

Dunn and The Eastern Trust Co. v. Eaton, 9 D.L.R. 303, 47 Can. S.C.R. 205, 49 C.L.J. 114, 12 E.L.R. 360.

SUPREME COURT OF CANADA—HABEAS CORPUS—CRIMINAL CHARGE—PROSECUTION UNDER PROVINCIAL ACT—APPLICATION FOR WRIT—JUDGE'S ORDER.

Re McNutt, 10 D.L.R. 834, 47 Can. S.C.R. 259, 21 Can. Cr. Cas. 157, 49 C.L.J. 117, 13 E.L.R. 109.

FINAL JUDGMENT—FURTHER DIRECTIONS—MASTER'S REPORT.

Hesseltine v. Nelles (No. 5), 10 D.L.R. 832, 47 Can. S.C.R. 230, 49 C.L.J. 115.

JURISDICTION OF SUPREME COURT OF CANADA—ELECTION CONTESTS—ALBERTA.

The judgment of the Alberta Supreme Court, on appeal from the decision of a judge on preliminary objections filed under the Alberta Controverted Elections Act, is not a "final judgment" from which an appeal lies to the Supreme Court of Canada. The inherent power of the Legislature of Alberta to determine questions relating to the election of its members has been, in part, delegated by that legislature to the judges of the Alberta Supreme Court; and such delegation of power under the Alberta Controverted Elections Act to the Alberta Supreme Court was intended by the Alberta Legislature to be final, so far as courts of law are concerned, and the decision of the Alberta Supreme Court is not subject to appeal to the Supreme Court of Canada.

Cross v. Carstairs, Re Edmonton Election, 11 D.L.R. 152, 47 Can. S.C.R. 559, 24 W.L.R. 131, quashing appeal from 8 D. L.R. 369.

TO SUPREME COURT OF CANADA—FINAL JUDGMENT.

Where the highest provincial appellate court had dismissed the plaintiff's claim for breach of contract with a company to employ him for a fixed term with an exclusive territory as sales agent because of nondisclosure of material facts to the shareholders by the plaintiff in his fiduciary position as a director up to the time of making the contract, on his failure to shew that the contract was a fair and reasonable one for the company, such judgment is a final disposal of a distinct and separate ground of action entitling the plaintiff to appeal to the Supreme Court of Canada, although the court appealed from had, at the same time, allowed to the plaintiff remuneration by way of quantum meruit for services rendered by the plaintiff in faith of such contract, and had directed a reference to fix the amount, which had not been fixed prior to the last appeal. [Hesseltine v. Nelles, 10 D.L.R. 832, 4 Can. S.C.R. 230, referred to; McDonald v. Belcher, [1904] A.C. 429, and St. Jean v. Molleur, 40 Can. S.C.R. 139, applied.]

Denman v. Clover Bar Coal Co., 15 D.L.R. 241, 48 Can. S.C.R. 318, 26 W.L.R. 435.

JURISDICTION—ORIGINATING PETITION—QUEBEC PRACTICE.

A judicial proceeding originating on petition to a Judge in Chambers, under the Quebec Code of Civil Procedure, articles 875 and 876, is appealable to the Supreme Court of Canada where the subject of the controversy amounts to the sum or value of two thousand dollars.

Turgeon v. St. Charles, 15 D.L.R. 298, 48 Can. S.C.R. 473, 13 E.L.R. 521.

FURTHER DIRECTIONS—FINAL JUDGMENT.

Where, prior to the amendment, in 1913, to s. 2 (e) of the Supreme Court Act, R.S. C. 1906, c. 139, judgments were rendered maintaining an action on a bond by which two of the defendants were ordered to pay to the plaintiffs an amount not exceeding that secured by the bond to be ascertained upon a reference to the master and further directions were reserved, and as to another defendant, recovery of the same amount, to be ascertained in the same manner, was ordered, but there was no reserve of further directions, the last-mentioned defendant has no right of appeal to the Supreme Court of Canada as such judgment did not finally conclude the action, and was not a final judgment within the meaning of s. 2 (e) of the Supreme Court Act, prior to the amendment by the Stats. 3 and 4 Geo. V. c. 51. [Rural Municipality of Morris v. London and Canadian Loan and Agency Co., 19 Can. S.C.R. 434, followed; Ex parte Moore, 14 Q.B.D. 627, distinguished; Clarke v. Goodall, 44 Can. S.C.R. 284, and Crown Life Ins. Co. v. Skinner, 44 Can. S.C.R. 616, referred to. And see Windsor, etc., Co. v. Nelles, 1 D.L.R. 156 and 309; Nelles v. Hesseltine, 2 D.L.R. 732, and 6 D.L.R. 541; Gold Medal Furniture Mfg. Co. v. Stephenson (No. 2), 10 D.L.R. 1, 23 Man. L.R. 159, appeal therefrom quashed.]

Stephenson v. Gold Medal Furniture Mfg. Co. (No. 3), 15 D.L.R. 342, 48 Can. S.C.R 497, 26 W.L.R. 570.

SUPREME COURT OF CANADA—ALLOWING SECURITY—QUESTION OF COMPETENCY OF APPEAL.

Until the question is settled as to the right of appeal in Ontario to the Supreme Court of Canada from a decision of the Appellate Division of the Supreme Court of Ontario, varying an award on the compulsory taking of lands under the Railway Act of Canada, the proper practice is for the Ontario Court to approve the security on the proposed appeal, leaving the parties to contest in the Supreme Court of Canada the jurisdiction of the latter court, in view of s. 36 of the Supreme Court Act, R.S.C. 1906, c. 139, and of s. 209 of the Railway Act, R.S.C. 1906, c. 37. [Townsend v. Northern Crown Bank, 10 D.L.R. 652, 4 O.W.N. 1245, referred to.]

Re Ketcheson & Canadian Northern Ontario R. Co. (No. 2), 14 D.L.R. 542, 5 O.W.N. 271, 25 O.W.R. 252.

JURISDICTION OF SUPREME COURT OF CANADA—FINAL JUDGMENT.

A judgment of a provincial court of last resort varying the judgment given on the trial of an action for damages for alleged breach of contract, and affirming the plain-

tiff's right of recovery with certain limitations as to damages as to which a reference was directed, is not a "final judgment" from which an appeal lies to the Supreme Court of Canada, within the statutory definition of that term contained in s. 2 of the Supreme Court Act, R.S.C. 1906, c. 139, as a judgment order or decision "whereby the action is finally determined and concluded." [Clarke v. Goodall, 44 Can. S.C.R. 284, and Crown Life Insurance Co. v. Skinner, 44 Can. S.C.R. 616, specially referred to.]

Nelles v. Hesseltine; Windsor, Essex and L.S. Rapid R. Co. v. Nelles (No. 2), 2 D.L.R. 732, 21 O.W.R. 430, 3 O.W.N. 862.

CANADA SUPREME COURT—APPEALS TO—ACTION ON MECHANIC'S LIEN.

Under the Mechanics' Lien Act (B.C.) an action to enforce a mechanic's lien may be maintained only in a County Court; consequently there can be no appeal to the Supreme Court of Canada from the decision of the Court of Appeal, B.C., on appeal from such County Court. [Champion v. World Building Co., 18 D.L.R. 555, appeal therefrom quashed.]

Champion v. World Building, 22 D.L.R. 465, 50 Can. S.C.R. 382, 7 W.W.R. 1162.

SUPREME COURT OF CANADA—EXCEPTION—CRIMINAL CHARGE.

No appeal as of right to the Supreme Court of Canada lies from the refusal by a Provincial Supreme Court, en banc, of a writ of prohibition to restrain proceedings under a provincial liquor law for an alleged offence of illegal sale; such a prosecution being a "criminal charge" within the meaning of s. 39 (c) of the Supreme Court Act, Can., R.S.C. 1906, c. 139. [Re McNutt, 10 D.L.R. 834, 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, referred to.]

R. v. Mitchell (No. 2), 31 Can. Cr. Cas. 223.

BOARD OF RAILWAY COMMISSIONERS—APPEALS FROM QUESTIONS OF LAW—STATED CASE.

An appeal, under the provisions of s. 55, or s. 56, subs. 3, of the Railway Act, R.S.C. 1906, c. 37, should not be entertained by the Supreme Court of Canada until the Board of Railway Commissioners for Canada has stated the case in writing and submitted for the opinion of the court some question which in the opinion of the Board is a question of law. [Cf. Regina Rates Case, 44 Can. S.C.R. 328, where this case was followed by Anglin, J., and 45 Can. S.C.R. at pp. 323 to 328.]

C.P.R. Co. v. Ottawa (Gatineau Branch Case), 48 Can. S.C.R. 257.

IN GENERAL—APPEAL TO SUPREME COURT OF CANADA—JUDGMENT OF APPELLATE DIVISION ON APPEAL FROM AWARD UNDER RAILWAY ACT, S. 208.

Re Ketcheson and Canadian Northern Ontario R. Co., 5 O.W.N. 271.

APPEAL FROM ORDER OF ONTARIO RAILWAY AND MUNICIPAL BOARD—COURT OF LAST RESORT—REFUSAL OF LEAVE TO APPEAL BY SUPREME COURT OF ONTARIO—ASSESSMENT ACT, R.S.O. 1914, c. 195, s. 80 (6)—SUPREME COURT ACT, s. 41.

King Edward Hotel Co. v. City of Toronto, 12 O.W.N. 33.

JURISDICTIONAL AMOUNT FIRST DETERMINED.

Where a sum of $125 only is in dispute, the amount is insufficient to support the jurisdiction of the Supreme Court of Canada under s. 37 (b) of the Supreme Court Act. The fact that in the statement of claim $500 damages were asked for and that a new trial might possibly be ordered would not justify the entertaining of the appeal. [Monette v. Lefebvre, 16 Can. S.C.R. 387, referred to.] Where the amount in dispute in the County Court far exceeds $250, the court cannot mero motu do more than assume that the original claim is what must determine the point of jurisdiction.

Hearn v. Nelson, 8 W.W.R. 99.

SUPREME COURT OF CANADA—JURISDICTION—APPEAL FROM REFUSAL OF WRIT OF PROHIBITION—AMOUNT INVOLVED.

An appeal as of right to the Supreme Court of Canada from the refusal of a writ of prohibition, if not barred by s. 39 (c) of the Supreme Court Act, R.S.C. c. 139, 1906, Can., as brought in respect of a criminal charge, is subject to the limitation provided by s. 48 of that act as amended, 8-9 Geo. V., 1918, Can. c. 7, s. 2, requiring that more than $1000 shall be involved in the appeal. Ss. 37, 38 and 39 of that Act are subject to s. 48. The Supreme Court of Canada has no jurisdiction to grant special leave to appeal under s. 48 (e) after the expiration of 60 days from the pronouncing of the judgment a quo. No appeal lies to the Supreme Court of Canada from the judgment of the Supreme Court of Nova Scotia upon an application for a writ of prohibition against a prosecution under the Nova Scotia Temperance Act, as the prohibition application arises "out of a criminal charge" (R.S.C. 1906, c. 139, s. 39 (c). [The John Goodison Thresher Co. v. McNab, 42 Can. S.C.R. 694, followed.]

Mitchell v. Tracey; R. v. Mitchell (No. 3), 31 Can. Cr. Cas. 410, affirming 31 Can. Cr. Cas. 223.

TO PRIVY COUNCIL FROM ALBERTA S.C.

Rules governing appeals to the Privy Council dated 10th January, 1910. Vol. 2, A.L.R., pages 571-578.

(§ II A—40)—OVER PROVINCIAL COURTS.

Where the judgment sought to be appealed from is that of the highest provincial court of final resort upon an appeal from a judgment which varied the report of a Referee or Master upon an appeal from his report in a reference which had been directed at the trial to assess the damages in the action, such judgment of the highest provincial court is not a final judgment appealable to the Supreme Court of Cana-

da, but an appeal lies from the judgment on further directions afterwards given upon the varied report. [Clarke v. Goodall (1911), 44 Can. S.C.R. 284, followed.]

Windsor, Essex and Lake Shore Rapid R. Co. v. Nelles, 1 D.L.R. 156, 309.

To Supreme Court (Can.)—Jurisdiction —Supreme Court Amendment Act (Can.), 1913—Prior actions.

The statute 3-4 Geo. V. (Can.) c. 51, amending the Supreme Court Act, R.S.C. 1906, c. 139, does not apply to enlarge the right of appeal from a judgment for the plaintiff directing a reference as to amount on which a report is still to be made by the referee, although such judgment determines in part a substantial right, and is, consequently, declared to be a "final judgment" within the statutory definition of the amending statute, if the action were begun prior to the amendment, but the judgment appealed from was subsequent thereto. [Hyde v. Lindsay, 29 Can. S.C.R. 99, and Colonial Sugar Refining Co. v. Irving, [1905] A.C. 369, followed; Williams v. Irvine, 22 Can. S.C.R. 108, referred to; Jewell v. Doran, 14 D.L.R. 523, appeal disallowed.]

Doran v. Jewell, 16 D.L.R. 490, 49 Can. S.C.R. 88.

B. Of Exchequer Court of Canada.

(§ II B—45)—Appeal from interlocutory order—Admiralty.

Where a mode of appeal is prescribed by statute such procedure must be followed in its entirety. Where the appellant on appeal from the order of a Local Judge in Admiralty to the Exchequer Court to obtain the permission of such Local Judge, or the Judge of the Exchequer Court, for such appeal being taken, the appeal was dismissed for not having complied with the requirements of the statute. [Supervisors v. Kennicott, 94 U.S. 498, referred to.]

Re 251 Bars of Silver & Canadian Salvage Assn. (No. 1), 15 Can. Ex. 367.

C. Of Provincial Courts.

(§ II C—50)—Summary convictions—Jurisdiction.

S. 749 of the Criminal Code confers jurisdiction on District Courts in Alberta to hear appeals from summary convictions, and though the District Courts Act (Alberta) does not constitute such courts for the hearing of appeals, they have jurisdiction under the first-named Act. [Stuart, J., commented upon the different names given to the courts for hearing appeals and speedy trials respectively.]

Gallagher v. Vennesland, 32 D.L.R. 435, 11 A.L.R. 228, 27 Can. Cr. Cas. 360.

Jurisdiction—Second appeal after appeal from arbitrators to judge.

No further appeal lies to the court en banc from an order of a judge of the Supreme Court of New Brunswick setting aside an award on an appeal to him under s. 17, subss. (20) and (21) of C.S.N.B. 1903, c. 91, which permit an appeal on questions of law or fact to a judge of such court from an award made by arbitrators in an expropriation proceeding. [Birely v. Toronto, Hamilton & Buffalo R. Co., 25 A.R. (Ont.) 88; Canadian Pacific R. Co. v. St. Thérèse, 16 Can. S.C.R. 606; Ottawa Electric Co. v. Brennan, 31 Can. S.C.R. 311; and Armstrong v. James Bay R. Co., 12 O.L.R. 137, affirmed 38 Can. S.C.R. 511, affirmed, [1909] A.C. 624, followed.]

St. John and Quebec R. Co. v. Bull, 14 D.L.R. 190, 42 N.B.R. 212, 13 E.L.R. 294.

Master's orders in land actions—Power of Appellate Judge.

A judge on appeal from a Master has the like discretionary powers, under Rules 326, 312 and 3 (Alta.), as the court on an appeal from a judge, and he may therefore rescind a Master's order directing a rescission of a land agreement and grant leave for an alternative remedy.

Shepard v. Astley, 23 D.L.R. 97, 31 W.L.R. 692.

Jurisdiction of B.C. Court of Appeal—Cancellation of order of deportation—R.S.B.C. 1911, c. 51.

Under s. 6 of the Court of Appeal Act, R.S.B.C. 1911, c. 51, providing that an appeal shall lie to the Court of Appeal from all judgments, orders, or decrees made by the Supreme Court or a judge thereof, no appeal lies to the Court of Appeal of British Columbia from the judgment of a judge of the Supreme Court of British Columbia cancelling an order of deportation made by the chairman of a Board of Inquiry constituted under s. 13 of the Immigration Act of Canada, 9-10 Edw. VII. c. 27. [Cox v. Hakes, 15 App. Cas. 506, followed; Ikezoya v. Canadian Pacific R. Co., 12 B.C.R. 454, overruled.]

Re Hoessan Rahim, 4 D.L.R. 701, 19 Can. Cr. Cas. 94, 17 B.C.R. 276.

Jurisdiction of King's Bench of Quebec —Conviction of Recorder's Court—Breach of city by-law.

No appeal lies to the Court of King's Bench in Quebec from a conviction of the Recorder's Court imposing a fine of $25 for breach of a city by-law.

Montreal Street Railway Co. v. The City of Montreal, 3 D.L.R. 812, 23 Que. S.C. 412.

Jurisdiction of Ontario Divisional Court — Reopening of case — Taking of fresh evidence—Trial de novo—Jurisdiction of Ontario courts as to admission of further evidence on appeal — Ontario Con. Rule, 1897, 498.

Re Fraser, Fraser v. Robertson; McCormick v. Fraser, 8 D.L.R. 955, 26 O.L.R. 508.

Award of arbitrators under Railway Act (Can.).

No appeal lies in the Province of Que-

bec to the Court of King's Bench from the judgment of the Superior Court upon an appeal under s. 209 of the Railway Act, R.S.C. 1906, c. 37, from the award of an arbitrator.

Rolland v. Grand Trunk R. Co., 7 D.L.R. 441, 14 Can. Ry. Cas. 21.

OF PROVINCIAL COURTS.

S. 1047 of the Crim. Code, 1906, providing that any costs ordered to be paid by a court pursuant to the foregoing provisions of the Code shall in case there is no tariff of fees provided with respect to criminal proceedings be taxed by the proper officer of the court according to the lowest scale of fees allowed in such court in a civil suit, does not, by the mere introduction of the civil tariff, give the right of appeal which is found in civil cases, and therefore, no appeal in that regard being anywhere provided for by the Criminal Code, the Ontario High Court has no appellate jurisdiction to interfere with the discretion of the officer whose duty it is to tax such costs.

Re Contantineau and Jones, 5 D.L.R. 483, 26 O.L.R. 160, 21 O.W.R. 880.

MAGISTRATES—QUESTION OF LAW—APPEAL UNDER ALBERTA LIQUOR ACT—DUTY OF MAGISTRATE TO SIGN AFFIDAVIT.

It is not within a magistrate's jurisdiction to decide the question of law, whether or not a defendant, having moved by way of certiorari, can yet proceed by way of appeal in an action under the Liquor Act (1916, Alta., c. 4). It is his duty to take the affidavit required by s. 4 (10) of the Act when requested to do so.

R. v. Dominion Drug Stores; R. v. C.N.R. Co., 44 D.L.R. 382, 30 Can. Cr. Cas. 318. [Affirmed in 31 Can. Cr. Cas. 86, 14 A.L.R. 384.]

LOCALITY OF OFFENCE—MAGISTRATE ACTING FOR TWO COUNTIES—JURISDICTION OF COUNTY COURT ON APPEAL.

An appeal under the Summary Convictions Act, R.S.B.C. 1911, c. 218, from a magistrate's conviction under a provincial law cannot be taken to the County Court of a county other than that in which the offence is alleged to have been committed, although the magistrate may have had jurisdiction in both counties. [R. v. Lynn (No. 1), 17 Can. Cr. Cas. 354, 3 Sask. L.R. 339, referred to.]

R. v. Brady, 23 Can. Cr. Cas. 35, 20 B.C.R. 217, 28 W.L.R. 733.

COURT OF KING'S BENCH—JURISDICTION—MOTION TO QUASH—APPEAL FROM A DECISION OF THE PUBLIC UTILITIES COMMISSION DISMISSING AN OBJECTION TO ITS JURISDICTION—JURISDICTION OF THE PUBLIC UTILITIES COMMISSION OVER TOLLS—ROADS TRUSTEES—R.S., [1909] ARTS. 758, 763.

An appeal lies to the Court of King's Bench from a decision of the Public Utilities Commission dismissing an exception to its jurisdiction. Toll roads trustees, though not owners of the roads, are subject to the jurisdiction of the Public Utilities Commission.

Les Syndics des Chemins, à Barrières de la Rive Sud v. Levis County R., 28 Que. K. B. 105.

JURISDICTION OF COURT OF KING'S BENCH—PROHIBITION—QUASHING MUNICIPAL BY-LAW—RECORDER'S COURT.

There is an appeal to the Court of King's Bench from a judgment refusing to grant a writ of prohibition to prevent a Recorder's Court from executing judgments based upon a municipal by-law, whose quashing is likewise asked for.

Drapeau v. La Cour de Recorder de la cité de Quebec, 27 Que. K.B. 182.

ASSIGNMENT FOR CREDITORS—APPOINTMENT OF CURATOR.

There is no appeal to the Court of King's Bench from an order of a Judge of the Superior Court appointing a curator in a judicial abandonment of property even if such appointment has been contested between the creditors.

Gauthier and Laviolette v. Lamarre, 27 Que. K.B. 320.

COURT OF KING'S BENCH — WINDING-UP MATTER—MOTION TO REJECT.

The fact that a court of first instance had discretionary power in pronouncing judgment may be a reason for not granting leave to appeal or for confirming it but is not a reason for rejecting the appeal on motion, when the permission to appeal was granted by a judge. A judgment directing a sale of the real property of an insolvent company, and refusing an application to stay the sale cannot be appealed to the Court of King's Bench because the object of the appeal is not a sum of money.

La Compagnie de Sainte-Foye and Parent v. Matte, 27 Que. K.B. 306.

INTERLOCUTORY JUDGMENT—COURT OF REVIEW.

The Court of Review has no jurisdiction to hear and adjudicate upon an appeal from an interlocutory judgment in a case appealable to the Court of King's Bench.

Harvey v. Mutual Life Assurance Co., 19 Que. P.R. 364.

(§ II C—60)—QUESTIONS OF TITLE—MINERS' LIENS.

A claim for a miner's lien does not involve "title to real estate" nor any "interest therein" within the meaning of s. 2 of the Act to amend the Yukon Amendment Act, 2 Geo. V. (Can.) c. 56, so as to permit an appeal from the Yukon Territorial Court to the British Columbia Court of Appeal, notwithstanding that the amount in controversy was less than $500.

Bradshaw v. Saucerman (No. 2), 9 D.L.R. 439, 18 B.C.R. 41, 23 W.L.R. 33.

(§ II C — 65) — AMOUNT NECESSARY TO CONFER JURISDICTION—JOINING CLAIMS.

Several claims for mechanics' liens, each for a sum insufficient to permit an appeal, cannot be joined in order to make up an

appealable amount. [Gabriel v. Jackson Mines Limited, 15 B.C.R. 373; and Gillis Supply Company v. Allen, 15 B.C.R. 375, followed.]

Boker v. Uplands, 12 D.L.R. 133, 18 B.C.R. 197, 24 W.L.R. 768.

JURISDICTIONAL AMOUNT — APPEAL FROM TAX ASSESSMENT.

Re Ontario and Minnesota Power Co. and Fort Frances, 22 D.L.R. 885, 34 O.L.R. 365.

CONTRACT—SALE OF GOODS—BREACH—DAMAGES—JUDGMENT FOR SMALL AMOUNT.

Campbell v. Mahler, 47 D.L.R. 722, 45 O.L.R. 44, affirming 43 O.L.R. 395.

DEPRIVATION OR REDUCTION—"GOOD CAUSE" —DISCRETION.

Young Hong v. Macdonald, 15 B.C.R. 303, 17 W.L.R. 417, 17 W.L.R. 417.

INJUNCTION — CONTRACT — COLLATERAL EFFECT OF JUDGMENT.

Shawinigan Hydro-Electric Co. v. Shawinigan Water and Power Co., 43 Can. S.C.R. 650.

TO DIVISIONAL COURT—FROM COUNTY COURT JUDGE—ORDER FOR ARREST—ACTION IN COUNTY COURT.

Bank of Montreal v. Partridge, 3 O.W.N. 149, 20 O.W.R. 206.

AMOUNT NECESSARY TO JURISDICTION—COURT OF REVIEW—QUE. C.P. 52a.

The Court of Review, Que., can hear an appeal from an interlocutory judgment, before final judgment, only in cases where the amount does not exceed $500.

Morin v. Beck's Weekly, 15 Que. P.R. 403.

JURISDICTIONAL AMOUNT — COURT OF REVIEW.

The Court of Review has no jurisdiction to review an interlocutory judgment in cases above $500, but when the appeal from such judgment includes also the merits of the case, the Court of Review has jurisdiction.

Poirier v. Trudeau, 52 Que. S.C. 405.

AMOUNT NECESSARY FOR JURISDICTION.

A judgment for a sum of $100 was, before 8 Edw. VII. c. 74, appealable to the Court of King's Bench.

Burns v. Cousineau, 14 Que. P.R. 389.

Where the only issue on an appeal was in respect of damages assessed at an amount below that limited for appeals from the Province of Quebec, the appeal should be quashed, but without costs, as the objection to the jurisdiction of the court had not been taken by motion as provided by the Rules of Practice. [Price Brothers & Co. v. Tanguay, 42 Can. S.C.R. 133, followed.]

Brompton Pulp and Paper Company v. Narcisse Bureau, 10 East. L.R. 290.

JURISDICTIONAL AMOUNT — AFFIDAVIT — LIQUIDATOR—WINDING-UP ACT.

Proof of the amount involved in an appeal can be made by affidavit and it is the duty of the court hearing the application to determine the amount from the affidavits filed. [Falkner's Gold Mining Co. v. McKinnery, [1901] A.C. 581.] On a liquidator's application under s. 101 (e) of the Winding-up Act, R.S.C. 1906, c. 144, as amended by 5 Geo. V., c. 21, s. 1, for leave to appeal from an order directing the payment of a solicitor's costs, the court should, in the absence of any contradiction, accept the sworn statement of the liquidator that the amount involved in the appeal exceeds the amount required to give jurisdiction.

Re Prudential Life Insurance Co. (Man.), [1918] 3 W.W.R. 508.

(§ II C—66)—JURISDICTIONAL AMOUNT—TITLE TO LAND.

The Court of King's Bench has jurisdiction to entertain an appeal from a judgment of the Superior Court, which has assessed damages at the sum of $250, when the effect of such judgment is to determine a title to immovable property and causes prejudice as to the conditions of the exigibility of a capital sum amounting to $1,100.

Lebel v. Morin, 25 Que. K.B. 320.

(§ II C—68)—TO PRIVY COUNCIL FROM ONTARIO COURT—AMOUNT IN CONTROVERSY.

In an action by an assignee for benefit of creditors brought against a bank to set aside securities given by the debtor to the bank, where the issue is whether the bank is entitled to the whole of the proceeds of certain property or only to a pro rata share with other creditors, the difference between such sums is the amount of the matter in controversy by which the statutory right of appeal to the Privy Council from the Ontario Supreme Court is governed under the Ontario statute, 10 Edw. VII. c. 24, if the total amount of the bank's claim against the debtor, which was in excess of the statutory minimum of $4,000, was not in dispute.

Townsend v. Northern Crown Bank, 10 D.L.R. 652, 4 O.W.N. 1245.

TO PRIVY COUNCIL—MOTION FOR LEAVE TO APPEAL—AMOUNT IN DISPUTE—WINDING-UP ACT.

Lapierre v. Banque de St. Jean, 12 Que. P.R. 152.

SUPREME COURT OF CANADA—MATTER IN CONTROVERSY — FLOODING OF LANDS — DAMAGES—OBJECTION TO JURISDICTION —PRACTICE.

Brompton Pulp & Paper Co. v. Bureau, 45 Can. S.C.R. 292.

MATTER IN CONTROVERSY—INSTALMENT OF MUNICIPAL TAX—COLLATERAL EFFECT OF JUDGMENT.

Town of Outremont v. Joyce, 43 Can. S.C.R. 611.

ACCOUNTING—AMOUNT IN CONTROVERSY.

St. Aubin v. Desmarteau, 44 Can. S.C.R. 470.

JURISDICTIONAL AMOUNT—FUTURE RIGHTS.

In order that a case, in which the amount claimed is less than $500, may be susceptible of appeal to the Court of King's Bench on account of the fact that rights in future may be affected, it is necessary that

such future rights should not be purely contingent, they must be determinable at an amount which would assure the jurisdiction of the court. Quære: Whether or not such future rights must be such as would affect immovable property.

Guimont v. Village of Montmorency, 25 Que. K.B. 228.

JURISDICTIONAL AMOUNT — SOLICITOR'S COSTS.

When a solicitor appeals from a judgment rejecting his application to sue for his costs, on account of the parties having collusively settled the case among themselves, he is to furnish evidence that his costs, or his interest in the cause, amount to at least $500; if he does not furnish such evidence his appeal will be quashed for want of jurisdiction. Should the question of want of jurisdiction not be raised until the time of pleading to the merits, and not by motion in limine, the respondent ought not to have more than the costs of a motion.

Richard v. Coulombe; Denis v. Richard, 25 Que. K.B. 144.

COURT OF KING'S BENCH—JURISDICTION—CANCELLATION OF COLLECTION LIST—AMOUNT IN LITIGATION — MOTION TO THROW OUT APPEAL—C.C.P., ART. 43.

There is no appeal to the Court of the King's Bench from a judgment of the Superior Court in an action for cancellation of a school collection list, of which the total amount is less than $500.

School Commissioners of Portneuf v. Marcotte, 28 Que. K.B. 441.

AMOUNT IN CONTROVERSY—EXCEPTIONS.

Montreal v. Chartrand, 20 Que. K.B. 53.

APPEAL TO SUPREME COURT—AMOUNT IN CONTROVERSY.

St. Aubin v. Birtz, 12 Que. P.R. 222.

JURISDICTION—AMOUNT INVOLVED.

Gillies Supply Co. v. Allan, 15 B.C.R. 375.

III. Transfer of cause; parties; time limitations.

A. RIGHT TO TRANSFER.

(§ III A—70)—SETTING DOWN FOR HEARING—FORM OF SUBMISSION—DEFINING QUESTIONS OF LAW.

The C.P.R. Co. v. Regina Board of Trade (Regina Rates Case), 44 Can. S.C.R. 328.

ASSESSOR'S RECOMMENDATIONS FOR USE ON APPEAL.

Where a trial takes place before a judge assisted by assessors, and the assessors have given their recommendations to the judge, parties appealing from the judge's decision are not entitled to the assessor's recommendations for use on the appeal.

Westholme Lumber Co. v. City of Victoria, 23 B.C.R. 178.

(§ III A—71)—RIGHT TO—WAIVER—ORDER OF RAILWAY AND MUNICIPAL BOARD.

The right of a municipality to appeal from an order of the Ontario Railway and Municipal Board permitting a street railway to deviate its line, is not lost or waived by the failure of the city to appeal from the mere ruling of the Board in favour of the railway company as to the right to deviate when the deviation plan was not approved at that hearing, as it may wait until the making of the formal order and appeal therefrom on obtaining the requisite leave.

Re Toronto & Toronto & York Radial R. Co., 12 D.L.R. 331, 28 O.L.R. 180, 15 Can. Ry. Cas. 277. [Affirmed by Privy Council, 15 D.L.R. 270, 25 O.W.R. 315.]

HOW LOST OR WAIVED.

A party cannot inscribe in appeal so long as the costs occasioned by an inscription in review in the same cause which was abandoned have not been paid. Per Cross, J.: —A motion to dismiss an appeal for nonpayment of the costs of a former appeal which was abandoned is not premature even when made before the expiration of the delay for appearance as the court is seized of the cause by the security furnished on the second appeal.

Mont-Royal Assur. Co. v. Mennier, 14 Que. P.R. 11.

B. EFFECT; SUBSEQUENT PROCEEDINGS IN COURT BELOW.

(§ III B—75)—EFFECT OF APPEAL WHERE A REHEARING.

The word "law" in Cr. Code, s. 752, where it is declared that the court appealed to should try and shall be the absolute judge "as well of the facts as of the law," in respect to the conviction or order appealed from refers to the law applicable to the facts adduced in support of or against the proof of the charge; the appeal being a rehearing, is a submission to the jurisdiction of the District Court to which an appeal is taken under Cr. Code, s. 797, from a summary trial for the indictable offence of keeping a disorderly house (Cr. Code, ss. 228 and 773 (f) and 774), and the District Court may rehear on the merits notwithstanding the want of jurisdiction of the magistrate below, by reason of the illegality of the arrest, nor does Code, s. 753, as to objections taken below, apply other than to the cases it specifically mentions. [Rand v. Rockwell, 2 N.S.R. 199, referred to.]

R. v. Miller, 25 Can. Cr. Cas. 151.

(§ III B—76)—TRANSFER OF CASE—SUMMARY CONVICTION—UNAUTHORIZED SECURITY—STAY OF PROCEEDINGS.

Where an appeal from a summary conviction under the Criminal Code has been entered on the records of a District Court, the validity of the entry of the appeal is not subject to collateral attack, and until quashed by the District Court or held invalid by a Superior Court in a proceeding such as prohibition upon which the question is raised on a direct and substantive application, the stay of proceedings incident to the appeal must be held to be operative so as to invalidate an arrest under the

conviction appeals from, made before the disposal of the appeal.

R. v. Gregg, 13 D.L.R. 770, 22 Can. Cr. Cas. 51, 6 A.L.R. 234, 25 W.L.R. 183.

STAY PENDING APPEAL.

A defendant appealing from a decision against him at the trial, has, under the Alberta practice rule 510, a prima facie right to a stay of proceedings pending the hearing of such appeal, on terms within the discretion of the court.

Bremner v. Braun, 15 D.L.R. 231, 7 A.L.R. 56.

STAY OF PROCEEDINGS—APPEAL PENDING—FORECLOSURE—REDEMPTION.

Where the mortgagor would be barred from reopening a foreclosure, as is probably the effect of subs. 8, of s. 93, of the Land Titles Act, R.S.S. 1909, c. 41, and, unless the application to stay proceedings upon an appeal from an order affecting the right to redeem were granted, the mortgagee might obtain a certificate of title to the lands, a stay of proceedings should be granted pending the appeal, on payment of the costs of the application and on giving security for the costs of the appeal. [See also Williams v. Box, 44 Can. S.C.R. 1; Reeves v. Konschur, 2 S.L.R. 125; Richards v. Thompson, 18 W.L.R. 1, 9.]

Wasson v. Harker (No. 3), 7 D.L.R. 528.

STAY OF EXECUTION PENDING APPEAL — PRIVY COUNCIL APPEALS FROM ONTARIO.

Subject to the power to otherwise order in any particular case, execution is stayed on an appeal from the Court of Appeal for Ontario to the Judicial Committee of the Privy Council, notwithstanding Ont. Con. Rule (1897) 832, when the security required by the Privy Council Appeals Act, 10 Edw. VII. (Ont.) c. 24, has been perfected. [This practice has since been varied by statute of 1912, 2 Geo. V. (Ont).]

Stavert v. Campbell, 1 D.L.R. 689, 25 O.L.R. 515, 21 O.W.R. 370.

STAY OF PROCEEDINGS—SUPERSEDEAS.

Where a defendant by its plea and cross-demand gives to plaintiffs the option of resuming work within fifteen days after judgment to be rendered and the judgment does order plaintiffs thereupon to resume work within a stipulated delay, failing which a deposit made by plaintiffs will be forfeited and defendant appeals from such judgment on another point, this fact does not prevent plaintiffs from tendering their services within such delay and if they fail to do so and await the decision of the Appellate Court they will be too late to avail themselves of this offer and the deposit will be forfeited.

Brazer v. Elkin & Co., 3 D.L.R. 114, 19 Rev. de Jur. 153.

FROM SUPREME COURT OF CANADA TO PRIVY COUNCIL—MOTION BELOW TO STAY PROCEEDINGS.

A stay of proceedings to admit of an appeal from the decision of the Supreme Court of Canada to the Privy Council will not be granted by a Judge of the Supreme Court in a case where the decision of the court en banc proceeded on the ground that it had no jurisdiction under the particular circumstances to entertain the appeal taken to it from a provincial court.

Mitchell v. Tracey; R. v. Mitchell (No. 3), 31 Can. Cr. Cas. 410.

TO DIVISIONAL COURT — FROM COUNTY COURT—ORDER STAYING ALL PROCEEDINGS IN A COUNTY COURT ACTION PENDING A TRIAL IN HIGH COURT.

Gibson v. Hawes, 3 O.W.N. 91, 20 O.W.R. 109.

STAY OF PROCEEDINGS.

An application to the Privy Council for leave to appeal from the judgment of the Supreme Court of Canada does not have the effect of staying proceedings, and no stay of proceedings will be granted upon the application. [Adams v. Bank of Montreal, 31 Can. S.C.R. 223.] Where, therefore, the judgment of the trial judge dismissing the action under a mechanics' lien and ordering that the lien be vacated, was reversed by the court en banc but restored by the Supreme Court of Canada, an order was granted on the application of the defendant directing the cancellation of the lien, notwithstanding the fact that an application for leave to appeal to Privy Council was pending.

Breckenridge-Lund Lumber & Coal Co. v. Short & Travis, 3 A.L.R. 236.

In an action against two defendants to have a Crown grant revoked, judgment was given in the Supreme Court annulling the grant, but also maintaining a claim of one of the defendants for betterments to the property. The defendants appealed to the King's Bench from the judgment of revocation and the plaintiff inscribed in review from that part of the judgment which maintained the claim for betterments. It was held that an application by the defendants to stay proceedings upon the appeal to the King's Bench, until after decision of the appeal to the Court of Review should be rejected.

Pontiac Gold Mining Co. v. Beaumont, 18 Rev. de Jur. 517.

(§ III B—77)—APPEAL FROM SUMMARY CONVICTION—EFFECT ON ORIGINAL WARRANT.

On an appeal taken under s. 751 of the Criminal Code, 1906, applicable to appeals from summary convictions and to certain appeals from summary trials (Cr. Code, s. 797) the original warrant of commitment on the conviction appealed from is not vacated by the lodging of the appeal and the granting of bail to the accused and the further enforcement of such warrant may be proceeded with without a fresh warrant

after the affirmance of the conviction upon such appeal.

R. v. Durlin, 4 D.L.R. 660, 19 Can. Cr. Cas. 392, 17 B.C.R. 207, 21 W.L.R. 837.

SUMMARY CONVICTIONS ACT (B.C.) — FINALITY OF FINDING OF SUPREME COURT — COURT OF APPEAL ACT — DUTY OF JUDGES TO FOLLOW JUDGMENTS OF HIGHEST COURTS.

Where a magistrate on a conviction under the Summary Convictions Act, B.C. stats. 1915, c. 59, has stated a case for the Supreme Court, under s. 92, the finding of the Supreme Court is final. There is no further appeal under the Court of Appeal Act of 1911. The decisions of the Privy Council and English Court of Appeal are binding on the British Columbia Court of Appeal and on the Judges of the Supreme Court, and it is the duty of the Supreme Court Judges to follow and apply the decisions of these highest Courts of Judicature in preference to those of the British Columbia Court of Appeal where they are in conflict.

R. v. Gartshore, 49 D.L.R. 276, [1919] 3 W.W.R. 757.

FROM SUMMARY CONVICTION—LEAVE TO APPEAL TO APPELLATE DIVISION FROM ORDER OF JUDGE IN CHAMBERS QUASHING MAGISTRATE'S CONVICTION—REFUSAL OF APPLICATION.

R. v. Davey, 5 O.W.N. 666.

C. PARTIES.

(§ III C—80)—PROSECUTOR—MINISTER OF INLAND REVENUE.

An information under the Special War Revenue Act, 1915, Can., may be laid in the name of the Minister of Inland Revenue by an authorized revenue officer, and an appeal from the dismissal of the complaint may thereupon be taken in the name of the Minister as the "prosecutor" under Cr. Code, s. 749.

Minister of Inland Revenue v. Thornton, 28 Can. Cr. Cas. 3, 12 O.W.N. 30.

PARTIES — MOTION TO QUASH — ACTION BROUGHT IN NAME OF ASSIGNEE FOR BENEFIT OF CREDITORS — ORDER OF COUNTY COURT JUDGE AUTHORIZING CREDITOR TO PROCEED WITH APPEAL IN NAME OF ASSIGNEE—ASSIGNMENTS AND PREFERENCES ACT, R.S.O. 1914 c. 134 s. 12 (2) — JURISDICTION OF JUDGE — PROCEEDINGS TO FOUND JURISDICTION NOT TAKEN—ADJOURNMENT OF MOTION TO ENABLE CREDITOR TO TAKE PROCEEDINGS—COSTS.

Maher v. Roberts, 6 O.W.N. 245.

(§ III C—81)—DEATH OF APPELLANT—REPRISE D'INSTANCE.

When the appellant dies pending an appeal the respondent may by motion obtain an order for the suspension of the appeal and for transmission of the record to the court of first instance to enable him to proceed by way of action en reprise d'instance.

Macdonald v. Lussier, 26 Que. K.B. 285

DEATH OF PARTY BELOW.

It was held that, costs having been adjudged against the appellant by the Court of Review, his universal legatee had an interest to continue proceedings in appeal, but that, at the present stage of the cause, the court would not express an opinion whether or not the universal legatee, as such, had an interest to pray for removal of the defendant from office.

Desaulniers v. Desaulniers, 18 Rev. de Jur. 518.

D. MODE; CONDITIONS; REGULATIONS.

(§ III D—85)—The signature of an attorney to a document of procedure (e.g., an inscription in review) which is affixed by means of a stamp instead of being written by hand, is valid, where no prejudice is caused by the adoption of this method. [Neil v. Champoux, 7 Que. L.R. 210, Cantin v. Belleau, 15 Que. S.C. 7, and Buzzell v. Harvey, 1 Que. P.R. 214, specially referred to.]

Grondin v. Tisi & Turner, 4 D.L.R. 819, 41 Que. S.C. 530.

FROM AWARD OF ARBITRATORS UNDER RAILWAY ACT—PROCEDURE.

In Quebec, the proper procedure for appealing from an award of arbitrators, made under c. 47, of the Railway Act, R.S.C. 1906, is by means of an inscription in appeal as in ordinary cases, and not by a writ and petition. [Re Vallières and Ontario and Quebec R. Co., 11 Can. Ry. Cas. 18, referred to.]

Ross Realty Co. v. Lachine, Jacques Cartier & Maisonneuve R. Co., & Bastien, 11 D.L.R. 741, 15 Can. Ry. Cas. 172.

FROM AWARD OF ARBITRATORS UNDER RAILWAY ACT.

The party dissatisfied with the award in an expropriation of land under the Dominion Railway Act may take an appeal by means of a notice or by inscription. He cannot have the recourse at the same time to a writ and an inscription. On motion therefor he will be condemned to elect as to which of the two he will proceed.

Lachine, Jacques Cartier & Maisonneuve R. Co. v. Charlebois, 14 Que. P.R. 419.

FROM AWARD OF ARBITRATORS UNDER RAILWAY ACT.

An appeal to the Superior Court from the award of arbitrators in a case of expropriation under the Dominion Railway Act should be taken by means of an inscription simply and not by way of a writ and a declaration annexed thereto; [Ross v. The Lachine, Jacques Cartier and Maisonneuve R. Co., 14 Que. P.R. 289, followed] but an appeal by way of action will not be dismissed on exception to the form.

Lachine, Jacques Cartier & Maisonneuve R. Co. v. Charest, 14 Que. P.R. 373.

LIQUOR ACT—AFFIDAVIT.

The affidavit of merits under s. 129 of the Sales of Liquor Act (Sask.) is a condition precedent to the right of appeal to the Supreme Court.

Gordon v. Swetman (Sask.), 10 W.W.R. 4.

(III D—86) — RECOGNIZANCE — SUMMARY CONVICTION AND FINE — CR. CODE, S. 750.

Where a summary conviction directs payment of a fine and, in default of distress, imprisonment, the defendant's recognizance on an appeal therefrom under Cr. Code, s. 750, need not cover the fine and costs, the imprisonment fixed in default of payment being sufficient security for that; the basis on which the amount of the recognizance should be fixed in such case is what the probable costs of the appeal would be.

R. v. McDermott, 19 D.L.R. 321, 23 Can. Cr. Cas. 252.

STATUTORY REQUIREMENTS — AFFIDAVIT OF MERITS—GAME ACT.

An appeal under the B.C. Game Act, 1914, c. 33, is not competent unless the statutory conditions of s. 56 as to making an affidavit of merits as well as the conditions imposed by the Summary Convictions Act, B.C., have been strictly complied with; and the defendant's affidavit of merits, stating that he did not commit the offence charged, must also negative the charge in the terms used in the conviction to comply with s. 56 of the Game Act.

R. v. Marshall, 24 Can. Cr. Cas. 180.

RESERVED CASE IN CRIMINAL MATTER—SPECIAL FINDINGS ON TRIAL WITHOUT JURY.

Where the magistrate holding a summary trial finds in favor of the accused on any question of fact that finding should appear upon the face of the reserved case taken under Cr. Code, s. 1014. The submission merely of a question to the Appellate Court whether or no there was evidence on which the magistrate could find the accused guilty is not the proper mode if the magistrate intends to find any of the questions of fact in favour of the accused, for it presupposes an adverse determination of all questions of fact in issue as well as an adverse determination by the magistrate of the question of law submitted.

R. v. Hoffman, 31 Can. Cr. Cas. 126, 45 O.L.R. 234.

E. CITATION; NOTICE; APPEARANCE.

(III E—90)—NOTICE OF APPEAL.

An appeal from the judgment of the provincial Court of last resort affirming the judgment given at the trial of the action disposing of the rights of the parties and directing a reference to determine the amount of damages, is not an appeal from "a judgment upon a motion to enter a verdict or nonsuit upon a point reserved at the trial" within the terms of s. 70 of the Supreme Court Act, R.S.C. (1906), c. 139, so as to require a notice of appeal within twenty days after the decision of the Court of Appeal of the province.

Windsor, Essex & Lake Shore Rapid R. Co. v. Nelles, 1 D.L.R. 156, and 309.

NOTICE OF—CRIMINAL CASE—TIME FOR GIVING—EXPIRATION ON SUNDAY.

If the last day of the ten days in which notice of appeal from a conviction may be given, as required by s. 750 (b) of the Criminal Code, falls on Sunday, s. 31 (h) of the Interpretation Act, R.S.C. 1906, c. 1, applies to make the notice regular if given on the following day.

R. v. Trottier, 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 A.L.R. 451, 25 W.L.R. 663.

NOTICE OF APPEAL—INSUFFICIENCY.

A notice of appeal is insufficient where the grounds stated therein are (1) that the judgment appealed from is against the law, evidence, and the weight of evidence; (2) that the trial judge erroneously admitted and excluded evidence, and (3) that the judgment was erroneous "upon such other grounds as may appear in the pleadings and proceedings," such alleged grounds being too indefinite.

Alfred & Wickham v. G.T.P.R. Co., 5 D.L.R. 154, 20 W.L.R. 111.

SUMMARY CONVICTION — FILING NOTICE OF APPEAL.

The notice of appeal under Cr. Code, s. 750 (amendment of 1909), which is to be filed with the court appealed to within ten days after a summary conviction, is too late where mailed to the clerk of the court in time for him to receive it on the tenth day at his post office, if by reason of his own office being officially closed on that day, he did not in fact receive it until the day following.

The King v. Green, 22 Can. Cr. Cas. 155.

NOTICE TO BOTH JUSTICES WHERE TWO JUSTICES REQUIRED TO FORM THE COURT—SELLING INTOXICANT TO TREATY INDIAN—QUASHING APPEAL WHERE ONLY ONE JUSTICE SERVED.

The King v. Edelston, 17 Can. Cr. Cas. 155 (Sask.).

The notice of appeal being given the court en banc is seized of it, and the filing of the appeal book is merely a provision for bringing the material relating to the appeal before the court and does not in any way affect the time within which notice must be given or determine the sittings to which such notice must be given.

Patterson v. Palmer, 4 S.L.R. 455.

NOTICE OF APPEAL FROM DISMISSAL ORDER.

The notice of appeal by the informant, under Cr. Code, s. 750, from the dismissal of the complaint laid by him on behalf of an association of which he was an officer, for infringement of a law the enforcement of which would specially benefit such association, need not specifically state that such informant is a "person aggrieved" by the dismissal order. (Cr. Code, s. 749.)

R. v. Austin, 25 Can. Cr. Cas. 446.

COUNTY COURT APPEAL—NOTICE OF EXTENDING TIME FOR SERVICE — WHAT JUDGE MAY MAKE ORDER.

The time for serving the notice of an appeal from the County Court may be extended by either a Judge of the Supreme Court or the Judge of the County Court appealed from: Order 59, r. 12.

Ying v. Foo, 42 N.B.R. 315.

INSCRIPTION IN APPEAL — SERVICE OF NOTICE—MOTION TO REJECT — MOTION TO GIVE NEW NOTICE—COSTS—C.P., ARTS. 518, 1213, 1220, 1236, 1248.

The service of the inscription in appeal before it is stamped and deposited in the office of the Prothonotary, is irregular and may be, on motion, set aside together with the security bond and all proceedings had and taken since the filing of the inscription. But the court, on motion, may permit the appellant to give a new notice, a new security and to proceed thereon. To that end, the record may be transmitted to the Superior Court, unless the parties agree otherwise. The costs of the two motions against the appellant, other costs reserved.

Protestant Board of School Commissioners, of Montreal v. Quinlan, 28 Que. K.B. 62.

(§ III E—91)—NOTICE OF APPEAL—SERVICE — APPEAL FROM SUMMARY CONVICTION.

R. v. McKay, 10 D.L.R. 820, 21 Can. Cr. Cas. 211, 23 W.L.R. 369.

SERVICE OF NOTICE OF — VACATION — FORECLOSURE ACTION BETWEEN VENDOR AND PURCHASER — SUBPURCHASERS AS PARTIES.

Hueston v. Gemmel, 25 D.L.R. 772, 8 S.L.R. 330, 32 W.L.R. 569.

FROM SUMMARY CONVICTION — PROOF OF SERVICE.

It is sufficient that a notice of appeal from a summary conviction to which the procedure of the Criminal Code is applicable should be proved by affidavit and not by calling a witness on the return of the appeal to prove the service. [R. v. Gray, 5 Can. Cr. Cas. 24; and Pahkala v. Hannuksela, 20 Can. Cr. Cas. 247, 8 D.L.R. 34, considered.]

R. v. Curran, 19 D.L.R. 120, 22 Can. Cr. Cas. 388.

FROM SUMMARY CONVICTION — SERVICE OF NOTICE OF APPEAL—CR. CODE, S. 750.

The period of ten days limited by Code s. 750 (as amended 1909 and 1913) for filing a notice of appeal from a summary conviction, does not apply to the service of notice on the respondent and the justices; it is sufficient that the service was made in sufficient time to perfect the appeal.

R. v. McDermott, 19 D.L.R. 321, 23 Can. Cr. Cas. 252.

FROM SUMMARY CONVICTION — "NEXT SITTINGS" UNDER CR. CODE, S. 749.

Where, as in Saskatchewan, the regular sittings of the District Court to which an appeal may be taken from a summary conviction are fixed by provincial order-in-council and others known as special sittings are fixed by the judge by virtue of a provincial statute, a notice of appeal is valid if served for the special sittings being the first sittings following the expiration of fourteen days from the conviction; and semble, it would be competent for an appellant to give notice of appeal either to the next special sittings or the next regular sittings, either being the "next sittings" within a liberal interpretation of Cr. Code, s. 749.

R. v. Georget, 19 D.L.R. 404, 23 Can. Cr. Cas. 341.

FROM SUMMARY CONVICTION — NEAREST PLACE OF SITTINGS — DISTRICT COURT (SASK.).

The sittings of a District Court which shall be held "nearest" to the place where the cause of the information or complaint arose and to which in Saskatchewan an appeal from a summary conviction is to be taken, means, primâ facie the nearest, measured in a straight line on a horizontal plane, but if it be shewn that another place for which a session of the court is fixed is more convenient of access, having regard to the recognized means of travel, the appellant will be deemed to have complied with Cr. Code, s. 749, if he brings his appeal either there or at the place which is nearest when measured in a straight line. [R. v. Surrey, 6 Q.B.D. 100; R. v. Norfolk, 99 L.T. 936, applied.]

R. v. Georget, 19 D.L.R. 404, 23 Can. Cr. Cas. 341.

SERVICE OF NOTICE—SUMMARY CONVICTION.

The service of a copy of notice of intention to appeal under s. 750 (b) of the Crim. Code, need not be effected within ten days of the conviction or order appealed against. Notwithstanding the absence of any such provision in the District Courts Act, the court for hearing appeals from summary convictions is the District Court.

Gallagher v. Vennesland, 32 D.L.R. 435, 27 Can. Cr. Cas. 360, 11 A.L.R. 228.

SERVICE OF NOTICE — AFFIDAVIT — ILLEGITIMATE CHILDREN'S ACT.

The filing of the appellant's affidavit with the magistrate under the Illegitimate Children's Act, R.S.M. 1913, c. 92, on appealing from his dismissal of an information thereunder, is intended to take the place of the service on the magistrate of any other formal notice of appeal, such affidavit in itself declaring both the intention to appeal and that the appeal was not being prosecuted for delay; consequently where the appellant has personally served the respondent with a notice of appeal, has given the prescribed bond and has within ten days from the decision complained of filed the statutory affidavit, a preliminary objection for failure to serve the like notice of appeal upon the magistrate will be

overruled. [Davis v. Feinstein, 24 Can. Cr. Cas. 160, 24 D.L.R. 798, 25 Man. L.R. 517, referred to.]

Re Sigurdson (No. 1), 28 D.L.R. 375, 25 Can. Cr. Cas. 291, 25 Man. L.R. 832. [See also 28 D.L.R. 376, 25 Can. Cr. Cas. 313, 26 Man. L.R. 209.]

NOTICE OF APPEAL FROM SUMMARY CONVICTION.

A notice of appeal given under Cr. Code, s. 750, by the person convicted and which shows on its face that he appeals as such from the summary conviction made against him, need not specifically state that he is the "person aggrieved" (Cr. Code, s. 749).

R. v. Hatt, 27 D.L.R. 640, 25 Can. Cr. Cas. 263.

NOTICE OF APPEAL IN CRIMINAL CASE—SERVICE OF COUNSEL — ATTENDANCE OF ACCUSED.

The Court of Appeal hearing an appeal by the Crown by way of reserved case from a ruling in favour of the accused on a criminal trial will hesitate to hear the appeal of which notice has been served on his counsel but not on the accused personally, although counsel for the accused is present to argue the appeal and admits that he had shewn the accused the notice of appeal; but an adjournment for personal service will not be necessary if the accused attends in person at the argument of the appeal.

R. v. Kerr, 3 D.L.R. 720, 20 Can. Cr. Cas. 70, 22 Man. L.R. 353.

SERVICE OF NOTICE OF APPEAL.

Upon an appeal from a summary conviction the notice of appeal may be served either upon the justice or upon the respondent under Cr. Code, s. 750 (amendment of 1909), but where the respondent is not served, more must be shewn than service upon a person to whom the witness, called in proof of service, had been directed on enquiry for a man bearing the same surname and initials as the justice; the appellant should prove that the person served was the justice who tried the case.

Pahkala v. Hannuksela (No. 1), 8 D.L.R. 34, 20 Can. Cr. Cas. 247, 2 W.W.R. 911.

NOTICE—SERVICE—CRIM. CODE.

Service of notice of appeal from a conviction under s. 750 (b) of the Criminal Code, need not be made upon the respondent and convicting justices within the ten days within which the notice must be filed in the Appeal Court; the limit applies only to the filing of the notice.

Gallagher v. Vennesland, 32 D.L.R. 435, 11 A.L.R. 228, 27 Can. Cr. Cas. 360.

NOTICE OF APPEAL—CRIMINAL CASE—SERVICE OF—APPOINTMENT OF OFFICER TO ACCEPT—SERVICE ON PERSON IN CHARGE OF OFFICE.

In the absence of an officer of the N.W. Mounted Police, on whom an Indian agent consents to service of notice of an appeal from a conviction by him, the notice may properly be served on the person in charge in such officer's place.

R. v. Trottier, 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 A.L.R. 451, 25 W.L.R. 663.

SUMMARY CONVICTION MATTER—NOTICE.

A notice of appeal taken in a summary conviction matter under Cr. Code, s. 749, by a person entitled to appeal thereunder, need not state on its face that the appellant is a "person aggrieved" nor recite such facts as would shew legal grounds for his being aggrieved. [R. v. McKay, 21 Can. Cr. Cas. 212, 10 D.L.R. 820, 23 W.L.R. 369, followed.]

Gates v. Renner, 24 Can. Cr. Cas. 122, 9 W.W.R. 190.

SUMMARY CONVICTION—PLACE OF SITTINGS —DISTRICT COURTS.

An appeal from a summary conviction in Saskatchewan is by Cr. Code, s. 749, to be taken to the sittings of the District Court held nearest to the place where the cause of the information or complaint arose, and the distance is to be measured in a straight line without regard to the circumstance that the sittings held at a place which was not the nearest in a straight line would be more convenient of access having regard to the recognized means of travel; the jurisdiction of the District Court is limited by Code, s. 749, to the sittings which are in fact the nearest.

Fauchaux v. Georgett; R. v. Georgett (No. 2), 25 Can. Cr. Cas. 76, 8 S.L.R. 325, 32 W.L.R. 863, reversing 23 Can. Cr. Cas. 341 on this point.

PRACTICE — PETITION FOR REGISTRATION — NOTICE OF SETTLING APPEAL BOOK — "PARTIES INTERESTED"—R.S.B.C. 1911, c. 127, s. 114—B.C. STATS. 1914, c. 43, s. 65.

Any interested party, who has been served with a petition to a judge in Chambers under s. 114 of the Land Registry Act, is on appeal from the decision given on the hearing, entitled to notice of, and to appear upon the settlement of the appeal book before the registrar. All material before the judge below should be included in the appeal book.

Re Land Registry Act; Re Granby Consol. Mining & Smelting Co., 26 B.C.R. 297.

NOTICE OF APPEAL.

In ordinary cases of appeal to the Supreme Court of Canada notice of appeal is not required before or after approving of the security.

Albion Motor Express Co. v. City of New Westminster (B.C.), [1918] 3 W.W.R. 23.

FILING—NOTICE—SERVICE—SECURITY.

An inscription in appeal to the Court of King's Bench must be deposited and stamped at the prothonotary's office before it is served upon the opposite party and before a valid notice of security may be given. The court will order the retransmission of the record to the Superior Court for the giving of a new security, unless

respondent declares himself satisfied with the security already given.

Protestant Board of School Commissioners v. Quinlan, 20 Que. P.R. 255.

NOTICE—INTERLOCUTORY APPEAL—NEW EVIDENCE.

A party intending to offer new evidence on an interlocutory appeal must give notice thereof in his notice of appeal and file the material intended to be used.

Royal Bank v. Pacific Bottling Works, 23 B.C.R. 463, [1917] 2 W.W.R. 227.

(§ III E—94)—CRIM. CODE—SUFFICIENCY OF NOTICE—DEPOSIT—LEGAL TENDER.

A notice of appeal from the magistrate's order under the Masters and Servants Ordinance (Alta.) is sufficient, if it sets forth with reasonable certainty the order or conviction appealed from, as required by s. 750 of the Criminal Code; it need not signify whether the appeal is from the adjudication of the issue or the sentence and penalty. If served on the magistrate and respondents it is immaterial to whom it is addressed. Signature to the notice is not important, nor is an omission of the judge's name a fatal irregularity. Unless objected to as legal tender, a cheque which is paid when presented is a sufficient deposit of the adjudged sum required by the section.

Bezancon v. G.T.P. Development Co., 31 D.L.R. 682, 10 A.L.R. 288, 27 Can. Cr. Cas. 388, 35 W.L.R. 436, [1917] 1 W.W.R. 436.

NOTICE OF APPEAL—SITTINGS.

Where notice of appeal was given for the Vancouver sittings and the date of hearing the appeal was omitted from the notice, but the following Vancouver sittings of the court were out of time, and no steps were taken to set the case down for hearing at the previous sittings of the court in Victoria, at which sittings the hearing of the appeal would have been in time, the notice of appeal will on motion be discharged.

Harris v. Mission Land Co., 22 B.C.R. 11.

NOTICE OF APPEAL.

A notice of appeal from a judgment of the Supreme Court of British Columbia to the Court of Appeal of that province is properly intituled in the Supreme Court.

Hepburn v. Beattie, 16 B.C.R. 209, 17 W.L.R. 473.

FORM OF NOTICE—MOTION TO SET ASIDE VERDICT.

White v. Grand Trunk Pacific, 2 A.L.R. 522.

[The reversal upon appeal, Grand Trunk Pacific v. White, 43 Can. S.C.R. 627, was upon other grounds.]

F. TIME; EXTENSION.

(§ III F—95)—SPECIAL LEAVE.

The Supreme Court of Saskatchewan cannot, by virtue of s. 71 of the Supreme Court Act (R.S.C. 1906, c. 139), extend the time for hearing an appeal of the class to which, s. 69 applies. [John Goodison Thresher Co. v. Tp. of McNab, 42 Can. S.C.R. 694, followed.]

Hillman v. Imperial Elevator & Lumber Co., 29 D.L.R. 372, 53 Can. S.C.R. 15, 10 W.W.R. 507. [See also 23 D.L.R. 420, 8 S.L.R. 91, 30 W.L.R. 951.]

TIME FOR—EXTENSION—WHEN REFUSED.

Cragg v. Keane, 24 D.L.R. 885, 9 A.L.R. 82, 9 W.W.R. 148, 32 W.L.R. 422.

TIME—SIGNING OR ENTRY OR PRONOUNCING OF JUDGMENT.

Where a statutory period for appeal from a judgment is designated as so many days "from the signing or entry or pronouncing of the judgment appealed from," the period begins to run, as to a judgment which was "pronounced" on a day previous to that on which it was "formally entered" upon the date of "pronouncing" the judgment, if nothing remained to be settled before the judgment could be entered. [Elgin (County) v. Roberts, 36 Can. S.C.R. 27; Walmsley v. Griffith, 13 Can. S.C.R. 434, applied.]

Re Cumberland Election; McKay v. Settee, 15 D.L.R. 803, 7 S.L.R. 111, 27 W.L.R. 1, 5 W.W.R. 1260.

NOTICE OF—EXTENSION OF TIME FOR GIVING—MISTAKE OF SOLICITOR NOT GROUND FOR.

The mistake of a party's solicitor in giving notice of appeal from the District Court one day too late is not a sufficient ground under the Saskatchewan practice for granting an extension of time for serving such notice. [Re Coles and Ravenshear, [1907] 1 K.B. 1, followed.]

Crapper v. C. P. R. Co. and The Regina Cartage Co., 11 D.L.R. 486, 6 S.L.R. 88, 24 W.L.R. 370, 4 W.W.R. 713.

EXTENSION OF TIME—NOTICE TO B.C. COURT OF APPEAL.

The British Columbia Court of Appeal has no power to extend the time within which notice of appeal should be given on an appeal to that court.

Laursen v. McKinnon (No. 2), 9 D.L.R. 758, 18 B.C.R. 10, 23 W.L.R. 1, 3 W.W.R. 717.

TIME FOR COMPLETING APPEAL—PETITION UNDER LAND ACT—CROWN LANDS.

The time for taking an appeal from the decision of the Minister of Lands (B.C.), refusing an application to purchase Crown lands is to be computed from the date of the official rejection of the claim and not from a prior date when the district commissioner gave notice to the applicant that the Lands Department had instructed him not to accept applications for the land until further advised. The right of appeal by way of petition against the decision of the Minister of Lands (B.C.), refusing an application for purchase of Crown lands is not preserved by the filing of a petition in a district registry within the statutory period of thirty days when no service of that petition is made on the Minister of Lands, but a fresh petition is filed too late in the principal registry and the latter petition is served

on the Minister. [Land Act, R.S.B.C. 1911, c. 129, s. 163, considered.]

Caskie v. Minister of Lands, B.C., 7 D.L.R. 616, 17 B.C.R. 398, 22 W.L.R. 498, 3 W.W.R. 273.

TIME FOR TAKING APPEAL.

The meaning of O. LVII., r. 3 (Nova Scotia), which stipulates that "the notice of appeal shall be served within ten days from the day that the appellant or his solicitor first had notice that the order upon the decision appealed from had been made," is not ten days from the service of the order nor ten days from the filing of the order, but ten days from "notice" of it, and for this purpose notice by telegram is effective.

R. v. Pelton, 8 D.L.R. 77, 20 Can. Cr. Cas. 239, 46 N.S.R. 462, 11 E.L.R. 585.

EXTENSION OF TIME—NOTICE OF APPEAL.

The Supreme Court of British Columbia has jurisdiction to enlarge the time for giving notice of appeal from that court to the Court of Appeal, although the application is not made until the time for giving such notice has elapsed, its jurisdiction in that respect differing from that of the Court of Appeal itself under ss. 23 and 25 of the Court of Appeal Act, R.S.B.C. 1911, c. 51, (formerly B.C. Statutes, 1907, c. 10, ss. 23 and 25.) [Laursen v. McKinnon (No. 2), 9 D.L.R. 758, considered.]

Laursen v. McKinnon (No. 3), 9 D.L.R. 827, 18 B.C.R. 677, 23 W.L.R. 407, 4 W.W.R. 84, affirmed 15 D.L.R. 384.

JURISDICTION — WINDING-UP PROCEEDINGS — TIME FOR APPEALING—AMOUNT IN CONTROVERSY—CONSTRUCTION OF STATUTE —"SUPREME COURT ACT," R.S.C., 1906, c. 139, ss. 46, 69, 71—"WINDING-UP ACT," R.S.C. 1906, c. 144, ss. 104, 106 —PRACTICE—AFFIRMING JURISDICTION —MOTION IN COURT—DISCRETIONARY ORDER BY JUDGE.

Ross v. Ross, 53 Can. S.C.R. 128.

TIME—EXTENSION—APPEAL TO SUPREME COURT—LAPSE OF TIME.

Jukes v. Fisher, 47 Can. S.C.R. 404.

"PASSAGE OF BY-LAW"—COMING INTO FORCE OF BY-LAW—TIME FOR APPEALING.

Winnipeg v. Brock, 45 Can. S.C.R. 271, 23 W.L.R. 581.

EXTENDING TIME TO APPEAL—SOLICITOR NOT GIVING NOTICE.

On an application under s. 4 of the Court of Appeal Act, 1913, to extend the time for giving notice of appeal owing to a slip of the solicitor in not giving notice until after the expiration of the time allowed under marginal rule 879:—Held, that there was not sufficient ground for granting special leave under said section. In all cases of application for extension of time to appeal under this rule very exceptional circumstances must be shewn. It is not the ordinary case when relief from slips of solicitors can be compensated with costs, because, in this particular class of case, there is a limit placed upon the time within which the judgment that the successful party has obtained can be taken from him and that is the principle which distinguishes it from ordinary cases of extension of time. Where a slip of a solicitor may result in loss of property to a client, relief should be granted.

McEwan v. Hesson, 20 B.C.R. 94, affirming 17 D.L.R. 99, 28 W.L.R. 137, 6 W.W.R. 977.

APPEAL NOT SET DOWN—EXTENSION OF TIME.

Where notice of appeal has been given for a certain sittings of the court for which the case has not been set down, the court may postpone the hearing until the following sittings. The proper practice is to apply to the court for an extension of time, and then serve notice for the following sittings.

Gilbert v. Southgate Logging Co., 21 B.C.R. 7, 7 W.W.R. 1133.

APPEAL FROM AWARD—EXTENSION OF TIME —NOTICE.

The time allowed for appealing from an award under 4 Geo. V., c. 32 (An Act to amend "The New Brunswick Railway Act," C.S. 1903, c. 91), may be enlarged on an application made after the expiration of the time allowed by the Act under O. 64, r. 7, but such application should be on notice under O. 52, r. 3, and not ex parte.

St. John & Que. R. Co. v. Fraser, 43 N.B.R. 188.

FAILURE TO SET DOWN IN TIME—ORDER EXTENDING TIME—SPECIAL CIRCUMSTANCES.

Re Hunt and Bell, 8 O.W.N. 467.

NOTICE OF APPEAL GIVEN AFTER EXPIRY OF TIME FOR GIVING—DEATH OF PLAINTIFF AFTER ABORTIVE NOTICE GIVEN—NO STEPS TAKEN IN MEANTIME—REVIVOR OF ACTION IN NAME OF EXECUTRIX—MOTION TO EXTEND TIME—REFUSAL—MERITS.

Miller v. Toronto R. Co., 15 O.W.N. 407.

APPEAL FROM MINING COMMISSIONER—EXTENDING TIME.

Re Pinnelle & Thompson, 2 O.W.N. 711, 18 O.W.R. 683.

QUEBEC PRACTICE — APPEAL TO KING'S BENCH.

The Act, 3 Geo. V. (Que.) c. 51, which limits to two months the time for appealing to the Court of King's Bench, does not apply to cases in which judgment has been given before the Act came into force.

Gagnon v. Cousineau, 15 Que. P.R. 326.

INTERLOCUTORY JUDGMENT—TRIAL BY JURY.

If a party obtains permission to appeal from interlocutory judgments rendered at different dates, it suffices if he files his inscription within 60 days from the date of the last judgment, provided that the judgments relate to the same matter. Art. 1209, C.C.P. (Que.), which declares that the appeal must be taken within 2 months from the date of the judgment, does not apply

to interlocutory judgments. A judgment of the Superior Court refusing to extend the delay granted by art. 442, C.C.P. (Que.) for proceeding to a trial by jury is not appealable, as it falls within the application of art. 446, C.C.P. (Que.); moreover, it is a question left entirely to the discretion of the court of first instance, with no appeal, except in the case of abuse of such discretion.

Dougan v. Montreal Tramways Co., 26 Que. K.B. 217.

JUDGMENT IN DEFAULT OF APPEARANCE—FINAL OR INTERLOCUTORY—DISMISSAL—TIME FOR APPEAL.

An order of a County Court Judge dismissing a motion to set aside an interlocutory judgment, entered in default of appearance, is an interlocutory order and therefore, under s. 15 (b) of the Court of Appeal Act, c. 51, R.S.B.C. 1911, an appeal therefrom must be brought within 15 days. [Gladwin v. Cummings, Cassels' S.C. Dig. 427, followed; Voight v. Orth, 5 O.L.R. 443, distinguished.]

Chilliwack Evaporating & Packing Co. v. Chung (B. C.), [1918] 1 W.W.R. 879. [See 25 B.C.R. 90.]

DATE OF JUDGMENT—REVIEW.

The date of the judgment of the Court of Review is that of the day upon which it was received to be registered by the prothonotary of the district where the judgment was originally rendered. Therefore an appeal was well taken on July 14, where the judgment was rendered in review on June 25, registered in the Court of Review on the 28th, and received by the prothonotary of Montreal on the 29th of the same month.

Okopny v. Atlas Construction Co., 27 Que. K.B. 276.

The inscription in appeal must be filed in the prothonotary's office before service of the notice of appeal and security on the other side. But if respondent's attorney is present when security is furnished and does not object to its being given, respondent acquiesces in the appeal and cannot complain of the aforesaid irregularity.

Leroux & Valade, 13 Que. P.R. 310.

INTERLOCUTORY JUDGMENTS.

Art. 1209, C.C.P. (Que.), providing that an appeal should be taken within two months from a judgment on a jury trial, does not apply to interlocutory judgments.

Dougan v. Montreal Tramways Co., 18 Que. P.R. 108.

EXPIRING ON SATURDAY.

When the delays for filing an inscription in review expire on a Saturday the inscription can be properly served and filed on the Monday following.

Montreal v. Garneau, 18 Que. P.R. 93.

INSCRIPTION IN REVIEW.

An inscription in the Court of Review for the revision of a judgment of the Superior Court must be filed in the office of the clerk of that court within 15 days from the date of the judgment to be reviewed, on pain of nullity.

Massé v. Bertrand, 50 Que. S. C. 355.

UNDER SMALL DEBTS RECOVERY ACT.

The provisions as to appeal contained in the Small Debts Recovery Act are complete without reference to the Criminal Code. An appeal under that act must be filed within 10 days after the judgment is given.

Dowes v. Gruver (Sask.), [1917] 2 W.W.R. 62.

APPLICATION TO REINSTATE AFTER DEATH OF APPELLANT—CONSENT TO EXTENSION OF TIME BY RESPONDENT PREVENTING LATTER FROM OBJECTION TO DEFAULT PRIOR TO SUCH CONSENT—DELAY OF APPEAL PENDING GRANT OF ADMINISTRATION.

After service of notice of appeal an appellant died and subsequently the solicitors for the appellants and respondent consented to an order for the appeal to stand over for a certain sittings. Administration was not granted to appellant's estate until some time after said sittings. On application to reinstate the action in the same plight and condition in which it was on the appellant's death and to extend the time for perfecting the appeal; held that the consent entered into between the solicitors for the parties prevents the solicitor for the respondent from taking the position that the appellants were in default prior to the giving of such consent; and as since the giving of the consent the appeal on behalf of the estate could not proceed until administration had been granted, and it does not appear that there was any negligence or default in procuring administration, the application should be granted.

Corp. of the City of Swift Current v. Leslie, [1919] 1 W.W.R. 129.

SUPREME COURT EN BANC—NOTICE OF APPEAL—TIME.

Patterson v. Palmer, 18 W.L.R. 684. (Sask.)

(§ III F—96)—TIME FOR CROSS-APPEAL—MODIFICATION OF JUDGMENT—NECESSITY FOR CROSS NOTICE.

Where on defendant's appeal from a judgment against him, it appears that the trial judge erroneously denied recovery on a note for $95 and that on another note for $150 a credit of $50 was disregarded, the judgment may be varied, though there was no notice of cross-appeal, so as to remedy the error, by virtue of order 57 of the Nova Scotia practice.

Benjamin v. McLean, 11 D.L.R. 224, 47 N.S.R. 49, 12 E.L.R. 572.

(§ III F—97)—TIME—FROM TAKING UP OF AWARD—NOTICE.

Even if notice of the taking up of an award is to be taken as impliedly required under the Municipal Arbitrations Act, R.S.O. 1897, c. 227, an appeal by the municipality is too late of which notice is given more than one month after the receipt of a letter by the municipality from the claimant's solicitor demanding payment of the

amount of the award and costs; such demand is in effect a notice of the taking up of the award.

Re Ketchum & Ottawa, 9 D.L.R. 274, 4 O.W.N. 828, 24 O.W.R. 113.

FROM SUMMARY CONVICTION—TEN DAYS' LIMITATION—SHEWING CORRECT DATE OF CONVICTION.

Where there is any question as to the correct date of a summary conviction it is open for the appellant to shew that date by extrinsic evidence and support his appeal taken within 10 days therefrom as in time, although the conviction itself bears a prior date which would make it appear that the notice of appeal was late.

R. v. Prokopate, 18 D.L.R. 696, 23 Can. Cr. Cas. 189, 7 S.L.R. 95, 29 W.L.R. 88, 6 W.W.R. 405.

N. S. SUMMARY CONVICTIONS ACT, S. 56—"WITHIN FOURTEEN DAYS" OF THE NEXT SITTINGS.

R. v. Marr, 10 E.L.R. 13 (N.S.).

COMPUTATION OF TIME.

The time for taking an appeal from a judgment of the County Court to the Court of Appeal must be computed from the delivery of the judgment and not from the taking out of the formal order. [Kirkland v. Brown, 13 B.C.R. 350, followed.]

Shipway v. Logan, 21 B.C.R. 595.

DELAY—GOOD CAUSE.

Through the failure of a party to bring his appeal before the Supreme Court within sixty days, the other party acquires vested rights and ought not to be deprived thereof, unless good cause be shown. The reasons are not sufficient. That the judgment appealed from has not been recorded on the date it was rendered, the court being positive that it was done a few days only after it has been rendered; that the petitioner's attorney has been continuously engaged before the Exchequer Court of Canada.

Great Northern Construction Co. v. Ross, 25 Que. K.B. 404. [See also 25 Que. K.B. 385.]

(§ III F—98)—EXTENSION OF TIME—WHEN GRANTED.

Failure to give notice of appeal during the time for appealing from the trial judgment may be relieved against by granting an extension of time where it was omitted solely because of the unavoidable and unanticipated absence of the solicitor's clerk entrusted with the duty, and not from any mere inadvertence. [Re Coles and Ravenshear, [1907] 1 K.B. 1, distinguished.]

Tasker v. Moore, 15 D.L.R. 701, 26 W.L.R. 671, 5 W.W.R. 1020.

EXTENSION OF TIME—DISCRETION.

Under the Alberta Rules a judge has the discretion to extend the time of appeal in any case it may seem just.

Lea v. City of Medicine Hat, 35 D.L.R. 109, 11 A.L.R. 380, [1917] 2 W.W.R. 789. [See also 37 D.L.R. 1.]

TIME—EXTENSION ON "SPECIAL CIRCUMSTANCES."

Upon an application under s. 71 of the Supreme Court Act, R.S.C. 1906, c. 139, for an extension of the prescribed time for appeal from a judgment already signed, entered or pronounced on the ground of "special circumstances," the time is not to be enlarged except on a strict shewing of "special circumstances" such as misleading conduct by the respondent or by an officer of the court or some sudden accident which could not have been foreseen, and the applicant's miscalculation as to the statutory period is insufficient. [International Financial Society v. Moscow Gas Co., 7 Ch.D. 241; Northern Commercial Co. v. Powell, 18 W.L.R. 89; Nelles v. Hesseltine, 6 D.L.R. 541, 27 O.L.R. 97, referred to.]

Re Cumberland Election; McKay v. Settee, 15 D.L.R. 803, 7 S.L.R. 111, 27 W.L.R. 1, 5 W.W.R. 1260.

EXTENSION OF TIME—OBJECTION THAT APPEAL NOT COMPETENT—CRIMINAL APPEAL—CR. CODE (1906), s. 1024.

On a motion to extend the time for appealing under Cr. Code, s. 1024 from the affirmance of a conviction for an indictable offence from a provincial Appellate Court to the Supreme Court of Canada, the latter court will enter upon the question of the competency of the appeal and if of opinion that the question is not appealable will refuse the extension. [R. v. Mulvihill, 18 D.L.R. 189, affirmed.]

Mulvihill v. The King, 18 D.L.R. 217, 23 Can. Cr. Cas. 194, 49 Can. S.C.R. 587, 6 W.W.R. 462.

FOR APPEAL UNDER WINDING-UP ACT (CAN.)—EXTENSION AFTER FOURTEEN DAYS.

The time for appeal from a winding-up order made under the Winding-up Act, R.S.C. 1906, c. 144, which, by s. 104 of that Act is to be taken, and security given therefor within fourteen days "or within such further time as the court or judge appealed from allows," may be extended by the court, although the fourteen days has already expired.

Calumet Metals v. Eldridge, 15 D.L.R. 461, 20 Rev. de Jur. 21.

EXTENSION OF TIME—REVIEW OF TAXATION.

A motion under r. 732 (Sask. Judicature Rules, 1911) for a review of a taxation between party and party, being in the nature of an appeal, the court will, in like manner as upon appeals, require very special circumstances to be shewn before exercising its judicial discretion to enlarge the time for giving the notice by which the review proceedngs are commenced. [Craig v. Phillips, 7 Ch.D. 249; Re Helsby, [1894] 1 Q.B. 742, applied.]

Re A Taxation, 11 D.L.R. 191, 6 S.L.R. 308, 24 W.L.R. 358, 4 W.W.R. 715.

SUPREME COURT ACT (S. 71)—EXTENSION OF TIME.

S. 71 of the Supreme Court Act, R.S.C. 1906, c. 139, providing that the court pro-

posed to be appealed from, or any judge thereof, may under special circumstances, allow an appeal although the same is not brought within the time prescribed by the Act, applies only to judgments otherwise appealable, and does not confer power to grant leave to appeal from a judgment which is interlocutory only or which is not a "final judgment" within the definition of that statute. [Vaughan v. Richardson, 17 Can. S.C.R. 703, and News Printing Co. v. Macrae, 26 Can. S.C.R. 691, specially referred to.]

Nelles v. Hesseltine; Windsor, Essex and L.S. Rapid R. Co. v. Nelles, 2 D.L.R. 732, 21 O.W.R. 430, 3 O.W.N. 862.

EXTENSION OF TIME—APPEALS TO SUPREME COURT OF CANADA.

The limitation of sixty days for appealing to the Supreme Court of Canada under s. 69 of the Supreme Court Act, R.S.C. c. 139, may under s. 71 of that Act be extended by the court appealed from, but not by the Supreme Court of Canada.

Windsor, Essex & Lake Shore Rapid R. Co. v. Nelles, 1 D.L.R. 156, 309.

EXTENSION OF TIME—REVIEW OF AN APPEAL OF MAIN ACTION.

Where notice was not given in proper time of an appeal from an order of a judge in Chambers extending the time to appeal from the judgment at the trial, and no appeal was specially taken from such order, the court hearing the principal appeal will not review the propriety of the extension order upon an objection that the principal appeal, apart from such order, is made too late. [Belden v. Freeman, 21 N.S.R. 106, specially referred to.]

Van Buskirk v. McDermott, 5 D.L.R. 5, 46 N.S.R. 98, 11 E.L.R. 100.

EXTENSION OF TIME FOR APPEALING—SUBSTANTIAL QUESTION OF LAW—OVERSIGHT IN SOLICITOR'S OFFICE.

Where the judgment of a Divisional Court is for such an amount that an appeal therefrom to the Court of Appeal lies as of right, and a substantial question of law of general interest is involved in the action, and there is an intention, communicated to the respondent's solicitors, to appeal within the proper time, but, owing to an oversight in the office of the appellant's solicitors, notice of appeal has not been served in time, the time for appealing may be extended. [Ross v. Robertson, 7 O.L.R. 494, referred to.]

McClemont v. Kilgour Manufacturing Co. (No. 2), 4 D.L.R. 351, 3 O.W.N. 1351, 22 O.W.R. 403.

EXTENSION OF TIME—APPEAL FROM CONVICTION UNDER INSPECTION AND SALE ACT R.S.C. 1906, C. 85—JUDICIAL DISCRETION.

Where, under s. 335 of the Inspection and Sale Act, R.S.C. c. 85, the court or judge hearing an appeal from a conviction under that Act has once extended the time for hearing and decision beyond the 30 days thereby limited, the time for such hearing and decision is then wholly at large and in the discretion of the court or judge.

R. v. Hamlink, 5 D.L.R. 733, 19 Can. Cr. Cas. 493, 26 O.L.R. 381, 22 O.W.R. 107.

NOTICE OF APPEAL—EXTENSION.

Where the appellant has allowed the time for giving notice of appeal to lapse, an application made to the court after a long delay for an extension of time for serving the formal notice should not be granted unless within the limited period the appellant has taken some step from which his intention to appeal might be inferred. [Ross v. Robertson, 7 O.L.R. 494; McClemont v. Kilgour Manufacturing Co., 4 D.L.R. 351, 3 O.W.N. 1351, referred to.]

Cain v. Pearce Co. (No. 2), 6 D.L.R. 325, 4 O.W.N. 70, 23 O.W.R. 43.

EXTENSION OF TIME FOR APPEALING—DISCHARGE OF PRISONER ON HABEAS CORPUS—ACADEMIC QUESTION.

Where the prisoner had since been discharged upon habeas corpus by a judge of the Supreme Court having undoubted jurisdiction and any question as to whether a Master of the court had power to discharge would be merely academic, there is no merit that would call for indulgence by extending the time for appealing from a prohibition order in respect of the Master's previous decision upon a similar application made on the prisoner's behalf.

R. v. Pelton, 8 D.L.R. 77, 20 Can. Cr. Cas. 239, 46 N.S.R. 462, 11 E.L.R. 585.

EXTENSION OF TIME FOR APPEALING.

Where a judgment of the Court of Appeal has given to the plaintiff in an action for specific performance of an agreement to deliver stock and bonds his choice between specific performance and a reference as to damages, and the defendant has not appealed from such judgment to the Supreme Court of Canada, being under the impression that no appeal would lie, and the plaintiff has elected to take a reference, and appeals have been taken from the referee's report, the Court of Appeal should not, at the instance of the defendant, extend the time for appealing to the Supreme Court of Canada from its original judgment.

Nelles v. Hesseltine; Windsor, Essex & L.S. Rapid R. Co. v. Nelles (No. 4), 6 D.L.R. 541, 27 O.L.R. 97.

EXTENSION OF TIME FOR APPEALING—JURISDICTION OF COURT—TITLE TO LAND—REMOVAL OF CAUSE.

Re Harmston v. Woods, 39 D.L.R. 793, 40 O.L.R. 171. [See 39 O.L.R. 105.]

EXTENDING TIME FOR APPEAL—BONA FIDE INTENTION — OFFICER OF COMPANY—SPECIAL CIRCUMSTANCES—TERMS.

Where the applicant for an order extending the time for appealing from a judgment of Appellate Division is an incorporated company, the rule that the applicant must shew a bona fide intention to appeal entertained while the right to appeal existed is not to be categorically and literally ap-

plied; it is sufficient if the officer of the incorporated company whose duty it is to deal with the matter, entertains, within the time allowed for appeal, the bona fide intention of submitting the question of appealing to the board of directors of the company, and is prevented by special circumstances from so doing. [Smith v. Hunt, 5 O.L.R. 97, distinguished.] An order was made in November, 1916, under r. 176, extending (upon terms) the time for an appeal by the plaintiff company from a judgment pronounced on the 14th July, 1916. According to r. 491, the appeal should have been set down for hearing on or before the 15th September, 1916.

Canadian Heating & Ventilating Co. v. T. Eaton Co. & Guelph Stove Co., 41 O.L.R. 150.

EXTENSION OF TIME—DELAY—"JUSTICE OF THE CASE."

An extension of time to appeal to the Supreme Court of Canada, under s. 82 of the Exchequer Court Act, will not be granted after a delay of 14 months, particularly when "the justice of the case" does not warrant the granting of such an extension.

The King v. Quebec North Shore Road Trustees & Burroughs, 17 Can. Ex. 488.

EXTENSION OF TIME—WINDING-UP ACT.

Upon an application under the Winding-up Act, R.S.C. 1906, c. 144, for an extension of the time within which to appeal, such time having expired, it is necessary to shew that the intention to appeal was formed within the time limited or that there was difficulty in communicating with clients and obtaining instructions.

B.C. Securities v. Mutual Life Assn. Co. (B.C.), [1918] 1 W.W.R. 733.

FAILURE TO ENTER IN TIME.

Notice of appeal having been given, the appellant on the fourth day before the sittings submitted an appeal book to the respondent's solicitors for approval. In the absence of the member of the firm who had the conduct of the case, his partner refused to approve, intimating that he knew nothing of the case and it would be necessary to wait for the return of his partner, but that he would, however, take no advantage of failure to get the case down in time owing to the delay occasioned by the absence of his partner. On the day before the sittings of the court, appellant's solicitor, finding the book had not as yet been approved, gave notice of motion to extend the time for entering appeal. This was opposed by respondent, the solicitor denying that he had given any undertaking not to take advantage of failure to enter the appeal in time. The application was refused by the court, and appellant then made a further application on new material, which was also refused. Respondent then moved for a declaration of abandonment of the appeal, which was opposed by the appellant who again applied for an extension of time for entering the appeal. Held, that in the circumstances the application for a declaration of abandonment of the appeal be refused and that an extension of time be granted for entering the appeal.

B.C. Independent Undertakers v. Maritime Motor Car Co., 24 B.C.R. 300.

EXTENSION OF TIME—DISCRETION—SPECIAL CIRCUMSTANCES.

A judge, in extending the time for appealing to the Court of Appeal under r. 704, has an unfettered discretion, and it is not necessary to shew special circumstances.

Smith v. Crawford, 11 S.L.R. 168.

EXTENSION OF TIME—POWER OF COURT.

Notwithstanding the apparent implication of the decision in Great Northern R. Co. v. Furness, Withy & Co., 40 Can. S.C.R. 455, the decision in the later case of Goodison Thresher Co. v. Tp. of McNab, 42 Can. S.C.R. 694, is an express authority for the conclusion that the term of sixty days, which under s. 69 of the Supreme Court Act, c. 139, R.S.C. 1906, is the period within which an appeal to the Supreme Court of Canada must be brought, cannot be extended by the court appealed from or by a judge thereof. The appellant who has delayed beyond the sixty days in bringing his appeal is not deprived of his right of appeal, but, as a consequence of his delay, he must shew some reasonable cause therefor or other special circumstances and must submit to such terms as the judge or court deems reasonable. Where the application for the allowance of the appeal is made within the sixty days, although no notice of the application has been given, and the judge, instead of approving of the bond ex parte with a reservation of leave to respondent to move to set it aside, allows time for the giving of notice, the application should be looked upon as adjourned and it should be held that the appellant has brought himself within the provisions of s. 69 and is entitled to have his application disposed of under that section, even though the sixty days have expired at the hearing of the adjourned application, without being required to shew special circumstances to bring himself within s. 71.

Rohoel v. Darwish, 13 A.L.R. 312, [1918] 2 W.W.R. 525.

EXTENSION OF TIME—MOTION TO QUASH.

A justice of the Court of Appeal for British Columbia has power to, and will in a proper case, extend the time for giving notice of appeal under s. 70 of the Supreme Court Act, notwithstanding that notice has been given by the respondent of intention to move the Supreme Court to quash the appeal. S.C. r. 5 is not a bar to such an application.

Adolph Lumber Co. v. Meadowcreek Lumber Co. (B.C.), [1918] 3 W.W.R. 305. [See 25 B.C.R. 298, [1918] 2 W.W.R. 466, re-

versed 45 D.L.R. 579, 58 Can. S.C.R. 306, [1919] 1 W.W.R. 823.

The court to which an appeal may be taken from a summary conviction upon compliance with the statutory requirements as to notice and security (Cr. Code, s. 750, as re-enacted, 1909) has no jurisdiction to extend the time for service of notice of appeal.

The King v. White, 19 Can. Cr. Cas. 156, 10 E.L.R. 297.

LEAVE TO APPEAL TO COURT OF APPEAL—EXTENSION OF TIME.

Bolton v. Gilmour Door Co., 2 O.W.N. 584, 18 O.W.R. 365.

EXTENSION OF TIME FOR APPEALING TO APPELLATE DIVISION—TERMS—COSTS.

Whaley v. Whaley, 12 O.W.N. 217.

MOTION TO EXTEND TIME FOR APPEALING—DISMISSAL WITHOUT COSTS.

Upper Canada College v. Toronto, 13 O.W.N. 273. [See 32 D.L.R. 246, 37 O.L.R. 665.]

MOTION TO EXTEND TIME FOR APPEALING AFTER EXPIRY—ORDER OF MASTER IN WINDING-UP MATTER REFUSING TO SET ASIDE SALE OF PROPERTY—NO SUBSTANTIAL QUESTION ON MERITS—REFUSAL OF MOTION.

Re Canadian Peat Co., 12 O.W.N. 196.

TO DIVISIONAL COURT—JUDGMENT OF COUNTY COURT—EXTENSION OF TIME.

Hunter v. Patterson, 2 O.W.N. 61.

EXTENSION OF TIME FOR APPEAL—CREDITOR APPLYING TO FILE CLAIM LONG AFTER DATE OF ORDER OF CONFIRMATION.

Re Atlantic & Lake Superior Railway & North Eastern Banking Co., 13 Can. Ex. 127.

NOTICE—EXTENSION OF TIME — GARNISHMENT.

Where money is paid into court by a bank under a garnishee order, the bank suggesting that it had been held by the defendant in trust for third parties, notwithstanding which an order is made for payment out to the plaintiff, and the parties then, recognizing that the order could not stand if the moneys belonged to third parties, endeavour to ascertain by correspondence who the actual owners are before going to the expense of an appeal, and in the meantime the time for giving notice of appeal expires, an application to extend the time for giving notice of appeal will be granted.

Patton v. Hartley, 24 B.C.R. 5, [1917] 2 W.W.R. 234.

EXTENSION OF TIME FOR—MISTAKE AS TO DATE OF DELIVERY OF JUDGMENT.

Northern Commercial Co. v. Powell, 18 W.L.R. 89 (Y.T.).

EXTENSION OF TIME—POWER OF JUDGE.

A judge of a District Court has no power to extend over the time for appealing from a judgment of a District Court judge to the court en banc; all applications for such extension must be made to a judge of, or to the court en banc as provided by r. 662. [Re Demaurez Estate, 4 Terr. L.R. 281, is not applicable.]

Kirk v. Salloun (Sask.), [1917] 3 W.W.R. 359.

G. SECURITY.

(§ III G—100) — SECURITY FOR COSTS — "SPECIAL CIRCUMSTANCES"—POVERTY.

Gusky v. Rosedale Clay Products (Alta.), 34 D.L.R. 727, [1917] 2 W.W.R. 441.

SUPREME COURT ACT—STAY OF EXECUTION—INJUNCTION—JUDICATURE ACT.

By the order of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, the judgment of the trial judge, dismissing the action, was set aside, and judgment was directed to be entered for the plaintiffs for damages and an injunction restraining certain of the defendants from entering upon the lane in question in the action. These defendants had appealed from the order of the Divisional Court to the Supreme Court of Canada, and security for the costs of the appeal had been given. Held, that while by s. 76 of the Supreme Court Act, R.S.C. 1906, c. 139, the execution of the judgment was stayed, the injunction remained in force. [McLaren v. Caldwell, 29 Gr. 438, followed; Bland v. Brown, 37 O.L.R. 534, distinguished.] Held, also, that, although the injunction was contained in a judgment which the Divisional Court directed to be entered, the judgment was the judgment of the High Court Division; and a judge of that Division, exercising the power of the court pursuant to s. 43 of the Judicature Act, had power to stay the operation of it. [Mitchell v. Fidelity & Casualty Co. of New York, 38 O.L.R. 543, 34 D.L.R. 22, referred to.] And held, having regard to the circumstances, that the power should in this case be exercised.

Baldwin v. O'Brien, 40 O.L.R. 287, 12 O.W.N. 402. [See 40 O.L.R. 24, 12 O.W.N. 256, 322, reversing 10 O.W.N. 304.]

ALLOWANCE OF SECURITY ON APPEAL TO PRIVY COUNCIL—PRIVY COUNCIL APPEALS ACT, R.S.O. 1914, c. 54, ss. 2, 3—PROPOSED APPEAL FROM ORDER OF APPELLATE DIVISION AFFIRMING ORDER SETTING ASIDE WRIT OF SUMMONS—JURISDICTION TO ALLOW SECURITY.

Electric Development Co. of Ontario v. Attorney-General for Ontario and Hydro-Electric Power Commission of Ontario, 12 O.W.N. 304. [Reversed 47 D.L.R. 10, [1919] A.C. 687. See also 11 O.W.N. 297, 34 D.L.R. 92, 38 O.L.R. 383.]

PRIVY COUNCIL—ORDER OF APPELLATE DIVISION INCREASING AMOUNT OF AWARD OF COMPENSATION FOR LAND EXPROPRIATED—APPLICATION FOR ENFORCEMENT OF AWARD—MONEY IN COURT—APPLICATION FOR PAYMENT OUT—SECURITY GIVEN ON APPEAL—STAY OF PROCEEDINGS—PRIVY COUNCIL APPEALS ACT, S. 4—"PAYMENT OF MONEY."

Re McAllister & Toronto & Suburban R. Co., 13 O.W.N. 360. [See 39 D.L.R. 207, 40 O.L.R. 252.]

EFFECT AS TO COSTS IN LOWER COURT.

Security to the extent of $500, to guarantee the costs of an appeal to the Supreme Court of Canada, does not stay execution for the debt or the costs of the lower court.

Vipond v. Furness Withy & Co., 18 Que. P.R. 262.

DEPOSIT FOR REVIEW—SEVERAL DEFENDANTS.

If several defendants sever in their defence the plaintiff whose action is dismissed on inscribing in review should make as many deposits as there are defendants.

Galligan v. Rainville, 18 Que. P.R. 196.

APPEAL TO COURT OF KING'S BENCH—SECURITY—JURISDICTION.

As soon as the security, required for the purpose of an appeal, has been furnished, the court of first instance is disseized of the case, and all questions of procedure, even those which appertain to the security, are within the exclusive jurisdiction of the Court of Appeal.

Lake St. John Ry. Co. of Quebec v. Vallieres, 23 Que. K.B. 22.

SECURITY—COMPANY—GENERAL AUTHORITY—ADDED PARTIES—INTEREST.

Fiduciary legatees and testamentary executors of one of the parties in the Superior Court may join other parties to make an appeal. Security in appeal should conform strictly to the law and cover an obligation to effectually prosecute the appeal; and to satisfy the condemnation and to pay the costs and damages adjudged in case the judgment appealed from is confirmed. But if the security furnished is insufficient, the Court of Appeal will allow the appellant to complete it instead of causing him to lose his right of appeal. A company which is authorized by law to furnish security in the Court of Appeal, may give one of its officers general authority to sign security bonds which it may agree to; there is no need of a special authorization for each particular case. The defendant cannot ask that certain appellants be struck out of the suit because they have no interest in the litigation, being rather advantaged than injured by the judgment of which they complain, when such appellants have been condemned to pay costs in the court of first instance, and that it is the respondent himself who has added them as defendants.

Papineau v. Papineau, 27 Que. K.B. 379.

SECURITY BOND ON APPEAL BY GUARANTEE CO.—PROOF OF COPY OF RESOLUTION OF DIRECTORS APPOINTING ATTORNEY TO EXECUTE SECURITY BOND.

Gagne v. Factories Ins. Co., 24 Rev. de Jur. 224.

PROCEDURE—SECURITY IN APPEAL—SECURITY BY PLEDGE OF DEBTORS IMMOVABLE.

Couture v. Guerin, 24 Rev. de Jur. 224.

(§ III G—101)—NECESSITY.

Art. 1214 C.P. (Que.) is imperative in declaring that unless an appellant declare in writing in the office of the court whose judgment is appealed from, that he does not object to the judgment rendered against him being executed, or unless he file a copy of any judgment ordering provisional execution of the judgment appealed from, in which cases he is only bound for the payment of the costs, he "must give good and sufficient security that he will effectually prosecute the appeal, that he will satisfy the condemnation and pay all costs and damages adjudged if the judgment appealed from is confirmed," and, therefore, the court has no discretion in the matter and the security must be furnished absolutely according to the statute. Security for costs only, is not sufficient on an appeal from an order condemning one to render an account within thirty days, or on default, to pay a sum of money received on account of the plaintiff, since the security must, under art. 1214 C.P., be for an amount sufficient to pay all costs, interest, and damages that can be taxed on confirmation of the judgment. [The Montreal, Rutland & Boston R. Co. v. Hattan, M.L.R. 1 Q.B. 72; Moore v. Lamoureux, Que. 5 Q.B. 532; Brunet v. The United Shoe Machinery Co. of Canada, 12 Que. P.R. 207, followed; O'Leary v. Francis, 12 Que. S.C. 243; Rochette v. Ouellet, 9 Q.L.R. 361; Rochette v. Ouellet, 6 L.N. 412, distinguished.]

A deposit of $2,000 cash under art. 1963 C.C. (Que.), providing that "when a person cannot find surety, he may in lieu thereof deposit some sufficient pledge as security" is insufficient on an appeal from an order condemning the defendant to render an account within thirty days, or on default to pay $42,913.20, and the appeal will be dismissed, unless the defendant shall, within ninety days, either give new security to satisfy all costs and damages if the judgment is affirmed, or make a further deposit of $5,000. On an appeal from an order condemning one to render an account within thirty days, or on default to pay $42,913.20, security need not be given for the payment of such sum, but only for the payment of such costs, interest, and damages as may be taxed upon a confirmation of the judgment.

Miller v. Diamond Light and Heating Co., 5 D.L.R. 99, 21 Que. K.B. 551.

BAIL ON CRIMINAL APPEAL.

While the Court of King's Bench (Que.)

has jurisdiction to admit a prisoner to bail after sentence pending his appeal to the Supreme Court of Canada, it will leave him to his recourse to an application to the latter court when the appeal has already been lodged.

R. v. Brunet, 30 Can. Cr. Cas. 9, 27 Que. K.B. 224. [See 42 D.L.R. 405, 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 16.]

(§ III G—102)—Summary conviction—Recognizance.

In order to perfect his appeal from a summary conviction, which ordered imprisonment in default of paying a fine, the appellant, who has given a recognizance under Cr. Code, s. 750, before a justice is under a duty to see that the justice promptly transmits the recognizance to the court which is to hear the appeal, and if he has taken no steps to see that the recognizance is transmitted in time by the magistrate, the observance of which duty might be enforced by a mandamus against the latter, there is no jurisdiction to hear an appeal on a recognizance filed on the day of the opening of the court when the appeal was to come on for hearing. [R. v. McKay, 21 Can. Cr. Cas. 211, 10 D.L.R. 820, not followed; Wills v. McSherry, [1913] 1 K.B. 20, distinguished.]

R. v. Hewa, 28 D.L.R. 147, 25 Can. Cr. Cas. 386, 9 W.W.R. 689.

Summary conviction — Recognizance — Cash bail.

Where the summary conviction appealed from by the defendant under Cr. Code, s. 750, as amended 1909 and 1913, adjudges payment of a fine and imprisonment in default, it is insufficient to give jurisdiction to hear the appeal that the defendant, when placed under arrest to answer the charge, had deposited with the chief of police who was the complainant in the proceedings, a sum as cash bail, the equivalent of which was afterwards imposed as the fine, and had, before the hearing of the appeal but not within 10 days after the conviction, deposited with the magistrate, the sum fixed by the latter as security for costs of the appeal; the appellant should have filed a recognizance to perfect his appeal. [R. v. McKay, 21 Can. Cr. Cas. 211, dissented from; Re McNeill and Saskatchewan Hotel Co., 17 W.L.R. 7, followed.]

R. v. Mack Sing, 25 Can. Cr. Cas. 158.

On an appeal from a summary conviction imposing a fine and, in default of payment, imprisonment, the Appellate Court is not deprived of jurisdiction to hear the appeal by a clerical error in the recognizance whereby the amount of appellant's personal obligation was omitted although filled in as to the sureties.

The King v. Koogo, 19 Can. Cr. Cas. 56, 19 W.L.R. 246.

From summary conviction—Security—Deduction from deposit by clerk for fee.

Where the defendant appealing from a summary conviction deposited with the justice the full amount fixed by the latter as security for the appeal and the latter transmitted it to the clerk of the Appellate Court, who deducted therefrom his fee of 50 cents for receiving, and issued a receipt to the justice for the balance only, the appeal is not thereby rendered incompetent; the making of the deposit with the justice and his handing the money to the clerk, of the Appellate Court completed the requirements of law as the regularity of the appeal, and the appellant was not concerned with the retention of the fee by the officer of the Appellate Court.

R. v. Walsh & Crane, 22 Can. Cr. Cas. 144, 26 W.L.R. 394.

Security on appeal—Regularity of security—Que. C.P. 179, 1216, 1220.

If security for costs of appeal to the Court of King's Bench has been received reserving the respondent's attorney's objections (based, in the present case, on a default already entered, the insufficiency of the notice, and the expiration of the time to appeal), it is the Court of King's Bench, and not the Superior Court, which must pronounce upon the regularity of the security.

Hope v. Leroux, 16 Que. P.R. 223.

Security—Sufficiency of—Appeal to Supreme Court—Supreme Court Act, R.S.C. 1906, c. 139, ss. 73, 75—Agreement of parties not to appeal.

An application to a judge of the Court of Appeal under ss. 73 and 75 of the Supreme Court Act to settle the case for an appeal to the Supreme Court, and to approve of the security for the respondents' costs of the appeal, should not be refused on account of an alleged agreement between the parties, made before the trial, that they would not carry the case beyond the Court of Appeal. It should be left to the Supreme Court itself to say whether the appellant has debarred himself from so appealing. Although there are two defendants, respondents in the appeal to the Supreme Court by the plaintiff, and they have defended separately and both have been given costs in the Court of Appeal, the plaintiff appealing need furnish security only in the one sum of five hundred dollars for the costs of both defendants in the Supreme Court. [Archer v. Severn, 12 P.R. 472, followed.]

Swanson v. McArthur, 24 Man. L.R. 641, 29 W.L.R. 257.

(§ III G—104)—Amount.

Where an order is made consequent upon the judgment disposing of the action, and it is so connected with the judgment as properly to form the subject of one and the same appeal, and its inclusion will lead to no additional inquiry or expense, an appeal from it may be entertained so that both it and the judgment may be dealt with together. In that case the security to be given on the appeal should be such as is

appropriate to one appeal. [Concha v. Concha, [1892] A.C. 670, followed.]

Ottawa Separate School Trustees v. City of Ottawa, 37 O.L.R. 25, 10 O.W.N. 191, [See also 30 D.L.R. 770, 36 O.L.R. 485.]

To Privy Council—From Court of Appeal—Amount of security—More than one respondent.

Stavert v. McMillan, 3 O.W.N. 165, 20 O.W.R. 242.

(§ III G—106)—Time for giving security — Extension — "Special circumstances."

Réaume v. City of Windsor, 25 D.L.R. 846, 34 O.L.R. 384.

Appeal to Court of King's Bench—Security—Default in furnishing—Presumption of abandonment of appeal.

A certificate of default by the appellant to furnish security on appeal delivered by the prothonotary on the fifth day after the filing of the inscription is not a presumption of the abandonment of the appeal under art. 1213 Que. C.P. A demand for taxation of costs made immediately afterwards by the defendant is, consequently, premature, and should be refused. On the other hand, the security not having been given within the prescribed time, the appellant cannot obtain a court order to the prothonotary to transmit the record to the Court of King's Bench.

Quebec et Lac Saint Jean R. Co. v. Vallieres, 45 Que. S.C. 1.

Time for giving security.

The department of the provincial treasurer, prosecuting an appeal from a judgment whereby the appellants, license commissioners in the city of Montreal, were prohibited from giving effect to a decision of cancellation of an innkeeper's license which had issued in favour of the respondent, is not required to affix stamps to the inscription in appeal or to give security thereon, but an appeal from a judgment rendered upon the special proceedings provided for in c. 40 C.P., cannot be made after thirty days from the rendering of the judgment, even if such appeal be at the instance of the Crown. The appeal was from a judgment maintaining a demand for prohibition against the license commissioners of the city of Montreal, in favour of the respondent. The respondent moved to quash the appeal on the grounds that the inscription had not been stamped, that security in appeal had not been given, and that the appeal had not been taken within the thirty days mentioned in art. 1006 C.P.

Choquet v. Demers, 18 Rev. de Jur. 14.

Appeal to judge from magistrate's order or conviction—Jurisdiction—Condition precedent — Deposit to be in court before appeal heard.

Re McNeill & Saskatchewan Hotel Co., 17 W.L.R. 7 (Sask.).

(§ III G—107)—Cash deposit.

A cash deposit under Cr. Code, s. 750 to answer the costs of an appeal from a summary conviction is a security payable to the Crown. Where an appeal from a summary conviction awarding a money penalty was taken under Cr. Code, s. 749 to the Court of King's Bench (Crown side) in the Province of Quebec, and that court dismissed the appeal without making any order in respect of the cash deposit made by the appellant under Cr. Code, s. 750, the Superior Court of Quebec on evocation from the Circuit Court has jurisdiction to decide a contestation respecting the ownership of the money deposited.

Grouly v. Sicotte, 19 Can. Cr. Cas. 101, 13 Que. P.R. 31.

IV. Record and case in Appellate Court.

A. In general.

(§ IV A—110) — Arbitrators' Award — If an appeal is taken to the Superior Court from an award of arbitrators appointed under the Dominion Railway Act, the respondent cannot ask for particulars on the questions of law or of fact pleaded by the appellant.

C.N.R. Co. v. Union Land Corp., 19 Que. P.R. 287.

Practice—Appeal books—Addresses of counsel to jury not to be included in.

It is the duty of the registrar not to allow anything in an appeal book that is not concerned in the appeal. Addresses of counsel at the conclusion of the evidence should therefore be excluded unless there is some ground of appeal founded upon the address of counsel.

Willard v. International Timber Co., 25 B.C.R. 210.

Municipal election—Interlocutory judgment—Review—Leave to appeal.

Lemoine v. Dubeau, 12 Que. P.R. 90.

B. What should be shewn by.

(§ IV B—115)—Settlement of case on appeal to Privy Council—Dispute as to what exhibits and evidence were before court at trial—Conflicting affidavits—Inference.

Ottawa Separate School Trustees v. Quebec Bank, 16 O.W.N. 23.

(§ IV B—116)—District Court—Facts in evidence—Appeal book—Remedying defect.

On an appeal from a District Court in Saskatchewan, the Trial Judge is to furnish the party appealing with a signed copy of the facts in evidence as noted by him and of his decision with the reasons therefor and findings of fact; and where this has not been done, the appeal book may be referred back to have the defect remedied.

Duck v. Floht, 20 D.L.R. 497, 7 S.L.R. 389, 7 W.W.R. 679.

APPEAL FROM SUMMARY CONVICTION—NO JURISDICTION IN COUNTY JUDGE TO STATE CASE TO COURT OF APPEAL.

The King v. McIntosh, 17 Can. Cr. Cas. 295 (Man.).

COUNTY COURT APPEAL—INTERLOCUTORY ORDER.

Gibson v. Hawes, 24 O.L.R. 543.

APPEAL FROM COUNTY COURT—QUESTION OF FACT—SETTING ASIDE INTERLOCUTORY JUDGMENT—LEAVE TO DEFEND.

Joiens v. Lockhart, 10 E.L.R. 165.

C. CONTRADICTIONS IN.

(§ IV C—120)—CONTRADICTIONS IN.

Items in controversy will not be considered which are not involved in the action in which the appeal is taken.

Maritime Gypsum Co. v. Redden, 8 D.L.R. 155, 46 N.S.R. 285, 11 E.L.R. 586.

CONTRADICTIONS IN RECORD ON APPEAL CASE—JUDGE'S CERTIFICATE OF EVIDENCE NOT SHEWN ON STENOGRAPHER'S NOTES.

In a conflict between what the trial judge certifies in a case stated under Cr. Code 1906, s. 1016, to have been specifically sworn to by a witness in answer to his own question, and what is shewn on the stenographer's notes of evidence sent up with the stated case under Cr. Code, s. 1017, a Court of Criminal Appeal is bound to accept the statement of the trial judge, particularly where he certifies that the stenographer's notes are defective by reason of the omission of such question and answer.

R. v. Angelo, 16 D.L.R. 126, 19 B.C.R. 261, 22 Can. Cr. Cas. 304, 27 W.L.R. 108, 5 W.W.R. 1303.

D. AMENDING; PERFECTING.

(§ IV D—125)—MOTION TO AMEND GROUNDS OF APPEAL.

A motion to amend the grounds of appeal may be denied where the appellant's case is without merit; the court not being bound to assist an appellant to enforce what may be his strict legal right by granting him an indulgence such as an amendment if his case is against equity.

Fordham v. Hall, 15 D.L.R. 659, 19 B.C.R. 80, 26 W.L.R. 882, 5 W.W.R. 1288.

APPEAL CASE OR RECORD—AMENDING OR PERFECTING.

Upon an appeal to the Supreme Court of Canada, where either party desires to include in the record the written reasons of one of the judges below which were not available until after the appeal case had been formally settled, an application may be made to the Supreme Court for an order giving leave for that purpose, on affidavits shewing the special circumstances upon which the application is based. [Mayhew v. Stone, 26 Can. S.C.R. 58, approved; Canadian Fire Ins. Co. v. Robinson, Coutlée's S.C. Dig. 1105, referred to.]

Dufresne v. Desforges, 10 D.L.R. 289, 47 Can. S.C.R. 382, 12 E.L.R. 210.

AMENDMENTS—ACTION IN NAME OF MUNICIPALITY—SUBSTITUTION OF COUNCIL.

Where an action to recover taxes is improperly begun in the name of the municipality instead of its council an amendment will be allowed on appeal substituting the name of the municipal council as plaintiff.

Rural Municipality of Vermillion Hills v. Smith (No. 2), 13 D.L.R. 182, 6 S.L.R. 366, 24 W.L.R. 903 4 W.W.R. 1219.

GROUNDS ON WHICH COURT WILL ALLOW AMENDMENT OF NOTICE OF APPEAL.

Where no mistake has been made, but the grounds of appeal set out in a notice of motion by way of appeal are untenable, and an amendment of such grounds is sought for the purpose of enabling new points to be argued, the court will have regard to the nature of the litigation and to the possibility of ending it by a decision upon the new points sought to be raised, in determining whether the amendment should be granted. An amendment of the grounds of appeal in a notice of motion by way of appeal is not allowed in every case, and, while it is as of course in an ordinary case, it will not be allowed simply because a mistake has been made.

Foxwell v. Kennedy, 3 D.L.R. 703, 3 O.W.N. 1225, 22 O.W.R. 21.

AMENDMENTS ON APPEAL.

A question not going to the merits of a case and not raised by the notice of appeal, cannot be brought to the attention of the court by a supplementary or "explanatory" notice of appeal.

Alfred & Wickham v. G.T.P.R. Co., 5 D.L.R. 154, 20 W.L.R. 111, 1 W.W.R. 622.

AMENDING OR PERFECTING—CRIMINAL APPEAL—STATED CASE—PROOF OF PROCEEDINGS AT TRIAL.

The power of a Court of Criminal Appeal on hearing a case stated by the trial judge under Cr. Code (1906), s. 1015, to refer to such other evidence of what took place at the trial as it thinks fit is limited by Cr. Code, s. 1017 to cases in which "only the judge's notes are sent and it considered such notes defective;" there is no such power where, in addition to the judge's notes, the notes of the official stenographer accompany the stated case.

R. v. Angelo, 16 D.L.R. 126, 19 B.C.R. 261, 22 Can. Cr. Cas. 304, 27 W.L.R. 108, 5 W.W.R. 1303.

SETTLEMENT OF APPEAL BOOK.

Any party to an action dissatisfied with the settlement of an appeal book by the registrar, may go to the County Court Judge who can make any amendment to his notes that he sees fit, but his action is not in the nature of an order or decree from which there is a right of appeal under s. 116 of the County Courts Act. Per Macdonald, C.J.A.: The hearing of an appeal may proceed in the absence of the note of the County Court Judge and it is for the court in each

case to say what satisfies it when it cannot get the best evidence of what took place.
Robertson v. Latta, 21 B.C.R. 597.

AMENDING NOTICE OF APPEAL — JURISDICTION TO AMEND.

On an application to the Court of Appeal to amend the notice of appeal regularly filed and served, but which was intituled "In the Court of Appeal":—Held, that the notice of appeal was sufficient to give the court jurisdiction to deal with any defect in it. Notice amended on payment of costs incurred through error. [Hepburn v. Beattie, 16 B.C.R. 209, distinguished.]
Wilson v. Henderson, 19 B.C.R. 45.

CONVICTION—APPLICATION TO QUASH—ERROR RECTIFIED.

R. v. Demetrio, 3 O.W.N. 313, 20 O.W.R. 524.

(§ IV D—126)—CRIMINAL CASE STATED—FORMAL SIGNATURE WAIVED.

On a case directed to be stated under Cr. Code, s. 1016, following the refusal of a reserved case, the Court of Appeal may proceed with the hearing of the questions which it has directed to be stated without sending them to be formally signed by the judge below if the Crown waives technical objections; the Court of Appeal may in such case direct that the record and evidence may be referred to by the Crown in contradiction of any fact incorrectly set forth in the stated case submitted by the accused.
R. v. Belyea, 24 Can. Cr. Cas. 395, 43 N.B.R. 375.

E. AFFIDAVITS.

(§ IV E—139)—CROSS-EXAMINATION OF—LEAVE TO.

Newton v. Bauthier, 24 D.L.R. 890, 21 B.C.R. 4, 8 W.W.R. 930.

F. EVIDENCE; FRESH EVIDENCE.

(§ IV F—135)—PROCEEDINGS BEFORE MASTER FOR RECEIVER'S FEES—FRESH EVIDENCE—AFFIDAVITS.

An appeal under r. 622 (Sask.) is a rehearing, on which fresh affidavits purporting to establish the proceedings before a Master respecting compensation to a receiver may be used on an appeal from the Master to a Judge in Chambers.
Campbell v. Arndt, 24 D.L.R. 699, 8 S.L.R. 320, 32 W.L.R. 249, 9 W.W.R. 57.

DIVISION COURT APPEALS—RECORD—EVIDENCE—AGREED STATEMENT OF FACTS.

The Appellate Court cannot review the judgment of a Division Court under ss. 127 and 128 of the Division Courts Act, R.S.O. 1914, c. 3, unless the evidence taken by the Division Court Judge is before it; a certificate of the judge as to what was proved before him might take its place, but a statement of facts agreed upon by the parties is not sufficient.
Luttrell v. Kurtz, 25 D.L.R. 240, 34 O.L.R. 586. [See also 21 D.L.R. 710, 33 O.L.R. 203.]

REVIEW OF AWARD UNDER RAILWAY ACT—REASONS OF ARBITRATORS — EXAMINATION OF ARBITRATOR AS WITNESS—LEAVE. [Crowley v. Boving & Co., 23 D.L.R. 696, referred to.]
Re Clarkson & Campbellford, Lake Ont. & West. R. Co., 26 D.L.R. 782, 35 O.L.R. 345.

GROUND NOT PREVIOUSLY RELIED ON—EXCEPTIONS.

A Court of Appeal should not consider a ground not previously relied on, unless satisfied that it has all the evidence bearing upon it that could have been produced at the trial, and that the party against whom it is urged could not have satisfactorily explained it under examination. [S.S. Tordenskjold v. S.S. Euphemia, 41 Can. S.C.R. 154, referred to.]
Re Union Supply Co. Caveat, 40 D.L.R. 282, 11 S.L.R. 157, [1918] 2 W.W.R. 305.

ADDING FRESH EVIDENCE—AS PART OF RECORD ON APPEAL—BY-LAW OF PLAINTIFF COMPANY TOO LATE, WHEN.

Where a by-law of plaintiff company was referred to at the trial whereupon defendant's counsel called for its production, but plaintiff company objected to produce it and withheld it from the court notwithstanding a direction for its production, leave is properly refused the company to produce it after the dismissal of the action and the argument of their appeal therefrom.
Houghton Land Corp. v. Ingham, 18 D.L.R. 682.

PRACTICE—ADDING NEW EVIDENCE ON—EXPROPRIATION.

It not being the practice in the Superior Court of Quebec on an appeal from an Inferior Court to permit further evidence to be given on the appeal and no general rule having been made to that end, new evidence is not admissible on an appeal under s. 209 to the Superior Court from the award of arbitrators in an expropriation under the Railway Act, R.S.C. 1906, c. 37.
Lachine, Jacques-Cartier, etc., R. Co. v. Kelly, 20 D.L.R. 587.

JUDGMENT—ACTION FOR MALICIOUS PROSECUTION—VERDICT OF JURY IN FAVOUR OF PLAINTIFF—JUDGMENT ENTERED FOR PLAINTIFF AND AFFIRMED BY APPELLATE DIVISION—FURTHER APPEAL TO SUPREME COURT OF CANADA—DISCOVERY OF FRESH EVIDENCE AFTER ENTRY OF CASE—JUDGMENT ALLEGED TO HAVE BEEN OBTAINED BY FRAUD, CONSPIRACY, AND PERJURY—DISMISSAL OF APPEAL WITHOUT PREJUDICE TO MOTION FOR NEW TRIAL IN SUPREME COURT OF ONTARIO—MOTION MADE UNDER R. 523 — FORUM — HIGH COURT DIVISION (WEEKLY COURT)—DUE DILIGENCE—CONCLUSIVENESS OF NEW EVIDENCE—ORDER FOR NEW TRIAL—COSTS.

Jeanette v. Michigan Central R.R. Co., 16 O.W.N. 137. [Affirmed 17 O.W.N. 53.]

EVIDENCE—DUTY OF PARTY DESIRING TO APPEAL.

It is the duty of a party who may want to carry a case further to have the evidence at the trial so taken that on appeal it can be properly and clearly brought before the Court. [Ex parte Firth; In re Cowburn, 19 Ch.D. 419, adopted.]

Stancliffe & Co. v. Corp. of Vancouver, 18 B.C.R. 629.

EVIDENCE APPLICABLE TO ISSUE IN APPEAL—ADDUCED BY LITIGANT NOT PARTY TO THE APPEAL.

Ordered, that the respondent should print the evidence in question, as by its motion it alleged such evidence to be necessary for the decision of the appeal.

Quebec Land Co. v. City of Quebec, 18 Rev. de Jur. 132.

EVIDENCE—ADDING FRESH EVIDENCE.

An appellant should not be deprived of his appeal because no notes of the evidence on the trial were taken by the judge or any other person. In such a case the witnesses who gave evidence on the trial may be called to give the same evidence on appeal as was given below, so far as possible, but no new evidence should be admitted.

City of Strathcona v. Edmonton & Strathcona Land Syndicate, 3 A.L.R. 259.

FRESH EVIDENCE OFFERED ON APPEAL.

White v. Grand Trunk Pacific, 2 A.L.R. 522. [The reversal upon appeal, G.T.P. v. White, 43 Can. S.C.R. 627, was upon other grounds.]

REVIEW—CONFLICT OF EVIDENCE.

Grant v. Grant, 45 N.S.R. 43.

(§ IV F—136)—RECORD—DOCUMENTARY EVIDENCE—LOST LETTER—PROOF BY AFFIDAVIT—ART. 123 C.C.

Simard v. Dubord, 25 D.L.R. 857, 24 Que. K.B. 350.

APPEAL FROM MOTION FOR JUDGMENT—NECESSITY OF INCLUDING IN APPEAL BOOK OR DELIVERING TO COURT AFFIDAVITS AND EXHIBITS USED ON MOTION.

McKinnon v. Crafts, Lee & Gallinger, 35 W.L.R. 148, [1917] 1 W.W.R. 148.

LOST EXHIBITS—RECONSTRUCTION OF RECORD.

If exhibits or pleadings in a case pending before the Court of Appeals disappear, an order will be given by that court that the parties, the prothonotary of the Superior Court, the clerk of the Court of Appeals, make special search for the documents missing and that, if same cannot be found, the record be sent back to the Superior Court, so that an order may there be given that each of the parties reconstitute the documents and exhibits filed by them. All proceedings in the case will be suspended, until the record has been duly reconstituted as aforesaid.

Locomotive & Machine Co. of Montreal v. Gardiner, 24 Que. K.B. 95.

G. STENOGRAPHER'S NOTES.

(§ IV G—140)—LOSS OF NOTES IN CRIMINAL CASE—EFFECT.

Upon an appeal on questions reserved from a conviction for theft, where the questions involve consideration of the evidence given at the trial, and the stenographer's notes containing the only official record of such evidence have been lost, or are not available, through omission of the Crown officers, it is compulsory upon the Crown to furnish such stenographer's notes or an authenticated transcript thereof, and in default of their so doing within a time limited by the court, the conviction will be quashed.

R. v. Jennings & Hamilton, 29 D.L.R. 604, 26 Can. Cr. Cas. 270, 11 A.L.R. 290, 34 W.L.R. 1058, 10 W.W.R. 1049.

LOSS OF NOTES—NOTES OF TRIAL JUDGE.

Where the stenographic report of the evidence taken at a trial cannot be obtained, and the only report of the evidence available to the Appeal Court are the notes of the Trial Judge, his findings of fact should be taken as practically conclusive, unless his notes themselves shew that he was in error.

McCord v. Alberta & Great Waterways R. Co. (Can.), 49 D.L.R. 696, [1918] 3 W.W.R. 622, reversing 41 D.L.R. 722, 13 A.L.R. 476, [1918] 2 W.W.R. 708.

OF REASONS FOR JUDGMENT — CRIMINAL CASE.

The Court of Appeal, in granting leave to appeal in a criminal case, may direct that the whole record should be transmitted by the Trial Court, and that the latter shall add a statement declaring whether the stenographic notes of the reasons for the judgment appealed against are correct.

Giroux v. The King, 34 D.L.R. 642, 27 Can. Cr. Cas. 366, 26 Que. K.B. 505. [See also 39 D.L.R. 190, 56 Can. S.C.R. 63, 26 Que. K.B. 323.]

H. INSTRUCTIONS.

(§ IV H—145)—CRIMINAL CASE—JUDGE'S CHARGE TO THE JURY.

The statutory power conferred by s. 1017 of the Cr. Code, whereby the Court of Appeal may, on any appeal or application for a new trial, refer to such other evidence of what took place at the trial as it thinks fit in addition to what is included in the judge's notes applies only to the notes taken by the judge presiding at the trial, and not to the address made by the judge to the jury, the stenographic report of which he had certified. [Compare R. v. Angelo, 22 Can. Cr. Cas. 304, 16 D.L.R. 126, 19 B.C.R. 261, as to judge's certificate of evidence not shewn on stenographer's notes.]

Di Lena v. The King, 24 Can. Cr. Cas. 301, 24 Que. K.B. 262.

I. FINDINGS.

(§ IV I—153)—SUFFICIENCY.

A judgment for the defendant in an action on a promissory note given by him to the plaintiff will not be disturbed where

the trial judge found on the facts that it had been paid by the defendant conveying to the plaintiff land the former had agreed to sell to a third person, who had sold his equity therein to the plaintiff, the latter assuming payment of the former's indebtedness on the land to the defendant, under an agreement between the three that the amount due the plaintiff from the defendant on such note should be credited by the latter on the indebtedness the plaintiff had assumed.

Lindsay v. La Plante, 3 D.L.R. 449, 21 W.L.R. 477.

J. Opinions.

(§ IV J — 155) — Workmen's compensation claims — Award varying from the delivered reasons for judgment — Disposal as to costs.

It is not an objection available on an appeal that the disposition made by the district judge of the costs in a proceeding under the Workmen's Compensation Act (Alta.), is different in his formal award from that in his written reasons for judgment; the award as finally signed is the only disposition to be dealt with on an appeal.

Barrie v. Diamond Coal Co., 17 D.L.R. 385, 7 A.L.R. 138, 28 W.L.R. 701, 6 W.W.R. 651.

Reserved case—Judge's notes.

In a demand for leave to appeal from the judgment rendered by the Judge of the Sessions of the Peace, upon a motion for a reserved case, the court must take cognizance of the notes of judgment of the first judge forming part of the record, notwithstanding the fact that the Crown filed affidavits to the effect that the judge discharged the respondent only on questions of law. The filing of the judge's notes in the record after the judgment has been rendered is not illegal.

The King v. Jacobs, 26 Que. K.B. 382.

L. Certificates.

(§ IV L—165)—On Appeal.

An appeal from the certificate of a taxing officer on a taxation between a solicitor and his client is to be treated as an appeal from a Master's report, and is to be taken in conformity with Manitoba King's Bench Rule 682 rather than in pursuance of rules 684 and 685.

Re Phillipps & Whitla, 1 D.L.R. 291, 22 Man. L.R. 150, 20 W.L.R. 229, 1 W.W.R. 840.

V. Objections and exceptions; raising question in lower court.

(§ V A — 230) — Objections and exceptions — Raising question in lower court.

An objection to an interlocutory order that it was made on an affidavit of information and belief which did not disclose the source of such information (N.S. Judicature rules, order 36, r. 3), is too late if first raised in appeal.

Buckley v. Fillmore, 8 D.L.R. 526, 46 N.S.R. 510, 12 E.L.R. 235.

A. Definiteness; sufficiency.

(§ V A—235)—New cause of action—Amendment.

Davis v. Burt, 3 S.L.R. 446.

War Relief Act — Leave to proceed — Waiver.

On an appeal from an order for a reference as to the damages sustained by a defendant by reason of an injunction, it is not open to the defendant to raise for the first time the preliminary objection that no leave to proceed had been obtained by the plaintiff under the provisions of the War Relief Act. S. 10 of the War Relief Act, c. 74, 1916 (B.C.), as amended by s. 8, c. 74, 1917, does not apply to proceedings in the Court of Appeal. A County Court Judge has not the power to refer a question of law and fact to a registrar, the question of law should first be disposed of by him.

John Hing Co. v. Sit Way, [1918] 1 W.W.R. 978, 25 B.C.R. 153.

(§ V A — 238) — To findings or conclusions of court.

An objection that the cause of action set up in a statement of claim was not supported by the evidence will not be considered on an appeal of a cause that was not defended on the trial, as such objection, had it been made on the trial, might have been met by an amendment of the statement of claim so as to conform to the evidence.

Ferguson v. Swedish Canadian Lumber Co., 2 D.L.R. 557, 41 N.B.R. 217, 10 E.L.R. 386.

(§ V A—251)—What questions raised.

Where in an action on calls on shares of capital stock, there is no proof of a by-law that shares should be sold at a discount, and no objection was made below to such want of proof, the court hearing the case in appeal may permit proof of the by-law to be put in. [Gowganda Queen Mines v. Boeckh, 24 O.L.R. 293, affirmed; Cook v. McMullen, 5 O.W.R. 507; Hargreaves v. Hilliam, 58 J.P. 655, cited in court below.]

Boeckh v. Gowganda Queen Mines, 8 D.L.R. 782, 46 Can. S.C.R. 645, 23 O.W.N. 313.

B. Necessity for exceptions.

(§ V B—269)—As to costs—Master.

The rules requiring the carrying in of written objections before the Taxing Master only apply when the appeal is as to the allowance of any "item or part of an item" and not when the general principle of the taxation is objected to. The carrying in of objections under r. 972 is not a prerequisite to an appeal under r. 681.

[Cooney v. Jickling, 7 D.L.R. 728, 22 Man. L.R. 468, followed.]

Robin Hood Mills v. Maple Leaf Milling Co., 35 W.L.R. 796, [1917] 1 W.W.R. 796. [See also 26 Man. L.R. 238.]

D. RAISING QUESTIONS BY MOTION OR OTHER MODE.

(§ V D—275)—PROCEDURE—JURISDICTION OF LOWER COURT UNTIL FILING OF SECURITY—MERITS OF APPEAL—FINAL OR INTERLOCUTORY JUDGMENT.

Demers v. City of North Montreal, 36 D.L.R. 773, 52 Que. S.C. 64.

VI. Preliminary motions; dismissal; abatement; abandonment.

A. IN GENERAL.

(§ VI A—280)—NOTICE—FAILURE TO ENTER APPEAL—MOTION FOR DISMISSAL—COSTS.

McIntosh v. Poirier, 33 D.L.R. 170, 44 N.B.R. 355.

BEFORE WHOM MADE—COURT—CHAMBERS.

An application affecting the list of appeals should be made to the court when the court is sitting, but when not sitting, to a Judge in Chambers.

Eddy v. C.P.R. Co., 22 B.C.R. 294.

APPEAL BOOK—APPLICATION TO STRIKE OUT.

This was an application to strike out certain pages of the appeal book, the appeal book having been settled by the registrar of the trial court pursuant to s. 24 of the Court of Appeal Act, R.S.B.C. 1911, c. 51, there having been no objection taken before the registrar of the trial court to the appeal book as settled, nor any appeal from the ruling of the registrar to a judge of the trial court. Counsel for appellant took the preliminary objection that the court had no jurisdiction, citing s. 24 of the Court of Appeal Act which directed that the appeal book should be settled by the registrar of the trial court:—Held, that the court had no jurisdiction; that the proper course for the applicant to have pursued was to object to the registrar's settlement of the appeal book, and to appeal from the registrar's settlement to a judge of the trial court, and to appeal from the order of the judge of the trial court to this court.

Patterson v. Hodges & Rowe, 8 W.W.R. 1080.

NOTICE OF MOTION.

When a preliminary objection is taken that an appeal is out of time, the respondent will be held strictly to the grounds taken in his notice of motion.

Wardroper v. Stewart-Moore, 25 B.C.R. 69.

STAY PENDING APPEAL — ATTORNEY-GENERAL AS PARTY.

When some question arises while an action is pending which may affect the course of the trial and which is the subject of appeal to the Court of Appeal, the trial ought, in general and in the absence of very special reasons otherwise, to be stayed until the Court of Appeal has dealt with the question. Accordingly a stay was upheld until after the determination of an appeal from an interlocutory order adding the Attorney-General as a party defendant, there being no reason shewn why the plaintiff should go to trial immediately or any suggestion that, should he fail to do so, he would be prejudiced.

E. & N. R. Co. v. Dunlop (B.C.), [1918] 3 W.W.R. 828, 25 B.C.R. 502. [See 41 D.L.R. 737, [1918] 3 W.W.R. 25.]

NEW EVIDENCE—ADJOURNMENT.

An application to the Court of Appeal to allow in evidence a document that was in the pocket of a witness when examined in the court below but inadvertently overlooked by counsel, will be refused. An application to adjourn the hearing of an appeal on the ground that counsel, through pressure of work, was unable to prepare his case, will be refused if objected to by opposing counsel.

Mellwee v. Foley, 24 B.C.R. 532, [1918] 1 W.W.R. 222. [Referred back by Privy Council for further enquiry, 44 D.L.R. 5.]

(§ VI A—281)—MOTION TO AFFIRM JURISDICTION.

A preliminary motion to affirm the jurisdiction on an appeal to the Supreme Court of Canada will be dismissed and the parties left to their rights on the hearing, if the facts shewn on the preliminary motion are insufficient to enable the court to finally determine whether the judgment or order appealed from was final and so subject to appeal or was interlocutory only and, therefore, not subject to appeal. [Clark v. Goodall, 44 Can. S.C.R. 284; Crown Life v. Skinner, 44 Can. S.C.R. 616, and McDonald v. Belcher, [1904] A.C. 429, specially referred to.]

Windsor, Essex & Lake Shore Rapid R. Co. v. Nelles, 1 D.L.R. 309.

(§ VI A—283)—ABANDONMENT.

When an abandonment of an inscription in review, signed by the attorney of the inscribing party, is filed in the prothonotary's office and served on the adverse party, it cannot afterwards be withdrawn or declared to be a nullity on the ground that the service was made through error. The application of the opposite party that acte of it should be given him ought to be granted.

Simard v. Poulin, 43 Que. S.C. 193.

B. GROUNDS FOR DISMISSAL.

(§ VI B—286)—LACK OF CONTROVERSY, CHANGE IN CIRCUMSTANCES PENDING APPEAL.

Where a verdict for an amount less than the claim is given with the consent of the defendant and is so entered on the record, the plaintiff, who took the benefit of it and took no objection although represented by counsel, must be taken to have also consented; the judgment so entered is a con-

sent judgment and as such is not appealable under the Manitoba County Courts Act, R.S.M. 1902, c. 38.

Timmons v. Brown, 1 D.L.R. 311, 22 Man. L.R. 47, 20 W.L.R. 346.

RELEASE—EXECUTOR'S DISCHARGE.

An appeal from an order ratifying an executor's account will not be quashed upon the production of a release to the executor, which has been previously considered in connection with the application for leave to appeal and the matter adjudged by granting leave, particularly where from the nature of the transaction it does not clearly appear that the instrument was obtained with the independent advice and with full information of the maker's rights.

Cookson v. Driscoll; Re Estate of Leahy, 27 D.L.R. 488, 50 N.S.R. 1.

(§ VI B—287)—IRREGULARITIES IN PAPERS OR PROCEEDINGS.

Although art. 1213 C.P. (Que.) provides that, after the inscription of appeal to the King's Bench, notice thereof must be served on the attorney for the opposite party, an objection to an appeal duly inscribed on the ground of want of notice is waived if the same objection might have been taken at the filing and allowance of security on the appeal and the party now objecting was there represented and did not object. [Gross v. Racicot, 11 Que. P.R. 124, distinguished.]

Valade v. Leroux, 2 D.L.R. 108.

QUASHING APPEAL FROM DISMISSAL OF SUMMARY CONVICTION—STATUS OF APPELLANT.

It is ground for quashing an appeal under Cr. Code, s. 749, from the dismissal of a summary conviction proceeding that the appellant has not shewn upon the appeal that he is the complainant and so within the limitation of Code, s. 749 as a party aggrieved by the order of dismissal; the court to which the appeal is taken under a notice of appeal which does not state the appellant to be the complainant in the proceedings below is not bound to look at the information transmitted under Cr. Code, s. 757, to ascertain whether the appellant was such complainant if the information was not put in evidence on the appeal.

Gates v. Renner, 24 Can. Cr. Cas. 122, 9 W.W.R. 190.

(§ VI B—288)—GROUNDS FOR DISMISSAL—CRIMINAL CASE—DELAY IN MOVING FOR LEAVE TO APPEAL.

A delay of two years after the conviction in applying for leave to appeal therefrom under s. 1019 of the Criminal Code, 1906, would not be a ground for refusing to entertain an appeal based upon the wrongful admission of the prisoner's wife as a witness against him, even if the Crown had not by consenting to an order granting leave to appeal waived such objection.

R. v. Allen, 14 D.L.R. 825, 22 Can. Cr. Cas. 124, 41 N.B.R. 516, 14 E.L.R. 40.

MOTION TO DISMISS APPEAL FOR WANT OF PROSECUTION—NOTICE—NECESSITY FOR—DEMAND.

Goddard v. Prime, 9 S.L.R. 303, 34 W.L.R. 1228.

MOTION FOR LEAVE TO APPEAL IN CRIMINAL CASE.

Where the accused files a motion before the Court of Appeal for leave to appeal under Cr. Code, s. 1015, following his conviction for an indictable offence, but makes default in proceeding with such motion, the Crown and make such disposition of the motion in the absence of the accused as it sees fit.

Abeles v. The King, 24 Can. Cr. Cas. 308, 24 Que. K.B. 260.

VII. Hearing and determination.

A. IN GENERAL.

(§ VII A—290)—BY CONSENT OF PARTIES.

Where an appeal would lie from the decision of an intermediate tribunal, the Appeal Court, with the consent of the parties to an action, may hear and determine an appeal from the court of first instance, and subsequent proceedings will not be affected by the departure from the practice of the Appeal Court.

Tp. of Cornwall v. Ottawa & New York R. Co., 30 D.L.R. 664, 52 Can. S.C.R. 466, affirming 23 D.L.R. 610, 34 O.L.R. 55, 20 Can. Ry. Cas. 91.

QUESTIONS OF FACT—CREDIBILITY OF WITNESSES—FINDING OF TRIAL JUDGE—REVERSAL.

When a question of fact depends upon the credibility of witnesses, an Appellate Court will not reverse the finding of the trial judge who has had the advantage of seeing and hearing such witnesses.

Morrow Cereal Co. v. Ogilvie Flour Mills Co., 44 D.L.R. 557, 57 Can. S.C.R. 403, affirming 39 D.L.R. 463.

CREDIBILITY OF WITNESSES.

When a question of fact depends upon the credibility of witnesses, the Court of Appeal will not reverse the finding of the trial judge. [Wood v. Haines, 33 D.L.R. 166, referred to.]

Ogilvie Flour Mills Co. v. Morrow Cereal Co., 39 D.L.R. 463, 41 O.L.R. 58. [Affirmed 44 D.L.R. 557, 57 Can. S.C.R. 403.]

IN GENERAL, RULES OF DECISION.

On an appeal from a summary conviction a preliminary motion may be made to quash the conviction appealed from upon grounds appearing on the face of the proceedings, ex. gr. the lack of any evidence as to an essential part of the offence.

The King v. Koogo, 19 Can. Cr. Cas. 56, 19 W.L.R. 240.

FORUM — REFERENCE TO COUNTY COURT JUDGE FOR TRIAL OF ACTION — JUDGE TREATING REFERENCE AS MADE TO HIM AS LOCAL MASTER — APPEAL FROM REPORT — JURISDICTION OF HIGH COURT DIVISION — MORTGAGE — RATIFICATION — PROMISSORY NOTE — ESTOPPEL — REPORT VARIED IN ONE RESPECT — COSTS.

Knowlton v. Union Bank of Canada, 7 O.W.N. 817, 8 O.W.N. 219.

EXTENSION OF TIME—SECURITY.

The hearing of an appeal will not be refused on the ground that security for costs has not been given. It is the duty of a party entitled to take proceedings to enforce it. A County Court Judge has no power to extend the time for hearing an appeal under marginal rule 967 of the Supreme Court Rules. The exercise by a judge of his jurisdiction under said rule is a judicial act and not a question of practice and procedure as contemplated by s. 121 of the County Courts Act. Where a dual jurisdiction is conferred on two separate tribunals to do a particular act, to either of which a litigant may resort, upon his selecting one of them the other is excluded and the matter must be solely adjudicated upon by the forum to which he has decided to resort.

Shipway v. Logan, 22 B.C.R. 410.

ORAL AGREEMENT—FINDING OF TRIAL JUDGE —APPEAL.

Vipond v. Watts, 19 W.L.R. 309 (B.C.).

(§ VII A—291)—CHANCE OF LAW PENDING APPEAL.

Appeals to the Supreme Court of Canada are not of the nature of rehearings; and a provincial statute (s. 25 of Alta. St. 1915, c. 2, amending s. 124 of the Land Titles Act, St. 1906, c. 24), which changes the law affecting cases while appeals therefrom are pending in the Supreme Court of Canada, has no binding effect upon the latter court in the disposition of such appeals. [Quilter v. Mapleson, 9 Q.B.D. 672, distinguished.]

Boulevard Heights v. Veilleux, 26 D.L.R. 333, 52 Can. S.C.R. 185, 9 W.W.R. 742, affirming 24 D.L.R. 881, 8 W.W.R. 440, 31 W.L.R. 10; 20 D.L.R. 858, 8 A.L.R. 16, 29 W.L.R. 140, 7 W.W.R. 616.

B. WHO MAY COMPLAIN.

(§ VII B—295) — WHO MAY COMPLAIN—LEAVE TO THIRD PARTIES TO APPEAL IN NAME OF DEFENDANTS AGAINST JUDGMENT IN FAVOUR OF PLAINTIFF—TERMS.

Swale v. C.P.R. Co., 4 O.W.N. 1110, 24 O.W.R. 479.

C. EVIDENCE; AMENDMENTS; TRIAL DE NOVO.

(§ VII C—300)—HEARING AND DETERMINATION — EVIDENCE — AMENDMENTS — TRIAL DE NOVO — UNAVOIDABLE MISTAKE.

Wile v. Wamboldt, 13 D.L.R. 942, 13 E.L.R. 223.

(§ VII C—301) — ONTARIO TEMPERANCE ACT — CONVICTION BY MAGISTRATE — APPEAL TO COUNTY JUDGE—HEARING—EVIDENCE—PREJUDICE.

A County Judge sitting in appeal under s. 92 of the Ontario Temperance Act is not justified in reversing the magistrate's finding because such judge has discredited the evidence of witnesses on whose evidence the magistrate's decision was based, in a previous case before such judge. He must not import prejudice from the other case, but should hear the witnesses and give them an opportunity of rehabilitating themselves in his good opinion. A whiskey detective or spy is not an accomplice and his evidence does not need to be corroborated.

R. v. McCranor, 47 D.L.R. 237, 44 O.L.R. 482.

EVIDENCE.

In dealing with the reception of further evidence bearing upon matters which have occurred before the decision upon the merits at the trial, an Appellate Court should exercise great caution, owing to the danger of throwing open the whole matter after it has been investigated at a trial, and the opinion of the trial judge and his reasons for it have become known. [Trimble v. Hortin, 212 A.R. (Ont.) 51, referred to.]

The power of Appellate Courts to direct the reception of further evidence is purely statutory, and exercisable only to the extent conferred either expressly or by fair implication.

Re Fraser; Fraser v. Robertson McCormick v. Fraser, 8 D.L.R. 955, 3 O.W.N. 1420, 26 O.L.R. 508, 22 O.W.R. 353.

MOTION TO ADDUCE FRESH EVIDENCE ON APPEAL.

Woodford v. Henderson, 15 B.C.R. 495.

(§ VII C — 302) — AMENDMENTS — SETTING UP NEW CAUSE OF ACTION—PROPER REMEDY, IF ANY.

The unsuccessful plaintiff, at the trial appealing from the dismissal of his action will be refused leave to amend where the proposed amendment sets up an entirely new cause of action and would necessitate a new trial; but leave may be reserved to him to bring another action. [Morrison v. Earls, 5 O.R. 477, referred to.]

O'Connor v. Sturgeon Lake Lumber Co., 20 D.L.R. 216, 7 S.L.R. 254, 29 W.L.R. 275, 7 W.W.R. 64.

AMENDMENTS.

Where the Court of King's Bench, had objection been made to its jurisdiction because a submission to arbitration of the question of compensation for land taken for a public street was not made a rule of court, could have granted an adjournment for the purpose of having the submission made a rule of court, the Court of Appeal has the like power on an appeal from the

order of the Court of King's Bench quashing the award made.

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351, 2 W.W.R. 470.

(§ VII C—303)—Illegitimate Children's Act.

S. 32 of the Illegitimate Children's Act, R.S.M. 1913, c. 92, has the effect of making s. 749 to 760 of the Criminal Code applicable to appeals under that Act, except in so far as the proceedings on such appeals are regulated by that Act; and the powers which the Act expressly confers by s. 30 upon the judge hearing the appeal, are to be considered as supplemented by the powers given by s. 754 of the Code, which include the power to make the order which the magistrate appealed from should have made and to impose costs and to commit for noncompliance.

Re Sigurdson (No. 2), 28 D.L.R. 376, 25 Can. Cr. Cas. 313, 26 Man. L.R. 209, 34 W.L.R. 53, 10 W.W.R. 159.

D. Presumptions.

(§ VII D—305)—Presumptions—Stated case based on pleading.

Where an appeal is taken to the British Columbia Court of Appeal by a submission of a stated case based upon certain paragraphs of plaintiff's statement of claim, the court may assume for the purposes of submission that the facts are as stated in those paragraphs.

Arbuthnot v. City of Victoria, 9 D.L.R. 564, 18 B.C.R. 35, 23 W.L.R. 563, 4 W.W.R. 145.

E. What reviewable, generally.

(§ VII E—320)—What reviewable—Question of costs.

Roy v. Denis, 20 D.L.R. 982, 23 Que. K. B. 517.

Criminal appeal—Questions of law—Refusal to postpone trial.

Where the court on an application under Cr. Code, s. 901 has, in the exercise of judicial discretion, refused to allow a postponement of a criminal trial, there can be no review of the decision by an Appellate Court and the question presented does not constitute a question of law upon which there may be a reserved case under the provisions of s. 1014 of the Criminal Code. [R. v. Charlesworth, 1 B. & S. 460; Winsor v. The Queen, L.R. 1 Q.B. 390; R. v. Lewis, 78 L.J.K.B. 722; R. v. Blythe, 15 Can. Cr. Cas. 177, 19 O.L.R. 386; Reg. v. Johnson, 2 C. & K. 354; and Reg. v. Slavin, 17 U.C. C.P. 205, referred to; R. v. Mulvihill, 22 Can. Cr. Cas. 354, affirmed.

Mulvihill v. The King, 18 D.L.R. 217, 23 Can. Cr. Cas. 194, 49 Can. S.C.R. 587, 6 W.W.R. 462.

Questions of law—Criminal appeal—Refusal to postpone trial.

The discretion of the trial judge at a criminal trial in refusing to grant a postponement to enable the defence to make inquiries as to the antecedents of two Crown witnesses who had not been examined at the preliminary inquiry, is not a question of law which can be reserved under Cr. Code, 1906, s. 1014. [R. v. Johnson, 2 Car. & K. 354, referred to; R. v. Blythe, 15 Can. Cr. Cas. 224, 19 O.L.R. 389, considered.]

R. v. Mulvihill, 18 D.L.R. 18, 22 Can. Cr. Cas. 354, 19 B.C.R. 197, 26 W.L.R. 955, 5 W.W.R. 1229. [Affirmed 18 D.L.R. 217.]

(§ VII E—321)—Finding of not guilty on undisputed facts reversed by Court of Appeal—Question of law.

The King v. Baxter, 18 Can. Cr. Cas. 340, 16 B.C.R. 6.

(§ VII E—322)—Building contract—Disputed items—Appeal.

Myers v. Roope, 17 W.L.R. 591 (B.C.)

(§ VII E—323)—Question of fact—Weight attached to finding of trial tribunal—Inferences to be drawn from truthful evidence—Position of Appellate Court.

Where a question of fact has been decided by a tribunal which has seen and heard the witnesses the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the judges of an Appellate Court.

Re Arnold Estate, Dominion Trust Co. v. New York Life Ins. Co.; Dominion Trust Co. v. Mutual Life Ass'ce Co. of Canada; Dominion Trust Co. v. Sovereign Life Ass'ce Co. of Canada, 44 D.L.R. 12, [1919] A.C. 254, [1918] 3 W.W.R. 850, affirming in part 32 D.L.R. 33, [1917] 1 W.W.R. 672, 35 W.L.R. 672.

Documentary evidence—Credibility of witness.

A finding of fact made by a trial judge, depending on the credibility of the witnesses examined before him will not be disturbed by a Court of Appeal. When, however, there are other circumstances in the case, for example, documentary evidence, which shew that the story of any particular witness is unworthy of belief a court may be justified in reversing the finding of the trial judge.

Newton v. Botsford (Man.), 43 D.L.R. 330, [1918] 3 W.W.R. 722.

Credibility of deposition evidence.

Though an Appellate Court will not ordinarily interfere with the credence given by the trial judge to the testimony of witnesses whose demeanour he could observe, that does not apply to evidence taken on commission which the Appellate Court has

the same opportunity of judging as the Trial Judge.

Fitzsimons v. Stoller, 27 D.L.R. 174, 10 W.W.R. 463. [See also Chalmers v. Machray, 26 D.L.R. 529, 26 Man. L.R. 105.]

TRIAL — JUDGE RELYING ON CERTAIN EVIDENCE—OPPORTUNITY OF OBSERVING DEMEANOUR OF WITNESSES— DUTY OF APPELLATE COURT.

Where a trial judge who has had the opportunity of observing the demeanour of witnesses has expressly relied on certain evidence which if accepted undoubtedly is sufficient to support his finding, an Appellate Court will not reverse such finding. [Dominion Trust Co. v. New York Life Ins. Co., 44 D.L.R. 12, followed; see also Granger v. Brydon-Jack, 46 D.L.R. 571.]

Frankel v. Anderson, 47 D.L.R. 277, [1919] 2 W.W.R. 742, 14 A.L.R. 559.

FINDING OF JURY—EVIDENCE TO SUPPORT—APPELLATE COURT WILL NOT INTERFERE.

Where there was evidence upon which the jury might, if they thought proper, reach the conclusion which they did reach their Lordships will not interfere with the decision arrived at by the jury.

C.P.R. Co. v. Herman, 48 D.L.R. 157, [1919] 3 W.W.R. 45, affirming 44 D.L.R. 343, 23 Can. Ry. Cas. 416, [1919] 1 W.W.R. 254, 12 S.L.R. 53.

FINDING OF TRIAL COURT—REVERSAL—DUTY OF MORTGAGEES—ALLEGED INADEQUACY OF PRICE.

Haddington Island Quarry Company v Huson, [1911] A.C. 722, reversing 16 B.C.R. 98.

CONCURRENT FINDINGS OF FACT—REVIEW ON APPEAL.

Dominion Fish Co. v. Isbester, 43 Can. S.C.R. 637.

EVIDENCE IN CRIMINAL PROSECUTION.

The Court of King's Bench (appeal side), has jurisdiction to decide whether or not, in a prosecution in the Court of Sessions of the Peace for theft, there has been proof made, or whether suspicions or doubts may avail as evidence, but it cannot interfere in regard to the appreciation of the evidence.

Giroux v. The King, 34 D.L.R. 642, 27 Can. Cr. Cas. 366, 25 Que. K.B. 505.

PROOF OF SIGNATURE — COMPARISON OF HANDWRITINGS BY JUDGE—ABSENCE OF EXPERT EVIDENCE.

Kalmet v. Keiser, 3 A.L.R. 26.

DAMAGES—AMOUNT—JUDGE'S MOTIVES—APPEAL.

According to well-established law, upheld by the Supreme Court, a court of appeal should not interfere with an award of exemplary damages, except when the amount granted is so excessive that there is reason to believe that the judge who rendered the judgment was misled, and was actuated by improper motives. In such a case the same rule applies as for jury trials.

Duggan v. Martin, 23 Que. K.B. 402.

F. DECISIONS IN FAVOUR OF PARTY, OR NOT AFFECTING HIM.

(§ VII F—328)—ACADEMIC QUESTION.

The reserving of purely academic questions for the opinion of the Court of Appeal, while within the powers of the court below, the Court of Appeal may refuse to hear them.

The King v. Lynn (No. 2), 19 Can. Cr. Cas. 129, 4 S.L.R. 324.

G. OBJECTIONS AS TO WHICH PARTY IS ESTOPPED.

(§ VII G—330)—HEARING OF OBJECTIONS.

A Divisional Court will not on appeal hear an objection to an order which it has itself given at an earlier stage in the same proceedings.

Re Toronto General Hospital Trustees & Sabiston, 33 D.L.R. 78, 38 O.L.R. 139, 11 O.W.N. 117, affirming 10 O.W.N. 331.

(§ VII G—335)—WAIVER OF OBJECTION—SUBMISSION TO JURISDICTION.

Where an appeal is permitted under Code, s. 797, from a conviction on summary trial for keeping a common bawdy house and the accused takes the appeal instead of proceeding by certiorari, the District Court acquires jurisdiction over the person of the appellant and may proceed to a rehearing "upon the merits," notwithstanding defendant's objection taken before the magistrate, that the latter had no jurisdiction because the arrest was illegally made without a warrant.

R. v. Miller, 25 Can. Cr. Cas. 151, 25 W.L.R. 296.

H. INTERLOCUTORY MATTERS—ORDERS, ETC., NOT APPEALED FROM.

(§ VII H—340)—INTERLOCUTORY ORDER FOR A FOREIGN COMMISSION—IRREGULAR APPLICATION.

Where a motion for a foreign commission is first made to a judge instead of to the registrar of the court under N.B. Rules, order 30, r. 5, and the commission has been issued, an appeal from the order will not be entertained merely on the ground that the applicant should have been ordered to pay the costs of the irregular application.

Cluff v. Brown, 7 D.L.R. 688, 11 E.L.R. 78, 41 N.B.R. 280.

APPEAL FROM TRIAL JUDGMENT—INTERLOCUTORY ORDERS NOT SPECIALLY APPEALED FROM.

An appeal from the trial judgment does not reopen interlocutory orders based on material that could not be before the trial judge. [Compare Windsor, Essex and L.S.R. Co. v. Nelles (No. 1), 1 D.L.R. 156, 159; Windsor, Essex, and L.S.R. Co. v. Nelles (No. 2), 1 D.L.R. 309, and Nelles v. Hesseltine; Windsor, Essex and L.S.R. Co. v. Nelles (No. 3), 2 D.L.R. 732.]

Van Buskirk v. McDermott, 5 D.L.R. 5, 46 N.S.R. 98, 11 E.L.R. 100.

INTERLOCUTORY MATTERS—INTERIM INJUNCTION—INTERLOCUTORY ORDER.

Rhéaume v. Stuart, 47 Can. S.C.R. 394, quashing appeal from 20 Que. K.B. 411.

INTERLOCUTORY ORDER—AMOUNT INVOLVED.

Forbes v. Forbes, 23 O.L.R. 518, 19 O.W.R. 47.

INTERLOCUTORY MATTERS.

An interlocutory judgment dismissing an exception to the form to pleadings as being vague and indefinite is not appealable to the Court of Review.

Lagacé v. Boyer, 14 Que. P.R. 13.

FROM INTERLOCUTORY RULING — DECISION RENDERED AT ENQUETE.

Friedman v. Podvol, 12 Que. P.R. 419.

INTERLOCUTORY JUDGMENT—INSCRIPTION ON THE MERITS—APPEAL TO COURT OF REVISION—QUE. C.P. 532.

An inscription on the merits ex parte, by the plaintiff, subsequently to permission given by the judge to the defendant to appeal to the Court of Revision from an interlocutory judgment (exception dilatoire) is illegal, and will be struck out of the record on motion.

Morgan v. Provost, 15 Que. P.R. 380.

SEPARATION ACTION.

The Court of Review cannot take knowledge of interlocutory judgments given in an action for separation from bed and board.

Hetu v. Coutlee, 19 Que. P.R. 243.

INTERLOCUTORY MATTERS — ORDER NOT APPEALED FROM.

Art. 5551 of the Revised Statutes of Quebec, 1909, which gives the right to review the judgment rendered on a petition to set aside a municipal election does not authorize the review of interlocutory judgments pronounced on such petition.

Labadie v. Ringuet, 14 Que. P.R. 268.

(§ VII H—342)—INJUNCTION.

The order for an injunction, which has the effect of preventing the execution of a contract or of resolutions attacked as being nullities, before the decision on the main action is not an interlocutory judgment susceptible of appeal but merely a judgment preparatory to the trial to avoid making useless a judgment maintaining the action by reason of execution of said resolutions and contract pending the action.

Bachaud v. Town of Saint Jean, 15 Que. P.R. 1.

I. DISCRETIONARY MATTERS.

(§ VII I—345)—DISCRETIONARY MATTERS—INTERFERENCE WITH.

The Supreme Court of Nova Scotia will not interfere on appeal with the exercise of discretion of a County Judge, acting as a Master of the Supreme Court, on a discretionary question of practice, except when an error in principle appears. No abuse of discretion by a County Judge, acting as a Master of the Supreme Court, sufficient to justify interference by the Supreme Court, is shewn by the disallowance of interrogatories propounded by the defendant to the plaintiff relating wholly to matters necessary for the plaintiff to prove in order to succeed in the action, which were essentially matters for cross-examination, and the nature of which could have been obtained by a demand for particulars. [Peek v. Ray, [1894] 3 Ch. 282; Marriott v. Chamberlain, 17 Q.B.D. 154; Kennedy v. Dodson, [1895] 1 Ch. 334, and Attorney-General v. Gaskill, 20 Ch.D. 519, referred to.]

Starratt v. White, 11 D.L.R. 488, 13 E.L.R. 8, 47 N.S.R. 162.

REVIEW OF DISCRETION OF TRIAL JUDGE.

The Appellate Court will not review the discretion of the trial judge unless there has been a disregard of principle or misapprehension of facts, even where leave to appeal has been granted. [Young v. Thomas, [1892] 2 Ch. 134, followed.]

Gariepy v. Greene, 23 D.L.R. 797, 8 A.L.R. 463, 32 W.L.R. 194, 8 W.W.R. 651.

HEARING AND DETERMINATION—WHAT REVIEWABLE—DISCRETIONARY MATTERS—REFUSAL TO GRANT WRIT OF SEQUESTRATION.

Whether a writ of sequestration shall issue under r. 710 of the King's Bench Act, R.S.M. 1902, c. 40, lies in the discretion of the court, and, when soundly exercised, its decision is final, a denial of an application for the writ not being open to review on appeal. [Hulbert v. Cathcart, [1896] A.C. 470, followed.]

Romanisky v. Wolanchuk (No. 3), 14 D.L.R. 851, 23 Man. L.R. 615, 26 W.L.R. 42, 5 W.W.R. 661 and 697.

DISCRETIONARY MATTERS—REFUSAL TO DISMISS ACTION AS TO ONE DEFENDANT.

On disposing of the costs of the action where a settlement of the other questions has been arrived at between the parties, the discretion of the trial judge in refusing to award costs of defence to one defendant urged on the ground that no specific relief as to him was asked in the statement of claim will not be interfered with, where the omission might have been remedied by an amendment and there was claim for general relief which would apply to such defendant.

Elliott v. Hatzic Prairie (No. 2), 13 D.L.R. 238, 18 B.C.R. 668, 24 W.L.R. 974.

WHEN ALLOWED—DISCRETIONARY MATTER.

An appeal will not be entertained against the dismissal by a County Court of an application, in the nature of a demurrer, to strike out an entire pleading by which dismissal the validity of the plea was left over until the trial: as even if there be jurisdiction under the County Court rules (B.C.) to strike out a pleading as distinguished from directing an amendment of same, the jurisdiction is one of wide discretion.

Bailey v. Granite Quarries, 12 D.L.R. 288, 18 B.C.R. 149, 24 W.L.R. 772.

DISCRETIONARY MATTERS.

A judge has large discretionary powers in fixing the place of trial, upon a summons for directions. Here, the court refused to change the judge's order.

Windsor Lumber Co. v. Rundle, 40 N.B. R. 522.

GRANTING COMMISSION.

The Court of Appeal is loath to interfere with the discretion exercised by the court below in granting a commission. Each case must depend upon its own circumstances and no general rule as to the exercise of that discretion can be laid down.

Gilberson & Brown v. Atkins, 24 B.C.R. 19.

ORDER OF PROTHONOTARY—"CASE OF EVIDENT NECESSITY."

An appeal lies to the Court of Review from a judgment of the Superior Court reviewing an order of the prothonotary under the authority of art. 33 C.P.Q. and refusing to allow an opposition to judgment to be filed. A judge presiding in the Superior Court has an absolute discretion in determining what in fact constitutes "A case of evident necessity." Unless there is a manifest error an Appeal Court should not interfere with the exercise of this discretion.

Lemieux v. Crepeau, 52 Que. S.C. 481.

APPOINTMENT OF SEQUESTRATOR.

A Court of Appeal will not interfere in a matter of discretion like the one of the nomination of a judicial sequestrator, unless it is convinced there has been an abuse of discretion.

Cohen v. Edelstone, 24 Que. K.B. 145.

(§ VII I—346)—DISCRETIONARY MATTERS—COSTS—RIGHT OF APPEAL.

Matheson v. Kelly, 18 D.L.R. 228, 24 Man. L.R. 695, affirming 15 D.L.R. 508, 29 W.L.R. 530, 7 W.W.R. 322.

COSTS ONLY INVOLVED—REFUSAL TO ENTERTAIN—STATUTORY RIGHT TO COSTS—WRONG ORDER OF COURT BELOW—DUTY OF COURT TO REVERSE.

While the Supreme Court of Canada ordinarily refuses to entertain an appeal which merely involves costs, where a party entitled by statute to receive his costs of certain proceedings from his opponent has been ordered to pay that opponent's costs it is the duty of the court to reverse such order.

Gavin v. Kettle Valley R. Co., 47 D.L.R. 65, 58 Can. S.C.R. 501, [1919] 2 W.W.R. 611, varying as to costs, 43 D.L.R. 47.

COSTS.

The court will not review a taxation of costs by a judge of the County Court even where the amount allowed appeared to be excessive unless the judge has first been applied to, to review his taxation and has refused to do so.

The Canadian Bank of Commerce v. Colwell, 5 D.L.R. 831, 46 N.S.R. 18, 12 E.L.R. 117.

An Appellate Court will not set aside on appeal a discretionary order as to costs made by the court below unless it appears that there has been a violation of principle or a misapprehension of facts in making the order appealed from. [Lock v. Snyder, 2 D.L.R. 414, 20 W.L.R. 466, approved.]

McEwan & Dougherty v. Marks, 4 D.L.R. 369, 5 S.L.R. 21, 21 W.L.R. 34, 2 W.W.R. 228.

DISCRETIONARY MATTERS—COSTS.

On an appeal from a Local Master's disposition of costs on refusing an application for security for costs under Rule 622 of Saskatchewan Rules of Court, 1911, though no leave to appeal is necessary, the order should be dealt with on the same principle as a discretionary order where leave to appeal is necessary and has been obtained, and on such appeal the Appellate Court will not interfere with the discretion exercised by the court below unless there has been a violation of principle or a misapprehension of facts. [In re Gilbert, 28 Ch. D. 549; Young v. Thomas, [1892] 2 Ch. 134, specially referred to.] Leave to appeal from a Local Master's disposition of costs on the dismissal of an application for security for costs is not necessary under rule 622 of the Saskatchewan Rules of Court, 1911. [Foster v. Edwards, 48 L.J.Q.B. 767, followed.]

Lock v. Snyder, 2 D.L.R. 414, 5 S.L.R. 148, 20 W.L.R. 466, 1 W.W.R. 939.

COSTS.

The Court of Review will not interfere with the judgment of the court of first instance in the exercise of its discretion in the matter of costs, when there is no other reasonable ground for its doing so.

Fréchette v. Demers, 47 Que. S.C. 7.

(§ VII I—350)—REFUSAL OF ADJOURNMENT—ENQUÊTE.

If a judge, to whom one of the parties makes an application to adjourn an enquête, in a civil case, because this same party is under arrest, and his trial is pending before a Criminal Court, refuses the demand, he is exercising a discretionary power in which the Court of Appeal will not interfere, unless it appears that he had used this power in an unjust and arbitrary manner.

Krauss v. Michaud, 26 Que. K.B. 504, [Appeal to Supreme Court of Canada quashed, 59 Can. S.C.R. 654.]

(§ VII I—351)—DISMISSAL FOR WANT OF PROSECUTION.

The dismissal of an action for want of prosecution is discretionary, and the order of the Master in Chambers in such a case will not be interfered with, unless the judge in appeal can say that the Master exercised his discretion wrongly, or that his order was not the right order. [Siever v. Spearman, 74 L.T.R. 132, followed.]

McNaughton v. Mulloy (No. 2), 3 D.L.R. 317; 3 O.W.N. 1061.

(§ VII I—352)—MATTERS OF PROCEDURE.

The discretion used by the Court of Orig-

inal Jurisdiction as to incidents of procedure and informalities therein should not be interfered with by Appellate Courts unless substantial injustice has been done.

Sterling v. Levine, 7 D.L.R. 266, 47 Can. S.C.R. 103, 12 E.L.R. 216.

(§ VII I—353)—Leave to defend.

The Court of Appeal will not interfere with the exercise of a trial judge's discretion in granting leave to defend an action after judgment by default, unless it appears that there was an abuse thereof. An order granting leave to defend an action, after entry of judgment, upon payment of the costs of the action up to judgment, and payment into court of the amount of the judgment, to abide the result of the trial, does not amount to such an abuse of the wide discretion vested in the trial judge as will justify interference by the Appellate Court.

Royal Bank of Canada v. Fullerton Lumber & Shingle Co., 2 D.L.R. 343, 17 B.C.R. 11.

(§ VII I—355)—Leave to file defence or contestation after default.

The right to permit a defendant, who is in default of pleading in contesting a proceeding, to file a defense or a contestation, is left to the discretion of the judge who should grant or refuse it according to the circumstances. A Court of Appeal will intervene in such a matter only on very strong grounds.

Ménard v. Choinière, 24 Que. K.B. 528.

(§ VII I—356)—Amendment.

Where it appears that the evidence was taken at the trial of an action for damages for slander as if the circumstances shewing how the words alleged, which were not in themselves actionable, could have been understood in the defamatory sense charged in the innuendo, the court hearing an appeal from a verdict for the plaintiff may direct an amendment of the pleadings to supply the omission under the powers of the Judicature Act of New Brunswick, 1909, Marginal Rule 486.

Sonier v. Breau, 3 D.L.R. 184, 41 N.B.R. 177, 10 E.L.R. 391.

Discretionary matters—As to pleadings—Amendments—Adding Statute of Limitations.

The discretion of a trial judge in permitting an amendment at the trial, by setting up the Statute of Limitations, will not ordinarily be disturbed on appeal. [Patterson v. Central Canada, etc., Co., 17 P.R. (Ont.), 470, referred to.]

Beck v. Anderson, 14 D.L.R. 798, 6 S.L.R. 283, 26 W.L.R. 144, 5 W.W.R. 659 and 702.

(§ VII I—361)—Admission of evidence.

Where the Court of Appeal has ordered a new trial of a criminal case tried before a County Court Judge's Criminal Court because of the improper admission of evidence, the case is remitted to the same court for trial upon his original election for speedy trial therein and waiver of his right to a jury.

The King v. Deakin (No. 2), 2 D.L.R. 282, 19 Can. Cr. Cas. 274, 17 B.C.R. 13.

(§ VII I—372)—Discharge of receiver—Ex parte order.

An ex parte order releasing and discharging a receiver and his sureties will not be interfered with on appeal before an opportunity is given to the judge to amend the order after hearing both sides. [Day v. Vinson, 9 L.T. 654, 723, followed.]

Campbell v. Arndt, 24 D.L.R. 699, 8 S.L.R. 329, 32 W.L.R. 249, 9 W.W.R. 57.

(§ VII I—375)—Conduct of trial, jury.

Although an order upon an interlocutory application to strike out the jury notice may have been improperly made under the general rules of court in force at the time it was made, the Divisional Court, hearing an appeal therefrom may make the substantive order which by the new rules of court passed, pending the appeal, the court appealed from is authorized to make. [Bank of Toronto v. Keystone Fire Ins. Co., 18 P.R. (Ont.), 113, followed.]

Ferguson v. Eyre, 1 D.L.R. 69, 3 O.W.N. 505, 20 O.W.R. 873.

Trial Judge's discretion—Refusing trial jury.

The Appellate Court will not interfere with the trial judge's exercise of discretion, under Marginal Rules 426–432 of the B.C. Rules, 1906, in refusing the plaintiff a jury in an action for damages for the breach of an agreement to supply water for domestic and irrigation purposes, and for a mandatory injunction to compel performance thereof.

McArthur v. Rogers, 2 D.L.R. 347, 17 B.C.R. 48.

Review of discretionary matters—Disposition of action—Counterclaim.

Bean v. Ecklin, 30 D.L.R. 544, 9 S.L.R. 298.

Granting trial by jury.

Where the pleadings and facts disclosed by the affidavits before the trial judge vest in him jurisdiction to consider and decide whether the action can be most conveniently tried with or without a jury under O. 36, r. 4 (N.B.), and he exercises his discretion and determines the question, the Supreme Court on appeal will not interfere with that discretion except in case of gross error.

Clark v. St. Croix Paper Co., 24 D.L.R. 513, 43 N.B.R. 225.

Action for negligence—Discretion as to dispensing with notice.

When a statute confers on a court the right to exercise a discretion, a Court of Appeal will only intervene if there is evident error as to the facts or if the principle of law propounded is wrong. If the law gives to the judge a discretion to dispense with the notice of action in case of a claim for damages on account of bodily injuries resulting from an accident, the difficulties

that the plaintiff meets in assembling his proof and in furnishing the details of his claim, as well as the fact that he is not aware of the nature and extent of his injuries, are sufficient reasons for the exercise of the discretion of the court, and this discretion thus properly exercised will not be interfered with on appeal when otherwise the other party is not thereby prevented from proving his case.

Town of Coaticook v. Laroche, 24 Que. K.B. 539.

(§ VII I—385)— AWARD — SUMMARY ENFORCEMENT.

An improper exercise of discretion by a judge to summarily enforce an award is reviewable on appeal. [Annotation in 3 D.L.R. 778, referred to.]

Sweinsson v. Charleswood, 36 D.L.R. 32, 28 Man. L.R. 189, [1917] 3 W.W.R. 201.

(§ VII I—386)—FROM DISCRETIONARY ORDERS—JUDICIAL DISCRETION NOT EXERCISED.

The judge's discretion referred to in the exception of s. 56 of the District Courts Act, R.S.S. 1909, c. 53, as to appeals in cases for over $50 excepting as to orders made "in the exercise of such discretion as by law belongs to a judge," must be judicially exercised and where it cannot be said that there has been an exercise of judicial discretion because of a supervening error as to a point of law, s. 56 does not prevent an appeal from a judge's order setting aside a judgment.

Dickson v. Van Hummell, 16 D.L.R. 774, 7 S.L.R. 88, 27 W.L.R. 642, 6 W.W.R. 307.

(§ VII I—387)—STAY OF EXECUTION.

Where a trial judge, in the exercise of his discretion, refused a stay of execution, a second application to the Court of Appeal having concurrent jurisdiction to grant a stay, will be dismissed unless some special circumstances are shewn. [The Annot. Lyle 11 P.D. 114; Barker v. Lavery, 14 Q.B.D. 769, followed; B.C. order 58, rule 16, specially referred to.]

Williamson v. Grigor, 6 D.L.R. 53, 17 B.C.R. 334, 22 W.L.R. 29, 2 W.W.R. 898.

EXTENDING TIME FOR MOTION TO SET ASIDE EXECUTION.

The Appellate Court cannot interfere with the discretion exercised by the judge below in extending the time for moving to set aside an order for leave to issue execution.

Joss v. Fairgrieve, 32 O.L.R. 117, 7 O.W.N. 184.

J. QUESTIONS NOT RAISED BELOW.

(§ VII J—390)— RAISING QUESTIONS IN COURT BELOW—DISPOSING OF ALL POINTS IN THE OPINIONS.

Oliphant v. Alexander, 15 D.L.R. 618, 27 W.L.R. 56.

QUESTION NOT RAISED BELOW.

Where an appeal is brought from the refusal of a motion for a new trial a ground of such motion which had been stated in the notice of motion but which was not argued or mentioned on the hearing of the motion upon oral argument and upon which the judge was not asked to pass and concerning which, therefore, he expressed no opinion, will not be considered on an appeal from the denial of such motion.

Hale v. Tompkins, 6 D.L.R. 502, 41 N.B.R. 269, 11 E.L.R. 91.

MISDIRECTION OF JUDGE.

Where a party has not used the opportunity at the trial nor in the first Court of Appeal, it is too late, in the absence of special circumstances, to urge misdirection of the judge upon a subsequent appeal to a higher court. [Creveling v. Can. Bridge Co., 20 D.L.R. 528, 20 B.C.R. 137, reversed.]

Creveling v. Can. Bridge Co., 21 D.L.R. 662, 51 Can. S.C.R. 216, 8 W.W.R. 619.

QUESTIONS NOT RAISED BELOW—BY-LAW OF MUNICIPALITY—ULTRA VIRES—CRIMINAL CODE, S. 753—EFFECT OF.

S. 753 of the Criminal Code, 1906, does not prevent one who pleads guilty before a justice of the peace on a summary proceeding for the violation of a municipal by-law, from attacking its validity on appeal, notwithstanding such objection was not raised before the justice of the peace. [R. v. Brook, 7 Can. Cr. Cas. 216, followed; R. v. Bowman, 2 Can. Cr. Cas. 89, distinguished.]

Upton v. Brown, 21 Can. Cr. Cas. 190, 2 W.W.R. 626.

(§ VII J—395)— QUESTIONS NOT RAISED BELOW—JURISDICTION.

When an action exclusively within the jurisdiction of the Circuit Court is brought in the Superior Court and the defendant takes no exception to it by declinatory plea, if it be of the class of cases that may be evoked to the Superior Court, the question of jurisdiction cannot be raised for the first time in the court sitting in review.

Moquin v. Dingman, 44 Que. S.C. 341.

COUNTY COURT—EQUITABLE JURISDICTION—PARTITION — INJUNCTION — RECEIVER —YACHT—COSTS.

The county court has no equitable jurisdiction except what is given by statute. In an action in the county court to recover the purchase price of an undivided four-fifths' interest in a yacht in which the plaintiff already held a one-fifth interest, the plaint included an application for a receiver, for the granting of an injunction, that there be a partition of the yacht, and that it be sold and the proceeds divided according to the interest of the parties. An order was made appointing a receiver and granting an injunction. Held, on appeal, reversing the decision of Grant, J., that as the court below had no jurisdiction to make the order, it should be set aside.

Granger v. Brydon-Jack (No. 2), 25 B.C.R. 531.

(§ VII J—400)—QUESTIONS NOT RAISED BELOW—NEW THEORIES.

An Appellate Court may refuse to consider an objection of noncompliance with a

regulating statute as to fire insurance policies where it had not been pleaded nor was it referred to at the trial or in the notice of appeal.

Pratt v. Connecticut Fire Ins. Co., 16 D.L.R. 798, 19 B.C.R. 449, 27 W.L.R. 547, 6 W.W.R. 579.

QUESTIONS NOT RAISED BELOW — RECORD SHEWING CAUSES NOT RELIED UPON—SCOPE—JUDGMENT.

Where a party holds a judgment in his favour and the record discloses grounds upon which such judgment can justly be supported, an Appellate Court may give effect to those grounds although they were not relied upon at any stage of the proceedings in the courts below, and will therefore refuse to reverse a judgment thus solidly based on the record merely because counsel for the party who has succeeded did not in the courts below put his case in the strongest way.

International Casualty Co. v. Thomson (No. 2), 11 D.L.R. 634, 48 Can. S.C.R. 167, 25 W.L.R. 256, 4 W.W.R. 385.

NEW THEORIES.

A plaintiff whose claim is wholly for equitable relief to which he is found disentitled may be refused leave on an appeal from such finding to change the form of his action so as to raise a new cause of action regarding the same subject-matter in lieu of the claim already made.

Bullen v. Wilkinson, 2 D.L.R. 190, 3 O.W.N. 859, 21 O.W.R. 427.

QUESTION NOT RAISED BELOW—CAUSE OF ACTION.

A question not raised in the court appealed from will not be considered by the Supreme Court of Canada when not mentioned in the factum, and when all evidence pertaining to such question had, by consent of the parties, been omitted from the appeal book.

C.P.R. Co. v. Kerr, 14 D.L.R. 840, 16 Can. Ry. Cas. 25, 49 Can. S.C.R. 33, 26 W.L.R. 380, 27 W.L.R. 248, 5 W.W.R. 782.

OBJECTION NOT TAKEN BELOW—VALIDITY OF DOMINION LEASE.

[Appeal by special leave from the Court of Appeal for British Columbia, Vancouver Lumber Co. v. Vancouver City, 15 B.C.R 432, dismissed.]

Vancouver City v. Vancouver Lumber Co., [1911] A.C. 711.

FRAUD—BUILDING CONTRACT.

In an action for breach of contract wherein fraud is neither alleged in the pleadings nor raised as an issue at the trial or by the notice of appeal and no amendment is sought at the trial to cover the alleged evidence thereof, an Appeal Court should not proprio motu declare the entire contract void on the ground of fraud. Semble, where a contractor undertakes to make as the basis of a contract an estimate of the probable cost to him of erecting a building there is no fraud in making such estimate cover the possibilities of accidental disappointment that confront every builder and thereby making sure that the work will not cost him more than the estimated sum.

Jones & Lyttle v. Mackie (Can.), [1918] 2 W.W.R. 82, reversing [1917] 3 W.W.R. 1021.

(§ VII J—408)—NEGLIGENCE.

The question whether a Master has, by delegating the conduct of his business to a competent manager and foreman, absolved himself from liability for injuries sustained by a minor servant who was directed to temporarily work at a dangerous machine without first being warned as to the dangerous nature thereof, cannot be raised for the first time in the Court of Appeal. [Young v. Hoffman, [1907] 2 K.B. 646, and Cribb v. Kynoch, Ltd., [1907] 2 K.B. 548, distinguished.]

Stokes v. Griffin Curled Hair Co., 4 D.L.R. 844, 3 O.W.N. 1414, 22 O.W.R. 474.

GROUND NOT RAISED BELOW—NEGLIGENCE—RESPONDEAT SUPERIOR.

A Court of Appeal ought only to decide in favour of an appellant on a ground first raised on the appeal, if satisfied beyond doubt, first, that the Court of Appeal has before it all the facts bearing upon the new contention as completely as would have been the case if the controversy had arisen at the trial, and secondly that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box. ["The Tasmania," 15 App. Cas. 223; Neville v. Fine Arts, [1897] A.C. 68; McKelvey v. LeRoi Mining Co., 32 Can. S.C.R. 664, referred to.]

Olver v. Winnipeg, 16 D.L.R. 310, 24 Man. L.R. 25, 27 W.L.R. 320, 6 W.W.R. 161.

(§ VII J—413)—CRIMINAL CASE — NON-DIRECTION.

Nondirection may in some cases amount to misdirection of the jury although no objection was taken to the charge, and such nondirection constitutes a ground for a new trial if it appears that it operated to the prejudice of the accused and may have affected the verdict against him. [R. v. Blythe, 15 Can. Cr. Cas. 224, 19 O.L.R. 386, and Allen v. The King, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, applied; Eberts v. The King, 20 Can. Cr. Cas. 273, 7 D.L.R. 538, 47 Can. S.C.R. 1, distinguished.]

R. v. Murray & Mahoney, 38 D.L.R. 395, 11 A.L.R. 502, 28 Can. Cr. Cas. 247, [1917] 2 W.W.R. 805. [See 28 D.L.R. 372, 33 D.L.R. 702, 25 Can. Cr. Cas. 214, 27 Can. Cr. Cas. 247, 9 A.L.R. 319.]

(§ VII J—415)—QUESTIONS NOT RAISED BELOW—REFUSAL OF LEAVE ON APPEAL TO AMEND PLEADINGS—TEST.

On an appeal from the judgment against defendant at trial, he will be refused leave to amend his pleadings to raise a question not in issue before the trial judge which

would necessitate the plaintiff being given leave to adduce further evidence.

Sawyer-Massey Co. v. Stahl, 20 D.L.R. 88, 7 S.L.R. 419, 29 W.L.R. 273.

SUBSTITUTION OF NEW CLAIM.

A plaintiff who has failed to support the case made in his statement of claim, cannot, after the action has been tried, be permitted to abandon that claim and substitute an entirely new and inconsistent one.

Perry v. Perry (Man.), 40 D.L.R. 628, 29 Man. L.R. 23, [1918] 2 W.W.R. 485, affirming 37 D.L.R. 89.

(§ VII J—417)—AS TO PLEADING, DEFENCES.

Where there are both a statute and a municipal by-law upon which a defendant might rest his defence, and, at the trial, he concedes that he cannot rely upon the statute and stands upon the by-law, it is not open to him, upon appeal, to fall back upon the statute.

McNair v. Collins, 6 D.L.R. 510, 27 O.L.R. 44, 22 O.W.R. 891.

HEARING—POINT NOT PLEADED BELOW.

On appeal the appellant will not ordinarily be allowed to raise a defense which he has not pleaded in the court below.

Wilbur v. Wildman, 10 D.L.R. 755, 6 A.L.R. 161, 23 W.L.R. 884, 4 W.W.R. 166.

(§ VII J—419)—INDICTMENT, INFORMATION AND COMPLAINT.

An objection to an information based on a municipal by-law prohibiting the use of abusive, insulting, and provoking language toward another while on a public street, because of the omission of the word "abusive" therefrom, is too late where made for the first time upon an appeal from the decision of a County Judge upon the review of a magistrate's conviction, where the statute authorizing the by-law is sufficient to warrant a by-law in the terms of the conviction without the word "abusive."

The King v. Elderman, 19 Can. Cr. Cas. 445.

FROM SUMMARY CONVICTION — CRIMINAL LAW—DEFECT IN THE CONVICTION.

The duty of the appellate judge on an appeal from a summary conviction is to hear and determine the charge notwithstanding any defect in the conviction, and he has no power to entertain a motion to quash the conviction as defective; on such defect appearing, reference must still be had to the information to ascertain the charge which is to be heard and determined on the appeal.

R. v. Dunlop, 22 Can. Cr. Cas. 245, 6 W.W.R. 3, 27 W.L.R. 121.

(§ VII J—428)—WITNESS NOT SWORN.

Where a witness upon a material fact has been permitted without legal sanction to testify on affirmation instead of upon oath, the result is a mistrial and a new trial should be ordered under Cr. Code, s. 1018.

The King v. Deakin, 19 Can. Cr. Cas. 62, 16 B.C.R. 271, 19 W.L.R. 43.

(§ VII J—430)—RIGHT TO JURY TRIAL.

After parties, in virtue of art. 422 C.C.P. (Que.), have elected trial by jury, objections to the right thereto cannot be urged for the first time on appeal to the Supreme Court of Canada.

Montreal Tramways Co. v. Séguin, 28 D.L.R. 494, 52 Can. S.C.R. 644.

(§ VII J—435)—AS TO INSTRUCTIONS TO JURY.

On a criminal trial an instruction is not erroneous by which the jury were told, in substance, that the accused would be guilty of the offense of procuring under Cr. Code (1906), s. 216 (f), only if they found that, at the time the accused induced a woman to enter a brothel she was not already an inmate of such a place.

R. v. Mah Hung, 2 D.L.R. 568, 17 B.C.R. 56, 20 Can. Cr. Cas. 40.

INSTRUCTION TO JURY ON CRIMINAL TRIAL—OBJECTION NOT TAKEN AT TRIAL.

While the lack of objection on the prisoner's behalf at a criminal trial to an erroneous instruction in the judge's charge is not necessarily fatal to an appeal, it is a matter which the Appellate Court will consider as a circumstance tending to uphold the trial proceedings notwithstanding the irregularity, when determining whether or not any substantial wrong or miscarriage had been thereby occasioned without which the conviction must be affirmed under s. 1019 of the Cr. Code (Can.) 1906.

The King v. Lew, 1 D.L.R. 99, 19 Can. Cr. Cas. 81, 17 B.C.R. 77, 19 W.L.R. 853.

INSTRUCTIONS—QUESTION OF LAW.

If the trial judge should wrongly tell the jury that there was competent evidence of the offense, his direction in that respect would raise a "question of law," which could be reserved under Cr. Code, s. 1014, for the opinion of the Court of Appeal, although the appreciation of the facts where there is competent evidence of the offense pertains exclusively to the jury.

Rivet v. The King, 27 D.L.R. 695, 25 Can. Cr. Cas. 235, 24 Que. K.B. 559.

(§ VII J—437)—JURY — VERDICT — OMISSION TO CONSIDER ELEMENTS OF CASE—INSTRUCTIONS—PRESUMPTION.

The court will not interfere with the verdict of a jury on the ground of inadequacy of damages awarded, unless the court is satisfied that the jury has omitted to consider some elements of the plaintiff's case. The fact that the court might have awarded a greater sum is not of itself sufficient reason for disturbing their finding, but if the damages are unreasonably small the court is entitled to conclude that the jury has failed to consider all the material elements bearing on the issue. The court must presume that the jury understood the plain obvious meaning of their verdict. [Phillips

v. The South Western R. Co., 4 Q.B.D. 406 and 5 Q.B.D. 78, followed.]

McNicol v. P. Burns & Co. & Hodson, 49 D.L.R. 132, [1919] 3 W.W.R. 621, 15 A.L.R. 1.

(§ VII J—440)— Specific findings — General verdict — Objections not taken at trial—Misdirection.

Gowganda-Queen Mines v. Boeckh, 24 O.L.R. 293, 19 O.W.R. 625.

K. Errors waived or cured below.

(§ VII K—445)—Errors waived or cured below.

An objection that a submission to arbitration had not been made a rule of court, will be considered waived and not open to consideration on appeal where the parties appeared before the Court of King's Bench and submitted a motion to set aside the award of an arbitrator without raising such question.

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351, 2 W.W.R. 470.

(§ VII K—446)—Arraignment and plea.

An objection that the preliminary enquiry in a criminal case was not conducted according to law will not avail where the accused, who had been committed for trial, pleaded not guilty and stood trial without questioning the regularity of the preliminary proceedings.

The King v. Sequin, 3 D.L.R. 257, 20 Can. Cr. Cas. 69.

(§ VII K—451)—Complaint, declaration or petition.

Where on an exception to the form raising want of production of notice of action the plaintiff is allowed to amend his declaration to allege the giving of the notice, and a copy of the notice is produced, and the exception subsequently dismissed as being without further object, and the case goes to trial by jury and judgment is rendered therein, such judgment will not be interfered with by an Appellate Court on the ground that the amended declaration was never served.

City of Westmount v. Hicks, 8 D.L.R. 488.

(§ VII K—457)—Hearing and determination—Errors waived or cured below —As to evidence—Exclusion.

A defendant in a mechanics' lien proceeding under the Mechanics' Lien Act, C.S.N.B. 1903, c. 147, who files the dispute notice which imposes on the court the duty of determining, as a distinct preliminary proceeding, the question raised by the notice, is not estopped by waiver from reviewing on appeal the error of the court in assuming to determine such question without duly taking the evidence therein, even though the defendant may not have urged the necessity of due proof nor otherwise interposed any objection to the omission at the trial.

Boucher v. Belle-Isle, 14 D.L.R. 146, 41 N.B.R. 509.

Damages too remote—Inscription in law —Plea to the merits—Que. C.C. 1074 —Que. C.P. 191.

The objection resulting from the fact that the damages claimed are too remote cannot be pleaded, for the first time, in the Court of Review. The defendant must take advantage of such an argument in the Superior Court by way of an inscription in law, or at least of opposition in the plea to the merits, denying the liability.

Poulin v. Martel, 46 Que. S.C. 541.

L. Review of facts.

(§ VII L—470)—Review of facts on nonsuit.

On an appeal from a judgment of a County Court (Man.), ordering a nonsuit, the Manitoba Court of Appeal may draw its own conclusions from plaintiff's evidence brought out at the trial, where there are no conflicting statements nor any contradictory evidence.

Stitt v. C.N.R. Co., 10 D.L.R. 544, 23 Man. L.R. 43, 15 Can. Ry. Cas. 333, 23 W.L.R. 641, 3 W.W.R. 1116.

Question of fact—Judgment appealed from must be erroneous—Burden of proof.

Before an Appellate Court will set aside a judgment on a pure question of fact, the appellant must demonstrate that such judgment is erroneous. Where the proof leaves it in a state of about equal probability that goods sold conformed in quality to sample as that they were inferior, the appeal will be dismissed.

De Felice v. O'Brien, 45 D.L.R. 295, affirming 27 Que. K.B. 192.

Review of facts on appeal.

Under the British Columbia Railway Act, R.S.B.C. 1911, c. 194, s. 68, upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings, the court will not supersede the arbitrators but will review the award as it would review the judgment of a subordinate court in a case of original jurisdiction, considering the award on its merits, both as to the facts and the law. Where conflicting views as to the quantum of damages are apparent but the estimate made in the award cannot be said to be unreasonable or manifestly incorrect, the findings of the arbitrators will not in that respect be disturbed, the arbitrators having seen and heard the witnesses and viewed the land in question.

Canadian Northern Pacific R. Co. v. Dominion Glazed Cement Pipe Co., 7 D.L.R. 174, 14 Can. Ry. Cas. 265, 22 W.L.R. 335, 3 W.W.R. 73.

Review of facts—Finding by trial judge without jury—Inadmissible evidence basing finding—Effect on appeal.

The rule by which ordinarily an Appellate Court will not reverse a finding of fact by the trial judge hearing a case without a jury where such finding is based on the credit to be given to the witnesses, is dis-

placed if the trial judge wrongly admitted testimony on matters not material to the issue in contradiction of the answers given on cross-examination of one of the witnesses whose testimony he discredits because of the wrongly admitted evidence.

Page and Jacques v. Clark, 19 D.L.R. 530, 31 O.L.R. 94.

CRIMINAL CASE RESERVED—EVIDENCE OF IDENTITY OF ACCUSED.

On a question of identity of the accused, the court on a case reserved will affirm the conviction by a "speedy trial" court if the evidence were such that the question of identity could not have been withdrawn from the jury had the case been tried in a jury court.

R. v. Harvey, 30 Can. Cr. Cas. 160, 42 O.L.R. 187.

VERDICT OF JURY—EVIDENCE TO SUPPORT—REFUSAL TO INTERFERE — WRONGFUL EVICTION AND TRESPASS.

McCarthy v. Boughner, 12 O.W.N. 292.

ITEMS OF ACCOUNT—QUESTIONS OF FACT—FINDINGS OF COUNTY COURT JUDGE—EVIDENCE TO SUPPORT.

Goodison v. Drennan, 8 O.W.N. 253.

QUESTION OF FACT—EVIDENCE TO SUPPORT TRIAL JUDGE'S FINDING.

Clarkson v. Antipitsky, 2 O.W.N. 950, 18 O.W.R. 900.

CONFLICTING EVIDENCE.

The rule that upon questions of fact an Appeal Court will not interfere with the decision of the judge who has seen the witnesses and has been able, with the impression thus formed fresh in his mind, to decide between their contending evidence, unless there is some good and special reason to throw doubt upon the soundness of his conclusions (Ruddy v. Toronto Eastern Ry., 33 D.L.R. 193, 38 O.L.R. 556) is applicable to a conflict between the testimony of living witnesses and the evidence of accounts.

McHugh v. McHugh, 11 A.L.R. 545, [1917] 2 W.W.R. 1044.

SUFFICIENCY OF EVIDENCE.

Upon questions of fact the Court of Appeal can only decide whether or not there has been any proof of the facts before the court of first instance, or whether or not there is a complete absence of proof.

R. v. Giroux, 26 Que. K.B. 323. [Affirmed by Supreme Court of Canada, 39 D.L.R. 190. See also 34 D.L.R. 642, 27 Can. Cr. Cas. 366, 25 Que. K.B. 505.]

A Court of Appeal should only reverse a judgment appealed from on the facts if there has been manifest error in the appreciation of the evidence.

Ruthman v. City of Quebec, 22 Que. K.B. 147.

By an inscription in law, defendant cannot raise questions of facts, nor deny the facts alleged, but the same must be presumed to be true. In the present case the evidence alone of the divers circumstances and facts alleged in plaintiff's declaration will shew whether the responsibility and compensation for the accident in question in this cause, are to be determined by the Workmen's Act, 9 Edw. VII. c. 66, or by the common law, and under such circumstances the court will order "preuve avant faire droit" on defendant's inscription in law.

Biggs et ux. v. G.T.R. Co., 18 Rev. de Jur. 383.

Whether or not a workman, killed by accident in the course of his employment, was the sole support of the ascendant who claims indemnity for his death, being only a question of fact the decision of the court of first instance thereon should not be reformed in review where there is palpable error therein. The provision of art. 1312 C.C. that the decree for separation as to property is without effect so long as it remains unexecuted does not apply to the case of a decree for separation de corps which involves separation as to property as a secondary consequence.

Bernard v. Davis, 42 Que. S.C. 170.

DUTY OF APPEAL COURT TO REVIEW FINDINGS OF FACT.

Thompson v. Greenwood, 34 W.L.R. 1194.

(§ VII L—472)—REFERRED OR RESERVED WITHOUT FINDING.

Upon the trial of a mechanics' lien action under the statutory provisions of the Nova Scotia Mechanics' Lien Act, the trial judge should not refer any of the questions involved to the Court of Appeal without himself deciding the same, but if it appears that the question which he did decide was sufficient to dispose of the action the case need not be referred back to deal with questions which could not affect the result.

Dixon v. Ross, 1 D.L.R. 17, 46 N.S.R. 143.

(§ VII L—473)—FROM AWARD—REVIEW OF FACTS.

The Appellate Court, on an appeal from an award in eminent domain proceedings should come to its own conclusions upon all the evidence, paying due regard to the award and findings and reviewing them as it would those of a subordinate court. [James Bay R. Co. v. Armstrong, [1909] A.C. 624, referred to.]

Re Ketcheson and Canadian Northern Ontario R. Co., 13 D.L.R. 854, 29 O.L.R. 339, 25 O.W.R. 20, 16 Can. Ry. Cas. 286.

APPEAL FROM AWARD—JURISDICTION TO SET ASIDE OR REMIT.

The court hearing an appeal from an award under s. 114 of the Railway Act, Alta., 1907, c. 8, has jurisdiction on setting aside the award and remitting the case to the arbitrators to dispose of the costs of the abortive arbitration proceedings. Where the arbitrators admitted, as evidence of value, matters which the court on appeal decided were inadmissible and which may have materially affected the arbitrators' finding, the court hearing an appeal from the award is not bound under s. 114 of the Railway Act, Alta. 1907, c. 8, to

decide the question of fact raised by the appeal as in a case of original jurisdiction; it is only where there is nothing but a question of fact involved that the court is bound under s. 114 to decide the same upon the evidence taken before the arbitrators instead of setting aside the award or remitting the case. [Atlantic and N.W.R. Co. v. Wood, [1895] A.C. 257; Cedars Rapids Mfg. Co. v. Lacoste, 16 D.L.R. 168, 83 L.J.P.C. 162, considered.]

Can. North. West. R. Co. v. Moore, 23 D.L.R. 646, 8 A.L.R. 379, 7 W.W.R. 1327, 30 W.L.R. 676.

(§ VII L—475)—Of verdict.

The Supreme Court of New Brunswick will not, on an appeal from an order of a County Court refusing a new trial on the ground that the verdict of the jury was against the evidence, interfere with the finding of the court below.] (Per Barry, J.) [Sheraton v. Whelpley, 20 N.B.R. 75, specially referred to. See also Hilland v. Haugm, 17 N.B.R. 289.]

Hale v. Tompkins, 6 D.L.R. 502, 41 N.B.R. 269, 11 E.L.R. 91.

Review of jury's findings on fraud and misrepresentation.

The issue of misrepresentation or fraud in procuring an agreement and promissory notes, raised in the defense to an action thereon, is one for the consideration of a jury, whose findings for the defendant, where the evidence is conflicting, are final and cannot, in the absence of misdirection, be disturbed on appeal by granting a new trial merely because the result of their findings may seem unsatisfactory to the Appellate Court. [Toronto R. Co. v. King, [1908] A.C. 260, followed; Canada Carriage Co. v. Lea, 37 Can. S.C.R. 672, distinguished. See Cowie v. Robins, 27 D.L.R. 52; Fraser v. Picton El. Co., 28 D.L.R. 251.]

Morgan v. McDonald, 27 D.L.R. 125, reversing 22 D.L.R. 705, 49 N.S.R. 1.

Review of verdict — Perverse — No evidence on which to reasonably find —Dismissal rather than new trial, when.

If there was not evidence sufficient to go to the jury upon which they could reasonably find a verdict against the defendant, the case should not have been left to them, but if it was left to the jury and they bring in a perverse verdict in favour of the plaintiff without the insufficiency of the plaintiff's evidence being remedied during the progress of the case, an Appellate Court may properly dismiss the action instead of directing a new trial. [MacKenzie v. B.C. Electric Ry. Co., 15 D.L.R. 530, 19 B.C.R. 1; Skeate v. Slaters, 30 Times L.R. 290; Metropolitan v. Wright, 11 App. Cas. 152; Cox v. English, Scottish & Australian Bank, [1905] A.C. 168, referred to; Toronto Ry. v. King, [1908] A.C. 260; 77 L.J.P.C. 77; Fraser v. Drew, 30 Can. S.C.R. 241, and Reiffenstein v. Dey, 13 D.L.R. 76, 28 O.L.R. 491, distinguished.]

Astley v. Garnett, 20 D.L.R. 457, 20 B.C.R. 528, 7 W.W.R. 538, 29 W.L.R. 796.

Verdict of jury—Weight of evidence.

If the answers by a jury to questions submitted can be supported by any reasonable construction, an Appellate Court should support them, and not set aside the findings as contrary to the weight of evidence unless they are such as in the opinion of the Appellate Court could not have been arrived at by reasonable men. [McKelvey v. Le Roi Mining Co., 32 Can. S.C.R. 664; Jamieson v. Harris, 35 Can. S.C.R. 625, referred to.]

Starratt v. Dominion Atlantic R. Co., 16 D.L.R. 777, 48 N.S.R. 82, 14 E.L.R. 162.

Setting aside verdict—Excessive damages.

To justify the setting aside of a verdict on the ground of excessive damages, the Appellate Court must find that the damages are so excessive that twelve reasonable men could not have given them, or that the jury have disregarded some direction of the judge or have considered topics which they ought not to have considered, or have applied a wrong measure of damages. [Praed v. Graham, 24 Q.B.D. 53, and Johnston v. Great Western Ry., [1904] 2 K.B. 250, 73 L.J.K.B. 568, 20 Times L.R. 455, applied.]

Taylor v. B. C. Electric R. Co., 1 D.L.R. 384, 19 W.L.R. 851, 1 W.W.R. 486. [Affirmed 8 D.L.R. 724, 2 W.W.R. 923.]

Review of verdict of jury—Review of findings of trial judge without a jury—Damages.

The findings of fact made by a judge in an action tried by him without a jury do not stand upon the same footing before an Appellate Court as the findings of a jury, but the Appellate Court, if it considers them erroneous, may come to a different conclusion and act upon it, and a finding as to damages is in precisely the same position in this respect as any other finding of fact. [Jones v. Hough, 5 Ex. Div. 155, followed; Phillips v. South Western R. Co., 4 Q.B.D. 406, 5 Q.B.D. 78, discussed and applied; Bigsby v. Dickinson, 4 Ch. D. 24; North British and Mercantile Insurance Co. v. Tourville, 25 Can. S.C.R. 177, and Prentice v. Consolidated Bank, 13 A.R. (Ont.) 69, referred to.]

Bateman v. County of Middlesex, 6 D.L.R. 533, 27 O.L.R. 122, 22 O.W.R. 685, varying 24 O.L.R. 34; 25 O.L.R. 137.

Right of Appellate Court to review verdict of jury—Absence of error or other substantial ground.

Although an Appellate Court may think that the preponderance of testimony is in favour of the unsuccessful party in an action tried with a jury, it cannot substitute its opinion for that of the jury, or interfere with the jury's conclusions except

upon some error or other substantial ground.

Zufelt v. C.P.R., 7 D.L.R. 81, 4 O.W.N. 39, 23 O.W.R. 801.

(§ VII L—476)—Review of facts—Verdict, not disturbed, when.

On appeal to the Appellate Division of the Ontario Supreme Court from the judgment of a trial court, based upon the findings of a jury in favour of the plaintiff, who was the sole witness for himself, though the Appellate Court may doubt the plaintiff's story or disbelieve him, they have no right to substitute their own opinion of the facts for that of the jury, but if there is some evidence to support the finding of the jury, it cannot be disturbed. A verdict of a jury for the plaintiff, in an action to recover damages for injury resulting from the alleged negligence of a railroad company in leaving an unnecessarily wide space between the planking and the inside of one of the rails of their track at a highway crossing, whereby the plaintiff while walking along the highway at night got his foot caught in the space, and being unable to extricate it in time, it was cut off by a locomotive, should not be disturbed on appeal, where the jury find that the railroad company was negligent in not having the crossing in proper order, and that the plaintiff could not by the exercise of reasonable care have avoided the accident.

Stevens v. C.P.R., 10 D.L.R. 88, 15 Can. Ry. Cas. 28, 4 O.W.N. 697, 23 O.W.R. 939.

Findings of jury — Negligence — Pleadings—Sufficiency of findings.

In an appeal on the grounds of contributory negligence, the findings of the jury, which were read in conjunction with the pleadings, the evidence, and the charge of the judge, were found to be justified, and sufficient to support the judgment entered.

B. C. Electric R. Co. v. Dunphy, 50 D.L.R. 264, 59 Can. S.C.R. 263, [1919] 3 W.W.R. 1076, affirming 48 D.L.R. 38.

Review of facts—Verdict against railway for negligently causing death —Absence of evidence to support jury's findings.

Jones v. C.P.R. Co., 13 D.L.R. 900, 30 O.L.R. 331, 16 Can. Ry. Cas. 305, 24 O.W.R. 917, reversing 5 D.L.R. 332.

Review of facts — Negligence causing death—Circumstantial evidence.

Where, in an action for negligently causing death there is a prima facie case to go to the jury, their function in weighing the probabilities of the case upon circumstantial evidence is not to be interfered with on an appeal from the verdict unless the court can say that the jury could not reasonably have come to the conclusion which the verdict involves. Jones v. C.P.R., 13 D.L.R. 900, and Grand Trunk R. Co. v. Griffith, 45 Can. S.C.R. 380, referred to.]

Cottingham v. Longman, 15 D.L.R. 296, 48 Can. S.C.R. 542, 5 W.W.R. 969, 26 W.L.R. 650, affirming 12 D.L.R. 568, 18 B.C.R. 184.

Review of verdict on appeal—Finding as to contributory negligence.

When the verdict of a jury was not only against the weight of the evidence, but also was one which a jury, reasonably viewing the whole of the evidence, could not properly find, it should be set aside. [Metropolitan v. Wright, 11 App. Cas. 152, applied. See also Solomon v. Bitton, 8 Q.B.D. 176.]

Monrufet v. B.C. Electric R. Co., 9 D.L.R. 569, 18 B.C.R. 91, 23 W.L.R. 17, 3 W.W.R. 733.

Review of verdict—Principle applicable in Appellate Court.

Simpchechen v. Montreal Tramways Co., 22 D.L.R. 902, 46 Que. S.C. 350.

Of verdict, negligence.

A verdict for the plaintiff for injuries sustained by the starting of a car with a jerk as he was about to alight therefrom will not be disturbed where there was sufficient evidence, although conflicting, to go to the jury that the plaintiff had not time to alight in safety before the car started.

Jacob v. Toronto R. Co., 3 D.L.R. 818, 22 O.W.R. 180, 3 O.W.N. 1255.

Review of fact—Verdict against railway for negligently causing death —Absence of evidence to support jury's finding.

A verdict of a jury in favour of the plaintiff in an action against a railway company for negligently causing the death of the fireman of a locomotive that was propelling a snow plough, cannot be sustained where there was no evidence tending to support the jury's finding that his death was due to the negligence of the railway company in operating the plough under a defective system by placing it in charge of a servant who had not passed the necessary eye and ear test, or to shew that the accident was due to a defect in the hearing or vision of such person.

Jones v. C.P.R. Co., 5 D.L.R. 332, 14 Can. Ry. Cas. 76, 30 O.L.R. 331, 22 O.W.R. 439. [Reversed, 13 D.L.R. 900, 16 Can. Ry. Cas. 305, 24 O.W.R. 917, on another point.]

Verdict of jury—Personal injuries sustained by being struck by street car.

A verdict against a street railway company in favour of the plaintiff for injuries sustained by being struck by a street car will not be disturbed where, from the evidence, the jury was justified in finding that the car was negligently operated at excessive speed in crossing a public street at a dangerous point where the view was obstructed, and that the plaintiff, who was driving a long waggon, exercised reasonable care in approaching and endeavouring to cross the track and took reasonable care to save himself from injury, and that the motorman in charge of the car had time to avoid the accident after he became

aware that the plaintiff intended to cross the track.

Goodchild v. Sandwich, Windsor, and Amherstburg R. Co., 4 D.L.R. 159, 22 O.W.R. 152, 3 O.W.N. 1252.

REVIEW OF FINDING AS TO NEGLIGENCE—CONFLICTING EVIDENCE.

Upon a question of fact, as to whether the rear vestibule and trap doors of a day car of a railway train on which car the plaintiff was riding were closed while the train was standing at a certain station; where the jury balances the probabilities (a) on the testimony of the defendant company's conductor and brakeman for the negative and (b) on that of the plaintiff and a disinterested witness for the affirmative, and finds on that point for the plaintiff, such finding is within the jury's province and will not be disturbed.

McDougall v. G.T.R. Co., 8 D.L.R. 271, 14 Can. Ry. Cas. 316, 27 O.L.R. 369, 23 O.W.R. 364.

REVIEW OF FINDINGS—CONTRIBUTORY NEGLIGENCE.

A verdict in favour of an injured servant will not be disturbed where the evidence as to his contributory negligence is conflicting and not so conclusive and undisputed as to warrant the withdrawal of that question from the jury.

McClement v. Kilgour Mfg. Co., 3 D.L.R. 462, 3 O.W.N. 999, 21 O.W.R. 856.

REVIEW OF VERDICT—LIABILITY OF RAILWAY FOR CAUSING DEATH.

Grand Trunk R. Co. v. Parent, 7 D.L.R. 810.

FINDINGS OF JURY—VOLENS.

Where the issue of volens has been fought out at the trial and clearly presented to the jury in the form of a specific question which they have not answered, the Appellate Court has no power to substitute itself for the jury to make such finding.

McPhee v. E. & N. R. Co., 23 D.L.R. 561, 22 B.C.R. 67, 32 W.L.R. 125, 8 W.W.R. 1319.

(VII L—477)—REVIEW OF VERDICT—MURDER—CULPABLE HOMICIDE REDUCED TO MANSLAUGHTER.

Where the Appellate Court is of opinion that, upon the evidence no jury could properly find that the prisoner shot the deceased while in the heat of passion caused by sudden provocation, no substantial wrong or miscarriage at the trial is shewn to warrant the Appellate Court in setting aside a conviction for murder or directing a new trial under the Cr. Code, 1906, s. 1019, by reason of the Trial Judge's instruction to the jury that they were bound, upon the evidence, either to acquit the prisoner altogether or to find him guilty of murder.

R. v. Eberts, 7 D.L.R. 538, 20 Can. Cr. Cas. 273, 47 Can. S.C.R. 1, 22 W.L.R. 901, 3 W.W.R. 37, affirming 7 D.L.R. 530, 4 A.L.R. 310, 2 W.W.R. 542.

CRIMINAL LAW—REVIEW OF CONVICTION ON QUESTION OF LAW—SUFFICIENCY OF EVIDENCE.

Although the evidence of theft is contradictory and unsatisfactory in the opinion of the court determining merely the question of law on a case reserved as to the sufficiency of the evidence to sustain a conviction, the court will uphold the finding of guilt if supported by sufficient legal evidence.

R. v. Edmunds, 18 D.L.R. 770, 23 Can. Cr. Cas. 77, 28 W.L.R. 965.

CRIMINAL CASE — INCEST — INFERENCES BY COURT TRYING CASE WITHOUT JURY—SPEEDY TRIAL.

On a speedy trial, without a jury under Part XVIII of the Criminal Code, the Trial Judge is entitled to make the same inferences from the facts as a jury might make had the accused elected for a jury trial, and his finding will not be disturbed if the evidence shewed a prima facie case which on a jury trial could not have been withdrawn from the jury.

R. v. Ward, 24 Can. Cr. Cas. 75, 48 N.S.R. 204.

REVIEW OF VERDICT, CRIMINAL CASES.

When it appears upon a reserved case that there was evidence upon which the jury could reasonably find as they did, the Appellate Court should not grant a new trial merely because a different conclusion may appear to it to have been preferable on a consideration of the whole evidence.

The King v. Faulkner, 19 Can. Cr. Cas. 47, 16 B.C.R. 229.

(§ VII L—480)—REVIEW OF FACTS—AS TO DAMAGES AND VALUES—APPELLATE JURISDICTION TO INCREASE—AWARD.

On an appeal from an award made in expropriation proceedings under the Railway Act, R.S.C. 1906, c. 37, the court may reject the method of ascertaining the damages adopted by the arbitrators and act upon another method shewn by the evidence if of opinion that the latter is preferable, and may increase or diminish the damages accordingly, although the quantum is the only question on the appeal. [James Bay v. Armstrong, [1909] A.C. 624; Re Ketcheson and C.N.R., 13 D.L.R. 854, 29 O.L.R. 339, and Re Cavanagh and Can. Atlantic, 14 O.L.R. 523, followed.]

Re Billings and Canadian Northern Ontario R. Co., 19 D.L.R. 841, 31 O.L.R. 329.

DAMAGES—REVIEW BY APPELLATE COURT.

Unless the conclusions at which the judge or jury arrives in assessing damages are clearly erroneous, the quantum should not be interfered with on appeal. [McHugh v. Union Bank, [1913] A.C. 299, 10 D.L.R. 562, applied.]

Kerley v. City of Edmonton, 21 D.L.R. 308, 8 A.L.R. 335, 30 W.L.R. 553, 7 W.W.R. 1352.

AS TO DAMAGES.

Where the damages awarded by the jury at the first trial were held to be excessive

and the Court of Appeal had ordered a new trial and the result of the new trial was a verdict for a still larger sum, the Court of Appeal, upon an appeal from the second verdict, may itself fix the amount of damages instead of sending the case back for a third trial before a jury by virtue of its statutory powers.

Taylor v. B. C. Electric R. Co., 1 D.L.R. 884, 19 W.L.R. 851, 1 W.W.R. 486. [Affirmed in 8 D.L.R. 724, 2 W.W.R. 923.]

REDUCTION OF DAMAGES.

An award of damages greater than the amount claimed in the pleadings will be reduced on appeal.

Dutton v. C.N.R. Co., 30 D.L.R. 250, 26 Man. L.R. 493, 21 Can. Ry. Cas. 294, 34 W.L.R. 881, 10 W.W.R. 1006, affirming, except as to damages, 23 D.L.R. 43.

EXPROPRIATION AWARDS—VALUES.

Upon an appeal from an award under s. 209 of the Railway Act it is competent for the court to decide any question of fact upon the evidence taken before the arbitrators, as in a case of original jurisdiction, subject to the following rules: (1) An appeal upon a question which is merely one of value should be discouraged. [Musson v. Canada Atlantic R. Co., 17 L.N. 179, followed.] (2) There must be such a plain and decided preponderance of evidence against the findings of the arbitrators as to border strongly on the conclusive. (3) The latter rule should be more strictly followed where the arbitrators are experienced in such matters, have local knowledge and the great advantage of a personal view of the premises, and of seeing and hearing the witnesses. [Lemoine v. City of Montreal, 23 Can. S.C.R. 390; Kearney v. The Queen, Cam. Cas. 344, followed.]

Canadian Northern R. Co. v. Billings, 31 D.L.R. 687, 19 Can. Ry. Cas. 193, reversing 19 D.L.R. 841, 31 O.L.R. 329.

REVIEW OF DAMAGES FOUND BY JURY.

Whatever may be the amount of damages granted by a jury in their verdict, the Court of Appeal will not interfere with the judgment rendered on that verdict by granting a new trial or reducing the amount of damages, if it is not evident that the jurymen have been moved by improper motives or have erred and if it does not appear that the verdict could not be reasonably rendered if acting according to the evidence given.

C.P.R. Co. v. Walsh, 24 Que. K.B. 185.

DAMAGES—AWARD OF REFEREE.

In an action for damages for personal injuries the Appellate Court will not, unless under very exceptional circumstances, disturb the verdict of a jury or of a referee for assessment of damages where consideration has been given to all the different elements of damage in respect to which the plaintiff is entitled to compensation and an award made which was deemed to be fair and reasonable, under all the circumstances.

Edwards v. City of Sydney, 40 D.L.R. 79, 52 N.S.R. 116.

ARBITRATION — VARIATION OF AWARD — "GOOD AND SPECIAL" REASONS—VALUATION.

An award of arbitrators under the Railway Act will not be varied by an Appellate Court upon a mere question of valuation except for "good and special" reasons, even when the Appellate Court is of opinion that the amount awarded is very excessive or very inadequate. [Ruddy v. Toronto Eastern R. Co., 21 Can. Ry. Cas. 377, applied.]

Noble v. Campbellford Lake Ontario & Western R. Co., 21 Can. Ry. Cas. 380.

ADMIRALTY—COLLISION—DAMAGES.

The Exchequer Court, sitting in appeal in Admiralty matters, will not interfere with the judgment of the lower court as regards pure questions of fact or the quantum of damages, unless it appears clearly erroneous.

The "Ethel Q" v. Beaudette, 17 Can. Ex. 505.

AS TO DAMAGES AND VALUE.

Richards v. Lambert, 4 O.W.N. 646, 23 O.W.R. 780.

(§ VII L—485)—WEIGHT OF EVIDENCE AS TO PREJUDICE FROM LACK OF NOTICE—WORKMEN'S COMPENSATION CLAIM.

While the question whether there was any evidence that the employed was not prejudiced by want of notice of the employee's injury under the Workmen's Compensation Act, Alta. Stat. 1908, c. 12, is a question of law upon which an appeal may be taken, no appeal lies as to the weight of such evidence where there was sufficient to base the judge's finding that there was no prejudice, and that the notice might therefore be dispensed with under the statute. [Bruno v. International C. & C. Co., 12 D.L.R. 745, referred to.]

Barrie v. Diamond Coal Co., 17 D.L.R. 385, 7 A.L.R. 138, 28 W.L.R. 701, 6 W.W.R. 651.

REVIEW OF FINDINGS OF COURT—HEARINGS OF INTERIM INJUNCTION.

In reviewing upon appeal an interim injunction order, whereby the injunction was continued until the trial unless the defendant gave security for an accounting, the Appellate Court may direct that the findings on any question of law or fact or upon the construction of the documents by the judge who made the injunction order shall not be binding on the parties at the trial of the action.

Pulford v. Burmeister, 23 D.L.R. 178.

REVIEW OF FINDINGS OF COURT—ACCEPTANCE OF OFFER FOR DRIVING LOGS — STORM BOOMS.

The findings of a trial judge that an offer to drive logs from a certain point, and to deliver them from that point in storm booms at a smaller price, was only accepted as to the driving and not as to the storm booms, based on sufficient and relevant evidence to support his conclusion, will not be reviewed on appeal.

Holt Timber v. McCallum, 25 D.L.R. 445.

CONCLUSIVENESS OF JUDGE'S FINDINGS UPON QUESTIONS OF FACT — CREDIBILITY OF TESTIMONY.

Johnson Investments v. Grunwald, 34 D.L.R. 733, 11 A.L.R. 565, [1917] 2 W.W.R. 142.

OF FINDINGS OF COURT.

Where it is evident upon an appeal, in a case tried without a jury, that the trial judge based one of his conclusions entirely upon the inferences which he drew from certain facts to which he referred in his opinion or written reasons for judgment, and the Appellate Court is of opinion that he erred in such conclusions, it may draw from the same facts the inferences which it considers to be the proper ones, and dispose of the case upon its own finding of the effect of the transaction in question.

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 5 A.L.R. 245, 22 W.L.R. 91, 2 W.W.R. 1036.

FROM FINDINGS OF FACT WITHOUT A JURY —RECONSIDERATION OF INFERENCES — INDIRECT EVIDENCE.

An Appellate Court, hearing an appeal from the findings made by the court below, trying a personal injury action without a jury, should reconsider the whole evidence, and particularly where the case depends upon the inferences or conclusions to be drawn from facts not substantially in dispute. [Boggs v. Scott, 34 N.B.R. 110; Papageorgiony v. Turner, 37 N.B.R. 449, and Coghlan v. Cumberland, [1898] 1 Ch. 704, referred to.]

Turnbull v. Corbett; O'Brien v. Corbett, 8 D.L.R. 343, 41 N.B.R. 284, 11 E.L.R. 67.

FINDINGS OF COURT—REVIEW—REVERSAL BY APPELLATE COURT—CREDIT OF WITNESSES.

Where the judge at the trial has seen and heard the witnesses for the plaintiff, but the evidence of those for the defendant has been taken de bene esse and read at the trial, and it appears to an Appellate Court that the evidence for the defendant was given with clearness and candour, while that for the plaintiff is discredited by the plaintiff's own letters, and the agreement sued upon by the plaintiff is, under the undisputed circumstances, a very improbable transaction, the Appellate Court may reverse findings of fact in favour of the plaintiff, and may hold that he has not made out his case, in spite of the fact that the trial judge has expressly given credit to the witnesses on his behalf.

Kinsman v. Kinsman (No. 2), 7 D.L.R. 31, 22 O.W.R. 979, reversing 5 D.L.R. 871.

REVIEW OF FACTS—FINDINGS OF COURT.

The Appellate Court should not reverse the finding of fact of the trial court where the same is based upon preponderating evidence unless the court hearing the appeal is of opinion that the evidence relied upon to support the finding of the court below is absolutely inconsistent with a reasonable view of the circumstances, and not merely that there are phases in the transaction pointing strongly against the finding appealed from.

Trites-Wood v. Waters, 3 D.L.R. 545, 20 W.L.R. 924.

FINDINGS OF COURT—REVIEW ON APPEAL.

In an action for the recovery of wages for the services of the plaintiff and his wife, where the defendant appeals from the trial judge's finding as to a certain alleged payment to the wife purporting to be in accord and satisfaction of the debt, the Appellate Court will properly consider among suspicious circumstances: (a) That the wife has separated from her husband and is working for the defendant under a new arrangement; (b) that the wife, after her husband's action was brought, took at the defendant's suggestion a long-date promissory note without interest (ante-dated) as in settlement of the action; (c) that the wife apparently lent herself to help the defendant in the action; (d) that the evidence for the defense was conflicting and unsatisfactory.

Styles v. Lasher, 8 D.L.R. 236, 22 W.L.R. 451, 3 W.W.R. 231.

CONCLUSIVENESS OF JUDGE'S FINDINGS UPON QUESTIONS OF FACT.

Fish v. Fish, 37 D.L.R. 197, 44 N.B.R. 617.

FINDINGS OF COURT—SALE.

The Appellate Court will not interfere with the findings of the trial judge that the burden of proof to establish a sale has not been satisfied. [Greene Swift & Co. v. Lawrence, 7 D.L.R. 589; Western Motors, Ltd. v. Gilfoy, 25 D.L.R. 378, distinguished; see also Holt Timber v. McCallum, 25 D.L.R. 445; Morgan v. McDonald, 27 D.L.R. 125; McBride v. Ireson, 26 D.L.R. 516.]

Cowie v. Robins, 27 D.L.R. 502, 9 S.L.R. 191, 34 W.L.R. 245, 10 W.W.R. 287.

FINDINGS OF TRIAL JUDGE.

The court was equally divided in the first action on the question whether the evidence sustained the findings of the Trial Judge as to whether the defendants had improperly obtained and used the plaintiffs' list of subscribers and wrongfully endeavoured to entice away plaintiffs' employees. The trial judgment granting an injunction was therefore affirmed, with some modifications as to the operation of the injunction.

Canada Bonded Att'y v. Leonard-Parmiter; Canada Bonded Att'y v. G. F. Leonard, 42 D.L.R. 342, 42 O.L.R. 141.

NEGLIGENCE—VERDICT OF JURY.

A verdict of a jury that an accident was caused by the neglect and lack of proper supervision of a ship's officer in not having the gang plank sufficiently manned, will be set aside where the evidence is equally consistent with it being attributable to the impetuosity of one or more fellow servants.

Cleugh v. C.P.R. Co., 40 D.L.R. 512, 25 B.C.R. 335, [1918] 2 W.W.R. 416.

A verdict of a jury will not be set aside if they were justified in coming to the con-

clusion that the direct cause of the accident was in the arrangement and equipment of the train, and if there was evidence upon which they might properly find that the negligence of the company was in the system employed for the operation of the particular train.

Cheeseman v. Canadian Pacific R. Co., 40 D.L.R. 437, 45 N.B.R. 452, 22 Can. Ry. Cas. 253. [Reversed in 45 D.L.R. 257, 57 Can. S.C.R. 439.]

FINDING OF FACT OF TRIAL JUDGE—CREDIBILITY OF WITNESSES—DUTY OF APPELLATE COURT—ACTION ON CHEQUE—ALLEGED DELIVERY IN ESCROW—TRANSFER BY PAYEE TO THIRD PERSON—HOLDER IN DUE COURSE—ABSENCE OF KNOWLEDGE IN TRANSFEREE OF EQUITIES EXISTING BETWEEN DRAWER AND PAYEE.

Sutherland v. Harris and McCuaig, 15 O.W.N. 251.

FINDINGS OF COURT—IN GENERAL.

Keiser v. Kalmet, 47 Can. S.C.R. 402, 23 W.L.R. 580.

EVIDENCE—FINDINGS OF FACT OF TRIAL JUDGE—MOTION TO REOPEN HEARING OF APPEAL.

Davidovich v. Swartz, 8 O.W.N. 222.

OPPOSITION TO SEIZURE OF WIFE'S PROPERTY—REVIEW OF COURT'S FINDINGS.

In the case of opposition taken by the wife for withdrawal from seizure of household furniture, even when the Court of Review should find it appearing that a piece of furniture of trifling value belongs to the husband, it will not reverse for that reason the judgment of the Superior Court; de minimis non curat lex.

Goulet v. Gratton, 47 Que. S.C. 465.

UNSEASONABLE FINDINGS.

An appellate tribunal, before it will undertake to overrule a finding of fact by the court below, must be satisfied that the court below has clearly come to an unreasonable decision about the facts.

Chong v. Gin Wing Sig (B.C.), [1917] 2 W.W.R. 183.

CONCLUSIVENESS OF JUDGE'S FINDINGS — DAMAGES.

The order of a trial judge directing an enquiry as to damages arising from the postponement of a sale will not be interfered with, as being a matter within his discretion, unless the Court of Appeal is convinced that the judge was clearly wrong.

Royal Bank v. Whieldon (B.C.), [1917] 2 W.W.R. 58.

(§ VII L—489)—FINDINGS OF COURT—TESTAMENTARY CAPACITY.

A finding of the Surrogate Court that a testator was mentally competent to make a testamentary disposition of his property will not be disturbed on appeal unless so manifestly and clearly wrong as to amount to a miscarriage of justice.

Thamer v. Jundt, 4 D.L.R. 753, 3 O.W.N. 1307, 22 O.W.R. 206.

TESTAMENTARY CAPACITY — INSANE DELUSIONS.

Where no error in law is shewn, an Appellate Court will not interfere with the findings of a trial judge upon a question of fact, that the dispositions made by a testator were not affected by insane delusions. [See Lloyd v. Robertson, 27 D.L.R. 745, 28 D.L.R. 192.]

Beament v. Foster, 26 D.L.R. 474, 35 O.L.R. 365.

(§ VII L—491)—FINDINGS OF COURT, FRAUD.

Where the purchaser and the real estate agent by whom the sale transaction was put through were joined as defendants in an action by the vendor to set aside the sale and a judgment was given setting aside the sale with costs against both defendants, and the defendant purchaser reconveyed in pursuance of the judgment and paid the costs, an appeal on the part of the agent will not be sustained where the real subject of the litigation is at an end by the compliance of the codefendant with the decree and no substantial variance is asked, except as to the considerants of the written opinion as to fraud which were not embodied in the formal decree.

Wolfson v. Oldfield, 2 D.L.R. 110, 22 Man. L.R. 170, 20 W.L.R. 484, 1 W.W.R. 920.

(§ VII L—492)—AGENCY.

An Appellate Court has power to review a finding of fact as to the existence of an agency, based on a misapprehension of the evidence. [Western Motors v. Gilfoy (Alta.), 25 D.L.R. 378, applied.]

Rohoel v. Phillipson, 31 D.L.R. 289.

FINDINGS OF COURT, AGENCY.

Where there was ample evidence to warrant the trial judge in his finding that the plaintiff's services as a real estate broker in listing for sale at the instance of a person other than the owner, property which was afterwards sold through another broker, were rendered gratuitously, an Appellate Court should not reverse the trial judgment based upon such finding whereby the broker's action for commission was dismissed.

McEnroe v. Trethewey, 4 D.L.R. 398, 21 W.L.R. 848.

FINDINGS OF COURT—AGENCY.

An Appellate Court has the legal power to review a finding of fact made by the trial judge upon contradictory testimony, as to whether a son in business with his father acted as agent for the firm.

Western Motors v. Gilfoy, 25 D.L.R. 378, 9 W.W.R. 770, 33 W.L.R. 136.

(§ VII L—495)—VALUATION OF PROPERTY BY COURT.

Where a person, wrongfully in possession of property, has wrongfully refused to render to the joint owners an accounting of the property in question, upon proper proceedings for that purpose, the value of the property may be estimated and fixed by the court, and the amount so fixed may be

made binding as against the persons wrongfully refusing to account, unless he shall, within a fixed period after judgment, duly render a detailed and verified accounting, upon which a different valuation may fairly and reasonably be adjudicated.

Houde v. Marchand, 8 D.L.R. 431.

(§ VII L—497)—Action for negligence against bailee — Death of hired horse caused by negligent driving—Review of findings of court—Insufficient evidence to sustain verdict for plaintiff.

Feindel v. Gunn, 25 D.L.R. 738, 49 N.S.R. 383.

(§ VII L—498)—Amount of damages.

An assessment of damages by a trial judge for the flooding of lands will not be disturbed on appeal, notwithstanding the Appellate Court might, on the evidence, have reached a different conclusion.

Cain v. Pearce Co., 5 D.L.R. 23, 3 O.W.N. 1321, 22 O.W.R. 174.

Amount of damages—Libel action tried without jury.

Where a libel action is tried with a jury the quantum of damages is peculiarly within their province and will not ordinarily be disturbed on appeal; and the same principle will apply on an appeal by plaintiff to increase the damages awarded by a judge trying a libel case without a jury.

Pickels v. Lane, 16 D.L.R. 347, 47 N.S.R. 465, affirming 11 D.L.R. 841.

Of findings of court—Damages.

A finding of the trial judge assessing damages for the negligence of a chattel mortgagee's agent in exercising the power of sale in the mortgage in such a manner that the mortgaged property became deteriorated and realized less than it ought to have realized upon the sale, should not be set aside on review, unless it appears that the Trial Judge's conclusions from the evidence before it are clearly erroneous. [McHugh v. Union Bank, 2 A.L.R. 319, affirmed; McHugh v. Union Bank, 3 A.L.R. 166, reversed in part; Union Bank v. McHugh, 44 Can. S.C.R. 473, reversed in part.]

McHugh v. Union Bank, 10 D.L.R. 562, 23 W.L.R. 409, 3 W.W.R. 1052, 108 L.T. 273, [1913] A.C. 299.

Assessment of damages by trial judge—Appeal.

Bateman v. County of Middlesex, 25 O.L.R. 137, 20 O.W.R. 567.

(§ VII L—509)—Trial without jury.

It is the duty of an Appellate Court to reverse the decision of a trial judge on a question of fact upon a trial without a jury, "if the evidence coerces the judgment" of the Appellate Court to do so.

Green, Swift & Co. v. Lawrence, 7 D.L.R. 589, 2 W.W.R. 932.

Increase of damages by Appellate Court—Trial below without a jury.

Where an action for personal injuries sustained through the defendant's negligence is tried by a judge without a jury and the damages awarded by him are so small as to shew that he must have omitted to take into consideration some of the elements of damage, the Appellate Court may, on appeal by the plaintiff, increase the amount on a consideration of the trial depositions without remitting the case for a new trial. [Rowley v. London and N.W.R. Co., L.R. 8 Ex. 221, and Phillips v. South Western R. Co., 5 Q.B.D. 78, applied.]

Vanhorn v. Verral, 4 D.L.R. 624, 3 O.W.N. 1567, 22 O.W.R. 860.

Findings of fact—Trial without a jury.

Upon the question as to whether the owner of farm lands, contiguous to a river, in protecting his lands against the inroads of the river by the construction of wing-dams, has exceeded his right of defense, and so constructed and maintained the wing-dams as to injure the lands of proprietors on the opposite bank of the river, or so as to alter the channel of the river to the detriment of the lands of his opposite neighbours; if the trial judge, trying the case without a jury, finds against the defendant, the Appellate Court will consider whether the evidence for the defendant is of such a strong and overwhelming character as to justify the overturning of the finding of the trial judge, and when unable, upon the whole case presented by the defense, to discover any such preponderating testimony, the finding will not be disturbed.

Lorraine v. Norrie, 6 D.L.R. 122, 46 N.S.R. 177.

Review of facts — Prima facie case — Trial without jury.

Where no reasons for judgment were given by the trial judge appealed from and it did not appear on the record in appeal therefrom that the trial judge had discredited the plaintiff's testimony, the judgment dismissing the action at the close of the plaintiff's case will be set aside and a new trial ordered if it appears to the Appellate Court that the plaintiff had made out a prima facie case which, on such ruling, the defendants desired to answer by calling witnesses.

McBride v. Rusk, 7 D.L.R. 656, 3 W.W.R. 223.

Review of facts—Trial without jury—Appellate Court itself reassesses damages, when.

The Court of Appeal will not necessarily send a case back to reassess the damages which, at the trial, had been allowed on a wrong basis against a wrongdoer, although there is no definite basis upon which to make the proper assessment; and if the Appellate Court, having all the evidence of damage before it is of opinion that $300 is a proper sum to allow it will direct judgment for that amount, although the precise damage is problematical, rather than put the parties to further expense by remitting the case to another jury. [Chaplin v.

Hicks, [1911] 2 K.B. 785, and Watson v. Ambergate R. Co., 15 Jur. 448, considered.]

Nicholais v. Dom. Express Co., 18 D.L.R. 464, 20 B.C.R. 8, 28 W.L.R. 754, 6 W.W.R. 1202.

TRIAL WITHOUT JURY—FINDINGS OF COURT—REVIEW—EVIDENCE MISAPPREHENDED OR OVERLOOKED, EFFECT.

While an Appellate Court should be loth to interfere with a finding of fact by a Trial Judge who has tried a case without a jury, the court will nevertheless scrutinize the evidence with great care where it appears that the Trial Judge has misapprehended the effect of the evidence or failed to consider a material part of it, and in this respect will not support his finding. [Beal v. Michigan Central Railway, 19 O.L.R. 502, followed; Nassar v. Equity, 8 D.L.R. 645, 4 O.W.N. 340; Kinsman v. Kinsman, 7 D.L.R. 31; Bateman v. Middlesex, 6 D.L.R. 533, 27 O.L.R. 122, specially referred to.]

Currie v. Hoskin, 9 D.L.R. 514, 4 O.W.N. 492, 23 O.W.R. 676.

FINDINGS OF COURT—TRIAL WITHOUT JURY—DEMEANOUR—REVIEW.

A Court of Appeal will not interfere in the finding of fact of a Trial Judge without a jury where the judge after hearing contradictory evidence has come to his decision upon the credibility of the witnesses as evidenced by their demeanour on the witness stand; but the rule is otherwise where the finding of fact depends upon the drawing of inferences from the facts in evidence. [Phenix Ins. Co. v. McGhee, 18 Can. S.C.R. 61; North British Mer. Ins. Co. v. Tourville, 25 Can. S.C.R. 177; Jack v. Kearney (No. 2), 10 D.L.R. 48, distinguished; Shaw v. Robinson, 8 E.L.R. 557, 10 E.L.R. 103, followed.]

St. John River Steamship Co. v. Crystal Stream Steamship Co.; St. John River Steamship Co. v. Austin, 10 D.L.R. 76, 41 N.B.R. 333, 11 E.L.R. 432.

TRIAL WITHOUT JURY—BASIS OF ASSESSMENT OF DAMAGE.

Although a jury is bound to assess damages for conversion of standing trees on timber land upon proper principles under judicial instructions, an assessment of such damages by the judge himself (without a jury) cannot be disturbed on appeal merely because such judicial assessment is made without indicating whether or not he himself is being governed by such principles.

Fulton v. Maple Leaf Lumber Co., 17 D.L.R. 128, 48 N.S.R. 48.

(§ VII L—510)—OF FINDINGS BY REFEREE.

Where there is evidence to support a finding of an arbitrator under the provisions of the B.C. Workmen's Compensation Act, who upon conflicting testimony found that the workman was not justified in leaving his place in the factory, and for purposes of his own, going behind a certain machine, where he was injured and that, in so doing, he was not acting in the course of his employment, such findings are findings of fact and not of law, and will not be disturbed by the Supreme Court of British Columbia upon a stated case on questions of law. [Low v. General Steam Fishing Co., [1909] A.C. 523, at p. 534, specially referred to.]

Scaizo v. The Columbia Macaroni Factory, 4 D.L.R. 866, 17 B.C.R. 201, 21 W.L.R. 223, 2 W.W.R. 259.

ARBITRATOR'S AWARD — HOW REVIEWED — REASONS NOT APPARENT OF RECORD.

The reasons or principles which guided arbitrators in making an award not contained in the award or supplemented therewith will not be reviewed on appeal.

St. John & Quebec R. Co. v. Fraser, 24 D.L.R. 339, 19 Can. Ry. Cas. 177, 43 N.B.R. 388.

MASTER'S REPORT—FINDINGS OF FACT.

Empire Limestone Co. v. Carroll, 16 D.L.R. 461, 5 O.W.N. 708, affirming 12 D.L.R. 841.

FINDINGS BY REFEREE—RECONSIDERATION ON APPEAL AS TO INFERENCES FROM SURROUNDING FACTS.

While a referee hearing the witnesses has the better opportunity for forming a right judgment upon the credibility of witnesses as affected by their demeanour in giving evidence and his finding where based upon credibility will not ordinarily be disturbed by an Appellate Court, the rule does not apply to the consideration of the weight to be given the evidence as affected by the surrounding circumstances and attendant facts; an Appellate Court should draw its own conclusions in regard to the probabilities and inferences to be drawn from such facts and circumstances.

McKenzie v. Elliott, 10 D.L.R. 466, 4 O.W.N. 1151, 24 O.W.R. 443.

FINDINGS BY REFEREE—MASTER IN ORDINARY—WEIGHT OF REFEREE'S FINDINGS RELATIVELY — TESTS — COMPARED WITH SCOPE OF TRIAL JUDGE.

Where in a claim for a fire loss the plaintiff sets up a $3,000 valuation and the defendant pays into court as sufficient to pay the plaintiff's entire claim $1,250, and where the Trial Judge determines in the plaintiff's favour the question of fraud in the plaintiff's proofs of loss, but refers the quantum of damages to a Master, and where the Master assesses the loss at only $400, upon an application by the plaintiff to set aside the findings of the Master upon the ground that he thereby, in effect at least, reversed the findings of the Trial Judge and thereby in substance though not in form found fraud in the proofs of loss, the objection basing such an application cannot be given effect, the decision of the Trial Judge merely having negatived at the time of the trial a fraudulent overvaluation, not an actual overvaluation, and not limiting the right to weigh the evidence to be thereafter given

on the reference. [Nassar v. Equity Fire Insurance Co., 1 D.L.R. 222, referred to.]

Upon a reference to the Master in Ordinary from the trial court as to the quantum of damages in a claim for a fire loss, the findings of the Master (within the scope of such reference) are in certain respects on the same footing as the findings of the Trial Judge himself; and while upon appeal from such findings the Appellate Court does not and cannot abdicate its right and its duty to consider the evidence; yet where the Court of Appeal is asked to set aside the Master's findings it will give special weight to the following tests of their probable correctness: (a) Careful statement of reasons by the Master, (b) his personal inspection of the property involved, (c) his opportunity of seeing the witnesses on the stand. [Nassar v. Equity Fire Insurance Co., 1 D.L.R. 222; Beal v. Michigan Central R. Co. (1909), 19 O.L.R. 502; Booth v. Rattê, 21 Can. S.C.R. 637, 643; Re Sanderson and Saville, 6 D.L.R. 319, 26 O.L.R. 616, 623, referred to.]

Nassar v. Equity Fire Insurance Co. (No. 2), 8 D.L.R. 645, 23 O.W.R. 340.

REVIEW OF FINDINGS OF MASTER — MORTGAGE ACTION—MONTHLY RESTS—REFERENCE BACK.

Colonial Investment and Loan Co. v. McKinley, 6 D.L.R. 880, 3 O.W.N. 949.

BREACH OF CONTRACT — REFERENCE — CONTRADICTORY EVIDENCE — FINDING OF MASTER.

Jamieson v. Gourlay, 6 D.L.R. 856, 4 O.W.N. 217, 23 O.W.R. 209.

REVIEW OF MASTER'S REPORT — REOPENING — SOLICITOR'S NEGLECT — SUBSTANTIAL GRIEVANCE.

A motion by the defendants entitled to the equity of redemption to reopen a Master's report in a mortgage action upon the ground of mistake will not be refused where a substantial grievance to the defendants is suggested by the material produced and the mortgagee's security is ample, although the omission to bring all the facts before the Master may have been due to the default of the defendant's solicitor.

Home Building and Savings Association v. Pringle, 7 D.L.R. 20, 4 O.W.N. 128, 23 O.W.R. 137, reversing 3 D.L.R. 896, 3 O.W.N. 1595.

SEIZURE UNDER TWO CHATTEL MORTGAGES—WRONGFUL SALE—REFERENCE TO TAKE ACCOUNTS—REFEREE'S FINDING.

Neal v. Rogers, 19 O.W.R. 873, 2 O.W.N. 1482, affirming 19 O.W.R. 132.

REFERENCE TO TAKE ACCOUNTS — APPEAL FROM REPORT—ITEMS ALLOWED—INTEREST DISALLOWED—COSTS FIXED.

Richardson v. Richardson, 19 O.W.R. 74.

(§ VII L—515)—ON APPEAL FROM APPELLATE COURT—CONCURRENT JUDGMENTS BELOW, EFFECT—ONUS ON APPELLANT.

Where the question is whether concurrent judgments in the courts below shall be reversed on the ground that the judges have taken an erroneous view of the facts, it is incumbent on the appellant to adduce the clearest proof that there is error in the judgment appealed from. [Whitney v. Joyce, 95 L.T.R.(N.S.) 74, applied.]

The "St. Pierre-Miquelon" v. Renwick Steamship Co., 17 D.L.R. 141, 14 E.L.R. 207.

HEARING—REVIEW OF FACTS — SECOND APPEAL WHERE FIRST IS A TRIAL DE NOVO.

The findings of a County Court Judge upon an appeal from a summary conviction, where such appeal is in effect a rehearing of the witnesses, and a trial de novo will not be disturbed on a further appeal, unless it appears that the County Court Judge was clearly wrong on the merits; and this doctrine applies where the County Court Judge preferred to follow the line of testimony discredited by the magistrate and consequently has reversed the latter's findings of fact.

R. v. Barker, 12 D.L.R. 346, 21 Can. Cr. Cas. 267, 47 N.S.R. 248, 12 E.L.R. 535.

REVIEW OF FACTS — FINDINGS OF COURT — CONFLICTING TESTIMONY.

Where a finding of a referee or master on conflicting facts was affirmed by a judge on appeal, an Appellate Court will not ordinarily disturb the finding on a second appeal.

Re National Husker Co., Worthington's Case, 14 D.L.R. 696, 25 O.W.R. 348.

ON APPEAL FROM APPELLATE COURT.

The Supreme Court of Canada will not disturb a judgment of the Court of Appeal of British Columbia on a mere question of quantum of damages, where that court, by virtue of the power given to it by rule 869 (a) of the rules of the Supreme Court of British Columbia, has reduced a verdict of the trial court in an action for personal injuries arising out of an accident. [Taylor v. British Columbia Electric R. Co., 1 D.L.R. 384, 16 B.C.R. 420, affirmed.] The rule that the Supreme Court of Canada will not interfere with the judgment of a Provincial Court of Appeal reducing the quantum of damages assessed by the trial court does not prevent interference in cases where some element of damages for which no compensation is allowed by law may have been given a place in the total of damages reached. [Praed v. Graham, 24 Q.B.D. 53, considered. See also Johnston v. Great Western R. Co., [1904] 2 K.B. 250, and Dunn v. Prescott Elevator Co., 26 A.R. (Ont.) 389, 30 Can. S.C.R. 620.

Taylor v. B.C. Electric R. Co. (No. 2), 8 D.L.R. 724, 2 W.W.R. 923.

REVIEW OF FACTS — POWER TO HEAR WITNESSES AND TRY DE NOVO — DISPOSAL OF APPEAL ON TESTIMONY BELOW.

A county judge hearing an appeal from a conviction under the Ontario Temperance Act may himself hear evidence and

retry the case, and, if neither party calls witnesses, the appeal may be disposed of on the depositions taken by the magistrate whose decision is appealed from; but, in the latter event, there should not be a reversal of the magistrate's finding of fact based upon competent evidence. Any reversal made by discrediting, without a rehearing, the testimony which the magistrate credited will be corrected on the further appeal given to the prosecution on terms of obtaining the Attorney-General's certificate (6 Geo. V. Ont. c. 50, s. 94). [Compare R. v. Barker, 12 D.L.R. 346, 21 Can. Cr. Cas. 267, 47 N.S.R. 248.]

R. v. McCranor, 31 Can. Cr. Cas. 130.

M. WHAT ERRORS WARRANT REVERSAL.

(§ VII M—520) — FINDINGS OF TRIAL JUDGE — WHAT ERRORS WARRANT REVERSAL — PROBABILITIES — WEIGHT.

An Appellate Court reviewing the weight of evidence adduced at a trial without a jury where it appears that the probabilities of the case are strongly against the trial judge's findings of fact and that the weight of the testimony is in accord with those probabilities, will set aside such findings.

Leslie v. Hill, 11 D.L.R. 506, 28 O.L.R. 48.

CRIMINAL APPEALS — SUBSTANTIAL WRONG.

It is for the appellant under s. 1019 of the Cr. Code to establish that there has been a substantial wrong or miscarriage so as to entitle him to relief because of something done at the trial which was not in strict accordance with the law. [Allen v. The King, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331, referred to; Criminal Appeal Act (Imp.) 1898, distinguished.]

The King v. Romano, 21 D.L.R. 195, 24 Can. Cr. Cas. 30, 24 Que. K.B. 40.

(§ VII M—524) — CONSOLIDATION OF ACTIONS.

Where the plaintiff, while actions on policies of insurance were pending, to which defences had been interposed, brought two new actions, which, notwithstanding they had not proceeded to the length of pleading, were ordered consolidated with the older actions, after which the trial court found in favour of the plaintiff in all the actions, such order of consolidation, as well as the judgments so rendered, will be vacated, but without prejudice to an application to the trial court, under s. 158 of the Ont. Insurance Act of 1912 (2 Geo. V. (Ont.) c. 33), to make a further order of consolidation upon the completion of the pleadings in the new actions, whereupon the cases shall be heard upon the evidence already taken, together with such further testimony as either party may desire to give in relation to such new actions.

Strong v. Crown Fire Insurance Co. (No. 2), 4 D.L.R. 224, 22 O.W.R. 734, reversing 1 D.L.R. 111, 3 O.W.N. 481.

(§ VII M—525) — WHAT ERRORS WARRANT REVERSAL — AS TO PLEADINGS — REAL ISSUE COVERED.

Where the statement of claim in an action as originally brought shews on its face nonjoinder of parties, the defect in pleading is not ground for reversal of judgment by the final Appellate Court, if it appears that the courts below had the right to treat the defective pleading as amended so as regularly to cover the real issue, in a form which afforded the relief to which the plaintiffs were held entitled, and that no substantial injustice ensued by reason of the courts below proceeding on such footing.

Allen v. Hyatt, 17 D.L.R. 7, 26 O.W.R. 215, affirming 8 D.L.R. 79.

(§ VII M—535) — AS TO EVIDENCE.

Where evidence was, against defendant's objection, received by the court tending to prove a custom of which the court could take judicial notice without formal proof, its admission is not a ground for setting aside the verdict. [McKenzie v. Scovil, 12 N.B.R. 6, referred to.]

Campbell v. Pugsley, 7 D.L.R. 177, 11 E.L.R. 561.

REJECTION OF EVIDENCE — SUBSTANTIAL WRONG NEGATIVED.

The rejection in an action for a breach of warranty of soundness on the sale of a horse, of testimony tending to shew that the horse was sound prior to and at the time of sale, does not occasion any substantial wrong or work a miscarriage of justice sufficient, under the N.B. Judicature Act, 1909, to justify the reversal of a judgment in favour of the plaintiff, where the defendant admitted that at the time he sold and warranted the horse, he had noticed that the intermittent attacks to which the horse was subject were of a serious nature, although he then declined to believe that the trouble was of more than a trifling character.

Hale v. Tompkins, 6 D.L.R. 502, 41 N.B.R. 269, 11 E.L.R. 91.

AS TO EVIDENCE — REVERSAL REFUSED, WHEN.

A finding at the trial in the plaintiff's favour, on his claim of title to lands by possession, will not be disturbed on appeal, where, although the evidence is conflicting as to continuous possession, there was some evidence upon which to base the finding.

Duncanson v. Atwell, 17 D.L.R. 135, 48 N.S.R. 113.

AS TO EVIDENCE.

It is the plain duty of an Appellate Court to reverse the findings of the trial judge, if it appears that he has misapprehended the effect of the evidence, or failed to consider a material part thereof, leading him to erroneous conclusions. [Beal v. Michigan Central R. Co., 19 O.L.R. 502, applied. See also Western Motors Ltd. v. Gilfoy, 25 D.L.R. 378; Holt Timber Co. v

McCallum, 25 D.L.R. 445; Kerley v. Edmonton, 21 D.L.R. 308; Cowie v. Robins, 27 D.L.R. 502.]

McBride v. Ireson, 26 D.L.R. 516, 35 O.L.R. 173.

CONFESSION IMPROPERLY ADMITTED.

Where the whole circumstances negative any reasonable inference that the accused freely and voluntarily made the confession or admission put in evidence against him, the uncontradicted evidence being all one way to shew that the accused was terrorized into making it, a conviction made in reliance upon such confession will be set aside on an appeal by case reserved; no order will be made remitting the case for a new trial if in the opinion of the Court of Appeal the interests of justice do not require it. [R. v. Lai Ping, 8 Can. Cr. Cas. 467, 11 B.C.R. 102; R. v. Mulvihill, 18 D.L.R. 189, 22 Can. Cr. Cas. 354, referred to.]

R. v. De Mesquito, 26 D.L.R. 464, 21 B.C.R. 524, 24 Can. Cr. Cas. 407, 9 W.W.R. 113, 32 W.L.R. 368.

REVERSING TRIAL JUDGE UPON FINDINGS OF FACT—EVIDENCE—CORROBORATION.

Goddard v. Prime, 33 D.L.R. 790, 10 S.L.R. 102, [1917] 2 W.W.R. 174.

ERRORS WARRANTING REVERSAL — EVIDENCE —JUDGE'S FINDINGS.

Hunka v. Hunka (Alta.), 33 D.L.R. 788.

CORRECTNESS OF COURT'S FINDINGS — CONFLICTING EVIDENCE.

Where the evidence at a trial is conflicting, the Appellate Court will not set aside the finding of the trial judge, who has had the advantage of seeing and hearing the witnesses, and forming a correct estimate of the value of their evidence, unless it is obvious that he has come to a wrong conclusion on the facts of the case.

Imperial Lumber Co. v. Gibson (Alta.), 32 D.L.R. 192.

CONFLICTING—ISSUE OF PURE FACT—FINDING OF TRIAL JUDGE — APPELLATE COURT NOT JUSTIFIED IN REVERSING.

An Appellate Court is not justified in reversing on an issue of pure fact the finding of a Trial Judge, necessarily and expressly made to depend upon the credit to be given to the conflicting evidence of the parties to the transaction whom he saw and heard testify.

Granger v. Brydon-Jack, 46 D.L.R. 571, 58 Can. S.C.R. 491, [1919] 2 W.W.R. 621, reversing 25 B.C.R. 531.

NEGLIGENCE — DAMAGES — SETTLEMENT — SUBSEQUENT CLAIM FOR FURTHER DAMAGES — ACCORD AND SATISFACTION —EVIDENCE TAKEN ON COMMISSION— READING IN FULL DISPENSED WITH AT TRIAL—APPEAL ON QUESTIONS OF FACT.

At the conclusion of the plaintiff's case on the trial, counsel for the defence intimated that he desired to put in the whole of the evidence of a witness taken on commission and that that was his whole case. The Trial Judge then asked that he give the gist of what the evidence was. Counsel then gave a resume of the evidence, but asked that the court read the evidence before delivering judgment. The court refused to read the evidence and gave judgment for the plaintiff. Held, on appeal, that, after reading the evidence taken on commission, the court was of opinion that it would be impossible for a judge to form a true estimate of the weight of the evidence for the defence without reading it. That the court was not, therefore, subject to the ordinary rules as to deciding an appeal on questions of fact, and, after reading all the evidence, are of opinion the appeal should be allowed.

Coupland v. Foley Bros., Welch & Stewart, 25 B.C.R. 173.

CONFLICTING EVIDENCE — MATTER FOR JURY.

An appeal will not be allowed in a case where the issue between the parties is clear, and there is evidence both ways which is peculiarly for the jury, and the charge of the trial judge is impartial and fair.

Balsor v. Wood, 49 N.S.R. 560.

REVERSAL OF FINDINGS OF FACT—ACTION ON BUILDING CONTRACT.

The general rule that a Court of Appeal should not reverse the findings of fact of a Trial Judge when the testimony of the witnesses is contradictory is not an absolute one. When the question arises which of two witnesses is to be believed, and the question turns on manner and demeanour, the Court of Appeal always must be guided by the impression made on the judge who saw the witnesses; but there may be obviously other circumstances, quite apart from manner and demeanour, which may shew whether a statement is credible or not, and such circumstances may warrant the court in differing from the Trial Judge, even on a question of fact turning on the credibility of witnesses, whom the court has not seen. [Coghlan v. Cumberland, [1898] 1 Ch. 704; Khoo Sit Hoh v. Lim Thean Tong, [1912] A.C. 323, followed.] On an appeal by the plaintiff from a judgment in an action, tried without a jury, arising out of an oral contract for the construction of a building, held that the Trial Judge's findings could not be supported by the evidence and that the judgment entered for the defendant should be set aside and judgment entered for the plaintiff. Howell, C.J.M., dissenting, thought the judgment of the trial should not be disturbed.

Bostrom v. Atkinson (Man.), [1918] 1 W.W.R. 591.

MURDER — JUDGE'S CHARGE — ERROR IN REVERSING THE ORDER OF WITNESS' STATEMENTS.

The King v. De Marco, 17 Can. Cr. Cas 497, 7 O.W.R. 387.

(§ VII M—536)—Facts not in dispute—Inferences — Right of Appellate Court to draw.

Where the facts of a case are not in dispute and the action depends on inferences to be drawn from those facts an Appellate Court should draw its own inferences.

Magill v. Tp. of Moore, 46 D.L.R. 562, 59 Can. S.C.R. 9, affirming 44 D.L.R. 489, 43 O.L.R. 372.

Misapprehension of evidence by trial judge — Reversal of judgment by Appellate Court.

Where it is evident that a trial judge has misapprehended the evidence, an Appellate Court will reverse his finding and give judgment in accordance with the weight and reliability of the evidence.

Whalley v. Vandergrand, 44 D.L.R. 319, 12 S.L.R. 14, [1919] 1 W.W.R. 87.

(§ VII M—541)—Erroneous reason.

A judgment of a trial judge will be reversed on a question of fact only when it is evident that he made a mistake, and where the evidence, as a whole, does not sustain his decision.

Baillargeon v. St. George's, 4 D.L.R. 894, 22 Que. K.B. 6.

(§ VII M—542)—Criminal case—Statutory corroboration—Error in ruling at close of prosecutor's case.

If the presiding judge on the trial of a criminal case erroneously rules at the close of the Crown's case that the prosecution has made out the corroboration required by statute for the particular offence and refuses the defendant's motion to take the case from the jury for lack of corroboration, the defense may either rest its case or adduce evidence in defence, but if it elects the latter course and sufficient corroboration is made out from the defendant's witnesses the defendant cannot, upon an appeal by case reserved, take advantage of the absence of corroborative evidence at the close of the Crown's case. [R. v. Girvin, 45 Can. S.C.R. 167; and R. v. Fraser, 7 Cr. App. R. 99, followed.]

R. v. Wakelyn, 10 D.L.R. 455, 21 Can. Cr. Cas. 111, 5 A.L.R. 464, 23 W.L.R. 807, 4 W.W.R. 170.

Criminal trial — Inadmissible testimony.

In a criminal case not of the class in which a wife may testify by virtue of the Canada Evidence Act or of the common law against her husband, the wrongful taking of the wife's testimony against her husband is a ground for a new trial under s. 1019 as a "substantial wrong," if the evidence of the wife is material and of such a character that it may have had an influence with the jury in leading them to find a verdict of guilty. [Makin v. Attorney-General of N.S.W., [1894] A.C. 57; and Allen v. The King, 44 Can. S.C.R. 331, applied.]

R. v. Allen, 14 D.L.R. 825, 22 Can. Cr. Cas. 124, 41 N.B.R. 516.

Misjoinder of counts—Abortion—Manslaughter.

Where a count under Code s. 303 for unlawfully administering noxious drugs to procure a miscarriage are joined with a count for manslaughter for the death alleged to have been occasioned thereby, such added count should be withdrawn if the prosecution uses the woman's dying declaration as evidence in the manslaughter charge, and a new trial will be ordered where this was refused and the jury found the accused guilty of unlawfully administering but disagreeing on the manslaughter count.

R. v. Inkster, 24 Can. Cr. Cas. 294, 8 S.L.R. 233, 31 W.L.R. 782, 8 W.W.R. 1098.

(§ VII M—545)—Uncontroverted facts.

In a case on appeal, where the Appellate Court (Alberta) is, upon the hearing of an appeal, restricted in the receiving of evidence to evidence "on questions of fact as to matters which have occurred after the date of the decision from which the appeal is brought," yet it has the power to grant a new trial for the purpose of enabling additional evidence to be given, and, since the Supreme Court of Canada (under Supreme Court Act, s. 98), in the event of an appeal to it, would have power itself to receive further evidence, a case on appeal in the Alberta Court may properly be treated as though a statutory law of another province (specially referred to by both parties in the pleadings as in force), had been duly proved at the trial.

Dodge v. Western Canada Fire Ins. Co. (No. 2), 6 D.L.R. 355, 5 A.L.R. 294, 2 W.W.R. 972.

(§ VII M—550) — Facts otherwise proved.

Where the defendant, in a criminal conversation case was examined for discovery before the trial without objecting to testify on the ground of privilege, and where he testified in his own defence at the trial and upon cross-examination repeated substantially everything included in the discovery depositions an objection taken on appeal against the verdict on the ground that the depositions on discovery were put in evidence at the trial by the plaintiff against the defendant's objection founded on the statute 32-33 Vict. (Imp.) c. 68, s. 3, will not be allowed. [Fleury v. Campbell, 18 P.R. (Ont.) 110, referred to.]

Zdrahal v. Shatney, 7 D.L.R. 554, 22 Man. L.R. 521, 22 W.L.R. 336, 3 W.W.R. 239.

What errors warrant reversal — Facts otherwise proved — No substantial wrong.

Upon a criminal appeal by way of appeal upon a case reserved setting up misdirection and improper reception of evidence, the provision of s. 1019 of the Code is applied and the conviction stands where (a) the clearly competent evidence of the case strongly supported the finding of

guilt, and (b) the Appellate Court is unable to say that "something not according to law was done at the trial or some misdirection given" whereby "some substantial wrong or miscarriage was occasioned on the trial."

R. v. Minchin, 18 D.L.R. 340, 6 W.W.R. 800, 23 Can. Cr. Cas. 414, affirming 15 D.L.R. 792.

REVERSAL AS TO FACTS—REVERSAL INVOLVING FINDING OF FRAUD.

The Court of Appeal ought not to reverse the finding of a trial judge who heard the evidence and observed the demeanour of witnesses and gave credit to their story, especially in the case where the reversal involves a finding of gross fraud, where there are no collateral facts or circumstances or fundamental facts regarding matters in dispute upon which the Appellate Court so reversing can with absolute confidence and assurance rely and feel they are not mistaken.

Dominion Permanent Loan Co. v. Morgan, 22 D.L.R. 163, 50 Can. S.C.R. 485, 7 W.W.R. 844.

(§ VII M—570) — FINDINGS OF TRIAL JUDGE—REVERSAL.

Saskatchewan Supply Co. v. McFarland, 16 D.L.R. 881, 27 W.L.R. 662.

(§ VII M—575)—IN CASES TRIED WITHOUT A JURY.

In an action for malicious prosecution and false arrest tried without a jury, an Appellate Court has the right to revise the judgment of the trial judge as to the appreciation of evidence offered for or against the character of one of the parties to the suit, and to increase the amount of damages awarded when the allowance is unjust and unfair.

Kalmanovitch v. Muller, 1 D.L.R. 628 18 Rev. de Jur. 159.

AS TO EVIDENCE—FINDINGS ON TRIAL WITHOUT A JURY.

Ericeson v. Marlatt, 11 D.L.R. 839, 18 B.C.R. 120, 24 W.L.R. 946.

(§ VII M—580)—REVERSIBLE ERROR — INSTRUCTION—OBJECTION NOT SUSTAINED BY RECORD.

A verdict will not be disturbed where the record on appeal does not sustain an objection that the jury was erroneously instructed on a certain point.

Ayer v. Kelly, 11 D.L.R. 785, 41 N.B.R. 489, 12 E.L.R. 564.

(§ VII M—588)—MISDIRECTION.

Upon a motion for a new trial on the ground of misdirection, the expressions objected to are to be interpreted by the meaning conveyed as they are associated with the context, and the question of misdirection is to be determined upon a fair and reasonable construction of the entire charge given to the jury.

Markey v. Sloat, 6 D.L.R. 827, 41 N.B.R. 234, 11 E.L.R. 295.

CONVICTION FOR ATTEMPT ONLY — NO EVIDENCE TO SUPPORT IF PRINCIPAL CHARGE NEGATIVED—MISDIRECTION.

The King v. Menary, 18 Can. Cr. Cas. 237, 23 O.L.R. 323.

(§ VII M—594)—AS TO INSTRUCTIONS — NEGLIGENCE OF MASTER — MISDIRECTION, WHEN IMMATERIAL.

On an appeal in a negligence action, an erroneous direction to the jury on the facts is not ground for reversal, where the misdirection appears not to have influenced the jury's finding.

McGraw v. Hall, 17 D.L.R. 185, 19 B.C.R. 441, 27 W.L.R. 871.

(§ VII M—614)—JOINT TRIAL FOR MURDER — CAUTIONING JURY THAT ADMISSION OF ONE DEFENDANT INADMISSIBLE AGAINST THE OTHER — SUBSTANTIAL WRONG—CR. CODE (1906), S. 1019.

The failure of the trial judge to caution the jury on the trial together of two persons charged with murder, that any admission or confession made by one of the accused not in the presence of the other is only evidence against the one making such confession or admission, will not be a ground for a new trial where the statement was brought out on the Crown's cross-examination of the latter as a witness on his own behalf, and the codefendant, now objecting, had, by his counsel, dealt with it in cross-examination of such witness, if it be manifest to the Appellate Court from the evidence (including the objecting defendant's own testimony) that there had been no substantial wrong or miscarriage on the trial by reason of such warning not being given. [See as to admissions of one defendant on trial of joint indictment, R. v. Martin, 9 Can. Cr. Cas 371; R. v. Connors, 5 Can. Cr. Cas. 70, 3 Que. Q.B. 100; R. v. Blais, 10 Can. Cr. Cas. 354, 358.]

R. v. Davis, 16 D.L.R. 149, 22 Can. Cr. Cas. 431, 19 B.C.R. 50, 26 W.L.R. 912, 5 W.W.R. 1340, 6 W.W.R. 12.

REVERSIBLE ERRORS—RESERVING RULING AS TO CROWN EVIDENCE — DEFENCE ENTERED UPON IN MEANTIME.

On a criminal trial it is not reversible error for the trial judge to reserve until after the hearing of the witnesses in the case an objection to the placing in evidence of the prior deposition of an absent witness taken on the preliminary enquiry and compelling the accused to proceed with his defence without a ruling on the objection, where the accused had available all that he was required to answer in his defence including the questioned deposition which was finally admitted.

R. v. Frank, 14 D.L.R. 382, 22 Can. Cr. Cas. 100.

CRIMINAL TRIAL—PREJUDICE.

A conviction will not be set aside, or leave to appeal granted, because the judge presiding at the trial had in his charge to the jury erroneously commented on second-

ary matters unless in the opinion of the Appeal Court the accused has suffered prejudice therefrom.

R. v. Shayanez, 26 Can. Cr. Cas. 438, 25 Que. K.B. 316.

As to evidence—Homicide.

A conviction based upon nondirection or misdirection as to the applicability of evidence is not saved on the ground that there has been no substantial wrong or miscarriage (Cr. Code, s. 1019), merely because there is ample evidence to support a conviction without the incompetent testimony; the Court of Appeal should not allow the conviction to stand unless it comes to the conclusion that the jury would certainly have convicted even if the error had not intervened.

R. v. Duckworth, 31 D.L.R. 571, 26 Can. Cr. Cas. 314, 37 O.L.R. 197, 10 O.W.N. 267.

Summary conviction — Rehearing on merits.

On an appeal from a summary conviction, the complaint is to be reheard on the merits notwithstanding such an irregularity as the omission from the conviction of costs which the magistrate had ordered in the adjudication below. [R. v. Dunlop, 22 Can. Cr. Cas. 245, referred to.]

R. v. Murphy (No. 1) (N.S.), 29 Can. Cr. Cas. 445.

Criminal trial—Verdict.

The Court of Appeal is not to set aside a verdict in a criminal case on the ground that it does not accord with its views of what the verdict should be. To do so it must be satisfied that the evidence does not constitute such legal evidence as could satisfy honest men.

R. v. Green; R. v. Bosomworth (Alta.), 29 Can. Cr. Cas. 425.

Criminal trial—Instruction to jury—Misdirection as to onus of proof of alibi.

A new trial will be ordered if the effect of the judge's charge to the jury, taken as a whole, was to cause the jury to believe that they would be justified in acquitting on the ground of an alibi raised, only in the event of the accused proving there was no possibility of his being at the place of the alleged offence at the time it is sworn to have taken place.

R. v. Akerley, 30 Can. Cr. Cas. 343, 46 N.B.R. 195.

(§ VII M—615)—Instructions to jury—Prejudicial error on refusal of application to modify—Criminal case.

Where due warning has been given in the judge's charge against crediting the uncorroborated evidence of an accomplice, the fact that further references to the subject in the charge and the refusal of the Crown's request for a specific direction that they might convict if they saw fit upon such evidence may have led the jury to understand that it was not competent for them to find a verdict on such evidence, should not be made a ground for placing the accused twice in jeopardy by ordering a new trial on an appeal by the Crown after his acquittal; such circumstances are insufficient to constitute a "substantial wrong or miscarriage" in the terms of Cr. Code, s. 1019, limiting the right of an Appellate Court to grant a new trial. [R. v. Bechtel (No. 1), 5 D.L.R. 497, 4 A.L.R. 402, discussed and doubted.]

R. v. Bechtel (No. 2), 9 D.L.R. 552, 24 W.L.R. 470.

Inaccuracy in summing up—Conducing to wrong verdict.

An inaccurate statement as to the facts made by a judge in summing up, will not necessarily be a ground for a new trial; the party claiming to have been adversely affected by the error must shew that the misstatement was of a character which must have conduced to a wrong verdict. [Clark v. Molyneux, 3 Q.B.D. 237, referred to.]

Starratt v. Dominion Atlantic R. Co., 16 D.L.R. 777, 48 N.S.R. 82.

(§ VII M—626)—Misstatement of counsel as to witness not called—Undertaking of counsel at trial not to appeal—Relief.

Caswell v. Toronto R. Co., 24 O.L.R. 339, 19 O.W.R. 785.

(§ VII M—628)—Advocate's authority—Forms of judicial admission—Revocation of admission—Que. C.C. 1027, 1065, 1472, 1476, 1477, 1478—Que. C.P. 3, 251, 286–290, 316, 359–372.

An advocate's admission, as also the respondent's admission at the hearing in appeal, to the effect that the mis-en-cause appellant has, since the trial began, obtained from the principal appellant a simple deed of sale of the property in question, cannot make up for the absence of peremptory exception necessary to establish that ground, such an admission, however, cannot be of any value when made by the advocate, as he has no authority to that effect. An advocate, without special authority, has no power to make any admission on behalf of his client; he may always, even before disavowal, obtain permission to retract an imprudent admission he may have made without any right. The forms of a judicial admission are limited to the following cases; interrogatory before inquest; interrogatory on articulated facts; interrogatory during inquest, serment en plaids, admission-judgment. The form of revocation of an admission is not described in our procedure; by analogy, a simple petition may, therefore, meet the purpose, during the trial, or a petition in revocation of judgment, after judgment has been rendered.

Cousineau v. Gagnon, 23 Que. K.B. 309.

(§ VII M—630)—Opinion expressed by judge.

It is not a ground for appeal that the

Trial Judge told the jury what verdict he would give if he were a juror.

Rivet v. The King, 27 D.L.R. 695, 25 Can. Cr. Cas. 235, 24 Que. K.B. 559.

(§ VII M—635)—Jury—Questions submitted—Instructions—New trial.

If the jury does not answer questions submitted to them, which are of great importance to the right determination of the issues involved, on the ground that they do not understand one of the questions, and if they are not further instructed by the judge, a new trial will be ordered.

Scott & Co. v. McCain Produce Co., 40 D.L.R. 342, 45 N.B.R. 379.

(§ VII M—636)—Evidence warranting nonsuit—Failure of defendant to ask—Verdict for plaintiff—Power of Appellate Court on appeal.

If a Court of Appeal is of opinion that they have all the facts before them, and that there is no reason to think that further evidence of importance could be produced at another trial, and is also of opinion that the evidence given at the trial was such that the presiding judge should, if asked by the defendant's counsel, have either nonsuited the plaintiff or directed a verdict for the defendant, the court has power under order LVIII. r. 4 (Eng.) not only to set aside a verdict for the plaintiff, but to enter judgment for the defendant. A requisition to a judge at the trial to enter a nonsuit or direct a verdict for a defendant is not a condition precedent which must be fulfilled in order to entitle him to do either.

Banbury v. Bank of Montreal, 44 D.L.R. 234, [1918] A.C. 626.

(§ VII M—640)—Summoning and selection of jury.

The omission of the sheriff, in striking from the grand jury panel, on his own motion, the names of two jurors known to him to be exempt from jury duty, and the substituting of duly qualified jurors therefor, to have before him the affidavit of exemption required by s. 43 of c. 162 of R.S.N.S., cannot, under the provisions of s. 1011 of the Criminal Code (1906), be questioned on appeal from a judgment in a criminal case.

The King v. Brown and Diggs, 19 Can. Cr. Cas. 237, 45 N.S.R. 473.

Substantial wrong or miscarriage—Constitution of Grand Jury.

In determining whether or not any "substantial wrong or miscarriage" has been occasioned on the trial within the meaning of Cr. Code, s. 1019, as to criminal appeals, the Appellate Court hearing a case reserved upon an objection to the constitution of the Grand Jury which the trial judge refused to allow on motion to quash the indictment (Cr. Code, s. 899) must have regard also to the curative provisions of Cr. Code, s. 1011, as to the preparation of jury lists and jury panels and to the limitation made by s. 899 (2) whereby an objection to the constitution of the grand jury is not to be allowed on a motion to quash unless the accused has suffered or may suffer prejudice by the subject-matter of such objection. [R. v. Hayes, 9 Can. Cr. Cas. 101, 11 B.C.R. 4; R. v. Brown, 19 Can. Cr. Cas. 237, 45 N.S.R. 473, referred to.]

R. v. Morrow, 24 Can. Cr. Cas. 310.

(§ VII M—650) — Misdirection — New trial.

Where the evidence on a material issue is contradictory, and the effect of the charge is to preclude the jury from finding the issue in favour of one of the parties without disregarding the charge, a new trial will be granted for misdirection.

Gerow v. Webber, 46 N.B.R. 358.

(§ VII M—651)—Jury trial—Reading works of medical jurisprudence to jury—Excessive damages.

Phoenix Bridge Co. v. Haley, 20 Que. K.B. 361.

(§ VII M—655)—Review of award—Conclusiveness.

The Appellate Court will not set aside an award of the Ontario Railway and Municipal Board, unless it is convinced that some substantial injustice has been done.

Re Toronto and Hamilton Highway Commission and Crabb, 32 D.L.R. 706, 37 O.L.R. 656.

Finding of jury against uncontroverted evidence—New trial.

If the Appellate Court is of opinion that the jury were not justified in refusing to believe the uncontradicted evidence of witnesses in support of a claim for damages in respect of defects in and inferior quality of goods supplied, it may order a new trial in respect of the disallowance of such claim.

Victor Mfg. Co. v. Regina Trading Co., 14 D.L.R. 801, 6 S.L.R. 302, 26 W.L.R. 157, 5 W.W.R. 624.

Murder—Cogency of evidence—Question for murder.

The King v. Bennett, 17 Can. Cr. Cas. 322 (Ont.).

Contract — Commission — Pleadings — Amendment of—Verdict of jury—Answers to questions—Uncertainty of meaning—New trial.

An application for amendment of the pleadings during the course of the trial should be either granted or refused at once, and when granted, the applicant should be required to put in his amendment in writing forthwith. When the jury's answers to questions are so insufficient and vague that it is apparent they were confused when answering them, and their meaning is not sufficiently plain for judgment to be entered upon them, a new trial will be ordered.

Sawyer v. Millett, 25 B.C.R. 193.

(§ VII M—657)—Jury finding—Insufficiency—Specific questions answered by general finding.

The answers of a jury to questions put to them by a judge, must be such that, having regard to the evidence adduced the

court can say that there is evidence to support their finding, and that that evidence discloses a ground of legal liability, and where several questions respecting definite and specific possible acts of negligence of a certain kind are put by the judge, and the jury find negligence of that kind generally, a new trial will be ordered.

Hudson v. Smith's Falls Electric Power Co., 11 D.L.R. 479, 24 O.W.R. 539.

INSUFFICIENCY OF FINDINGS—DIRECTING NEW TRIAL—EMPLOYER'S LIABILITY ACTION.

Although an Appellate Court may have statutory power to draw inferences of fact and to give any judgment and make any order which ought to have been made in the trial court, and to make such further or other order as the case in appeal may require, nevertheless, it should not undertake the functions of a jury where it may be reasonably open to them to come to more than one conclusion on the evidence. [Paquin v. Beauclerk, [1906] A.C. 148, and Skeate v. Slaters, 30 Times L.R. 290, referred to.]

McPhee v. Esquimalt and Nanaimo R. Co., 16 D.L.R. 756, 49 Can. S.C.R. 43, 5 W.W.R. 926, 27 W.L.R. 444. [Referred to in Radowitch v. Parsons, 19 D.L.R. 8.]

SUFFICIENCY OF FINDINGS—VERDICT NOT DISTURBED, WHEN—EMPLOYER'S LIABILITY ACTION.

A verdict denying the plaintiff's right of action against his employer founded on negligence, will not be set aside as perverse unless the evidence is such that only one conclusion can be drawn from the evidence and that no jury could properly find a verdict on it other than one for the plaintiff. [Paquin v. Beauclerk, [1906] A.C. 148; McPhee v. Esquimalt & N.R. Co., 16 D.L.R. 756, 49 Can. S.C.R. 43; Toulmin v. Millar, 12 App. Cas. 746; Skeate v. Slaters, [1914] 2 K.B. 429; Allcock v. Hall, [1891] 1 Q.B. 444, and Sydney Post Co. v. Kendall, 43 Can. S.C.R. 461, referred to.]

Radowitch v. Parsons, 19 D.L.R. 8, 8 A.L.R. 323, 30 W.L.R. 213, 7 W.W.R. 885.

INSUFFICIENCY OF VERDICT.

It is the duty of an Appellate Court to sustain a judgment upon a verdict if there is reasonable evidence to support the findings and if the findings themselves are reasonably sufficient to determine the issues between the parties.

Siven v. Temiskaming Mining Co., 2 D.L.R. 164, 25 O.L.R. 524, 21 O.W.R. 454.

VERDICT AGAINST EVIDENCE.

A jury's findings against the right of a partner to compel another partner to repurchase his interest less his share of any loss upon his withdrawal from the business, in face of evidence establishing an agreement to that effect, will be set aside on appeal.

Landry v. Kirk, 28 D.L.R. 49, 50 N.S.R. 133.

(§ VII M—658)—FAILURE TO FIND.

Where an application is made by a landlord to a county judge against an overholding tenant under the Landlord and Tenant Act (Ont.), and where the judge makes no findings of fact, but simply dismisses the application, it is in substance an application for a writ of possession, and the judge's refusal to make any finding as to whether the tenant "wrongfully holds against the right of the landlord," although dismissing the application, is, in effect, a refusal of a writ of possession from which there is a right of appeal to the Divisional Court under s. 78 of the Act. [Landlord and Tenant Act, 1 Geo. V. (Ont.) c. 37, ss. 75 and 78, referred to.]

Re Dickson & Co. and Graham, 8 D.L.R. 928, 27 O.L.R. 239.

JUDGMENT OF TRIAL JUDGE BASED OF ORAL EVIDENCE—FAILURE TO GIVE REASONS—JUDGMENT NOT SUSTAINED BY EVIDENCE—REVERSAL.

A judgment of a trial judge based on oral evidence will be reversed on appeal where no reasons for his conclusions are given, and the Appellate Court is satisfied that the judgment is not sustained by the evidence.

Patterson v. Tp. of Aldborough, 11 D.L.R. 437, 4 O.W.N. 1346, 24 O.W.R. 638.

(§ VII M—659)—AMOUNT—MEASURE OF DAMAGES.

The sum of ten thousand dollars is not excessive damages for personal injuries to a servant twenty-six years old due to a collision between trains causing him to be knocked down by the coal heater of the car he was in and to be so severely burned by the coals that his face was badly disfigured and his head was left so tender that he would not be able to stand extreme heat or cold and his right hand was so severely burned as to render it permanently useless, leaving him unable to follow his trade of blacksmith. [Tobin v. Canadian Pacific R. Co., 2 D.L.R. 173, and Johnston v. Great Western R. Co., [1904] 2 K.B. 250, specially referred to.]

Gordon v. C. N. R. Co., 2 D.L.R. 183, 5 S.L.R. 169, 20 W.L.R. 705, 2 W.W.R. 114.

EXCESSIVE VERDICT—MEASURE OF DAMAGE—PERSONAL INJURIES ACTION.

Twelve thousand dollars is not an excessive verdict for damages for personal injuries to one left a permanent cripple and unable to follow his usual occupation as conductor of a construction train earning two hundred and fifty dollars a month in summer and as conductor of a freight train in winter earning, at least, one hundred and twenty dollars a month, whose future earning power would be problematical and such verdict cannot be said to have been founded upon a wrong measure of damage where the income which it would bring in, at current investment rates, would be less than one half of his previous earnings. [Johnston v. G. W. R. Co., [1904] 2 K.B. 250; Bateman v. Middlesex, 25 O.L.R. 137, and

Sheahen v. Toronto Ry. Co., 25 O.L.R. 310, specially referred to.]

Tobin v. C. P. R. Co., 2 D.L.R. 173, 5 S.L.R. 381, 20 W.L.R. 676, 1 W.W.R. 1252.

MEASURE OF DAMAGES—WORKMEN'S COMPENSATION ACT—INCREASING THE AMOUNT ON APPEAL.

The appellant court may modify the judgment below by increasing the damages on the plaintiff's appeal, if the court below has underestimated the percentage of loss of earning power which the evidence shews to have resulted to the workman in an action under the Workmen's Compensation Act (Que.).

Peterson v. The Garth Co., 12 D.L.R. 647.

CONCLUSIVENESS OF AWARD—VALUE—EVIDENCE.

The Appellate Court will not interfere with the award of an arbitrator when the evidence of value is conflicting and evenly divided. [Lake Erie & North. R. Co. v. Muir, 32 D.L.R. 252; Can. North. R. Co. v. Billings, 31 D.L.R. 687; Can. North. R. Co. v. Ketcheson, 32 D.L.R. 629, followed.]

Re Watson and City of Toronto, 32 D.L.R. 637, 38 O.L.R. 103.

CONCLUSIVENESS OF ARBITRATOR'S AWARD—AMOUNT.

The Appellate Court will not interfere with the award of arbitrators who have had the advantage of viewing the property, on a mere matter of valuation, unless it is evident that they have acted on a wrong principle in making the award.

Lake Erie & Northern R. Co. v. Muir, 32 D.L.R. 252, reversing 20 D.L.R. 687, 32 O.L.R. 150.

VIII. Judgment.

A. IN GENERAL.

See Judgments.

(§ VIII A—665)—INTERPRETATION OF JUDGMENT—DIRECTIONS TO REFEREE.

If it is desired to ascertain what has been decided by a court the course is not to go to remarks made by members of the court during the argument but to go to the considered decision and the decree or order taken out thereon. In allowing the appeal and remitting the case to the referee the Privy Council gave explicit directions to the referee upon one branch of the case, and refrained from giving directions upon another branch as to which directions were asked for:—Held, that an intention not to give such directions was to be inferred and that the referee having complied with the directions given was functus. Where the judgment of the court deals with several points and the appeal is asserted only as to certain points and not as to others, the judgment as to points not appealed from is not open to further consideration.

Eastern Trust Co., Administrator v. Mackenzie, Mann & Co., 50 N.S.R. 26. [See 22 D.L.R. 410, [1915] A.C. 750, 32 D.L.R. 780.]

UNSIGNED OPINION OF JUDGE AS JUDGMENT.

Where judgment is reserved after argument, and the decision of one of the judges, in his own handwriting but not signed, is later handed to the presiding judge of the court, who subsequently, in delivering judgment, announces the decision of the absent judge:—Held, that if the court is satisfied that the opinion which reaches them is the opinion of the judge, though not signed, it must be accepted as an effective judgment from the day it is pronounced, and the subsequent filing thereof with the registrar of the court is a sufficient compliance with the requirements of the Court of Appeal Act.

Ferrera v. National Surety Co. (No. 2), 23 B.C.R. 122.

INTERLOCUTORY OR FINAL JUDGMENT.

Every interlocutory judgment can be reviewed by the final judgment, or by that rendered by the Appellate Court, and the latter has jurisdiction to set aside a final judgment and to render in its place an interlocutory judgment, as in the case where it reverses a judgment dismissing an action, upon an inscription en droit, and remits the cause to the court of first instance for hearing upon the merits.

Marsil v. McDonald, 49 Que. S.C. 407, 17 Que. P.R. 414.

PROVISIONAL EXECUTION—ALIMENTARY PENSION—ARREARS AND COSTS.

In an appeal from a judgment ordering a mother-in-law to pay an alimentary pension to her daughter-in-law for herself and her son, two judges of the Court of Appeal (in Chambers) granted the respondent, upon proof by affidavit, provisional execution of the judgment without security, but only for future pensions on maturity, and not for arrears or for costs.

Aubry v. Allard, 27 Que. K.B. 87.

RESERVING RIGHT OF APPEAL.

The Appellate Division will, where circumstances render it convenient, reserve the right of appeal in one action, until the appeal in a second action between the same parties has been disposed of.

Cromwell v. Morris, 12 A.L.R. 107, [1917] 1 W.W.R. 460.

B. RENDERING MODIFIED JUDGMENT.

(§ VIII B—670)—ASSESSMENT OF COMPENSATION BY APPELLATE COURT—B.C. WORKMEN'S COMPENSATION ACT.

The Court of Appeal, upon reversing, because no negligence on the part of the defendant was shewn, a judgment in favour of the plaintiff for negligently causing the death of her son, based on Lord Campbell's Act and the Employers' Liability Act as well, cannot assess compensation under s. 6, of subs. 4, of the Workmen's Compensation Act (B.C.); the trial court is the only tribunal with jurisdiction to do so. [McCormick v. Kelliher, 7 D.L.R. 732, ap-

plying McCormick v. Kelliher, 4 D.L.R. 657, affirmed.]

McCormick v. Kelliher (No. 3), 9 D.L.R. 392, 18 B.C.R. 57, 23 W.L.R. 10, 3 W.W.R. 722.

RENDERING MODIFIED JUDGMENT—SUPPLEMENTING THE FINDINGS OF JURY—TO AVOIDS COSTS OF NEW TRIAL.

The power conferred by subs. 2 of s. 27 of the Judicature Act (1913 Ont. c. 19) upon the Appellate Court to supplement the findings of the jury as to negligence where the answers of the jury do not dispose of the case, may be exercised where only a small amount is in question, and the costs of a new trial would make the costs of the litigation out of proportion to the amount involved, and where the proposed supplementary finding of the Appellate Court is such that the jury probably intended so to find and is consistent with the jury's answers.

Smith v. Northern Construction Co., 19 D.L.R. 380, 30 O.L.R. 494.

JUDGMENT—RESERVING JUDGMENT INSTEAD OF GRANTING NEW TRIAL—PERVERSE VERDICT—NECESSARY MATERIAL BEFORE APPELLATE COURT.

On setting aside a verdict for the plaintiff as perverse, the Supreme Court of Saskatchewan may without sending the case back for a new trial, give judgment for the defendant if it has before it the material necessary for finally determining the questions in dispute and finds upon these in the defendant's favour.

Hutchins v. Gas Traction Co., 20 D.L.R. 204, 30 W.L.R. 288.

CRIMINAL CASE—RENDERING MODIFIED JUDGMENT—SENTENCE OF WHIPPING.

Where a sentence of whipping imposed on a summary trial was successfully attacked as having improperly included a direction as to the times when the whipping should take place, which by statute was under the control of the prison surgeon and not of the magistrate, and pending such determination in a habeas corpus application the court had stayed proceedings in respect thereof, the court has a discretion to strike out the sentence of whipping and confirm the sentence of imprisonment if the latter is so near expiry that it would be impossible to carry out the evident intention of the convicting magistrate that the first half of the whipping should be given at a considerable interval from the second half.

R. v. Boardman, 18 D.L.R. 698, 23 Can. Cr. Cas. 191, 9 A.L.R. 83, 29 W.L.R. 176, 6 W.W.R. 1304.

JURISDICTION TO ENTER JUDGMENT UPON EVIDENCE.

The Court of Appeal is entitled to give judgment for a defendant although a verdict has already been given by a jury for the plaintiff, there being some evidence to support that verdict, if the Court of Appeal is satisfied that there is all the evidence before it that could be obtained and no reasonable view of that evidence could justify the verdict for the plaintiff.

Mackenzie v. B.C. Electric R. Co., 21 B.C.R. 375, 8 W.W.R. 956.

(§ VIII B—672)—WHERE PROPER DECISION CANNOT BE GIVEN—DUTY OF APPELLATE COURT—NEW TRIAL.

Where an Appellate Court is not satisfied upon the argument of the appeal that the case has been so fully developed as to enable a proper decision to be given, it should direct a new trial.

Re Fraser; Fraser v. Robertson; McCormick v. Fraser, 8 D.L.R. 955, 26 O.L.R. 508, 22 O.W.R. 353.

REDUCTION OF DAMAGES. REMITTITUR.

In an action for personal injuries in a negligence action against a street railway, where it appeared that the plaintiff, a man aged thirty-one, was permanently incapacitated by the injury from following any continuous occupation, although he might be able to earn something towards his own support, a verdict for $11,500 is not unreasonable and will not, under ordinary circumstances, form a ground for ordering a new trial or reducing the verdict on appeal.

Carty v. B. C. Electric Co., 2 D.L.R. 276, 19 W.L.R. 905, 1 W.W.R. 523.

REDUCTION OF DAMAGES—PLAINTIFF'S ABANDONMENT OF EXCESS.

An Appellate Court has the power without remitting the case to another jury for assessment to award damages at a reduced sum thought to be reasonable, on the abandonment of the excess by the plaintiff, although the original verdict was excessive.

Collard v. Armstrong, 12 D.L.R. 368, 6 A.L.R. 187, 24 W.L.R. 742, 4 W.W.R. 879.

INCREASING AMOUNT OF ARBITRATORS' AWARD.

Upon an appeal from the award of arbitrators made under the Railway Act, R.S.C. 1906, c. 37, the Appellate Court may increase the amount of the award, upon consideration of the evidence given before the arbitrators.

Lake Erie & Northern R. Co. v. Brantford Golf & Country Club, 32 D.L.R. 219, varying 32 O.L.R. 141.

(§ VIII B—673)—INCONSISTENT COUNTS—DIRECTIONS AS TO SENTENCE.

Where the majority of the Court of Appeal in deciding a reserved case on counts for three separate crimes charged on the same facts, holds that the accused at least was properly found guilty of one of such crimes, and that the penalty should be imposed as for one crime only, a direction may be given under Cr. Code, s. 1020 that the trial judge, in passing sentence which had been postponed until after the appeal, shall impose one penalty in respect of the three counts and regulate the extent of same by the maximum which would apply to the lesser offence. The Supreme Court of Canada, on a further appeal under Cr. Code, s. 1024, will decline to deal with the question of the validity of the conviction on the

other counts as raising mere academic questions under such circumstances, if it finds the verdict for such lesser offence unassailable.

R. v. Kelly, 34 D.L.R. 311, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282, [1917] 1 W.W.R. 463, affirming 27 Can. Cr. Cas. 140, 27 Man. L.R. 105, [1917] 1 W.W.R. 46, which affirmed 27 Can. Cr. Cas. 94, 10 W.W.R. 1345. [See also R. v. Buck, 35 D.L.R. 55.]

PUNISHMENT APPROPRIATE TO COUNTS.

Cr. Code, s. 1020 would enable the Court of Appeal on a case reserved upon a general verdict to affirm a sentence appropriate to counts properly framed and which were supported by the evidence without regard to other counts framed upon the wrong enactment and therefore not supported by the evidence.

R. v. McDonald, 28 D.L.R. 377, 25 Can. Cr. Cas. 106, 49 N.S.R. 245.

REVERSING AN ACQUITTAL ORDERED ON QUESTION OF LAW—CR. CODE, S. 1018.

Upon a reserved case by a judge of sessions trying without a jury a charge for an indictable offence upon which he entered an acquittal based solely on specific points of law found by the Appellate Court not to be well founded, the Appellate Court may itself find the accused guilty and remand him to the lower court for sentence.

R. v. Gross & Miller, 31 Can. Cr. Cas. 35.

C. REMANDING; GRANTING NEW TRIAL.

See New Trial.

(§ VIII C—675)—REMANDING, REMITTITUR.

Where, at the close of the evidence in the trial of a breach of contract case, upon the motion of plaintiff for the appointment of viewers and experts the trial judge irregularly appoints a single expert under ss. 392 et seq. of the Code of Civil Procedure (Que.), and such appointment is on appeal declared irregular, the cause will be remitted to the trial court to be reinscribed for hearing on the roll at the stage it had reached when the motion for expertise was made. Where the Trial Judge submits to a single expert, appointed by the judge sua sponte at the trial, questions not relevant under the pleadings, the cause will be remitted for rehearing from the point reached in the trial when the motion for the appointment of the expert was entered.

Pontbriand v. Chateauguay, 7 D.L.R. 22, 46 Can. S.C.R. 603.

NEGLIGENCE—COMMON LAW—EMPLOYER'S LIABILITY—NEW TRIAL WHEN.

Where in a negligence action both at common law and under the Employers' Liability Act, B.C., the verdict is in excess of that allowed under the Act, a new trial will be ordered so as to dispose of the claim under the Act if the verdict cannot be supported at common law. [Shearer v. Canadian Collieries, 16 D.L.R. 541, followed.]

Creveling v. Canadian Bridge Co., 20 D.L.R. 528, 20 B.C.R. 137, 28 W.L.R. 906, 6 W.W.R. 1399.

DAMAGES—POINT RAISED ON APPEAL NOT CONSIDERED BY TRIAL JUDGE—REMITTING CASE BACK TO HAVE POINT DETERMINED.

Where from the evidence it is impossible for an Appellate Court to say that the point raised and urged by the appellants was in fact considered by the judge by whom damages were assessed, and if it was omitted from his consideration, there is a flaw in his judgment which requires to be remedied. The only order that should be made is an order to remit the case back so that the point may be determined.

Foley Bros v. McIlwee, 44 D.L.R. 5, [1919] 1 W.W.R. 403. [See 24 B.C.R. 532.]

REMITTING CASE TO ADD NEW GROUND OF APPEAL FROM SUMMARY CONVICTION—CASE STATED BY A JUSTICE ON POINT OF LAW.

On an appeal by way of case stated by a justice on points of law affecting a summary conviction, the court hearing the appeal may remit the case for amendment so as to add a new ground which had been raised below and which appeared from the depositions to be decisive of the appeal on the merits of the controversy.

R. v. McFarland, 31 Can. Cr. Cas. 211, [1919] 2 W.W.R. 649.

CRIMINAL CASE — ALIBI — MISDIRECTION — NEW TRIAL.

If the omission of the judge in his charge to the jury to refer to confirmatory circumstances brought out in evidence upon an alibi claim was such as to seriously prejudice the accused and to make the judge's statement of the evidence misleading to the jury, it is proper to grant a new trial on a case reserved.

R. v. Hyder (Sask.), 29 Can. Cr. Cas. 172.

REMANDING FOR AMENDMENT—ANNULMENT—DURESS.

If in an intervention, on the ground of duress, the assignor does not ask for the nullifying of the deed of cession, the Court of Review, in the interest of justice, and under the principle that "it is the subject-matter which prevails over the form," will order the case sent back to the Superior Court, so as to permit the intervening party to make the necessary conclusions to have such transfer annulled.

Gagnon v. Seguin, 49 Que. S.C. 355.

TRIAL—JURY—DAMAGES—WRONGFUL ADMISSION OF EVIDENCE.

In an action for damages for injury to an infant plaintiff tried before a jury the wrongful admission of evidence as to his father's health on the question of damages was held not to justify a new trial, as there was little evidence given on the point, it was not objected to at the trial, the same subject-matter was touched upon the cross-examination of the father, the father was not mentioned in the judge's address to the jury, and the Court of Appeal considered

the evidence under the circumstances innocuous.

Ward v. Mainland Transfer Co., [1919] 3 W.W.R. 193.

(§ VIII C—676)—Direction to trial court.

Upon an appeal from a decision of a District Court Judge under the Workmen's Compensation Act (Alta.), limited by statute to questions of law, the Appellate Court on reversing the trial judge as to the law will remit the cause to the trial judge if a further finding of fact becomes necessary because of such reversal, so that the District Court Judge may pronounce a new judgment in view of the decision in appeal and of his own further findings of fact.

Cargeme v. The Alberta Coal & Mining Co., 6 D.L.R. 231, 5 A.L.R. 173, 22 W.L.R. 68, 2 W.W.R. 1058.

(§ VIII C—677)—Enforcement of affirmed judgments.

S. 150 subs. (e) of the Liquor License Act, R.S.N.S. 1900, c. 100, which provides that, upon the affirmance on appeal of a conviction thereunder, if it is adjudged by the conviction that the person convicted "shall be imprisoned," the County Court Judge hearing the appeal may issue his warrant of commitment, applies only where the commitment imposed imprisonment in the first instance without the alternative of a fine, and the County Court Judge has no authority to issue a warrant of commitment because of the default of the unsuccessful appellant in paying the fine which the conviction imposed, although the conviction provided that in default of payment the defendant should be imprisoned unless the fine were sooner paid. [Ex parte Abell, 33 C.L.J. 626, followed.]

R. v. Ackerson, 7 D.L.R. 95, 20 Can. Cr. Cas. 245.

D. Costs; interest; damages for delay.

See Costs.

(§ VIII D—680)—Default judgment—Conditional order—Payment of costs—Waiver—New trial.

The payment of costs under a conditional order setting aside a default judgment for the plaintiff on terms of paying costs within fifteen days and of going to trial at the next sittings which commenced five days after the making of the order, is not waived by the plaintiff appearing at such sittings within the fifteen days and requesting an early trial; and a dismissal of the action on the trial being called in plaintiff's absence within the fifteen days and without payment of such costs will be set aside and fresh terms imposed for proceeding to a new trial.

Bergstrom v. Edwards, 20 D.L.R. 279, 7 S.L.R. 424, 30 W.L.R. 405, 7 W.W.R. 738.

Judgment—Costs—Wrong principle—Corrected by Appellate Court, when.

Where the trial court has dealt with the question of costs upon a wrong principle, the Appellate Court will correct the judgment in that respect although it would not disturb a discretionary order as to costs. [Metropolitan v. Hill, 5 App. Cas. 582, applied.]

Lloyd v. Lloyd, 19 D.L.R. 502, 7 A.L.R. 307, 28 W.L.R. 806, 6 W.W.R. 1387.

Costs—Bond filed as security on appeal to Supreme Court of Canada—Security for costs of appeal—New trial directed by Supreme Court—Costs of appeal to abide result—Retention of bond to answer possible award of costs against appellant—Practice.

Dicarllo v. McLean, 6 O.W.N. 290.

(§ VIII D—681)—Cost of transcript, brief, etc.

When a judgment of the Court of Review, although partially changing the first judgment, does not alter it as to costs, the losing party will have to pay the transcription of the depositions which are costs in the case.

Crowley v. Silverstone, 13 Que. P.R. 332.

(§ VIII D—684)—Costs—Discretion of judge—Proceeding on wrong principle.

Notwithstanding s. 47 of King's Bench Act, Man., which declares that no order as to costs only which by law are left to the discretion of the court judge shall be subject to appeal except by leave, the Appellate Court may review a judge's decision on a question of costs which were left to his discretion where he had proceeded on an erroneous principle or had not exercised a judicial discretion. [Young v. Thomas, [1892] 2 Ch. 134; Civil Service C. v. General Steam Nav. Co., [1903] 2 K.B. 756, applied.]

Gibson v. Snaith, 21 D.L.R. 716, 25 Man. L.R. 278, 8 W.W.R. 247.

E. Effect of decision; subsequent proceedings.

(§ VIII E—686)—Effect of decision, conclusiveness.

Where an action on a promissory note is dismissed on grounds which do not effectually dispose of the question of the liability of the maker of the note, leave may be reserved to the plaintiff to bring another action thereon.

Hamilton v. Isaacson, 5 D.L.R. 114, 21 W.L.R. 333.

Effect of decision—Decision "on the merits"—Summary conviction—Insufficiency of information.

A judgment given by a Division Court in Ontario, upon an appeal taken from a summary conviction, whereby the conviction was quashed on the ground of the insufficiency of the information, is a decision "on the merits."

Re McLeod v. Amiro, 8 D.L.R. 726, 25 Can. Cr. Cas. 230, 27 O.L.R. 232.

F. Correction.

(§ VIII F—690)—Power to recall judgment for correction.

An Appellate Court has jurisdiction, after its formal order has been issued, to recall it for the purpose of amending errors or omissions due to oversight or mistake. [Penrose v. Knight, Cout. Dig. 1122; Rattray v. Young, Cout. Dig. 1123; McCaughey v. Stringer [1914], 1 Ir. R. 73; E. v. E., [1903] P. 88, applied.

Prevost v. Bedard, 24 D.L.R. 862, 51 Can. S.C.R. 629. [See 24 D.L.R. 153, 51 Can. S.C.R. 149.]

Supplementing entered judgment.

On an appeal to the County Court from a summary conviction, the judge of the County Court is functus officio on the entry of his judgment allowing the appeal with costs and the adjournment of the court sine die; and subsequent orders of the judge purporting to adjourn the appeal to a fixed date and on the later date purporting to allow counsel fees or other costs not covered by the former order, will be set aside on certiorari as having been made without jurisdiction.

Ex parte Cronkhite; R. v. Wilson, 26 Can. Cr. Cas. 224, 44 N.B.R. 69.

Powers of court at final judgment to revise interlocutory judgment rendered by an Appellate Court.

Longpre v. Dumoulin, 24 Rev. de. Jur. 1.

Appeal from order varying order made on consent—Terms of consent not followed—Power to vary order after formal issue.

Broom v. Pepall, 23 O.L.R. 630, 19 O.W.R. 262.

IX. Rehearing (on appeal).

See Trial; New Trial; Judgment.

(§ IX—695)—Rehearing on appeal.

Where an interlocutory order adding a party defendant was made on default of the appearance of the added party at the hearing of an appeal from an order refusing to add him as a defendant, but the order in appeal contained terms for the protection of the added party as to pleading the Statute of Limitations up to the date of his being added, the Court may properly decline to reopen the appeal where the added party is at liberty by a substantive application to move against the order adding him.

Broom v. Toronto Junction, 3 D.L.R. 699, 3 O.W.N. 1228, 22 O.W.R. 41.

Interest on money demand—Discretion of lower court—Appeal as to costs only—Appeal joined with other parts of judgment.

Buckley v. Vair, 39 D.L.R. 796, 40 O.L.R. 465.

(§ IX—698)—From summary conviction for second offence — Liquor law — Rehearing—Proving prior conviction.

On an appeal from a summary conviction under the Liquor License Act, R.S.S. 1909, c. 130, all the facts necessary to shew that the offence has been committed must be proved before the district judge hearing the appeal; and where the appeal is from a conviction as for a second offence with increased penalties the alleged former conviction must be proved and it is not sufficient that the magistrate in the conviction appealed from had included a statement that the accused had been previously convicted giving the alleged particulars thereof, where neither the prior conviction nor formal proof thereof was produced on the appeal. [Re Ryer and Plows, 46 U.S.Q.B. 206, referred to.]

R. v. Curran, 19 D.L.R. 120, 22 Can. Cr. Cas. 388.

(§ IX—699)—Rehearing—Appeal from summary conviction—Right to begin.

An appeal from a summary conviction can ordinarily only be disposed of by (a) quashing, (b) formal abandonment, or (c) a hearing; and the appeal being a rehearing (Cr. Code 1906, ss. 751-754), the respondent, who is the prosecutor, must prove his case although the appellant does not appear.

R. v. Gregg, 13 D.L.R. 770, 22 Can. Cr. Cas. 51, 6 A.L.R. 234, 25 W.L.R. 183, 4 W.W.R. 1345.

X. Liability on appeal bond.

(§ X—702)—Liability on appeal bond—What will release sureties.

If by a bond for costs in appeal, defendant is bound towards plaintiff in case only the judgment appealed from should be confirmed and the appellant should not then satisfy the condemnation, these conditions are not fulfilled and the judgment is not confirmed, if the appeal is quashed for want of jurisdiction.

Foster v. U.S. Fidelity & Guaranty Co., 14 Que. P.R. 425.

Stipulation as to liability upon affirmance of judgment—Appeal quashed—Discharge of surety.

A surety who signs an appeal bond whereby "he obliged himself that in case the appellant did not effectually prosecute the appeal and does not satisfy the condemnation and pay all the costs and damages adjudged, in case the judgment appealed from is confirmed by the said Court of King's Bench sitting in appeal, then the said surety will satisfy the said condemnation in capital interest and costs up to the sum of $1,200 on behalf of and as surety for the said defendant" is not responsible under such bond, if the judgment appealed from is not confirmed by the Court of Appeal, but the appeal quashed on motion for want of jurisdiction "ratione materiae." In such case the bond is absolutely null. A bond of suretyship must be constructed strictissimi juris, and its pro-

visions cannot be extended beyond its limits.

Foster v. U.S. Fidelity & Guaranty Co., 24 Que. K.B. 163.

XI. Leave to appeal.

(§ XI—720)—Appeal to Supreme Court of Canada—Special leave—Exceptional grounds.

The mere fact of a difference of opinion on a question of fact, among the members of the Court of Appeal for a province is not a sufficient reason for granting special leave to appeal to the Supreme Court of Canada. [Milligan v. Toronto R. Co., 18 O.L.R. 109, followed.]

Curtis v. McCabe, 50 D.L.R. 618, 12 S.L.R. 455, [1919] 3 W.W.R. 716.

To Privy Council—Stay of execution.

S. 10, Privy Council Appeals Act (R.S.O. 1914, c. 54), does not apply to appeals by special leave of the Judicial Committee, but the Supreme Court of Ontario has inherent power to stay proceedings in it, when such special leave has been given.

Mitchell v. Fidelity & Casualty Co. of New York, 34 D.L.R. 22, 38 O.L.R. 543. [See 37 O.L.R. 335.]

From order of Judge in Chambers—Conflicting decisions—Matter of importance.

The decision of a Judge in Chambers in an interlocutory matter is prima facie final; but, under Rule 507, leave to appeal may be granted: (1) where there are conflicting decisions by judges, and it is desirable that an appeal shall be allowed; (2) where there appears, to the judge applied to, to be good reason to doubt the correctness of the order, and the appeal involves matters of such importance that leave to appeal should be given. Under the first head, only the decisions of judges of the Supreme Court of Ontario, whether of the High Court Division or of the Appellate Division, are to be considered. [Re Rowland and McCallum, 22 O.L.R. 418, applied notwithstanding that the wording of Rule 507 is not quite the same as that of the former Rule—Con. Rule 1278.] In this case, where leave was sought to appeal from an order of a Judge in Chambers, setting aside an order of the Master in Chambers changing the place of trial, there were no conflicting decisions by judges of the Supreme Court of Ontario; and there was no good reason to doubt the correctness of the order of the judge; under the second head, the two prerequisites—reason to doubt the correctness of the order and the appeal involving matters of importance—must coexist.

Gage v. Reid, 39 O.L.R. 52. [See also 34 D.L.R. 46, 38 O.L.R. 514.]

Relief to contributories.

Leave to appeal should be granted at the instance of a person who is sought to be made liable as a contributory, where there is reasonable ground to suppose that the would-be appellant may obtain further relief, and a prolongation of the litigation cannot be regarded as vexatious. [See s. 101 of the Winding-up Act, R.S.C. 1906, c. 144.]

Re Sovereign Bank; Clark's Case, 27 D.L.R. 253, 35 O.L.R. 448.

From orders in examination for discovery.

Leave should not be granted to appeal to the Appellate Division from an order by a judge in Chambers requiring a witness to answer certain questions in an examination for discovery.

Augustine Automatic Rotary Engine Co. v. Saturday Night, 30 D.L.R. 613, 36 O.L.R. 551.

Privy Council—Finality of judgment—Damages not assessed.

When a plaintiff claims damages for more than the £500 necessary to allow an appeal under s. 2 of the Imperial order in council of July, 1911, and has been awarded such damages to be assessed by the County Court Judge, which judgment has been sustained by the Supreme Court of the Province, such judgment is final, although the damages have not actually been assessed and leave to appeal to the Privy Council will be granted the defendant upon application. [Re A Debtor, [1912] 3 K.B. 242, applied; Dunn v. Eaton, 9 D.L.R. 303, 47 Can. S.C.R. 205; Union Bank of Halifax v. Dickie, 41 Can. S.C.R. 13; Allan v. Pratt, 13 App. Cas. 780, distinguished.]

Burt v. Dominion Iron & Steel Co., 26 D.L.R. 154, 49 N.S.R. 465, granting leave to appeal from 25 D.L.R. 252, 49 N.S.R. 339, 19 Can. Ry. Cas. 187. [Appeal dismissed by Privy Council, 33 D.L.R. 425, [1917] A.C. 179, 20 Can. Ry. Cas. 134.]

Criminal case—Question of law.

On motion under Cr. Code, s. 1015, for leave to appeal from a conviction at a County Judge's Criminal Court the Court of Appeal is restricted in the determination of the legal question of jurisdiction to such facts as appear on the face of the proceedings in the lower court, as there is no appeal on questions of fact except under Crim. Code, ss. 1012 and 1021. [R. v. Carter (No. 2), 6 Can. Cr. Cas. 507; R. v. Spintlum, 15 D.L.R. 778, 22 Can. Cr. Cas. 483, 18 B.C.R. 606, and Mulvihill v. The King, 18 D.L.R. 217, 23 Can. Cr. Cas. 194, 49 Can. S.C.R. 587, specially referred to.]

R. v. Jun Goon, 28 D.L.R. 374, 25 Can. Cr. Cas. 415, 22 B.C.R. 381, 33 W.L.R. 761, 19 W.W.R. 24.

Leave to appeal to Appellate Division—Order of Judge in Chambers.

Re Emmons v. Dymond, 12 D.L.R. 853, 4 O.W.N. 1405, 24 O.W.R. 735.

Leave to appeal—From discretionary order.

Leave to appeal from the exercise of a judicial discretion as to striking out a jury

notice will not ordinarily be granted by the court.

Cornish v. Boles, 12 D.L.R. 245, 4 O.W.N. 1551.

TRANSFER OF CAUSES—LEAVE TO APPEAL TO PRIVY COUNCIL — PROCEEDING UNDER CONTROVERTED ELECTIONS ACT.

Leave to appeal to the Privy Council from an order of a court made in a proceeding on a petition under the Controverted Elections Act, R.S.M. 1902, c. 34, will be refused, since the proceeding is one to which the Royal prerogative to hear appeals does not extend. [Théberge v. Landry, 2 App. Cas. 102, 107; Valin v. Langlois, 5 App. Cas. 115; Cushing v. Dupuy, 5 App. Cas. 409; Kennedy v. Purcell, 4 Times L.R. 664; Moses v. Parker, [1896] A.C. 245, and Re Wi Matua, [1908] A.C. 448, followed.]

Re Gimli Provincial Election; Rejeski v. Taylor (No. 4), 14 D.L.R. 872, 26 W.L.R. 30, 5 W.W.R. 598.

LEAVE TO APPEAL — CONVICTION — SUFFICIENCY OF PARTICULARS.

R. v. Lemelin, 8 D.L.R. 1025, 22 Can. Cr. Cas. 109.

LEAVE TO APPEAL—CONVICTION FOR USURY —IMPORTANCE OF QUESTION.

R. v. Eaves, 8 D.L.R. 1026.

LEAVE TO APPEAL TO DIVISIONAL COURT FROM JUDGE IN CHAMBERS—CON. RULE 777 (3) (a), (c).—MOTION.

Dick & Sons v. Standard Underground Cable Co. (No. 1), 6 D.L.R. 855, 4 O.W.N. 111, 23 O.W.R. 96.

INADVERTENCE OF SOLICITOR—FAILURE TO GIVE NOTICE OF APPEAL.

Helson v. Morrisey, Fernie & Michel R. Co. (No. 2), 7 D.L.R. 822, 1 W.W.R. 992.

ORDER OF THE BOARD OF RAILWAY COMMISSIONERS—CANADA SUPREME COURT—FIXING COST OF INSTALLATION, MAINTENANCE AND PROTECTION OF CROSSING OF RAILWAY BY MUNICIPALLY OWNED STREET RAILWAY.

Edmonton Street R. Co. v. G.T.P.R. Co. (No. 2), 7 D.L.R. 888, 22 W.L.R. 45.

ORDER REFUSING TO QUASH CONVICTION.

R. v. Harran, 3 D.L.R. 885, 3 O.W.N. 1450, 22 O.W.R. 596.

LEAVE TO APPEAL TO DIVISIONAL COURT FROM ORDER OF JUDGE IN CHAMBERS—DISCOVERY—SLANDER.

Brown v. Orde, 3 D.L.R. 867, 3 O.W.N. 1312, 22 O.W.R. 331.

LEAVE TO APPEAL TO A DIVISIONAL COURT FROM ORDER OF JUDGE IN CHAMBERS WAS GRANTED.

Swaisland v. G.T.R. Co., 2 D.L.R. 898, 3 O.W.N. 1083.

LEAVE TO APPEAL—RECEIVING STOLEN MONEY—EVIDENCE—JUDGE'S CHARGE—APPLICATION FOR STATED CASE.

R. v. Chilman, 1 D.L.R. 914, 3 O.W.N. 777, 21 O.W.R. 369.

LEAVE TO APPEAL—WINDING UP OF COMPANY—SETTLING CONTRIBUTORIES.

The policy of the Winding-up Act, R.S.C., c. 144, as to appeals from orders settling the list of contributories of an insolvent company, is that after the first appeal to a judge in court from the decision of the referee, leave to appeal from the order of the judge to the Court of Appeal should not be granted unless the question to be raised upon the appeal involves future rights or is likely to affect other cases of a similar nature in the winding-up proceedings. [Re McGill Chair Co., 5 D.L.R. 73, 26 O.L.R. 254, 3 O.W.N. 1074, and Re Matthew Guy C. and A. Co., 4 D.L.R. 764, 26 O.L.R. 377, 3 O.W.N. 1233, specially referred to.]

Re McGill Chair Co. (Munro's case) & Re Matthew Guy Carriage & Automobile Co., 5 D.L.R. 393, 3 O.W.N. 1326, 22 O.W.R. 222.

LEAVE TO APPEAL — SUMMARY OR NON-SUMMARY PROCEEDING.

An appeal does not lie under art. 46 C.P. from an order denying a motion to have a summary proceeding declared to be a nonsummary one.

Nesbit v. Investment Trust Co., 5 D.L.R. 144.

GRANTING LEAVE TO APPEAL — DIVISIONAL COURT ORDER GRANTING NEW TRIAL—TERMS.

Where a party appeals to a Divisional Court from a judgment after trial with a jury, and contends that he is entitled to judgment upon the findings of the jury, but does not ask for a new trial, and the Divisional Court nevertheless grants a new trial without disposing of the motion for judgment, it is a proper case for granting leave to appeal to the Court of Appeal, but such leave should be upon the terms that the party appealing shall abandon his right to a new trial.

Dart v. Toronto R. Co., 3 D.L.R. 776, 3 O.W.N. 1202, 22 O.W.R. 102.

LEAVE TO APPEAL—JUDICIAL DISCRETION IN COURT BELOW.

Where the amount in question is less than the amount in respect of which an appeal can be taken without leave, an application for leave to appeal will not be granted merely to review the question of the proper exercise of a judicial discretion by the court below. Leave to appeal is properly refused where the amount in question is below the statutory sum and the decision sought to be appealed from introduces no new rule of decision.

Re Sturmer & Town of Beaverton, 2 D.L.R. 501, 25 O.L.R. 566, 21 O.W.R. 55.

GRANTING LEAVE—CERTIORARI AND PROHIBITION CASES—QUEBEC PRACTICE.

Leave to appeal to the Privy Council will not be granted by the Quebec Court of King's Bench from a decision of that court, in matters of certiorari or of prohibition unless it be shewn that future rights are

involved. [O'Farrell v. Brassard, Ramsay's Appeal Cases (Que.), 55, followed.]

Gosselin v. Bar of Montreal (No. 2), 2 D.L.R. 37, 13 Que. P.R. 308.

GRANTING LEAVE TO APPEAL.

Leave to appeal to the Court of Appeal will not be granted the liquidator of a company under ss. 101 (e) and 104 of the Winding-up Act, from the decision of the trial court that the liquidator was not a creditor and as such entitled to the benefits of the Bills of Sale and Chattel Mortgage Act, where, if the judgment should be reversed, he could not prevail in the action unless he could successfully contend, as he must, in order to succeed that the bills of sale under which the opposing party claimed, did not satisfy the requirements of such act, and no case for leave to appeal on that branch of the case was made out. Leave to appeal to the Court of Appeal on the ground that the question raised by the judgment of the trial court is of great public importance, will not be granted the liquidator of a company under ss. 101 (e) and 104 of the Winding-up Act, R.S.C. 1906, c. 144, where the question involved is not of a common-law or equitable right, but simply of the interpretation of a statute, and where such question is not one of frequent recurrence.

Re Canadian Shipbuilding Co. (No. 2), 7 D.L.R. 304, 4 O.W.N. 157, 23 O.W.R. 149.

ORDERS OF DISTRICT COURT.

Where no special leave has been granted an order made by a District Court Judge, as persona designata under the Creditors' Relief Act, R.S.S. c. 63, is not subject to appeal.

Royal Bank of Canada v. Lee & Girard, 23 D.L.R. 216, 30 W.L.R. 577. [Affirmed, 23 D.L.R. 219, 8 S.L.R. 17.]

TO PRIVY COUNCIL—LEAVE TO—IMPORTANT QUESTIONS—WORKMEN'S COMPENSATION —COURSE OF EMPLOYMENT.

[Leave to appeal to Privy Council from Doyle v. Moirs, 22 D.L.R. 767, 48 N.S.R. 473, refused.]

Doyle v. Moirs, 24 D.L.R. 899, 49 N.S.R. 242.

EXTENSION OF TIME—TRESPASS TO LAND—CONSTRUCTION OF RAILWAY—MEASURE OF COMPENSATION.

Holmested v. C.N.R. Co., 24 D.L.R. 894. [See 20 D.L.R. 577, 7 S.L.R. 200.]

JUDGMENT APPEALED FROM RIGHT—APPEAL HOPELESS — COURT WILL NOT GRANT LEAVE.

Leave to appeal will not be granted, if the judgment appealed from is so clearly right that an appeal would be hopeless.

Schaefer v. The King, 45 D.L.R. 492, 58 Can. S.C.R. 43. [See 31 Can. Cr. Cas. 22, 27 Que. K.B. 233.]

LEAVE TO APPEAL—ACTION ARISING IN DISTRICT COURT — APPEAL TO SUPREME COURT OF CANADA—EXTENSION OF TIME —SUPREME COURT ACT, R.S.C. 1906, c. 139, ss. 37, 71.

Leave to appeal to the Supreme Court of Canada in an action which does not originate in a Superior Court can only be granted by the Supreme Court of Canada or a judge thereof; and no extension of the time for bringing on such appeal can be granted by the Saskatchewan Court of Appeal, R.S.C. 1906, c. 139, ss. 37, 71. [Hillman v. Imperial Elevator & Lumber Co., 29 D.L.R. 372, 53 Can. S.C.R. 15, referred to.]

Jackson v. C.P.R. Co., 50 D.L.R. 279, [1920] 1 W.W.R. 279.

LEAVE TO APPEAL—WINDING-UP ACT, R.S.C. 1906, c. 144, s. 106.

If a proposed appeal to the Supreme Court of Canada raises no question of public importance, and if the hearing would not settle any important question of law or dispose of any matter of public interest, leave will not be granted under the Winding-up Act, although the amount in controversy exceeds $2,000.

Riley v. Curtis's & Harvey & Apedaile, 50 D.L.R. 281, 59 Can. S.C.R. 206.

WORKMEN'S COMPENSATION ACT — NEW EVIDENCE.

An application for leave to appeal from the award of an arbitrator under the Workmen's Compensation Act (1908, c. 12, Alta.) will not be granted, where the affidavits filed shew that it is in reality an application for a new trial, so that further evidence may be adduced and not an appeal on a matter of law.

Ripka v. Georgetown Collieries (Alta.), 39 D.L.R. 593, [1918] 1 W.W.R. 757.

SPECIAL ACT—JURISDICTION TO GRANT LEAVE.

S. 48 (1) of the Ontario Railway and Municipal Board Act (R.S.O. 1914, c. 186), which provides that an appeal shall lie from the Board to a Divisional Court upon a question of jurisdiction or upon any question of law, applies to the jurisdiction given to the Board by the Ontario Act, 1917, 7 Geo. V. c. 92, s. 4, by which power is given to the City of Toronto to expropriate part of the Toronto and York Radial Railway, and although under the later Act no right of appeal is expressly given to the county of York, the Appellate Court has jurisdiction to grant leave.

Re City of Toronto & Toronto & York Radial R. Co. & County of York, 43 D.L.R. 49, 42 O.L.R. 545, 23 Can. Ry. Cas. 218.

TO PRIVY COUNCIL—AMOUNT IN DISPUTE —INDEMNITY—ACTION.

Under art. 1056, C.C. (Que.) only one action can be brought on behalf of those who are entitled to an indemnity. Permission will be granted to appeal to the Privy Council, if the total amount of the indem-

nity granted is sufficient to allow the appeal.

Brown Corp. v. Bouchard, 29 Que. P.R. 209.

PRIVY COUNCIL—LEAVE—PERSONAL INJURY ACTION.

Leave to appeal to the Judicial Committee of the Privy Council from the dismissal by the Court of Appeal of an appeal from the dismissal of an action for $1,700 damages for personal injuries, refused.

Trainshi v. C.P.R. Co. (B.C.), [1918] 3 W.W.R. 281, 25 B.C.R. 536. [See [1918] 2 W.W.R. 1034, 25 B.C.R. 497.]

CRIMINAL LAW—NEW TRIAL—EVIDENCE—TREASON—SALE OF TICKETS—ENEMY.

The Court of King's Bench (in appeal) cannot give leave to appeal upon an application for a new trial because the verdict of guilty given against the appellant was contrary to the weight of evidence in a criminal action for treason, the accused having undergone his trial before a jury under an accusation of having sold transportation tickets to some Austrian subjects to disembark in a neutral port, but with the intention that they should go from there to Austria, which was then at war with England.

Schaefer v. The King, 27 Que. K.B. 233. [Leave to appeal to Canada Supreme Court refused. See 45 D.L.R. 492, 58 Can. S.C.R. 43 also 31 Can. Cr. Cas. 22.]

LEAVE TO APPEAL—GRANTING STATED CASE TO CONSIDER MERITS—SHOOTING.

The King v. Pettipas (No. 1), 17 Can. Cr. Cas. 448.

LEAVE TO APPEAL FROM CONVICTION—CR. CODE (1906) S. 1016.

In granting leave to appeal from a conviction upon an indictment, the Court of Appeal may settle the form of the questions upon which it directs the trial court to state a case.

The King v. Tansley, 19 Can. Cr. Cas. 42, 3 O.W.N. 411, 20 O.W.R. 698.

SPECIAL LEAVE—SUPREME COURT ACT, R.S.C. (1906), c. 139, s. 37 (c)—INTERESTS INVOLVED—ALBERTA LOCAL IMPROVEMENT ACT.

Johnston v. McDougall (No. 2), 17 Can. Cr. Cas. 398.

INVALID CONVICTION—PUNISHMENT.

Although a conviction has improperly been made against the same defendant for both stealing and receiving, and had a case been reserved the Court of Appeal would have quashed the conviction on the count for receiving and supported the conviction on the count for theft, yet it need not grant leave to appeal and direct a case to be stated, if no additional punishment was imposed by reason of the conviction for receiving.

R. v. Carmichael, 26 Can. Cr. Cas. 443, 22 B.C.R. 375.

WINDING-UP ACT—LEAVE TO APPEAL.

Re Ontario Sugar Co. & McKinnon, 44 Can. S.C.R. 659.

SPECIAL LEAVE—"JUDICIAL PROCEEDING"—DISCRETIONARY ORDER—MATTER OF PUBLIC INTEREST — ALBERTA LIQUOR LICENSE ORDINANCE.

Finseth v. Ryley Hotel Co., 43 Can. S.C.R. 646.

No leave to appeal is granted from a motion to quash a by-law passed by a County Council establishing a continuation school in a high school district which never existed in fact.

Re Henderson & the Tp. of West Nissouri, 46 Can. S.C.R. 627, affirming 24 O.L.R. 517 and 23 O.L.R. 21.

IN MATTERS OF PRACTICE.

Leave to appeal to the Appellate Division should not be granted except in cases of real importance and involving some substantial right—mere matters of practice should (except in extraordinary cases) be disposed of finally in the High Court Division.

Henderson v. Henderson, 38 O.L.R. 97.

LEAVE TO APPEAL—CONFLICTING DECISIONS.

Howland and McCallum, 22 O.L.R. 418.

LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—RULE 507—EXAMINATION OF WITNESS ON PENDING MOTION—EX PARTE ORDER FOR—RULES 227, 346.

Halero v. Cloughley, 12 O.W.N. 307, 311.

MOTION FOR LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—PARTIES—REVIVOR—STATUS OF PLAINTIFF—PRESERVATION OF RIGHTS OF DEFENDANTS—REFUSAL OF LEAVE.

Baker v. Order of Canadian Home Circles, 12 O.W.N. 40.

INTERLOCUTORY ORDER—STAY OF ACTION AS "INCIDENTAL"—ORDER DURING VACATION—PREJUDICE.

Where an appeal is taken from an interlocutory order a stay of the whole action may, in certain cases, be a matter "incidental" to the appeal, within the meaning of s. 10 of the Court of Appeal Act, R.S.B.C. 1911, c. 51. The power given by s. 10 of the Court of Appeal Act to make an order during vacation to prevent prejudice is not restricted to acts which may be committed during vacation.

E. & N. R. Co. v. Dunlap (B.C.), [1918] 3 W.W.R. 25. [See 41 D.L.R. 737.]

LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS STRIKING OUT JURY NOTICE—RULE 507—RULE 398—ACTION ON POLICY OF FIRE INSURANCE—DEFENCE OF "ARSON"—OTHER DEFENCES—INTRICATE INVESTIGATION—CASE PROPER FOR TRIAL WITHOUT JURY—LEAVE REFUSED.

Goderich Manufacturing Co. v. St. Paul Fire & Marine Ins. Co., 13 O.W.N. 443.

LEAVE TO APPEAL FROM ORDERS OF JUDGE IN CHAMBERS—SECURITY FOR COSTS—RULE 507 (3) (B).

Smith v. Tp. of Tisdale, 14 O.W.N. 111. [See 15 O.W.N. 134.]

LEAVE TO APPEAL FROM JUDGMENT OF COUNTY COURT JUDGE IN MATTER ARISING UNDER DITCHES AND WATERCOURSES ACT, R.S.O. 1914, C. 260—DRAINAGE REFEREE—WHEN LEAVE SHOULD BE GRANTED—QUESTION OF LAW—AMENDING ACT, 7 GEO. V. C. 56, S. 5.

Re Edwards and Wynne, 14 O.W.N. 327.

LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—RULE 507—ORDER STRIKING OUT JURY NOTICE—DISCRETION—RULE 398—MATERIALS.

Hutchinson v. Toronto, 15 O.W.N. 43.

MOTION FOR LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS AS TO COSTS—MOTION MADE TO ANOTHER JUDGE—JUDICATURE ACT, R.S.O. 1914, C. 56, SS. 24, 74.

Young v. Spofford, 11 O.W.N. 253. [See also 32 D.L.R. 262, 37 O.L.R. 663.]

SUMMARY JUDGMENT—MOTION FOR—AFFIDAVIT IN ANSWER SETTING UP ARGUABLE DEFENCE—LEAVE TO DEFEND—MOTION FOR LEAVE TO APPEAL—PLAINTIFF DEPRIVED OF SECURITY OF EXECUTION—RULE 507 (B).

Martens v. Stewart, 17 O.W.N. 18.

COURT OF APPEAL—LEAVE TO APPEAL FROM TRIAL JUDGE—AMOUNT IN CONTROVERSY.

Williamson v. Bawden Machine & Tool Co., 2 O.W.N. 870, 18 O.W.R. 637.

LEAVE TO APPEAL—CONVICTION ON INDICTMENT—ORDER SETTLING FORM OF QUESTIONS TO BE SENT UP.

The King v. Tansley, 3 O.W.N. 411, 20 O.W.R. 698.

LEAVE TO APPEAL—FROM TRIAL JUDGE'S ORDER IN WINDING-UP PROCEEDING—DOMINION WINDING-UP ACT, SS. 101, 104.

Re Monarch Bank, 2 O.W.N. 738, 18 O.W.R. 743.

LEAVE TO APPEAL—SECURITY FOR COSTS—CONDITIONS.

Brown v. Clendennan, 2 O.W.N. 1013, 19 O.W.R. 19.

LEAVE TO APPEAL TO COURT OF APPEAL—ORDER OF ONTARIO R. AND M. BOARD—QUESTIONS OF LAW.

Re City of Toronto & Toronto & York Radial R. Co., 3 O.W.N. 342, 20 O.W.R. 568.

LEAVE TO APPEAL TO COURT OF APPEAL—AMENDMENT OF JUDGMENT BELOW ON QUESTION OF INTEREST.

Bayer v. Clarkson, 2 O.W.N. 769, 18 O.W.R. 298.

MOTION FOR LEAVE TO APPEAL—QUESTIONS OF FACT—NO SUBSTANTIAL QUESTION OF LAW INVOLVED.

Martin v. Beck Manufacturing Co., 2 O.W.N. 901, 18 O.W.R. 904.

TO PRIVY COUNCIL.

Beardmore v. Toronto, 2 O.W.N. 479.

LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—RULE 507—EXTENSION OF TIME FOR APPEALING—LEAVE TO SET CASE DOWN—FORUM.

Morrison v. Morrison, 11 O.W.N. 421.

LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS — RULE 507 — IMPORTANT QUESTION OF PLEADING—LIBEL—STATEMENT OF DEFENCE—FACTS IN MITIGATION OF DAMAGES—RULE 158—OPINION OF JUDGE IN ANOTHER PROCEEDING.

Redmond v. Stacey, 13 O.W.N. 206. [See also 13 O.W.N. 79, 179.]

ORDER POSTPONING TRIAL—ORDER OF JUDGE IN CHAMBERS—RULE 507.

Kennedy v. Suydam Realty Co., 9 O.W.N. 353, 36 O.L.R. 512.

MOTION FOR LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—RULE 507—PARTICULARS—STATEMENT OF CLAIM—WRONGFUL ACTS OF DEFENDANTS.

Harvey v. Toronto, 10 O.W.N. 260, 289.

MOTION FOR LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—QUESTIONS OF PRACTICE—CHANGE OF VENUE—LEAVE REFUSED.

Prestolite Co. v. London Engine Supplies Co., 9 O.W.N. 387.

LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—RULE 507—LIMITATION OF DISCOVERY.

Jarvis v. Keith, 9 O.W.N. 138, 493.

LEAVE TO APPEAL AFTER EXPIRY OF TIME—SUPREME COURT ACT, R.S.C. 1906, C. 139, SS. 69, 71—VACATION—RULES 9, 119—EXCUSE FOR DELAY—SPECIAL CIRCUMSTANCES.

Loveland v. Sale, 11 O.W.N. 136, 10 O.W.N. 238, 8 O.W.N. 576.

EXTENSION OF TIME FOR APPEALING FROM TRIAL JUDGE TO APELLATE DIVISION—SPECIAL CIRCUMSTANCES—RULE 176—INTENTION OF OFFICER OF APPELLANT COMPANY TO BRING QUESTION OF APPEALING BEFORE DIRECTORS—DELAY—EXCUSE FOR.

Canadian Heating & Ventilating Co. v. T. Eaton Co. & Guelph Stove Co., 41 O.L.R. 150.

LEAVE TO APPEAL TO APPELLATE DIVISION FROM ORDER OF JUDGE IN CHAMBERS—RULE 507—REFUSAL OF LEAVE—PARTICULARS OF STATEMENT OF CLAIM—PRACTICE.

Pierce v. G.T.R. Co., 6 O.W.N. 128, 26 O.W.R. 116.

GRANTING LEAVE TO APPEAL—AWARD UNDER SCHOOL SITES ACT—APPEAL TO COUNTY COURT JUDGE—MOTION FOR LEAVE TO APPEAL TO APPELLATE DIVISION—R.S.O. 1914, C. 277, S. 20 (3)—REASONABLE GROUND—DISCRETION—COSTS.

Re Jacobs & Toronto Board of Education, 7 O.W.N. 452.

LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS — DEBATABLE QUESTION—PLEADING—STATEMENT OF CLAIM—ADDITION OF CAUSE OF ACTION NOT ENDORSED ON WRIT OF SUMMONS—RULE 109—LEAVE TO JOIN TWO DISTINCT CLAIMS—PARTIES—RULES 67, 68, 73.

Schmidt v. Schmidt, 7 O.W.N. 392.

LEAVE TO APPEAL FROM ORDER OF JUDGE IN FROM ORDER OF JUDGE IN CHAMBERS—SERVICE OF PROCESS OUT OF THE JURISDICTION—CONFLICT OF AUTHORITIES.

Leonard v. Cushing, 5 O.W.N. 692, 25 O.W.R. 631.

LEAVE TO APPEAL TO APPELLATE DIVISION FROM ORDER OF JUDGE IN CHAMBERS—RULE 507—PLEADING—VALIDITY OF MARRIAGE.

Langworthy v. McVicar, 5 O.W.N. 767, 25 O.W.R. 699.

LEAVE TO APPEAL TO APPELLATE DIVISION FROM ORDER OF JUDGE IN CHAMBERS—DISCOVERY—AFFIDAVIT ON PRODUCTION.

St. Clair v. Stiar, 5 O.W.N. 28, 25 O.W.R. 40.

LEAVE TO APPEAL TO APPELLATE DIVISION FROM ORDER OF JUDGE IN CHAMBERS—PARTIES.

Till v. Town of Oakville; Harker v. Town of Oakville, 5 O.W.N. 601, 25 O.W.R. 520.

PRINCIPAL AND SURETY—COMPROMISE OF ACTION—DOUBLE RANKING—APPEAL UNDER R.S.C. c. 144, s. 101 (c).

Re Stratford, etc., Fuel Co., 4 O.W.N. 497, 23 O.W.R. 690.

STAY OF PROCEEDINGS—PRIOR JUDGMENT AGAINST COMPANY—RES JUDICATA—ESTOPPEL—NEGLIGENCE.

Campbell v. Verral; Gibson v. Verral, 4 O.W.N. 355, 23 O.W.R. 973.

MOTION FOR LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS TO APPELLATE DIVISION.

Duncan v. Cooper, 8 O.W.N. 519.

MOTION FOR LEAVE TO APPEAL FROM ORDER OF JUDGE IN CHAMBERS—ADJOURNMENT FOR HEARING BEFORE ANOTHER JUDGE.

Hawes v. Hawes, 8 O.W.N. 566.

ORDER OF JUDGE IN CHAMBERS—LEAVE TO APPEAL FROM r. 507, CL. 3 (B)—PATENT FOR INVENTION—VALIDITY—PLEADING—DEFENCE AND COUNTERCLAIM—JURISDICTION OF SUPREME COURT OF ONTARIO—PATENT ACT, R.S.C. 1906, c. 61, ss. 34, 35, 38, 45—JUDICATURE ACT, R.S.O. 1914, c. 56, s. 3.

Berliner Gramophone Co. v. Pollock, 9 O.W.N. 169.

ORDER STAYING PROCEEDINGS IN ACTIONS BY LIQUIDATOR AGAINST CONTRIBUTORY.

Re London Fence Co. (No. 2), 21 Man. L.R. 100, 17 W.L.R. 650.

GRANTING LEAVE TO APPEAL TO PRIVY COUNCIL—B.C. COURT OF APPEAL—VACATION SITTING, WHEN REFUSABLE.

Although the courts of Canada are not bound to hold special sittings for the hearing of motions for leave to appeal to the Privy Council, they may do so merely as a matter of judicial comity, and their power to hold such sittings, in the Province of British Columbia, whenever they deem it expedient, is, therefore, not affected by s. 14 of the Court of Appeal Act since that only applies to the hearing of appeals. A special sittings for the hearing of a motion for leave to appeal to the Privy Council will not be granted in vacation in the absence of urgency or special circumstances; the rule that the court must grant leave "as of right" where the amount in dispute is £500 or upwards only applies when the court is sitting in term.

Re Heinze, 20 B.C.R. 149, 29 W.L.R. 438, 7 W.W.R. 78.

WINDING-UP ACT—FUTURE RIGHTS.

The words "future rights" in subs. (a) of s. 101 of the Winding-up Act apply only to rights that arise in the future and do not include present existing rights and may be the subject of determination in the action at a later date. In the circumstance the judge has no power to grant leave to appeal under the section.

Hill v. Canadian Home Invest. Co., 22 B.C.R. 501.

APPEAL TO SUPREME COURT OF CANADA—LEAVE TO APPEAL—SPECIAL CIRCUMSTANCES—DISCOVERY OF NEW EVIDENCE.

Fisher v. Jukes, 20 Man. L.R. 331, 17 W.L.R. 43.

LEAVE TO APPEAL—ORDER, WHETHER INTERLOCUTORY OR FINAL—AFFIDAVIT OF DISBURSEMENTS—CROSS-EXAMINATION.

Herman v. McConnell, 3 A.L.R. 136.

LEAVE TO LIQUIDATOR UNDER WINDING-UP ACT—TIME.

Where an action by a creditor against a company in liquidation to have his claim declared privileged, was dismissed by the Superior Court, an appeal taken by the liquidator falls under the jurisdiction of the Winding-up Act, R.S.C. 1906, c. 144, arts. 22, 104, and cannot be taken without the leave of the court, and must be inscribed within the delay fixed by law. An appeal taken without observing these formalities may be rejected on motion.

Stinson Reeb Builders' Supply Co. v. Eastern Trust Co., 24 Que. K.B. 348.

DISCRETION—TRIFLING AND UNIMPORTANT.

The Court of King's Bench will not grant leave to appeal from a judgment of the Superior Court involving a trifling amount and a question of little importance, especially in a matter left to the discretion of the court of first instance.

Canada Cement Co. v. McNally, 26 Que. K.B. 314.

INTERLOCUTORY JUDGMENT.

A judge of the Court of King's Bench (appeal aside) cannot grant leave to appeal to the Supreme Court of Canada from an interlocutory judgment of the Superior Court, confirmed by the Court of King's Bench.

Bourassa v. Bourassa, 26 Que. K.B. 524.

WINDING-UP ACT—DISMISSAL OF HYPOTHECARY ACTION.

A bank in liquidation may inscribe in review from a judgment dismissing its hypothecary action. A special authority is necessary to enable the liquidator of an

insolvent bank to inscribe in review from a judgment. [See Standard Mutual Fire Ins. Co. v. Dominion Fire Ins. Co., 11 Que. P.R. 386.]

Bank of St. Jean v. Bienvenu, 17 Que. P.R. 443.

It is not a valid ground of challenge to the array that the venire issued in the name of "George, by the grace of God, King," etc., instead of "George the Fifth, by the grace of God, King," etc. (2) That it is not a valid ground of challenge to the array, for misconduct on the part of the sheriff, to allege as such misconduct that the sheriff had summoned as a petit juror a person whose name appeared as a juror both upon the list of grand jurors and the list of petit jurors for the same assizes, that two other names on the list of petit jurors were names of nonexistent persons, and that instead of the required number of jurors—forty—the sheriff had thus summoned only thirty-seven. (3) That leave to appeal by stated case, upon a ground of wrongful communication with two of the sworn jurors by third persons, would not be granted where it appeared from the affidavits that all that was said in the case of one of the jurors were the words, "Je sais que je ne peux pas te parler, mais je peux bien te donner la main," uttered by the third person while shaking hands with the juror, that the communication to the other juror was by a person who said to the juror that he had come to the town to pay him a small debt, but would have to pay it later, that both statements were made while the sitting of the court was being adjourned in the course of the examination of the witnesses, and that in neither instance did the third person speak of the cause on trial or have any concern with it. (4) That leave to appeal by stated case upon the ground of misconduct of jurors would not be granted, when it merely appeared from the affidavits that a sworn guardian had found a bottle partly filled with gin on a couch on which a sworn juror had slept and an empty bottle under the couch of another juror in the room in which the jurors had been kept overnight and that a juror afterwards asked the guardian for the partly filled bottle saying that he was ill. (5) That leave to appeal by stated case on the ground that an important witness for the defence could not be examined at the trial would not be granted, where it appeared from the entries and affidavits that the witness had given testimony at the preliminary inquiry, that before the trial an order had been made, on the prisoner's application, that subpœnas should issue "in forma pauperis" to the witnesses for the defence, that a constable had attempted to summon the absent witness at his former place of abode, but could not find him, that there was credible information that the witness was absent in the United States, that the trial having been proceeded with, the absent witness was called for the defence, but made default, that a postponement was not applied for and that upon application of counsel for the prisoner the deposition of the absent witness, taken at the preliminary inquiry, was read to the court and the jury.

The King v. Plourde, 18 Rev. de Jur. 372.

A judgment deciding that an action has been rightly taken under summary procedure is not one from which leave to appeal should be granted.

Nesbitt v. The Investment Trust Co., 13 Que. P.R. 285.

PUBLIC UTILITIES COMMISSION — APPEAL THEREFROM—LEAVE REFUSED—DECISION NOT "FINAL"—PURPOSE TO TEST CONSTITUTION VALIDITY OF ACT — APPEAL NOT PROPER PROCEEDING.

Application for leave to appeal against an order made by the public utilities commissioner was refused because the order desired to be appealed from was not final; and because the main purpose of the appeal was to test the constitutional validity of the Public Utilities Act or the part of it relating to the appointment of the commissioner, and leave for this purpose should not be given in view of the great number of decisions by the commission and as the proper proceeding for such purpose is by quo warranto information [Re Toronto R. Co. & City of Toronto, 46 D.L.R. 547, referred to]; also the power of the commissioner to make the order complained of could be more properly dealt with in an action now pending.

In re The Public Utilities Act, Winnipeg Electric R. Co.'s Case, [1919] 3 W.W.R. 737.

TO PRIVY COUNCIL FROM ALBERTA, S.C.

Rules governing appeals to Privy Council, dated 10th January, 1910, 2 A.L.R. pp. 571-578.

SPECIAL LEAVE — APPEAL FROM SUPREME COURT OF CANADA—WHEN GRANTED.

A question of the exercise of the Royal prerogative was discussed in this petition for special leave to appeal from a judgment of the Supreme Court of Canada in litigation respecting the construction of a contract for the purchase of land. An action was brought by the petitioner in the Supreme Court of Alberta for specific performance, and the judge decided in his favour (2 W.W.R. 677). The respondents appealed from that decision to the Supreme Court en banc, which dismissed the appeal (4 W.W.R. 354). An appeal was then preferred by the respondents to the Supreme Court of Canada, and that tribunal reversed the judgment of the Alberta courts and dismissed the petitioner's action (6 W.W.R. 27, Davies and Anglin, JJ., dissenting). The Lord Chancellor delivering the judgment of the Privy Council, said that the question in the case was one of the construction of a contract. The Dominion of

Canada had made the Supreme Court of Canada the final Court of Appeal. The Act constituting that court could not be read without seeing that those who framed it intended that in this class of case there should be no going beyond that court—in fact, that there should be going beyond that court in any case. The prerogative, however, was not taken away, and it was only on the footing of the continued existence of the prerogative that there was power to question the Supreme Court. With reference to a case cited, in which a petition for special leave to appeal from the Supreme Court had been granted by the Board, the Lord Chancellor thought that such leave was granted when the practice of the Board was more lax than it should have been. In respect of the divergence of judicial opinion in the courts below, the Lord Chancellor said that that was only an element which was to be taken into account, and intimated that the Board was of opinion that this was not the class of case in which the prerogative ought to be exercised. The petition was accordingly dismissed.

Carey v. Roots, 6 W.W.R. 1060.

(§ XI—721)—Grounds for refusing reserved case.

Where a judge refuses to reserve a case it would be expedient that he give his reasons for refusal, and in doing so certify the facts sufficiently to shew the court whether the question of law has a foundation in fact. In default of the trial judge doing this, a proper course for the Court of Appeal to take on a motion for leave to appeal would be to request him to do so for the purpose of informing the Court of Appeal sufficiently to enable it to decide whether or not the trial judge should be directed to reserve the question.

R. v. Murray & Mahoney, 33 D.L.R. 702, 27 Can. Cr. Cas. 247, 10 A.L.R. 275, [1917] 1 W.W.R. 404. [See also R. v. Murray (No. 1), 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319. For later decision, see 11 A. L.R. 502, 38 D.L.R. 395, 28 Can. Cr. Cas. 247, [1917] 2 W.W.R. 805.]

Leave to appeal—Criminal case—Stated case not to be dispensed with.

On giving leave to appeal under Cr. Code (1906), s. 1015, following the refusal of the trial judge to reserve a case, the Court of Criminal Appeal should not, even by consent, hear and deal with the matter as though a case had been stated on the question on which the leave is given. S. 1016 of the Criminal Code is mandatory in directing that a case "shall be stated." [R. v. Armstrong, 12 Can. Cr. Cas. 544, 15 O.L.R. 47, dissented from.]

R. v. Angelo, 16 D.L.R. 126, 19 B.C.R. 261, 22 Can. Cr. Cas. 304, 27 W.L.R. 108, 5 W.W.R. 1303.

Granting leave to appeal—Instructing jury on malice—Criminal case.

Leave to appeal will be granted the accused where the general effect of the instruction to the jury in a murder charge is in the opinion of the Appellate Court, to deal with the question of malice as if it were sufficiently proved by shewing ill-feeling on the part of the accused towards the deceased, where the circumstances were such as to make such definition prejudicial to the accused by reason of the meagreness of any evidence of unlawful intent in respect of the crime charged as distinguished from mere ill-will. Leave to appeal should be granted the accused on a conviction for murder if the Appellate Court thinks that the instruction given to the jury as to the possible mitigation of the offence by provocation was, in effect, limited so as to include acts done by the accused in carrying out a grudge. Leave to appeal will be granted the accused in a homicide trial involving the responsibility for the accidental discharge of a gun in the hands of the deceased if the Appellate Court considers that the jury has not been properly instructed on the question of the causal connection between the acts of the accused and the discharge of the gun. [The conviction was subsequently affirmed on an equal division of the court differently constituted. R. v. Graves (No. 3), 9 D.L.R. 175.]

R. v. Graves (No. 2), 9 D.L.R. 30, 46 N.S.R. 305, 20 Can. Cr. Cas. 384, 12 E.L.R. 1.

Summary trial—Reserved case.

A city police magistrate summarily trying a charge of keeping a disorderly house without the consent of the accused (Code, ss. 774, 776) cannot grant a reserved case under ss. 1013 and 1014 in respect of the conviction nor can the Court of Appeal grant leave to appeal and direct a case to be stated under s. 1015.

R. v. Davidson (No. 2), 35 D.L.R. 94, 28 Can. Cr. Cas. 56, 11 A.L.R. 491, [1917] 2 W.W.R. 718. [See also 35 D.L.R. 82, 28 Can. Cr. Cas. 44, 11 A.L.R. 9.]

Reserved case.

Where a reserved case is applied for on several questions of law and granted only as to some of them by the Trial Judge, the Court of Appeal, on granting leave to appeal on one of the questions which the trial judge refused to reserve, will ordinarily direct that the reserved case shall stand over to be considered at the same time so that the entire appeal may be disposed of in one judgment. [Compare R. v. Bela Singh, 27 Can. Cr. Cas. 40, 22 B.C.R. 321.]

Giroux v. The King, 34 D.L.R. 642, 27 Can. Cr. Cas. 366, 25 Que. K.B. 505. [See also 26 Que. K.B. 323, 39 D.L.R. 190, 56 Can. S.C.R. 63.]

Interlocutory order in Chambers — Right of—Dominion Winding-up Act, R.S.C. (1906), c. 144, ss. 101, 104, 110 —Con. Rule 1278.

Re McLean, Stinson, Brodie, 2 O.W.N. 435, 18 O.W.R. 163.

APPEAL TO PRIVY COUNCIL—SUMMARY CONVICTION UNDER TEMPERANCE ACT.

The court which has affirmed a summary conviction under the Nova Scotia Temperance Act in certiorari proceedings will decline leave to appeal to the Privy Council from that decision to raise the question whether the Act was not more extensive in its scope than the Legislature had power to enact, if the circumstances in the case in question indicated no probability that the liquor found to have been illegally kept for sale was brought in from another province to be sold outside of Nova Scotia so as to make the question of ultra vires applicable to the facts. [R. v. Hoare, 24 Can. Cr. Cas. 279, considered.]

R. v. Hoare (No. 2), 25 Can. Cr. Cas. 87, 49 N.S.R. 287.

CRIMINAL CASE—RESERVED CASE.

On a motion to the Appellate Court for leave to appeal from a conviction where the trial judge refused to reserve a case, the Appellate Court will not consider possible objections not included in the points on which the accused moved below for a reserved case.

R. v. Jennings; R. v. Hamilton (No. 2), (Alta.), 28 Can. Cr. Cas. 164.

APPEARANCE.

Judgment for default of appearance, see Judgment. *

(§ 1—1)—BY ATTORNEY.

Though in law a mandatory has the right to renounce his mandate, the court has nevertheless the right to dismiss a motion by the attorney of record praying "acte" of his declaration of withdrawal from the cause at a time when the action is about to be tried by a jury.

Van-Felson v. Bourdeau, 18 Rev. de Jur. 216.

(§ 1—2)—APPLICATION BY DEFENDANT IN CAUSE BEFORE ENTRY OF APPEARANCE.

Until a defendant has entered his appearance, he is not entitled to take any step in the action other than to move to set aside for irregularity the process with which he was served or the service thereof.

Sanitary Water Still Co. v. Tripure Water Co., 13 D.L.R. 354, 24 W.L.R. 866, 4 W.W.R. 1122.

MORTGAGE FORECLOSURE—APPLICATION FOR RELIEF.

An appearance to the writ of summons is not a prerequisite to the defendant's right to apply for relief against the confirmation of a mortgage sale.

Quebec Bank v. Milding, 33 D.L.R. 694, 10 S.L.R. 227, [1917] 2 W.W.R. 390.

SPECIALLY ENDORSED WRIT FOR LIQUIDATED DEMAND—AFFIDAVIT.

A defendant on entering his appearance to a specially endorsed writ for a liquidated demand must do more than make affidavit that he has a good defence on the merits; he must shew facts and circumstances on which he relies as a defence so that the court may judge whether they afford an answer; so where the defendant, suing for the price of goods sets up a deficiency in quality and quantity, his affidavit should state what reduction he claims on that account.

Carter v. Hicks, 21 D.L.R. 831, 33 O.L.R. 149.

DECLARATIONS ACCOMPANYING—QUE. C.P. 161.

The attorney for a party may add to his appearance any declaration he chooses to make, provided he does not pray for anything.

Lachance v. Leboeuf, 15 Que. P.R. 423.

(§ 1—3)—SPECIALLY ENDORSED WRIT—AFFIDAVIT—DEFENCE "UPON MERITS."

The affidavit necessary with defendant's appearance to a specially endorsed writ under Ont. C.R. 1913, r. 56, must state that he has a good defence "upon the merits;" it is not sufficient that defendant swears he has a good defence to the action. [Robinson v. Morris, 15 O.L.R. 649, followed.]

Leushner v. Linden, 21 D.L.R. 208, 33 O.L.R. 153, 7 O.W.R. 758.

WAIVER OF DEFECTS IN PROCESS.

Defects in a summons in a summary conviction matter are cured by a personal appearance by the defendant and going to trial on the merits. [See also R. v. Doherty, 3 Can. Cr. Cas. 505, 32 N.S.R. 235; Ex parte Gilberson, 4 Can. Cr. Cas. 537, 34 N.B.R. 538; McGuiness v. Dafoe, 3 Can. Cr. Cas. 139.]

R. v. Holyoke; Ex parte McIntyre, 13 D.L.R. 225, 21 Can. Cr. Cas. 422, 42 N.B.R. 135, 13 E.L.R. 210.

(§ 1—5)—CONDITIONAL APPEARANCE.

Where, in an action on an insurance policy, the defendant moves to set aside an order allowing service out of the jurisdiction, and it appears doubtful whether the contract was made within or without the territorial jurisdiction of the court or whether the alleged breach took place within the jurisdiction, the proper course is to let the order stand, and to give leave to the defendant to enter a conditional appearance. [Burson v. German Union Ins. Co., 10 O.L.R. 238, 3 O.W.R. 230, 372; Canadian Radiator Co. v. Cuthbertson, 9 O.L.R. 126; Blackley v. Elite Costume Co., 9 O.L.R. 382, and Kemerer v. Watterson, 20 O.L.R. 451, followed.]

Farmers Bank v. Heath (No. 1), 5 D.L.R. 290, 3 O.W.N. 682, 21 O.W.R. 283 (No. 2), 5 D.L.R. 291, 3 O.W.N. 805, 879, 22 O.W.R. 614.

CONDITIONAL APPEARANCE—VARIANCE IN FORM.

While the proper practice under Order XII., r. 30, of the English practice rules, applicable in Alberta, providing for an entry by defendant of a conditional appearance is to apply ex parte for leave to do so, and for the clerk upon filing the condi-

tional appearance to stamp on the memorandum words to the effect that it is to stand as unconditional unless the defendant obtains an order to set aside the writ, an appearance entered in the ordinary form, but adding that it is without prejudice to defendant's right to apply to discharge or set aside the order authorizing the service of the writ upon her and to set aside the service of the said writ and to set aside the said writ, is sufficient as a conditional appearance, since it is sufficient notice to plaintiff that the appearance is conditional and such an appearance entitled the defendant to apply to set aside an order allowing service of a writ to be made substitutionally. [Mayer v. Claretie, 7 T.L.R. 40, applied.]

Walker v. Harris, 7 D.L.R. 366, 24 W.L.R. 464, 3 W.W.R. 55.

FAILURE TO ENTER A CONDITIONAL APPEARANCE — SOLICITORS LIEN FOR COSTS — CON. RULE (ONT.) 173.

Where a party to an action failed to take advantage of Con. Rule (Ont.) 173, providing that a conditional appearance might be entered by leave of the court or a judge; and entered an unconditional appearance, he cannot after recovery of judgment against him object to the jurisdiction of the court to entertain a petition by solicitors representing the prevailing party in the action for an order declaring them entitled to a lien for their costs upon the judgment recovered by their client and for payment of these costs by the losing party.

Grocers' Wholesale Co. v. Bostock, 4 D.L.R. 213, 3 O.W.N. 1588, 22 O.W.R. 786.

CONDITIONAL APPEARANCE — NONRESIDENT DEFENDANT—JURISDICTION—EFFECT ON BY PLEA TO MERITS.

Richardson v. Allen, 24 D.L.R. 883, 31 W.L.R. 437.

LEAVE TO ENTER CONDITIONAL APPEARANCE.

National Trust Co. v. Trusts & Guarantee Co., 2 O.W.N. 222, 268.

CONDITIONAL APPEARANCE—RULE 48—SERVICE EFFECTED IN ONTARIO UPON FOREIGN COMPANY—JURISDICTION—FUTURE PROCEEDING IN FOREIGN COURT UPON JUDGMENT OBTAINED IN ONTARIO.

Ingersoll Packing Co. v. New York Central & Hudson R.R. Co., 14 O.W.N. 134. [See 42 O.L.R. 330.]

CONDITIONAL APPEARANCE—ABSENCE OF ORDER FOR.

A conditional appearance entered without leave must stand as an unconditional appearance.

Turnbull v Nichols, 5 W.W.R. 1167.

CONDITIONAL APPEARANCE—SASKATCHEWAN, R.S. c. 118—SETTING ASIDE SERVICE.

A defendant after entering a conditional appearance may apply to set aside the writ or service thereof.

Dinning v. Ferguson, 5 W.W.R. 1165.

APPRENTICES.

WHAT CONSTITUTES.

An apprenticeship is a contract in virtue of which a person undertakes to teach another a profession, trade or calling upon certain conditions, within a stipulated time, which contract creates reciprocal obligations between the contracting parties.

Wilston v. G.T.R. Co., 47 Que. S.C. 67.

ARBITRATION.

I. IN GENERAL.
II. ARBITRATORS; UMPIRE.
III. AWARD.
IV. REVIEW OF ARBITRATION.

As to eminent domain and expropriation, see Expropriation; Damages, III I.; Right of appeal from award by arbitration, see also Appeal.

Annotation.

Rights of alien enemies to proceed with: 23 D.L.R. 375, 383.

Review of award; appeal practice: 39 D.L.R. 218.

I. In general.

(§ I—1)—SUBMISSION TO—WHAT AMOUNTS TO—AGREEMENT FOR ASSESSMENT OR VALUATION.

Where it is necessary for those to whom a question is submitted to hear evidence or argument, in order to determine the damages to which a person is entitled, the submission is not merely for an assessment or valuation but for an arbitration, and is therefore revocable, if by parol only.

Hill v. Simmonds, 14 D.L.R. 877, 47 N.S.R. 396, 13 E.L.R. 497.

WHAT CONSTITUTES—DIVIDING LINE—"VALUATION" DISTINCT FROM "ARBITRATION"—TEST.

It is indicative that a valuation and not an arbitration was intended by the written submission to three persons that they are therein termed "valuers," and that the submitting parties offered no evidence.

Re Laidlaw & Campbellford Lake Ontario & Western R. Co., 19 D.L.R. 481, 31 O.L.R. 209.

AGREEMENT FOR SUBMISSION — WHAT AMOUNTS TO—PROVISION IN CONTRACT FOR—EFFECT ON SUBCONTRACTOR.

A stipulation in a contract between a construction company and a municipality that disputes arising from any cause during the continuance of the contract should be referred to the city engineer whose award should be final, cannot be read into a subcontract so as to compel a subcontractor to submit to such official a claim against the original contractor for the balance due on the contract price, and for losses occasioned by the latter's default, where the original contract was not made a part of the subcontract and the subcontractor did not covenant or agree to comply with the terms thereof, notwithstanding that the subcontract as well as the prin-

cipal contract provided for the submission to the city engineer for final determination of any question respecting the meaning of the specifications. [Northern Electric v. Winnipeg, 13 D.L.R. 251; Hamilton v. Mackie, 5 Times L.R. 677; Thomas v. Portsea, [1912] A.C. 1, and Temperly v. Smyth, [1905] 2 K.B. 791, referred to.]

Watson Stillman Co. v. Northern Electric Co., 15 D.L.R. 182, 23 Man. L.R. 912, 26 W.L.R. 385, 5 W.W.R. 853.

JURISDICTION OF ARBITRATOR — CONSTRUCTION OF WORDS OF SUBMISSION—PARTNERSHIP DISSOLUTION.

A submission by partners to arbitration recited that certain misunderstandings had happened necessitating the dissolution of the partnership and the points to decide were "(1) on which partner rests the responsibility of the present difficulty. (2) On which condition shall the partnership be dissolved." Held, this did not give jurisdiction to the arbitrator to award payment by one partner to the other of damages because of premature dissolution of the partnership.

In re The Arbitration Act; In re Guyot and Vigouret, [1919] 3 W.W.R. 957.

(§ I—2)—CONSTRUCTION CONTRACT—SUBMISSION OF DISPUTES TO ENGINEER.

The alleged completion of the work contracted for under a construction contract does not withdraw the contract from the operation of clauses therein which provide that an arbitration shall decide questions arising as to the true meaning of the specifications or from any cause whatever during the continuance of the contract, and that such arbitrator shall be sole judge of the sufficiency, quality and quantity of the work done, and of every matter or thing incident to, bearing upon, or arising out of the specifications and the contract.

Northern Electric & Manufacturing Co. v. Winnipeg (No. 2), 13 D.L.R. 251, 23 Man. L.R. 225, 24 W.L.R. 547, 4 W.W.R. 862.

SALE OF TIMBER LIMIT—FIXING DEFICIENCY BY ARBITRATION.

Cameron v. Cuddy, 13 D.L.R. 757, [1914] A.C. 651, 25 W.L.R. 236, 5 W.W.R. 56, reversing 7 D.L.R. 296, 3 W.W.R. 388.

AGREEMENT FOR—STAY OF PROCEEDINGS.

The court has power, under s. 5 of the Arbitration Act (Alta., 1909, c. 6), to stay an action for breach of a contract which provides for a submission to arbitration of any dispute arising "during the prosecution of the work or after the completion thereof."

Stokes-Stephens Oil Co. v. McNaught (Alta.), 34 D.L.R. 375, 12 A.L.R. 50, [1917] 2 W.W.R. 530. [Affirmed, 44 D.L.R. 682, 57 Can. S.C.R. 549, [1918] 2 W.W.R. 122.]

LEASE—REMEDIES—ORIGINATING NOTICE—STATED CASE.

Rule 604 creates no new jurisdiction; it merely provides a mode by which the jurisdiction, conferred by s. 16 (b) of the Ontario Judicature Act, R.S.O. 1914, c. 56, may be exercised. The right to bring an action for a declaratory judgment is supplemented by the simple procedure of an originating notice, when the rights of the parties depend upon the construction of a deed, will, or other instrument. The court will not, upon an originating notice under Rule 604, interpret the provisions of a lease containing a submission to arbitration, under which arbitrators have been appointed, but will leave the parties to work out their remedies under the Arbitration Act, R.S.O. 1914, c. 65. A case may be stated by the arbitrators under s. 29. [Ottawa Y.M.C.A. v. Ottawa, 29 O.L.R. 574, applied.]

Re Toronto General Trusts Corp. & McConkey, 41 O.L.R. 314. [See 43 D.L.R. 732.]

CAUSES OUTSIDE AGREEMENT—STAY OF PROCEEDINGS.

When some of the causes of action set forth in the plaintiffs' statement of claim are not, and others are, within the terms of an agreement between the parties for submission to arbitration, and the former are of a substantial character and put forward in good faith, or where some of such causes of action are of such a complex legal nature that they could not be properly or adequately dealt with by an arbitrator, a motion, under s. 6 of the Arbitration Act, R.S.M. 1913, c. 9, to stay the proceedings in the action should be refused. Neither should the action be split up by referring to arbitration certain matters in dispute which are within the submission agreement and leaving the action to proceed as to the others which are not within it. [Workman v. Belfast Harbour Commissioners, [1899] I.R. Ir. 2 Q.B.D. 234, and Turnock v. Sartoris, 43 Ch. D. 150, followed.]

Murray v. Gunn, 26 Man. L.R. 345, 34 W.L.R. 633.

CONSENT OF PARTIES TO DISPOSITION OF ALL MATTERS IN QUESTION BY JUDGE AS QUASI-ARBITRATOR—EQUITABLE AWARD—COSTS.

McKinney v. McLaughlin Carriage Co., 7 O.W.N. 702.

PARTNERSHIP DISPUTE—PROVISION IN PARTNERSHIP ARTICLES FOR REFERENCE TO ARBITRATOR—APPOINTMENT BY JUDGE OF HIGH COURT—PERSONA DESIGNATA—CONDITION PRECEDENT.

Re Wood Vallance & Co., 7 O.W.N. 814.

AGREEMENTS FOR—WHAT MAY BE SUBMITTED TO.

A declaration in writing of the respective parties that they would accept the award that would be made by the arbitrators and mediators is not binding when the arbitrators do not follow the directions given in the judgment appointing them nor observe the formalities required by law.

Pacaud v. St. Pierre, 14 Que. P.R. 377.

AGREEMENT FOR—COMPLIANCE WITH.

Where a contract contains a clause stipulating that all matters in dispute should

be referred to arbitration, one of the party cannot contest the right of the other to sue before the tribunal, if he has not put him in default, mis en demeure, to appoint arbitrators.

Great Northern Construction Co. v. Ross, 25 Que. K.B. 385, 404.

CONTRACTOR AND SUBCONTRACTOR—ARBITRATION CLAUSE—AGREEMENT TO SUBMIT—PENALTY — SET-OFF — QUE. C.C. 1131, 1188—QUE. C.P. 1434.

The clause by which contracting parties agree to submit their differences to a board of three arbitrators, each party naming one and the third to be chosen by the other two, does not constitute a real agreement to submit to arbitration, but is only a promise to so submit, which, however, can be carried out at the request of the parties. When the court orders a subcontractor to pay the penalty agreed upon, as liquidated damages, for delay in the execution of his works, it ought not to admit this penalty as a set-off and deduct it from the amount that the principal contractor owes for the execution of the works under the contract, but such sum ought to be claimed in a cross action.

Lefebvre v. Mackinnon, 23 Que. K.B. 555.

DEFICIENCY TO BE DECIDED BY ARBITRATION—ARBITRATION CONDITION PRECEDENT TO RIGHT OF ACTION.

Cuddy v. Cameron, 15 B.C.R. 452. [See 16 B.C.R. 451.]

SIGNING SUBMISSION—CONTRACT.

Where there is a contract for arbitration the submission need not be signed by the parties.

Lyon v. Morgan (B.C.), [1917] 2 W.W.R. 224.

CONTRACT CONTAINING ARBITRATION CLAUSE—ACTION FOR SPECIFIC PERFORMANCE—APPLICATION BY DEFENDANT FOR STAY OF PROCEEDINGS—DISPUTE GOING TO THE MAKING OF THE CONTRACT AND NOT OF SUCH CHARACTER AS WITHIN ARBITRATION CLAUSE.

McIntosh v. Layfield, [1919] 1 W.W.R. 590.

(§ I—3)—EXTENSION OF TIME—AGREEMENT TO EXTEND.

A formal extension in writing during the limitation period, of the time for the arbitrators to make their award upon an arbitration in expropriation proceedings under the Railway Act, R.S.C. 1906, c. 37, is not a sine quâ non to their jurisdiction: there may be circumstances which debar either party from setting up the lack of a formal extension, such as an arrangement made for the postponement of the proceedings for the convenience of counsel, which was equivalent to a consent to the making of a formal extension by the arbitrators either before or after the time fixed at the first meeting pursuant to s. 204 of the Railway Act, R.S.O. 1906, c. 37. [See MacMurchy & Denison's Railway Law, 2nd ed., 260, and Montreal Park, etc., R. Co. v. Wynness, 16 Que. S.C. 105.]

Canadian Northern Quebec R. Co. v. Naud, 14 D.L.R. 307, 48 Can. S.C.R. 242, 16 Can. Ry. Cas. 198, 13 E.L.R. 341, affirming 42 Que. S.C. 121, 22 Que. K.B. 221.

REVOCATION OF SUBMISSION—SUBSEQUENT AWARD—VALIDITY.

An award rendered after the revocation by one party of the authority of the arbitrators under a parol submission is void in the absence of a reauthorization of the arbitrators.

Hill v. Simmonds, 14 D.L.R. 877, 47 N.S.R. 396, 13 E.L.R. 497.

EXTENDING TIME FOR AWARD—LAPSE OF AGREED PERIOD.

An agreement of reference to arbitrators does not lapse because on the return of the first appointment the hearing was adjourned to a date beyond the time limit for making the award; and an extension of the latter may still be made by the court under the statutory powers conferred by s. 11 of the Arbitration Act, R.S.M. 1913, c. 9, on proper grounds being shewn. [See Canadian Northern Quebec R. Co. v. Naud, 14 D.L.R. 307.]

Souris School District No. 285 v. Bullock, 16 D.L.R. 467, 27 W.L.R. 751.

HOW LOST—DEATH OF ARBITRATOR.

Where in order to ascertain the value of hotel property parties agree to submit the matter to two arbitrators, the death of one such arbitrator after the right of appointment has been exercised by the parties, and there being no provision either in the agreement for submission or by statute enabling the appointment of a successor, brings the whole matter to a standstill, to which ss. 7 and 8 of the Arbitration Act, R.S.M. 1913, c. 9, have no application, and the right to arbitration is thereby lost. [Yeates v. Caruth, [1895] 2 Ir. R. 146, followed.]

Windebank v. C.P.R. Co., 25 D.L.R. 225, 26 Man. L.R. 1, 33 W.L.R. 82, 9 W.W. R. 715.

ARBITRATION AND AWARD—ACTION BROUGHT AFTER SUBMISSION—MOTION TO STAY PROCEEDINGS—ARBITRATION ACT, R.S.O. 1914, c. 65, s. 8—PREVIOUS ISSUE AND SERVICE OF ORDER FOR SECURITY FOR COSTS — ELECTION TO PROCEED WITH ACTION—DISMISSAL OF MOTION.

Heistein & Sons v. Polson Iron Works, 17 O.W.N. 155, 46 O.L.R. 285.

(§ I—4)—POWER OF MUNICIPALITY TO ENTER LANDS AND TAKE MATERIAL FOR REPAIR OF HIGHWAYS—ARBITRATION.

Cook v. District of North Vancouver, 16 B.C.R. 129.

(§ I—5)—CROWN—CONSTITUTIONAL LAW.

A reference to the Crown in a provincial statute is to the Crown in right of the province only, unless the statute makes it clear that the reference is to the Crown in some other sense. S. 5 of the Ontario Arbitration Act does not apply to a submission by the Crown in right of the Dominion.

Gauthier v. The King, 40 D.L.R. 353,

56 Can. S.C.R. 176, affirming 33 D.L.R. 88, 35 Can. Ex. 444.

POWERS AS TO EXECUTION—COURTS.

The arbitrators under the statute of 6 Geo. V., 1916, c. 88, s. 7, have jurisdiction exclusive of every Court of Justice at every stage of the proceedings. Their jurisdiction extends even to the execution of judgments obtained prior to its creation. On a motion for the setting aside of an opposition afin d'annuler to a seizure of immovable property, the Superior Court has no jurisdiction to entertain the matter ratione materiae.

Asselin v. Lapierre, 50 Que. S.C. 67, 17 Que. P.R. 430, 18 Que. P.R. 67.

II. Arbitrators.

(§ II—10)—RESIDENCE OF — APPOINTMENT BY LIEUTENANT-GOVERNOR—DISQUALIFICATION.

S. 699 of the Municipal Act (Man.) empowering the Lieutenant-Governor-in-Council in expropriation proceedings to nominate an arbitrator resident without the limits of any municipality interested, to act for the party failing to appoint, is imperative and not directory, and the appointment of one resident within the municipality is a contravention of the statute and will affect the validity of the award. [Re Smith & Corp. of Plympton, 12 O.R. 20, applied.] Bare relationship to one of the parties disqualifies an arbitrator, on the ground of nonindifference. [Re Christie and Toronto Junction, 24 O.R. 443, dissented from.]

Turnbull v. R.M. of Pipestone, 29 D.L.R. 75, 26 Man. L.R. 562, 34 W.L.R. 1073, 10 W.W.R. 1133, affirming 24 D.L.R. 281, 31 W.L.R. 595, 8 W.W.R. 982.

STATUTORY ARBITRATORS—AWARDS FROM TIME TO TIME—COMMON SCHOOL FUND APPEAL TO PRIVY COUNCIL DISMISSED (unreported).

Province of Quebec v. Province of Ontario, 42 Can. S.C.R. 161.

APPOINTMENT OF ARBITRATORS.

By virtue of s. 8 (a) of the Arbitration Act a party to an arbitration has power to appoint another arbitrator in place of a first who has rendered himself incapable of acting.

Re Weiler Bros. & City of Victoria, 24 B.C.R. 148.

EXPROPRIATION PROCEEDINGS — RIGHT OF JUDGE TO APPOINT—NOTICE TO OWNER.

A judge of the County Court alone has jurisdiction to appoint a sole arbitrator to determine the value of lands taken or required under the provisions of the New Brunswick Railway Act, except when he is personally interested in the lands, in which case a judge of the Supreme Court has such jurisdiction. Where an owner of land omits to name an arbitrator in expropriation proceedings after notice is served on him as required by the New Brunswick Railway Act, a sole arbitrator cannot be appointed by any judge until notice of the intended application for such appointment has first been given to the landowner.

St. John & Que. R. Co. v. Anderson, 43 N.B.R. 31.

ARBITRATORS—UMPIRE—IN GENERAL.

A ratepayer of the city of Moncton is disqualified on the ground of pecuniary interest from acting as an arbitrator to determine the value of lands taken by the city for the purposes of the Water Department, under 56 Vict. c. 45. Where objection to the qualification of an arbitrator was taken at the commencement of the arbitration proceedings, subsequent appearance under protest and taking part in the proceedings, will not operate as a waiver of the objection.

Re Bessie v. Wilkins, 41 N.B.R. 141.

SUFFICIENCY OF OATH—AUTHORITY TO ADMINISTER.

Although R.S.Q. 1909, art. 1569, requires the arbitrators in a railway expropriation to be sworn before a Justice of the Peace, the fact that they have taken the oath before a judge, the prothonotary or a commissioner of the Superior Court, does not avoid their award, these latter functionaries having the right to swear according to the spirit of the act as well as Justices of the Peace.

Girard v. Ha-Ha-Baie, 47 Que. S.C. 325.

SUBMISSION — FIRE INSURANCE — WITHDRAWAL BY ONE ARBITRATOR—FRESH APPOINTMENT BY COURT.

Re Kirk & Fidelity Ins. Co., 10 E.L.R. 72 (N.S.).

ARBITRATORS — ELIGIBILITY — RECUSATION —GROUNDS.

The grounds upon which arbitrators can be recused are the same as those for recusation of judges, as art. 1439 of C.C.P. (Que.) is silent upon this subject. The enumeration of the grounds of recusation of judges contained in art. 237, C.C.P., is not limited; others may be admitted. Art. 12 of Title XXIV., of the Ordinance of 1667, surrendering to the discretion of judges the grounds on which they can be recused, has never, in effect, been repealed and is still in full force. Par. 2 of art. 237, C.C.P., decreeing that a judge can be recused if he has an action involving a question similar to the one in dispute, ought not to be too liberally interpreted. So, there is ground for recusation although the question may not be exactly similar, if it can be determined by the same rules. The existence of a civil action between an arbitrator and a party to the arbitration agreement is ground for recusation. It is indispensable, however, that the action be between a party to the arbitration agreement and the arbitrator personally. An arbitrator cannot be recused because he acted as such for owners, strangers to the agreement, in a large number of expropriations. Chosen from among the members of the bar, according to the constitution, judges cannot

be recused on the ground of incompetence. The clerk of the Court of Appeal may be an arbitrator. The law only deprives him of the exercise of the profession of advocate. The functions of arbitrators, in an extra-judicial arbitration matter, are essentially discretionary. The arbitrator can, therefore, refuse to fulfil them without any need to give any reason for the ground of his refusal. Such explanation is only contested in a forced arbitration matter. The rules for the recusation of experts in a judicial arbitration are the same as in an extra-judicial arbitration. An agreement declaring that the difference of the parties will be finally determined by "three arbitrators or experts qualified in the matter," which confuses the terms arbitrators and experts, should be interpreted in the sense that the parties intended to submit to arbitrators and not to experts. The nullity of the arbitration agreement, resulting from the obligation of all parties to sign, is covered by an express renunciation, as in the case of a municipal corporation which orders the completion of the arbitration deed without regard to the refusal of the interested parties to sign it. A judge having power to appoint arbitrators is not compelled to choose them in a limited circle of some particular professions.

Bourdon v. Montreal, 54 Que. S.C. 193.

CLAIM AGAINST MUNICIPALITY—REFUSAL TO APPOINT ARBITRATOR—JURISDICTION OF JUDGE.

A motion to appoint an arbitrator under s. 8 of the Arbitration Act, R.S.B.C. 1911, c. 11, on the refusal of the municipality to appoint its arbitrator upon a claim being made upon it for damages alleged to have arisen from the regrading of a certain street, refused on the ground of lack of jurisdiction.

Gold v. South Vancouver, 26 B.C.R. 147, [1918] 3 W.W.R. 585.

(§ II—14)—COSTS—ARBITRATORS' FEES—RAILWAY EXPROPRIATION—RAILWAY ACT (R.S.C. 1906, c. 37, s. 199).

Canadian Northern R. Co. v. Green, 30 D.L.R. 546, 9 S.L.R. 371, 34 W.L.R. 1207, 21 Can. Ry. Cas. 157.

[See also Green v. C.N.R. Co., 22 D.L.R. 15.]

RAILWAY ACROSS LAND—DAMAGES—COMPENSATION OF ARBITRATORS—EXPROPRIATION ACT (SASK.).

C.N.R. Co. v. Ouseley, Chisholm & Thomson, 42 D.L.R. 772, 11 S.L.R. 282, [1918] 2 W.W.R. 1005.

(§ II—12)—NOTARY—NEGLIGENCE—DAMAGES.

A notary who has been given instructions by arbitrators to receive their award and signify it to the parties within the delay in which the signification has to be made, and who negligently neglects to do so, is responsible for resulting damages.

Théberge v. Dumesnil, 42 D.L.R. 685, 54 Que. S.C. 220.

MISCONDUCT.

Misconduct of arbitrators, in its legal sense as regards the power of the court to set aside an award, does not necessarily imply any improper motive to the arbitrators.

Re False Creek Flats Arbitration (No. 2), 8 D.L.R. 422, 17 B.C.R. 282, 21 W.L.R. 761, affirming 1 D.L.R. 363.

If arbitrators and mediators are appointed by a judgment directing them to take the evidence of the necessary witnesses an award rendered without the examination of witnesses indicated by one of the parties whose evidence appears to be important will be set aside as irregular.

Pacaud v. St. Pierre, 14 Que. P.R. 377.

PROPOSED STATUTORY ARBITRATOR — DISQUALIFICATION—BIAS.

The fact that the person proposed as an arbitrator by a corporation in a statutory arbitration is largely interested in another corporation which for a number of years previously had operated some of its undertakings upon joint account with the appointing corporation will not alone be a ground of disqualification where no such joint operations had taken place in two years and likelihood of bias was not suggested on any other ground. [Christie v. Town of Toronto Junction, 24 O.R. 443; Vineberg v. Guardian Assurance Co., 19 A. R. (Ont.) 293; R. v. Justices of Queen's County, [1908] 2 I.R. 285, at p. 294, specially referred to.]

Plaunt v. Gillies Brothers, 3 D.L.R. 283, 3 O.W.N. 921, 21 O.W.R. 509.

MOTION TO SET ASIDE AWARD—MISCONDUCT OF ARBITRATORS — RECEPTION OF TESTIMONY NOT ON OATH — UNFOUNDED REFERENCE TO OFFER OF SETTLEMENT—REJECTION OF COMPETENT EVIDENCE—IRREGULARITIES IN PROCEDURE—COSTS.

Wright v. Toronto R. Co., 6 O.W.N. 119.

MISCONDUCT OF ARBITRATOR — VIEW OF PREMISES—EVIDENCE—SETTING ASIDE AWARD—COSTS.

Re Hardy & Lake Erie & Northern R. Co., 7 O.W.N. 308.

(§ II—13)—PRIOR PARTICIPATION IN DISPUTE.

Where one designated as referee by the parties themselves acted prior to the award as chief adviser to the agent of one of the parties, though with no intent to do wrong, the award must be set aside and the referee removed. [See Hudson on Building Contracts, 3rd ed., 755.]

Wilkerson v. McGugan & Gaston, 2 D.L.R. 11, 5 S.L.R. 166, 20 W.L.R. 651, 2 W.W.R. 121.

MEMBER OF SCHOOL BOARD—APPOINTED ARBITRATOR BY TOWN—MOTION BY COMPANY TO HAVE HIM REMOVED—BIAS.

Re Sarnia & Sarnia Gas & Electric Co., 3 O.W.N. 117, 20 O.W.R. 204.

(§ II—14)—REMOVAL OF ARBITRATOR—APPOINTMENT OF NEW.

When what has to be done by an arbitrator can only be done with certain persons and almost necessarily must be done in a certain place, his removal to a place 2,000 miles away with no expectation of returning justifies the appointment of another arbitrator under s. 7 of the Arbitration Act (c. 6, 1909, Alta.).

Re McNaught & Stokes-Stephens Oil Co. (Alta.), 43 D.L.R. 7, 14 A.L.R. 1. [See 34 D.L.R. 375, 12 A.L.R. 501, 43 D.L.R. 743, 44 D.L.R. 682, 46 D.L.R. 668.]

III. Award.

(§ III—15)—SUMMARY ENFORCEMENT OF AWARD.

An award on an arbitration under s. 634 of the Municipal Act (Man.) is enforceable summarily, by motion, as a judgment of the court, under s. 15 of the Arbitration Act (Man.).

Sweinsson v. Charleswood, 36 D.L.R. 32, 28 Man. L.R. 189, [1917] 3 W.W.R. 201.

APPEAL FROM AWARD—HEARING OF OBJECTIONS.

A party to arbitration proceedings will not after award made be allowed to raise on appeal to a Divisional Court a ground of objection which might have been taken at the commencement of proceedings.

Re Toronto General Hospital Trustees & Sabiston, 33 D.L.R. 78, 38 O.L.R. 139, 11 O.W.N. 117, affirming 10 O.W.N. 331.

COSTS—TAXATION.

On a reference to an arbitrator which included power to award the costs in an action which had been commenced, and of the arbitration there is power to award for counsel fees on the trial, and to postpone till a later date the actual taxation of the costs instead of including them in the award.

Chatterson v. Dutton, 33 D.L.R. 622, 10 S.L.R. 169, [1917] 2 W.W.R. 393.

SUFFICIENCY OF AWARD—VALUE OF LAND—EVIDENCE — CONCLUSIVENESS — EXPROPRIATION UNDER RAILWAY ACT, R.S.C. 1906, c. 37.

C.N.R. Co. v. Ketcheson, 32 D.L.R. 629, 21 Can. Ry. Cas. 104, affirming 13 D.L.R. 854, 29 O.L.R. 339, 16 Can. Ry. Cas. 286.

REASONS OMITTED—SETTING ASIDE—SUPPLEMENTING.

The omission of an arbitrator to set out his reasons for his award, as required by s. 4 of the Municipal Act (R.S.O. 1914, c. 199), when he proceeds partly on a view of the premises or upon some special knowledge or skill possessed by him, is not a ground for setting aside the award, but it should be supplemented in that respect.

Re Watson & Toronto, 32 D.L.R. 637, 38 O.L.R. 103.

EMINENT DOMAIN—AWARD—APPEAL.

Where a case has been referred back to the arbitrator for further expert evidence to be obtained and his decision on the second hearing is appealed against the Appellate Court may deal with the case finally rather than again remit in the hope of getting more satisfactory evidence on which to base a conclusion. [McHugh v. Union Bank of Canada, 10 D.L.R. 562, [1913] A.C. 299, applied.]

Fuller v. G.T.P.R. Co., 17 D.L.R. 210, 6 W.W.R. 832, 28 W.L.R. 218, 6 W.W.R. 832.

POWER TO AMEND AWARD—EXPROPRIATION — COMPENSATION — INTEREST — RENTS —EXPIRY OF TIME FOR APPEAL—ENFORCEMENT OF AMENDED AWARD.

The corporation of the City of Toronto having expropriated land under a by-law, an award fixing the amount of compensation was made by the Official Arbitrator. After the time for appealing from the award, under s. 7 of the Municipal Arbitrations Act, R.S.O. 1914, c. 199, had expired, the arbitrator amended the award by adding thereto a clause directing that interest on the amount awarded from the day of the date of the expropriating by-law should be paid by the corporation, and that the landowner should pay to the corporation the rents received from the same day. It appeared by the arbitrator's written reasons that he had intended to include in his original award the clause so added: —Held, upon an application by the landowner, under s. 14 of the Arbitration Act, R.S.O. 1914, c. 65, for leave to enforce the award as a judgment, that if the arbitrator had not power under s. 2 (2) (e) of the Municipal Arbitrations Act to amend the award, he had power to do so under s. 10 (c) of the Arbitration Act, which, by s. 4, was applicable to this award. Also, that whether the power to amend could be exercised after the time limited for an appeal had expired should not be determined upon this application; the only award which could be enforced was the amended award; and, unless the landowner was content with an order for its enforcement, the application must be dismissed. Semble, that the arbitrator was right in determining that the city corporation was deemed to be in possession from the date of the expropriating by-law, and entitled to the rents from and after that date, and the claimant to interest from that date.

Re White & Toronto, 38 O.L.R. 337, 11 O.W.N. 285.

VALUATION OF ASSETS OF BUSINESS—APPOINTMENT OF THIRD ARBITRATOR——AWARD DRAFTED BY SOLICITOR FOR ONE PARTY—AMOUNT LEFT BLANK—ALLOWANCE FOR GOODWILL.

Re Zuber & Hollinger, 5 O.L.R. 252, 20 O.W.R. 724.

AWARD—VALUATION OF SHARES IN A JOINT STOCK COMPANY—BOOKS OF COMPANY.

Macdonald v. Macdonald, 3 O.W.N. 1, 20 O.W.R. 92.

GROUND RENT OF PREMISES FIXED BY AWARD — ACTION FOR VALUE OF USE AND OCCUPATION—FAIR RENTAL VALUE OF PREMISES—EVIDENCE.

MacDonald v. Davies, 8 O.W.N. 48, 315.

CLERICAL ERROR—CORRECTION.

The failure of an arbitrator to mention in his award certain property the disposition of which was agreed upon at the hearing held to be a clerical mistake or error arising from an accidental slip or omission, within the meaning of s. 8 of the Arbitration Act, which omission the arbitrator was entitled to supply by an addition to the award. [Re Stringer & Riley Bros., [1901] 1 Q.B. 105, distinguished.]

Debret v. Debret, 10 S.L.R. 366, [1917] 3 W.W.R. 503.

ARBITRATION AWARD—CONTEST BY DIRECT ACTION—ENTRY IN LAW—GENERAL ALLEGATION—C.C.P. ART. 1444

An arbitration award rendered after a compromise, can be attached by direct action in certain cases, for example, when the arbitrators have manifestly exceeded their powers, when their proceedings are filled with grave irregularities or illegalities, and when their award is unjust and unfair. The recourse opened by art. 1444 C.C.P. does not exclude direct action for nullity; this section is neither limited nor exclusive; it concerns the mode of execution of the arbitration award. An allegation which is too wide in a written pleading, should be attached by exception to the form or by a motion for particulars; it cannot be attached for this reason by an entry in law; moreover it is relevant although informal. In an entry in law, a general allegation is supposed to be proven like other allegations. It should be admitted in its widest sense. In such a case one cannot refer to a piece of evidence produced to limit its extent, except to contradict it. Allegations attaching an arbitration award as unjust, arbitrary and ultra vires, cannot be taken away by an entry in law.

Montreal v. Paiement & Pitre, 28 Que. K.B. 381.

ARBITRATION FOR EXPROPRIATION—POWER TO ADJOURN PROCEEDINGS.

A board of arbitrators appointed for expropriation purposes under the Railway Act of Canada, c. 37, R.S.C. 1906, that adjourns its proceedings until a named day (in the French language, "jusqu'au 28 février") has the whole day named included in which to act and make its award.

Lachine, Jacques Cartier et Maisonneuve R. Co. v. Bastian, 46 Que. S.C. 133.

(§ III—16)—VALIDITY—IMPROPER EVIDENCE—EXPERTS.

The reception by the arbitrators of testimony of a number of expert witnesses greater than that limited by the Evidence Act (Alta., 1910, 2nd Sess., c. 3) is a ground for setting aside the award.

Canadian Northern Western R. Co. v. Moore, 31 D.L.R. 456, 53 Can. S.C.R. 519, 10 W.W.R. 1231, affirming 23 D.L.R. 646, 8 A.L.R. 379.

VALIDITY OF AWARD FOR LAND INJURIOUSLY AFFECTED—MUNICIPAL EXPROPRIATION—INJUNCTION.

Yager v. City of Swift Current, 30 D.L.R. 564, 9 S.L.R. 306, 34 W.L.R. 1213, 10 W.W.R. 1317.

[See also Yager v. Swift Current, 22 D.L.R. 801.]

VALIDITY—AMALGAMATION OF COMPANIES—TENDER OF CONVEYANCE—RAILWAY ACT.

An amalgamation under the Dominion Railway Act (R.S.C. 1906, c. 37, ss. 361-3) will not affect a pending arbitration proceedings under a provincial statute, and the award may be enforced against the amalgamated company; a tender of a conveyance of the expropriated land is not a statutory prerequisite to the validity of the award.

Haney v. C.N.R. Co. (Man.), 36 D.L.R. 674, 21 Can. Ry. Cas. 388, [1917] 3 W.W.R. 105.

VALUATION OF FIXTURES BETWEEN LANDLORD AND TENANT—INTERVIEW BY ARBITRATOR.

An interview with the landlord while procuring invoices of stock to be used in making the award, in the absence of the tenant or his counsel, does not constitute misconduct on the part of an arbitrator appointed in pursuance of the terms of a lease to determine the value of fixtures to be taken over by the landlord at the end of the term, where the invoices were so obtained at the suggestion of the tenant's counsel.

Fleming v. Duplessis, 25 D.L.R. 26, 9 W.W.R. 261, 32 W.L.R. 632.

DISQUALIFICATION OF ARBITRATORS — WAIVER.

The remaining and taking part in arbitration proceedings does not constitute a waiver of an objection to the proceedings because of the disqualification of the arbitrators. [Hamlyn v. Betteley, 6 Q.B.D. 65, applied.]

Turnbull v. Rur. Mun. of Pipestone, 24 D.L.R. 281, 8 W.W.R. 982, 31 W.L.R. 595.

NONREPAIR OF DRAINS—DAMAGES—NOTICE—ERRORS IN LAW.

A notice of claim for damages to lands commenced under the Municipal Drainage Act, R.S.O. 1914, c. 198, against a municipality for its negligent upkeep and nonrepair of drains, and also for the original malconstruction thereof, entitles the owner under s. 90 of the Act to recover all damages accruing to him before the service of the notice, and an arbitrator's award which merely allows the damages sustained after the service of the notice is erroneous

on its face and will be set aside. It is the duty of the court to set aside an award where an error in law appears on the face thereof; and, where an arbitrator gives his reasons in a memorandum accompanying the award, error in law may be shewn by reference to those reasons. [Kent v. Elstob, 3 East 18, followed.]

Parsons v. Tp. of Eastnor, 23 D.L.R. 790, 34 O.L.R. 110.

IMPROPER VALUATION AS TO DATES—EXPROPRIATION BY RAILWAY.

An award in expropriation proceedings under the Railway Act, Alta., 1907, c. 8, is not invalidated because the arbitrators proceeded to fix the value as of the date of the arbitration instead of the date a few months earlier in the same year, when the appointment of the third arbitrator was made by a judge's order, if the case developed no distinction as to value between those dates and both parties at the opening of the arbitration had acquiesced in the arbitrators' suggestion that the present value should be the basis of compensation.

Can. North. West. R. Co. v. Moore, 23 D.L.R. 646, 8 A.L.R. 379, 7 W.W.R. 1327, 30 W.L.R. 676.

IMPROPER VALUATION.

An award by valuators, defective because based on a valuation of several lots as an entirety instead of ascertaining the value on each lot separately, does not warrant a dismissal of the action, but that the same or other valuators should be appointed to ascertain the value in a proper manner. [Cameron v. Cuddy, 13 D.L.R. 737, [1914] A.C. 651, followed.]

Irwin v. Campbell, 23 D.L.R. 279, 51 Can. S.C.R. 358, reversing 32 O.L.R. 48.

EXPROPRIATION OF LAND—VALUATION OR ARBITRATION.

The mere permission to a majority of the valuers to examine witnesses does not necessarily make the submission one of arbitration rather than a valuation; each case must be determined according to its particular circumstances. [Re Carus-Wilson, 18 Q.B.D. 7, applied.]

Campbellford, Lake Ontario, etc., R. Co. v. Massie, 22 D.L.R. 673, 50 Can. S.C.R. 409.

VALIDITY OF AWARD—EXCESSIVE FEES.

An award which allows an arbitrator fees in excess of the scale allowed by statute must be remitted for correction.

Re False Creek Reclamation Act, 22 D.L.R. 117, 8 W.W.R. 1191, 31 W.L.R. 678, affirming 22 D.L.R. 103.

JURISDICTION TO SET ASIDE AWARD—VALIDITY — MISCONDUCT — JURISDICTION OF UMPIRE.

Upon a motion to set aside, vary or amend a report filed by an umpire acting in pursuance of a consent judgment regarding certain building lots. Held, that the Court of King's Bench (Man.) had jurisdiction to deal with charges of misconduct against an appraiser and the umpire, and also to deal with objections based on excess of jurisdiction by the umpire in making allowance for items not covered by the judgment. The court further held that over-zealousness in supporting the claim of one of the parties and assuming the role of advocate on the part of the appraiser in disputed matters which had to be determined by the umpire, did not amount to misconduct on the part of such appraiser. Held, also, that the umpire had not been guilty of misconduct in withholding certain evidence from the appraisers. If an umpire has made no mistake as to the extent of the jurisdiction conferred upon him the court cannot set aside the award unless it is shewn that there was misconduct or some other equitable ground for interference but if the umpire has exceeded his jurisdiction, all of which is apparent on the face of the award, the court can and ought to interfere.

Att'y-Gen'l for Manitoba v. Kelly, 48 D.L.R. 536, [1919] 3 W.W.R. 435.

MOTION TO SET ASIDE AWARD VALID ON ITS FACE—OBJECTIONS TO AWARD—WITNESSES NOT SWORN—ARBITRATION ACT, R.S.O. 1914, C. 65, SCHEDULE A., CL. (J.)—NO OBJECTION RAISED BEFORE ARBITRATORS—EXCLUSION OF PARTIES DURING SITTINGS OF ARBITRATORS—ABSENCE OF MISTAKE—AWARD COVERING ALL MATTERS IN DISPUTE—DISMISSAL OF MOTION.

Re Singer & Katz, 12 O.W.N. 181.

INNOCENT MISCONDUCT OF ARBITRATOR—EVIDENCE IMPROPERLY ADMITTED—COMPROMISE AWARD SET ASIDE.

Re Garfunkel & Hutner, 13 O.W.N. 179.

VALIDITY OF AWARD—MISCONDUCT OF ARBITRATORS—COSTS.

Re Windatt & the Georgian Bay & Seaboard R. Co., 4 O.W.N. 395, 23 O.W.R. 509.

AWARD — VALIDITY — ACTION TO ENFORCE AWARD OR VALUATION MADE BY TWO OR THREE ARBITRATORS OR VALUERS—CONSTRUCTION OF SUBMISSION-AGREEMENT—INVALIDITY OF AWARD—CLAIM FOR REFORMATION OF AGREEMENT—ABSENCE OF AGREEMENT OTHER THAN THAT EXECUTED BY PARTIES.

Massie v. Campbellford Lake Ontario & Western R. Co., 6 O.W.N. 161, 26 O.W.R. 180.

COMPENSATION FOR ELECTRIC WORKS EXPROPRIATED BY CITY CORPORATION—CLAIMS EXCLUDED BY STATUTES FROM CONSIDERATION OF ARBITRATORS — APPEAL FROM AWARD—RIGHT TO EXAMINE ARBITRATORS AS WITNESSES IN SUPPORT OF APPEAL.

Re City of Peterborough & Peterborough E. L. & P. Co., 10 O.W.N. 244, affirming 9 O.W.N. 119.

MISCONDUCT—ESTOPPEL.

On an application to set aside an award

on the ground of misconduct by one of the arbitrators, it appeared that after the proceedings before the arbitrators were closed, counsel for the objecting party, with knowledge of the alleged misconduct, attended on an application and consented to an order extending the time for the arbitrators, to make their award:—Held, on appeal, affirming the decision of Macdonald, J., that the act of consent to extension of time, and recognition of the propriety of the arbitrators making the award, is of the nature of an estoppel, and precludes objections to the award on the ground of misconduct.

Powis v. Vancouver; Ramage v. Vancouver, 23 B.C.R. 180.

RAILWAY ACT, C.S. 1903, c. 91—AWARD ON EXPROPRIATION OF LANDS—OATH OF ARBITRATORS — WAIVER — WHO MAY ADMINISTER—ADMISSION ON RECORD—ESTOPPEL — LEAVE TO ENTER JUDGMENT UNDER O. XIV—DEFENCE QUESTION OF LAW—DECISION BY JUDGE AT CHAMBERS.

Turney v. St. John & Quebec R. Co., 42 N.B.R. 557.

BINDING EFFECT—SUBMISSION.

An award is binding upon a party who has appeared and given evidence, although he has not signed the submission.

Lyon v. North West Trust Co. & Morgan, 22 B.C.R. 511, 34 W.L.R. 485.

STATUS OF OWNER ATTACKING AWARD.

A vendor of an immoveable with the right of redemption, who allows the delay for redemption to expire without exercising his right, is no longer owner of this immoveable; and if the latter is expropriated, he cannot after this delay bring an action to have the award set aside, although the proceedings in expropriation were commenced before the expiration of this delay when the vendor had some eventual rights in the land. It is not a ground for setting aside an award of arbitrators if one of them did not visit the expropriated premises at the same time as the others since the majority of the arbitrators have a right to make the award, especially when the persons at the view did not raise any objection.

Girard v. Ha-Ha-Baie, 47 Que. S.C. 325.

VALIDITY—EXTENSION OF TIME—CONFIRMATION—EFFECT.

When parties to an action make a compromise by which they agree to submit their case to arbitration, and the arbitrators themselves extend the time within which they should render their award, without obtaining the consent of the parties, such award is null and void, even if the court has received it. The receiving of the award by the Superior Court does not constitute confirmation of such award, which can only be obtained by action brought in the ordinary manner to have the party condemned to execute it.

Cyr v. Cyr, 54 Que. S.C. 397.

VALIDITY OF AWARD—PLANS OF RAILWAY BOARD—COMPLIANCE.

The arbitrators are bound to take the plans and specifications, approved by the Railway Commission, as exact, and can neither change them, nor modify them, nor admit any proof tending to establish a different area than is indicated in such plans and specifications. Though the courts have the power, in the case of fraud, illegality, or irregularity, duly alleged and proved, to annul the award of the arbitrators, they have not the right to revise the exercise of the discretion and of the judgment of the arbitrators, and the amount of compensation awarded cannot be a cause for avoiding the award unless it does violence to a sense of justice.

Baril v. G.T.R. Co., 46 Que. S.C. 295.

(§ III—17)—AWARD—REVIEW—REFERRING BACK FOR SUPPLEMENTARY CERTIFICATE.

An award under the Railway Act (Can.) will not be set aside by reason of the fact that after a view of the lands in question the arbitrators have not put in writing a statement sufficiently full to enable a judgment to be formed of the weight which should be attached to their finding (Arbitration Act 9 Edw. VII. (Ont.) c. 35, s. 17 (3)), but will be referred back for a supplementary certificate.

Re Myerscough & Lake Erie & Northern R. Co., 11 D.L.R. 458, 4 O.W.N. 1249, 15 Can. Ry. Cas. 168, 24 O.W.R. 535.

AWARD — REVIEW — AFFIRMANCE FOR REASONS DIFFERENT FROM THOSE ADVANCED BY ARBITRATORS.

On an appeal from an award, the latter will not be set aside merely because the Appellate Court disagrees with the reasoning of the arbitrators, but will stand if it can be supported on any ground sufficient in law.

Re Ketcheson & Canadian Northern Ontario R. Co., 13 D.L.R. 854, 29 O.L.R. 339, 25 O.W.R. 20, 16 Can. Ry. Cas. 286.

AWARD — CONCLUSIVENESS — MUNICIPAL ACT (B.C.).

S. 396 of the Municipal Act, R.S.B.C. 1911, c. 170, is a restrictive and not an enabling statute as regards the enactment that applications to set aside awards on the class of arbitrations for which the Act provides, are to be made (1) on the ground of misconduct from the arbitrators, and (2) for awarding compensation on a wrong principle. Rulings on points of law arising in the arbitration in expropriation proceedings under the Municipal Act, R.S.B.C. 1911, c. 170, are to be reviewed upon a case stated by the arbitrators prior to the award being made, and not by an application after the award is made to set the same aside on the ground that the arbitrators had made a mistake of law.

Laursen v. Corp. of South Vancouver, 14 D.L.R. 241, 18 B.C.R. 532, 25 W.L.R. 431.

REVIEW OF AWARD—DELAY.

The statute of 9 and 10 William III.

(Imp.) c. 15 (repealed by the Arbitration Act (Imp.) of 1889), limiting the time within which a claimant may ask for a review of an award made for expropriation to the last day of the next term after the arbitration is made and published, would not and never did apply to such a statutory award as may be made under the Nova Scotia Arbitration Act (R.S.N.S. 1900, c. 176), read with a city charter; and under the Nova Scotia practice such an application is not too late where there has been no unreasonable delay. [English Judicature Rules, order 64, r. 14; Nova Scotia Jud. Rules, order 70, r. 2; Land Clauses Consolidation Act of 1845, s. 36, specially referred to; Re Harper & Great Eastern R. Co., L.R. 20 Eq. 39, distinguished.]

Hawkins v. Halifax, 10 D.L.R. 747, 47 N.S.R. 233, 12 E.L.R. 167.

If an award of arbitrators fails to decide on all matters referred to them, the award will be set aside by the court, whether the omission appears on the face of the award or by affidavit.

Re False Creek Flats Arbitration (No. 2), 8 D.L.R. 422, 21 W.L.R. 761, 17 B.C.R. 282, at 286, affirming 1 D.L.R. 363, 20 W.L.R. 387, 17 B.C.R. 282.

AWARD — CONCLUSIVENESS—SETTING ASIDE FOR FAILURE TO CARRY OUT UNDERTAKING—R.S.C. 1906, c. 37, s. 198.

An award made by arbitrators appointed under s. 196 of the Railway Act, R.S.C. 1906, c. 37, to ascertain the compensation that should be paid for injuries to land not actually taken or used by the railway, the owners claiming that the land was injuriously affected because the railway was built between the land and the sea, thereby cutting off their rights of access to the sea, will be set aside because of the failure of the arbitrators to keep a promise made by them to the owners of the land when the suggestion was offered on the arbitration proceedings that the question of the applicability of s. 198 of the Railway Act R.S.C. 1906, c. 37, to such a case should be referred to the court, which promise was that they (the arbitrators) should have it appear on the face of the award whether or not such section applied. [Judgment rendered at the trial affirmed by divided court.]

Re Vancouver, Victoria & Eastern R. Co., 5 D.L.R. 722, 14 Can. Ry. Cas. 101, 2 W.W.R. 688.

ERROR IN AWARD—POWER OF COURT TO ALTER OR AMEND—EMINENT DOMAIN.

Where arbitrators appointed under s. 396, R.S.B.C. 1911, c. 170, to ascertain damages for land taken for a public street, award interest at 7 per cent instead of 5 per cent as allowed by statute, the court cannot, upon the award coming before it on a motion to set the same aside, alter or amend the same to cure such error by accepting the respondent's abandonment of the excess, but must order the award set aside. [Skipworth v. Skipworth, 9 Beav. 135, followed.]

Humphreys v. City of Victoria, 5 D.L.R. 294, 17 B.C.R. 258, 21 W.L.R. 555, 2 W.W.R. 566.

CONCLUSIVENESS—MEMORANDUM OF ADJUDICATION — FORMAL AWARDS — PREPARATION OF—ADJOURNED MEETING—CHANGING ADJUDICATION—SETTING ASIDE.

On a majority of the arbitrators signing a memorandum of their adjudication under the Railway Act R.S.C. c. 37, and adjourning the arbitrators' meeting pending the preparation of a formal award as an authentic notarial document, it is too late for one of the majority to have the adjudication varied at the adjourned meeting if notice of such adjudication has been given to the parties; a notarial document passed on the later date with a lesser sum awarded than that first decided upon and notified to the parties, will be set aside.

Lachine, Jacques-Cartier, etc., R. Co. v. Kelly, 20 D.L.R. 587.

AWARD — CONCLUSIVENESS — ARBITRATORS —MODIFICATION—SETTING ASIDE.

An award under the Railway Act, Can., on the expropriation of land for railway purposes is not conclusive merely on the signing of an award by a majority of the arbitrators; it must be promulgated within the period provided for making the award in order to be binding, as although signed within the period it is subject to modification until published; the arbitrators are functi officio and the award must be set aside if not notified to the parties until after the expiry of the time. [Hampson v Dupuis, 8 D.L.R. 500, applied.]

Lachine, Jacques Cartier & Maisonneuve R. Co. v. Theberge & Bedard, 20 D.L.R. 703, 21 Can. Ry. Cas. 385.

AWARD — CONCLUSIVENESS — APPEAL — RAILWAY ACT (B.C.).

An award in arbitration proceedings under the Railway Act, R.S.B.C. 1911, is final and conclusive except for the statutory right of appeal (s. 68); it cannot be altered except by the court on the hearing of the appeal, and the power of remitting and setting aside an award upon motion is excluded. [Van Horne v. Winnipeg R. Co., 14 D.L.R. 897, and Ontario & Quebec R. Co. v. Vallières, 11 Can. Ry. Cas. 1, cited.]

Re B.C. Ry. Act and C.N.P.R. Co., 20 D.L.R. 633, 6 W.W.R. 467.

AWARD — CONCLUSIVENESS — REVIEW — MISTAKE.

To justify the setting aside of an award by a single arbitrator on the ground of mistake not appearing on the face of the award or in papers incorporated therewith, the arbitrator's admission of the mistake is necessary; so where there were three arbitrators, two of whom published an award, both must concur in certifying the mistake not apparent upon the award which the

court is to rectify and no relief can be granted where one of them denies that there is any mistake although the other asserts there was and desires the assistance of the court. [McRae v. Lemay, 18 Can. S.C.R. 280; Dinn v. Blake, L.R. 10 C.P. 388; Flynn v Robertson, L.R. 4 C.P. 324, referred to.]

Re Laidlaw & Campbellford Lake Ontario & Western Ry. Co., 19 D.L.R. 481, 31 O.L.R. 209.

AWARD — GROUNDS FOR SETTING ASIDE — MISTAKE OF LAW — MUNICIPAL ACT (B. C.).

[Laursen v. South Vancouver, 14 D.L.R. 241, affirmed.]

Laursen v. Corp. of South Vancouver, 17 D.L.R. 17, 18 B.C.R. 532.

EXPROPRIATION UNDER RAILWAY ACT (CAN.) — APPEAL TO SUPERIOR COURT IN QUEBEC PROVINCE — REVISION — JURISDICTION OF COURT OF REVIEW (QUE.).

Lefebvre v. Lachine, Jacques Cartier & Maisonneuve R. Co., 16 D.L.R. 858, 45 Que. S.C. 508.

ADVANTAGES ATTACHING TO LAND — FORESHORE — RIGHT OF ACCESS TO SEA — SETTING ASIDE AWARD.

An arbitrator is not entitled to allow in his award in expropriation proceedings, for rights or interests which do not attach to the lands and which cannot be acquired as being advantages that attach to the lands; consequently if the expropriating municipality had obtained grants from the Crown to the foreshore so that a strip of foreshore under such grant intervened between the sea and the claimants' properties, compensation as for a right of access to the sea cannot be allowed such proprietors as if they had direct littoral or foreshore rights, nor can the arbitrator properly consider as a potential value attached to the property, the intention manifested by the municipality before conceding to a railway company rights along its foreshore, to make foreshore grants or leases to adjoining owners so as to enable them to enjoy the right of access to the sea. [Re False Creek Arbitration, 8 D.L.R. 422, 17 B.C.R. 282; R. v. Bradburn, 14 Can. Ex. 419; Cedars Rapids v. Lacoste, 16 D.L.R. 168, referred to.] The question as to whether an award should be set aside or remitted for reconsideration is one of discretion, and unless that discretion has been obviously misused it will not be interfered with on appeal.

Re False Creek Reclamation Act, 22 D.L.R. 117, 8 W.W.R. 1191, 31 W.L.R. 678, 113 L.T.R. 795, affirming 22 D.L.R. 103.

SETTING ASIDE AWARD — DISREGARD OF STATUTE AS TO OPINION EVIDENCE.

A disregard of the limitations of s. 10 of the Evidence Act, Alta, limiting the number of witnesses to be called to give opinion evidence upon an arbitration subject to its provisions is a ground for setting aside the award and remitting the case to the arbitrators. [Rice v. Sockett, 8 D.L.R. 84, followed.]

Can. North. West. R. Co. v. Moore, 23 D.L.R. 646, 8 A.L.R. 379, 30 W.L.R. 676, 7 W.W.R. 1327.

REVIEW OF AWARD — CONCLUSIVENESS.

An Appellate Court treats an award as a judgment of an inferior court, and in the absence of error or misconduct on the part of the arbitrators will not interfere with it.

Toronto Suburban R. Co. v. Everson, 34 D.L.R. 421, 54 Can. S.C.R. 395.

RAILWAY ACT — REVIEW OF AWARD — APPEAL.

The award of arbitrators under s. 209 of the Railway Act, R.S.C. (1906), is similar to the judgment of a trial judge. An appeal, upon law and fact, is always open. But an Appeal Court will not interfere with the decision, unless there is good and special reason for doubting the soundness of the award.

Ruddy v. Toronto Eastern R. Co., 33 D.L.R. 193, 21 Can. Ry. Cas. 377, 38 O.L.R. 556.

APPEAL — POWER TO REMIT — RAILWAY ACT — COMPENSATION — MINING RIGHTS.

Where, in an arbitration under the Dominion Railway Act, the arbitrators refused, for legal reasons, to entertain a claim, an Appellate Court, on appeal therefrom, has power to remit the case to the arbitrators, to be dealt with by them on the merits; the question of compensation if any to be paid for a mining right under a coal lease is one of fact for the arbitrators. [Can. North. West. R. Co. v. Moore, 31 D.L.R. 456, 53 Can. S.C.R. 519, 10 W.W.R. 1231, followed; Davies v. James Bay R. Co., 26 D.L.R. 450, [1914] A.C. 1043, considered.]

Re Nash & Williams and Edmonton, Dunvegan & B.C.R. Co., 36 D.L.R. 601, 12 A.L.R. 151, 21 Can. Ry. Cas. 399, [1917] 3 W.W.R. 553.

INVALIDITY OF AWARD — POWER TO REMIT.

Under a statute making the award of arbitrators final and without appeal, the arbitrators' findings of fact and value are not free from challenge if they have exceeded their jurisdiction, as by assessing the value of the wrong thing.

Fraser v. City of Fraserville, 34 D.L.R. 211, [1917] A.C. 187, 116 L.T. 258, 23 Rev. de Jur. 446, affirming 25 Que. K.B. 106.

RAILWAYS — COURT'S POWER TO REMIT AWARD.

The provisions of the Arbitration Act (Alta., 1909, c. 6) apply to arbitrations under the Alberta Railway Act (1907, c. 8), so as to empower the court or a judge on appeal from an award, to remit it to the arbitrators for reconsideration. [Cedars Rapids v. Lacoste, 16 D.L.R. 168; Holditch v. Can. North. Ont. R. Co., 27 D.L.R. 14, 20 D.L.R. 557, referred to.]

Canadian North. West. R. Co. v. Moore, 31 D.L.R. 456, 53 Can. S.C.R. 519, 10 W.W.R. 1231, affirming 23 D.L.R. 646, 8 A.L.R. 379, 30 W.L.R. 676, 7 W.W.R. 1327.

MUNICIPAL CORPORATION — EXPROPRIATION OF LAND — COMPENSATION — WRONG BASIS FOR AWARD.

Re Slater & Ottawa, 28 D.L.R. 360, 10 O.W.N. 401.

EXPROPRIATION PROCEEDINGS—AWARD—APPEAL—POWER OF COURT.

On an appeal from an award in expropriation proceedings under the Railway Act, Can., the court may send the case back to the same arbitrators to make a new award where the first one is defective in that it does not definitely and clearly disclose what the award is based upon and how the sum awarded is arrived at, where it seems probable that some wrong principle has been applied by the arbitrators.

C.P.R. Co. v. Ball, 20 D.L.R. 903, 19 Can. Ry. Cas. 99, 23 Que. K.B. 547.

CONCLUSIVENESS OF AWARD.

The award of arbitrators is final and without appeal under art. 5797, R.S.Q. 1909, unless it is established that they have exceeded their jurisdiction. [Fraser v. Fraserville, 34 D.L.R. 211, [1917] A.C. 187, followed.]

Town of Montmagny v. Letourneau, 39 D.L.R. 214, 55 Can. S.C.R. 543.

INTERPRETATION ACT—APPEAL.

According to the Interpretation Act (R.S. C. 1906, c. 1, s. 34 (26)), the Superior Court to which an appeal may be taken in British Columbia against an award of arbitrators under the Railway Act (R.S.C. 1906, c. 37, s. 209) is the Supreme Court of British Columbia; there is no further appeal from such court to the Court of Appeal.

Re Kitsilano Arbitration (B.C.), 41 D.L.R. 170, 23 Can. Ry. Cas. 324, 25 B.C.R. 505, [1918] 2 W.W.R. 411.

AGREEMENT TO SUBMIT DISPUTE TO—APPOINTMENT OF ARBITRATORS—APPEAL FROM — OBJECTION THAT ARBITRATORS HAD NOT DEALT WITH MATTERS SUBMITTED.

Stokes-Stephens Oil Co. v. McNaught (Alta.), 43 D.L.R. 743, [1918] 3 W.W.R. 956. [See 34 D.L.R. 375, 12 A.L.R. 501, 43 D.L.R. 7, 44 D.L.R. 682.]

REVIEW OF AWARD—BIAS.

On a review of an award made as the result of an arbitration, upon which two arbitrators and an umpire sat, it should be kept in mind that the arbitrators appointed by the parties are likely to be biased in favour of the side appointing them, and there is some authority to justify such bias, under such circumstances. Enoch & Zaretsky, [1910] 1 K.B. 327, at 334.

Ripstein v. Winnipeg (Man.), 44 D.L.R. 60, [1918] 3 W.W.R. 965; [1919] 3 W.W.R. 750.

OPENING UP — FRESH EVIDENCE — REASONABLE DILIGENCE.

Before an award can be opened because of the discovery of fresh evidence after the award it must be shewn that there was reasonable diligence on the part of the applicant prior to the award to discover such evidence. [Burnard v. Wainwright, 19 L.J.Q.B. 423; Re Keighley & Bryan, Durant & Co., [1893] 1 Q.B. 405, distinguished.]

Gornigiani v. Welch, [1918] 3 W.W.R. 797, 26 B.C.R. 195.

AWARD—ARBITRATORS' JURISDICTION AS TO COSTS—AMENDING AWARD.

Farmers Bank v. Todd, 2 O.W.N. 1389, 19 O.W.R. 703.

RAILWAY—CONSTRUCTION OF BRIDGE AND APPROACHES IN STREET OF CITY — CHANGE IN GRADIENT OF STREET—INJURIOUS AFFECTION OF PROPERTY USED AS COAL YARD — COMPENSATION — AWARD — BASIS OF — DEPRECIATION IN SELLING VALUE—DISTURBANCE AND INJURY TO BUSINESS—METHOD OF ASCERTAINING EXTENT OF INJURY.

Re P. Burns & Co. & G.T.R. Co., 16 O.W.N. 309.

JURISDICTION TO REMIT AWARD.

There is no jurisdiction to remit an award in an arbitration held under the British Columbia Railway Act.

Re Can. North. Pac. R. Co. & Finch, 20 B.C.R. 87.

CONCLUSIVENESS OF AWARD—PARTICULARS —WHEN SET ASIDE.

In an award, the arbitrators are not obliged to give particulars. To justify the setting aside of an award, the proof that the arbitrators went upon a wrong basis as to time with reference to which compensation should have been ascertained, must be clear.

Forget v. Lachine, J.-C. & M.R. Co., 24 Que. K.B. 174.

EXPROPRIATION — REFERENCE BACK — DISQUALIFICATIONS OF ARBITRATORS.

In the case of expropriation of three immoveables when the award of the majority of the arbitrators is maintained for one of them and as to the others it is ordered by the Privy Council that the case be returned to the arbitrators to be proceeded upon by hearing of witnesses and by giving a new award upon bases defined and indicated, the same arbitrators are not disqualified from acting, and the case should be sent back to them rather than to new arbitrators. Nevertheless, if since the making of the award the wife of one of the arbitrators has become a shareholder in usufruct and her children in ownership, in the expropriating company, and if this arbitrator is himself the attorney of his wife, and, moreover, the executor and trustee of the succession of his father-in-law, who was also a shareholder in the company, the arbitrator cannot continue to act as such in order to give the new award, and should be replaced.

Cedars Rapids Mfg. & Power Co. v. Lacoste, 24 Que. K.B. 207.

REMEDIES AGAINST—CHANGE OF AWARD.

The Railway Act, R.S.C. 1906, c. 37, s. 209, gives two remedies against an arbitrators' award in a matter of expro-

priation; an appeal to the Superior Court; an action at common law. But the right of action to set aside the award is no longer open, if the appeal has been taken, and if the appellant did invoke or could have invoked, in his petition, the same reasons of fact and of law as those alleged in his action. When a majority of arbitrators in an expropriation under the Railway Act, decided to grant indemnity and chose a notary to draft the arbitrators' award, the third arbitrator, one of the majority, cannot later declare that he made a mistake in his figures and change the amount against the protests of the owner's arbitrator.

Lachine, Jacques Cartier & Maisonneuve R. Co. v. Bedard, 25 Que. K.B. 450.

APPEALS FROM AWARD — EXPROPRIATION — DISTRICTS.

An appeal from an arbitration award in matters of expropriation for hydraulic purposes, is well taken by direct action in the district where the defendant, the expropriating company, has its head office, although the lands to be expropriated are situate in another district.

Fleury v. Quebec Development Co., 17 Que. P.R. 425.

APPEAL—DIRECT ACTION—REGISTRATION OF RIGHT—C. C. ART. 1022—C.C.P. ART. 392, 410 TO 417, 1020, 1431, 1433, 1434, 1436, 1443, 1444—ORDINANCE OF 1534, C. 16, ART. 30—EDITION OF AUGUST 1560, ART. 2—AWARD OF THE PREVOST OF QUEBEC OCT. 1, 1737.

Art. 1444 of the case of Procedure was suggested by the Code Makers of 1867 in order to render definite and without appeal an arbitration award given under compromise. An arbitration award under compromise in this system, is not subject, as formerly, to approval, as even to-day the reports of arbitrators named by virtue of art. 411, are upon a simple motion; nor is it executed like judgments, by a writ in the name of the sovereign. The award only gives the right to an action in the ordinary form, that is to say, a principal action, to oblige the party to carry it out. The court can in this action enter into the examination of the nullities of form which would justify it in refusing to approve of the award, but it cannot get down to the bottom of the dispute except in the case where the party who is contesting the action, pays the penalty agreed upon by the compromise, or offers the amount to the other party, or brings it into court. The annulment of the arbitration award does not give rise to an action for the amount of the penalty. The previous payment of the penalty is only imposed to prevent by this means the reopening of a new dispute as to the grounds for the contestation between the parties, when the act has declared it to be adjudged finally by the arbitration award. The party condemned by the arbitration award cannot then ask for a nullity by a principal action. A similar recourse of annulment, elsewhere authorized by the code, would have the effect of giving indirectly to the party condemned by the arbitration award the right to a new trial or to an appeal which the Act has refused him.

Montreal v. Paiement & Pitre, 55 Que. S.C. 64.

IRREGULAR PROCEEDINGS.

Re Brooks Scanlon O'Brien Co., 17 W. L.R. 408 (B.C.).

MOTION TO MAKE AWARD A JUDGMENT OF THE COURT—RESPONDENT RESIDENT OUT OF THE JURISDICTION—AWARD ULTRA SUBMISSION.

Re Graves & Tentler, 16 W.L.R. 389, (Man.).

(§ III—18)—MODE OF ATTACKING AWARD—STATUTORY PROCEDURE—WAIVER.

An action does not lie to set aside an award, but application for that purpose should be made by motion under the Arbitration Act, and where an action has been commenced, the error cannot be cured by amendment or waived by filing a defence. [Heming v. Swinnerton, 5 Hare 350, applied; Spettigue v. Carpenter, 3 P.W. 361; Ives v. Medcalfe, 1 Atk. 63, referred to; Smith v. Whitmore, 2 D.G. J. & S. 297, 46 E.R. 390; Wilkerson v. McGugan, 2 D.L.R. 11; Vernon v. Oliver, 11 Can. S.C.R. 156, distinguished.]

City of Swift Current v. Leslie, 26 D.L.R. 442, 9 S.L.R. 19, 33 W.L.R. 528, 9 W.W.R. 1024.

APPLICATION TO SET ASIDE—EXTENSION—"SPECIAL CIRCUMSTANCE"—MISTAKE.

Mistake of counsel upon a question of law or practice does not constitute a "special circumstance" justifying the court in extending the time for an application to set aside an award, within the meaning of s. 13 (3) of the Arbitration Act, R.S.M. 1913, c. 9.

Re Sweinsson & Munic. of Charleswood, 31 D.L.R. 263, 27 Man. L.R. 234, 35 W.L.R. 293, [1917] 1 W.W.R. 293.

MOTION TO SET ASIDE AWARD FIXING AMOUNT OF RENT ON RENEWAL OF LEASE—CONDUCT OF THIRD ARBITRATOR — SPLITTING DIFFERENCE BETWEEN SUMS NAMED BY COLLEAGUES — OVER-VALUATION—MORTGAGEES—PARTIES TO ARBITRATION.

Re Toronto General Hospital Trustees & Sabiston, 10 O.W.N. 331.

MAKING AWARD A JUDGMENT OF THE COURT —REJECTION OF PART OF AWARD AS SURPLUSAGE.

Re Graves & Tentler, 21 Man. L.R. 417, 19 W.L.R. 361.

(§ III—25)—APPEAL—VALUATION—COSTS.

Re Irwin, Hawken & Ramsay, 4 O.W.N. 1562, 24 O.W.R. 878.

IV. Review of arbitration.

Appeals from awards, see Appeal.

(§ IV—40)—Appeal—Motion to quash—Jurisdictional amount.

An appeal from the King's Bench, Quebec, to the Supreme Court of Canada, dismissing a motion by a railway company for appointment of arbitrators on an expropriation, on the ground of the insufficiency of the notice to treat under the Railway Act, Can., will be quashed when it neither appears on the record nor by affidavit, under s. 49 of the Supreme Court Act, Can., that the matter in controversy amounts to the sum or value of $2,000. [Turgeon v. St. Charles, 15 D. L.R. 298, 48 Can. S.C.R. 473, referred to.]

Can. North. Ont. R. Co. v. Smith, 22 D.L.R. 265, 50 Can. S.C.R. 476.

Submission—Compulsory appointment—Remedy.

Where a General Arbitration Act authorizes the appointment compulsorily by the court of an arbitrator on default of either of the parties to a statutory submission to make his own appointment, the court will not seek to find at common law some other more tedious and expensive remedy, by way of mandamus or the like, to reach the same end.

North Vancouver v. Jackson, 16 D.L.R. 400, 19 B.C.R. 147, 27 W.L.R. 456, 6 W.W. R. 389.

Submission — Stipulation for — Stay of action.

A stay of proceedings pending an arbitration is properly ordered in respect of the contractor's action against the owner for the amount certified by the final certificate of the architect, although the question in dispute is whether the cost of removing the old building was included in the contract price or was an extra as the architect had certified where the building contract made in the form adopted by the Winnipeg Builders' Exchange stipulated for a final certificate in which the amount of the last payment should be indicated by the architect and further stipulated that his decision should be final, "subject to arbitration."

Gunn v. Hudsons Bay Co., 18 D.L.R. 420, 24 Man. L.R. 388, 28 W.L.R. 575, 6 W.W.R. 1224, affirming 16 D.L.R. 540, 27 W.L.R. 806.

Railway company—Lands taken possession of—Petitioner—Railway Act, Can.

A railway company cannot be ordered to proceed to arbitration under the Railway Act, Can., in respect of lands already taken possession of by it and which the petitioner claims.

Mackay v. G.T.R. Co., 20 D.L.R. 947.

Submission to—Compromise—Promise to compromise—Essentials of submission.

An alleged agreement, for arbitration of damages arising from the construction, maintenance and operation of a railway over the plaintiffs' lands, which specifies that "the damages shall be fixed by appraisers to be named by the parties," but neither specifies the names of the arbitrators, nor the subject-matter of the dispute, nor fixes the time within which the arbitration award shall be rendered, is not a compromise, but is merely a promise to compromise, and does not estop a person suffering damages from a right of action for the recovery of such damages. [McKay v. Mackedie, 11 Que. S.C. 513, followed.]

Desmeules v. Quebec & Saguenay R. Co., 15 Can. Ry. Cas. 94, 43 Que. S.C. 150.

Motion for order for enforcement of award valid on its face—Written reasons of one of three arbitrators, whether forming part of award—Extension of time for moving to set aside award—Stay of execution upon order for enforcement.

Re Wells & Gray and Windsor Board of Education, 17 O.W.N. 229.

(§ IV—41)—Excess of powers of.

Under an agreement nominating a referee or sole arbitrator, and calling upon him to decide what was necessary for the contracting builder to do in order to complete a house which he had contracted to build for the other party, the referee cannot authorize the purchaser or mortgagee to complete on the builder's default, nor can he, in his award, reserve the right so to authorize, nor has he authority to provide in the award that the builder shall not be freed from his obligation to do the work thereby directed to be done by way of completion of the contract until after the referee has approved of the manner of doing such work. Under an agreement stipulating that a builder will complete a house for occupancy "fully in keeping with the kind and quality of house as now standing" and specifying a referee to decide between the parties in case of any dispute between them as to the manner in which the house was completed, such referee has no authority to decide the matters in dispute on his personal inspection of the premises, but should provide for a hearing and the taking of evidence if either party wished to adduce evidence.

Wilkerson v. McGugan & Gaston, 2 D. L.R. 11, 5 S.L.R. 166, 20 W.L.R. 651, 2 W.W.R. 121.

Interest—Statutory right to.

The right to interest upon the compensation awarded for the compulsory taking of lands under the Railway Act, Can., is a statutory right, and the arbitrators have no power to include such interest in their award. [Re Ketcheson & C.N.O.R. Co., 13 D.L.R. 854, 29 O.L.R. 339, followed.]

Green v. C.N.R. Co., 22 D.L.R. 15, 8 S.L. R. 53, 19 Can. Ry. Cas. 139, 30 W.L.R. 572, 7 W.W.R. 1072.

Submission to—Effect—Agreement, or promise, to compromise.

A covenant by which it is provided that "in the event of any dispute arising out of the construction or meaning of any part of

this agreement, the subject of the dispute shall be referred to the award and determination of three arbitrators," is not an agreement to compromise, but simply a promise to compromise. The court is without jurisdiction to appoint the third arbitrator and the party aggrieved can only sue in damages.

Shedden Forwarding Co. v. G.T.R. Co., 15 Que. P.R. 229.

(§ IV—42) — COMPULSORY REFERENCE BY COURT.

When the parties to a construction contract are before the trial referee under the Mechanics' Lien Act (Ont.), for the purpose of tendering evidence at the trial of the contractor's claim in a mechanics' lien proceeding, an order cannot be made for the compulsory reference of the matters in dispute to arbitration or to compel the contractor to proceed to arbitration before going on with his action, although the contract provides that any dispute as to extras or reductions after the architect's certificate should be referred to arbitration, if an arbitration and award is not made a condition precedent to the action.

Contractors' Supply Co. v. Hyde, 2 D.L.R. 161, 3 O.W.N. 723, 21 O.W.R. 530.

WHAT IS SUFFICIENT SUBMISSION — ORDER OF THE COURT — JURISDICTION OF (MAN.) COURT OF KING'S BENCH.

Where, without objection by the parties to the proceeding, the Court of King's Bench made an order remitting to a single arbitrator, as provided by the charter of a city, an award of damages made by three arbitrators in a proceeding to open a public street, upon the award of such single arbitrator being set aside by the court on motion, such proceedings before the court constituted a sufficient submission by order of court. Where a city charter under which proceedings were instituted to open a public street did not provide for a formal submission to arbitration of the question of compensation for the land taken, but clearly shewed that the Court of King's Bench was to have summary jurisdiction over the proceedings, the practice provided by the Land Clauses Act is to be followed, and the appointment by such court, under the provisions of such charter, of a single arbitrator to consider the award made by three arbitrators, will be considered a sufficient submission of the question to arbitration by order of court.

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351, 2 W.W.R. 470.

APPOINTMENT OF ARBITRATOR BY COURT ON PARTY'S DEFAULT.

While under s. 8 of the Arbitration Act, R.S.B.C. 1911, c. 11, the court, on an application to appoint an arbitrator in default of appointment by either party, may consider a nomination by the party in default, and if it sees fit to select his nominee, it has no jurisdiction to make an order, in the nature of a mandamus, directing the defaulting party to nominate and appoint its arbitrator within a time limited. [See also North Vancouver v. Jackson, 16 D.L.R. 400.]

North Vancouver v. Loutet, 16 D.L.R. 395, 19 B.C.R. 157, 27 W.L.R. 237, 6 W.W.R. 139.

APPOINTMENT OF ARBITRATOR BY COURT — PENDING ACTION.

The defendant insurance company, on an action on a fire insurance policy, is not entitled to ask for the compulsory appointment of an arbitrator for the assured, under ss. 6 and 8 of the Arbitration Act, R.S.B.C. 1911, c. 11, to fix the loss in terms of a statutory condition on the policy after the defendant has delivered its statement of defence in such action, as the court thereby obtains seisin of the entire matter. [Doleman v. Ossett Corporation, [1912] 3 K.B. 257, applied.]

Re Hudson Bay Fire Ins. Co. v. Walker, 16 D.L.R. 275, 19 B.C.R. 87, 27 W.L.R. 218, 6 W.W.R. 147.

COMPULSORY APPOINTMENT OF ARBITRATOR BY COURT—B.C. ARBITRATION ACT.

Failure by a municipality to appoint its arbitrator under s. 394 of the Municipal Act, R.S.B.C. 1911, c. 170, falls within s. 8 of the Arbitration Act, R.S.B.C. 1911, c. 11, read with s. 25 thereof, under which an order may be made by the court appointing an arbitrator to represent the party who has failed to appoint his own arbitrator. [See also North Vancouver v. Loutet, 16 D.L.R. 395.]

North Vancouver v. Jackson, 16 D.L.R. 400, 19 B.C.R. 147, 27 W.L.R. 456, 6 W.W.R. 389.

(§ IV—44) — SUBMISSION TO — COURT'S FUNCTION THEREUNDER.

Where shares in a lumber company, based upon a specified list of company assets, are sold at a certain price, with a stipulation for a deduction in the purchase price of the shares to the extent of any future-ascertained deficiency in such assets, and where such deficiency is stipulated to be ascertained by arbitration, the court will give effect to the award under such arbitration, or, if the arbitration should for any sufficient cause prove abortive, it is the duty of the court (in the place and stead of the arbitration board) to hear and determine the question of deficiency and thus effectuate justice. Hamlyn v. Talisker Distillery, [1894] A.C. 202, at 211, applied.]

Cameron v. Cuddy, 13 D.L.R. 757, [1914] A.C. 651, 25 W.L.R. 236, 5 W.W.R. 56, reversing 7 D.L.R. 296, 3 W.W.R. 388.

AWARD OF ARBITRATORS—ENFORCEMENT OF UNDER ARBITRATION ACT — ENFORCEMENT OF AS A JUDGMENT—ORDER FOR.

McNaught v. Stokes-Stephens Oil Co., 46 D.L.R. 668, [1919] 1 W.W.R. 952.

ORAL SUBMISSION—ENFORCING AWARD.

An award made upon an oral submission to submit a dispute to arbitration cannot be entered as a judgment for enforcement under the Arbitration Act, 1911 (Man.); the empowering section (s. 14) which declares that "an award on a submission" may be so entered, being controlled by s. 2 defining a submission, unless the contrary appears, as a written agreement to submit.

Re Simpson & Halford, 11 D.L.R. 410, 4 W.W.R. 129.

ENFORCEMENT.

A stipulation for an arbitration to determine the amount due under a building contract is subject to the provisions of the Arbitration Act, 9 Edw. VII. (Ont.), c. 35, s. 8, and the party invoking the same must apply to stay the action before his defence is pleaded or other step taken in the cause after entering his appearance.

Contractors' Supply Co. v. Hyde, 2 D.L.R. 161, 3 O.W.N. 723, 21 O.W.R. 530.

ENFORCING AWARD—STATUTORY RELIEF FOR FAILURE TO CARRY OUT AWARD—REMEDIES OF LANDOWNERS.

The provisions of clause (u), s. 6, of Victoria Waterworks Act, 1873, 36 Vict. (B.C.), c. 20, 55 Vict., c. 64, s. 3, that upon default in payment of the amount awarded for land expropriated for waterworks purposes the proprietor may resume possession thereof, in which case all his rights shall revive, is intended only as an additional safeguard to secure payment of such award, and is not the exclusive remedy available to him, and he may obtain judgment on the award.

Davie v. City of Victoria, 2 D.L.R. 287, 20 W.L.R. 544, 1 W.W.R. 1021.

Differences having arisen as to the interest of the parties in certain lands and goods, such differences were referred to arbitration. The arbitrators found in part as follows: "That the south-east quarter of s. 16-14-15, W. 2nd, be transferred from the name of H. Mitchell to R. Mitchell, subject to the proportion amount of the mortgage now registered against the property, said proportion being ($1,600). R. Mitchell to assume said mortgage and to pay interest owing thereon from and after the 1st day of January, 1909; also principal as it becomes due." On application an order was made to enforce the award, from which order the unsuccessful party appealed, and urged certain objections against the procedure and conduct of the arbitrators:—Held, that if a party desires to set up misconduct of the arbitrators or that the award was improperly procured, he should move to set aside the award, and such objections should not be entertained on a motion to enforce the award. (2) That the award as set out above was so uncertain as to be incapable of enforcement.

Mitchell v. Mitchell, 4 S.L.R. 406.

JUDGE DIRECTING EXECUTION — AWARD AS JUDGMENT.

S. 13 of the Arbitration Act (c. 6, 1909, Alta.) does not authorize a judge to direct execution, on an award, where the evident intention of the arbitrators was not to determine how much was due but the basis upon which the amount could be determined. All that the section authorizes is the granting of leave by a judge for the award to be treated as a judgment for the purpose of enforcement.

Re McNaught & Stokes-Stephens Oil Co., 43 D.L.R. 7, 14 A.L.R. 1, [1918] 3 W.W.R. 337. [See 34 D.L.R. 375, 12 A.L.R. 501, 43 D.L.R. 743, 44 D.L.R. 682.]

MOTION TO ENFORCE AWARD — PAYMENT OF MONEY BY MUNICIPALITY—AGREEMENT TO PAY AMOUNT AWARDED AND INTEREST FROM DATE OF EXPROPRIATION NOTICE.

Keewatin Power Co. v. Town of Kenora, 20 O.W.R. 835.

ACTION TO ENFORCE AWARD OR VALUATION MADE BY TWO OF THREE ARBITRATORS OR VALUERS — CONSTRUCTION OF SUBMISSION-AGREEMENT — VALIDITY OF AWARD OR VALUATION—CLAIM FOR REFORMATON OF AGREEMENT—EVIDENCE—NEW TRIAL.

Massie v. Campbellford, Lake Ontario & Western R. Co., 6 O.W.N. 457.

SUBMISSION—AGREEMENT TO PAY DAMAGES TO "PROPERTY OWNERS" — AWARD IN FAVOUR OF UNNAMED OWNER—DISPUTE AS TO OWNERSHIP — REFERENCE BACK TO ARBITRATOR TO DETERMINE.

Re Young & Ontario & Minnesota Power Co., 17 O.W.N. 204.

(§ IV—46)—AWARD—COSTS TAXED MORE THAN AWARD — EFFECT OF RAILWAY ACT, R.S.C. 1906, c. 37, s. 199.

Under R.S.C. 1906, c. 37, s. 199, the taxable costs, incurred on an arbitration, are a debt recoverable by action, and the expropriated party is liable for such costs even though they may exceed the compensation awarded. The judge who taxes these costs acts as persona designata, and no appeal lies from his decision.

Calgary & Edmonton R. Co. v. Saskatchewan Land & Homestead Co., 50 D.L.R. 16, [1919] 3 W.W.R. 1011, reversing 46 D.L.R. 357, 24 Can. Ry. Cas. 346, 14 A.L.R. 416, which reversed 44 D.L.R. 133.

COSTS — WINNIPEG CHARTER, S. 812 — "COSTS OF THE ARBITRATION" — "FULL COSTS OF AND INCIDENTAL TO THE ARBITRATION"—PARTY AND PARTY COSTS ONLY—NO COSTS PRIOR TO COMMENCEMENT OF PROCEEDINGS — APPLICATION OF TARIFF—COSTS OF WITNESS AS TO REAL ESTATE VALUES.

The "costs of the arbitration" which under s. 812 of the Winnipeg Charter arbitrators are empowered to award ordinary costs between party and party; a direction by the court that the "full costs of and

incidental to the arbitration are to be taxed" does not go beyond that. Where arbitration proceedings are inaugurated by a notice claiming damages, the first item of costs of and incidental to the arbitration is instructions for this notice, and no costs should be allowed prior thereto. Where a scale of costs is fixed the parties are bound by it (Re C.N.R. & Robinson, 17 Man. L.R. 579, distinguished). Under the Manitoba tariff a witness called to express an opinion as to real estate value can only demand the ordinary fee allowed to a nonprofessional witness. Any extra payment to him for examining the property or otherwise qualifying himself cannot be taxed against the other side. Certain particular items of costs considered with reference to the tariff.

Ripstein v. Winnipeg, [1919] 3 W.W.R. 730.

ARCHITECT.

As to building contracts, see Contracts.

Annotation.

Duty to employer: 14 D.L.R. 402.

(§ I—5)—Rights and liabilities—Negligence — Counterclaim — Commission—Costs.

McDonald v. Edey, 3 D.L.R. 893, 3 O.W.N. 1514, 22 O.W.R. 664.

Rights and liabilities — Building contract — Substituting concrete for rubble wall—Absence of resulting damage.

The substitution by the architect's direction of a concrete for a rubble wall called for in the specifications of a building contract will not be allowed as a ground of diminution to or set-off against the architect's remuneration where no resulting damage to the building owner is shewn, and the evidence proves that the building was not of less value on that account nor was the owner put to any increased cost by the change.

Samwell v. Kindt, 20 D.L.R. 199, 28 W.L.R. 347.

Rights and liabilities — Plans for constructing building—Negligence.

An architect is bound to exercise reasonable care, skill, and diligence in the preparation of plans ordered from him, and his failure to do so will not only disentitle him to recover the price, but make him liable for the expense which the owner must incur to remedy the defect in a wall improperly built in reliance upon the plans.

Cauchon v. MacCosham, 19 D.L.R. 708, 28 W.L.R. 500.

Rights and liabilities — Failure to secure deposit with tenders — Compensation.

In the absence of an express instruction from his employer to obtain deposits with tenders for the construction of a building, an architect is not answerable for a failure to do so, where the lowest bidder refused to enter into a formal contract in pursuance of his tender. An architect who submits preliminary plans accompanied by estimates from reliable contractors as to the probable cost of a structure to be erected with a certain capacity, and on the faith thereof obtains an order for the preparation of detailed plans and specifications and the obtaining of tenders, is not precluded from recovering for his services when the lowest tender is greatly in excess of the preliminary estimates; the architect is not a guarantor of the estimated cost and is not chargeable with negligence if he took reasonable care to obtain reliable estimates.

Munro v. Yorkton Agricultural Assn., 15 D.L.R. 396, 26 W.L.R. 513, 5 W.W.R. 974.

Negligence in giving final certificate —Liability for.

An architect employed to superintend the erection of a building, who with knowledge that it had not been completed according to the plans and specifications improperly gave the contractor a certificate of completion is answerable for his negligence to his employer. [Rogers v. James, 8 Times L.R. 67; Badgley v. Dixon, 13 A.R. (Ont.) 494, followed; Chambers v. Goldthorp, [1901] 1 K.B. 624, distinguished.] An architect is entitled to compensation quantum meruit for superintending the erection of a building and making extra drawings therefor, notwithstanding the fact that he is answerable to his employer for negligently giving a final certificate to the contractor before he had finished his work according to the plans and specifications. [Rogers v. James, 8 Times L.R. 67, followed.]

Bruce v. James, 12 D.L.R. 469, 23 Man. L.R. 339, 24 W.L.R. 752, 4 W.W.R. 1019.

Right to recover fees for preparing plans—Defence of not being satisfied with plans — Payment into court—Costs.

Maclure v. Cusack, 7 D.L.R. 835, 20 W.L.R. 611.

Contract — Architect — Preparation of plans — Risk of architect — Evidence of employment — Action for remuneration — Testimony of discharged servants—Suspicion.

Wolfe v. Eastern Rubber Co., 5 O.W.N. 979, 26 O.W.R. 11.

Building contract — Architect — Fees for services in erection of building —Breach of duty—Attempt to remedy defect in construction — Bona fides—Recovery of fees—Deduction of expense caused by abortive attempt—Costs.

Meredith v. Roman Catholic Episcopal Corp. of Ottawa, 7 O.W.N. 550.

PREPARATION OF PLANS—ACTION FOR FEES.

Lennox v. Russell Motor Car Co., 10 O.W.N. 181.

CHANGE IN PLAN—WANT OF AUTHORITY.

An architect, who orders additions or changes in the plan and specification necessitating an increase in the price without authority from the owner, is personally liable to the contractor for the cost of such work.

Pauzé v. Doucet, 48 Que. S.C. 184.

ARCHITECTS' ASSOCIATION — MEMBERS — OFFENCES.

The word "architect" cannot be used by a person to designate his profession unless he has been registered as a member of the Architects' Association of the Province of Quebec. One who advertises himself in various ways as an architect and who practises as such without this registration can be prosecuted only for a first offence although it may be continued.

Assoc. of Architects v. Paradis, 48 Que. S.C. 220.

ARCHITECTS' ASSOCIATION—USE OF NAME.

The statute incorporating "The Province of Quebec Association of Architects," as contained in the R.S. of 1909, Arts. 5236 to 5255, does not constitute the said association a closed corporation, or prevent others duly qualified and not members of the said association from practising their profession and using the name of architect, within the Province of Quebec, provided they do not use that name to be understood that they are architects under the law incorporating the above association. The words "first offence," in s. 5247, must be considered to mean first offence established by a judgment of the court.

Assoc. of Architects v. Gariepy, 50 Que. S.C. 134.

NEGLIGENCE — CONTRACT — PAYMENT FOR PLANS.

Hutcheroft v. Leitch, 25 W.L.R. 609.

(§ I—8)—ACCOUNTING TO OWNER FOR CERTIFICATES ISSUED — BASIS OF CERTIFICATES TO BE SHEWN IN DETAIL.

An architect is bound to render to the building owner a detailed account shewing the appropriation of the various sums expended under the architect's certificate, notwithstanding that the certificate is, by the terms of the contract, made final as between the building owner and contractor; and such account should shew separately the extras and the work condemned and disallowed.

McDermott v. Coates, 14 D.L.R. 401, 18 B.C.R. 439, 25 W.L.R. 711, 5 W.W.R. 390.

ARMY AND NAVY.

See Military Law; Militia.

War Relief Acts, see Moratorium.

ENLISTMENT—MINOR UNDER 18.

In time of war a minor, acting of his own free will, has the right to enlist for military service without the consent of his father, this is in accord with the provisions of the federal statutes and of the regulations and orders of the Governor-General in Council.

Amesse v. Desrosiers, 50 Que. S.C. 243.

ARREST.

I. FOR CRIME.
  A. In general.
  B. Without warrant.
II. IN CIVIL CASES.

See also False Imprisonment; Malicious Prosecution; Criminal Law.

Annotation.

Arrest and detention of alien enemies: 23 D.L.R. 375, 383.

I. For crime.

A. IN GENERAL.

(§ I A—1)—CRIMINAL OFFENCE—DISCRETION OF MAGISTRATE.

The discretion vested by law in a magistrate to refuse a warrant of arrest for an indictable offence will not be interfered with by a Superior Court by way of mandamus, nor will a mandamus be granted where a warrant of arrest had been granted by the magistrate, but, on reconsideration, he had directed its withdrawal before it was executed.

R. v. Biddinger, 15 D.L.R. 511, 22 Can. Cr. Cas. 217.

CRIMINAL CASE—REGULARITY—CHARGE FOR ATTEMPT AFTER ACQUITTAL FOR PRINCIPAL OFFENCE—MATTER OF DEFENCE.

An arrest upon a warrant for an attempt to commit an indictable offence is not illegal merely because a plea of autrefois acquit was available to the accused in respect of a prior acquittal for the principal offence, upon the charge of which the attempt might have been inquired into and punished, if the evidence warranted it, by virtue of Cr. Code (1906) s. 949.

R. v. Weiss; R. v. Williams (No. 2), 13 D.L.R. 633, 22 Can. Cr. Cas. 42, 6 A.L.R. 262, 25 W.L.R. 351, 5 W.W.R. 48.

EXEMPTION FROM ARREST—SOLDIERS IN ACTIVE SERVICE.

Ex parte Hughes, 24 D.L.R. 898, 24 Can. Cr. Cas. 222.

SUFFICIENCY OF WARRANT—DESCRIPTION.

Although the description in a warrant of arrest be not exact it is sufficient if there could be no failure to identify the person to be arrested.

Re Wade (N.B.), 38 D.L.R. 287.

DEPUTY CLERK OF PEACE—POWERS.

A clerk of the peace has the right, under R.S.Q. art. 3505, to appoint one deputy only, with all the powers he himself has; all deputies whom he appoints subsequently to the first have not these powers; and accusations which the latter receive under oath, and the orders for arrest which are issued under such accusations, are illegal and void.

Villeneuve v. Primeau, 54 Que. S.C. 82.

(§ I A—2)—Witnesses on application for warrant.

S. 655 of the Cr. Code, as amended 1909, does not make it essential that witnesses should be produced on an application to a justice for a warrant of arrest, but requires that if any witnesses are produced their evidence must be given upon oath and taken down in writing by the justice. [To same effect see Ex p. Archambault, 16 Can. Cr. Cas. 433; R. v. Mitchell, 19 Can. Cr. Cas. 113.]

White v. Dunning, 21 D.L.R. 528, 8 S.L.R. 76, 24 Can. Cr. Cas. 85, 30 W.L.R. 585, 7 W.W.R. 1210.

Arresting officer also informant.

An arrest under warrant in a criminal matter may be made by the same officer who laid the information, but it is undesirable that the informing officer should act if he has any personal feeling against the accused or any monetary interest in the subject matter of the charge.

R. v. Harrison, 29 Can. Cr. Cas. 420, 25 B.C.R. 433.

(§ I A—3)—By policeman—Measures to prevent escape — Circumstances — Judgment of officer—Interference by Appellate Court.

If a policeman, making a sudden arrest, makes up his mind that it is necessary to handcuff a prisoner in order to prevent his escape, an Appellate Court will not interfere with such judgment, unless the circumstances, under which the handcuffing was done, give them reason to believe that there was a particular desire to administer harshness.

Fraser v. Soy, 44 D.L.R. 437, 30 Can. Cr. Cas. 367, 52 N.S.R. 476.

Warrant of commitment—Authority to all peace officers to execute—Prosecutor a peace officer.

Re McMurrer (No. 2), 18 Can. Cr. Cas. 49 (P.E.I.).

(§ I A—4)—Malice—When inferred—Technical objection—Wrong offence charged—Resisting officer.

Malice is not to be inferred merely from a technical objection such as that the party suing for false arrest had been charged with crossing a certain street at an immoderate speed whereas he was not on that street but had been forcibly stopped on a connecting street on disobeying the signal of the traffic officer to stop, and on disputing the latter's authority had been arrested by the officer in good faith and uninfluenced by any desire to injure the plaintiff in making the arrest in question; the plaintiff was merely charged with the wrong offence and might properly have been charged with resisting a police officer in the execution of his duty.

St. Denis v. Montreal, 20 D.L.R. 571, 45 Que. S.C. 435.

Illegal detention by police.

An arrest in criminal proceedings is not invalidated by the circumstance that at the time of the arrest the accused is already in the custody of the police under an unlawful arrest or detention. A subsequent valid arrest can be made without a previous discharge from the unlawful custody.

R. v. Harrison, 29 Can. Cr. Cas. 420, 25 B.C.R. 433.

Judgment — Illegal arrest — Damages —Motives of judgment, C.C. art. 1053 C.C.P. art. 541.

In an action for damages for illegal and malicious arrest rejected by the court on the defence of good faith and probable cause, the court of reversion can order that the following words, "the plaintiff after all is guilty of the offence" be attached from the judgment of the Superior Court.

Valcourt v. Valiquette, 25 Rev. Leg. 16.

B. Without warrant.

(§ I B—5)—Municipality not liable.

A city policeman appointed by a Justice of the Peace under the Constables Ordinance, Alta. (C.O. 1905), and paid by the city to carry on his duties as a police constable, especially within the boundaries of the city, but at the same time having jurisdiction throughout the province, is not a servant of the municipality in the ordinary sense, and the municipality is not liable under the doctrine of "respondeat superior" for an arrest wrongfully made by the constable without a warrant. [McCleave v. Moncton, 6 Can. Cr. Cas. 219, 32 Can. S.C.R. 106, referred to.]

Pon Yin v. Edmonton, 24 Can. Cr. Cas. 327, 31 W.L.R. 402, 8 W.W.R. 809.

Making arrest without warrant—Presumption of legality of prisoner's custody.

The King v. McDonald, 18 Can. Cr. Cas. 251, 16 B.C.R. 191.

(§ I B—7)—Effect on summary trial jurisdiction.

Where the defendant was illegally arrested without a warrant on a charge of keeping a disorderly house, and is brought before a magistrate having power of summary trial without the consent of the accused (Code, s. 774, as amended, 1909), there is a lack of jurisdiction over the person, which may be effectively raised by an objection, but which it is competent for the accused to waive. [R. v. Baptiste Paul (No. 2), 7 D.L.R. 25, 20 Can. Cr. Cas. 161; R. v. Davis, 7 D.L.R. 608, 20 Can. Cr. Cas. 203, followed.]

R. v. Miller, 25 Can. Cr. Cas. 151, 25 W. L.R. 296.

Assault on peace officer.

A constable may at the time of an assault with bodily harm committed upon him arrest the person so assaulting him, and he may also arrest him in fresh pursuit while there is danger of the guilty person escaping; no warrant is in such case required, but he is not justified, after the lapse of several months, in arresting without a warrant in a case in which he is the injured

party. [Powell v. Williamson, 1 U.C.Q.B. 154; Ex parte McCleave, 6 Can. Cr. Cas. 15, 3 O.L.R. 438, and Reg. v. Heffernan, 13 O.R. 616, referred to.]

R. v. Belyea, 24 Can. Cr. Cas. 395, 43 N.B.R. 375.

DISORDERLY HOUSE CHARGE — SUMMARY TRIAL.

If the accused was illegally arrested and brought before the police magistrate without a warrant and objection taken at the summary trial for keeping a disorderly house (Code, ss. 773 (f), 774 and 228), the magistrate acted without jurisdiction and the accused will be discharged on habeas corpus following the conviction made by the magistrate. [R. v. Miller, 25 Can. Cr. Cas. 151; R. v. Wilson, 24 Can. Cr. Cas. 370; R. v. Davis, 20 Can. Cr. Cas. 293, followed; R. v. Hurst, 23 Can. Cr. Cas. 389, 20 D.L.R. 129, not followed.]

R. v. Young Kee (No. 1), (Alta.), 28 Can. Cr. Cas. 161.

OFFENCE SUMMARILY PUNISHABLE — VAGRANCY.

Vagrancy under Cr. Code, ss. 238 and 239, being the subject of summary conviction proceedings and not if indictment, Code, s. 652 does not apply to justify an arrest on suspicion by a peace officer without warrant where the peace officer did not find the accused committing the particular act relied upon as constituting statutory vagrancy (Cr. Code, s. 648).

R. v. Lachance, 24 Can. Cr. Cas. 421.

ILLEGAL ARREST — DAMAGES — PROBABLE CAUSE — MALICE — ASSIGNMENT — JUDGE AND JURY—QUE. C.C. 16, 502—QUE. C.P. 4, 500, 85.

In order that a person illegally arrested can have a right to damages, it is necessary that the proceedings must have been ended by his release, and that the arrest could not be justified by probable cause, in this case malice being inferred from the absence of probable cause. "Probable cause," with respect to illegal arrest, is a question of law which ought to be left entirely and absolutely to the discretion of the judge, who should decide this question independently of the jury and without its help.

Perron v. Drouin, 46 Que. S.C. 336, 16 Que. P.R. 121.

LIABILITY — ILLEGAL ARREST — PROBABLE CAUSE—EVIDENCE—QUE. C.C. 1053.

One who has, even in good faith, bought a stolen article, and who, summoned before a magistrate to give explanations, instead of answering sincerely and frankly, runs away, and, being called back, becomes nervous, hesitates, contradicts himself and tries to dissimulate the truth, inspires enough suspicion of his being guilty or receiving stolen goods to justify his arrest. And, under such circumstances, if he is subsequently acquitted there is no remedy in damages against the complainant. It is now settled by law that in a case of damages for illegal arrest, the plaintiff must prove that the defendant, his accuser, has acted not only rashly but also maliciously. The accuser is also not responsible if he has acted conscientiously according to his counsel's advice, and especially under the advice of the magistrate charged to examine the plaintiff. If, however, the accuser had the plaintiff arrested not in the public interest but for his own private interest, the action in damages, if dismissed, will be dismissed without costs.

Wetstein v. Charlebois, 46 Que. S.C. 515.

BY CONSTABLE FOR BREACH OF CITY BY-LAW.

Plested v. McLeod, 3 S.L.R. 374, 15 W.L.R. 533.

BREACH OF RAILWAY REGULATIONS.

McAllister v. Johnson, 40 N.B.R. 73.

(§ I B—8)—WHEN JUSTIFIABLE—PROBABLE CAUSE.

A peace officer is justified under Cr. Code, s. 30, in arresting without warrant a person who, on reasonable and probable grounds, he believes has committed an indictable offence for which the law provides that the offender may be arrested without warrant, but in acting under s. 30, it is essential that the officer should stand indifferent so that he may act without bias or partiality in deciding whether or not there are reasonable and probable grounds for the arrest; consequently s. 30 cannot apply where the officer is himself the person specially aggrieved by the offence.

R. v. Belyea, 24 Can. Cr. Cas. 395, 43 N.B.R. 375.

(§ I B—9)—WITHOUT WARRANT ON CRIMINAL CHARGE — ARREST OF WRONG MAN ON DESCRIPTION AND PHOTOGRAPH SUPPLIED TO THE POLICE—CR. CODE, S. 30.

Cr. Code, s. 30, which justifies an arrest without warrant on suspicion of a crime for which, if the accused were guilty, he would be liable to arrest by a peace officer without warrant, justifies also the detention of the person arrested for such time as may be necessary to identify him or to permit the process of law to be enforced. The circumstances may justify the taking of a photograph of the person arrested and forwarding it for identification to the police of another city who had forwarded a photograph of the person against whom they held a warrant of arrest, where the resemblance to this photograph and the accompanying description was the cause of the arrest, but the police officer effecting the arrest and detention of the wrong man will be liable in damages for unnecessary delay in releasing him, due to amateur efforts in taking the photograph of the arrested person and in holding him in custody after the expiration of the time requisite for receiving information by wire that he was not the person wanted.

Anderson v. Johnston, 38 D.L.R. 563, 29 Can. Cr. Cas. 24, 10 S.L.R. 352, [1917] 3 W.W.R. 353. [Affirmed, 43 D.L.R. 183, 30 Can. Cr. Cas. 268, 11 S.L.R. 478.]

ILLEGAL ARREST ON FIRST CHARGE—CONVICTION MADE ON SECOND CHARGE ONLY—DISMISSAL OF FIRST CHARGE.

The fact that the accused had been illegally arrested without a warrant on a charge which was dismissed, and that pending the hearing another charge was laid for a different offence, will not deprive the magistrate having jurisdiction in respect of time and place over the latter offence from proceeding to trial and conviction where objection was raised only in that case and not in the case upon the prior charge which was dismissed. [R. v. Hughes, 4 Q.B.D. 614; R. v. Paul, 20 Can. Cr. Cas. 159, 7 D.L.R. 24, followed; Pearks v. Richardson, [1902] 1 K.B. 91, distinguished.]

R. v. Hurst, 20 D.L.R. 129, 7 W.W.R. 994, 23 Can. Cr. Cas. 389, 30 W.L.R. 176.

WITHOUT WARRANT—REARREST ON ORIGINAL WARRANT AFTER APPEAL FROM CONVICTION.

Pending the hearing of an appeal duly lodged against a summary conviction, the appellant cannot be rearrested on the original warrant as its operation is suspended by the appeal.

R. v. Trottier, 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 A.L.R. 451, 25 W.L.R. 663, 5 W.W.R. 363.

ACCUSED ON BAIL—REARREST ON ORIGINAL WARRANT.

The release under bail pending an appeal under Criminal Code, s. 797, from a conviction on summary trial for keeping a disorderly house does not prevent the rearrest and detention of the defendant under the original warrant of commitment on the conviction being affirmed.

R. v. Durlin, 4 D.L.R. 660, 19 Can. Cr. Cas. 392, 17 B.C.R. 207, 21 W.L.R. 837.

LIQUOR LAW.

Neither Cr. Code, s. 35, nor Cr. Code, s. 648, applies to authorize a peace officer to arrest without warrant a person whom he finds committing an offence against a provincial statute which itself provides a penalty and is therefore not within Cr. Code, s. 164, as to wilful disobedience of provincial statutes. [R. v. McMurrer, 18 Can. Cr. Cas. 385, approved.]

R. v. Pollard, 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 A.L.R. 157, [1917] 3 W.W.R. 754.

II. In civil cases.

(§ II—10)—FRAUDULENT DEBTORS ARREST ACT—PROOF OF DEBT—INTENT TO DEFRAUD—INTENT TO LEAVE WITHOUT PROVIDING FOR DEBTS.

Simpson v. Genser, 25 D.L.R. 847, 34 O.L.R. 381.

IMPRISONMENT FOR DEBT—DIFFERENCE OF BID—JUDICIAL SALE.

The provisions of the law respecting imprisonment in a civil matter should be strictly interpreted and applied only in cases clearly established. An arrest is not permissible, of a purchaser of movables judicially sold, for the payment of the difference between his bid, and the amount that the sale might have produced by a resale for false bidding (folle enchère), when such sale was made by a curator in insolvency under a judge's order which authorization is not equivalent to a judgment of the court under art. 833, C.P.Q.

Wilks v. Brossard, 49 Que. S.C. 467, 17 Que. P.R. 323.

SAISIE-ARRÊT—LIMITATIONS.

Nisbet & Auld v. White, 12 Que. P.R. 272.

(§ II—15)—AFFIDAVIT FOR WRIT OF CAPIAS.

An affidavit for capias must on its face shew every element to justify the condemnation of the defendant to imprisonment, and failure to mention in the affidavit the place of origin of the alleged indebtedness is a fatal irregularity. Where costs due upon a judgment obtained in Quebec are alleged in an affidavit to be due, but the place of the original indebtedness is not mentioned therein, such allegation regarding costs cannot justify the issue of a capias inasmuch as the judgment obtained did not operate as a novation of the debt and the costs incurred on such judgment are but an accessory of the debt. [Rocheleau v. Bessette, 3 Que. Q.B. 96, followed.]

Larue Cloutier v. Bastien, 8 D.L.R. 497, 43 Que. S.C. 309, 19 Rev. Leg. 251.

ARREST—EX PARTE ORDER FOR—FRAUDULENT DEBTORS ARREST ACT, R.S.O. 1914, c. 83, s. 3 — AFFIDAVITS — FAILURE TO SHEW CAUSE OF ACTION FOR $100—ORDER SET ASIDE AS IMPROVIDENT—PRACTICE—POWER TO RESCIND EX PARTE ORDER — R. 217 — FAILURE TO SHEW FACTS AND CIRCUMSTANCES INDICATING INTENTION TO ABSCOND — NONDISCLOSURE OF MATERIAL FACTS.

Parsons v. Hancock, 38 O.L.R. 590.

CAPIAS—AFFIDAVIT—SUFFICIENCY.

An affidavit for a capias, which merely sets out a note declared valid by a judgment of the Superior Court confirmed in review, is illegal as not sufficiently indicating that the debt was created or made payable within the limits of the Provinces of Quebec and Ontario.

Grimard v. Desaulniers, 18 Que. P.R. 260.

CAPIAS—FRAUDULENT WITHDRAWAL OF PROPERTY—CONFESSION OF JUDGMENT.

There is no fraudulent withdrawal of property for which a writ of capias may issue, in the act of a debtor who on the advice of his attorney confesses judgment in favour of his son who, in executing such judgment by the regular decree of the court, sells the only property belonging to his father, the returns from which are scarcely sufficient to pay the costs of the action and of the seizure.

Desjardins v. Rivard, 18 Que. P.R. 285.

NATURE OF CLAIM—DAMAGES—JUDGMENT.

The contrainte par corps can only be granted in an action for damages in the

case where the damages awarded have a personal character; it cannot be obtained when the judgment does not indicate the nature of the damages nor the amounts which relate to exemplary damages and real damages respectively.

Pagé v. Paton, 51 Que. S.C. 287, 18 Que. P.R. 271.

CAPIAS—AFFIDAVIT—FORMS.

The affidavit of the plaintiff to obtain a capias is sufficient if it follows the form in Schedule R. of the appendix to the Code of Civil Procedure (Que.), or any other form of the same tenor.

Lapointe v. Champlain, 18 Que. P.R. 70.

In an affidavit for a capias it is not sufficient to name the place where the debt is payable; the place where it was contracted should also be stated.

Abrahamovitch v. Wiselberg, 13 Que. P.R. 260.

(§ II—20)—REPAIRING BUILDING BELONGING TO WIFE ON CREDIT OF HUSBAND—SALE OF PROPERTY BY WIFE—QUASHING CAPIAS.

Where a builder or contractor does work on or repairs to a building standing registered in the name of the wife, but giving credit to the husband and charging him therewith, such builder or contractor cannot afterwards charge the husband with secretion of property by the fact of the sale of the house by the wife at a low figure and a capias issued under such circumstances will be quashed. Where merchants give credit recklessly on mere promises to pay to persons with no possible means of making good such promises, they are not entitled to relief by writ of capias if their debtors are unable to meet their payments as they fall due, although the debtors make payments to other creditors in preference or priority to them, particularly where the goods supplied are for personal use.

Sharpe v. de Pedro, 9 D.L.R. 129.

CAPIAS (QUEBEC)—PROCEDURE—SUFFICIENCY OF AFFIDAVIT—AMENDMENT OF—ERROR IN NAME—JUSTIFICATION—INTENTION TO ABSCOND.

An error in the name of the plaintiff or of the defendant in proceedings by way of capias in Quebec is a ground of exception to the form, and cannot be objected to by a petition to quash. Where goods have been sold to a purchaser in Quebec, and, while the price is still unpaid, he announces his intention of going to the United States, but does not notify the seller of such intention, and about a week before his intended departure he begins to dispose of his property, including the goods unpaid for, and pays none of the money so realized to the seller, but pays some of his other creditors, the facts are sufficient to justify the allegation in an affidavit for a capias on behalf of the seller that the purchaser is about to abscond from the Provinces of Ontario and Quebec with the intention of defrauding his creditors in general and the plaintiff in particular. An order that a capias may be maintained in Quebec, it is necessary to shew the intention of the defendant to leave the Provinces of Quebec and Ontario with the intention of defrauding his creditors. An error in the name of the plaintiff in an affidavit for a capias in Quebec, which has not misled or prejudiced the defendant, may be amended. An absolute rule cannot be laid down in regard to amendments of affidavits leading to the issuing a capias; each case must be considered on its own merits. An allegation in an affidavit for a capias in Quebec that "cette dette a été créré de la manière suivante; par un envoi d'un char de fleur vendu et delivré au défendeur, en la bille de Shawinigan Falls, dans le cours de l'automne dernier, 1911," shews sufficiently for the purpose of such an affidavit where the cause of action arose and when the debt was incurred. [Dominion Flour Mills Co. v. Pelletier, 13 Que. P.R. 389.]

Pelletier v. Dominion Flour Mills, 5 D.L.R. 379.

PROCEDURE ON ARREST BY CAPIAS.

Upon a motion by the defendant under s. 7 of the Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, c. 12, for the discharge of bail put in to a writ of capias, the judge in Chambers may go into the whole matter at large. Objections to an order for a capias on the ground of defects in the affidavits upon which it was made cannot be taken after special bail has been put in. [Robertson v. Beers, 7 B.C.R. 76, referred to.] It is beyond the jurisdiction of a judge in Chambers in British Columbia to set aside an order for a capias after it has been passed and entered, on the ground of defects in the affidavits on which it was made. [Damer v. Busby, 5 P.R. (Ont.) 356, referred to.]

Oliphant v. Alexander; Selkirk v. Alexander, 6 D.L.R. 261, 2 W.W.R. 908.

CAPIAS — IMPRISONMENT — LIBERATION — JUDICIAL GIVING UP OF GOODS—BAIL—C.C.P. ART. 886, 887, 889, 910, 913.

The capias ad respondendum should not be considered as a penalty, but as a mode of provisional execution on the part of the creditor, to prevent fraud on the part of the debtor by the arrest of his person and by forcing him to pay his debt or make an assignment of his goods. The special security authorized by art. 824 of the old Code of Procedure, by which the debtor could give bail even after the judgment maintaining the capias, according to jurisprudence of former judgment, has been supplanted by the present code, for the very purpose of obliging the debtor to pay his debt at once or to make a judicial surrender of his goods. The surrender of his goods liberates in plain law, a debtor arrested on a capias; he has only to demand his discharge by application in order to obtain it. The theory that the debtor who surrenders his goods, cannot be discharged before the expiration of four

months given to his creditors to contest his bankruptcy, is absolutely contrary to the old French law reproduced by art. 846 of the Code of Procedure. It results from the pure literal sense of art. 889, but this should be set aside, when one considers it, as one should, with the other provisions which apply to this matter, because it has the result of preventing the Act from attaining the object for which it was passed. Although the debtor can only give, under the present code, the provisional and ordinary security of arts. 910, 913, C.C.P., nevertheless, if he makes a surrender of his goods after judgment maintaining the capias, and demands his release, offering good and sufficient security that he will give himself up to the sheriff when required such application will not be rejected.

Kearney Bros. v. Haddad, 55 Que. S.C. 280.

CAPIAS AD RESPONDENDUM—RESERVING—SUM OF MONEY—CONFESSION—C.C. ART. 1245—C.C.P. ART. 895.

A debtor who admits under oath that he has at his home a sum of $1,200, and who, when the sheriff comes to seize it, declares that he has hidden this money and that he will not pay his creditor, is removing his goods with the intention of defrauding his creditors, and can be arrested on a capias ad respondendum. A judicial confession cannot be retracted except to prove a mistake of fact.

Dulude v. Rivet, 56 Que. S.C. 343.

CAPIAS AD RESPONDENDUM — DEFENDANT LIVING OUTSIDE THE PROVINCE.

Fuerst v. Beamolt, 13 Que. P.R. 90.

CAPIAS AND BOND FOR RELEASE—IRREGULARITIES.

McManamy v. Hayes, 39 Que. S.C. 452.

CAPIAS—DEBTOR AND CREDITOR—RELIEF.

Anderson v. Maude, 10 E.L.R. 194 (N.S.).

CAPIAS—PERSONS FURNISHING INFORMATION—IDENTIFICATION.

Quebec Bank v. Davidson, 12 Que. P.R. 336.

RULE NISI—IMPRISONMENT FOR DEBT—ABANDONMENT OF PROPERTY—DELAY FOR CONTESTING—SUSPENSION OF PROCEEDINGS.

Leclerc v. Boucher, 12 Que. P.R. 367.

(§ II—21) — CAPIAS — ARREST OF DEBTOR'S ACT—AFFIDAVIT.

A defendant arrested under a writ of capias for a money claim who makes a deposit in lieu of bail and obtains his release under the Arrest of Debtors Act (Con. stats. N.B. 1903, c. 130, s. 5) is entitled to a return of the deposit upon an order setting aside the arrest because of the invalidity of the affidavit to hold to bail. [MacAuley v. Jacobson, 37 N.B.R. 537, distinguished.]

Peters v. Charlot, 39 D.L.R. 407, 45 N.B.R. 314.

CAPIAS—ACTION FOR LIQUIDATED DEMAND—ENDORSEMENT OF WRIT.

An application to set aside an arrest under a writ of capias and to have the bail bond discharged is not "a step in the cause" within the meaning of order 70, r. 2, of the Judicature Act, to the effect that no application to set aside any proceedings for an irregularity shall be allowed, if the party applying has taken any fresh step after knowing of the irregularity. In an action for a debt or liquidated demand commenced by a writ of capias under N.B. order 96, r. 1, against the defendant, the writ should be endorsed under order 3, r. 7, of the N.B. Judicature Act, 9 Edw. VII. c. 5, in like manner to a writ of summons, with a statement of the amount of debt and costs respectively upon payment of which within six days further proceedings will be stayed: but the court has power to allow an amendment where the endorsement does not comply with that rule.

Gunns v. Dugay, 10 D.L.R. 416, 41 N.B.R. 402.

WRIT OF CAPIAS—ARREST ON—MAINTENANCE MONEY—PAYMENT IN ADVANCE.

Upon arrest on writ of capias the maintenance money must be paid by plaintiff in advance irrespective of any arrangement made by defendant with the sheriff to pay expenses of an attendant in order that defendant might be at large.

Kinder v. Macmillan, [1919] 2 W.W.R. 248.

CAPIAS—PETITION TO QUASH—AFFIDAVIT.

Stevenson v. Lecker, 12 Que. P.R. 418.

(§ II—22) — CAPIAS — ASSIGNMENT—CONTESTATION.

The sureties of a debtor arrested on a capias may ask to be discharged from their suretyship as soon as he was made an assignment and given notice thereof to the seizing creditor, although the time for contesting the statement has not expired. The creditor's contestation of the statement of a debtor arrested on a capias must be taken under advisement within four months after the production of that statement.

Howard v. Haardt, 16 Que. P.R. 264.

ARSON.

Effect of misconduct of juror on verdict of conviction, see Appeal.

Admissibility of confession of one accused of, see Evidence.

Sufficiency of proof of attempted arson, see Evidence.

Libel in charging, see Libel and Slander.

Competency of wife as witness against husband charged with, see Witnesses.

(§ I—5)—SUFFICIENCY OF EVIDENCE—CR. CODE, S. 511.

R. v. Rosca (Sask.), 28 Can. Cr. Cas. 449.

ASSAULT AND BATTERY.

I. In general.
II. Justification; defenses.

I. In general.

(§ I—1)—What constitutes common assault—Tramway conductor and juvenile passenger.

Leclerc v. Marti (Que.), 36 D.L.R. 775, 28 Can. Cr. Cas. 160.

Summary trial — Assault occasioning actual bodily harm.

R. v. Sharpe, 20 Man. L.R. 555, 18 W.L.R. 55.

(§ I—2)—By bicyclist.

Where the defendant riding a bicycle on a city street violently collided with and seriously injured the plaintiff who was crossing the street; and where it appears (a) that there was nothing to prevent the defendant from seeing the plaintiff, (b) that he was in a better position to see the plaintiff than was the plaintiff to see him, (c) that the defendant did see the plaintiff long enough before the actual collision to warn him; such circumstances disclose a prima facie case of trespass by the defendant and cast upon him the onus of proving justification or excuse in an action for damages. [Sadler v. South Staffordshire Co., 23 Q.B.D. 17, referred to.]

Woolman v. Cummer, 8 D.L.R. 835, 4 O.W.N. 371, 23 O.W.R. 504.

II. Justification; defenses.

(§ II—5)—Benevolent societies—Sisters of Charity—Control of Bishop over—Rights conferred by provincial legislation—Unlawful assault by officers—Liability of society.

The society of the Sisters of Charity of the House of Providence at Kingston was incorporated under the authority of the act respecting benevolent societies (37 Vict., c. 34). The society is a self-governing one, and with certain minor exceptions the Bishop of Kingston has no legal right to interfere in the management of its affairs; the constitution makes no provision for the disciplining of a member or her expulsion from the society. The rights which the members possess are conferred upon them by provincial legislation, and those rights cannot be taken away by the application of the canon law or by any ecclesiastical authority of the Church of Rome. The law will not imply against the society that it gave to its officers authority to do that which it itself had no right to do. A resolution of the society authorizing an act to be done must be construed as authorizing it to be done by lawful means.

Basil v. Spratt, 45 D.L.R. 554, 44 O.L.R. 155.

Of peace officer—Consent to summary trial.

A charge of assaulting a peace officer acting in the discharge of his duty is subject to the provisions of Part XVI. (summary trials) and a magistrate has no jurisdiction to try it without the consent of the accused under Cr. Code, s. 778, in provinces where such consent is not dispensed with by the code.

Ex parte Carroll (N.B.), 41 D.L.R. 196, 29 Can. Cr. Cas. 213.

Indecent assault—Intent of ambiguous act shewn by words spoken—Cr. Code, s. 292.

An act which otherwise would have no indecent import and would constitute a common assault only, may by reason of the surrounding circumstances and by words spoken at the time, constitute an indecent assault.

R. v. Louie Chong, 23 Can. Cr. Cas. 250, 32 O.L.R. 66.

Assault—When justifiable—Warning—Force—Legal justification.

R. v. Kinman, 16 B.C.R. 148, 17 W.L.R. 439.

Chastisement of scholar by teacher.

The King v. Zinck, 18 Can. Cr. Cas. 456.

Defence of justification—Mutual tax collector—Right to eject ratepayer when calling to pay rates—Trespass.

Oickle v. Oickle, 9 E.L.R. 301 (N.S.).

(§ II—7)—Opprobrious words.

A provocation caused by being called an opprobrious and disgraceful name is no legal justification for an assault and battery. [Short v. Lewis, 3 U.C.Q.B. (O.S.) 385; Percy v. Glasco, 22 U.C.C.P. 521, 526; Murphy v. Dundas, 38 N.B.R. 563; Slater v. Watts, 16 B.C.R. 36, followed.]

Evans v. Bradburn, 25 D.L.R. 611, 9 A.L.R. 523, 32 W.L.R. 585, 9 W.W.R. 281.

Reprehensible conduct provoking assault—Effect as to damages.

Collins v. Keenan, 18 D.L.R. 795, 14 E.L.R. 242.

(§ II—8)—Degree of force—Finality of findings—Certiorari.

In a summary conviction of a fence viewer for common assault, the findings of the justice, as to the degree of force or violence actually used to make the act unlawful, are final and not reviewable on certiorari.

The King v. Shaw; Ex parte Kane, 27 D.L.R. 494, 26 Can. Cr. Cas. 156.

(§ II—9)—Defence of property or dwelling.

In an action for damages for assault where the plaintiff as a private individual is lawfully engaged in abating an obstruction in a river as a nuisance, and the defendant, in resisting the abatement, assaults and pushes or strikes the plaintiff, whereby he falls into the water, the defendant is liable in damages for the assault, and this, although the assault in question instantly led up to an aggravated

assault upon the defendant's person by one of plaintiff's companions, who becomes liable in damages therefor. [Lorraine v. Norrie, 6 D.L.R. 122, referred to.]

McCurdy v. Norrie, 6 D.L.R. 134, 46 N.S.R. 229.

DEFENCE OF LANDS OR GOODS ENTRUSTED TO ACCUSED—EXCESSIVE AND VINDICTIVE FORCE.

The King v. Kinman, 18 Can. Cr. Cas. 139, 16 B.C.R. 148.

(§ II—11)—SELF DEFENCE—DUTIES OF TRIAL JUDGE IN CHARGING JURY.

McKenna v. Cummiskey, 13 E.L.R. 229.

ASSESSMENT.

See Taxes; Schools; Municipal Corporations.

ASSIGNMENT.

I. WHAT ASSIGNABLE; VALIDITY.
II. EQUITABLE ASSIGNMENT; ORDERS.
III. RIGHTS AND LIABILITIES OF PARTIES.

For creditors, see Assignment for Creditors.

Of interest in contract for sale of lands, see Vendor and Purchaser; Land Titles; Mortgage; Assignment of Book Debts; Insolvency; See Bankruptcy.

Annotation.

Equitable assignments of choses in action: 10 D.L.R. 277.

I. What assignable; validity.

(§ I—1)—REAL PROPERTY—TRANSFER BY OFFICIAL ASSIGNEE UNDER INSOLVENCY ACT—VALIDITY—TESTS.

A quit claim deed from an official assignee under the Insolvent Act of 1869 (Can.), does not have the effect in Nova Scotia of dispensing with proof that there was a valid statutory sale and that the requisite advertising for a period of two months under s. 47 of that Act had taken place, where such deed is not in the statutory form "L" to the Insolvent Act and does not recite a due compliance with the statute; and this objection is available against a claim for trespass brought by a person not in possession whose paper title is dependent upon such quitclaim deed.

Davison Lumber v. Wentzel, 20 D.L.R. 89.

ASSIGNMENT OF CLAIM—VALIDITY—RATIFICATION.

Irregularity of a transfer of claim can no longer be pleaded by a debtor against the transferee, if the debtor has accepted such a transfer, by making propositions of payment to the transferee or his representative.

Perron v. Drouin, 16 Que. P.R. 121, 46 Que. S.C. 336.

RIGHT TO ASSIGN—CONTRACTING FIRM BECOMING INCORPORATED COMPANY—NOVATION OF CONTRACT.

Canadian Pacific Lumber Co. v. Paterson Timber Co., 47 Can. S.C.R. 398, 23 W.L.R. 579.

WHAT ASSIGNABLE—MUTUAL INSURANCE NOTES.

A deposit note given by a member to a mutual fire insurance company is not a promise to pay the sum for which it is made, but affords only a basis on which assessments may be declared and levied, as provided in arts. 7016 and 7017, R.S.Q. 1909. It is therefore doubtful whether such a note can be assigned or sold to a third party.

Clément v. Rhéaume, 44 Que. S.C. 233.

(§ I—2)—INSURANCE CLAIM.

The claim of the person whose premises are damaged by fire against another for negligence in causing the fire is assignable to a fire insurance company which, in consequence, is called upon to pay a loss under its policy to the owner of the premises. [King v. Victoria Ins. Co., [1896] A.C. 250, followed; Dell v. Saunders, 17 D.L.R. 279, 19 B.C.R. 500, referred to.]

Union Assn. Co. v. B.C. Electric R. Co., 21 D.L.R. 62, 21 B.C.R. 71, 30 W.L.R. 717, 8 W.W.R. 327.

FUTURE FARM CROP—EXECUTIONS.

An assignment may be validly made to third persons of an interest in a farm crop to be grown thereafter, notwithstanding the existence of executions against the assignor at the time of the assignment.

Jacobsen v. International Harvester Co., 28 D.L.R. 582, 34 W.L.R. 879, 11 A.L.R. 122, at 124, 10 W.W.R. 955, affirming 24 D.L.R. 632, 11 A.L.R. 122, 32 W.L.R. 332, 9 W.W.R. 87.

CHOSE IN ACTION—RIGHTS OF ASSIGNEE TO SUE—REVERTING TRUST AS TO PROCEEDS.

An assignment of a debt or legal chose in action may be absolute within the Judicature Act so as to enable the assignee to sue therefor, although a trust is created in respect of the proceeds in favour of the assignor. [Comfort v. Betts, [1891] 1 Q.B. 737, applied; Mercantile Bank of London v. Evans, [1899] 2 Q.B. 613; Hughes v. Pump House Hotel Co., [1902] 2 K.B. 190, referred to.]

Re Bland & Mohun, 16 D.L.R. 716, 30 O.L.R. 100.

WHAT ASSIGNABLE GENERALLY.

In an action for the recovery of a physician's bill for services, where the bill had been assigned by attaching to an ordinary statement of the account a written assignment with an attesting witness of "this claim of $1,500," the assignment, however, not shewing any consideration, such an assignment is sufficient in form, no technical form being required by the laws of Quebec. [Walker v. Bradford Old Bank, 12 Q.B.D. 511, referred to.]

Reader v. Calumet Metals Co., 6 D.L.R. 496, 19 Rev. de Jur. 346.

CHOSE IN ACTION—"ABSOLUTE" ASSIGNMENT—ACTION—PARTIES—ADDING ASSIGNEE.

An assignment of a chose in action which, followed by notice, would entitle the assignee to sue in his own name and (ordinarily) disentitle the assignor to sue in his name, may on its face purport to be given by way of security of on certain trusts; if the assignment purports to pass the assignor's entire title to the chose in action, though expressly by way of mortgage (passing the legal title), it is nevertheless absolute; if the assignment, whatever its form, purports to charge the assignor's interest, while leaving the title to that interest in the assignor, it is an assignment by way of charge only. [Hughes v. Pump House Hotel Co., [1902] 2 K.B. 190, and Wilton v. Rochester German Underwriters Agency Co., 11 A.L.R. 574, followed.] In an action upon a chose in action by the assignor thereof, if both the assignor and assignee are bound by the result, any difficulty on the score of parties is fully met. [Wilton v. Rochester German Underwriters Agency Co., supra, distinguished.] An alleged compromise as to the amount of a claim for insurance moneys held not to have been concluded.

Taylor v. Equitable Fire & Marine Ins. Co., 13 A.L.R. 58, reversing [1918] 1 W.W.R. 277.

RIGHT OF ASSIGNEE TO SUE IN HIS OWN NAME—CONTRACT FOR PERSONAL SERVICES—CLAIM FOR UNLIQUIDATED DAMAGES FOR BREACH.

Cohen v. Webber, 24 O.L.R. 171, 19 O.W.R. 586.

CAUSE OF ACTION FOR ASSAULT—NONASSIGNABILITY.

Webber v. Gaffin, 9 E.L.R. 277 (N.S.).

CHOSE IN ACTION—GUARANTEE—ASSIGNMENT OF RIGHTS UNDER INDENTURE GUARANTEEING PAYMENT OF DEBT OF ANOTHER—GUARANTEED DEBT OVERDUE AT TIME OF ASSIGNMENT—NOTICE TO GUARANTOR—NOT ESSENTIAL TO NOTIFY PRIMARY DEBTOR OF ASSIGNMENT—LAWS DECLARATORY ACT, R.S.B.C., 1911, c. 133, s. 2 (25).

An assignment of rights under an indenture containing a covenant to pay another's debt in the event of that other not paying it by a specified time, if such assignment is made after the debt is overdue, need not be notified to the primary debtor to enable the assignee to sue the guarantor thereon. The guarantor has become a "debtor" under subs. 25 of s. 2 of the Laws Declaratory Act, R.S.B.C., 1911, c. 133.

Donald v. Jukes, [1919] 1 W.W.R. 169.

(§ 1—6)—AUDITOR AND CLERK DEFINED—COLLOCATION—PRIVILEGE—ART. 70, C. 144, R.S.C. (1906).

Art. 70, c. 144, R.S.C. (1906), being a law of privilege and exception, must be restrictively interpreted and be made to apply only to clerks or other persons similarly employed. In interpreting the expressions "other persons in the employment of the company" in said article, the rule "noscitur a sociis" should be the guiding rule. An auditor of the books of a company is not a clerk nor a person fulfilling the duties of a clerk nor a person fulfilling the duties of a clerk or employed in a similar capacity, nor a person in the employment of the company in or about its business, within the meaning of said article, and is not, therefore, entitled to be collocated by privilege over its other creditors.

Miquelon v. Vilandre Co., 15 Que. P.R. 266.

(§ 1—7)—FUTURE WAGES — CREDITOR'S RIGHT TO IMPOUND.

Unless a man has assigned or charged his future earnings or has made a sum payable out of them, they cannot be prospectively impounded by any of his creditors by any ordinary process of execution whether legal or equitable. [Holmes v. Millage, [1893] 1 Q.B. 551, applied.]

Hobbs v. Attorney General of Canada, 18 D.L.R. 395, 7 A.L.R. 391, 29 W.L.R. 650, 7 W.W.R. 256.

(§ 1—8) — WHAT ASSIGNABLE — VALIDITY—UNEARNED PRICE FOR CONSTRUCTION WORK—CONSIDERATION CONTINGENT.

There can under Quebec law be validly made by a contractor a transfer of the whole or a part of the contract price as and when it becomes due although at the time of such transfer there is nothing actually due because the work has not been done, and although the amount to be paid to the transferee is not yet determined, but is thereafter to be fixed by arbitration between the contractor and the transferee, ex. gr. where the transfer is made to the extent of the damages which the latter incurs by the demolition of his party wall and exacts such transfer as security on consenting to the demolition.

Rosenveesen v. Thackeray, 19 D.L.R. 715, 46 Que. S.C. 50.

(§ 1—12)—TRANSFER OF LAND AGREEMENT.

An agreement for sale is transferable in its nature providing there is no express stipulation making it exclusively in favour of the person to whom it is addressed. The transfer of such an agreement is valid if made within the delays fixed for its acceptance.

Langlois v. Charpentier, 47 Que. S.C. 97.

(§ 1—14)—OF CONTRACT.

Neither party to a contract of sale of lands can assign over the burden thereof, and when one party to the contract has assigned his interest therein, he remains liable to perform his part of the contract; the other party cannot sue the assignee, either for the specific performance or for damages for breach of contract, unless he

has accepted the assignee as occupying the assignor's place in respect to the fulfilment of the contract.

Coté v. Olson, 2 D.L.R. 392, 5 S.L.R. 234, 20 W.L.R. 690, 2 W.W.R. 54.

CLAIM FOR COMMISSION ON SALE OF REAL ESTATE — TRANSFER BY HUSBAND TO WIFE.

The claim of a real estate agent for commission due him on the disposal of property is assignable and where the claim is assigned to the wife of the agent she may sue in her own name.

Lewis v. Bucknam, 1 D.L.R. 277, 20 W.L.R. 4, 1 W.W.R. 760.

CONTRACT TO PURCHASE LAND — STIPULATION AGAINST TRANSFER WITHOUT CONSENT — PRIORITY BETWEEN SUBPURCHASERS.

A stipulation in an agreement for sale of land that no assignment thereof by the purchaser shall be valid unless formally approved of by the vendor is effective only for the protection of the vendor, and cannot be set up by a second subpurchaser to defeat the claim of a prior subpurchaser whose claim had legal priority under the registry laws as between themselves, although the second subpurchaser had obtained the original vendor's approval and the first subpurchaser had not.

McKillop v. Alexander, 1 D.L.R. 586, 45 Can. S.C.R. 551, 20 W.L.R. 850, 1 W.W.R. 871.

(§ I—17)—OF CHOSE IN ACTION — CLAIM FOR DAMAGES.

A claim for unliquidated damages arising out of breach of contract is assignable, and is enforceable by the assignee; whether a particular assignment is champertous is a question of fact.

Baird & Botterill v. Taylor, 33 D.L.R. 99, 10 A.L.R. 319, [1917] 1 W.W.R. 1172.

OF CLAIM FOR DAMAGES.

A claim for damages for personal injuries from a collision on the highway due to the defendant's driving on the wrong side of the road is not assignable. [McGregor v. Campbell, 19 Man. L.R. 38, and McCormack v. Toronto R. Co., 13 O.L.R. 656, followed.]

Compton v. Allward, 1 D.L.R. 107, 48 C.L.J. 109, 22 Man. L.R. 92, 19 W.L.R. 783, 1 W.W.R. 452.

CHOSE IN ACTION — POLICY — LIABILITY OF ASSIGNEE.

The right of recovery under a policy of insurance against liability for injuries to employees is a chose in action which is assignable under s. 26 (e) of the King's Bench Act. On the assignment of a right or benefit which is subject to the performance of a condition, the right to perform the condition, where there is the power, also passes where there is nothing in the nature of personal service or consideration attaching to such performance.

Newton v. North American Accident Ins. Co. (Man.), [1917] 2 W.W.R. 1120. [Affirmed 45 D.L.R. 247, 57 Can. S.C.R. 577.]

II. Equitable assignment; orders.

(§ II—20) — GARNISHEE AND ASSIGNEE — PRIORITY.

To establish an equitable assignment of a chose in action in priority to garnishment proceedings, it must appear that the alleged equitable assignee had an interest in the fund and not merely some right of action against the creditor whose debt is attached.

Brodeur v. Elliott, 22 D.L.R. 122.

EQUITABLE OF LEGAL CHARGE — DISTINCTION.

Where the holder of the fund intervenes and assumes a responsibility in respect of an order drawn on him not amounting to an equitable assignment, the question against him is one of a charge either equitable or legal and not one of assignment; the question of an equitable assignment must depend solely upon what took place between the assignee aand the assignor. An assignment of a chose in action may be verbal where a writing is not required by law; no particular form of words is necessary so long as they clearly shew an intention that the assignee is to have the benefit of the chose in action. An equitable assignment may be inferred from conduct or a course of dealing, and this although a bill of exchange has been drawn or a mere order has been given which alone would not constitute an assignment; and where the written order does not specify the debt owing by the addressee or the fund intended to be assigned, the fact of an equitable assignment may be shewn as supplementary to the writing. [Galt v. Smith, 1 Terr. L.R. 129; Percival v. Dunn, 29 Ch. D. 128, referred to.]

Ritchie v. Jeffrey, 21 D.L.R. 851, 8 A.L.R. 215, 31 W.L.R. 221, 8 W.W.R. 729. [Affirmed 26 D.L.R. 703, 52 Can. S.C.R. 243.]

EQUITABLE—APPROPRIATION OF FUND.

The appropriation of a claim against a company in liquidation, by a shareholder, in reduction of his liability is such, operates as an equitable assignment of the claim. [Fraser v. Imperial Bank, 10 D.L.R. 232, 47 Can. S.C.R. 313, specially considered.]

Morrison v. McPherson (Man.), 36 D.L.R. 550, 28 Man. L.R. 113.

EQUITABLE—CHOSE IN ACTION—RIGHT TO SUE.

An assignment of a legal chose in action, arising out of tort, made while litigation is proceeding, and not under the Laws Declaratory Act (B.C.), operates as an equitable assignment, and the action there-

on can only be continued in the name of the assignor.

Deisler v. U. S. Fidelity & Guaranty Co., 36 D.L.R. 29, 24 B.C.R. 278. [Affirmed 49 D.L.R. 688.]

TRANSFER WITHOUT INDORSEMENT—BY SEPARATE INSTRUMENT — ORDER FOR PAYMENT—VALIDITY.

A written order from the payee directing the maker of a promissory note to pay the amount due thereon to a third person operates as an assignment, and not merely as an order which is revoked by the death of the signer. [Harding v Harding, 17 Q.B.D. 442, Farquhar v. Toronto, 12 Gr. 187, and Bank of B.N.A. v. Gibson, 21 O.R. 615, referred to.]

Tyrrell v. Murphy, 18 D.L.R. 327, 30 O.L.R. 235.

EQUITABLE ASSIGNMENT — TRANSFER OF HALF INTEREST IN DEBT.

When an action is brought for the whole of a debt in the name of the original creditor, although the defendant debtor has been given notice of an assignment of a half interest therein by the original creditor to a third party, the defendant may properly plead such assignment and notice in reduction of the plaintiff's claim, and to protect himself from the claim of such assignee, whether or not the latter's claim to a half interest could be sued in the name of the assignee or the transfer operated only by way of equitable assignment.

Kennerley v. Hextall (No. 2), 10 D.L.R. 591.

EQUITABLE ASSIGNMENT.

An arrangement between a boarding house keeper and a company that he should charge for meals served to the company's employees, and that the company should deduct the amount owing in respect of such meals from the employees' pay checks and pay it to the boarding house keeper, is not dependent on the law of assignment, as the amount so to be deducted from wages yet to be earned would from time to time be payable to the boarding house keeper as the direct creditor of the company and would never have been legally payable to the employee, although for convenience of accounting the gross wages were placed to his credit and the boarding accounts charged against the same. [Lee v. Friedman, 20 O.L.R. 49, distinguished.]

Olson v. Machin, 8 D.L.R. 188, 4 O.W.N. 287, 23 O.W.R. 531.

PRIOR EQUITABLE CLAIM.

Wellband v. Walker, 20 Man. L.R. 510, 16 W.L.R. 408.

NECESSITY OF NOTICE—GARNISHEE ORDER—PRIORITIES.

Notice of an equitable assignment is not necessary as against third persons who stand in the same position as the assignor, such as a creditor who has attained a garnishee order. An equitable charge takes priority over a garnishee order even when no notice of the charge has been given. [Bailey v. Consolidated Bank, 38 Ch. D. 238, referred to.]

O'Neil & Co. v. Galbraith & Sons, 7 W.W.R. 155.

ORDER FOR PAYMENT OF MONEY—EQUITABLE ASSIGNMENT.

Waterloo Manufacturing Co. v. Kirk, 19 W.L.R. 344 (Man.).

BUILDING CONTRACT — STIPULATION NOT TO ASSIGN.

Fraser v. C.P.R. Co., 19 W.L.R. 369.

(§ II—21)—EQUITABLE—ORDERS.

An order directing the payment of a sum from the proceeds of a loan does not create an equitable assignment of the particular amount from a fund other than the one specially designated.

Partridge v. Winnipeg Investment Co. (Man.), 55 D.L.R. 420, [1917] 2 W.W.R. 832.

FUND PAYABLE UNDER BUILDING CONTRACT.

A written order for the payment out of a fund payable under a building contract is not enforceable as an equitable assignment in the absence of the owner's promise to pay it out of the fund, and where, owing to the contractor's failure, the owner is compelled to complete the work at an outlay which leaves no balance sufficient to meet the amount of the order.

Ritchie v. Jeffrey, 26 D.L.R. 703, 52 Can. S.C.R. 243, 9 W.W.R. 1534, affirming 21 D.L.R. 851, 8 A.L.R. 215, 31 W.L.R. 221, 8 W.W.R. 729.

(§ II—23)—SUBCONTRACTOR FOR WORK ON IDENTICAL TERMS—EQUITABLE ASSIGNMENT.

An agreement whereby a contractor for work subcontracts with another to do the same work at the same price as he is to receive and agrees to pay the second contractor in the same instalments as are stipulated for in the original contract with the property owner, constitutes an assignment to the person who performs the work of the moneys to accrue under the original contract made by the property owner, and such transaction is an equitable assignment of a chose in action.

Fraser v. Imperial Bank, 10 D.L.R. 232, 47 Can. S.C.R. 313, 23 W.L.R. 445, 3 W.W.R. 649, reversing Fraser v. Imperial Bank, sub nom. Fraser v. Can. Pacific R. Co., 1 D.L.R. 678, 22 Man. L.R. 58.

III. Rights and liabilities of parties.

(§ III—25) — DEBTS — COLLECTION — LIQUIDATION.

Under a general assignment of present and future debts, etc., as security, when the assignor is permitted to collect and apply the proceeds, in the ordinary course of business, the money actually collected becomes the property of the assignor, and any balance of such collected money, existing at the time of the assignor's insolvency, even in a fund capable of identification, would belong to the liquidator, and the fund itself is not within the scope of

such an assignment. An assignee of debts as security by permitting the assignor to collect them, and to use the proceeds, does not thereby release or abandon the security, and may withdraw its permission at any time, and the assignor is trustee for the assignee of any portion of such debts collected, and not used by the assignor, but existing in a fund, which can be identified, at the insolvency of the assignor.

Re Cope Fruit Co. & Bank of Montreal, 32 D.L.R. 346, 11 A.L.R. 191, [1917] 1 W.W.R. 881.

OF MORTGAGE — "ABSOLUTE ASSIGNMENT" WITHIN JUDICATURE ACT—COLLATERAL SECURITY TO BANK.

Farney v. Canadian Cartage Co. (Alta.), 37 D.L.R. 777, [1917] 3 W.W.R. 758.

CHOSE IN ACTION—PRIOR EQUITIES.

The assignee of a chose in action takes subject to the equities existing between the assignor and the debtor or fundholders, whether the assignment is under the King's Bench Act (Man.) or is an equitable assignment, and the assignee cannot, by giving notice, create for himself higher rights than the assignor possessed. [Mangles v. Dixon, 3 H.L. Cas. 702, referred to.]

Chalmers v. Machray, 26 D.L.R. 529, 26 Man. L.R. 105, 9 W.W.R. 1435, 33 W.L.R. 656, reversing 21 D.L.R. 635, 30 W.L.R. 836, 8 W.W.R. 27.

RIGHTS OF ASSIGNEE—CROWN LAND PATENT —ATTACKING GRANT OF SAME LAND OBTAINED BY FRAUD.

An assignee of an original land grant from the Crown may attack another grant by the Crown of the same land on the ground that the other Crown grant was fraudulently obtained. [Prosser v. Edmonds, 1 Y. & C. Ex. 481, distinguished.]

Zock v. Clayton, 13 D.L.R. 502, 28 O.L.R. 447, reversing 6 D.L.R. 205, 3 O.W.N. 1611.

OF DRAFT—VALIDITY—REGISTRATION—PRIORITIES—SECURITY TO BANK—GARNISHMENT—BANK ACT—PREFERENCE.

Imperial Bank of Canada v. Western Supply & Equipment Co. (Alta.), 39 D.L.R. 803.

ASSIGNMENT OF BUILDING CONTRACT TO BONDING COMPANY—LIABILITY OF ASSIGNEE TO SUBCONTRACTOR.

A guaranty company, which gave a bond of indemnity to the owner of a building about to be constructed, for the due completion of said building by a construction company under contract, and to whom the construction company assigned the contract to take effect only on the default of the construction company, agreed, when the default had taken place, to allow the owner to complete the building. The construction company had subcontracted to the plaintiff for certain work on the building, part of which was done before and part after the construction company's default. In an action for the value of the work against the guaranty company as assignee of the contract:—Held, on appeal, that no liability could be attached to the guaranty company for the subcontractor's debt. Decision of Grant, Co. J., reversed.

Ramsay v. Westwood & U.S. Fidelity & Guaranty Co., 20 B.C.R. 85.

CHOSE IN ACTION—ASSIGNMENT OF—MONEY RECEIVED BY DEFENDANT FOR THE USE OF PLAINTIFF.

Waterloo Manufacturing Co. v. Kirk, 21 Man. L.R. 457.

ASSIGNMENT OF DEBT—SERVICE—COSTS.

In the sale of a debt legal proceedings founded upon the transfer and duly served are equivalent to the service of the transfer provided that the deed of assignment is filed at the time of the filing of the writ of summons. If the deed is only filed at the enquête the action of the plaintiff will be maintained but with costs against him, each party paying his own costs of enquête.

Viewmount Land Co. v. Smythe, 51 Que. S.C. 394.

ASSIGNMENT OF DEBT—SERVICE—JOINT AND SEVERAL LIABILITY.

An action based upon a sale of debts not served on the debtor is equivalent to an acceptance of the assignment and leave to the court only discretion as to costs. When several successive holders agree to pay to the vendor the same interest on the purchase price each may be condemned to pay the whole, and the vendor may proceed against them all in one action.

Chopin v. Levinoff, 52 Que. S.C. 268.

(§ III—26)—PRIORITY BETWEEN ASSIGNEES —BANK'S PRIOR ASSIGNMENT FOR FUTURE ADVANCES — PERMITTING OUTLAY BY JUNIOR ASSIGNEE.

Where, under an equitable assignment of a railway contract for the construction of a number of railway stations the plaintiff, with the knowledge and permission and encouragement of the defendant bank (whose customer he is) goes on supplying materials for and constructing the railway stations, the defendant bank is estopped from subsequently setting up a prior assignment in its own favour for future advances as against the plaintiff's claim for the materials and work so contributed by him in good faith and without notice; especially where to defeat the plaintiff's claim would be an injustice tantamount to a reproach upon the law, and where the bank failed to notify the plaintiff of its prior assignment. [Russell v. Watts, 10 App. Cas. 590; Stronge v. Hawkes, 4 DeG. M. & G. 186, applied.]

Fraser v. Imperial Bank, 10 D.L.R. 232, 47 Can. S.C.R. 313, 23 W.L.R. 445, 3 W.W.R. 649, reversing 1 D.L.R. 678, 22 Man. L.R. 58.

PRIORITIES BETWEEN ASSIGNEES — ASSIGNMENT OF INTEREST OF VENDEE IN CONTRACT FOR SALE OF LAND—KNOWLEDGE OF VENDOR—SUBSEQUENT ASSIGNMENT.

Where the plaintiff to the knowledge of the vendor, in consideration of an assignment to him of the vendee's interest in a contract for the sale of land, furnished the latter with money to make his first pay-

ment, and the plaintiff covenanted in consideration of the acceptance of the assignment by the vendor without a formal execution of it, to make future payments as they became due, the rights of the plaintiff in the land are entitled to priority over those of a third person who, without the knowledge of the plaintiff, advanced the vendee money for a subsequent payment and received as security an assignment of his interest under the contract, in which the vendor joined without disclosing the prior assignment; although the plaintiff's rights will be on condition that he make the payments as he had covenanted to do.

Scharf v. Warner, 12 D.L.R. 577, 6 S.L.R. 163, 24 W.L.R. 896, 4 W.W.R. 1181.

"Book-accounts, debts, dues, and demands" — Insurance — Ejusdem generis—Contest between bank and assignee for creditors.

Royal Bank v. Healey, 10 O.W.N. 424, 11 O.W.N. 119.

Assignment—Prior equitable claim.

Willband v. Walker, 20 Man. L.R. 510.

(§ III—27)—Assignee of wages.

A claim for work done by the owner of a threshing outfit is assignable, and where the work was ordered without an agreement as to the price to be charged, the party for whom the work was done is liable to the assignee of the account for whatever sum the work is worth estimated at a fair price.

Case v. Haslam Land Co., 1 D.L.R. 282, 19 W.L.R. 889.

Rights of assignee of wages—Recovery.

Dochendorff v. Mester, 25 D.L.R. 818, 32 W.L.R. 911, 9 W.W.R. 526.

(§ III—28)—Equities and set-offs—Diminution of price by partial failure of consideration.

As against the assignee of a mortgage taking with notice and subject to all equities, an allowance may be ordered by way of diminution of the purchase price which the mortgage secures, for the mortgagee's failure to supply the use of certain farm equipment which the mortgagee as vendor to the mortgagor had undertaken to do as one of the considerations for the agreement of exchange mentioned in the mortgage, or, in the alternative, for damages for breach of contract.

Walton v. Ferguson, 16 D.L.R. 533, 7 A.L.R. 325, 28 W.L.R. 657, 6 W.W.R. 557.

Equities and set-offs against assignee—Exclusion of counterclaim.

The King's Bench Act, R.S.M. 1902, c. 40, s. 39 (f), confers no right to counterclaim but only a right to set-off as against the assignee of a chose in action arising out of a contract in addition to the right to plead any defence arising out of the contract prior to notice of the assignment.

Cummings v. Johnson, 13 D.L.R. 343, 23 Man. L.R. 740, 24 W.L.R. 144, 25 W.L.R. 31.

Subject to "equities"—Set-off—"Mutual debts"—Unconnected transactions.

[Parsons v. Sovereign Bank, 9 D.L.R. 476, referred to.]

Burman v. Rosin, 26 D.L.R. 790, 35 O.L.R. 134.

Set-off.

The intent of s. 26 of the Assignments Act (Alberta, 1907, c. 6) is to secure to debtors the right to set-off debts due to them before the assignment, and therefore a debt acquired afterwards cannot be set-off by a defendant in an action by an assignee.

Mackinnon v. Horn, 32 D.L.R. 374, 10 A.L.R. 389, [1917] 1 W.W.R. 830.

Equities and off-set.

Where one acquires property by gift or purchase from another with knowledge of a previous contract lawfully and for valuable consideration made by him with a third person to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller. [De Mattos v. Gibson, 4 De G. & J. 282, followed.]

Rudd v. Manahan, 5 D.L.R. 565, 5 A.L.R. 19.

Assignment of land contract—Equities—Rights and liabilities of parties.

Where a contract for the sale of land has been cancelled by the vendor because of the nonpayment by the vendee of all of the initial payment, which, however, the contract recited had been paid in full, an assignee thereof takes subject to all equities between the vendor and vendee, and can not, in the absence of allegation and proof of equitable rights as an innocent purchaser without notice, upon tender of the balance due upon the contract, obtain specific performance thereof. [Goddard v. Slingerland, 16 B.C.R. 329, distinguished; Rimmer v. Webster, 71 L.J. Ch. 561, and Winter v. Lord Anson, 3 Russell 488, referred to.]

McKenzie v. Goddard, 2 D.L.R. 354, 20 W.L.R. 912.

Transfer of an agreement of sale—Rights of transferee.

The transferee of rights under a promise of sale can have no greater rights under such promise of sale as against the original owner than the transferor.

Lapierre v. Magnan & Viens, 2 D.L.R. 544, 42 Que. S.C. 59.

Assignment—Right of assignees subject to set-off—Mutual dealings.

Bank of Montreal v. Tudhope, 17 W.L.R. 83. [Affirmed, 19 W.L.R. 141.]

(§ III—29)—Assignee of lease—Right to sue in own name—"Entire beneficial interest"—Proof of.

Where the assignee of a lease proves an assignment absolute in form it is sufficient evidence of his entire beneficial interest to enable him to sue in his own name under c. 146, R.S.S. 1909, unless it is proved that

notwithstanding the assignment he did not have the entire beneficial interest in the claim sought to be recovered. [John Deere Plow Co. v. Tweedy, 15 D.L.R. 518, distinguished.]

West v. Shun, 24 D.L.R. 813, 8 S.L.R. 243, 9 W.W.R. 644, 32 W.L.R. 961.

RIGHTS OF LESSEE ON ASSIGNMENT OF LEASE —IMPLIED AGENCY.

The lessor in making an agreement with the assigns under which the rights and obligations entered into by the lessor are to be respected, acts both personally and in the quality of agent of the lessee whom he had bound himself to protect, and the lessee is therefore a party to such transfer, even though he does not personally intervene in the deed of transfer.

Authier v. Driscoll, 3 D.L.R. 797.

(§ III—30)—NOTICE OF ASSIGNMENT—JUDICATURE ACT.

An assignment of an agreement to supply a corporation with electric power and light for a term of years is unenforceable until notice of the assignment is given in accordance with s. 19 (6) of the New Brunswick Judicature Act, 1909.

Woodstock Electric R. L. & P. Co. v. Dominion Tanneries, 40 D.L.R. 643, 45 N.B.R. 408.

SALE—CONTRACT—CHOSE IN ACTION—GIVING NOTICE OF ASSIGNMENT—REQUIREMENT.

Notice in writing of the assignment of a chose in action is a prerequisite to action thereon in the sole name of the assignee under the Judicature Ordinance, Alta., Stat. 1907, c. 5, s. 7; but leave may be given to add the assignor either as plaintiff if consenting or as defendant if not consenting. [Dell v. Saunders, 17 D.L.R. 279, applied.]

Armstrong v. Marshall, 19 D.L.R. 183.

GIVING NOTICE OF ASSIGNMENT.

Although an assignee of the purchaser's interest in a land contract, of which a prior undisclosed assignment had been made as to part of the land without notice to him is the first to procure the original vendor in whom the legal estate is vested to become a party to the assignment by consenting thereto, his right to call for the conveyance of the legal estate over that of the person whose equitable interest while prior in point of time had not been notified to the holder of the legal estate, is controlled by the registry laws and a caveat filed by the first purchaser under the Saskatchewan Land Titles Act before the second purchaser had obtained such consent, will preserve the first purchaser's priority. [Hopkins v. Hemsworth, [1898] 2 Ch. 347, and Taylor v. London and County Banking Co., [1901] 2 Ch. 231, specially referred to.]

McKillop v. Alexander, 1 D.L.R. 586, 20 W.L.R. 850, 45 Can. S.C.R. 551.

TRANSFER OF LIEN NOTE—CHOSE IN ACTION —NOTICE.

The transfer of a "lien note" is subject to the provincial law dealing with assignments of choses in action and with the method of giving notice to the debtor that the transfer has been made. The notice of the transfer of a chose in action required to be given to the debtor in order to vest in the transferee a right of action in his own name under Saskatchewan laws (Con. Ord. 1898, c. 41) is sufficient if the transfer is produced and shewn to the debtor, and the debtor is not protected by payments thereafter made to the transferor.

Bank of Toronto v. Graham, 1 D.L.R. 36, 5 S.L.R. 69, 19 W.L.R. 879, 1 W.W.R. 492.

ACCOUNT—NOTICE OF ASSIGNMENT OF— SERVICE OF WRIT OR PROCESS COMMENCING THE ACTION, SUFFICIENT.

Where a physician assigned to another his bill against a patient for services, and no notice of the assignment was given to the debtor, before action brought by the assignee, the service of the writ or process commencing the action, in the name of the assignee, is a sufficient notification of the transfer. [Bank of Toronto v. St. Lawrence Fire Ins. Co., [1903] A.C. 59, 2 Com. L.R. (Can.) 42, followed.]

Reader v. Calumet Metals Co., 6 D.L.R. 496, 18 Rev. de Jur. 346.

GIVING NOTICE OF ASSIGNMENT—ASSIGNMENT OF LEASE—LEASE AND ASSIGNMENT IN EFFECT ONE DOCUMENT EXECUTED IN PRESENCE OF DEBTORS.

A debtor, being financially embarrassed, made an arrangement with the plaintiff, who acted on behalf of the creditors, as a result of which the debtor leased his business premises to the defendants and assigned the rent payable therefor to the plaintiff, as trustee for the creditors. The lease and assignment were executed at a meeting, at which the debtor, the plaintiff, and the defendants were all present. The plaintiff sued the lessees for rent due under the lease, and it was contended that the plaintiff had not proven notice of the assignment to the debtors, the defendants:—Held, that the lease and assignment, although two separate documents, formed, in fact and in law, parts of one entire agreement, having for its special object the payment of the rent by the defendants to the plaintiff, to which the defendants were parties, and, therefore, the statute requiring notice of assignment of choses in action was not applicable.

Lavell v. McDonald, 3 A.L.R. 441.

NOTICE.

In a suit founded on a transfer of debts neither accepted nor acknowledged, the summons is a sufficient allegation of the assignment; before the action it is sufficiently brought to the knowledge of the debtor by a letter from the creditor's attorney claiming payment of the debt, and entitles the creditor to his costs of the action.

Orsali v. Hebert, 49 Que. S.C. 200.

SALE OF DEBT—NOTICE.

The transferee who sues to recover the

debt transferred without having given notice of the sale to the debtor can only obtain judgment for the debt without costs.

St. Maurice Sand Co. v. Brault, 48 Que. S.C. 386.

(§ III—31)—Assignment to trustee with notice.

A trustee under a marriage settlement who in pursuance thereof takes a transfer from the settlor of shares of stock in a company incorporated under the Dominion Companies Act, R.S.C. 1906, c. 79, having at the time full notice of the terms of a prior option agreement made concerning such shares by the settlor, will hold the shares subject to the terms of such agreement and subject to the enforcement against him by the holders of the option of the rights which they had acquired from the settlor.

Re Polson Iron Works, 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

(§ III—32)—Agreement for sale of land—Right to sue.

An assignment by mortgage of all moneys due under agreements for the sale of land which does not pass all the legal rights and remedies of the assignor, and all his legal and other remedies, is not an absolute assignment within the meaning of subs. 3, s. 7, c. 5 of the Statutes of Alberta, 1907; the assignee cannot sue in his own name by virtue of such an assignment and action on the agreement may be properly brought by the assignor alone.

Magrath v. Collins, 32 D.L.R. 29, [1917] 1 W.W.R. 487. [See also 37 D.L.R. 611, 12 A.L.R. 240.]

Contract for sale of land—Recital in vendor's subsequent deed.

The recital of an agreement to purchase by instalments, contained in a conveyance of land, and to which agreement the conveyance was subject, does not, without notice in writing to the purchaser, constitute an assignment in writing, in conformity with s. 2 of the Laws Declaratory Act, c. 133, R.S. B.C. 1911, so as to enable the assignee to bring an action in his own name for the recovery from the purchaser of overdue instalments payable under the agreement to the original vendor.

Bell v. Saunders, 17 D.L.R. 279, 19 B.C.R. 500, 27 W.L.R. 844, 6 W.W.R. 657.

Right of assignee to sue in own name—Entire beneficial interest — Saskatchewan statute—Open account.

Under R.S.S. 1909, c. 146, an assignee of a chose in action, suing in his own name, must plead and prove that he is entitled to the entire beneficial interest. [John Deere Plow Co. v. Tweedy, 15 D.L.R. 518, applied.]

McArthur & Co. v. Dubreuil, 20 D.L.R. 321, 7 S.L.R. 319, 29 W.L.R. 549, 7 W.W.R. 240.

Right of assignee to sue in own name—Entire beneficial interest — Saskatchewan statute.

An assignee of a chose in action under R.S.S. 1909, c. 146, s. 2, is entitled to sue in his own name under that Act only if possessing "the whole and entire beneficial interest" in the claim assigned; it is therefore obligatory on the assignee suing under an assignment which purports to be a mere collateral security for a debt, to plead and prove that he is entitled to the entire beneficial interest to support an action in which the assignor is not a party. [Wood v. McAlpine, 1 A.R. (Ont.), 234, followed; Mussen v. Great North-West Central R. Co., 12 Man. L.R. 574; Burlinson v. Hall, 12 Q.B.D. 347; Tancred v. Delagoa Bay & E. Africa R. Co., 23 Q.B.D. 239; Durham (Bishop) v. Robertson, [1898] 1 Q.B. 765, considered.]

John Deere Plow Co. v. Tweedy, 15 D.L.R. 518, 7 S.L.R. 39, 26 W.L.R. 761, 5 W.W.R. 1155.

Assignee of agreement for sale of land—Equities between vendor and purchaser.

The assignee of an agreement for sale, even in the event of the payments under the agreement not having matured at the time of the assignment, is only entitled to recover the moneys due and enforce the agreement subject to any equities existing between the purchaser and vendor.

British Pac. Trust Co. v. Baillie, 20 B.C.R. 199.

(§ III—33)—Vendor and purchaser—Assignment—Rights of assignee.

A purchaser under an agreement of sale of land, who defaults under circumstances which justify the vendor in believing that the contract has been abandoned, cannot by making a merely speculative assignment of his interest place his assignee in any better position.

Wilson v. Patterson, 39 D.L.R. 642, 14 A.L.R. 162, [1918] 1 W.W.R. 999.

Assignment by purchaser of land-purchase contract.

Upon the forfeiture of a contract for the sale of land, and the vacation of all instruments depending thereon, on account of the default of the vendee to pay the amount due within the time decreed by the court therefor, the assignee of the vendee's interest in the contract will be given judgment against the latter for the amount the assignee had paid under the contract to the vendee or his agent, which had not been applied in satisfaction thereof.

Southwell v. Williams & Schank, 4 D.L.R. 1, 17 B.C.R. 209, 21 W.L.R. 771, 2 W.W.R. 697.

(§ III—34)—Assignment of lien note—Effect.

The defendant on the 25th March, 1912, sold an engine to B. for $400, and took from B. a lien-note for that amount, payable on the 1st November, 1912, with interest. The title, ownership, and right to possession of the engine were to remain in the defendant until payment. The defendant was indebted to the plaintiffs, and on

the 2nd April, 1912, assigned and handed over the lien note to them. The assignment was by a separate document; it stated that the lien note was assigned as collateral security for payment of present and future indebtedness. No notice of the assignment was given to B. before the maturity of the lien note, but after the assignment, B., finding the engine too small for his work, returned it to the defendant, telling him to sell it and apply the proceeds on the lien note. This was in good faith and without collusion. The engine then remained in the defendant's possession until it was replevied by the plaintiffs in January, 1913:—Held, that the assignment did not give the plaintiffs the right to take the machine from the defendant. The property never passed to B., but remained in the defendant; and s. 11 of the Bills of Sale Act, R.S., Sask. c. 144, operated against it passing to the plaintiffs. Quære, as to the effect of want of notice of the assignment to B., having regard to s. 4 of the Act respecting Choses in Action, R. S. Sask. c. 146. [Re Davis & Co., Ex p. Rawlings, 22 Q.B.D. 193, followed.]

Tudhope-Anderson Co. v. Kerr, 25 W.L.R. 332.

(§ III—35)—Contracts — Securities — Special words—What passes—Right to distrain for rent.

An assignment was in the following words: "The undersigned hereby assign and transfer . . . as security for all existing or future indebtedness and liability of the undersigned, all the debts, accounts and moneys, due or accruing due, or that may at any time hereafter be due . . . . and also all contracts, securities, bills, notes, and other documents now held, or which may hereafter be taken or held by the undersigned, or anyone on behalf of the undersigned in respect of the said debts, accounts, moneys or any part thereof." Held, that the right of distress was not included in the assignment, and that rent reserved in a lease is not a debt secured by the lease, and an assignment sufficient to bring the rents within the Stat. 4 Geo. II. must be an assignment of rents "qua rents."

Bank of Commerce v. Edmonton Law Stationers, 48 D.L.R. 344, [1919] 3 W.W.R. 406, affirming [1919] 2 W.W.R. 869.

ASSIGNMENTS FOR CREDITORS.

I. What constitutes an assignment.
II. Construction and effect of assignment.
III. Assignee or trustee.
A. In general.
B. Rights and powers.
C. Liabilities.
IV. Rights and liabilities of assignee's solicitor.
V. Validity; taking effect.
VI. Property included.
VII. Preferences by insolvent.
A. In general.
B. Validity of.
VIII. Rights, duties and liabilities of creditors; priority and release of claims.
A. In general.
B. Release of claims.
IX. Liability of assignor.

Insolvency and winding-up of companies, see Companies; Banks.

Annotation.

Rights and powers of assignee: 14 D.L.R. 503.

I. What constitutes an assignment.

(§ I—1)—Deed of trust to build and pay debts—Mortgage by trustee.

A conveyance of several parcels of land for the purpose of completing houses in the course of erection and then selling them, with incidental powers of borrowing money thereon and to collect all debts and thereout to pay all creditors of the grantor, is not an assignment for the general benefit of creditors within the meaning of s. 9 of the Assignments and Preferences Act, R.S.O. 1914, c. 134, as will render ineffectual a mortgage by the trustee because executed without the consent of the creditors or inspectors appointed by them.

Foster v. Trusts & Guarantee Co., 27 D.L.R. 313, 35 O.L.R. 426.

Incomplete divesting of title—Equity of redemption—Preference.

Where there is reserved to a debtor the right to redeem or reclaim property, a trust extension agreement and a chattel mortgage conveying such property to a trustee, for the benefit of such creditors only as shall sign the agreement, are void, as against creditors who do not sign, as constituting a preference to the former; there being no complete divesting of the property by the debtor, there is no assignment for the general benefit of creditors.

Lumber Manuf. Yards v. Western Jobbers Clearing House, 28 D.L.R. 6, '9 S.L.R. 165, 34 W.L.R. 234, 10 W.W.R. 42.

Who may make—Corporation.

An incorporated company has power to make an assignment for the benefit of creditors, and is therefore subject to the provisions of the Assignment Act. [Hovey v. Whiting, 14 Can. S.C.R. 515, followed.]

Re Olympia Co., 25 D.L.R. 620, 26 Man. L.R. 73, 9 W.W.R. 875.

Demand of assignment—Registered judgment creditor.

A creditor who has caused his judgment to be registered against immovables, possessed by his debtor under an agreement of sale, cannot within 30 days after registration, and without abandoning it, make a demand for an assignment from his debtor on account of the same debt. If the debtor has given good grounds, the demand for as-

signment, in the circumstances, will be dismissed without costs.

Re Bonnier & Roy, 17 Que. P.R. 347.

LITIGIOUS CLAIM.

Litigation between a creditor and his debtor should be submitted to the court by the ordinary procedure, and the creditor is not justified to force the debtor to make a judicial abandonment of his property when this latter sets up a serious defence against his claim.

Rumlos v. Sherwin, 54 Que. S.C. 366.

TRADER — CLERK OR AGENT TRANSACTING BUSINESS—LIABILITY.

Although a son, employed as clerk and agent by his father, and in his own name collects debts, makes claims, and purchases and does all the commercial business of his father, he is not for that reason a trader; and a creditor cannot make an application for an abandonment by him of his property. But such agent is subject to art. 1716, C.C. (Que.), and personally liable to third parties.

Major v. Scarborough, 24 Rev. Leg. 461.

REVOCABILITY.

Where an assignment for the benefit of creditors has been duly made by the assignors and accepted by the assignee, such assignment is irrevocable and cannot be disclaimed. [Nelles v. Maltby, 5 O.R. 263; Gardner v. Kleopfer, 7 O.R. 603; Brown v. Grove, 18 O.R. 311; Rennie v. Block, 26 Can. S.C.R. 356, referred to.]

Ahlberg v. Blair, 8 W.W.R. 59.

II. Construction and effect of assignment.

(§ II—5)—PRIORITIES—INTERPLEADER.

In determining the rights of an assignee under an assignment for the benefit of creditors made pending an interpleader between certain creditors and a chattel mortgagee, s. 8 of the Assignments Act, 1907 (Alta.), c. 6, must be construed as controlled by the later enactment, subs. 4 of s. 5 of the Creditors' Relief Act, 1910 (Alta.), c. 4, by virtue whereof those creditors only who come in as parties to the interpleader and contribute to the expense of the contest are entitled to share in the benefits. [Dominion Bank v. Markham (No. 1), 14 D.L.R. 508; Martin v. Fowler, 6 D.L.R. 243, 46 Can. S.C.R. 119, and Sykes v. Soper, 14 D.L.R. 497, 29 O.L.R. 193, referred to.]

Dominion Bank v. Markham (No. 2), 15 D.L.R. 549, 26 W.L.R. 687, 5 W.W.R. 1224.

EFFECT OF ASSIGNMENT—INTERPLEADER PROCEEDINGS—PREFERENCE.

Soper v. Pulos, 10 D.L.R. 848, 4 O.W.N. 1258, 24 O.W.R. 526. [Overruled in Sykes v. Soper, 14 D.L.R. 497.]

FILING STATEMENT—EFFECT ON SEIZURE.

An abandonment of property is not completed until the statement (bilan) has been deposited. The mere filing of the consent to abandon does not constitute an abandonment such as to suspend a seizure.

Légaré Co. v. Monast, 49 Que. S.C. 19.

JUDICIAL ABANDONMENT—ATTACHMENT BEFORE JUDGMENT—RIGHT OF DEFENDANT TO CONTEST.

The defendant, in an abandonment of property, has a sufficient interest to contest an attachment before judgment taken against him in order to clear himself of the accusation brought against him, and a motion to that effect will be granted.

Cockburn & Rea v. Lizotte, 15 Que. P.R. 70.

CONSTRUCTION AND EFFECT — ABANDONMENT OF PROPERTY.

The fact that a plaintiff has made an abandonment of his property does not deprive him of all rights of action to enforce a claim, especially if the curator and inspectors decline to do so. [Lemay v. Martel, 1 Que. K.B. 160, followed.] If the plaintiff had made an abandonment of property before the institution of his action, a petition by the defendant that the proceedings be suspended until the curator has taken up the instance, will not be granted, without shewing that the curator and inspectors have been put in default to do so and that it is obligatory on their part.

Gauthier v. Rousseau, 15 Que. P.R. 36.

EFFECT ON CONDITIONAL SALE.

An assignment for the benefit of creditors, made in accordance with s. 6 of the Assignments Act (Alta.), cannot operate to divest a vendor under a conditional sale agreement of the ownership of the goods comprised in such agreement prior to the fulfillment of the condition.

Re Hodges; John Deere Plow Co. v. Trusts & Guarantee Co., [1917] 1 W.W.R. 317, 11 A.L.R. 198.

CHATTEL MORTGAGE CANCELLED — ASSIGNMENT FOR BENEFIT CREDITORS WITHIN 60 DAYS—10 EDW. VII. c. 64, s. 5.

D'Avignon v. Bomerito, 3 O.W.N. 438, 20 O.W.R. 775.

III. Assignee or trustee.

A. IN GENERAL.

(§ III A—10)—APPOINTMENT OBTAINED BY FRAUD.

Where the appointment of a curator to an insolvent estate has been secured through fraud, by producing false, fictitious, and exaggerated claims, the nomination may be annulled and set aside on a petition of a creditor.

Curran v. Richards, 51 Que. S.C. 204.

LIQUIDATION — PROCEEDINGS IN — LIQUIDATOR'S REMUNERATION—SETTLING.

An application to reduce the monthly remuneration of a liquidator, on the ground that the liquidation is at a stage where his entire services are no longer required, will be refused upon opposition by creditors whose claims form a substantial portion of the aggregate. On an application without notice or filing of material, the following resolution, passed at a meeting of the creditors, was submitted to the court:

"that in the opinion of this meeting the expenses for legal and accountancy work of this liquidation are excessive and this meeting asks Mr. Justice Murphy to appoint a solicitor for the liquidation on a monthly salary basis and to bring all possible pressure to bear to secure an early termination of the liquidation and to this end the creditors ask that the liquidator continue to give his whole time to the work of the liquidation." Held, that the resolution as submitted cannot be dealt with by the court, but that if any party interested desires to bring any of the matters therein referred to before the court, he may do so by application in proper form, accompanied by proper evidence, in accordance with the established practice of the court.

In re Dominion Trust Co., 25 B.C.R. 537.

APPOINTMENT OF CURATOR—CREDITOR.

There is nothing to prevent the appointment as curator of a creditor whose debtor has made a judicial abandonment of his property for the benefit of his creditors. A curator in an abandonment of property is the agent both of the bankrupt and of the creditors.

Gauthier v. Patenaude, 54 Que. S.C. 101. [See 19 Que. P.R. 470.]

RIGHT OF ENDORSER OF NOTE.

The endorser of a note, which he has not paid, cannot file a claim for the note nor vote for the appointment of a curator, when the holder of the note himself has filed a claim for the note. One who once voted for a curator cannot later cancel his vote and give it to another candidate. A creditor has the right of becoming its curator.

Gauthier v. Laviolette, 19 Que. P.R. 470. [See 54 Que. S.C. 101.]

EXAMINATION OF CURATOR.

The examination of the curator to an insolvent estate will not be ordered if the petition does not shew that this examination is asked for in the interest of the creditors generally or of the petitioner especially.

Clark v. McAdam, 18 Que. P.R. 167.

APPOINTMENT OF CURATOR—FRAUD—REVOCATION.

If the appointment of a curator to an insolvent estate has been obtained by the production of claims fabricated from a number of documents or increased in amount, this appointment will be revoked and a new meeting of creditors called to appoint another curator.

Curran v. Richards, 18 Que. P.R. 176.

(§ III A—11)—WHO MAY BE ASSIGNEE—COMPANY AS SUCH.

A company cannot act as an assignee under the Creditors' Trust Deed Act, R.S. B.C. 1911, c. 13.

Colonial Development Co. v. Beech, 16 D.L.R. 630, 19 B.C.R. 250, 6 W.W.R. 336, 27 W.L.R. 489, affirming 12 D.L.R. 738, 19 B.C.R. 247.

B. RIGHTS AND POWERS.

(§ III E—15)—POWERS AND STATUS OF ASSIGNEE.

An assignee for the benefit of creditors is in the position of a mere volunteer as against whom proceeds of materials pledged to a bank under the Bank Act, R.S.C. 1906, c. 29, may be followed.

Townsend v. Northern Crown Bank (No. 4), 13 D.L.R. 300, 28 O.L.R. 521, affirming 10 D.L.R. 150, 27 O.L.R. 479.

RIGHTS OF ASSIGNEE—LEASE—SURRENDERING POSSESSION—REBATE OF RENT.

Mackinnon v. Royal George Hotel Co. (Alta.), 34 D.L.R. 190, 10 A.L.R. 417 [1917] 1 W.W.R. 1509.

SALE OF ASSETS OF INSOLVENT ESTATE BY ASSIGNEE TO CREDITOR — INSPECTOR OF ESTATE — CONSTRUCTIVE TRUSTEE — RESALE AT PROFIT — JUDGMENT DIRECTING ACCOUNT OF PROFITS—PROOF OF SALE AND DELIVERY OF GOODS AND SOLVENCY OF PURCHASERS—RIGHT TO RECOVER PURCHASE PRICE — INABILITY OF PURCHASERS TO SET UP DEFECT IN VENDOR'S TITLE—EFFECT OF CONSENT JUDGMENT DISMISSING ACTION UPON PROMISSORY NOTES MADE BY PURCHASERS.

Insolvent traders made an assignment for the benefit of their creditors. J., a creditor of the insolvents, was an inspector of the estate; he bought from the assignee the assets of the estate for $3,587, and (contemporaneously) sold them to the wives of the insolvents for $5,500—$1,500 cash and $4,000 secured by the promissory notes of the purchasers. J. and his partners, the defendants, were adjudged, in an action brought by the assignee, to account for the profits, if any, made by them out of the purchase of the assets:—Held, that when J. received the assets he became a constructive trustee, but that did not prevent him from selling the goods; and the purchasers could not successfully defend an action for the recovery of the price they agreed to pay. When the plaintiff proved that the goods were sold and delivered, and that the purchasers were solvent, he established a prima facie case; and the defendants were not entitled to say that they could make no profit because no recovery of the purchase price was possible; the purchasers could not set up a defect in the title of their vendor. The defendants had brought an action against the purchasers upon their promissory notes, and that action had been dismissed, but the dismissal was by the consent of the defendants, the plaintiffs in that action; the dismissal established nothing in favour of the defendants unless they shewed, which they did not, that some secret arrangement for payment had not been made when they consented to the dismissal. And, therefore, the Master had

rightly found that the defendants had made a profit of $1,739.25.

Wade v. James, 43 O.L.R. 614. [Reversed, 51 D.L.R. 704, 45 O.L.R. 157.]

PLEDGE OF IMMOVABLES—SALE BY CURATOR.

If real estate is given in pledge by traders who later become insolvent, their curator cannot obtain permission to sell the said properties without first indemnifying the creditor who holds the pledge.

Leger v. Turcotte, 19 Que. P.R. 214.

CONTRACT—SALE OF DEBTS—WARRANTY.

A sale en bloc, by a curator of the debts of a bankrupt, with a stipulation that there was no warranty as to the value or existence of such debts, and relinquishment by the purchaser of all recourse, constitutes an aleatory contract, and is not subject to the provisions of art. 1576, C.C. (Que.). In such case there is no recourse in warranty or for reduction of price if some of the debts included in the estate are found to have no actual existence, or are extinguished by prescription or compensation.

La Compagnie Beaudoin v. Larue, 53 Que. S.C. 298.

CURATOR—COSTS—INSURANCE POLICY.

The curator in a judicial abandonment of property who receives a fee equivalent to 5% of the value of the insolvent's goods has no right to charge additional fees for notices to creditors for the preparation of the dividend sheet, for each claim, or any other special fee for his various acts of administration. Neither can he reimburse himself for the insurance premium paid by him upon the guarantee policy which he furnished to the creditors instead of security.

Daoust v. Houde, 53 Que. S.C. 64.

CURATOR—COSTS.

There is a custom generally followed, by which all the services of a curator in a judicial abandonment of property are not paid according to the time that the curator has spent on it, but are paid by a commission of 5% upon the moneys realized by the sale of the movable of the bankrupt, and of 2½% upon moneys arising from the sale of the immovables; nevertheless, where there was an extraordinary amount of work, or when the commission would be very trifling or overstated and clearly unjust, the court may grant an additional fee. The costs of the curator incurred in the sole interest of the hypothecary creditors with respect to the sale of real property hypothecated in their favour, ought to be borne by the latter and not by all the creditors or by the ordinary creditors. A curator cannot claim a fee for services rendered before his nomination as substitute for the judicial guardian, which, according to custom, is never paid.

Moscovitch and Middlton-Hope v. Forget, 53 Que. S.C. 99.

PROPERTY UNDER CONDITIONAL SALE.

An assignment for the benefit of creditors, even though in the terms of s. 6 of the Assignments Act, c. 6, 1907, does not vest in the assignee the seller's interest in property in the possession ofthe assignor under a conditional sale agreement, whether such agreement be registered or not, as the assignee is not a creditor who has a judgment, execution or attachment against the assignor and it is only such creditors who are protected by the Conditional Sales Ordinance, c. 44, C.O.

Re Hodges; John Deere Plow Co. v. Trusts & Guarantee Co., 11 A.L.R. 198, [1917] 1 W.W.R. 317.

CURATOR'S FEES—ATTORNEY'S FEE—AMENDMENT.

The curator of an insolvent estate is not entitled to fees for the preparation of notices of assignment. He has no right to charge the estate with the premium that he was obliged to pay to the guarantee company which became surety for him, nor is he entitled to a fee for the preparation of the dividend sheet for examination of claims filed. The court will allow the curator a little more than 5% upon the receipts of the insolvent estate, the fee covering the continuation of the business of the bankrupt by the curator. [See Re Waldron, Drouin & Co., 17 Que. P.R. 358, and authorities cited at 368.] If the contestation of the dividend sheet is amended, and the hearing not delayed, there will be granted to the attorney of the curator in addition to the costs of motion a fee of $10. [See Chené v. Chené Heirs, 15 Que. P.R. 372.]

Re Daoust, 17 Que. P.R. 421.

CURATOR'S FEES.

Curators and liquidators in addition to their costs and disbursements will be well and equably remunerated for their services by granting them 5% upon the first $5,000, 2½% on amounts from $5,000 to $12,000 and 1¼% on the excess over $12,000.

Re Godin, 18 Que. P.R. 10.

(§ III B—20)—ASSIGNEE—POWERS—PROPERTY OR TITLE TAKEN—IMPLIED AUTHORITY TO SELL REALTY, WHEN.

A trustee to whom an assignment has been made for the benefit of creditors of "all the assets and effects" of the assignor has implied authority to sell any real property of the assignor covered by the assignment if it appears that his duties cannot be carried out without such power. [Flux v. Best, 31 L.T.N.S. 645, referred to.]

Re Snell & Dyment, 10 D.L.R. 364, 4 O.W.N. 759, 24 O.W.R. 64.

ASSIGNEE—CLAIM TO FUND IN COURT PAID IN UNDER CONDITIONAL ORDER.

Doctor v. People's Trust Co., 14 D.L.R. 451, 18 B.C.R. 111, 3 W.W.R. 929.

SALE OF ASSETS TO INTERESTED PARTY—VALIDITY.

A sale by a company's assignee for the benefit of its creditors was not vitiated on the ground that an inspector of the estate was interested in the purchase, though he had not formerly resigned his position,

where he did not participate in the negotiations leading up to the sale, and his act in signing a memorandum on the margin of the conveyance was purely formal and at the suggestion of the purchaser. Under an assignment by a company of its assets upon trust to apply the proceeds in payment of its debts and to pay any balance to the company, any right to sue to set aside a sale of the assets made by the assignee, upon the ground that one of the inspectors of the estate was interested in the purchase, is vested in the liquidator and not in a creditor or shareholder.

Shantz v. Clarkson, 11 D.L.R. 107, 4 O.W.N. 1303, 24 O.W.R. 596.

PRIORITIES—CREDITORS' INTERPLEADER WITH CHATTEL MORTGAGEE PENDING WHEN ASSIGNMENT MADE.

Contesting execution creditors who have taken an issue in interpleader proceedings as against a chattel mortgagee whose mortgage is attacked are subject to have their executions and rights in the interpleader subordinated to those of the general body of creditors as represented by the assignee upon an assignment under the Ontario Assignments Act, 10 Edw. VII. c. 64, R.S.O. 1914, c. 134, made between the preliminary interpleader order and the trial of the issue thereunder, and this although the preliminary order, pursuant to the interpleader clauses of the Creditors' Relief Act, 9 Edw. VII. (Ont.) c. 48, R.S.O. 1914, c. 81, made provision whereby other creditors might come in and share in the benefits of the issue on contributing pro rata to the expense. [Re Henderson Roller Bearings, 22 O.L.R. 306, 24 O.L.R. 356, in appeal sub nom. Martin v. Fowler, 6 D.L.R. 243, 46 Can. S.C.R. 119, distinguished; Soper v. Pulos, 10 D.L.R. 848, overruled. If the debtor's assignee for the benefit of creditors can, in any lawful way, obtain possession of personal property of the debtor fraudulently transferred or mortgaged, he is entitled to deal with it as part of the estate without bringing action and obtaining a judgment declaring his right thereto.

Sykes v. Soper, 14 D.L.R. 497, 29 O.L.R. 193.

BURDENSOME PROPERTY—LEASE.

An official assignee under the Assignments Act, 1907, Alta., c. 6, is not bound to accept a term of years to which the assignor was entitled under a lease at the date of the assignment for benefit of creditors, if it may be a charge instead of a benefit to the estate; the operation of the assignment in vesting the term in the assignee is suspended quâ the lease until he does some act signifying acceptance.

North-West Theatre v. MacKinnon, 24 D.L.R. 107, 8 A.L.R. 226, 31 W.L.R. 226, 8 W.W.R. 691.

ACTION—AUTHORIZATION—NOTICE.

A curator has the right, when authorized by the inspector and by judgment of a judge of the Superior Court, to take action against a debtor of the estate for which the curator is acting, and likewise to contest the insolvent's statement, without being bound to give notice of his petition to act against such insolvent or debtor.

Re Cohen and Turgeon, 24 Rev. de Jur. 31.

TERMINATION OF LEASE—LANDLORD'S LIEN.

The curator to the property of a debtor who has made a judicial abandonment can terminate a verbal lease made by the insolvent, at an annual rent payable in monthly instalments by giving to the lessor a month's notice; the latter has the right in such case to be collocated by privilege for the arrears of rent and the rent for the month in which the notice was given.

Pelletier v. Lamarre, 50 Que. S.C. 441.

PROPERTY OR TITLE TAKEN.

The sale of book debts of an insolvent, made under authority given to the curator by the court and under surveillance of the inspectors, deprives it of all character of the sale of litigious rights. Neither a resolution of the creditors nor even an order of court authorizing it is a condition precedent to a right of action for the proceeds of a sale so authorized. To obtain the authority of the court and consent of the inspectors or creditors, the creditors generally, as well as the one who institutes the proceedings, must have an interest therein. In this case the judge suspended proceedings for fifteen days to enable the curator to obtain from the inspectors or creditors authority to take action.

Gervais v. Douglass, 13 Que. P.R. 421.

ASSIGNEE—DELIVERY OF PROPERTY TO—PAYMENT OF SHERIFF'S FEES.

A sheriff is not bound to deliver over goods seized by him to the assignee of the execution debtor until his "fees and charges" (including poundage) have been paid by the assignee. [Lee v. Dangar, [1892] 2 Q.B. 337, applied.]

Campbell, Wilson & Strathdee v. Gimple, 7 W.W.R. 337.

(§ III B—25)—ACTIONS BY—PRIVITY OF CONTRACT.

In an action by the approved assignee for creditors under the Assignments Act, Sask., to recover on the debtor's contract with a third party where there has been no assignment to raise a privity of contract with the third party in favour of the plaintiff, leave may be given to add the debtor as a party to obviate the objection of want of privity. An official assignee under the Bulk Sales Act, Sask., is not entitled to sue for money or property until it has actually been transferred or assigned to him.

National Trust Co. v. Nadon, 24 D.L.R. 742, 8 S.L.R. 41, 7 W.W.R. 1067, 30 W.L.R. 588.

ACTIONS BY—REPLEVIN—MODE OF PROCEEDING.

An assignee for the benefit of creditors

need not rely upon the special statutory remedies given him under ss. 48 and 50 of the Creditors Trust Deeds Act, R.S.B.C. 1911, c. 13, to enable him to proceed in replevin to recover the possession of goods assigned to him.

Roy v. Fortin, 25 D.L.R. 18, 22 B.C.R. 282, 9 W.W.R. 407, 32 W.L.R. 700.

ACCOUNTING—ASSIGNEE DEFENDING ACTION—COSTS.

Where a claim filed against the partnership estate is for money alleged to have been received by one of the partners in the course of the partnership business, but, in respect of which he had defaulted in accounting, the assignee for creditors of the partnership will, if justified in defending the action, be entitled to be paid out of the assets both the claimant's costs of a successful action to establish the claim and his own costs of defence as between solicitor and client.

Sask. Elevator Co. v. Can. Credit Men's Assoc., 21 D.L.R. 658. [Reversed, 27 D.L.R. 604, 9 S.L.R. 176.]

ASSIGNEE—ACTIONS BY—PURELY PERSONAL RIGHTS OF DEBTOR.

A cause of action for damages for alleged injuries done to the plaintiff's credit, character and business by reason of illegal acts by the defendants, which forced the plaintiff to assign for the benefit of his creditors, is a purely personal right and does not pass to the assignee. [Smith v. Commercial Union Ins. Co., 33 U.C.Q.B. 529, applied; Hodgson v. Sidney, L.R. 1 Ex. 313, specially referred to.]

Tucker v. Bank of Ottawa, 11 D.L.R. 32, 4 O.W.N. 1189, 24 O.W.R. 485.

ACTIONS BY ASSIGNEE—INTERVENTION BY ASSIGNEE FOR BENEFIT OF CREDITORS—DISMISSAL OF COUNTERCLAIM—LEAVE TO ASSIGNEE TO INTERVENE.

Medland v. Naylor, 2 D.L.R. 890, 3 O.W.N. 1005.

PLACE OF ENTRY OF SUIT.

A creditor who has acquired a claim in a district, must sue the insolvent company in the district in which the winding-up takes place.

Plante v. Dalmas Pulp Co., 16 Que. P.R. 1.

ACTIONS BY ASSIGNEE.

It is the duty of the curator, representing the general body of creditors of an insolvent, to recover from the latter by direct action, property which he had secreted or withdrawn. The contestation of the debtor's schedule is in its nature purely penal; it has no other object and can have no other result than imprisonment of the debtor for a term not exceeding one year. It is not necessary to require the insolvent to make a new assignment in order to take possession of a sum of money belonging to him which was only determined to be his property long after his assignment.

Lafreniere v. Moudou, 14 Que. P.R. 156.

C. LIABILITIES.

(§ III C—30)—BREACH OF TRUST—FAILURE TO MAKE PAYMENTS ON SPECULATIVE CLAIMS—RIGHTS OF ASSIGNOR.

Where a debtor, not in fact insolvent and having a large surplus of assets, makes an assignment for the benefit of creditors, no breach of trust arises on the part of the assignee for his failure to make payments, in order to preserve the interests of creditors, upon speculative coal claims upon which large arrears were due the government, though such appears to be detrimental to the interests of the assignor.

King v. Doll, 25 D.L.R. 557, 9 W.W.R. 151, affirming 22 D.L.R. 524, 32 W.L.R. 411.

LEASE.

An assignee for the benefit of creditors under the Assignments Act (Alta. Statutes 1907, c. 6, as amended by s. 14 of Statutes 1909, c. 4 and s. 12 of Statutes 1913, 2nd Sess., c. 2), becomes invested with "all the estate and effects of the (assignor) which might be seized or taken in execution," including possession of premises held by the assignor under a lease, and there being no statutory provision for disclaimer, he remains liable to the landlord, because of privity of estate with him, for the rent which accrues after the assignment, while such privity of estate continues. If this defendant had pleaded his quality as official assignee, I am disposed to think his liability might have been limited to the extent of the assets coming to his hands. The equitable distribution of the estate of the insolvent amongst his creditors is the scope and purpose of the act, and an assignee does not necessarily remain liable to a landlord because a lease is included in the assets assigned. The assignee took possession under the lease. After occupation for three months it was not open to him to say, "I have not accepted the lease." It is, therefore, unnecessary to consider the general rule governing the position of the assignee with reference to the lease when the assignment took place. The act vests in the assignee whatever estate the insolvent has, for the benefit of creditors generally. The assignee agreed to pay the rent only so long as he would be in possession. When that ceased, liability ceased.

North-West Theatre Co. v. MacKinnon, 28 D.L.R. 63, 52 Can. S.C.R. 588, 9 W.W.R. 1255, reversing 24 D.L.R. 107, 8 A.L.R. 226, 31 W.L.R. 226, 8 W.W.R. 691.

DISTRIBUTION—CONTRACT—SELLING PRICE.

An agreement not to sell certain goods except at retail and at a fixed price, is not broken by a distribution of the goods at the said price amongst the creditors of the purchaser, by his assignee for the benefit of creditors.

Waterman Co. v. Canadian Credit Men's Trust Assoc. (Sask.), 32 D.L.R. 504.

SALE BY CURATOR—WARRANTY.

A curator named in a judicial abandonment of property who, duly authorized, sells

anything forming part of the assets of the bankrupt, with warranty, is not personally responsible if the purchaser is disturbed in his possession of the thing.

Savard v. Trudel, 53 Que. S.C. 515.

ASSIGNMENTS AND PREFERENCES—CHATTEL MORTGAGE—ASSIGNMENT OF BOOK DEBTS—MONEY ADVANCED TO INSOLVENT COMPANY TO PAY ONE CREDITOR—PREFERENCE—INTENT TO HINDER AND DELAY—13 ELIZ. C. 5—ASSIGNMENTS AND PREFERENCES ACT, S. 2, SUBS. 1—BOOK DEBTS RESTORED TO COMPANY—LACHES—SUBROGATION TO RIGHTS OF CREDITOR.

Stecher Lithographic Co. v. Ontario Seed Co., 22 O.L.R. 577.

V. Validity; taking effect.

(§ V—40)—AUTHORIZATION TO CURATOR—PETITION IN REVOCATION.

In a doubtful case, and in view of art. 890, C.C.P. (Que.), an insolvent may file a petition in revocation of the judgment authorizing the curator to contest his statement.

Cohen v. Turgeon, 19 Que. P.R. 368.

(§ V—41)—PARTNERSHIP—INDIVIDUAL ASSETS—WHAT PASSES TO ASSIGNEE.

Where an assignment is made by two partners and each of the partners transfers individual property "in accordance with rights of the joint or separate creditors as the case might be," the separate creditors of each partner individually are entitled to payment out of the separate property which that partner contributed to the estate, the remainder going into the estate and forming part of the partnership property to be wound up.

Re Gillespie, 9 D.L.R. 94, 23 Man. L.R. 5, 23 W.L.R. 45, 3 W.W.R. 791.

(§ V—42)—TAKING POSSESSION OF GOODS—EFFECT ON LEASE.

The fact that the official assignee for benefit of creditors put a man in possession of the stock in trade on premises leased to the assignor is not necessarily an acceptance of the lease by the assignee, and will prima facie be held to be an entry for the purpose of taking possession of the goods rather than of the land.

North-West Theatre v. MacKinnon, 24 D.L.R. 107, 8 A.L.R. 226, 31 W.L.R. 226, 8 W.W.R. 691.

(§ V—43)—SALE OF ESTATE OF INSOLVENT—PURCHASE BY AGENTS AND TRUSTEES FOR ASSIGNEE—FRAUD—PROFITS ON RESALE.

Atkinson v. Casserley, 22 O.L.R. 527, 17 O.W.R. 926.

FRAUD — ACCOUNTS — CONCEALMENT OF ASSETS.

An insolvent who makes a judicial abandonment of his property is obliged to render an account of his operations for the year. His default to do so in a satisfactory manner establishes against him a presumption of fraud which renders him liable to imprisonment. An insolvent who sells goods two weeks before his judicial abandonment of his property and omits fraudulently to enter this sale in his books, instructs his shipper not to mention it, receives the prices and applies it to his own use, and who is unable to explain why his statement or bilan shows a large deficit while, according to his books, he should have a surplus, is creating against him a presumption equivalent to proof of secretion which render him liable to imprisonment. An insolvent, who appears on the contestation of his statement or bilan, asks for particulars and produces a defence to the merits, cannot afterwards complain that the permission from a judge to contest the statement or bilan was obtained ex parte and without notice to him, and that the prolongation of the delay to adduce proof of the contestation, was obtained before the contestation itself was filed. Although a judge had no power to prolong the delay to contest the statement (bilan) of the insolvent, there is nothing in the law prohibiting the extension of the delay to prove the allegations of the contestation, even before the contestation is filed, provided it is filed within the delay fixed by law.

Krauss v. Michaud, 26 Que. K.B. 504. [Appeal to Supreme Court of Canada quashed, 52 D.L.R. —, 59 Can. S.C.R. 654.]

(§ V—44) — SCHEDULE — EXTENSION OF TIME—PETITION IN REVOCATION.

An insolvent cannot, by way of a petition in revocation, complain of a final judgment maintaining a contestation of his statement by alleging that the curator's petitions to be allowed to contest the statement and to extend the delay of contestation have not been served on the insolvent. A fortiori, a petition to revoke the judgment cannot be received when the grounds on which it is based have already been submitted to the courts seized of the case. The delay for attacking, by way of petition in revocation, preliminary and interlocutory judgments begin to run from the date of the delivery of the judgments and not from the date of the final judgment.

Krauss v. Michaud, 20 Que. P.R. 1. [Affirmed in 25 Rev. Leg. 139.]

CONTESTATION OF SCHEDULE—DELAY.

In the contestation of a schedule, if the contesting curators allege in their answer to the insolvents, that the delay for contesting the schedule was enlarged, a motion on the part of the insolvents for the dismissal of the allegation on the ground that it should have been made in the contestation of the schedule itself is not well founded.

Krauss v. Michaud, 18 Que. P.R. 62.

(§ V—46) — SEIZURE OF GOODS UNDER EXECUTION—VALIDITY OF ASSIGNMENT.

Canadian Bank of Commerce v. Davidson, 3 S.L.R. 403, 15 W.L.R. 530.

VI. Property included.

(§ VI—50) — Government coal lands — Speculative claims.

Where the creditors, the assignee and the debtor had acted as if certain speculative dealings of the debtor through himself and his nominees to acquire government coal lands were not within the debtor's assignment for creditors, made specially because of a separate mercantile business, although the assignment in form included all the debtor's real estate, the acquiescence of the debtor will bar his subsequent claim that the estate through the assignee should have protected the coal lands by making payments out of the general estate necessary to prevent the forfeiture of his interests.

King v. Doll, 22 D.L.R. 524. [Affirmed 25 D.L.R. 557, 32 W.L.R. 411, 9 W.W.R. 151.

Hotel license—Government indemnity.

The indemnity payable by the government by virtue of the Act 4 Geo. V., c. 6, art. 8, to the holder of a certificate for a tavern or restaurant license in the case of insolvency of such holder, belongs to his assets and becomes the security of his creditors according to their rank and privilege.

Gervais v. Bilodeau, 52 Que. S.C. 66.

The indemnity payable by the provincial government to indemnify a restaurant keeper or hotel keeper for the cancellation of his license, as provided by 4 Geo. V., c. 6, art. 8, is an ordinary debt and part of the assets of the owner. In case of judicial abandonment of the property the curators may be authorized to recover such sum from the provincial government for distribution among the creditors.

Vinet v. Lalonde, 51 Que. S.C. 337.

Druggist—Effects—Tools of trade.

A druggist who assigns for benefit of creditors may retain and withhold from the assignment only the tools, instruments or other ordinary articles usually used in the exercise of his business as a druggist and chemist, and not those used in the exercise of his general business.

Re Weinfield, 17 Que. P.R. 398.

Property included.

The Act 2 Geo. V., c. 50 (Que), which provides that if an insolvent debtor works without remuneration the court will fix the value of his services in order that the portion liable to seizure may be distributed among his creditors, applies to one who has made an assignment under a judicial order and not to the case of a voluntary assignment only. It does not apply in the case of a man who works gratuitously for his wife.

Orsali v. Racicot, 14 Que. P.R. 148.

Judicial abandonment of property — Schedule—Contestation.

In a judicial abandonment of property where the insolvent declares in his statement that he has no property movable or immovable, and that he is not aware of any creditors, if it is established that the bankrupt, registered as doing business under a firm name, is only a prête-nom in good faith, the contestation of this statement and demand for his imprisonment will be dismissed

Lauzon v. Lachapelle, 47 Que. S.C. 352.

Insolvent debtors—Assignment of moneys due under contract—Fresh advance.

Northern Commercial Co. v. Powell, 17 W.L.R. 297 (Y.T.).

VII. Preferences by insolvent.

A. In general.

(§ VII A—55) — Preferences by insolvent—Intent and pressure.

A preference given by a debtor when in insolvent circumstances and within 60 days prior to the debtor's making an assignment for the benefit of his creditors, is void as in contravention of the Alberta Assignments Act, Statutes 1907, c. 6, and this regardless of the questions of intent and pressure (ss. 42 and 43). [Benallack v. Bank of B.N.A., 36 Can. S.C.R. 120, distinguished.]

Trusts and Guarantee Co. v. Whitla Co., 16 D.L.R. 185, 7 A.L.R. 330, 27 W.L.R. 589, 6 W.W.R. 42.

Assignments and Preferences Act — Creditor holding mortgage-security — Valuation of, at amount of claim — Release by assignee of equity of redemption—Effect upon right of creditor against surety for part of claim—Discharge—Satisfaction.

Union Bank of Canada v. Makepeace, 38 D.L.R. 361, 40 O.L.R. 368.

Chattel mortgage—Forfeiture of term—Bonus of advance rent under lease.

A clause in a lease at a monthly rental in advance, stipulating for immediate termination of the lease and a further payment of three months' rent in advance on the lessee transferring his interest in the goods and chattels upon the demised premises, is not effective as against an assignee for the benefit of creditors under the Alberta Assignments Act, c. 6 of 1907, as to the forfeiture of three months' advance rent because such clause contravenes the general policy of the Act for the distribution of the assets pari passu among all the creditors; and this although the transfer of the goods relied upon as terminating the lease was a chattel mortgage and the seizure was made thereunder prior to the assignment. [See Stanley v. Willis, 16 D.L.R. 549.]

McKinnon v. Cohen, 16 D.L.R. 72, 7 A.L.R. 317, 26 W.L.R. 828, 5 W.W.R. 1263.

Acceleration clause in lease.

An acceleration clause in a lease, providing that rent due for a future period shall become due and payable upon the making of an assignment for the general

benefit of creditors, is not necessarily fraudulent and void as against creditors.

Alderson v. Watson, 28 D.L.R. 588, 35 O.L.R. 564. [See also 31 D.L.R. 259, 36 O.L.R. 502.]

ASSIGNMENTS AND PREFERENCES ACT — MORTGAGE — ACTION TO SET ASIDE — PARTIES.

Mortimer v. Fesserton Timber Co., 39 D.L.R. 781, 40 O.L.R. 86.

PREFERENCE—TRUST—STATUTE OF FRAUDS.

Smith v. Sugarman, 47 Can. S.C.R. 392, 23 W.L.R. 623.

PREVIOUS TRANSFER OF LEASES AND BUILDINGS TO CREDITOR—CHATTEL MORTGAGE ON BUILDINGS (TREATED AS CHATTELS) MADE TO PERSON ADVANCING MONEY—PRIORITIES — BUILDINGS FOUND TO BE FIXTURES — PREFERENCE — ASSIGNMENTS AND PREFERENCES ACT—INTENT —PRESENT, ACTUAL, BONA FIDE ADVANCE OF MONEY—COSTS.

Struthers v. Chamandy, 42 O.L.R. 508, at 513, affirming 12 O.W.N. 302.

ASSIGNMENTS AND PREFERENCES — PURCHASE BY CREDITOR AND INSPECTOR OF ASSETS OF ESTATE — RESALE TO WIVES OF INSOLVENTS — CONSIDERATION — AMOUNT PAID BY CREDITORS PLUS AMOUNT OF HIS CLAIM—FRAUD UPON ESTATE—ACCOUNT OF PROFITS—ILLEGALITY OF TRANSACTION—PUBLIC POLICY — PROMISSORY NOTES MADE BY WIVES OF INSOLVENTS—ANSWER TO ACTION FOR BALANCE DUE UPON NOTES.

The plaintiff was the assignee of the insolvent estate of K. Brothers for the benefit of their creditors; J., one of the defendants, who were creditors of the estate, was an inspector of the estate; he purchased from the plaintiff, for $3,587, the assets of the estate, and turned them over to the wives of the insolvents, getting from them $1,500 in cash and four promissory notes, each for $1,000. The $5,500 appeared to have been made up of the $3,587 and the amount of the indebtedness of the insolvents to the defendants, less the amount which the defendants expected to receive in dividends. The purchase and resale were made in pursuance of an arrangement between the wives of the insolvents and J. By the judgment in this action, the Master was directed to take an account "of the profits, if any, made or to be made by the defendants out of the purchase of the insolvent estate." The whole of the amount of the promissory notes had not been paid; the Master found that there was still due upon them upwards of $1,739.25, and that for that sum and interest, as such "profits," the defendants were liable:—Held, that the real transaction was a fraud upon the estate, to which the wives of the insolvents were parties; the defendants could not, by reason of the illegality of the transaction, recover the balance remaining due upon the promissory notes; and, therefore, that balance was not "profits made or to be made," within the meaning of the judgment. Although the general rule is, that a person cannot set up the illegality of a transaction to which he was a party, he may, on grounds of public policy, do so in such a case as this. The order of Masten, J., 43 O.L.R. 614, dismissing the defendants' appeal from the Master's report, was reversed, and the report of the Master varied by deducting from the amount found due by the defendants the sum of $1,739.25 and interest.

Wade v. James, 51 D.L.R. 704, 45 O.L.R. 157.

CREDITORS OF INSOLVENT RECEIVING PAYMENT IN FULL—INTENT TO DELAY OR PREJUDICE OTHER CREDITORS—EVIDENCE —ONUS—FAILURE TO SATISFY — PRESSURE—PRESUMPTION — ASSIGNMENT OR TRANSFER OF GOODS—CLAIM TO RECOVER VALUE OF GOODS—ASSIGNEE FOR BENEFIT OF CREDITORS—FINDINGS OF TRIAL JUDGE—APPEAL.

Clarkson v. Victor Edelstein & Son, 15 O.W.N. 390.

ASSIGNMENT FOR BENEFIT OF CREDITORS—CLAIM TO RANK ON ESTATE IN HANDS OF ASSIGNEE — CONTESTATION—ACTION TO ESTABLISH CLAIM — TIME FOR BRINGING—ASSIGNMENTS AND PREFERENCES ACT, S. 27 (2)—EXTENSION OF TIME AFTER EXPIRY OF 30 DAYS—JURISDICTION OF COUNTY COURT JUDGE — REASONS FOR MAKING ORDER.

Re O'Hara & Co.; Jarvis's Claim, 17 O.W.N. 291.

CREDITORS OF INSOLVENT RECEIVING PAYMENT IN FULL — INTENT TO DELAY OR PREJUDICE OTHER CREDITORS—EVIDENCE —ONUS—FAILURE TO SATISFY—PRESSURE—SIXTY-DAY PRESUMPTION—FINDING THAT TRANSACTION DID NOT AMOUNT TO ASSIGNMENT OR TRANSFER OF GOODS OR PROPERTY—CLAIM TO RECOVER VALUE OF GOODS—ASSIGNEE FOR BENEFIT OF CREDITORS.

Clarkson v. Bonner-Worth Co., 14 O.W.N. 272. [Affirmed, in 15 O.W.N. 390.]

ASSIGNMENT—PARTNERSHIP.

Defendant endorsed a firm's note at three months for $500 which fell due August 10, 1915. On July 21, 1915, defendant obtained goods from firm's store to the amount of $511.75, computed at retail price. Defendant gave his cheque for $500 bearing date July 21, 1915, to one of the partners, with which cheque the partner paid at the bank the note on which defendant was endorser. One of the partners executed a deed of assignment for the benefit of his creditors to the plaintiff of all his individual and partnership property on August 4, 1915. The other partner executed a deed of assignment for the benefit of his creditors to the plaintiff of all his individual and partnership property on August 14, 1915. Held, in an action brought by the assignee to set aside the transfer or conveyance of the goods to the defendant, that the plaintiff

by virtue of the assignments to him by each partner of his individual and partnership property, had sufficient interest and status to maintain this suit. Query, whether individual assignments can be deemed to be an assignment of the debtor firm within the meaning of subs. 4 of s. 2 of the Assignments and Preferences Act, C.S. 1903, c. 141. Held, also, that transfer to the defendant was made when defendant was in insolvent circumstances or on the eve of insolvency, and was made with intent to give the defendant an unjust preference over the other creditors, and is void under the Act respecting Assignments and Preferences by Insolvent Persons, C.S. 1903, c. 141; that the amount of the claims, proved according to the statute C.S. 1903, c. 141, and filed with the assignee, was relevant and admissible testimony as to the solvency or insolvency of the firm.

Fleetwood **v.** Welton, 44 N.B.R. 318.

ASSIGNMENTS AND PREFERENCES — ASSIGNMENT FOR BENEFIT OF CREDITORS—ORDER OF COUNTY COURT JUDGE ALLOWING CREDITOR TO SUE IN NAME OF ASSIGNEE —LEAVE TO APPEAL — ASSIGNMENTS AND PREFERENCES ACT.

Re Taylor, 6 O.W.N. 175, 26 O.W.R. 197; 6 O.W.N. 447, 26 O.W.R. 662.

MONEY GIVEN BY HUSBAND TO WIFE TO PURCHASE LAND — ANTENUPTIAL PROMISE, NOT IN WRITING—INSOLVENCY OF HUSBAND—ACTION BY ASSIGNEE TO BRING LAND INTO ESTATE OF HUSBAND—ABSENCE OF FRAUDULENT INTENT.

Learie v. Gaudet, 12 O.W.N. 389.

MONEY WITHDRAWN FROM BUSINESS BY INSOLVENT TRADER BEFORE ASSIGNMENT—PROSECUTION OF INSOLVENT BY TWO CREDITORS FOR FRAUD — PAYMENT TO PROSECUTING CREDITORS OUT OF MONEY WITHDRAWN OF SUMS SUFFICIENT WITH DIVIDEND FROM INSOLVENT'S ESTATE TO PAY CLAIMS IN FULL—AGREEMENT—INTIMATION TO CROWN ATTORNEY—SUSPENDED SENTENCE — DEDUCTION FROM DIVIDENDS OF SUMS PAID—COSTS.

Bonnick v. Lennox; Bonnick **v.** Wolfe, 11 O.W.N. 239.

INTENTION TO PREFER PARTICULAR CLASS OF CREDITORS — CONVEYANCE OF LAND TO TRUSTEE—SUBSEQUENT CONVEYANCE BY DEBTOR AND TRUSTEE TO COMPANY AS TRUSTEE — GENERAL ASSIGNMENT FOR BENEFIT OF CREDITORS — EXECUTION CREDITORS—PRIORITIES.

Imperial Trusts Co. of Canada **v.** Langley, 11 O.W.N. 262.

ASSIGNMENTS AND PREFERENCES — SECURED CREDITOR VALUING SECURITY—RIGHT TO REVALUE — ASSIGNMENTS AND PREFERENCES ACT, R.S.O. 1914, c. 134—COSTS.

Re Payne & Union Bank of Canada, 8 O.W.N. 614.

ASSIGNMENTS AND PREFERENCES — CONVEYANCE OF LAND IN TRUST FOR ERECTION OF BUILDINGS AND PAYMENT OF CREDITORS—EXPENDITURE BY TRUSTEE IN EXCESS OF SUMS RECEIVED FROM PROPERTY —MORTGAGE BY TRUSTEE TO SECURE PERSONAL CREDITOR—APPOINTMENT OF NEW TRUSTEE — ACTION AGAINST FOR FORECLOSURE—TRUST NOT WITHIN ASSIGNMENTS AND PREFERENCES ACT — JUDGMENT—IMMEDIATE FORECLOSURE—COSTS.

Foster v. Trusts & Guarantee Co., 8 O.W.N. 531, 35 O.L.R. 426.

INADEQUATE CONSIDERATION — ONUS AS TO GOOD FAITH.

In an action by an official assignee to recover goods assigned to defendant it appeared that there was a general assignment of all the goods in the store of the assignor for a consideration that was grossly inadequate. The defense related chiefly to a part of the goods which it was claimed was the subject of a bona fide sale some months previous to the date of the general transfer. The trial judge found against this contention on the ground that the goods in question were not separated in any way from the remainder of the goods in the assignor's store, that the defendant had failed to sustain the burden resting upon him as to the transaction alleged, and that the transaction was fraudulent and entered into with the same purpose and intent as the transfer of the remainder of the goods. Held, that, in the face of the general fraudulent scheme proved, it would require the most clear and satisfactory proof of the alleged earlier transaction, and that as the proof offered was not of that character defendant's appeal should be dismissed with costs.

Morton v. Thomas, 49 N.S.R. 252.

PREFERENCE BY INSOLVENT.

An agreement by which a bank makes an advance to an insolvent customer, of the amount of a composition with his creditors, in consideration of an absolute transfer to it of securities, already held as collateral, and of his note for the surplus of his secured indebtedness to it, after payment of the composition, does not amount to an undue preference and is valid and binding.

Philie ès-qual. v. Coté, 21 Que. K.B. 128.

DEED OF TRUST—RIGHTS OF CREDITORS — SETTING ASIDE.

A trust agreement providing that the estate of the grantor should be held in trust for such of his creditors as should execute the same, must be held to be made with intent to give such creditors a preference. [Lumber Manufacturers Yards v. Western Jobbers, 28 D.L.R. 6, 9 S.L.R. 165, followed.] The fact that the creditors actually executing the deed exerted pressure to obtain its execution by the grantor does not prevent such trust agreement from being a voluntary or fraudulent preference and void. A creditor, whose claim was not

at the date of the deed admitted by the grantor, but who subsequently obtains judgment against him, may have such trust agreement set aside.

Kimball Lumber Co. v. Canadian Credit Men's Trust Ass'n, [1917] 2 W.W.R. 561, 10 S.L.R. 251.

SET-OFF.

The transferee of a debt, due from a person who makes an assignment for the general benefit of his creditors, is not entitled to set-off the debt, where such transfer is a colourable contrivance to enable the transferor to obtain a preference. The allowance of a set-off of such debt, after the assignment for the benefit of creditors, would be contrary to the spirit and intention of the Assignments Act.

MacKinnon v. Horn, 32 D.L.R. 374, 10 A.L.R. 389, [1917] 1 W.W.R. 830.

(§ VII A—56)—PREFERENCES BY INSOLVENT — EXEMPTIONS — FAILURE TO CLAIM—REGISTRATION OF TITLE.

If a debtor who has assigned his property for the benefit of his creditors does not file his claim of exemptions within thirty days of the registration of the assignment as required by Land Titles Act, s. 117 (R.S.S. 1909, c. 41), the registrar of title has the right to recognize the assignee as the absolute owner, both legal and equitable, of the land assigned, but the title of the debtor is not affected by such failure where the assignee has not applied for registration as owner and admits the debtor's right to the exemptions claimed, and in such a case and on the registrar's refusal to register a transfer of the debtor's homestead, an order will be entered, directing registration of the transfer; it being only against the transferee of the assignee that the debtor cannot claim his exemptions if he fails to claim them within the thirty days' period.

Leach v. Haultain & National Trust Co., 11 D.L.R. 238, 6 S.L.R. 58, 24 W.L.R. 154, 4 W.W.R. 484.

(§ VII A—57)—PREFERENCES—EFFECT OF PRESSURE—CHATTEL MORTGAGE — SALE BY MORTGAGEE—FOLLOWING PROCEEDS.

Mere formal pressure by the creditor for security will not support a preference which would otherwise be void; and a chattel mortgage given to the bank for an unmatured debt already incurred will not stand merely because the bank asked for the security if the purpose of same was to give it an advantage over unsecured creditors and to leave the debtor without the means of satisfying other creditors. The proceeds of sales of mortgaged goods may be followed in the hands of the chattel mortgagee at the instance of the debtor's assignee for creditors, by virtue of s. 13 of the Assignments and Preferences Act, 10 Edw. VII. (Ont.), c. 64, R.S.O 1914, c. 194, on the chattel mortgage being successfully impeached as an unlawful preference.

Munro v. Standard Bank of Canada, 16 D.L.R. 293, 30 O.L.R. 12.

B. VALIDITY OF.

(§ VII B—61)—SECURITIES ASSIGNED TO BANK — ASSIGNMENT ATTACKED BY CREDITOR, R.S. SASK., 1909, C. 142, S. 39.

A gift or conveyance, made by a debtor when he is insolvent, which has the effect of giving a creditor a preference is void under s. 39 of the Assignments Act, R.S. Sask., 1909, c. 142; provided that the transaction is attacked in the manner laid down by statute within 60 days after it takes place. [Lawson v. McGeoch, 20 A.R. (Ont.), 464, distinguished.]

McLean & Union Bank of Canada v. Hodge, 50 D.L.R. 123, [1919] 3 W.W.R. 1108, affirming 12 S.L.R. 298.

PREFERENCE BY INSOLVENT — ACTION AGAINST COMPANY — SALE TO CERTAIN CREDITORS — JUDGMENT AGAINST COMPANY — SEIZURE BY SHERIFF — INTERPLEADER—SALE SET ASIDE.

The sale of an insolvent concern to certain of its creditors for good and valuable consideration cannot be impeached, provided that such sale is not made for the purpose of defeating the other creditors or any of them. [In re Johnson; Golden v. Gillam (1881), 20 Ch. D. 389; Wood v. Dixie (1845), 7 Q.B. 892; Hopkinson v. Westerman (1919), 48 D.L.R. 597, 45 O.L.R. 208, referred to.]

Penny v. Fulljames, 50 D.L.R. 553, [1920] 1 W.W.R. 555.

ASSIGNMENT BY INSOLVENT PARTNERSHIP—ASSETS OF FIRM—ACTION BY ASSIGNEE TO MAKE LIABLE LANDS PURCHASED BY WIFE OF PARTNER — FRAUDULENT CONVEYANCE.

McPhie v. Tremblay, 2 D.L.R. 921, 3 O.W.N. 605, 21 O.W.R. 217.

ASSIGNMENTS AND PREFERENCES — ACTION BY ASSIGNEE FOR BENEFIT OF CREDITORS OF INSOLVENT TO SET ASIDE MORTGAGE TO CREDITOR MADE BY INSOLVENT—EVIDENCE — PREFERENCE — CHATTEL PROPERTY TRANSFERRED TO CREDITOR — CLAIM OF CREDITOR AGAINST ESTATE—ACCOUNT—COSTS.

Anderson v. Nowosielski, 16 O.W.N. 379.

CHATTEL MORTGAGE BY INSOLVENT—SECURITY FOR CURRENT PROMISSORY NOTE AND MONEYS ADVANCED TO SATISFY EXECUTION.

D'Avignon v. Bomerito, 3 O.W.N. 158, 20 O.W.R. 211.

ASSIGNMENTS AND PREFERENCES—CLAIM OF ASSIGNEE TO MORTGAGE UPON LAND OF INSOLVENT — SECURITY FOR MAINTENANCE OF IMBECILE — ORIGINATING NOTICE — RULE 600 — SCOPE OF.

Re Battrim, 7 O.W.N. 778.

CHATTEL MORTGAGE—GIVING PREFERENCE—VALIDITY OF—BONA FIDES.

Maher v. Roberts, 5 O.W.N. 603, 25 O.W.R. 569.

BY MORTGAGE OR BILL OF SALE.

Under s. 42 of the Manitoba Bills of Sale and Chattel Mortgage Act, a security for a debt given to a creditor which has the effect of giving him an advantage over other creditors, will be declared void, notwithstanding that it has been secured by pressure on the part of the creditor and whether or not the creditor knew of the debtor's insolvency. Under s. 44 of the Act, a chattel mortgage security given to a creditor for an existing debt and also to cover fresh advances, although void as to the existing debt as being a fraudulent preference, should be held good as regards any fresh advances made to the debtor on the strength of it. [Mader v. McKinnon, 21 Can. S.C.R. 645, and Goulding v. Deeming, 15 O.R. 201, followed.]

Empire Sash & Door Co. v. Maranda, 21 Man. L.R. 605.

PREFERENCES—BILL OF SALE FOR BENEFIT OF CREDITORS — EVADING ASSIGNMENTS ACT.

Held, that where a bill of sale is made to a trustee for the benefit of a scheduled list of creditors, and it is shewn by the evidence that all creditors who file claims with the trustee are to be entitled to the benefit of the bill of sale, whether included in the schedule or not, the evident intention is to effect an assignment for the general benefit of creditors, and the bill of sale, being made to a person other than an official assignee, is void under the Assignments Act. [Canadian Bank of Commerce v. Davidson, 3 Sask. L.R. 403, distinguished.] Quære, whether the bill of sale is not void as against the execution creditor in any event under s. 13 of the Bills of Sales Act.

Newton v. One Northern Milling Co., 6 W.W.R. 1021.

VIII. Rights, duties and liabilities of creditors; priority and release of claims.

A. IN GENERAL.

(§ VIII A—65)—PREFERRED CLAIMS—RENT—STIPULATION IN LEASE—VALIDITY.

Harwood v. Assiniboia Trust Co., 25 D.L.R. 830, 8 S.L.R. 162, 8 W.W.R. 565.

DISPUTED CLAIMS—CORROBORATION.

There is no difference as to the degree of corroboration required between a claim attacked under s. 5 of the Statute of Elizabeth, c. 13, and a claim where one seeks to rank as a creditor; and where any such claim is disputed the items thereof must be established by sufficient corroborative evidence. [Merchants Bank v. Clarke, 18 Gr. 594; Morton v. Nihan, 5 A.R. (Ont.) 20; Koop v. Smith, 25 D.L.R. 355, 51 Can. S.C.R. 554; Maddison v. Alderson, 8 App. Cas. 467; Holmes v. Bonnett, 24 N.S.R. 279; McDonald v. Dominion Coal Co., 36 N.S.R. 15, applied.]

Josephs v. Morton, 26 D.L.R. 433, 49 N.S.R. 417.

CONFLICTING CLAIMS — DIFFERENT STATUTES.

When special provisions are enacted for dealing with particular cases, these provisions are to govern, even though there may be some general provisions of another enactment wide enough to cover some of them; hence, an assignee for the benefit of creditors, under an assignment within the provisions of the Assignments and Preferences Act, R.S.O. 1914, c. 134, is not entitled, upon a summary application to the Court, under s. 66 of the Trustee Act, R.S.O. 1914, c. 121, or under r. 600, to have conflicting claims of right to rank upon the estate determined.

Re Fearnley's Assignment, 22 D.L.R. 604, 33 O.L.R. 492.

UNLIQUIDATED DAMAGES—FUTURE RENT.

A provision in a trust agreement whereby the trustee was authorized to sell the property of the lessee and divide the proceeds among "creditors" does not entitle the lessor to rank for future rent, as he was not a creditor for such rent within the meaning of the agreement at its execution. [See also Harwood v. Assiniboia Trust Co. (Sask.), 25 D.L.R. 830; Cristall v. Loney (Alta.) 27 D.L.R. 717.]

Gardner v. Newton, 29 D.L.R. 276, 26 Man. L.R. 251, 33 W.L.R. 949, 10 W.W.R. 511.

CLAIMS FOR RENT—UNLIQUIDATED DAMAGES—BREACH OF COVENANT IN LEASE.

Cristall v. Loney, 27 D.L.R. 717, 33 W.L.R. 563. [See also Re Shirleys, 29 D.L.R. 273.]

CLAIM OF MORTGAGEE CREDITOR—VALUING SECURITY — ASSIGNMENTS AND PREFERENCES ACT, R.S.O. 1914, C. 134, SS. 25, 27.

Barber v. Wade, 28 D.L.R. 366, 37 O.L.R. 459.

SECURED CLAIM—MORTGAGE—STATEMENT OF VALUE—ASSIGNMENTS AND PREFERENCES ACT.

Under the Assignments and Preferences Act (R.S.O. 1897, c .147, s. 20 (4)) the creditor is not required to put a specified value on the security in the claim which he files with the assignee; this may be done by a separate document; the delivery to the assignee of a simple statement that he puts a stated value on his security is sufficient compliance with the section. If a secured creditor and the assignee meet and arrive at an agreement as to the value of the security held by the creditor, and the assignee does not desire to be given an opportunity of taking over the security in the formal manner for which s. 20 (4) provides, he may waive his right to have a specified value put on the security by the creditor and consent to the retention

of it at the value which he and the creditor have agreed that it was at all events when the assignee does this under the authority of the creditors. It being known to the assignee and to the creditors that a mortgagee is a secured creditor, they must be taken in appointing him an inspector to have intended that he should act as inspector only in respect of matters outside of those in which he has duties to perform under s. 20 (4).

Taylor v. Davies, 41 D.L.R. 510, 41 O.L.R. 403, reversing 39 O.L.R. 205. [Affirmed 51 D.L.R. 75.]

CLAIMS—AMENDMENT—ESTOPPEL.

A creditor having amended his claim and valued his securities against an insolvent debtor, and such valuation having been acquiesced in, is estopped from subsequently setting up any preferential claim not set out in the amended claim.

Williams Machinery Co. v. Graham, 43 D.L.R. 437, 57 Can. S.C.R. 229, [1918] 3 W.W.R. 597, affirming 39 D.L.R. 140, 25 B.C.R. 284.

PRIOR SEIZURE BY SHERIFF—SALE OF GOODS BY ASSIGNEE—POSSESSION—TITLE OF PURCHASER—ASSIGNMENTS ACT—NOTICE.

Under s. 16 of the Assignments Act, failure to publish the notice of an assignment for the benefit of creditors directed by s. 12 of the Act does not invalidate the assignment. Failure to furnish the sheriff, pursuant to s. 12 of the Assignments Act, with a copy of an assignment for the benefit of creditors does not invalidate the assignment or a sale by the assignee of the goods assigned, where, at any rate, the assignee does not know the sheriff has made seizure and neither the sheriff nor any one on his behalf is in actual possession. The purchaser of goods from an assignee for the benefit of creditors, neither the assignee nor the2 purchaser knowing of a seizure thereof prior to the assignment, held to have obtained a good title to the goods notwithstanding the absence of publication of notice of the assignment and the failure to furnish the sheriff with a copy of the assignment.

Scinbaine v. Christopherson and Sask. Guarantee & Fidelity Co., [1918] 3 W.W.R. 174, 11 S.L.R. 385.

PREFERRED CLAIMS—"JUDGMENT"—ALIMONY DECREE.

On an assignment under the Creditors' Trust Deeds Act, R.S.B.C. c. 13, a decree for alimony does not give the assignor's wife a preference over his other unsecured creditors. A decree for alimony is a "judgment" of the Supreme Court and is, therefore, covered by the word "judgments" in s. 14 of the Creditors' Trust Deeds Act.

Francis v. Wilkerson, [1918] 2 W.W.R. 956, affirming 25 B.C.R. 132, [1917] 3 W.W.R. 920.

DISTRIBUTION—DIVIDEND SHEET—COSTS OF CURATOR—PRIVILEGED CREDITOR—DEFICIT.

The dividend sheet prepared by a curator of an insolvent estate, for the distribution of the assets among the creditors, must establish the amount due each one of them according to the order, privilege and amount of each one's respective claim; and should that memorandum shew a deficit, it must name the creditors on whom it should be assessed. In such a memorandum the curator cannot collocate himself by preference to a privileged creditor for his own traveling and boarding expenses, for his inventory costs, his fees of inspection and delivery of the business and for his commission on the collection of rents and sale price of goods.

Sahekik v. Duhamel, 53 Que. S.C. 61.

COSTS—PRIVILEGED CREDITOR—APPORTIONMENT.

If a curator in a judicial abandonment of property has been condemned to pay the costs of contestation of his dividend sheet, and that, in consequence of the payment of these costs, a privileged creditor, who would have been paid his debt in full, is not so paid, the court may order the curator to deduct proportionately from each creditor who produces a claim, an amount sufficient to pay the privileged creditor in full.

Lester v. Turcotte, 53 Que. S.C. 541.

CLAIMS—SIMPLE CONTRACT CREDITOR—CURATOR'S FEES—CONTINUATION OF BUSINESS.

In a judicial abandonment of property, the costs of a seizure, made the same day but later than another, and under a judgment which was not given the same day, are not privileged. (2) A simple contract creditor has a right to contest a dividend sheet prepared by the curator in a judicial abandonment of property. (3) The curator in a judicial abandonment of property has not the right, under a simple resolution of the inspectors and without the authorization of a judge, to continue the trade of the bankrupt; nevertheless, if such business has turned out to be for the benefit of the creditors in general, the court, recognizing the accomplished fact, will not void the transaction. (4) A curator who continues the business of the bankrupt has no right to pay an account for merchandise sold and delivered before the judicial abandonment of property. (5) A curator has no right to ask a fee for his steps and proceedings towards making a compromise between the debtor and his creditors, if such compromise is not authorized by the judge and especially if he has brought no benefit to the creditors.

Chagnon v. Rameau, 53 Que. S.C. 279.

CLAIMS—SECURED DEBT—DIVIDEND SHEET.

A creditor, in producing his claim in a judicial abandonment of property under the authority of C.C.P., is not bound, as un-

der the old bankruptcy law and Dominion Winding-up Act, to state his securities and specify them in his claim. A court, in a contestation of a dividend sheet, cannot admit a fact which has not been pleaded. A final dividend sheet cannot be annulled and set aside because the curator ought to have prepared a first dividend sheet.

Morency v. Gagnon, 24 Rev. Leg. 92.

RIGHTS, DUTIES, AND LIABILITIES OF CREDITORS.

Where the same two partners carry on two business concerns, hotel and hardware, and fail in both; and where some of the judgment creditors realize under their executions out of the hardware assets, and others are looking to the hotel assets, and still others to both; and where one of the partners (alleging nonliability on the hotel debts through dissolution) assigns for the benefit of creditors under the Assignments Act, R.S.S. 1909, c. 142; and where there is confusion as to the liability of the insolvent for the hotel and hardware claims and as to the ranking of creditors in respect thereto, an application in the insolvent estate matter on behalf of an execution creditor to have his exact rank and rights fixed may be heard in Chambers under the Assignments Act (Sask.), and a reference to the local registrar may be ordered, to examine and inquire into the exact rights and obligations of the insolvent, and the creditors, in relation to each of the partnerships, and to report thereon.

Re Crawhall, 6 D.L.R. 386, 22 W.L.R. 183.

ASSIGNMENT—COMPANY—WISHES OF MAJORITY—DISCRETION.

Re Belding Lumber Co., 23 O.L.R. 255, 18 O.W.R. 668.

TRANSFER OF DEBTS BEFORE INSOLVENCY—NOTICE.

In a judicial assignment of property for the benefit of creditors, the body of creditors constitute a third party as against the transferee of the debts of the insolvent, if there has been no notice of the transfer before the assignment. Hence, the transferee not having the useful possession as required by art. 1571 C.C., he cannot compel the curator to furnish him with a list of the accounts due the insolvent and pay over to him what he has received on these accounts.

Dominion Bank v. Ayling, 26 Que. K.B. 75.

SECURED DEBT—JUDGMENT—REGISTRATION.

A creditor having a judgment, which forms a judicial hypothec upon the immovable of his debtor, has a secured debt which prevents him from making a demand for a judicial abandonment of property, even where the title of the debtor was only registered after the demand, or where the deed contains a resolutory clause, notwithstanding art. 2023, C.C.; but in such case the demand will be dismissed without costs. The words "of which the debt is not secured" contained in art. 853, C.P.Q., respecting the creditor who cannot make a demand for judicial abandonment of property, should be interpreted as applying to the existence of the security without regard to its value or legality.

Bonnier v. Roy, 51 Que. S.C. 1.

COSTS—ATTORNEY'S FEES—RENT.

The costs of an attorney who has obtained leave to sell the movables of an insolvent has priority over the privileged claim of the landlord and over that of the curator. Semble, the costs of the inventory of the sale and delivery of the stock are the only costs of the curator which take precedence of the landlord's claim.

Courchesne v. Courchesne, 18 Que. P.R. 189.

PETITION FOR—ASSIGNMENT FROM ONE CREDITOR TO ANOTHER.

Though the assignment of debts from creditor to creditor, in order to make up a large enough sum to petition for a judicial assignment of goods, is not to be recommended, nevertheless it is permitted, above all when the debtor accepts the assignment.

Perron v. Drouin, 46 Que. S.C. 336, 16 Que. P.R. 121.

PRIORITIES.

When the owner of horses seized and placed under judicial control has been appointed voluntary guardian and afterwards assigns his property for benefit of creditors the trader who sells him fodder in the interval between the seizure and the assignment cannot claim that such sale was made in the common interest of the creditors and had served to preserve their common security in order to claim the privilege provided by art. 1994 C.C., especially if he was not aware of the seizure and gave credit to the owner as such and not as guardian.

Lester v. Turcotte, 43 Que. S.C. 385.

It was held, reluctantly following Brown v. Marshall, 10 E.L.R. 146, that, under s. 28 of the Nova Scotia Collection Act, the creditor is absolutely entitled to an assignment of the judgment debtor's property in trust for the payment of the judgment.

John R. Charlton v. Jacob White, 11 E.L.R. 61.

PROCEDURE TO DETERMINE VALIDITY OF DISPUTED CLAIM—IRREGULARITY—WAIVER.

Where an assignment has been made for the general benefit of creditors under the Assignments Act (Saskatchewan), any action to determine the validity of a claim disputed by the assignee must be commenced and carried on according to the procedure laid down in s. 31 of that Act and no other. The commencement of an action by writ of summons to determine the validity of a claim disputed by an assignee for the benefit of creditors is improper and the procedure is wholly void and not merely irregular, and the defendant, by appearing to the writ of summons,

does not waive his rights to object to such procedure.

West v. Sask. General Trust Corp., 8 W.W.R. 232, 32 W.L.R. 189.

(§ VIII A—66)—Elevator company—Agent—Grain tickets—Advances to agent—Safeguarding—Loss—Assignment for creditors—Rights of company.

Where grain dealers supplied their paying agent with currency to pay to its customers their grain tickets, it being a term of the contract that the money "shall be used for the payment of grain tickets only and for no other purpose," and the money was in fact kept by the agent separate from his own and earmarked as the grain dealers' property, the agent is bound to safeguard such money only to the same extent as he did his own and other moneys in his care belonging to other parties; and where, without negligence on his part, the money, which was in bank bills in his safe, left temporarily open, was destroyed by a fire, the loss falls on the grain dealers, and they are not entitled, even with the paying agent's consent, to rank on his estate on an assignment for creditors. [Finucane v. Small, 1 Esp. 315; Sinclair v. Brougham, [1914] A.C. 398, and Hallett's Case, 13 Ch.D 698, referred to.]

Northern Elevator Co. v. Western Jobbers, 20 D.L.R. 889, 7 W.W.R. 199, 29 W. L.R. 497.

Right of preferred creditor to rank—Notice.

The statutory notice given by an assignee for creditors under s. 7 of the Assignments and Preferences Act, R.S.O. 1914, c. 134, contesting the preference claimed by a creditor for a part of his claim, does not create a forfeiture of the security or of the creditor's right to rank upon the estate in the event of noncompliance with the notice of contestation.

Cole v. Cole, 21 D.L.R. 576, 8 O.W.N. 450.

Contestation of creditors' claims—Notice of contestation of claim—Failure of creditor to bring action within time limited by statute—Jurisdiction of court to extend time.

Singer v. Mundell, 7 D.L.R. 774, 1 W.W.R. 902.

Assignments and preferences—Action against brokers for money claim—Assignment by defendants for benefit of creditors pendente lite—Claim filed by plaintiff in action with assignee—Identity of claim with that made in action—Notice of contestation given by assignee—Action not brought to establish claim and order of judge extending time not obtained within 30 days—Assignments and Preferences Act, R.S.O. 1914, c. 134, s. 27—Order adding assignee as defendant in action and amending proceedings by seeking declaration of right to rank on estate—Order improperly made.

Jarvis v. O'Hara, 17 O.W.N. 72.

Judgment of distribution—Petition from creditor to have judgment suspended—Formalities—Subcollocation.

A party praying for the cancellation of a subcollocation can do so only by establishing that the defendant is insolvent, or else that he has against him a claim which carries execution. A simple petition from a creditor requiring the liquidator to stop payment of a certain sum cannot be granted; because, if such a petition were granted, it would have the same effect as a seizure garnishment before judgment obtained by way of a simple petition in the winding up and without observing the formalities required to obtain a seizure garnishment before judgment.

Dominion French Dyeing Fur Co. v. Brodeur & Joeckel, 16 Que. P.R. 51.

(§ VIII A—69)—Priorities—Business carried on by creditors—Debts incurred meanwhile.

The business of an insolvent carried on by the creditors in pursuance of an agreement with the debtor for the purpose of liquidating their claims does not necessarily constitute the creditors a partnership of the business, so as to render them personally liable for goods furnished the estate during the continuance of the business by the creditors; nor will the claims of those who become creditors subsequently to such arrangement be accorded a priority over the claims of the old creditors. [Cox v. Hickman, 8 H.L.C. 286, followed.]

Re Wilson Assignment, 25 D.L.R. 417, 8 S.L.R. 401, 31 W.L.R. 798. [See also 25 D.L.R. 758.]

(§ VIII A—71)—Priorities—Rights under unregistered mortgage.

Whether an assignment is general or special, the assignee for the benefit of creditors takes no greater title to land included in the assignment than the assignor can give, and a mortgagee claiming under an unregistered mortgage made in good faith prior to the assignment will be accorded a priority over the assignee for creditors. [Thibaudeau v. Paul, 26 O.R. 385; Steele v. Murphy, 3 Moore P.C. 445, followed.]

Re Wilson Estate, 24 D.L.R. 792, 33 O.L.R. 500.

(§ VIII A—72)—Rights on interpleader.

The provision of the Creditors' Relief Act, 9 Edw. VII. (Ont.) c. 48, s. 6, which enacts that where proceedings are taken by a sheriff for relief under any provisions relating to interpleader, those creditors only who are parties thereto and who agree to contribute pro rata in proportion to the amount of their executions to the expense of contesting any adverse claim shall be entitled to share in any benefit which may

be derived from the contestation of such claim so far as may be necessary to satisfy their executions, confers a preferential lien upon the contributing creditors of which, in case of the debtor making an assignment for the benefit of his creditors, such contributing creditors are not deprived by the general direction of s. 14 of the Assignments and Preferences Act, 10 Edw. VII. (Ont.) c. 64, as to the precedence to be given to such assignment.

Martin v. Fowler, 6 D.L.R. 243, 46 Can. S.C.R. 119, affirming, sub nom. Re Henderson Roller Bearings, 24 O.L.R. 356.

INTERPLEADER—RIGHT OF INDIVIDUAL CREDITOR TO ATTACK PREFERENTIAL AGREEMENT—THE ASSIGNMENTS ACT, S. 48, SUBS. (3).

S. 48, subs. 3 of the Assignments Act giving the creditors the right to take proceedings where there is no valid assignment for the benefit of creditors, is permissive only and does not exclude the right of an individual creditor to attack a preferential agreement or transaction upon sheriff's interpleader in the case of chattels exigible under execution, which are the subject of such preferential transaction. [Brown v. Peace, 11 Man. L.R. 409, referred to.]

Canadian Bank of Commerce v. McAuley, 6 W.W.R. 1169.

(§ VIII A—74)—PRIORITIES.

A shareholder in a company incorporated under the B.C. Companies Act, R.S. B.C. 1911, c. 39, who leaves a portion of his dividend at his credit in the company's books is not debarred from proving his claim thereto, in competition with other creditors upon the company long afterwards making an assignment for the benefit of creditors under the Creditors' Trust Deeds Act, R.S.B.C. 1911, c. 13, where no winding-up proceedings have been taken.

Savage v. Shaw, 8 D.L.R. 910, 17 B.C.R. 343.

PRIORITY OF CLAIMS—WAGES—RIGHTS OF ASSIGNEE OF CLAIM FOR.

A preferential claim for wages earned within three months of debtor's assignment for the benefit of his creditors, carries with it its priority on a transfer being made thereof, and the transferee, although he acquired the claim before the debtor made the assignment for creditors, is entitled under the Wages Act, 10 Edw. VII. c. 72, R.S.O. 1914, c. 143, to priority over the debtor's ordinary creditors. ["The Wasp," L.R. 1 Ad. & Ecc. 367, applied.]

Porterfields v. Hodgins, 14 D.L.R. 832, 29 O.L.R. 409. [Affirmed, 17 D.L.R. 859, 30 O.L.R. 651.]

WAGES.

Where an assignment is made for the general benefit of creditors, the wages "not exceeding three months' wages" for which (under the Wages Act (Ont.) 10 Edw. VII. c. 72, s. 3), a person in the employment of the assignor within a month of the assignment has a preferential claim, means, not necessarily the wages for the three months immediately preceding the assignment, but the balance of wages due him not exceeding any three months' wages.

McLarty v. Todd, 7 D.L.R. 344, 4 O.W.N. 172, 23 O.W.R. 166.

PREFERRED CLAIMS FOR WAGES—SALARY OF MANAGING DIRECTOR.

The manager of a company, who was also a director therein, is entitled to rank as a preferred creditor for salary due him, by virtue of s. 27 of the Assignment Act, R.S.S. 1909, c. 142, which provides a priority for 3 months "wages or salary of all persons in the employ." [Re Newspaper Syndicate, [1909] 2 Ch. 349; Re Ritchie-Hearn Co., 6 O.W.R. 474, distinguished; The Companies Act, R.S.S. 1909, c. 72, s. 54, considered. See also Re Shirleys (Sask.), 29 D.L.R. 273; Re Parkin Elevator Co., 31 D.L.R. 123.]

Hives v. Imperial Canadian Trust Co., 29 D.L.R. 271, 9 S.L.R. 248, 34 W.L.R. 433, 10 W.W.R. 696.

INSOLVENT COMPANY—NOTE TAKEN FOR AMOUNT OF WAGES DUE—PRIORITY OF CLAIM.

The taking of a promissory note or other negotiable instrument for the amount of a debt does not constitute payment of the debt in the absence of proof that there was an agreement to that effect, and therefore employees of an insolvent company who have taken notes for wages due them do not lose their right to priority for such wages under the Assignments Act (1907, Alta., c. 7, s. 28).

Armstrong v. Watson, 45 D.L.R. 501, [1919] 1 W.W.R. 956.

CLAIM FOR WAGES—SUIT—JUDGMENT—SUBSEQUENT ASSIGNMENT OF DEBTOR—QUESTION OF MERGER—WAGES ACT, R.S.O. 1914, c. 143, s. 3.

A wage earner's claim to priority for his wages under s. 3 of the Wages Act, R.S.O. 1914, c. 143, is enforceable where his employer has made an assignment for the benefit of his creditors; even though the wage earner has sued, and recovered a judgment against his employer before the assignment. The right of preference is given because the claim is for wages, and the claim remains one for wages even after the judgment is obtained; the remedy, not the right is merged. [King v. Hoare, 13 M. & W. 494, 504; Price v. Moulton, 10 C.B. 561, 573, referred to.]

Thorne v. Ball, 50 D.L.R. 85, 46 O.L.R. 261.

LANDLORD'S CLAIM FOR TAXES FOR PERIOD OCCUPIED BY ASSIGNEE—TAXES FOR CURRENT YEAR—CONDUCT OF ASSIGNEE—ESTOPPEL—PERSONAL LIABILITY—PREFERENTIAL CLAIM—LANDLORD AND TENANT ACT, R.S.O. 1914, c. 155, s. 38(2).

Cuthbertson v. Ross, 10 O.W.N. 458.

ASSIGNMENTS AND PREFERENCES—ASSIGNMENT FOR BENEFIT OF CREDITORS—CLAIM TO RANK AS PREFERRED CREDITOR FOR SALARY—EVIDENCE.

Harcourt v. Martin, 15 O.W.N. 300.

MONEY PAID TO SHERIFF BY ASSIGNOR BEFORE ASSIGNMENT—PRIORITY.

Newton v. Foley, 20 Man. L.R. 519, 17 W. L.R. 105.

CREDITORS' TRUST DEEDS ACT—REGISTERED JUDGMENT — PRIORITIES — RIGHT TO FUND IN COURT.

Newton v. Bauthier, 7 W.W.R. 688.

B. RELEASE OF CLAIMS.

(§ VIII B—75)—UNSCHEDULED SECURITY —PROOF OF CLAIM IN ASSIGNMENT PROCEEDINGS—LOSS OF SECURITY.

A company that proves a claim against an estate assigned for the benefit of creditors does not lose the benefit of security it holds because it was not valued in the assignment proceedings.

Box v. Bird's Hill Sand Co. (No. 2), 12 D.L.R. 556, 23 Man. L.R. 415, 24 W.L.R. 706, 4 W.W.R. 961, affirming 8 D.L.R. 768, 22 W.L.R. 871, 3 W.W.R. 602.

RELEASE OF CLAIMS—MORTGAGE—SATISFACTION—OFFER AND ACCEPTANCE.

McKinnon v. London Shoe Co. (Alta.), 37 D.L.R. 192.

RELEASE OF CLAIM—CONSENT TO CANCELLATION—QUE. C.C. 2148.

The release of a claim, in law, is equivalent to its cancellation, and one who is subrogated to the rights of the creditor who has so given a release, by a written document of a later date, has no recourse.

Belisle v. Gilbert, 16 Que. P.R. 45.

GOODS IN PAYMENT OF RENT—PUBLIC SALE.

If the inspectors of an insolvent estate have decided to transfer certain articles to the lessor of the insolvent in diminution of his claim a creditor can demand that they be sold by public auction.

Re Weinfield, 17 Que. P.R. 398.

IX. Liability of assignor.

(§ IX—80)—LIABILITY OF ASSIGNOR.

A debtor at liberty who made an assignment but no curator was appointed nor contestation had for more than four months cannot demand his discharge with the consequences provided for by art. 889, C.P.Q. That article applies only to the case of a debtor under arrest.

Cinq-Mars v. Drolet, 41 Que. S.C. 302.

CONTINUED LIABILITY OF ASSIGNOR.

An assignment for the benefit of creditors does not discharge the insolvent from the obligation to pay his debts in full, and he will remain debtor for the surplus over and above what is realized from the assigned property.

St. Charles v. Monette, 47 Que. S.C. 164.

ASSOCIATIONS.

I. In general.
II. Members.
  A. In general.
  B. Right to membership, expulsion.

See Benevolent Societies; Charities; Religious Institutions; Partnership; Companies.

I. In general.

(§ I—1)—ALTERATION OF RULES—NECESSITY OF NOTICE.

No previous notice of intention to introduce at an annual meeting a resolution making radical alterations in the rules of a voluntary society is required under a by-law providing that the rules may be altered, amended, or changed only at an annual or semi-annual meeting.

Vick v. Toivonen, 12 D.L.R. 299, 4 O.W.N. 1542, 24 O.W.R. 802.

POWERS OF—YOUNG MEN'S CHRISTIAN ASSOCIATION — PROVIDING MEALS AND LODGINGS FOR MEMBERS.

The furnishing of lodgings and meals for its members is not ultra vires of a Young Men's Christian Association, incorporated for their spiritual, mental, social and physical improvement, by the maintenance and support of meetings, lectures, classes, reading rooms, libraries, gymnasia and such other means as may be adopted, if the proceeds therefrom are devoted to carrying out the objects of the association. [Ottawa Y.M.C.A. v. Ottawa, 20 O.L.R. 567, affirmed.]

Ottawa Y.M.C.A. v. Ottawa, 15 D.L.R. 718, 29 O.L.R. 574.

(§ I—2)—FRATERNAL SOCIETIES—PROPERTY RIGHTS—REVIEW BY COURTS.

Ordinarily courts of justice will not interfere with the actions of fraternal societies, unless rights of property are involved.

Lindsay v. Empey, 23 D.L.R. 877, 8 W.W.R. 32, 32 W.L.R. 256.

PROPERTY RIGHTS.

Luen On Chong v. Lung Took, 10 D.L.R. 839.

(§ I—3)—RIGHT TO INCORPORATION.

A certificate of incorporation under R. S.S., c. 79, will be denied an association having for its object the promotion of honourable practice among, and the elevation of the standard of land surveyors in the province, and also the promotion and conciliation of misunderstandings between them, as well as the hearing and determination of complaints and accusations preferred by third persons against the professional conduct of land surveyors, and the imposition of punishment for misconduct, the contemplated objects of the association not being within the scope of such chapter, since the association seeks control of all surveyors within the province and not merely over the members thereof.

Re Stewart, 7 D.L.R. 503, 22 W.L.R. 192, 2 W.W.R. 1078.

(§ I—4)—Purchase of intoxicating liquors in bulk by several persons for joint use—Unincorporated association or club.

The King v. Cahoon, 17 Can. Cr. Cas. 65, 17 O.W.R. 467.

Unincorporated association—Rent of club premises—Liability.

Pears v. Stormont, 24 O.L.R. 508.

II. Members.

A. In general.

(§ II A—5)—Unincorporated society—Election of directors and officers—Persons entitled to vote—Determination by returning officer—Absence of fraud—Rules of society—Irregularity—Breach of trust—Costs.

Wirta v. Vick, 7 O.W.N. 758.

Actions.

Members of an incorporated association cannot, in their own names, maintain actions which belong to the corporation; but, if their interests are distinct, personal and definite, they may have in their own personal right such recourse as may be essential for the safeguarding of their interests.

Rigaud-Vaudreuil Gold Fields v. Bolduc & Pacaud, 25 Que. K.B. 97.

(§ II A—6)—Members—Rights in property of —Diversion to use foreign to purpose of society.

The property of a voluntary society cannot be diverted by the majority of its members against the wishes of the minority, from the purpose for which it is acquired by their contributions, and devoted to a purpose alien to and in conflict with the fundamental principles of the society.

Vick v. Toivonem, 12 D.L.R. 299, 4 O.W.N. 1542, 24 O.W.R. 802.

Fraternal societies—Rights of minority —Property rights.

The power of assembly guaranteed by the constitution of the supreme body of a fraternal society to the minority members of a subordinate constituency in the event of a withdrawal of the majority, and a by-law specifically providing that the property and effects thereof are to be held by the principals to the use and benefit of the constituency, the action of the seceding majority alien to such purposes is ultra vires, and the courts will compel the return of the property to the remaining minority. [Free Church of Scotland v. Overtoun, [1904] A.C. 515; Craigdallie v. Aikman, 1 Dow. 1, applied.]

Lindsay v. Empey, 23 D.L.R. 877, 8 W.W.R. 32, 32 W.L.R. 256.

(§ II A—7)—Powers of members—Liability for debts.

The association of a number of persons for purposes of a public demonstration without capital or revenue and without any expectation of gain or profit for any of them is not such an association as is defined by art. 1830, C.C. Hence, there cannot be applied to such an assemblage the provisions of art. 1851, C.C., which declares that in the absence of special provisions as to the mode in which the affairs of the association are to be administered, each of the members is considered to have the power of administration for the others and each may make the others responsible. The members of such an association cannot be held responsible for debts contracted by one of them without the knowledge and authorization, express or implied, of the others, unless there exist reasonable grounds for believing that such authorization has been given according to the rules governing a mandate. The fact that a person is president of such an association does not empower him to contract in the name of the body and make the members liable.

Aaron v. Trudel, 47 Que. S.C. 156.

Incorporated club—Cheques payable to order of club—Authority of secretary to indorse—Proceeds misapplied.

Toronto Club v. Dominion Bank; Toronto Club v. Imperial Bank; Toronto Club v. Imperial Trusts Co., 25 O.L.R. 330.

Personal liability of members—Note.

A member of an unincorporated association who was present when money was lent for the purposes of the association and who was a party to the negotiations which led up to the signing by two other members of a promissory note payable to the lender for the amount of the loan, held personally liable for the sum lent. [Todd v. Emly, 10 L.J. Ex. 262, followed.]

Austin v. Holser (Sask.), [1917] 3 W.W.R. 994.

B. Right to membership; expulsion.

(§ II B—10)—By-laws—Cancellation of certificate—Retail liquor business—Loss of benefits—Acquiescence.

A by-law of a benefit association which states that if any member enters into a retail business for the sale of intoxicating liquors he shall be expelled from the order, his certificate of membership shall be cancelled and he shall lose his benefits, does not apply to a member who was engaged in such business before the by-law was passed, who, having after that transferred his place of business to his son, continued the actual control of it, and 5 years afterwards took back complete control with another license in his own name, the by-law in question only having been enacted for future cases. When a benefit certificate of a benefit association becomes void according to the by-laws the fact of the association receiving contributions from a member holding such certificate does not constitute an acquiescence.

Royal Guardians v. Schneider, 23 Que. K.B. 461.

ASSUMPTION OF RISK.

See Master and Servant.

ATTACHMENT.

I. When lies.
- A. In general.
- B. On what claims.
- C. By or against nonresidents or foreign corporations.
- D. For fraud.

II. Interest acquired—Lien—Priority.
- A. In general.
- B. Lien; priority.

III. Procedure.
- A. In general; affidavits; petition, etc.
- B. Bonds, liability on.
- C. Dissolution; dismissal; setting aside.

See also Garnishment; Levy and Seizure; Execution; Judicial Sale.

Attachment for contempt, see Contempt. Arrest in civil cases, see Arrest.

I. When lies.

A. In general.

(§ I A—1)—All other means exhausted.

An application for an attachment should not be made until and unless all other means, provided by law for the recovery of the money, have been exhausted.

The King v. Borden; Ex parte Kinnie, 24 D.L.R. 197, 43 N.B.R. 299.

After judgment—Writ not returned.

Chan Moa Yiu v. Hum Jack, 12 Que. P.R. 204.

Conservatory attachment — Partnership, dissolution of.

Taylor v. Charokin, 13 Que. P.R. 73.

Absent or absconding debtor—Attachment—N.S. Judicature Act, order 46.

Williams v. Sanford, 10 E.L.R. 151 (N.S.).

(§ I A—5)—Promissory notes cannot be seized, by attachment, before maturity and placed in judicial control in order to deduct therefrom interest taken in excess of that provided by the Money Lenders' Act, R.S.C. 1906, c. 122, where the insolvency of the holder of the notes is not alleged in the affidavit for the writ, nor in the declaration, so as to shew that it will be impossible to reclaim such overcharge from him in an action on the notes.

Friedenberg v. Bailey & Bank of Montreal, 4 D.L.R. 711.

Conservatory attachment — Right of heir to remedy—Tortious withholding of movables from estate — Inventory and seal.

Wollenberg v. Barasch, 24 D.L.R. 907, 24 Que. K.B. 249.

Conservatory seizure—Contract.

A person who, on the refusal of a contractor to finish the work of deepening a well, brings an action for an order compelling him to continue it or, on his default, to be authorized to finish it at his expense, has no right to a conservatory seizure of the tools, machinery and materials which are found upon the premises in order to prevent the contractor from removing them on the ground that they are indispensable to the execution of the work which remains to be done.

Canadian Natural Gas Co. v. Coté, 51 Que. S.C. 491.

Quebec practice.

A plaintiff cannot seize goods which are in his possession and belonging to the defendant by a writ of attachment by garnishment.

Arnold v. Canadian Motors, 14 Que. P.R. 394.

B. On what claims.

(§ I B—10)—Saisie-arrêt—Construction of statute—2 Geo. V. c. 50 (Que.).

The Act 2 Geo. V. c. 50 (Que.) amending art. 891 C.P.Q. which permits the creditor of an insolvent, who has issued a writ of seizure after judgment and the garnishee has declared that the value of the debtor's services have never been fixed in money, to have such value ascertained by the court applies only to the case of a debtor who has made an assignment for benefit of creditors under the provisions of arts. 853 et seq. C.P.Q. This Act does not apply to the case of a man who works for his wife without salary as the relation of debtor and creditor does not exist between them.

Pion v. Fortier, 42 Que. S.C. 407.

Writ issued—Recovery of debt—Goods seized—Appeal—R. 666—Effect of Land Titles Act, 6 Edw. VII. (Alta.) c. 24.

A writ of attachment against the goods of the defendant will be granted in an action for the recovery of a debt under r. 666, provided that the judgment is not obtained on the personal covenant in an agreement of sale of land. Execution cannot be issued on such a judgment according to the provisions of the Land Titles Act, 6 Edw. VII. c. 24, s. 62, as amended by 9 Geo. V. c. 37, s. 1.

Bennefield v. Birdsell, 50 D.L.R. 34, [1919] 3 W.W.R. 991.

Conservatory attachment—Vendor unpaid—Privilege—Que. C.P. 955.

A conservatory attachment will be maintained if it is based on the fact that the defendant purchaser has not paid one of the notes representing certain goods, especially when he offers for sale the same goods falsely declaring himself to be the owner and claiming to have paid cash for them.

Brien v. Lesperance, 16 Que. P.R. 158.

Conservatory attachment — Commission on sales.

Gourdeau v. Lyon, 12 Que. P.R. 89.

C. By or against nonresidents or foreign corporations.

(§ I C—17)—Nonresident owner of race horses—Secretion—Fraudulent departure—C. P. 895, 931.

Held:—A nonresident who owns horses and runs them on the race circuit of Canada and the United States, is not guilty of

secretion or of fraudulent departure, and amenable to capias or attachment before judgment, simply because he intends to take them to another race track outside of the Province of Ontario.

Mackenzie v. O'Connell, 16 Que. P.R. 219.

D. For fraud.

(§ I D—20)—Sufficiency of allegations—Defense.

In the case of a seizure before judgment, a declaration which sets out certain reprehensible acts of the defendant without alleging that the latter then acted with the intention of defrauding his creditors and especially the plaintiff, will be dismissed on inscription en droit. The defence that the defendant can set up, as to the sufficiency and falsity of the allegations in the affidavit, is independent of that which he has a right to make on the main demand.

Carmel v. Maison Paquin, 15 Que. P.R. 68.

The filing of his attachment by a defendant in an interpleader issue, by the sheriff, to determine the ownership of goods seized under the writ is prima facie proof of his status as a creditor in an action attacking the sale of certain of the goods. The consideration in the bill of sale may properly be made up of a promissory note past due, wages owing and cash paid, and expressed as moneys paid at or before the sealing of the bill of sale. On an interpleader issue to determine whether or not the goods are the property of the debtor the question of fraud may properly be tried. [West v. Ames Holden Co., 3 Terr. L.R. 17, followed.]

Patterson v. Palmer, 4 S.L.R. 487.

II. Interest acquired; lien; priority.

A. In general.

(§ II A—25)—Attachment—Tort—Damages for enticing away plaintiff's wife and for criminal conversation.

Hine v. Coulthard, 20 Man. L.R. 764, 15 W.L.R. 288.

Practice—Certificate of attachment, rr. 819-822—Certificate giving plaintiff no interest in crop grown on land.

A certificate of attachment registered by plaintiff against defendant's land pursuant to rr. 819, 820 and 821 gives plaintiff no interest in the crop raised upon said land whether by defendant or a fortiori by a tenant.

Campbell v. Morgan, [1919] 2 W.W.R. 243.

B. Lien; priority.

(§ II B—30)—The proper mode of disposing of an objection by a subsequent attacher that the prior attacher's claim is barred by the Statute of Limitations is by a motion to set aside the prior writ of attachment and not by an order permitting the subsequent attacher to plead to the action brought upon the prior attacher's claim.

Gormley v. DeBlois, 8 D.L.R. 109, 46 N.S.R. 280, 11 E.L.R. 575.

(§ II B—33)—Priorities between attachment liens—Subsequent executions.

Where there are no other executions in the sheriff's hands at the time, the service of a summons for the attachment of a debt, under s. 31 of the Creditors Relief Act (B.C.), while not a transfer of the debt itself, creates a charge thereon in favour of the attaching creditor entitling him to be paid out of the funds the amount of his claim, and is not taken away by the subsequent receipts of other writs of execution by the sheriff. [Re Combined Weighing, etc., 43 Ch. D. 99; Norton v. Yates, [1906] 1 K.B. 112; Cairney v. Back, [1906] 2 K.B. 746, applied; Ward v. Wilson, 13 B.C.R. 273, disapproved.]

Anderson v. Dawber, 25 D.L.R. 644, 22 B.C.R. 218, 32 W.L.R. 841, 9 W.W.R. 511.

(§ II B—36)—Priority between attachment and other liens.

Where the provisions of s. 1 of the Act respecting lien notes had not been complied with, in that the lien notes did not contain such a description of the goods that the same might be readily and easily known and distinguished—the only description being "a motor cycle." [Aricinski v. Arnold, 4 W.L.R. 556, followed.] Also, that, as no description at all was given, the claimant should not be allowed to shew by affidavit or parol evidence that the article signed was his property. Also, that the affidavit of bona fides on the lien notes being identical with the affidavit referred to in Aricinski v. Arnold, did not comply with the statute. Therefore, that the right of the plaintiff as an attaching creditor must prevail.

Bowser v. Goodwin, 19 W.L.R. 873.

III. Procedure.

A. In general; affidavits; petition, etc.

(§ III A—40)—Saisie-gagerie—Sequestration before judgment.

Nugent v. Middleton, 12 Que. P.R. 228.

Conservatory attachment—Powers of judge.

The discretionary power of a judge, as to the provisory possession of effects seized in cases of simple attachment and seizure-revendication exists also and applies in the same way in the case of conservatory attachment.

Contractors Ltd. v. St. Jerome, 23 Que. K.B. 182.

Judicial guardian — Discharge—Second seizure—Possession of goods.

Art. 20 of Title 19 of c. 23, Ordinance of 1667, discharging, without a judicial order the guardian of property under seizure two months after the oppositions have been disposed of and a year after his appointment if the matters in dispute are not settled, has been repealed by art. 623 C.P.Q.

A second seizing creditor should not appoint the same guardian as the first unless he has been dispossessed of the property seized. When two guardians are appointed under different seizures, and leave the debtor in possession of the property seized, if one of the guardians desire possession, the court will grant it, in the absence of reasons to the contrary, to the one performing his functions in the action under which the bulk of the property will be sold.

Chevrette v. Cournoyer, 14 Que. P.R. 142.

PROCEDURE.

The minutes of seizure describing the things seized as follows:—"13 bottles of champagne, 7 tables and 24 chairs, etc.," are sufficient to enable the bailiff to identify the objects when he is called upon to sell them. The absence of details is matter for a motion for particulars and not for an exception to the form.

Smith v. Shapiro 14 Que. P.R. 160.

(§ III A—45)—CONSERVATORY ATTACHMENT—PROCEDURE.

Sufficient ground for the issuance of a conservatory attachment is shewn where the facts shewn in the affidavit for the writ were that the plaintiff, as curator of a person non compos mentis, had instituted an action to have a transfer of a note by the latter to the defendant, annulled for want of consideration, and that the garnishee had become liable to pay the amount of the note to the defendant, and that such payment rightfully belonged to the plaintiff and not to the defendant.

Moffat v. Montgomery & Eastern Trust Co., 12 D.L.R. 361, 23 Que. K.B. 483.

AFFIDAVITS FOR ORDER, WHEN CONDITION PRECEDENT—ABSCONDING DEBTORS ACT (ONT.).

S. 4 of the Absconding Debtors Act, 9 Edw. VII. (Ont.) c. 49, requiring that an application for an attaching order shall be supported by corroborative affidavits of two persons other than the applicant, is an imperative provision, and an order made in the absence of such affidavits will be set aside.

Yolles v. Cobey, 9 D.L.R. 452, 4 O.W.N. 819, 24 O.W.R. 66.

NONPAYMENT OF COSTS—SERVICE OF RULE—ENDORSEMENTS.

In an application for an attachment for nonpayment of costs, it is unnecessary that the rule served should be endorsed as required by O. 41, r. 5. [In re Deakin, Ex parte Cathcart, [1900] 2 Q.B. 478, applied.] On an application for an attachment for nonpayment of costs, an affidavit may be read if it is entitled in the Court and cause, although it is not entitled the same as the rule under which it is made.

The King v. Borden, Ex parte Kinnie, 24 D.L.R. 197, 43 N.B.R. 299.

IRREGULAR AFFIDAVIT LEADING TO ISSUE OF WRIT—STRICT COMPLIANCE WITH RULES OF COURT—SASK. RULES (1911), 545.

Fitzgerald v. Warner, 7 D.L.R. 859, 2 W.W.R. 299.

AFFIDAVIT FOR CAPIAS—PROMISSORY NOTES—PARTICULARS OF CAUSE OF ACTION.

In an affidavit for capias issued for an indebtedness on promissory notes, it is sufficient to enumerate the details appearing on the face of the notes, without alleging more specially the cause of action; the consideration of the notes, the place where the debt was contracted, and that it was contracted within the limits of the Province of Quebec and Ontario.

Schavoi v. Silverman, 47 Que. S.C. 204.

CONSERVATORY ATTACHMENT—AFFIDAVIT—INDISPENSABLE ALLEGATIONS — QUE. C.P. 939, 956.

The affidavit necessary to obtain a conservatory attachment must, as in the case of garnishment and capias, in order to establish a right to the remedy claimed, specify the nature and amount of the debt and the place where it originated.

Millen v. Lebesson, 16 Que. P.R. 181.

IN GENERAL—AFFIDAVITS—PETITIONS.

The affidavit required for the issue of the ordinary writ of attachment, or of the writ en mains tierces, based on belief or acknowledgment, which states neither the reason for such belief nor the source of the acknowledgments is insufficient, and any writ issued on such an affidavit will be quashed and set aside. It is not necessary that an application to quash the writ on such ground should be accompanied by the deposition required by art. 47 of the Rules of Practice of the Superior Court.

Sherman v. McAuley, 14 Que. P.R. 164.

DEFECTIVE AFFIDAVIT—FAILURE TO DISCLOSE CAUSE OF DEBT.

An application for a writ of attachment is an interlocutory proceeding. [Nohren v. Auten, 15 W.L.R. 417, not followed; Gibson v. Drennan, 1 W.L.R. 577, applied.] In attachment proceedings, strict compliance with the Rules of Court is necessary. [Fitzgerald v. Powell, 2 W.W.R. 299, referred to.] Where in attachment proceedings the affidavit of the plaintiff fails to disclose from what cause the debt sought to be attached arose, the omission is an irregularity which is fatal to the issue of the writ. [Newton v. Bergman, 13 Man. L.R. 563, referred to.]

Hole v. Simpson, 6 W.W.R. 742, 27 W.L.R. 689.

PRACTICE—KING'S BENCH ACT.

If the affidavits filed on an application for an order for attachment against goods and chattels fully comply with rr. 814 and 815 of the King's Bench Act, the question of the liability of the defendant for the debt sued for will not be inquired into on motion in Chambers to set the order aside, notwithstanding that the defendant's denial of the liability is supported by statements

made by officers of the plaintiff company on their cross-examination upon their affidavits filed. Such question must be left to be decided by the judge at the trial of the action. An order for attachment will not be set aside because the affidavits upon which it was made do not disclose matters afterwards appearing in statements made by officers of the plaintiff company under cross-examination on the affidavits, although it is contended that, if such matters had been disclosed, the judge would probably have refused the order. [Newton v. Bergman, 13 Man. L.R. 563, distinguished.]

Paulin v. Freinstein, 28 Man. L.R. 436.

OWNERSHIP—PAYMENT IN COURT.

When an attachment is issued by a plaintiff who is not the owner of the thing attached, the court, in maintaining the action, may order the defendant to deposit in court, instead of paying it to the plaintiff, the sum which he is condemned to pay, on default of returning the thing claimed.

Charron v. Walker, 54 Que. S.C. 439.

CONSERVATORY SEIZURE — AFFIDAVIT — PARTIES—DESCRIPTION.

An affidavit annexed to a fiat for a conservatory seizure or seizure before judgment need not contain the particular description of the parties if such description is found in the fiat. It is not necessary to describe in such affidavits the property that each of the tiers-saisis has in his possession which in certain cases would be quite impossible. Such affidavit is complete without the documents to which it refers.

Metro-Pictures, Ltd. v. Sawyer, 18 Que. P.R. 299.

The failure to file, before the issue of a writ for a conservatory seizure, the affidavit required by art. 955, C.P.Q., is fatal and makes void ab initio the writ of seizure itself and the defect cannot be remedied by filing the affidavit after the seizure.

Schechter v. Bazar, 18 Que. P.R. 151.

In the case of a conservatory seizure the defendant can by petition dispute only the truth or sufficiency of the allegations in the affidavit and not of those in the declaration. If the application to set aside the seizure brings in question the right of ownership of the plaintiff in the subject-matter of the litigation, the order will be to proceed with the hearing of the said petition only at the same time as that upon the merits.

Smith v. Dwyer, 18 Que. P.R. 404.

(§ III A—48)—INTERVENTION.

The court will permit a document entitled "Opposition afin de distraire" filed by a third party who wishes to withdraw certain of his goods from a saisie-gagerie to be treated as an intervention though judgment on the merits of the action has not yet been given.

Dorlia v. Filiatrault, 14 Que. P.R. 266.

GARNISHMENT — ALIMENTARY CREDITORS — EVENING GOWN—C.C. ART. 1980—C.C.P. ART. 599.

A testamentary executor has the duty to execute the wishes of the testator; and when a legacy, declared to be inexigible by the will, it attached, and the legatee does not dispute the attachment, the testamentary executor has the right to intervene, in order to maintain if he can, the exemption from seizure of the legacy. An annuity of $2000 a year given to a wife by virtue of a will which declares this legacy inexigible, cannot be attached for the payment of an evening gown costing $85 and for the purchase of flowers, this wife being alone without any other revenue, and not occupying any official function. The intervenant who denies to the plaintiff the right which he is exercising and who only succeeds partially, is in the position of a defendant whose defense is only partly admitted, and he should be ordered to pay the costs.

Fields v. Laviolette and Décarie, 55 Que. S.C. 405.

C. DISSOLUTION; DISMISSAL; SETTING ASIDE.

(§ III C—55)—DISSOLUTION—DISMISSAL—SETTING ASIDE.

Proceedings in execution are not instances. If the plaintiff proceeds by saisie-arrêt before judgment and seizes the same property after judgment proceedings on one may be suspended or they may be consolidated, but the last will not be set aside on the plea of lis pendens.

Laing Packing & Provision Co. v. Duval, 13 Que. P.R. 349.

DISCONTINUANCE OF ACTION—DISCHARGE—RIGHT TO ASSIGN.

When an action is discontinued after money has been paid into court under an attaching order, the money ceases to be subject to any court process, and the defendant may assign the fund to a third party who may successfully resist an application that the fund be kept in court to abide the result of further action between the same parties.

Schmid & Kruck v. Giffin; Robin-Hood Mills, Claimant, 23 B.C.R. 459.

(§ III C—56)—INSUFFICIENT AFFIDAVIT.

A judgment quashing a conservatory attachment, because of insufficiency of the affidavit, cannot dismiss the action itself, the latter being distinct from the conservatory attachment to which it is joined.

Girard v. Gariépy, 49 Que. S.C. 284, 17 Que. P.R. 396.

ATTACHMENT BEFORE JUDGMENT—PETITION TO QUASH—GROUNDS—DELAY IN FILING—C.P. 693 ET SEQ., 919 ET SEQ., 161 PAR. 2.

When a petition to quash an attachment before judgment is made altogether and unreasonably too late, and it would cause serious injury to the plaintiff if defendant were allowed to make the same (after plain-

tiff has contested the garnishee's declarations), and defendant has offered no excuse for the delay which he has allowed to take place in making same, a judge is justified in rejecting such petition from the record. [Compare Hogan v. Gordon, 2 L.C.J. 162; Barry v. Eccles, 2 U.C.Q.B. 383; Perreault v. Tite, 8 Que. S.C. 339.]

Choiniere v. Menard, 16 Que. P.R. 359.

ATTAINDER.

Under s. 103 Criminal Code 1906, providing that no conviction or judgment for any treason or indictable offence shall cause any attainder or corruption of blood or any forfeiture or escheat, a renewal of a prior lease of hotel premises will not be set aside merely because it was made by a convict while serving his term in a penitentiary.

Young v. Carter, 5 D.L.R. 655, 19 Can. Cr. Cas. 489, 26 O.L.R. 576, 22 O.W.R. 643.

ATTESTATION.

Of wills, see Wills, I.

ATTORNEY-GENERAL.

As necessary party, see Parties.

(§ I—1)—Right to bring public nuisance actions.

Prima facie all actions in respect of public nuisances must be brought in the name of the Attorney-General.

Oak Bay v. Gardner, 17 D.L.R. 802, 19 B.C.R. 391, 27 W.L.R. 960, 6 W.W.R. 1023.

Protection of public rights—Right to bring action—Breach of city by-laws—Gasworks and holders.

The only party who can sue for the protection of the public right is the Attorney-General of the province in an action to restrain the breach of three city by-laws one of which forbade the erection of any gas works or gas holders within the city without first obtaining the permission of the city Council, another prohibiting the erection of buildings within the city without a permit from the building inspector, and the third prescribing an area within the city within which no gas works should be erected or continued. [Devonport v. Tozer, [1903] 1 Ch. 759; Attorney-General v. Wimbledon, [1904] 2 Ch. 34, and Attorney-General v. Pontypridd, [1908] 1 Ch. 388, referred to.] The right of the Attorney-General to take action on behalf of the public for the violation by an electric railway company of a by-law forbidding the erection of gas holders within the city without first obtaining the permission of the city Council, cannot be taken away by the city consenting to the erection of a gas holder by a company in breach of the city's own by-law. [Yabbicom v. King, [1899] 1 Q.B. 444, followed.]

Attorney-General v. Winnipeg Electric R. Co., 5 D.L.R. 823, 22 Man. L.R. 761, 21 W.L.R. 906, 2 W.W.R. 854.

ATTORNEYS.

See Solicitors.

For power of attorney, see Powers.

AUTOMOBILES.

I. In general.
II. Public regulation and control; license.
III. Individual rights and liabilities.
  A. In general.
  B. Duty of operator; negligence.
  C. Responsibility of owner when car operated by another.
  D. Duty and liability to operator or person using.
IV. Automobiles for hire.
V. Garage.
  A. In general.
  B. Right of proprietor to lien.
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  D. Duty to customer.

Homicide by negligent operation, see Homicide.

Evidence as to speed, see Evidence.

Summary conviction, see Summary Conviction.

Insurance of, see Insurance.

Annotation.

Review of Canadian and English decisions on law of motor vehicles: 39 D.L.R. 4.

Obstruction of highway by owner: 31 D.L.R. 370.

I. In general.

See Negligence.

(§ I—2)—Liability of owner—Negligence of brother of owner using same for his own purpose—Absence of agency.

Lane v. Crandell, 5 D.L.R. 580, affirmed in Lane v. Crandell (No. 2), 10 D.L.R. 763, 5 A.L.R. 42, 23 W.L.R. 869, 4 W.W.R. 165.

Liability — Automobile — Damages — Sufferings—Statement of claim—Proof—Speed—Municipal ruling—C.C. art. 1053—S. ref. [1909], art. 1416, 1420.

A statement of claim in an action for damages for a collision making the following allegation "for suffering $25" will be rejected. It devolves upon the owner of an automobile when an accident is caused by a collision to prove that he is not at fault. The speed of an automobile at intersections of streets or public roads, ought to be reduced to 4 miles an hour. The chauffeur ought to submit to the municipal ruling under pain of himself and the owner of the automobile responsible for accidents which they cause.

Denis v. Deshaies, 25 Rev. Leg. 462.

II. Public regulation and control; license.

(§ II—30)—Public regulations.

A summary conviction under s. 18 of the Ontario Motor Vehicles Act, 2 Geo. V., c. 48, providing that if an accident occurs to

any vehicle in charge of any person owing to the presence of a motor vehicle on the highway, the person in charge of such motor vehicle shall return to the scene of the accident and give in writing to anyone sustaining loss or injury, the name and address of himself and of the owner of the motor vehicle and the number of the permit, will be quashed, though the motor vehicle driven by the convicted person grazed the wheel of a passing buggy with sufficient force to loosen two spokes in its wheel, if it appeared at the trial that the person in charge of the motor vehicle did not know or have reason to know that such an injury had resulted to the buggy. [Core v. James, L.R. 7 Q.B. 135; Nicholls v. Hall, L.R. 8 C.P. 322; Reg. v. Sleep, 1 L. & C. 44; Hardcastle, Statutory Law, 3rd ed., 405 (5th ed.—the 2nd ed. of Craies-Hardcastle—468); Maxwell's Interpretation of Statutes, 2nd ed., 115 (5th ed., 157), specially referred to.]

Robertson v. McAllister, 5 D.L.R. 476, 19 Can. Cr. Cas. 441.

(§ II—51)—Fine for ignoring signal by officer.

A person driving an automobile must stop when signalled or called upon to do so under penalty of fine under the Quebec Motor Vehicles Act, R.S.Q. 1909, art. 1416, although the officer making the signal is not in official uniform or exhibiting his badge of office.

Collector of Revenue v. Auger, 25 Can. Cr. Cas. 412.

(§ II—90)—Chauffeur's license—Production—Penalty.

The chauffeur of an automobile put en demeure to exhibit his license cannot excuse himself from inability to do so by alleging that he does not have it upon his person. This declaration is equivalent to a refusal and renders him liable to the penalty under art. 1405, R.S.Q. 1909.

Lebel v. Blier, 51 Que. S.C. 246.

(§ II—100)—Operating without license—Defect in highway.

Greig v. City of Merritt, 11 D.L.R. 852, 24 W.L.R. 328.

Operating without license—Effect on right of driver to recover for collision injuries.

Contant v. Pigott, 15 D.L.R. 358, 5 W.W.R. 946.

(§ II—110)—Regulation of use for hire—Effect of by-law on issued licenses.

A by-law of city police commissioners, placing further restrictions on the operation of automobiles for hire within the city, will not be effective to control an unqualified license already held by the accused which remained unrevoked.

R. v. Aitcheson, 25 Can. Cr. Cas. 36, 9 O.W.N. 65.

III. Individual rights and liabilities.

A. In general.

(§ III A—160)—Liability for injury to pedestrian—Stepping back to avoid automobile—Collision with another vehicle.

That loss or damage was incurred or sustained "by reason of" a motor vehicle on a highway may be found where, in order to avoid an automobile, a pedestrian was compelled to step backward and in doing so came into contact with a horse and was injured.

Maitland v. Mackenzie (No. 2), 13 D.L.R. 129, 28 O.L.R. 506.

Liability of seller—Structural defects.

An automobile manufacturer and his agent are liable for an accident resulting from latent structural defect of a car sold by them and guaranteed to be in perfect order when delivered; the liability is not only contractual, but also delictual.

Lajoie v. Robert, 33 D.L.R. 577, 50 Que. S.C. 395.

Negligence—Violation of municipal by-law as to rules of road—Common fault.

The owner of an automobile who does not remain at rest behind a stationary car at a distance of not less than 10 feet in conformity with the by-law No. 450 of the city of Montreal, and who injures a passenger descending from a car, is liable for the consequences of this accident. On the other hand, a passenger who descends from a car without considering whether or not the road is clear and he can cross the street without danger is guilty of a serious fault. In the above case the accident is due to common fault, namely, that of the owner of the automobile for one-third and that of the passenger for two-thirds.

Evans v. Lalonde, 47 Que. S.C. 374.

B. Duty of operator; negligence.

(§ III B—180)—Duty and negligence of operator—Rule as to "turning to right."

Though there is no rule of law requiring the driver of an automobile to keep on the right side of the road, nevertheless he is negligent in being on the left side of the road without any excuse therefor, where he knows that he is very likely to collide with other drivers coming from the opposite direction. Notwithstanding the negligence of plaintiff in driving an automobile down a hill at an excessive rate of speed, recovery for injuries incurred through a collision with defendant's automobile will not be barred where the real cause of the accident was the negligence of the defendant in being on the wrong side of the road without excuse and not turning out as soon as he should have done and not allowing the plaintiff ample room to pass him. The statutory rule of the road in Alberta requiring drivers of vehicles when they meet to "turn to the right," does not imply that

a driver of an automobile should always be on the right side of the road, but simply requires the driver to turn to the right in a reasonable and seasonable time to avoid collision. [See also Campbell v. Pugsley, 7 D.L.R. 177.]

Thomas v. Ward, 11 D.L.R. 231, 7 A.L.R. 79, 24 W.L.R. 250.

RULE OF ROAD—KEEP TO THE RIGHT.

In the absence of statutory provision and of proof of any regulation of the Lieutenant-Governor in Council under subs. 3 of s. 20 of the Motor Vehicles Act (Alta.), or of any municipal by-law, the act of a defendant in driving to the left of the centre line of a street is not negligence per se, even though the rule of the road in this country is, as the court is entitled to recognize without proof, to keep to the right. [Thomas v. Ward, 11 D.L.R. 231, distinguished.]

Osborne v. Landis, 34 W.L.R. 118.

FAILURE TO SOUND HORN — CONTRIBUTORY NEGLIGENCE.

Marshall v. Gowans, 24 O.L.R. 522.

NEGLIGENCE—PERSON DRIVING IN BUGGY—OVERTAKEN BY AUTOMOBILE—COLLISION—DAMAGES — MOTOR VEHICLES ACT, SS. 6, 18—ONUS.

Fisher v. Murphy, 3 O.W.N. 150, 20 O.W.R. 201.

AUTOMOBILE ACCIDENT—ONUS ON DEFENDANT TO SHEW THAT ACCIDENT WAS CAUSED THROUGH NO FAULT OF HIS—ONUS NOT SATISFIED—DAMAGES.

Ashick v. Hale, 3 O.W.N. 372, 20 O.W.R. 606.

DRIVER FOLLOWING VEHICLE—RULE OF ROAD—SIGNALS.

Where the driver of an automobile following a vehicle acts contrary to the provisions of R.S.Q., art. 1415, by passing to the right instead of the left of the vehicle, when there was room to the left more than sufficient to pass without accident, an accident occurring thereby is attributable solely to the fault of the driver, particularly where the automobile had no horn, as required by art. 1417, R.S.Q., to warn the driver of the carriage that he wished to pass, and after the accident he continued on his way contrary to art. 1321.

Taillon v. Cote, 24 Rev. de Jur. 80.

BORROWER—NEGLIGENCE—DAMAGES.

A borrower is not responsible for ordinary wear and tear, but is for negligence; receiving property in good condition and returning it in a damaged condition is prima facie evidence of negligence.

Bijou Motor Parlors v. Keel (Alta.), 39 D.L.R. 410, [1918] 1 W.W.R. 706.

LIABILITY OF INVITEE—ACCOMPLICE.

One knowing that a chauffeur has taken without permission his employer's automobile, who gets in it with him on his invitation to take a drive around, becomes his accomplice and is responsible for damages sustained as the result of an accident.

Galibert v. Vaillancourt, 53 Que. S.C. 521.

BURDEN OF PROOF.

In an action for damages for personal injuries caused by the defendant's automobile, held, that the defendant had failed to satisfy the onus cast upon him by the Motor Vehicle Act, c. 131, R.S.M. 1913, of proving that the damage suffered by the plaintiff did not result from the defendant's negligence.

Lechiw v. Sewrey (Man.), [1918] 2 W.W.R. 386.

COLLISION—PRESUMPTION.

Where in an action for damages caused by a collision between an automobile and a carriage it is impossible for the court to establish which of the parties was to blame, the responsibility falls on the owner of the automobile, by reason of the presumption created by 3 Geo. V., c. 19, s. 2.

Guilbeault v. Loomis, 24 Rev. Leg. 510.

LAW OF ROAD—CROSSINGS.

The proprietor and chauffeur of a motor vehicle are guilty of negligence and responsible in damages when violating the law respecting motor vehicles, to wit: (a) R.S. Q. 1909, art. 1420, enacting that "when approaching a sharp angle, turn or curve, or a steep descent in the highway, or intersecting highways and crossings, the speed of the motor vehicle shall be reduced to four miles per hour, and signal shall be given upon approaching angle, turn or curve in a highway or the intersections of two streets;" (b) art. 1420b of the same statutes amended, enacting that "when a motor vehicle meets or overtakes a street car which is stationary, for the purpose of taking on or discharging passengers, the motor vehicle shall not pass the car, on the side on which passengers get on or off, until the car has started and any passengers who have alighted shall have reached the side of the street;" (c) the by-law of the city of Montreal No. 450, art. 14a, ordering that, "every driver of vehicle going in the same direction as a street car shall, when such car stops, also stop his vehicle at a distance of at least ten feet from said car, and shall keep such vehicle at a standstill, until the said car has been again set in motion."

Carson v. Raifman, 27 Que. K.B. 337.

PERSONAL INJURIES — NEGLIGENCE —AUTOMOBILE ACCIDENT — MOTOR VEHICLES ACT, 5 GEO. V. 1915 (N.B.), C. 43—CONTRIBUTORY NEGLIGENCE OF PEDESTRIAN.

The owner of an automobile, who is driving his car, is liable for damages in respect to personal injuries caused a pedestrian when, even though the negligence of the latter may have contributed to the accident, he could have avoided such accident

by the exercise of ordinary reasonable care and diligence.

Lyman v. Emery, 50 D.L.R. 317.

NEGLIGENCE—COLLISION OF MOTOR VEHICLES ON HIGHWAY—EVIDENCE—FAULT ATTRIBUTED TO DEFEND—EXCESSIVE SPEED—DRIVING ON WRONG SIDE OF ROAD—FAILURE TO TAKE PRECAUTIONS TO AVOID COLLISION—ABSENCE OF CONTRIBUTORY NEGLIGENCE—FINDINGS OF TRIAL JUDGE—DAMAGES.

Katzman v. Hall, 15 O.W.N. 337.

DEFECTIVE HIGHWAY—PRIMARY NEGLIGENCE—REGISTRATION—NUMBER PLATES.

Operating a motor car in violation of the statutory requirements as to registration and number plates will bar recovery of any damages sustained by reason of defects in the highway; under such circumstances, a municipal corporation owes no duty to the driver or owner of the car except to refrain from wilful or malicious injury.

Etter v. City of Saskatoon, 39 D.L.R. 1, 10 S.L.R. 415, [1917] 3 W.W.R. 1110.

DRIVING WITH CLOSED HOOD UP—STREET CAR.

It is an active act of negligence on the part of a driver of a motor car to drive with a closed hood up, only being able to look out through isinglass. Semble, it is the duty of the driver of a motor car not to pass upon the steel rails of a street railway car, save when the way is clear. This is on the grounds that a street car cannot pass any other way than over the steel rails, whereas a motor can be operated in any direction. (Per McPhillips, J.A., dissenting.)

Kinnee v. B. C. Elec. R. Co., [1917] 1 W.W.R. 1190.

NEGLIGENCE OF OPERATOR—TAKING HANDS OFF STEERING WHEEL WHILE RUNNING AT HIGH SPEED—LIABILITY.

Borys v. Christowsky, 27 D.L.R. 792, 9 S.L.R. 181, 34 W.L.R. 346, 10 W.W.R. 291.

IN GENERAL.

While the automobile is not dangerous per se, its freedom of motion, speed, control, power and capacity for moving without noise give it a unique status and impose upon the motorist the strict duty to use care commensurate with its qualities, and the conditions of its use, especially since the dangers incident to the use of the motor vehicle are commonly the result of the negligent or reckless conduct of those in charge and do not inhere in the construction and use of the vehicle so as to prevent its use on the streets and highways. [Fisher v. Murphy, 3 O.W.N. 150; Beven on Negligence, 3rd ed., 439, 440; Le Lievre v. Gould, [1893] 1 Q.B. 491, referred to. See also Stewart v. Steele, 6 D.L.R. 1.]

Campbell v. Pugsley, 7 D.L.R. 177, 11 E.L.R. 561.

COLLISION—NEGLIGENCE OF OPERATOR.

The driver of a motor car who attempts to pass a vehicle ahead, does so at his own risk and peril, and is responsible for any collision that may occur.

Ménard v. Lussier, 32 D.L.R. 539, 50 Que. S.C. 416.

DRIVING ON WRONG SIDE OF STREET—COLLISION—PROXIMATE CAUSE—ACT IN EXTREMIS.

Defendant's motor car, not being properly under control or in a position to be stopped instantly, was being driven on the wrong side of the street, and, under such conditions, was swung into the traffic of a busy street still on the wrong side of the street. The driver of plaintiff's car, in order to avoid a collision which seemed to be certain, turned his car to the right, and, defendant's car being turned to the left at the same moment, a collision occurred. Held, that the proximate cause of the accident was the violation of the rules of the road on the part of the defendant, and that the act of plaintiff's in extremis, and in the agony of trouble brought about by defendant's negligence, was justified under the circumstances.

Bain v. Fuller, 51 N.S.R. 55, affirming 29 D.L.R. 113.

NEGLIGENCE — COLLISION OF AUTOMOBILES IN HIGHWAY — CLAIM AND COUNTERCLAIM — TRIAL — JURY — VERDICT — STATEMENT OF FOREMAN — JURY SENT BACK TO ANSWER QUESTIONS — FINDINGS — JUDGE'S CHARGE — DAMAGES.

Townsend's Auto Livery v. Thornton, 13 O.W.N. 237.

PEDESTRIAN INJURED BY MOTOR CAR ON HIGHWAY—EXCESSIVE RATE OF SPEED—EVIDENCE — CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE — MOTOR VEHICLES ACT, R.S.O. 1914, C. 207, S. 23—ONUS—DAMAGES.

Hall v. McDonald, 12 O.W.N. 407.

(§ III B—205)—STATUTORY DUTY.

The nonobservance by the driver of an automobile of a duty imposed upon him by statute is in itself evidence of negligence. [See Halsbury's Laws of England, vol. 9, p. 571.] The Saskatchewan Act to regulate the Speed and Operation of Motor Cars, R.S.S. 1909, c. 132, is passed to insure the safety and protection of persons riding or driving upon the highway, and gives a right of action to any such person who is injured by reason of the nonobservance of the requirements of the statute. [Butler v. The Fife Coal Co., [1912] A.C. 149, referred to.]

Stewart v. Steele, 6 D.L.R. 1, 5 S.L.R. 358, 22 W.L.R. 6, 2 W.W.R. 902.

MOTOR CAR ACCIDENT — LIABILITY UNDER MOTOR VEHICLES ACT (ALTA.), 7 GEO. V. 1917, C. 3.

Under s. 21 of the Motor Vehicles Act (Alta.), 7 Geo. V. c. 3, the liability for violation of the act is penal, not civil.

Johnson v. Mosher, 50 D.L.R. 321, [1919] 3 W.W.R. 1039, affirming 49 D.L.R. 347.

NEGLIGENCE — AUTOMOBILE PASSING STREET CAR—PASSENGER ABOUT TO ENTER CAR.

Rose v. Clark, 19 W.L.R. 456 (Man.).

(§ III B—210)—LIABILITY OF OWNER FOR INJURIES TO HORSE FRIGHTENED BY STEAM SHOVEL—B.C. MOTOR VEHICLES ACT, R.S.B.C. 1911, c. 169, s. 29.

One who was carefully driving an automobile at slow speed on a highway is not liable, under s. 29 of the Motor Vehicles Act, B.C. 1911, for injuries sustained by a horse, where it appeared that it became frightened and unmanageable, not at the automobile, but by a steam shovel that was in operation near the road, and ran into the automobile.

Queer v. Greig, 5 D.L.R. 308.

NEGLIGENCE IN THE USE OF—CONTINUING TO DRIVE CAR WHEN APPROACHING HORSE SHEWS SIGNS OF FRIGHT — LIABILITY OF DRIVER.

A driver of an automobile who continues to advance towards horses which, by their actions, indicate that they are frightened by his car, is guilty of negligence, and is liable to the owner of the horses for injuries sustained by him while trying to hold them.

Stewart v. Steele, 6 D.L.R. 1, 5 S.L.R. 358, 22 W.L.R. 6, 2 W.W.R. 902.

PUBLIC REGULATION—STATUTE AND COMMON LAW CUMULATIVE.

The statutory requirements of the Motor Vehicles Act (N.B.), 1 Geo. V. c. 19, for the public regulation and control of the use on highways of automobiles, do not limit or interfere with the common-law remedy for negligence, but they give other remedies directed to other ends. [Beven on Negligence, 3rd ed., 440, referred to.]

Campbell v. Pugsley, 7 D.L.R. 177, 11 E. L.R. 561.

PUBLIC REGULATION AND CONTROL—RESTRICTION — COMMON-LAW LIABILITY — 2-3 GEO. V. (ALTA.) C. 6, S. 35.

At common law the owner of a motor vehicle is not answerable for the negligence of the driver thereof, except where the relation of master and servant exists, and where, at the time of the negligent act, the latter was acting within the scope of his employment; and such liability can be changed by statute only by the use of distinct and unequivocal words. Section 35 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) c. 6, providing that the owner of a registered motor vehicle shall be liable for any violation of the provisions of the Act while operating such vehicle, is restricted to the penal liability thereby imposed, and does not alter the common-law liability of the owner of a motor vehicle for the violation of the Act, either by himself or by any other person in charge of or operating such vehicle. [Mattei v. Gillies, 16 O.L.R. 558, and Verral v. Dominion Automobile Co., 24 O.L.R. 551, distinguished.]

The B. & R. Co. v. McLeod, 7 D.L.R. 579, 22 W.L.R. 274, 5 A.L.R. 176.

DRIVING CAR INTO SCHOOL YARD—FRIGHTENING HORSES WORKING IN YARD—MOTOR VEHICLES ACT (MAN.)—NEGLIGENCE—ONUS OF PROOF—TRESPASS—DAMAGES.

The defendant drove a motor car into a school yard and around the school building to where the plaintiff was working with a team and scraper, neither party being aware of the presence of the other. The motor car frightened the plaintiff's horses and caused them to run away one of them being injured. The court held that the Motor Vehicles Act only referred to loss or damage arising out of the use of a motor vehicle on a public highway, but if this included a school yard, the evidence put in by the defendant displaced the onus of proof created by s. 63 of the Act, and replaced upon the plaintiff the onus of proving his case. Held, also, that even if the defendant was guilty of a trespass in driving his motor car into the school yard, the damage which occurred did not naturally flow from the trespass and was not an ordinary consequence of the trespass and the defendant was not liable. [Bradley v. Wallace, [1913] 3 K.B. 629; Heath's Garage v. Hodges, [1916] 2 K.B. 370, referred to.]

Collyer v. McAuley, 46 D.L.R. 140, [1919] 1 W.W.R. 1073.

(§ III B—215)—LIABILITY FOR INJURIES TO PEDESTRIANS—FAILURE TO LOOK.

S. 33 of the Motor Vehicles Act (Alta. Stats. 1911-12, c. 6) throws upon the driver of the vehicle, in all cases of accident, the burden of proof that the injury did not arise through his negligence. Even where the plaintiff admits his own negligence in crossing a highway without looking, the driver of the vehicle must prove that he could not by the use of ordinary and reasonable care have avoided the accident which resulted. [Springett v. Ball, 4 F. & F. 472, followed.]

White v. Hegler, 29 D.L.R. 480, 10 A.L.R. 57, 34 W.L.R. 1061, 10 W.W.R. 1150.

RESPONSIBILITY — ACCIDENT — PRECAUTIONS — SPEED — BRAKE — C.C., ART. 1053.

The proper way to stop a motor vehicle so as to avoid an accident, is to cut off the power and to apply the brakes, and not to put the machine on the low speed before applying the brakes.

Stackhouse v. Montreal Public Service Corp., 55 Que. S.C. 177.

INJURY TO PEDESTRIANS ON HIGHWAY BY MOTOR VEHICLE—EVIDENCE — ONUS — MOTOR VEHICLES ACT — FINDINGS OF TRIAL JUDGE—DAMAGES—STAY OF PROCEEDINGS.

Brooks v. Lee, 7 O.W.N. 219.

LIABILITY OF DRIVER FOR INJURY TO PEDESTRIAN — BURDEN OF PROOF OF NEGLIGENCE.

Toronto Gen'l Trusts Corp. v. Dunn, 20 Man. L.R. 412, 15 W.L.R. 314.

(§ III B—220) — NEGLIGENCE — INJURY TO BICYCLIST ON HIGHWAY—NEGLIGENCE OF DRIVER OF LORRY—EVIDENCE—VERDICT OF JURY — QUESTIONS NOT SUBMITTED—QUANTUM OF DAMAGES.

Pickering v. Toronto & York Radial R. Co., 7 O.W.N. 287.

NEGLIGENCE—INJURY TO BICYCLIST BY MOTOR VEHICLE—RULE OF ROAD—EXCESSIVE SPEED — EVIDENCE — DAMAGES — COSTS.

Hodgins v. Lindsay, 7 O.W.N. 133.

COLLISION WITH CYCLIST—CYCLE AND AUTOMOBILE—INCREASE OF SPEED OF CYCLE —NEGLECT TO APPLY BRAKE—CONTRIBUTORY NEGLIGENCE.

Where a cyclist after becoming aware of the approach of an automobile in a direction at right angles to his own and the apparent danger of a collision, increases his speed in a rash attempt to pass ahead of the approaching automobile, his contributory negligence in this respect is the proximate cause of the ensuing collision, notwithstanding the negligence of the defendant in approaching an intersection of streets without taking proper care. (Per Simmons and McCarthy, JJ.) Where a cyclist finds himself confronted with an emergency as above described and, owing to a mere mistake of judgment, swerves to the left to gain space and increased his speed in the hope of getting safely past, the automobilist is the proximate cause of the accident. (Per Scott and Stuart, JJ.) [Harnovis v. City of Calgary, 5 W.W.R. 869, referred to.]

Orser v. Mireault, 7 W.W.R. 837.

COLLISION OF MOTOR VEHICLES ON HIGHWAY —RULE OF ROAD—NO REASONABLE EVIDENCE OF NEGLIGENCE, EITHER PRIMARY OR ULTIMATE—NONSUIT.

Coffey v. Dies, 10 O.W.N. 255.

NEGLIGENCE—COLLISION IN STREET BETWEEN BICYCLE AND AUTOMOBILE.

Wales v. Harper, 17 W.L.R. 623 (Man.).

MOTOR TRUCK — INJURY TO CYCLIST.

The plaintiff was riding a bicycle westerly, on the southerly side of Hastings Street in Vancouver, and about to cross Cambie Street, when the defendant's motor truck, coming easterly on the north side of Hastings Street, was about to turn and go southerly up Cambie Street. The plaintiff had ample time to cross Cambie Street in front of the motor truck but, while crossing, his wheel skidded and he fell. The driver of the motor truck saw him fall, but was not able to stop until it rested on the plaintiff's leg and fractured it. The driver did not sound his horn when turning the corner. In an action for damages judgment was given for the plaintiff. Held, on appeal, affirming the decision of McInnes, Co. J. (Macdonald, C.J.A., dissenting), that there was evidence upon which the learned judge below might reasonably find that the driver of the motor truck was negligent and the appeal should be dismissed.

Bell v. Johnston, 25 B.C.R. 82, [1918] 2 W.W.R. 549.

NEGLIGENCE — COLLISION IN HIGHWAY OF BICYCLE AND AUTOMOBILE — INJURY TO BICYCLIST — EVIDENCE — ONUS — MOTOR VEHICLES ACT, S. 23—AUTOMOBILE TURNING WITHOUT GIVING VISIBLE OR AUDIBLE WARNING — FINDINGS OF FACT OF TRIAL JUDGE—DAMAGES.

Nugent v. Gunn, 16 O.W.N. 145. [Affirmed 17 O.W.N. 53.]

(§ III B—221)—RULES OF ROAD—ATTEMPTING TO PASS ON ROAD—NEITHER MACHINE EXCEEDING SPEED LIMIT—RACING WITHIN S. 25 OF MOTOR VEHICLE ACT, N.S.

If two motor cars are on a public highway and one endeavours to pass the other, the first one has a perfect right to put on more speed and prevent it from doing so. If neither machine exceeds the speed limit, this cannot be considered racing within the meaning of s. 25 of the Nova Scotia Motor Vehicle Act.

Canning v. Wood, 44 D.L.R. 525, 52 N.S.R. 452.

ACCIDENT ON HIGHWAY—CAR PASSING ANOTHER — COLLISION — DUTY OF OPERATOR — NEGLIGENCE — PERSONAL INQUIRIES—MOTOR VEHICLES ACT 8 GEO. V., 1917 (SASK. 2ND SESS.) C. 42, S. 38, SUBS. 1.

Notwithstanding the negligence of the injured parties in not complying with s. 38 of the Motor Vehicles Act when the accident is caused solely by the carelessness and negligence of another party, that party is liable in damages to the parties injured.

Bogaert v. Keeney, 50 D.L.R. 795.

COLLISION—ULTIMATE NEGLIGENCE.

An action for damages for injuries caused by a collision between motor vehicles is properly dismissed, where the answers of the jury indicate that each party was to blame and there is nothing to suggest that the respondent was guilty of ultimate negligence.

Judson v. Haines, 43 D.L.R. 227, 42 O.L.R. 629. [New trial ordered 16 O.W.N. 73.]

HIGHWAYS — COLLISION AT STREET INTERSECTION — RIGHT-OF-WAY — PARTY ON WRONG SIDE OF ROAD.

Defendants were held liable in damages because of a collision of their fire motor truck (in driving to a fire) with plaintiff's automobile, the truck having swung over from its proper side of the road and met the automobile as the latter turned the corner of a street intersection.

A by-law passed under s. 37 of the Motor-traffic Regulation Act, said by-law pro-

viding that the driver of a vehicle shall in approaching any street intersection give the clear right-of-way to a person driving a vehicle and approaching such intersection from the left does not entitle a person so approaching from the left to the right-of-way if he is not complying with the requirement of s. 36 of said act that he drive on the left-hand side of the road. In turning a street corner the driver of a vehicle has a right to expect that a person driving a vehicle on the intersecting street will comply with the statutory requirements and otherwise exercise a proper degree of care.

Nash v. City of Victoria, [1919] 3 W.W.R. 1058.

(§ III B—222)—Negligence — Collision between motor vehicles on highway — Evidence — Rule of road — Cause of collision — Contributory negligence — Unlicensed driver under 18 yrs. of age — Motor Vehicles Act, ss. 4 (3) and 13 (7 Geo. V. c. 49, s. 10)—Unlawful use of highway.

Buck v. Eaton, 17 O.W.N. 191.

(§ III B—225)—Duty when horses encountered on highway — Statutory requirements — Negligence.

Where an automobile on the highway is meeting a horse and buggy and the car is frightening the horse and the motorist sees or ought to see this, it is the legal duty of the motorist to stop his car and take all other precautions as prudence suggests and this irrespective of any statute regulating and controlling the use of motor vehicles and whether or not the driver of the horse holds up his hand to indicate the trouble with his horse. Under the provisions of the Motor Vehicles Act (N.B.), 1911, 1 Geo. V. c. 19, s. 4, subs. 4, the motorist, violating its provision in not stopping his car, incurs a fixed penalty by way of fine for the violation, this penalty being additional to, not in lieu of, civil damages to the person injured by the motorist's negligence and his violation constitutes evidence of negligence.

Campbell v. Pugsley, 7 D.L.R. 177, 11 E.L.R. 561.

Fright to horse by wrecked car—Unlicensed driver.

The leaving of a wrecked motor car on the side of the road is not necessarily negligence, nor does it amount to an unreasonable user of the highway, entitling the owner of a runaway horse, frightened by the wreck, to damages. Neither is the owner liable by reason that at the time the motor was wrecked it was being driven by an unlicensed driver. [Contant v. Pigott, 15 D.L.R. 358, referred to.]

Pederson v. Paterson, 31 D.L.R. 368.

Duty when approaching horses.

S. 16 (1) of the Motor Vehicles Act, R.S.O. 1914, c. 207, that "every person having the control or charge of a motor vehicle . . . shall not approach such horse . . . at a greater speed than 7 miles an hour" is a specific and definite prohibition, and does not depend upon the knowledge or belief of the driver of the motor vehicle.

Bradshaw v. Conlin, 39 D.L.R. 86, 40 O.L.R. 494.

Duty of automobile driver to stop on signal from carriage driver approaching.

The King v. Hyndman, 17 Can. Cr. Cas. 469 (Que.).

Negligence — Person unloading gravel —Killed by team running away — Frightened by automobile — Liability of owner of automobile.

Marshall v. Gowans, 3 O.W.N. 69, 20 O.W.R. 38.

Duty when horses on highway—Highway — Improper use of — Motor vehicle left standing on highway for unreasonable time—Injury to horse taking fright at car—Liability of owners of car—Proximate cause of injury — Negligence — Contributory negligence—Motor Vehicles Act, 2 Geo. V. c. 48 — Inapplicability to "dead" car—Absence of lights — "Between dusk and dawn"—ss. 6 (2) and 8 (3) of Act.

Bailey v. Findlay, 7 O.W.N. 24 & 159.

(§ III B—253) — Injury by motor vehicle to person lawfully standing in public place — Contributory negligence — Emergency — Liability of driver of vehicle.

Elliott v. Fraba, 10 O.W.N. 41.

Rights of pedestrians.

Pedestrians have the same rights in the use of public streets as have drivers of automobiles, and the latter must exercise the necessary care and prudence to avoid any accident, and not violate the rights which pedestrians have under the common law.

Legault v. Kander, 24 Rev. de Jur. 143

Passenger alighting from street car—Negligence — Contributory negligence.

S. 7 of the Vehicles Act, c. 38, 1912, which provides that "every motor vehicle shall be equipped . . . with a suitable horn or other device which shall be sounded only whenever it shall be reasonably necessary to notify pedestrians or others of the approach of such vehicle," imposes on the driver of a motor car the duty of sounding his horn when he sees a passenger alighting from a street car in front of him and where, because of his failure to so sound his horn, the passenger is injured and the accident would not have happened had the horn been sounded, the passenger is entitled to damages even though he did not look in the direction of the motor car before attempting to cross from the street car to the sidewalk. [B.C. Elec. R. Co. v.

Loach, 23 D.L.R. 4, [1916] 1 A.C. 719, and later cases referred to.]

Coe v. Mayberry, 11 S.L.R. 425. [Affirmed, [1919] 1 W.W.R. 357.]

INJURY TO PEDESTRIAN WHILE WAITING FOR CAR—FAILURE TO LOOK—CONTRIBUTORY NEGLIGENCE.

A pedestrian crossing a wide street, who stops in the roadway at a safe place beside the street car track for a street car to pass and then walks back in the direction from which he came without looking for approaching vehicles, is himself guilty of negligence disentitling him to recover where, in retracing his steps, he walked in front of an automobile proceeding at a moderate rate of speed and was knocked down and injured before the motorist could avoid him.

Todesco v. Maas, 23 D.L.R. 417, 8 A.L.R. 187, 7 W.W.R. 1373.

(§ III B—260) — DUTY WHEN APPROACHING STREET CROSSING.

To drive an automobile towards an intersecting street at a speed of ten miles per hour, although that speed may be within the maximum permitted by law, is negligence sufficient to prevent the plaintiff recovering for a collision between his own and the defendant's automobile, which approached on the intersecting street at a greater rate of speed than was permitted by law, since the speed of the plaintiff's automobile at such place was unreasonable, as he must have known the possibility of meeting other automobiles moving on the intersecting street at a rate of speed equal to his own.

The B. & R. Co. v. McLeod, 7 D.L.R. 579, 5 A.L.R. 176, 22 W.L.R. 274, 2 W.W.R. 1093.

DUTY WHEN APPROACHING STREET CROSSING — COMING INTO A MAIN TRAFFIC ARTERY.

It is the special duty of a person driving a motor vehicle to keep a good lookout while approaching a tramway crossing, and it is the duty of such person coming out from a crossroad into a main artery of traffic to wait and give way to that traffic, and not to throw himself headlong into the advancing traffic along the main traveled road. [Campbell v. Train, 47 Sc. L.R. 475, applied.]

Monrufet v. B.C. Electric R. Co., 9 D.L.R. 569, 18 B.C.R. 91, 23 W.L.R. 17, 3 W.W.R. 733.

AS TO SIDEWALKS.

The Nova Scotia Motor Vehicles Act, 1914, does not supersede a municipal ordinance imposing penalties for driving a motor car along a city sidewalk.

R. v. Archibald, 29 Can. Cr. Cas. 146.

COLLISION AT STREET CROSSING—RULES OF ROAD.

When the primary cause of an automobile collision was the defendant's violation of the rules of the road (Nova Scotia Stats. 1914), by running on the wrong side of the road when approaching an intersection and cutting the corner at that intersection, he cannot evade the consequences of his negligence by setting up that the plaintiff (who was originally on the proper side of the cross street) had swerved, in the emergency, to the wrong side of the cross street in an attempt to avoid the collision.

Bain v. Fuller, 29 D.L.R. 113. [Affirmed 51 N.S.R. 55.]

(§ III B—262)—DUTY TO SLOW UP—TAXICAB COMPANIES — INJURY TO PASSENGER—PRIMA FACIE NEGLIGENCE.

A taxicab driver's act in running into an upright post plainly visible, resulting in injury to a passenger, was prima facie negligent, where while running at considerable speed he turned quickly to correct a mistake in turning into a wrong street.

Hughes v. Exchange Taxicab & Auto Livery, 11 D.L.R. 314, 24 W.L.R. 174, 4 W.W.R. 556.

DUTY NEAR STREET CARS.

Where the circumstances and the situation are such as to require the chauffeur to exercise a more than ordinary degree of care for the safety of pedestrians and to anticipate the possibility of being confronted at any time in such a situation by pedestrians who for the moment lose control of their mental faculties, and are overcome by a sudden panic, although at other times of healthy and rational intellect, and that under the circumstances the chauffeur was guilty of such negligence that the defendants were liable for the damages suffered by the plaintiff, the Trial Judge, being satisfied that the plaintiff's solicitor honestly believed that the plaintiff would recover an amount beyond County Court jurisdiction, while giving him no costs, gave the statutory certificate, under r. 933 of the King's Bench Act, to prevent the defendant setting off any costs.

Rose v. Clark, 21 Man. L.R. 635.

COLLISION WITH STREET CAR — DRIVER UNDER AGE OF 18—CONTRIBUTORY NEGLIGENCE—ULTIMATE NEGLIGENCE.

Discepolo v. City of Fort William, 11 O.W.N. 73.

(§ III B—264) — NEGLIGENT OPERATION — EMERGENCY—SWERVING AUTO.

The driver of an automobile is not relieved from liability for running into the plaintiff by reason of the fact that, in order to avoid striking children who suddenly ran into the street, he was compelled to change the course of his automobile, and in doing so struck the plaintiff who was about to board a street car, where the defendant's own negligence had placed him in a situation where the swerving of the automobile became a necessity.

Oakshott v. Powell, 12 D.L.R. 148, 6 A.L.R. 178, 24 W.L.R. 654, 4 W.W.R. 983.

(§ III B—266)—Towing—Caution.

An automobile driver who, towing another machine with a rope, leaving a certain distance between the two machines, is bound to take increased precautions; he should take the necessary means to inform other vehicles of the danger from the tow rope.

Laberge v. La Compagnie des Tramways de Montréal, 24 Rev. Leg. 133.

(§ III B—270)—Motor Vehicles Act—Injury to child by motor vehicle on city highway—Negligence—Onus—R.S.O. 1914, c. 207, s. 23.

Hook v. Wylie, 10 O.W.N. 15, 237.

C. Responsibility of owner when car operated by another.

(§ III C — 300) — Injury to person by daughter of owner of car — Negligence—Liability of owner—Motor Vehicles Act, R.S.O. 1914, c. 207, s. 19, amended by 7 Geo. V. 1917, c. 49, s. 14.

The owner of a car is not liable for the negligence of his daughter, she not having possession of the vehicle with his consent, nor being a person in his employment. Motor Vehicles Act, R.S.O. 1914, c. 207, s. 19, as amended by 7 Geo. V. 1917, c. 49, s. 14.

Walker v. Martin, 49 D.L.R. 593, 46 O.L.R. 144, affirming 45 O.L.R. 504.

Chauffeur taking car to garage.

A chauffeur who on taking a car back to the garage in accordance with his instructions, after his master has finished using it, finds the garage locked and goes for the key in order to put the car in the garage, is in the employ of the master while going for the key and the master is liable for his negligence.

Poplis v. Chaput, 40 D.L.R. 667, 53 Que. S.C. 440.

Salesman—Displaying car—"Mechanic"—"Chauffeur."

An automobile salesman who displays his car by operating it, and having effected a sale, assists the purchaser in locating some trouble, by going out with him and operating the car for a time, is not a "mechanic" within the meaning of the word as used in the definition of "chauffeur" in s. 2 (3) of the Motor Vehicle Act (Alta. stats. 1911-12, c. 6).

Hutchinson v. Shearer, 41 D.L.R 418, 13 A.L.R. 309, [1918] 2 W.W.R. 480.

Car used by servant—Negligence—Burden of proof.

Where a grocer, owner of an automobile, employs a young man to deliver his goods with such machine, he is responsible for damages caused by the fault of his driver. It is negligence for the owner of an automobile not to provide it with a siren, which the driver could make use of when necessary. When an automobile causes an injury to any one in a public road, the burden of proof that the injury is not due to negligence of the owner or of the driver is upon the latter.

Dussault v. Chartrand, 54 Que. S.C. 488.

In an accident caused by an automobile truck, the burden of proof that the loss and damages sustained did not arise through the negligence or improper conduct of the driver of the truck, is upon the owner of the machine.

Babinsky v. Wilson, 24 Rev. Leg. 433.

Responsibility — Automobile owner — Chauffeur — Intrusting to another —C. C. art. 1053, 1054.

The owner of an automobile is not responsible for accidents caused by the fault of his chauffeur when the latter is not at the moment of the accident in the exercise of the functions entrusted to him by the owner. Thus he is not responsible in the case where his chauffeur, in spite of being forbidden to do so, and without the owner's knowledge, takes his auto from the garage, and in the course of a pleasure trip with his friends, strikes a passerby and causes his death, through criminal negligence.

Latreille v. Curley, 28 Que. K.B. 388.

Responsibility of owner when car used by another.

Under s. 35 of the Motor Vehicles Act (c. 6, Alta. statutes 1911-12), the owner of an automobile is liable in damages as well as the driver who is using the car with his tacit permission, for injuries sustained by a third party in consequence of the driver's negligence. [Mattei v. Gillies, 16 O.L.R. 558; Verral v. Dom. Auto Co., 24 O.L.R. 551, referred to; B. & R. Co. v. McLeod, 7 D.L.R. 579, distinguished.]

Witsoe v. Arnold & Anderson, 15 D.L.R. 915, 27 W.L.R. 259, 6 W.W.R. 4. [Followed in B. & R. Co. v. McLeod, 18 D.L.R. 245.]

Responsibility of owner when car used by another.

Under s. 35 of Motor Vehicles Act (c. 6, Alta. statutes 1911-12), the owner of an automobile is liable in damages as well as the driver who is using the car with the owner's sanction or permission, for injuries sustained by a third party in consequence of the driver's negligence. [Witsoe v. Arnold, 15 D.L.R. 915, followed; B. & R. Co. v. McLeod, 7 D.L.R. 579, reversed.]

B. & R. Co. v. McLeod, 18 D.L.R. 245, 7 A.L.R. 349, 28 W.L.R. 778, 6 W.W.R. 1299.

Collision—Car operated by another—Liability of owner—Stolen car.

The Motor Vehicles Act, 2 Geo. V. c. 48, did not make the owner of a stolen automobile responsible for damages sustained when it collided with another vehicle through the negligence and furious driving of the person who had stolen it a short time previously, if the owner was himself guilty of no negligence in the manner in which he left the automobile and had taken away the spark plug so that the thief could not have operated the car without supplying a similar spark plug. [Wynne v. Dalby, 16 D.L.R. 710, 30 O.L.R. 67, applied; Lowry v.

Thompson, 15 D.L.R. 463, 29 O.L.R. 478, distinguished. And see amending statute, 4 Geo. V. c. 36, s. 3.]

Cillis v. Oakley, 20 D.L.R. 550, 31 O.L.R. 603.

LARCENOUS TAKING—WHAT IS.

The taking by a servant of a garage keeper without the owner's consent of a car stored in the garage for repairs, the servant mistaking it for a demonstration car, raises no such animus furandi as to render such taking an act of larceny which will relieve the owner from the liability imposed by s. 19 of the Motor Vehicles Act, R.S.O. 1914, c. 207.

Downs v. Fisher, 23 D.L.R. 726, 33 O.L.R. 504.

LICENSED CAR ON HIGHWAY — OPERATION BY REPAIRMAN WITHOUT OWNER'S CONSENT—OWNER'S STATUTORY LIABILITY.

The King v. Labbe, 17 Can. Cr. Cas. 417 (Que.).

OPERATING AS "JITNEY" BY JOINT OWNER.

E. and J. were joint owners of an automobile licensed as a jitney and, at the time of the accident, operated by E. as a "jitney." J. had a chauffeur's license, but there was no evidence of agency or partnership. Held, that the facts fell far short of establishing that J. had entrusted E. with the automobile within the meaning of the Motor Vehicles Act (B.C.), and that the onus was on the plaintiff in an action for damages sustained while riding in the automobile, to shew that J. came within the provisions of s. 33 of the Act.

Moore v. B. C. Electric R. Co., 34 W.L.R. 469, 22 B.C.R. 504.

"OWNER"—CONDITIONAL VENDOR.

The registered owner of an automobile, who disposes of it and delivers it to the purchaser without removing the plate intended to identify the owner, incurs the penalty under the Act 3 Geo. V. c. 16; but he is not liable for damages subsequently caused by the car in an accident to which he was a complete stranger. The vendor of an automobile, reserving the ownership thereof until the price has been fully paid, will be considered as the owner within the meaning of the Motor Vehicles Act; but would still be allowed to disclaim liability for damages caused by a collision, if at the time of the accident he was neither personally nor by an agent in control or care of the car.

Coté v. Pennock, 51 Que. S.C. 537.

AUTOMOBILE WITH REPAIR COMPANY—COLLISION—LIABILITY OF THE OWNER.

McCabe v. Allan, 39 Que. S.C. 29.

(§ III C—305)—BURDEN OF PROVING "VIOLATION OF THE ACT"—MOTOR VEHICLES ACT (ONT.).

S. 19 of the Motor Vehicles Act, 1912, c. 48, R.S.O. 1914, c. 207, which provides that the owner of a motor vehicle shall be responsible for "any violation of the Act," does not relieve the plaintiff, in a negligence action for personal injury against such owner, from the obligation of obtaining a finding that the accident was caused by a violation of the Act for which the defendant was responsible.

Lowry v. Thompson, 15 D.L.R. 463, 29 O.L.R. 478.

LIABILITY OF OWNER — NEGLIGENCE OF BROTHER OF OWNER USING SAME FOR HIS OWN PURPOSE—ABSENCE OF AGENCY.

The fact that the owner of an automobile in Alberta has given permission to his brother to use the automobile on his own business without payment raises no presumption of agency between him and his brother, and the owner is not liable to one injured by the gross negligence of his brother while exercising such permission, even though at the time of the accident he be driving home the owner's wife at the owner's request. [Yewens v. Noakes, 6 Q. B.D. 530, referred to. See also Pollock on Torts, 7th ed., pp. 77 and 78, and Bigelow on Torts, 8th ed., p. 54.]

Lane v. Crandall, 5 D.L.R. 580, 5 A.L.R. 42, 21 W.L.R. 793, 2 W.W.R. 675.

The Alberta Motor Vehicle Act (2-3 Geo. V. c. 6) does not render the owner of a motor vehicle liable for a violation of the provisions of the Act resulting in injury to the plaintiff where the vehicle was at the time of the injury being used by another person without the owner's knowledge or consent.

The B. & R. Co. v. Hugh S. McLeod, 7 D.L.R. 579, 5 A.L.R. 176, 22 W.L.R. 274, 2 W.W.R. 1093.

RESPONSIBILITY OF OWNER WHEN CAR OPERATED BY ANOTHER—WHO IS "OWNER"—SELLER RESERVING TITLE.

The seller of an automobile under a conditional sale contract whereby he retains the title until fully paid for, with the right, on feeling insecure or on the purchaser's default, to resume possession of the car, is not the "owner" of the automobile within the meaning of s. 19 of the Motor Vehicles Act, 2 Geo. V., c. 48, R.S.O. 1914, c. 207, so as to incur a statutory liability for personal injuries sustained by the mismanagement of the car while under the control of the conditional vendee or of his servant, by the infringement of motor car regulations, passed under statutory authority. [Wynne v. Dalby, 13 D.L.R. 569, 29 O.L.R. 62, 4 O.W.N. 1330, affirmed.]

Wynne v. Dalby, 16 D.L.R. 710, 30 O.L.R. 67.

CAR OPERATED BY OTHER THAN OWNER—OWNER'S LIABILITY BY STATUTE.

Woo Chong Kee v. Fortier, 20 D.L.R. 985, 45 Que. S.C. 365.

(§ III C—310)—RESPONSIBILITY OF OWNER WHEN CAR USED BY SERVANT FOR HIS OWN BUSINESS OR PLEASURE.

The owner of an automobile is answerable at common law for its negligent operation by his chauffeur, where, instead of returning the car to the garage where it was kept, as it was his duty to do after

having used the vehicle in the business of his employer, the chauffeur while using the car for purposes of his own and driving it in a reckless manner, caused the plaintiff to be knocked off a bicycle and injured as a result of the chauffeur's negligent conduct. Under s. 19 of the Motor Vehicles Act, 2 Geo. V. (Ont.) c. 48, R.S.O. 1914, c. 207, the owner of an automobile is liable for any violation of the provisions of the act by his chauffeur while using the car for purposes of his own without the knowledge or consent of his employer. [Campbell v. Pugsley, 7 D.L.R. 177, specially referred to; Mattei v. Gillies, 16 O.L.R. 558; Verral v. Dominion Automobile Co., 24 O.L.R. 551, followed.]

Bernstein v. Lynch, 13 D.L.R. 134, 28 O. L.R. 435.

NEGLIGENCE OF CHAUFFEUR—SCOPE OF EMPLOYMENT—SERVANT'S OWN BUSINESS—CAR FURNISHED BY MASTER—DAMAGES—LIABILITY.

The master is not liable at common law for the negligence of his servant while the latter is engaged in some act beyond the scope of his employment for his own purpose though he may be using the instrumentalities furnished by the master to perform his duties as servant; and a chauffeur who takes his master's automobile out of a garage in contravention of his master's orders and proceeds with it to make a call of his own before the time appointed for taking the car out for his master's use is not to be considered as acting within the course of his employment so as to make the master liable at common law for injuries resulting to another whom he negligently runs down. [Halparin v. Bulling, 17 D.L.R. 150, 24 Man. L.R. 235, affirmed; Storey v. Ashton, L.R. 4 Q.B. 476, followed.]

Halparin v. Bulling, 20 D.L.R. 598, 50 Can. S.C.R. 471, 8 W.W.R. 95.

CAR OPERATED BY REPAIRMAN—"STOLEN IT."

An employee in a repair shop who takes a motor vehicle from the shop to test it by driving upon the highway, and after so testing it continues to drive it for his own pleasure, has not "stolen it from the owner" within the meaning of s. 19 of the Motor Vehicles Act, R.S.O. 1914, c. 207, as amended by 4 Geo. V. c. 36, s. 3; nor is the employee guilty of "theft of a motor car" under s. 285 (B) of the Criminal Code, as enacted in 9 & 10 Edw. VII. c. 11.

Hirshman v. Beal, 32 D.L.R. 680, 38 O. L.R. 40, 28 Can. Cr. Cas. 319, reversing 37 O.L.R. 529, 10 O.W.N. 411.

NEGLIGENCE OR WILFUL ACT OF DRIVER.

The owner of a motor car driven by his daughter is not liable under the Manitoba Statute, 5 Geo. V. c. 41, s. 63a, for injury thereby, unless the injury was caused by the negligent or wilful act of the driver.

McIlroy v. Kobold, 35 D.L.R. 587, 28 Man. L.R. 109, [1917] 3 W.W.R. 6.

CAR USED WITHOUT OWNER'S KNOWLEDGE.

The liability of the owner of an automobile, in virtue of art. 1406, R.S.Q. 1909, as amended by 3 Geo. V. c. 19, merely creates a presumption of fault on the part of the owner or the driver of the vehicle. The owner is not responsible in damages for injuries occasioned in an accident by his automobile, where the driver thereof is not his servant or agent, e.g., where his nephew, a competent chauffeur, has borrowed or has taken the vehicle without his knowledge and was in charge of it at the time of the accident.

Robillard v. Bélanger, 50 Que. S.C. 260.

RESPONSIBILITY — AUTOMOBILE — ASSOCIATES—CHAUFFEUR—C.C. ARTS. 1053, 1054.

The responsibility of the owner of an automobile, which is in the possession of a chauffeur, continues until this possession ceases by the return of the car to the owner. The member of a company, who is driven out in the company's automobile without the knowledge of his partner, is personally liable for an accident which was caused by the fault of the chauffeur.

Lafontaine v. Christin, 25 Rev. Leg. 110.

MOTOR VEHICLES ACT—INJURY BY AUTOMOBILE ON HIGHWAY—EXCESSIVE SPEED—UNAUTHORIZED USE OF VEHICLE BY SERVANT.

Verral v. Dominion Automobile Co., 24 O.L.R. 551.

(§ III C—315)—RESPONSIBILITY OF OWNER—CAR OPERATED BY BORROWER.

The owner of an automobile is not liable for the negligence of his brother to whom the car was loaned for the latter's own purposes, although at the time of the accident in question the brother was engaged in driving home the owner's wife at the request of the owner's daughter, it not appearing that the owner was aware that the car was being used for that purpose, nor that the daughter had any authority from the owner to request or direct his brother to use the car for the purpose for which it was actually used. [B. & R. Co. v. McLeod, 7 D.L.R. 579, referred to; Lane v. Crandell (No. 1), 5 D.L.R. 580, affirmed.]

Lane v. Crandell (No. 2), 10 D.L.R. 763, 5 A.L.R. 42, 23 W.L.R. 869, 4 W.W.R. 165.

UNLICENSED DRIVER.

If the owner of an automobile permits his brother who is not competent, has not had the necessary experience and is not licensed to drive, to habitually use it he is liable, jointly with him and severally, for the injury resulting from a collision caused by the fault of the driver.

Lebau v. Colas, 51 Que. S.C. 335.

MOTOR CAR DRIVEN BY SERVANT—HIRED TO A THIRD PARTY—COLLISION—INJURY TO PASSENGER — DAMAGES — LIABILITY OF MASTER.

A servant, who is driving his master's motor car notwithstanding the fact that such car was with others supplied to a third

party, the servant of his master, and the latter is responsible for his servant's negligence. [Quarman v. Burnett, 6 M. & W. 499, 151 E.R. 509, followed; Consolidated Plate Glass Co. v. Caston, 29 Can. S.C.R. 624, followed.]

Heron v. Coleman, 49 D.L.R. 602, 46 O.L.R. 154.

JOINT LIABILITY—RULE OF ROAD.

Injuries occasioned by collision with an automobile due to the negligence of the driver in driving on the wrong side of the road, and that the father of the driver, being owner of the car and having authorized the use if it was liable with the son for damages both under the statute and at common law.

Boyd & McDougal v. Houston (B.C.), 10 W.W.R. 518.

D. DUTY AND LIABILITY TO OPERATOR OR PERSON USING.

(§ III D—350)—DUTY AND LIABILITY TO ANOTHER OPERATOR—EMBARRASSMENT CAUSED BY ANOTHER OPERATOR.

The driver of an automobile is not guilty of contributory negligence as a matter of law where on approaching another automobile coming towards him on the wrong side of the road and having reasonable ground to believe that there was not ample room for him to pass the approaching vehicle on his right side of the road, turns to his left, though it turned out to be the wrong course to adopt because a collision resulted, where it appears that the driver's embarrassment was due solely to the action of the approaching automobile in adhering too long to the wrong side of the road without turning to the right of the road seasonably. [Adams v. Lancashire & Yorkshire R. Co., L.R. 4 C.P. 739, 38 L.J.C.P. 277, distinguished. See also Campbell v. Pugsley, 7 D.L.R. 177.]

Thomas v. Ward, 11 D.L.R. 231, 7 A.L.R. 79, 24 W.L.R. 250.

CAUSE OF ACCIDENT—SPEED—FINDINGS OF JURY.

In an action for damages for injury to an automobile on a highway the findings of the jury should not be disturbed although they have not directly indicated the connection between the negligence found and the accident, if they did on the evidence reasonably draw the inference that the effective cause of the accident was the "excessive rate of speed," and that the plaintiff was not guilty of contributory negligence.

Gallagher v. Toronto R. Co., 40 D.L.R. 114, 41 O.L.R. 143, 23 Can. Ry. Cas. 257.

COLLISION—NEGLIGENCE—INSTINCT OF SELF-PRESERVATION.

It is a defence to an action for negligence, that the defendant did the act complained of in an emergency in response to his instinct for self-preservation, provided that his action was what a reasonable man might well have done under the circumstances.

Turnbull v. Graham, 44 D.L.R. 632, 14 A.L.R. 125, [1918] 3 W.W.R. 1033.

V. Garage.

A. IN GENERAL.

(§ V A—450)—ATTACHMENT—EXECUTION—LANDLORD AND TENANT.

One placing an automobile in a garage to be sold, at a rent of $5 a month, payable to the keeper of the garage, who is a tenant, will be deemed a subtenant to the owner of the building in which the garage is situated. So that, if the latter issues execution by way of security against his tenant and seizes the automobile, the owner must, in order to obtain his machine, pay the amount of the rent which he owed at the time of the seizure.

Marcotte v. Auto Garage, 53 Que. S.C. 77.

RIGHTS OF GARAGE KEEPER—JUDGMENT—EXECUTION—OWNER OF MACHINE.

A garage keeper receiving an automobile from one who is not the owner, who makes repairs upon it and keeps it in his garage, cannot, after obtaining judgment for his services, seize the automobile in execution; he could only do so in execution of a judgment against the owner of the automobile in a suit brought against him.

Rapid Motor Co. v. Dagenais, 24 Rev. de Jur. 101.

B. RIGHT OF PROPRIETOR TO LIEN.

(§ V B—460)—GARAGE—LIEN CLAIM OF PROPRIETOR.

The fact that an automobile was returned in a damaged condition to the care of the garage keeper on the order of the conditional vendee to be left until repaired but without any change of the terms upon which the garage keeper had theretofore taken care of it on a monthly engagement, will not change the latter's status to that of a warehouseman so as to entitle him to a lien for the fixed monthly compensation as against the conditional vendor. [Automobile and Supply Co. v. Hands, 13 D.L.R. 222, referred to.]

Webster v. Black, 17 D.L.R. 15, 24 Man. L.R. 456, 28 W.L.R. 300.

C. LICENSING OF GARAGE.

(§ V C—470)—LICENSE—MEANING OF "GARAGE."

A "garage" under the Quebec Motor Vehicles Law, R.S. Que. 1909, art. 1402b (added by Quebec statutes 1916, c. 21), for which a license is required does not include a place where automobiles are kept without extra charge while repairs are being made to them.

Collector of Revenue v. Verret, 38 D.L.R. 630, 28 Can. Cr. Cas. 314, 53 Que. S.C. 21.

D. DUTY TO CUSTOMER.

(§ V D—480)—AUTOMOBILE DAMAGED BY FIRE—LIABILITY OF GARAGE OWNER.

The owner of a garage is a paid depository, and as such is responsible for damage by fire to an automobile entrusted to his

care, unless he can prove that the accident did not result from any fault on his part.

Brunet v. Painchaud, 48 Que. S. C. 59.

NEGLIGENCE—INJURY BY FIRE TO AUTOMOBILE LEFT FOR REPAIRS IN GARAGE—EVIDENCE—FINDINGS OF TRIAL JUDGE—CAUSE OF FIRE—ESCAPE OF GASOLINE FROM AUTOMOBILE OF THIRD PERSON—LIABILITY OF OWNER OF GARAGE—PROPER CONSTRUCTION OF BUILDING AND PROPER CARE TAKEN—DUTY OF BAILEE—EFFICIENT DISCHARGE OF — LIABILITY OF OWNER OF OTHER AUTOMOBILE — ACCIDENTAL BREAKING OF TANK.

Karn v. Ontario Garage & Motor Sales, 16 O.W.N. 31.

INJUNCTION—MOTION FOR INTERIM INJUNCTION—USE OF PRIVATE WAY—"GARAGE"—MUNICIPAL BY-LAW.

Miller v. Tipling, 13 O.W.N. 43.

AUCTION.

(§ I—1)—"PUFFING"—SELLER'S RIGHT TO BID NOT RESERVED—SALE OF GOODS.

Where at an auction sale of a horse it appears that the vendor employed a "puffer" to bid at the sale, without reserving the right to do so, and the price was bid up to much beyond the value of the animal without the knowledge of the person who became the purchaser, the latter would be entitled to rescind the transaction upon discovering the fraud, even before the passage of the Sale of Goods Act, 1910, N.S. Stat. 1, s. 58, subss. 3 and 4, making a sale under such circumstances unlawful. [Mortimer v. Bell, L.R. 1 Ch. 10, and Smith v. Clerke, 12 Ves. 482, referred to.]

Wright v. Bentley, 11 D.L.R. 515, 46 N.S. R. 534, 12 E.L.R. 270.

(§ I—5)—SALE OF FARMING EFFECTS—TERMS—PROMISSORY NOTE.

On an auction sale of farming effects on advertised terms of six months' credit, three months without interest, on approved joint note, a buyer, who obtains delivery on a promise to pay cash in a few days and refuses to give an approved note on the advertised terms, may be sued forthwith on defaulting in his promise, and cannot set up in answer that the three months' credit term had not expired.

Crossman v. Mosely, 22 D.L.R. 713, 48 N.S.R. 227.

AUCTION—VERBAL EVIDENCE—AUCTIONEER—BOOK OF SALE—C.C., ARTS. 1235, 1567, S. REF. [1909], ART. 1191.

Verbal proof of the sale and auction of commercial goods, the value of which exceeds $50, is inadmissible when the purchaser has not accepted nor received any part of the goods and has not made a deposit and if besides, the formalities required by s. 1567 C.C. have not been followed. The sale of a thing sold at auction should be verified by the signing of the purchaser's name in the auctioneers book of a sale by the auctioneer himself. This book should be a register held by the auctioneer in the manner prescribed by art. 1191, s. ref. [1909]. A simple loose sheet of paper containing neither the date, nor the signature, nor the description of the parties nor of the object sold, cannot take the place of the auctioneers book, nor of the writing required by art. 1235, C.C.

Herscovietz v. Dion, 56 Que. S.C. 325.

AWARD.

See Arbitration; Expropriation; Damages.

BAGGAGE.

See Carriers.

BAIL AND RECOGNIZANCE.

Annotation.

Bail pending decision on writ of habeas corpus: 44 D.L.R. 144.

Right to bail for a misdemeanour: 50 D.L.R. 633.

(§ I—2) — CRIMINAL LAW — APPLICATION FOR BAIL—CHARGE OF TREASON—STATE OF WAR.

R. v. Rowens, 7 O.W.N. 467.

FAILURE TO FILE RECOGNIZANCE — DISMISSAL OF APPEAL.

Where no attempt is made by an appellant to secure the return of a recognizance into court by magistrates within the statutory ten days, a return which can be compelled by mandamus, the failure to file such recognizance should entail the dismissal of the appeal. [Wills v. McSherry, [1913] 1 K.B. 20, distinguished, and R. v. McKay, 21 Can. Cr. Cas. 211, disapproved. Re McNeill and Saskatchewan Hotel Co., 17 W.L.R. 7, followed.]

R. v. Hewa, 9 W.W.R. 689, 33 W.L.R. 29.

(§ I—3) — RIGHT TO BAIL — CRIMINAL CHARGE — EXTRADITION FROM FOREIGN COUNTRY FOR THEFT IN CANADA.

R. v. McNamara, 12 D.L.R. 859, 18 B.C. R. 125, 4 W.W.R. 647.

CRIMINAL CASE — SUBMITTING NAMES AND PARTICULARS OF BONDSMEN.

Upon an application for bail to a judge or magistrate, the practice which should be followed is for the accused to submit the names of his sureties and their residence and occupation, and for the judge or magistrate, in his discretion, to give leave to the Crown prosecutor to make inquiries as to whether the proposed sureties have sufficient means to satisfy the amount in which they are to be found, and that, after inquiries have been made and the parties heard, the judge or magistrate should thereupon decide whether or not the bondsmen offered by the accused are sufficient.

R. v. Greig, 23 Can. Cr. Cas. 352.

BAIL UNDER CR. CODE, S. 698 — SUFFICIENCY OF—DUTY OF JUDGE—PRACTICE.

Where bail is granted by a judge of a Superior or County Court under Cr. Code, s. 698, the sufficiency of the sureties is to be

passed upon by the judge who grants the bail; the duty of the justices before whom the recognizance is taken is in such case of a merely ministerial character to carry out the judge's order. After an order for bail made by a District Court Judge has been issued and acted upon, there is no jurisdiction to amend it, but if after release of the prisoner thereunder he is re-arrested for alleged irregularity in the warrant of deliverance, bail may be applied for de novo. A judge's order for bail should not delegate absolutely to the representative of the Attorney-General the duty of the court to stand between the Crown and the prisoner, and should therefore provide for submission to the judge of the sufficiency of the bondsmen in case the Attorney-General is not satisfied in that regard. The practice in Saskatchewan is to require the bail to justify unless the judge or magistrate making the order for bail dispenses with their justification because of his personal knowledge of their sufficiency.

R. v. Greig, 23 Can. Cr. Cas. 352.

CONTEMPT.

A party in custody in execution under a sentence, for a time certain, for contempt of court is not bailable.

Re Beck (Man.), 32 D.L.R. 15, [1917] 1 W.W.R. 657.

(§ I—4)—CRIMINAL OFFENCES—JURISDICTION OF JUSTICES.

Rape is a capital offence in Canada, and justices of the peace have no jurisdiction to grant bail after the holding of the preliminary enquiry before the justices upon which the accused was committed for trial before a Court of Competent Jurisdiction.

Re Hopfe's Bail, 10 D.L.R. 216, 22 Can. Cr. Cas. 116, 5 A.L.R. 398, 23 W.L.R. 751, 4 W.W.R. 1.

COMMITTAL ON CHARGE OF MURDER.

The general rule is that a person committed for trial on a charge of murder will not be granted bail. [R. v. Rae, 23 Can. Cr. Cas. 266, 32 O.L.R. 89, applied.]

R. v. Gentile, 24 Can. Cr. Cas. 342, 8 W.W.R. 1081, 32 W.L.R. 217.

JURISDICTION AFTER COMMITTAL WHEN ACCUSED MOVED TO JAIL OUT OF DISTRICT FOR SAFE CUSTODY.

Where owing to the lack of a jail in the district in which a prisoner has been committed for trial there is no place where prisoners who are committed for safe keeping to await their trial can be confined and they are sent to a provincial jail outside of the district of the District Court Judge where the committal took place, it is to be assumed that such confinement is a confinement within such district so as to enable such District Court Judge to make an order for bail under Cr. Code, s. 698.

R. v. Greig, 23 Can. Cr. Cas. 352.

CAPITAL OFFENCE — MURDER CHARGE POSTPONED BY CROWN.

That the prisoner against whom a true bill had been found for murder had been ready for trial at the Assizes and that the trial had been postponed at the request of the Crown will not constitute sufficient ground for concurrently making an order to admit to bail; semble, the prisoner's recourse is to apply on the first day of the following Assize to be brought to trial, under the Habeas Corpus Act, 31 Car. II., c. 2, and in default that he be granted bail. [R. v. Keeler, 7 P.R. (Ont.), 117, and R. v. Mullady, 4 P.R. (Ont.), 314, followed; R. v. Chapman, 8 C. & P. 558, considered.]

R. v. Rae, 23 Can. Cr. Cas. 266, 32 O.L.R. 89.

(§ I—6) — CAPIAS — BOND TO SHERIFF — IRREGULARITY OF CAPIAS—DELAY.

A delay on the part of defendant in not applying to set aside a writ of capias and a bail bond given to the sheriff thereunder until two months after judgment by default had been entered against him and a fi. fa. issued thereon, constitutes such an unreasonable delay as would justify a court under N.B. Order 70, r. 2, of the Judicature Act, 1909, in refusing an application founded on the irregularity in failing to properly endorse the writ under N.B. Order 3, r. 7.

Gunns v. Dugay, 10 D.L.R. 416, 41 N.B. R. 402.

APPEAL FROM SUMMARY CONVICTION — CONTINUANCES.

The recognizance given on the release of the accused pending an appeal to an Inferior Court from a summary conviction will remain in force for the purposes of continuances ordered by a Superior Court in substitution for the erroneous quashing of the appeal by the Inferior Court to which by statute the appeal had to be taken. Ex parte Blues, 24 L.J.M.C. 138, specially referred to.]

R. v. Trottier, 14 D.L.R. 355, 22 Can. Cr. Cas. 102, 6 A.L.R. 451, 25 W.L.R. 663, 5 W.W.R. 263.

CERTIORARI—PETITION.

A petition in the name of the surety for the accused, to revoke a judgment forfeiting the recognizance is the proper proceeding to take to have the judgment revoked, and the petition may and should be accompanied by a certiorari if it is desired to have the sentence against the accused revoked.

The King v. Davis, 16 Que. P.R. 297.

(§ I—9)—SURETIES TO KEEP THE PEACE—BREACH OF CONDITION.

The certificate of the magistrate before whom a recognizance to keep the peace had been taken that the condition of such recognizance had been broken is conclusive evidence of breach and forfeiture in the Province of Quebec under Code, ss. 1113 and 1114.

R. v. Walker, 18 D.L.R. 541, 23 Can. Cr. Cas. 179.

(§ I—10) — ESTREAT — SURETIES FOR THE PEACE UNDER JUSTICE'S ORDER.

Where a person under recognizance to

keep the peace ordered by a justice under Code, s. 748 (2) on complaint of threats made, is afterwards guilty of a breach of the peace, though towards a person other than the complainant, the recognizance may be forfeited, and the same justice may give the certificate of default after written notice to the defendant and his sureties to shew cause, although the second conviction was before the Court of Sessions not presided over by the justice who ordered the recognizance.

R. v. Walker, 18 D.L.R. 541, 23 Can. Cr. Cas. 179.

ESTREAT — REQUÊTE CIVILE TO SET ASIDE FORFEITURE—CERTIORARI.

The surety of an accused person may petition by requête civile in the Province of Quebec to have set aside a judgment given upon an order for forfeiture of the recognizance, and his petition can and should be accompanied by a writ of certiorari if it is desired to shew that the order itself was irregular.

R. v. Davis, 24 Can. Cr. Cas. 382, 16 Que. P.R. 297.

DISCHARGE OF BAIL.

It is only in a very plain case that bail put into a writ of capias under the Arrest and Imprisonment for Debt Act, R.S.B.C. 1911, c. 12, should be discharged on the ground that the plaintiff cannot succeed upon his alleged cause of action.

Oliphant v. Alexander; Selkirk v. Alexander, 6 D.L.R. 261, 2 W.W.R. 908.

DEFAULT—FORFEITURE OF BAIL.

When an accused is bound over by recognizance for trial at the "next criminal sitting," that means the term of the court which will sit for the hearing of criminal causes, and not a sitting for which, by direction of the Crown authorities, neither grand nor petit jury had been summoned; so the forfeiture of a recognizance to appear for trial at the next criminal sitting is not authorized in respect of a session of the Court of King's Bench in Quebec without a grand or petit jury on default in obeying a notice to appear on the opening day fixed by order-in-counsel.

R. v. Tremblay, 27 Can. Cr. Cas. 46, 50 Que. S.C. 97.

(§ I—12)—RECOVERY BACK OF MONEY DEPOSITED AS BAIL.

Where, before the granting of an order by a higher court prohibiting a County Court hearing an appeal from a conviction by a police magistrate, which order carried $75 costs, such appeal was allowed by the County Court with costs of the same amount, upon a subsequent action being brought by the appellant to recover cash deposited as bail, a tender by the defendants to the plaintiff of the amount of the bail, less the costs of such prohibiting order, was refused, the court declining on the ground that a counterclaim had not been filed, nor a tender pleaded, nor any money paid into court, to consider whether the defendants were entitled to deduct the amount of such costs from the bail money. Cash deposited as bail with the attorney for the prosecution upon an appeal to a County Court from a conviction by a police magistrate may, upon an allowance of the appeal, be recovered by the appellant. In an action brought after the allowance by a County Court of an appeal from a conviction by a police magistrate, to recover cash deposited as bail, an allegation in the plaint to the effect that such money was deposited with the defendants as security for the appearance of the appellant, while in another paragraph the money was referred to as having been given as security for costs, does not embarrass or confuse defendants as to what money was claimed by the plaintiff, where the bail money was paid to one of the defendants, since it was received by him as bail only and for no other purpose, notwithstanding that in the order allowing the appeal and requiring the money to be returned, it was referred to as having been given as security for costs.

Robinson v. District of Saanich & Aikman, 7 D.L.R. 499, 20 W.L.R. 235, 20 Can. Cr. Cas. 241.

(§ I—16)—ORDER ON HABEAS CORPUS—PRIOR TO COMMITTAL FOR TRIAL.

Although s. 698 of the Criminal Code does not confer jurisdiction upon a judge of a Superior Court to grant bail in respect of an indictable offence until the accused has been committed for trial, a defendant has his remedy by way of habeas corpus upon the return of which the court may order bail pending a remand by a magistrate, and this remedy is applicable as well where the charge upon which the remand was made is a subject of summary conviction and not indictable. [R. v. Hall, 12 Can. Cr. Cas. 492; R. v. Cox, 16 O. R. 228, referred to.]

R. v. Vincent; R. v. Fair, 14 D.L.R. 221, 22 Can. Cr. Cas. 98, 5 O.W.N. 141, 25 O.W. R. 104.

SEDITIOUS CONSPIRACY — FORMER MISDEMEANOUR—CR. CODE, SS. 14, 134, 698.

Although seditious conspiracy (Cr. Code, s. 134) was a misdemeanour and not a felony before the abolition of the distinction between felony and misdemeanour (Cr. Code, s. 14) there is no absolute right after committal for trial to bail either on habeas corpus, or on a summary application. In either case the question of bail is in the discretion of the court under Cr. Code, s. 698.

R. v. Russell, 50 D.L.R. 629, 32 Can. Cr. Cas. 66.

ORDER IN HABEAS CORPUS.

Where it appears from the record on a habeas corpus application that the applicant is held in custody on a committal for trial and that the offence is one for which he should be admitted to bail, but the question of the validity of the commitment cannot be decided for failure of the applicant

to produce a copy of the warrant, the court may, nevertheless, make an order for bail. Ex parte Aubin, 19 Can. Cr. Cas. 94, 13 Que. P.R. 27.

HABEAS CORPUS — BAIL ON CONCURRENT CHARGES.

R. v. Drake (N.S.), 29 Can. Cr. Cas. 174.

HABEAS CORPUS—BAIL—CONDITION FOR SURRENDER IN ANOTHER PROVINCE—AUXILIARY JURISDICTION OF PROVINCIAL COURTS.

On an application for a writ of habeas corpus, the Supreme Court of Alberta has jurisdiction to admit to bail one arrested on a criminal charge laid in another province, though the arrest be legal, and to make the condition of the recognizance that the prisoner shall surrender himself to the proper officer in the province in which the charge is pending against him, the Superior Courts of the several provinces being, in criminal matters, auxiliary to each other.

R. v. Hughes, 28 W.L.R. 559, 6 W.W.R. 1120.

(§ I—17)—CERTIFICATE OF FORFEITURE—CONCLUSIVENESS.

A certificate of forfeiture of recognizance for appearance taken before a justice of the peace or police magistrate in Quebec is "conclusive evidence" under Cr. Code, s. 1114, and R.S. Que. art. 3395, only for the purposes of the entry of the ex parte judgment authorized by Cr. Code, s. 1115; after such entry is made, the certificate of the breach of recognizance as well as the judgment thereon may be attached by an "opposition to judgment" under the Quebec Code of Civil Procedure. [Cr. Code, ss. 1097, 1114 and 1117, and R.S. Que. art. 3397, considered.]

R. v. Edwards, 19 D.L.R. 207, 23 Can. Cr. Cas. 296.

ESTREAT OF RECOGNIZANCE—SETTING ASIDE.

Where an order has been made estreating bail and for a writ of fi. fa. and capias, the court before which the writ is returned for further disposition of the matter may, with the concurrence of the judge who made the order, set aside the same and the writ issued thereunder, if it appears that the bail was taken by justices in a case in which they had no jurisdiction to bail and that the estreat order was in consequence made improvidently.

Re Hopfe's Bail, 10 D.L.R. 216, 22 Can. Cr. Cas. 116, 5 A.L.R. 398, 23 W.L.R. 751, 4 W.W.R. 1.

ESTREAT CHARGE AT—PRELIMINARY HEARING—CHARGE BY GRAND JURY—MOTION TO SET ASIDE.

A bailor remains responsible for a prisoner being brought into court, even though the charge on which the accused was committed for trial was later changed to a more serious charge by the grand jury. The bail may be estreated, if the prisoner is not produced.

The King v. Mandacos, 50 D.L.R. 427.

ESTREAT—EX PARTE JUDGMENT—ATTACK—QUEBEC PRACTICE.

The ex parte entry of judgment by the prothonotary of the Superior Court in Quebec on a certificate of forfeiture of recognizance whether from the court of King's Bench, criminal side, or from a Magistrate's Court, is subject to attack in the Superior Court by any one of the modes of procedure authorized by its practice in regard to ex parte or default judgments. In the Province of Quebec (differing from the practice in other provinces), two modes of procedure are available for the collection of recognizances forfeited in the Criminal Courts: one is by means of the ex parte judgment resulting upon the entry in the records of the Superior Court of the Province of Quebec of the recognizance and certificate of default, and the other by direct action at the suit of the Attorney-General of Canada, or of the Attorney-General of Quebec, or of other officer authorized to sue for the Crown. [Cr. Code, ss. 1114, 1115, and 1117, and R.S. Que. arts. 3396, 3398, 3399, considered; Re Hopfe's Bail, 22 Can. Cr. Cas. 116, 10 D.L.R. 216, referred to.]

R. v. Edwards, 19 D.L.R. 207, 23 Can. Cr. Cas. 296.

ESTREAT — SUFFICIENCY OF AFFIDAVIT — ACKNOWLEDGMENT — NOTICE TO SURETIES—ORDER OF JUDGE.

The King v. Zarkas, Antonio & Kortes, 39 D.L.R. 776, 11 S.L.R. 51, 29 Can. Cr. Cas. 183, [1918] 1 W.W.R. 323.

ENFORCEMENT AND ESTREAT OF RECOGNIZANCE — CALLING THE BAIL — CERTIFICATE OF DEFAULT.

Where bail was given for the accused's appearance on a fixed date and he defaulted, failure to call the bondsmen three times within and three times without the courtroom, will not invalidate a certificate of default and the subsequent estreat of the recognizance, where it was shewn that the bondsmen were not in court on the date fixed for appearance.

R. v. Sullivan, 18 D.L.R. 535, 29 W.L.R. 115, 23 Can. Cr. Cas. 174.

FILING AFFIDAVIT TO HOLD TO BAIL—ORDER 69, R. 30—DISCRETION OF JUDGE.

Gunns v. Dugay, 41 N.B.R. 401.

(§ I—20)—BINDING OVER TO KEEP THE PEACE—THREATS AND PROVOCATION THEREOF.

Binding over a person to keep the peace because of threats made against the complainant, and without any assault upon or injury to the latter having occurred, is a procedure which is not in the nature of a punishment, but is dependent only upon proof of the complainant's fear of bodily harm based upon some reasonable ground; and it is not an answer to shew that there was provocation for the threats. [See R. v. McDonald, 2 Can. Cr. Cas. 64; Re John Doe, 3 Can. Cr. Cas. 370; R. v. Power, 6 Can. Cr. Cas. 378; Re Sarah Smith's Bail, 6 Can. Cr.

Cas. 416; R. v. Mitchell, 13 Can. Cr. Cas. 344.]

Pouliot v. Descroiselles, 22 Can. Cr. Cas. 243.

DISCHARGE—TAKING ACCUSED IN CHARGE AFTER CONVICTION — CHANGE OF SENTENCE.

Where, after verdict of "guilty," the accused is taken into custody thereunder, his bail is discharged; so where on a plea of guilty by the accused appearing for summary trial, imprisonment is first adjudged, but after the accused has been taken in charge by the deputy sheriff, the magistrate has the accused recalled and imposes instead a fine with imprisonment in default, the bail is not responsible for the fine where the accused was not held in custody until paid, under a recognizance in terms to "appear and answer the charge and to be further on treated according to law."

R. v. Edwards, 19 D.L.R. 207, 23 Can. Cr. Cas. 296.

FINDING—SURETIES TO KEEP THE PEACE—THREATS — ENFORCEMENT OF RECOGNIZANCE—PARTIES TO PROCEEDINGS.

Proceedings for the forfeiture and estreat of a recognizance to keep the peace which had been required on proof of threats under subs. (2) of Code, s. 748 may in the Province of Quebec, be taken at the instance of another individual than the first complaining party or the party threatened, as the case may be; and this without the intervention of any public authority or Crown officer. [R. v. Young, 4 Can. Cr. Cas. 580, distinguished.]

R. v. Walker, 18 D.L.R. 541, 23 Can. Cr. Cas. 179.

(§ I—21)—CALLING THE BAIL UPON THE RECOGNIZANCE.

A previous notice to the bail is essential before a certificate of forfeiture can legally be issued for default of the accused to appear, where the latter and his bail were not called upon their recognizance on the day when he was bound to appear, and it is sought to estreat the recognizance at a later date. [R. v. Croteau, 9 L.C.R. 67, and Atty.-Genl. v. Beaulieu, 3 L.C. Jur. 117, referred to.]

R. v. Edwards, 19 D.L.R. 207, 23 Can. Cr. Cas. 296.

(§ I—25)—CRIMINAL LAW—DIRECTION FOR BAIL IN LIEU OF COMMITTAL FOR TRIAL—RECORD.

Where an order is made on a preliminary enquiry that the accused give bail under Code, s. 696 to appear for trial, but no committal for trial is made as the magistrate does not consider the case sufficiently strong to order committal, the recognizance of bail acknowledged before the magistrate or two justices and duly signed, is the only necessary record to go before the trial court with the depositions and information; and a speedy trial without jury on defendant's subsequent election of same is not annulled by the lack of a formal order signed by the magistrate to further evidence the direction to give such bail.

R. v. Daigle, 18 D.L.R. 56, 23 Can. Cr. Cas. 92.

(§ I—30)—NOTICE TO SURETIES—DEFAULT OF APPEARANCE—CRIMINAL LAW.

No preliminary notice to the sureties is required in the Yukon Territory, under the English Crown Rules or otherwise on estreating bail given for appearance before justices in the event of default of appearance by the accused. [R. v. Creelman, 25 N.S.R. 404; Re Barrett's Bail, 7 Can. Cr. Cas. 1, 36 N.S.R. 135, and Re Burns' Bail, 17 Can. Cr. Cas. 292, considered.]

R. v. Sullivan, 18 D.L.R. 535, 23 Can. Cr. Cas. 174, 29 W.L.R. 115.

(§ I—35)—ADJOURNMENT OF PRELIMINARY ENQUIRY BY CONSENT FOR MORE THAN EIGHT DAYS—WAIVER.

The sureties to a recognizance of bail expressly given for an adjournment of a preliminary enquiry by consent, for longer than the eight days provided by Code, s. 679, are not released for nonconformity with the statutory direction that adjournments shall not be for more than eight days, that being a matter of procedure only which it was competent for the parties to waive, if indeed the statutory direction applies at all where bail is given. [Re Burns' Bail, 17 Can. Cr. Cas. 292, and R. v. Hazen, 20 A.R. (Ont.), 663, applied; Dick v. The King, 19 Can. Cr. Cas. 44, considered.]

R. v. Sullivan, 18 D.L.R. 535, 29 W.L.R. 115, 23 Can. Cr. Cas. 174.

(§ I—40)—DISCRETION OF COURT—MISDEMEANOUR—FELONY—DOMINION STATS. 1869 — SUBSEQUENT RE-ENACTMENT — LAW OF MANITOBA.

By Dominion Statute 1869, 33 Viet. c. 30, s. 53, the question of granting or withholding bail was made discretionary in cases of misdemeanour as well as in cases of felony and although Manitoba had not then been taken into the Dominion the subsequent re-enactment of this section in the Code made it also the law in Manitoba.

The King v. Russell, 48 D.L.R. 603, [1919] 3 W.W.R. 306.

BAIL BY ACCUSED—RECOGNIZANCE TO APPEAR—WARRANT OF ARREST AS FOR DEFAULT.

The King v. Keizer (No. 2), 18 Can. Cr. Cas. 39 (N.S.).

ESTREAT—RECOGNIZANCE FOR DEFENDANT'S APPEARANCE—NEXT COURT OF COMPETENT JURISDICTION.

The King v. Bailly, 18 Can. Cr. Cas. 298 (N.S.).

BAIL—CHARGE OF MURDER—EVIDENCE SUFFICIENT FOR COMMITMENT FOR TRIAL—CLAIM OF SELF-DEFENCE.

The King v. Monvoisin, 18 Can. Cr. Cas. 122 (Man.).

RECOGNIZANCE TO APPEAR IN COURT ON ADJOURNED ENQUIRY—DEFAULT—NOTICE TO PERFORM CONDITION—ESTREAT.

Re Burns' Bail, 17 Can. Cr. Cas. 292.

INTEREST ON MONEYS DEPOSITED IN LIEU OF BAIL—RIGHT OF SHERIFF AS DEPOSITARY TO RETAIN SUCH INTEREST.

McKane v. O'Brien, 10 E.L.R. 19 (N.B.).

BAILIFFS.

See Sheriff; Levy and Seizure.

(§ I—1)—BAILIFFS' SOCIETY (QUE.).

The Bailiffs' Society of the District of Montreal is responsible for the acts of its members in the ordinary exercise of their functions. It must reimburse, to the amount of the judgment obtained, the value of goods regularly seized by one of its members, and entrusted to the care of a guardian, if said goods are not forthcoming on the day of sale.

Kaster v. Bailiffs' Society of the District of Montreal, 14 Que. P.R. 184.

BAILIFFS' SOCIETY (QUE.).

The Bailiffs' Society of the District of Montreal cannot, by simple resolution, deprive a member guilty of certain irregularities at a time already distant of the right to exercise his functions, especially if his contributions for the current year have been accepted without conditions; the society should, in such case, prefer a formal charge against the offending member.

Bastien v. Bailiffs' Society of the District of Montreal, 14 Que. P.R. 146.

BAILMENT.

I. IN GENERAL.
II. RIGHTS OF BAILEE.
III. DUTY AND LIABILITY OF BAILEE.

See Pledge.

Annotation.

Recovery by bailee against wrongdoer for loss of thing bailed: 1 D.L.R. 110.

I. In general.

(§ I—3)—GRATUITOUS UNDERTAKING—CUSTODY OF MONEY.

Where in bailment the principal objects sought in the contract are service and labour and the custody of the chattel in bailment is merely incidental, the ordinary rule that in cases of gratuitous bailment the bailee is only liable for acts of gross negligence, does not apply; the element of personal trust dominates that of mere custody, and the custodian of money will be liable as for breach of trust in case of loss due to the negligence or misconduct of another person to whom he delegated the custody of the money without the owner's consent where a right of delegation is inconsistent with the gratuitous service which the bailee undertook.

Wills v. Browne, 1 D.L.R. 388, 3 O.W.N. 580, 20 O.W.R. 880.

LIABILITY OF EXHIBITION ASSOCIATION—DEATH OF DOGS EXHIBITED, FROM INFECTIOUS DISEASE—ABSENCE OF NEGLIGENCE.

An exhibition association that solicited the exhibition of the plaintiff's dogs, is not liable for their subsequent death from distemper, which developed upon their being returned to him, where it did not appear that other dogs there exhibited had such disease, and that there was ample opportunity for the plaintiff's dogs to have contracted it elsewhere, and no negligence was shewn on the part of the defendant, either in inspecting dogs admitted to the exposition, or in caring for the plaintiff's dogs while there. [Coltart v. Winnipeg Industrial Exhibition, 17 W.L.R. 372, affirmed; Connacher v. Toronto, 21 C.L.T. 172, distinguished.]

Coltart v. Winnipeg Industrial Exhibition, 4 D.L.R. 108, 21 W.L.R. 471, 2 W.W.R. 515.

DAMAGES RECOVERED BY BAILEE FOR LOSS OF CHATTEL—ACCOUNTING TO BAILOR.

Where a bailee in possession recovers from a wrongdoer the damage done to the subject of the bailment, the moneys received in excess of the monetary interest of the bailee in the chattel are deemed to have been received to the use of the bailor and the bailee must account to the bailor in respect thereof. [See Beven on Negligence, 3rd ed. 1908, p. 737.]

Compton v. Allward, 1 D.L.R. 107, 48 C.L.J. 109, 22 Man. L.R. 92, 19 W.L.R. 783, 1 W.W.R. 452.

DESTRUCTION OF GOODS WHILE IN BAILEE'S CUSTODY — PRESUMPTION — ONUS TO DISAPPROVE NEGLIGENCE.

Where goods are taken by any one as a bailee and are lost or destroyed when in his custody, he will be liable in damages, unless he shews circumstances negativing the presumption of negligence on his part which arises from such circumstances. [Pratt v. Waddington, 23 O.L.R. 178, and Polson v. Laurie, 3 O.W.N. 213, approved.]

Carlisle v. G.T.R. Co., 1 D.L.R. 130, 25 O.L.R. 372, 20 O.W.R. 860.

WAREHOUSED GOODS—RESPONSIBILITY.

A public warehouseman is only required to exercise the reasonable care of a prudent man in the storage of merchandise entrusted to him; he is not responsible for damage resulting from the precarious nature of the goods stored and does not occupy the relation of insurer with relation thereto. [Searle v. Laverick, L.R. 9 Q.B. 122, specially referred to.]

Roy v. Adamson, 3 D.L.R. 139.

(§ I—7)—MONEY PLACED FOR SAFE KEEPING—RIGHT TO FOLLOW FUNDS—DEPOSIT IN BANK.

Money placed with one for safe keeping creates a bailment not a debt, and may be followed up by the bailor in the bank where

the money had been deposited in the bailee's name.

Beamish v. Lawlor, 23 D.L.R. 141, 43 N.B.R. 426.

CAR LEFT AT SHOP FOR REPAIRS—LIEN FOR VALUE OF WORK DONE—DELIVERY OF CAR TO OWNER WITHOUT PAYMENT—RETURN OF CAR TO SHOP FOR ADDITIONAL REPAIR—REPAIR EXECUTED AND PAID FOR—ASSERTION OF LIEN AND RIGHT TO DETAIN CAR FOR BALANCE DUE FOR FIRST REPAIRS — ABSENCE OF AGREEMENT — LOSS OF LIEN—COUNTERCLAIM FOR STORAGE CHARGES DURING PERIOD OF DETENTION — CONVERSION — DETINUE — JUDGMENT FOR RETURN OF CAR—DAMAGES — COUNTERCLAIM FOR BALANCE DUE FOR FIRST REPAIRS — SET-OFF — COSTS.

A lien implies the right of continuing possession, or the continuing right of possession. [Forth v. Simpson, 13 Q.B. 680, followed.] The plaintiff left his car at the defendant's repair shop to be repaired, and was afterwards allowed to take it out without paying for the repairs which had been actually made. While he had the car out, the plaintiff paid the defendant a part of the charge for the repairs; afterwards he returned the car to the shop for a minor repair, which was made and for which he paid; but the defendant then refused to allow the plaintiff to take the car out until the balance of the charge for the first repairs was paid:—Held, that the defendant's lien did not reattach upon the car being brought back for the minor repair, at all events in the absence of an agreement that the lien should continue and that the plaintiff should be the agent of the defendant as to possession; no such agreement was proved; and the defendant's lien was lost. Held, also, that the defendant, unlawfully detaining the car, could not recover storage charges on his counterclaim against the plaintiff. [Somes v. British Empire Shipping Co., 30 L.J.Q.B. 229, 8 H.L.C. 338, followed.] Held, also, that there had been no wrongful appropriation of the car by the defendant to his own use, or wrongful deprivation of possession permanently, or for any very substantial time, when the plaintiff began this action for conversion of the car: the plaintiff's claim was more properly in detinue and he should have judgment for delivery to him of the car and damages assessed at $20, with costs fixed at $75. The defendant was held entitled to judgment upon his counterclaim for the balance of the amount of the charge for the first repairs, $67.75, without costs. It was ordered that there should be a set-off and that the balance should be paid to the plaintiff.

Katzman v. Mannie, 46 O.L.R. 121.

(§ I—8)—WAREHOUSEMAN — STIPULATION TO RETAIN GOODS—LIEN AT COMMON LAW—INCONSISTENCY.

If by the agreement of bailment the party owning the goods is entitled to have them immediately and the payment in respect of their storage is to take place at a future time, as in the case of an agreement for monthly settlements with the warehouseman, such is inconsistent with the latter's right to retain the goods until payment, and negatives his claim to a lien at common law. [Fisher v. Smith, 4 App. Cas. 1; Crawshay v. Homfray, 4 B. & Ald. 50, applied; Canada Steel & Wire Co. v. Ferguson, 19 D.L.R. 581, reversed.]

Canada Steel & Wire Co. v. Ferguson, 21 D.L.R. 771, 25 Man. L.R. 320, 8 W.W.R. 416.

STORAGE OF GOODS — LIEN FOR STORAGE CHARGES AS AGAINST TRUE OWNER—PROPERTY IN GOODS REMAINING IN VENDOR—STORAGE BY VENDEE.

Smith v. Campbell, 16 B.C.R. 505, 17 W.L.R. 493.

II. Rights of bailee.

(§ II—10)—GRATUITOUS BAILMENT—COMPENSATION—EXPENSES.

A gratuitous bailee entrusted with money for the purpose of safe keeping is entitled to traveling expenses and costs of exchange incurred in the performance of the trust, but cannot recover any commissions or charges for services performed therein.

Beamish v. Lawlor, 23 D.L.R. 141, 43 N.B.R. 426.

RIGHTS OF BAILEE AGAINST WRONGDOER FOR CONVERSION.

As against a wrongdoer, possession is title and a bailee of goods may recover the full value thereof if they are wrongfully taken out of his possession; the amount recovered must be accounted for to the bailor who likewise may sue instead of the bailee, the first recovery of damages operating in full satisfaction. [The Winkfield, [1902] P. 42, approved; Glenwood Lumber Co. v. Phillips, [1904] A.C. 405, referred to.]

Eastern Construction Co. v. National Trust Co.; National Trust Co. v. Miller (No. 2), 15 D.L.R. 755, [1914] A.C. 197 110 L.T. 321, 25 O.W.R. 756.

RIGHTS OF BAILEE—INJURY TO PROPERTY BY THIRD PERSON.

A bailee may recover against one who wrongfully injures the bailed property, regardless of whether the bailee is bound to make good to the bailor any damage to the property; and, hence, the bailee of a scow injured by another's act in negligently permitting another scow to come in contact with it, is entitled to recover the whole damage as if he was the actual owner, subject to his accounting to his bailor. ["The Winkfield," [1902] P. 42; Claridge v. South Staffordshire Tramway Co., [1892] 1 Q.B. 422, and Irving v. Hagerman, 22 U.C.R. 545, referred to.]

Cotton Co. v. Coast Quarries & Patterson, 11 D.L.R. 219, 24 W.L.R. 288, 4 W.W.R. 142, 515.

RIGHTS OF BAILEE.

As against a wrongdoer the possession of

a bailee is title, and the bailee is entitled to recover for the whole loss or deterioration of the subject of the bailment, ex. gr., a horse and buggy hired from a livery stable keeper, and the wrongdoer having once paid full damages to the bailee has an answer to any action by the bailor against him. [Re The Winkfield, [1902] P. 42; Glenwood Lumber Co. v. Phillips, [1904] A.C. 405, and Turner v. Snider, 16 Man. L. R. 81, followed. And see Beven on Negligence, 3rd ed. 1908, pages 736, 737.]

Compton v. Allward, 1 D.L.R. 107, 48 C.L.J. 109, 22 Man. L.R. 92, 19 W.L.R. 783, 1 W.W.R. 452.

III. Duty and liability of bailee.

(§ III—17)—Liability of bailee—Loss of goods by theft.

A person holding grain under a thresher's lien is liable merely as a bailee for the safe-keeping thereof; and is not answerable for grain stolen from his custody in the absence of negligence on his part. [Finnicane v. Small, 1 Esp. 315, followed.]

Hill v. Stait, 14 D.L.R. 158, 23 Man. L.R. 832, 25 W.L.R. 475, 5 W.W.R. 225.

Money for safe-keeping—Theft—Liability of gratuitous bailee.

Seeh v. Rodnicke, 25 D.L.R. 757, 25 Man. L.R. 685, 32 W.L.R. 505, 9 W.W.R. 244.

Loss or injury to property generally.

The effect of an arrangement between the parties being to constitute a gratuitous bailment which subsequently became a bailment for hire, the bailee is liable to the plaintiff in damages for any injuries resulting from his negligence. When it is shewn by the bailee that his negligence did not produce the damage complained of he had discharged the onus resting upon him, and is not required to shew the cause of such damage.

Wright v. Smith, 4 S.L.R. 253.

Injury to hired horse—Negligence of hirer.

The jury having found that it was negligence for the hirer of a horse to allow it to stand harnessed but unbridled in an open place near the shafts of the waggon while he went to the waggon to get the bridle, in consequence of which the horse escaped from his control into a ploughed field, where it lay down and rolled, and in getting up cut itself in the foreleg, the court will not disturb the verdict.

Gray v. Steeves, 42 N.B.R. 676.

Destruction of property by bailee — Damages.

Green Fuel Economiser Co. v. Toronto, 8 O.W.N. 541.

Kennel club—Liability of officers.

Officers of a kennel club who hold an exhibition are bailees of the dogs placed in their charge, and must use reasonable care and diligence in looking after them. [See Coltart v. Winnipeg Industrial Exhibition, 4 D.L.R. 108.]

Andrew v. Griffin, 39 D.L.R. 202, 12 A.L.R. 516, [1918] 1 W.W.R. 532, affirming [1918] 1 W.W.R. 274.

Destruction of goods by strikers — Pleading.

Where coats were entrusted to a workman to make buttonholes in them, and strikers entered his shop, and, without his knowledge, poured corrosive acids on them, the damage so caused is due to force majeure. The workman has only to allege and prove such cause, and if the owner of the coats could set up against him a fault which preceded or accompanied it, it was his duty to so allege and prove it. The workman cannot be found to be in fault for not having foreseen that the strikers, after having once entered his shop and made threats to him, would return and damage the coats left with him.

Kaswan v. Solin, 24 Rev. de Jur. 226.

Lawyer—Samples—Gratuitous service.

A lawyer, gratuitously agreeing to receive from a client samples of minerals to turn them over to a mining engineer, does not constitute himself their depositary. Once his task is over, he is not bound to see to their conservation nor to their being returned to the client.

West Canadian Coal Mining Syndicate v. Lovett, 53 Que. S.C. 472.

Bailment — Repair of automobile — Injury caused by servant of repair company.

McCabe v. Allan, 39 Que. S.C. 29.

Liability of bailee—Injury to horse hired.

Beatty v. Hodson, 7 D.L.R. 821, 19 W.L.R. 823.

(§ III—18)—Degree of care—Open safe—Destruction by fire.

It is not negligence on the part of a bailee, whether his relationship is that for a reward or that of a paid agent entrusted with the moneys of his principal, to leave unlocked the door of a safe where the money was kept while he was using a book which was to be restored to the safe, where after the fire broke out he made such efforts to rescue the money as a reasonable man might be expected to make.

Northern Elevators v. Western Jobbers, 24 D.L.R. 605, 25 Man. L.R. 605, 32 W.L.R. 630, 9 W.W.R. 343, affirming 20 D.L.R. 889, 29 W.L.R. 497, 7 W.W.R. 194.

Delivery of dress for dyeing—Loss by fire—Degree of care.

When a dress is delivered to a dyer and cleaner establishment to be dyed and cleaned, and the same is destroyed by a fire, the contract is one of hire of work, and the proprietor of the establishment is only obliged to prove that he had taken the care of a prudent administrator, and is not obliged to prove that the dress was destroyed by inevitable accident or force ma-

jeure to throw the loss on the owner of it, unless it is proved that the proprietor of dyeing and cleaning work has been guilty of fault or negligence.

Moore v. Allen, 47 Que. S.C. 417.

(§ III—19)—Restaurant keeper—Article deposited temporarily as an incident to his business—Loss—Liability for—Burden of proof.

A restaurant keeper, in whose custody clothing or other articles are deposited temporarily as an incident to his general business is liable as an ordinary bailee for hire for any loss resulting from ordinary negligence. The burden is on the plaintiff to establish negligence, but where the loss is established, a sufficient prima facie case against the bailee is raised to put him on his defence. [Ultzen v. Nicols, [1894] 1 Q.B. 92; Jenkyns v. Southampton Packet Co., 35 T.L.R. 264; Phipps v. New Claridges Hotel, 22 T.L.R. 49; Bunnell v. Stern, 122 N. Y. 539, followed.]

Murphy v. Hart, 46 D.L.R. 36.

(§ III—22)—Garments for repair—Loss by fire while in care of third person.

A merchant tailor who receives a garment for repair, and who, without being authorized by the owner, sends it to a cleaning company to be cleaned, is liable for the loss of this garment in a fire which took place in the premises of the said company.

Gadbois v. Lauzon, 47 Que. S.C. 276.

(§ III—24)—Wrongful sale of goods.

An auctioneer to whom goods in bulk are entrusted by a carrier to sell for unpaid charges against them impliedly contracts with the warehousemen employing him, that he will exercise reasonable care in selling the goods. [Gagné v. Rainy River Lumber Co., 20 O.L.R. 433, specially referred to.]

Swale v. C.P.R. Co. (No. 2), 2 D.L.R. 84, 25 O.L.R. 492, 21 O.W.R. 225.

Breach of duty by bailee or agent—Manager of bank—Authority or ostensible authority—Liability of bank—Sale of business—Keys of business premises to be delivered to purchaser upon receipt of cheque—Keys handed by agent to landlord of premises—Purchaser obtaining possession without making payment—Jus tertii—Proof of title of third party—Evidence—Onus—Damages—Effective cause of ultimate damage—Costs.

The plaintiff sold his business and agreed to assign to the purchasers the lease of the premises upon which the business was carried on. The plaintiff sent the keys of those premises to the defendant C., manager of a branch of the defendant bank, in a letter, in which he requested C. to hand the keys to W., one of the purchasers, upon receiving from W. a cheque for a named sum. C., however, without getting the cheque, gave up the keys to the landlord of the premises, who handed them to W. The purchasers then got possession, and refused to pay the plaintiff the full amount which they had agreed to pay and which C. was authorized to accept:—Held, that C. had failed to carry out the terms of his instructions, and was liable to the plaintiff, unless he (C.) was entitled to set up the jus tertii; the onus of proof of the title of the third party (the landlord) was upon C., and, upon the evidence, he had not discharged this onus. Held, also, that the keys were sent to C. in his capacity as manager; and the transaction was within the scope of his authority as manager: the bank was the plaintiff's agent for the collection and remission of the money; and the position was in no way different from what it would have been if a bill of exchange had been attached to the keys. But held, that the onus of proving damage was on the plaintiff, and he had not satisfied it; the wrongful act of the defendants was not the effective cause of the ultimate damage, for W. could have got possession, without the keys, by breaking into the premises; and there was a question whether he was not entitled to the keys in any event by virtue of a new contract with the landlord. [Hadley v. Baxendale, 9 Ex. 341, applied.] An action brought against the bank and C. was dismissed without costs.

Garber v. Union Bank of Canada, 46 O.L.R. 129.

(§ III—26)—Changing place of storage.

When the place of storage is changed, the warehouseman must shew that the new premises are equally safe and suitable; if he does so then the mere change of premises will not create any liability for goods becoming damaged whilst in his keeping. [Lilley v. Doubleday, 7 Q.B.D. 510, approved.]

Roy v. Adamson, 3 D.L.R. 139.

Gratuitous loan of horses—Conversion into bailment for hire—User for unauthorized purposes.

Wright v. Smith, 16 W.L.R. 709 (Sask.).

Agreement to take delivery of goods—Privilege of bailee to purchase.

Western Stoneware Co. v. Ozo Co., 39 Que. S.C. 251.

Loan of animal—Transfer by bailee to another—Cause of death—Treatment of animal.

Pratt v. Waddington, 23 O.L.R. 178, 18 O.W.R. 725.

Bailee—Custody of possible purchaser.

Gravel v. Limoges, 39 Que. S.C. 17.

Care of horse left on trial—Negligence.

Capellini v. Belanger, 18 O.W.R. 93.

Use of hired horse — Loss of thing leased—Presumption of fault.

Huard v. Feiczewitz, 40 Que. S.C. 385.

AUTHORITY OF HOTEL CLERK TO TAKE CHARGE OF LUGGAGE OF DEPARTING GUEST — LIABILITY OF OWNERS AS BAILEES—DUTY OF GRATUITOUS BAILEES.

Sutherland v. Bell & Schiesel, 18 W.L.R. 521 (Alta.).

BAKERS.

See also Municipal Corporations.

(§ 1—5)—HEALTH REGULATIONS—WRAPPING BREAD FOR DELIVERY.

A municipal by-law compelling the delivery of bread by bakers and shopkeepers in enclosed containers or wrappers is not unreasonable so as to invalidate the same by reason of the fact that compliance with the by-law involves additional expense to the sellers.

Re Shelley, 10 D.L.R. 666, 24 W.L.R. 285, 4 W.W.R. 741.

BALLOTS.

See Elections.

BANKRUPTCY.

See Assignment for Creditors.

Winding-up companies, see Companies; Banks.

Assets of foreign bankrupt, powers of foreign receiver, see Conflict of Laws, 1 F—20.

NOTE:—There has heretofore been no Bankruptcy law in Canada. A Bankruptcy Act has, however, now been passed, which will come into force in July, 1920, after which classifications will be made under this heading.

FRAUDULENT CONCEALMENT OF ASSETS—EXTRADITION FOR BANKRUPTCY FRAUDS.

Extradition proceedings against the bankrupt for concealment of property in fraud of a bankruptcy trustee are not defeated by the fact that the concealment took place two months prior to the trustee's appointment, as the failure to disclose the prior concealment is in itself a concealment at the later date when the trusteeship became operative.

Evidence of the concealment by the accused of certain other sums of money a few days before the concealment of a larger sum in respect of which the charge was laid that he had concealed part of his property with intent to defraud his creditors, is admissible as evidence of the intent to defraud and of guilty knowledge. [R. v. Shellaker, [1914] 1 K.B. 414; R. v. Ball, [1911] A.C. 47; R. v. Ollis, [1900] 2 K.B. 758, applied.]

Re Goodman, 28 D.L.R. 197, 26 Can. Cr. Cas. 84, 26 Man. L.R. 537, 34 W.L.R. 531, 10 W.W.R. 781. [Affirmed in 29 D.L.R. 725, 26 Can. Cr. Cas. 254, 34 W.L.R. 1091, 26 Man. L.R. 537, 10 W.W.R. 1178.]

FRAUDULENT CONCEALMENT OF ASSETS.

The essence of the offence of fraudulent concealment of assets by a bankrupt under the law of the United States is the continuance of the concealment after adjudication of bankruptcy and the appointment of a trustee, whose title relates back to the date of the adjudication, and extradition will not be refused merely on the ground that the act of concealment is alleged to have taken place before the date of the adjudication.

United States v. Webber (No. 1), 5 D.L.R. 863, 20 Can. Cr. Cas. 1, 11 E.L.R. 379.

EXTRADITION—DEFRAUDING CREDITORS—SECTION 29B OF UNITED STATES BANKRUPTCY ACT — NONEXISTENCE OF ANY GENERAL BANKRUPTCY ACT IN CANADA.

The King v. Stone (No. 2), 17 Can. Cr. Cas. 377 (Que.).

BANKS.

I. RIGHT TO DO BUSINESS; POWERS.
II. STOCKHOLDERS.
III. OFFICERS AND AGENTS.
  A. Qualification; election.
  B. Authority; ratification.
  C. Liability.
IV. BANKING.
  A. Deposits.
  B. Collections.
  C. Other transactions; discounts, etc.
  D. Clearing-house business.
V. INSOLVENCY.
VI. SAVINGS BANKS.
VII. CRIMES.
VIII. SECURITY TO BANKS.
  A. What banks may lend on.
  B. What banks may not lend on.
  C. Warehouse receipts, bills of lading or securities.
  D. Penalties.

See also Bills and Notes: Cheques.

Rate of Interest, see Interest.

Procedure under Winding-up Act, see Companies, VI.

Annotations.

Banking; deposits; particular purpose; failure of; application of deposit: 9 D.L.R. 346.

Effect of war on enemy banks: 23 D.L.R. 375, 379.

How affected by moratorium: 22 D.L.R. 865.

Rate of interest that may be charged by bank: 42 D.L.R. 134.

Written promises under s. 90 of the Bank Act: 46 D.L.R. 311.

I. Right to do business; powers.

See Constitutional Law.

(§ I—1)—PURCHASE OF BANKING BUSINESS BY BANK—ITS RIGHT TO TAKE CHATTEL MORTGAGE—BANK ACT.

Royal Bank of Canada v. Ball, 19 D.L.R. 875, 20 B.C.R. 242, 7 W.W.R. 174.

(§ I—2)—ENGAGING IN TRADE—BANK ACT (CAN.)—VOTING POWER ON COMPANY SHARES HELD AS COLLATERAL.

The two essential rights of a shareholder in a company embrace (a) the profits, and

(b) the voting power, and the inhibition of subs. 2, s. 76, of the Bank Act, R.S.C. 1906, c. 29 (the gist of whose intent is merely that a bank shall not create an alias carrying on business for the bank with its money and giving it the profits), cannot ordinarily be invoked against a bank which did not have the right nor the intention to share in the profits although it did in substance have the voting power. A bank does not engage in a trade or business in contravention of subs. 2, s. 76, of the Bank Act, R.S.C. 1906, c. 29, [3-4 Geo. V. (Can.), c. 9], where its operations are through the medium and intervention of the company chartered to carry on such trade or business and having a distinct and separate legal existence, although the bank holds a controlling interest and is thus enabled and in reality does direct the affairs of such company, if the bank does not share in the profits nor is the business of the company owned by the bank. [See Falconbridge on Banking, 2nd ed., 196.]

Northern Crown Bank v. Great West Lumber Co., 17 D.L.R. 593, 7 A.L.R. 183, 28 W.L.R. 708, 6 W.W.R. 528, reversing 11 D.L.R. 395.

(§ I—3)—Bank—Letter of credit—Cancellation.

A person who induces a bank to give him a letter of credit may, by his subsequent conduct, justify the bank in revoking it, but it is otherwise when a customer induces a bank to give him a letter of credit to a third person. In this case the customer cannot, of his own will, compel the bank to cancel the letter, because the contract is not between a customer of the bank but between the bank and the third person. A letter of credit issued by a New York bank must be interpreted according to the New York law. When a bank issues a letter of credit to a customer who transfers it to a third person, the bank cannot revoke it. There is nothing in the law which prevents a person who receives a consideration in favour of another, from rendering the latter liable to a third person for an obligation.

Sovereign Bank v. Bellhouse, Dillon & Co., 23 Que. K.B. 413.

(§ I—4)—Purchase of entire assets of another bank—Assumption of liabilities.

The purchase by one chartered bank of the entire assets of another chartered bank can only be carried out under statutory authority; and where it is a term of the arrangement as approved by the governor-in-council under ss. 99-111 of the Bank Act, Can., that the purchasing bank shall assume the liabilities of the selling bank, a statutory obligation is created in respect of each liability which is enforceable by the creditor of the selling bank. [Davis v. Taff Vale R. Co., [1895] A.C. 542; Watkins v. Naval Colliery Co., [1912] A.C. 693, applied.]

Cameron v. Royal Bank of Canada, 21 D.L.R. 824, 8 S.L.R. 119, 30 W.L.R. 865, 8 W.W.R. 375.

Securities for subscriptions for stock—Sale of.

Promissory notes given to a bank by subscribers to its capital stock may be validly sold by the bank for the purpose of making the deposit required by the Bank Act prior to the issue of a certificate permitting the commencement of business.

McLennan v. Kinman, Kinman v. Bank of Vancouver, 28 D.L.R. 507, 22 B.C.R. 415, 10 W.W.R. 517.

Cancelling bank charter—Scire facias—Fiat of attorney-general—Discretion.

Lapierre v. Banque de St. Jean, 12 Que. P.R. 169.

II. Stockholders.

See Companies.

(§ II—6)—Transfer of stock.

The sale or transfer of shares in capital stock of a bank is perfected by the mere consent of the parties and the formalities required by ss. 43 et seq. of c. 29 R.S.C. 1906, respecting the capacity of the transferor and the registration in the books of the bank affect only the relations between the shareholders and the bank. The acceptance by the vendor of bank stock in part payment for land sold does not constitute a dation en paiement nor involve the obligations of such an act. Shares in the capital stock of a bank have a real existence so long as the affairs of the bank are not in liquidation whatever reduction may be made in its capital or whatever may be its state of solvency. Hence, they can form the legal consideration of a contract, e.g., they may be transferred in payment of the price of a sale.

Bessette v. Brien, 21 Que. K.B. 132.

(§ II—9)—Who liable as stockholder.

Under s. 125 of the Bank Act, R.S.C. 1906, c. 29, making shareholders liable upon a deficiency in the property and assets of the bank to pay its debts and liabilities, to an amount equal to the par value of the paid-up shares held by them, the holders of fully paid-up shares on the date of the commencement of the proceedings are liable as contributories notwithstanding a subsequent transfer by them of their shares and the fact that a judgment was obtained against the transferees by the liquidator. Where a liquidator on winding up the affairs of a bank places the names of transferees of stock made after the proceedings were begun upon the list of contributories, who are liable upon a deficiency in the property and assets of the bank under s. 125 of the Bank Act, R.S.C. 1906, c. 29, instead of the names of the holders of the stock on the day the proceedings were commenced, such action upon the part of the liquidator, does not constitute an election on the part of the liquidator to accept the transferees instead of the original holders as contribu-

tories, even though the liquidator had obtained a judgment against such transferees. Under s. 21 of the Winding-up Act, R.S.C. 1906, c. 144, providing that all transfers after the commencement of winding-up proceedings, except transfers made to or with the sanction of the liquidator under the authority of the court, shall be void, the mere entry in the transfer book of the company of a transfer of stock, after the commencement of the winding-up proceedings, will not shift the responsibility as contributories under s. 130 of the Bank Act, R.S.C. 1906, c. 29, from the transferors to the transferees. (Dictum per Garrow, J.A.)

Re Ontario Bank; Massey & Lee's Case, 8 D.L.R. 243, 27 O.L.R. 192.

WHO LIABLE AS SHAREHOLDERS—ASSIGNOR OF SHARES — NONCOMPLIANCE WITH BANK ACT.

A subscriber for bank shares, who, before the organization of the bank, rescinds his subscription for fraud and receives back the payment made by him, at the same time executing a document purporting to be an assignment to an agent of the bank, of his shares, which at the time, had not been allotted or issued, and who was never afterwards treated as a shareholder, cannot, on the subsequent insolvency of the bank, be placed on the list of contributories or held for a shareholder's double liability on the ground that the assignment of his shares was not made in conformity with the requirements of the Bank Act, since, at the time of the purported assignment, there were no shares he could assign. A subscriber for bank shares who, before its organization, rescinds his subscription for fraud, and receives back the money he paid thereon, cannot, on the subsequent insolvency of the bank, be placed on the list of contributories or held for the double liability of a shareholder, notwithstanding that on the organization of the bank, shares were allotted him, where such allotment was made without his knowledge and no calls were ever made on, or any shares ever issued to, or received by him, or any dividends paid to him, and he had never attended or voted at a shareholders' meeting, or knowingly permitted his name to appear as a shareholder.

Re Farmers Bank of Canada (Murray's Case), Sproat's Executors' Case, 14 D.L.R. 596, 5 O.W.N. 272, 25 O.W.R. 933.

STOCKHOLDERS — WHO LIABLE AS — BANK WITHOUT TREASURY CERTIFICATE — ALLOTMENTS.

Subscribers for shares in a bank which never went into operation because of failure to get the necessary amount of subscriptions to obtain a certificate from the Treasury Board (Can.), and to whom the provisional directors had made allotments, may be placed on the list of contributories on the winding-up of the bank; a subscriber who has paid his entire subscription may be placed on the list of contributories for the purpose of apportioning the amount returnable to him over and above the amount which may be found to be his proper share. [Atty.-Gen. v. Great Eastern, 5 App. Cas. 473, and Re Anglesea Colliery, L.R. 1 Ch. 555, applied.]

Re Monarch Bank of Canada, 20 D.L.R. 108, 32 O.L.R. 207.

III. Officers and agents.

B. AUTHORITY; RATIFICATION.

(§ III B—25)—OFFICERS AND AGENTS — AUTHORITY—BRANCH MANAGER — CERTIFYING CHEQUE GIVEN IN PAYMENT OF INDIVIDUAL DEBT.

The payee of a cheque is placed on strict enquiry as to the authority of the manager to bind the bank by its certification of the cheque where the drawer did not have funds on deposit to meet it and the payee knew that the nominal drawer of the cheque gave same in the personal interest of the bank manager. In order to bind a bank by a transaction in which a branch manager acts for himself, or as agent for a third person, in a matter in which the bank has no interest, the manager must possess special authority. The manager of a branch bank cannot, in the absence of special authority, bind a bank by the certification of a cheque of a third person given in payment of the individual debt of the manager, or of the drawer, in the creation of which the manager acted as the latter's agent, unconnected with his duty to the bank, where the drawer did not have funds on deposit to meet the cheque. A letter in the name of a bank written and signed by a branch manager, promising to redeem bonds deposited by the manager as collateral to his individual debt, or of a third person for whom the manager acted as agent, and in which the bank had no interest, is not binding on the bank unless the branch manager was expressly authorized by the bank to make the agreement. The Bank Act, R.S.C. 1906, c. 29, does not empower the manager or branch manager of a bank to pledge its credit to the payment of the debt of a person in which the bank has no interest. The appointment of a person as manager of a branch bank does not imply any authority to bind the bank by an agreement to purchase shares of stock or bonds on the bank's account. The general manager of a bank cannot ratify an unauthorized contract of a branch manager so as to bind the bank unless it be one that the general manager himself has authority to make.

McIntosh v. Bank of New Brunswick, 15 D.L.R. 375, 42 N.B.R. 152.

(§ III B—27)—OFFICERS AND AGENTS — AUTHORITY OF GENERAL MANAGER — DEALING IN SHARES OF THE BANK'S OWN STOCK.

The general manager of a Canadian chartered bank can have from it no ostensible authority to do acts on behalf of the bank which would be ultra vires on its part, ex-

gr. purchasing or dealing in shares of the bank's own capital stock.

Coates v. Sovereign Bank of Canada, 20 D.L.R. 142.

OFFICERS — AUTHORITY OF GENERAL MANAGER.

The general manager of a bank has no implied authority from the bank to agree on its behalf to remunerate or indemnify a person who purchased shares of the bank's stock at the manager's instance to be held subject to his order and will be liable on the liquidation of the bank for the overdraft occasioned by the bank's payment of his cheques given for the purchase price. [Bank of Montreal v. Rankin, 4 L.N. (Que.) 302, applied. Compare McMillan v. Stavert, 13 D.L.R. 761 (P.C.), affirming Stavert v. McMillan, 24 O.L.R. 456.

Sovereign Bank v. Pyke, 14 D.L.R. 383.

(§ III B—28)—"PENSION FUND" — BASIS FOR—DIRECTORS' AUTHORITY, HOW LIMITED—INSOLVENT BANK.

Where a by-law passed by bank shareholders at an annual meeting authorized the directors to establish a pension fund for the officers and employees, and empowered the directors to contribute thereto, the opening of an account in the bank's books under the name of "Officers' Pension Fund" and the transfer to its credit from profit and loss account of various sums annually, will not, on the bank's failure, constitute a trust for the amounts in favour of the proposed beneficiaries, where the same by-law further authorized the directors to pass rules for the organization and regulation of a pension fund, the contributions thereto by officers and employees and the settling of the scheme of benefits, where in fact no such rules were formulated nor were any contributions made by officers or employees. [Sinnett v. Herbert, L.R. 12 Eq. 201; Re Gassiot, 30 L.J. Ch. 242, and Re Gosling, [1900] W.N. 15, 48 W.R. 300, referred to.]

Re Ontario Bank Pension Fund, 19 D.L.R. 512, 30 O.L.R. 350.

C. LIABILITY.

(§ III C—35)—GUARANTEE BY MANAGER—AUTHORITY—BANK RECEIVING BENEFIT.

The officers of a bank are held out to the public as having authority to act according to the general usage of their business, and their acts, within the scope of such usage and of their several lines of duty, will, in general, bind the bank in favour of third persons who possess no other knowledge. A bank is liable on a guarantee given by its local manager for the repayment of a loan made to a customer of the bank, the loan to be used by the customer in assisting it in its business and reducing its indebtedness to the bank, and being paid to the manager and by him deposited to the credit of the customer, the fact that the manager had no authority to give such guarantee being unknown to the lender, and the bank receiving a benefit from the transaction.

Stevens v. Merchants Bank of Canada (Man.), 42 D.L.R. 171, [1918] 2 W.W.R. 554.

(§ III C—37) — LIABILITY OF DIRECTORS——BREACH OF TRUST.

Where, in breach of trust and without the authority of any resolution of the board of directors or other corporate act of a chartered bank, funds of the bank were used by its manager, in connivance with one or more of the directors, to make purchases of bank shares in the names of brokers and others who were allowed to overdraw their accounts with the bank to make the purchases, knowing that the bank was prohibited by statute from purchasing or dealing in its own shares, the duty of the other directors, on ascertaining that such breach of trust had been committed, was to repudiate the transactions and insist on the restoration to the bank of the funds illegally diverted; in such event there could be no claim to indemnity against the bank on the part of such nominal purchasers even if the bank asserted a lien on the shares for the overdrafts while repudiating the purchases; nor can any claim for indemnity against the bank arise in favour of the directors who, after the illegal diversion of funds had occurred, attempted to rectify the same by an adjustment whereby promissory notes of the directors were given to the bank to recoup it for the money unlawfully diverted, although the recoupment represented the price of the shares illegally purchased. [Stavert v. McMillan, 24 O.L.R. 456, 3 O.W.N. 6, affirmed on appeal.]

McMillan v. Stavert, 13 D.L.R. 761, 49 C.L.J. 669, 24 O.W.R. 936.

LIABILITY — BREACH OF TRUST OF BRANCH MANAGER — KNOWLEDGE THAT ESTATE MONEY WRONGFULLY USED.

Bradfield v. Bank of Ottawa, 2 O.W.N. 1383, 19 O.W.R. 671.

CONTRACT BETWEEN BANKS — PLEDGE OR SALE OF ASSETS—BANK ACT (R.S.C.) 1906, c. 29.

McFarland v. The Bank of Montreal and The Royal Trust Co., [1911] A.C. 96, 27 T.L.R. 55.

POWERS OF PROVISIONAL DIRECTORS — PAYMENT OF COMMISSIONS FOR OBTAINING STOCK SUBSCRIPTIONS.

Re Monarch Bank of Canada, 22 O.L.R. 516. [Leave to appeal from this decision was afterwards granted, 2 O.W.N. 738, 17 O.W.R. 904.] Purchase of bank shares held illegally by bank in name of guarantee fund, see Company (winding-up).

Re Ontario Bank; Barwick's Case, 24 O.L.R. 301.

SALE OF BANK STOCK—ALLOTMENT TO SHAREHOLDERS — SHARES REFUSED OR RELINQUISHED—SALE TO PUBLIC.

Sovereign Bank v. McIntyre, 44 Can. S.C.R. 157.

PLEDGEE PARTING WITH COLLATERAL SECURITY—BANK MANAGER'S POWER AND AUTHORITY—MANAGER RELEASING BANK'S CLAIM.

La Banque D'Hochelaga v. Larue, 3 A.L.R. 42, 13 W.L.R. 114.

AUTHORITY OF MANAGER OF BRANCH BANK—SECURITY HELD BY BANK — FURTHER CHARGE—NOTICE TO BANK — COMMUNICATION TO MANAGER.

Auld v. Traders Bank of Canada, 16 W.L.R. 24 (Alta.).

IV. Banking.

A. DEPOSITS.

(§ IV A—40)—CHEQUE — DEPOSIT — COMPENSATION—C. C., ART. 1190, S. 2.

By virtue of the principle that a person cannot do justice for himself, and because according to art. 1190, s. 2, C. C., compensation cannot take place when the petition is for restitution of a thing of which the owner has been unjustly deprived. A bank which consents to pay a cheque already accepted by another bank cannot retain on the amount, a sum which the drawer owes to it, in order to bring about compensation. When legal compensation cannot be admitted the court can, although it has not been asked, bring about a judicial compensation.

Pelletier v. La Banque Nationale, 55 Que. S.C. 141.

(§ IV A—45)—DEPOSITS—NATURE OF — LIENS ON.

The relation existing between a bank and its depositors as regards the cash deposited is that of debtor and creditor.

Royal Trust Co. v. Molsons Bank, 8 D.L.R. 478, 27 O.L.R. 441.

ACCOUNTS IN JOINT NAMES.

A written direction to the manager of a bank, to open a joint account in the names of the depositors, stating that all moneys which may be deposited are their joint property, is in no sense a contract between the parties themselves, and is not proof that the plaintiff is in fact entitled to one-half of the account, although evidence against either of them as an admission in favour of the other.

Southby v. Southby, 38 D.L.R. 700, 40 O.L.R. 429.

POWER OF ATTORNEY—TO DRAW—REVOCATION—KNOWLEDGE.

A power of attorney by which a creditor authorizes an advocate "to withdraw for me the sum of $2,025, and to give a receipt for it in my name, to endorse all documents and cheques, and ratifying in advance everything that he shall do for withdrawing the said sum," gives the attorney the right not only to receive this amount from the debtor, but also to deposit it in a bank and to withdraw it upon his or their own cheques. A creditor has no recourse against a bank which has paid such sum to the attorney, if the bank had no knowledge of the revocation of the power of attorney, or of any fraud committed by him. The knowledge which a bank has that a deposit is made by an agent for his principal does not prevent the agent from drawing money upon his cheques. The responsibility of the bank is only concerned in a case in which it has profited by the funds.

Robidoux v. Royal Bank, 44 D.L.R. 765, 54 Que. S.C. 529.

BANKING — DEPOSITS — MANAGER'S AUTHORITY TO RECEIPT FOR, HOW LIMITED.

A bank is not bound by a receipt given by its agent or branch manager in charge of a branch bank to its customer's agent for moneys said to have been deposited to the customer's credit on current account if no such deposit was in fact made, as it is not within the scope of the manager's authority to give a receipt for money he had not received and as such limitation of authority is generally known by business men. [Grant v. Norway, 10 C.B. 665, 20 L.J.C.P. 93, applied.]

Sask. and Western Elevator v. Bank of Hamilton, 18 D.L.R. 411, 7 S.L.R. 134, 20 W.L.R. 262, 7 W.W.R. 100.

JOINT ACCOUNTS — INTENTION — CORROBORATION.

Money deposited by a testator in a joint account of himself and his niece, to be devoted to his support and that of his business establishment, including the support of the niece during his life, does not, in the absence of other corroborative evidence, shew an intention of establishing joint ownership of the funds, and they form part of the testator's estate.

Sproule v. Murray, 48 D.L.R. 368, 45 O.L.R. 326.

DEPOSIT BY CUSTOMER—ENTRY IN PASSBOOK — ESTOPPEL — EVIDENCE — FINDING OF FACT OF TRIAL JUDGE.

Collins v. Dominion Bank, 8 O.W.N. 432.

DEPOSIT AND LOAN DISTINGUISHED.

There is a deposit in the legal sense of the word only so long as the preservation of the thing deposited has been the main object of its being placed in the hands of the depository. A document, by which a bank acknowledges having received on deposit a sum of money repayable in ten years on a year's previous notice and carrying interest at 15% payable monthly, is not a deposit but a loan at interest.

Allard v. Demers, 48 Que. S.C. 34.

DEPOSIT OF MONEY—SUPPOSED DEATH OF DEPOSITOR — RIVAL CLAIMS — ORDER DIRECTING TRIAL OF ISSUE—MONEY PAID INTO COURT.

Re Damod & Bank of Hamilton, 15 O.W.N. 360.

BANKING — JOINT ACCOUNT IN BANK IN NAMES OF PLAINTIFF AND DECEASED PERSON—MONEYS BELONGING TO ESTATE OF DECEASED—PLAINTIFF GIVING CHEQUE AND THEN COUNTERMANDING IT BUT THE BANK PAYING IT—NO STATUS IN PLAINTIFF TO BRING ACTION AGAINST BANK.

Plaintiff and her mother had a joint account in defendant bank, the moneys really belonging to her mother. The latter died and plaintiff subsequently gave a cheque on said account but before payment thereof she countermanded it, but nevertheless the bank paid it. Held plaintiff had no status to bring action against the bank for the amount, the only party having the right to bring such action being the administrator of her mother's estate.

Radcliffe v. Bank of Montreal, [1919] 2 W.W.R. 887.

(§ IV A—48)—LIEN.

As a general deposit in a bank is the property of the bank the bank's right to apply the same upon its contra account against the customer is one of "set-off" rather than one of "lien," the latter term being specially applicable to the right of retention of documentary securities or specific articles.

Royal Trust Co. v. Molsons Bank, 8 D.L.R. 478, 27 O.L.R. 441.

BANKING—DRAFT—PAYMENT OF—LIEN ON NOTE.

The $150 draft had on its face, embodying the terms on which it was negotiated, and stamped by an official of the bank when it was negotiated, the words: "Surrender documents attached on payment of draft only." The only document attached was the $250 note:—Held, that the bank had no general banker's lien on the note, and was not entitled to collect from the defendant and retain a sum which it had paid for costs in respect of other commercial paper given to it by the customer, even if there had been evidence that the customer was liable for those costs or had acknowledged or promised to pay them. [Judgment of Morson, Jun. Co. C.J., York, varied.]

Sterling Bank of Canada v. Zuber, 32 O.L.R. 123.

(§ IV A—49)—CHANGING ACCOUNT TO JOINT ACCOUNT.

A written notice to a bank by a depositor to so "arrange" the latter's savings deposit account (then standing in her own name) in the name of the depositor's daughter that the latter can draw the money, is not sufficient authority to the bank to transfer the deposit to the joint account of the mother and daughter withdrawable by either with right of survivorship.

Everly v. Dunkley, 5 D.L.R. 854, 3 O.W.N. 1607, 22 O.W.R. 820. [Affirmed 8 D.L.R. 839, 27 O.L.R. 414, 23 O.W.R. 415.]

(§ IV A—50)—SET-OFF AGAINST GENERAL ACCOUNT OF DEPOSITOR—ASSIGNEE.

Roy v. Canadian Bank of Commerce, 38 D.L.R. 742, 24 B.C.R. 397.

ENTRIES IN PASSBOOKS—FRAUD ON CREDITORS.

Where the customer of a bank has two passbooks representing two deposits, one for the payment of his old debts to the bank, the other for current account and his new debts, the entries made in these passbooks are imputations of payment in which the depositor concurs and which are equivalent to receipts by the bank. An imputation of payment may be set aside for the same causes as contracts, especially on account of frauds against creditors.

Valentine v. Bank of B.N.A., 25 Que. K.B. 47.

MONEY APPLIED BY BANK FOR PURPOSES OF BUSINESS—OWNERSHIP OF BUSINESS—LIABILITY.

Bank of Ottawa v. Dick & Walker, 11 O.W.N. 180.

BANK'S CONTROL OVER—APPLICATION OF.

The Terminal City Sand and Gravel Company gave a promissory note to C. G. Johnson & Co., who indorsed it and handed it to the bank as security for general advances. The note was not paid when it fell due, and was charged by the bank back to Johnson & Co., who then sued for the amount. While the note was under discount, and after it was due, the defendant voluntarily handed to the bank a share certificate in his favour from the Terminal Gravel Company (a concern in which defendant was a director and shareholder). This certificate, the evidence shewed, was not deposited in pursuance of any previous arrangement, though probably in the hope of securing forbearance in the future. Held, (1) that defendant was liable upon his indorsement, and (2) in the circumstances in which the share certificate was deposited, it was not available in satisfaction of the claim upon the note.

Johnson v. McRae, 16 B.C.R. 473, 17 W.L.R. 132.

(§ IV A—51)—APPLICATION OF PAYMENT—CHEQUE IN PAYMENT OF NOTE.

Where the maker of a promissory note pays the indorsee, and the latter gives his own cheque to a bank for the payment of the note, which cheque the bank accepts and charges to the overdrawn account of the endorsee, and the overdraft is extinguished by subsequent deposits in the current account, the note is paid, and the maker is entitled to its possession.

Gagnon v. Imperial Bank; Crète v. Gagnon, 29 D.L.R. 439, 49 Que. S.C. 428.

TITLE TO NOTES DEPOSITED AS COLLATERAL—APPLICATION.

A bank becomes a holder for value of notes deposited with it by its customer as collateral to the latter's promissory note not then due, as soon as the customer's in-

debtedness to the bank matures or at the time when such indebtedness was increased during the currency of the promissory note in question, particularly where the bank held general letter of hypothecation in respect of all notes, bills and securities lodged with the bank in connection with the customer's account. [Merchants Bank v. Thompson, 3 D.L.R. 577, referred to.]

Canadian Bank of Commerce v. Waldner, 23 D.L.R. 210, 8 S.L.R. 156, 30 W.L.R. 857, 8 W.W.R. 491.

BANK—PROMISSORY NOTE—RENEWAL—DEPOSIT—IMPUTATION OF PAYMENT—PARTIAL PAYMENT — BANK'S DUTY — C.C. ARTS. 1149, 1161, 1960.

When a promissory note, discounted by a bank, is kept constantly renewed, payable at future terms, the deposits made by the maker at the bank cannot be imputed upon the said debt, if the said note was not actually payable at the time of the deposits. The bank is not obliged to receive partial payment of its debt. The verbal communication by the indorser of a promissory note to the manager of the bank which has discounted it, that it has been agreed between him and the maker that all the monies which the latter might deposit with the bank would be applied to the payment of such note, does not constitute an undertaking on the part of the bank to make this imputation. It was the duty of the indorser to follow up the imputation, and not that of the bank. When a bank received as a partial payment, from the maker of a promissory note which is due, the transfer of a certain property at a determinate value, it must give credit pro tanto to the indorser of the note.

Bank of Ottawa v. McConnell, 55 Que. S.C. 477.

(§ IV A—52)—APPLICATION OF PAYMENTS —NOTE OF THIRD PERSON.

A bank which is not aware of the insolvency of its debtor, and obtains from him a written document declaring that all his stock in trade which he transfers to it shall be considered "as a general and continuing collateral security for payment of the present or any future liability to which it may seem expedient to the bank to apply it," cannot be held bound by imputations of payments which have been made to it by the debtor by means of notes of third persons; and it has the right to make the imputations upon an old account or upon new advances.

Valentine v. Bank of B.N.A., 25 Que. K.B. 47.

(§ IV A—53)—ON NOTE ON WHICH DEPOSITOR IS SURETY — REFUSAL TO HONOUR CHEQUE—ACTION AGAINST.

A bank holding notes upon which a depositor is liable as endorser may, at any time after the notes became due, apply pro tanto the money so on deposit at the credit of the endorser upon his indebtedness under the notes. The application by a bank of a customer's credit balance on his deposit account against his indebtedness to the bank, is a complete answer to an action by the depositor against the bank for damages in refusing to honour a cheque drawn by the depositor, where, after such application by the bank, no balance remains to the credit of the depositor.

Royal Trust Co. v. Molsons Bank, 8 D.L.R. 478, 27 O.L.R. 441.

(§ IV A—57)—DEPOSIT BY ADMINISTRATOR.

A bank that advances money to the executor of an estate authorized by the will to borrow for the needs of its administration, but also vested with full powers of alienation and disposal, is under no obligation to take notice of the use made of such advances. When an executor opens an account with a bank, for both himself and the estate, in the name of the latter, no presumption arises therefrom of fraudulent complicity or participation by the bank in any improper conversion he makes to his own use of the funds of the estate. No action will lie to recover the amount of indebtedness paid through error, when it was represented by promissory notes that were surrendered in good faith, at the time of payment, and are no longer available. No action will lie against a bank to recover moneys alleged to have been improperly paid to it by the executor of an estate, when such payment has been acquiesced in and tacitly ratified by the representatives of the estate, by dealings, renewals of notes, etc., during a period of six or seven years.

Gratton v. La Banque D'Hochelaga, 21 Que. K.B. 97.

(§ IV A—58)—DEPOSITS—BANK CONTROL OVER—RIGHT TO CHARGE PERSONAL ACCOUNT WITH OVERDRAFT AGAINST TRUST ACCOUNT.

Where the customer of the bank has two accounts with it, one his personal account and the other in his name with the addition of the words "in trust," but in which he alone was dealt with, the bank has prima facie a right to set off an overdraft of the trust account against its indebtedness to him in respect of a credit balance on the personal account. [Foley v. Hill, 2 H.L.C. 28, applied.]

Daniels v. Imperial Bank of Canada, 19 D.L.R. 166, 8 A.L.R. 26, 30 W.L.R. 133, 7 W.W.R. 666.

APPLICATION OF FUNDS—ACCOMMODATION INDORSEMENT.

A bank held not bound to apply certain moneys received by it to a note of which the defendant was an accommodation indorser.

Royal Bank of Canada v. Falk, 25 B.C.R. 142, [1917] 3 W.W.R. 654.

MONEY APPLIED BY BANK FOR PURPOSES OF A BUSINESS—OWNERSHIP OF BUSINESS—LIABILITY FOR MONEY—CONTRACT—EVIDENCE—FINDING OF FACT OF TRIAL JUDGE—APPEAL.

Bank of Ottawa v. Dick & Walker, 11 O.W.N. 372, reversing 11 O.W.N. 180.

(§ IV A—60)—CHEQUE—AUTHORITY TO SIGN.

A cheque signed by delegated authority is notice to the bank that the person signing only has a limited authority to sign and the bank is bound to enquire as to the extent of such authority.

Swift Canadian Co. v. Ouimet, 40 D.L.R. 597, 24 Rev. Leg. 260.

PAYMENT OF CHEQUES—ACCOUNT—CREDITS.

A bank is not bound to pay a cheque drawn upon an account in credit, if upon considering all the accounts of the drawer in the bank he is not in credit.

Carkson v. Dominion Bank, 38 D.L.R. 232, 40 O.L.R. 245, affirming 37 O.L.R. 591. [Reversed in part 46 D.L.R. 281.]

LIEN—DUTY TO CASH CHEQUE OR RETURN IT.

Held, that where a cheque is delivered to a banker to be cashed, he must either cash it or return it. He cannot place the money to the payee's credit and assert a lien thereon for the amount of a judgment previously recovered by the bank against the payee.

Rouxel v. Royal Bank, 11 S.L.R. 218, [1918] 2 W.W.R. 791.

DEPOSIT—BANK ACCOUNT—RIGHTS OF DEPOSITOR—CONFUSION OF NAMES—DEPOSIT IN THE PROVINCIAL TREASURER'S OFFICE—C.C. ART. 1799—3-4 GEO. V. [1913] C. 9 ART. 95 — SECTION REF. [1909] ART. 1496 ET SEQ.

A bank must at all times reimburse a depositor for the monies which he has left on deposit, unless these monies are legitimately claimed as being the property of a third party. An error of the bank's employee who entered the name of an illiterate depositor erroneously, or the confusion which arose later from this erroneous entry, cannot justify the bank in depositing the money received from the depositor in the office of the provincial treasurer.

Asoff v. Royal Bank, 56 Que. S.C. 439.

(§ IV A—61)—PAYMENT OF INFANT'S CHEQUE.

The effect of ss. 47, 48 and 165 of the Bills of Exchange Act, R.S.C. 1906, c. 119, is to constitute a cheque drawn by an infant upon an account standing in his name a complete discharge to the bank which pays it. A cheque drawn by an infant upon a bank account standing in his name is a good discharge to the bank which pays it, and the amount of a cheque so paid cannot be recovered by the infant from the bank. [Dicta in Earl of Buckinghamshire v. Drury, 2 Eden, 60, at p. 71; Ex p. Brocklebank, 6 Ch.D. 358, at p. 359, and Burnaby v. Equitable Reversionary Interest Society, 28 Ch. D. 416, at p. 424, approved and applied; Overton v. Bannister, 3 Hare 503, and Valentini v. Canali, 24 Q.B.D. 166, followed.]

Freeman v. Bank of Montreal, 5 D.L.R. 418, 26 O.L.R. 451, 22 O.W.R. 276.

(§ IV A—63)—BANKING — PAYMENT — CHEQUE OF FIDUCIARY—TRUSTEE.

If a bank has a reasonable suspicion that money drawn from the trust account by the trustee is being applied in breach of trust, and if the bank is going to derive a benefit from the money being transferred out of the trust account, and intends and design that it should derive a benefit from it, then the bank is not entitled to honour the cheque drawn upon the trust account without some further inquiry. [Bridgman v. Gill, 24 Beav. 302, and Coleman v. Bucks, etc., Bank, [1897] 2 Ch. 243, applied.]

British American Elevator Co. v. Bank of B.N.A., 20 D.L.R. 944, 29 W.L.R. 214, 6 W.W.R. 1444.

AUTHORITY OF AGENT OF CROWN—INDORSEMENT OF CHEQUE—PAYMENT BY BANK—BANK'S AUTHORITY—PROOF.

The burden of proving the authority of a Government agent to receive payment of a cheque drawn on a certain bank, payable to "Dominion Government Elevator Co.," rests upon that bank. The Crown is not liable for the negligence of its officers. [Viscount Canterbury v. Attorney-General, 1 Ph. 306, referred to.]

The King v. The Royal Bank of Canada, 50 D.L.R. 293, 30 Man. L.R. 104, [1920] 1 W.W.R. 198.

(§ IV A—66)—LIABILITY FOR DISHONOURING CHEQUE—SUFFICIENCY OF FUNDS—APPLICATION.

A bank has no right to dishonour cheques on account of an insufficiency of funds, if at the time they were received through the clearing house it had sufficient funds to the credit of the drawer available for the payment thereof; in the absence of any directions by the drawer it cannot give priority to cheques subsequently presented, and in doing so it commits a breach of duty which renders it liable for the damages directly resulting therefrom.

Bank of B.N.A. v. Standard Bank of Canada, 35 D.L.R. 761, 38 O.L.R. 570, affirming 26 D.L.R. 777, 34 O.L.R. 648.

LIABILITY FOR DISHONOURING CHEQUE.

No action lies by the holder of a cheque against a bank refusing to honour it whilst there were funds to meet it.

Dubreuil v. Bank of Montreal, 19 Que. P.R. 168.

(§ IV A—67)—CHEQUE FOR PROFESSIONAL SERVICES—STOPPING PAYMENT.

One who gives a cheque for professional services protesting at the same time that the amount claimed is excessive, but believing himself obliged to make the payment in order to obtain the return of documents which he requires, can afterwards stop payment of this cheque if the amount

claimed was really too great, it having been given without consideration.

Hamelin v. Vanasse, 47 Que. S.C. 110.

BANKS AND BANKING—CHEQUE—PAYMENT BY BANK OF COUNTERMANDED CHEQUE—BANK HOLDER FOR VALUE THROUGH ANOTHER BRANCH.

Plaintiff given judgment against bank for amount of his cheque which though countermanded had been paid by the bank. Bank given judgment on counterclaim for amount of the cheque which had been paid by its branch at another point, following London Provincial & South-Western Bank v. Buszard, 35 T.L.R. 142.

Garrioch v. Canadian Bank of Commerce, [1919] 3 W.W.R. 185.

(§ IV A—70)—LIABILITY TO DEPOSITORS FOR FORGED CHEQUES PAID—STATEMENT OF ACCOUNT—ACKNOWLEDGMENT—ESTOPPEL.

Columbia Graphophone Co. v. Union Bank of Canada, 34 D.L.R. 743, 38 O.L.R. 326.

PRECAUTIONS AGAINST FORGERIES—FILLING IN BLANKS—"RAISING" OF CHEQUE.

A bank which accepts a cheque drawn upon it is not bound to fill in the blank spaces, or to stamp it in such a manner as to make "raising" impossible. Its failure to do so does not make it liable for a larger amount paid by reason of an alteration on the cheque made after acceptance.

Duquet v. La Banque Nationale, 46 Que. S.C. 131.

PAYMENT — ENDORSEMENT — FALSE — SUIT AGAINST THE BANK—BORROWER "MIS EN CAUSE" — JUDGMENT — C.C., ART. 1241.

In a suit by an endorser of a check against the bank which has paid the check on a false endorsement, where the evidence establishes that the money has been paid to a lawyer charged to prepare a loan in favour of the borrower, the court before deciding ought to order the latter to be an added party before settling judgment between all the parties.

The Royal Bank & the Quebec Bank v. Laporte & The Quebec Bank, 25 Rev. Leg. 429.

B. COLLECTIONS.

(§ IV B—90)—DUTY TO NOTIFY OF PAYMENTS RECEIVED—RIGHT TO APPLY FUNDS TO NOTE.

Where in a contract of sale it is stipulated that the purchasers shall pay the price agreed upon directly to a bank and that the latter shall remit to a tradesman of the vendor a document declaring that the purchasers "are obliged to have all monies due remitted to the bank and as soon as we receive it we will advise you," knowing that the tradesman had advanced goods only on the condition of being paid directly by the bank, the latter by this document incurs an obligation towards these tradesmen not only to notify them when it has received the money from the purchaser, but also to pay over this money even if at the time the bank had claims against the vendor arising out of the discounting of a note of the purchasers in payment of the selling price and out of other matters.

Fortier v. Lemay, 47 Que. S.S. 277.

BANKING—COLLECTIONS—DUTY OF BANK TO FOLLOW INSTRUCTIONS RELATING TO DELIVERY OF GOODS—LIABILITY FOR NEGLECT.

A bank is liable for loss incurred through its neglect to follow specific instructions given it by a shipper of goods, as too the conditions upon which it is to deliver the bills of lading or documents of title to the consignee.

Schweiges v. The Bank of Hochelaga & Goodwyn, 46 Que. S.C. 164.

(§ IV B—101)—LIEN OF COLLECTING BANK.

Where a negotiable instrument is endorsed to a bank by a customer for collection, the bank is entitled to a lien thereon for all debts then payable to it by the customer, and for all debts which may become so payable while the instrument is in its possession, but the customer is entitled to take up the instrument from the bank whenever he is free from any obligations to the bank and even (semble) when he is free only from debts presently payable, though there may be debts due but not yet payable, e.g., negotiable instruments discounted by the bank which have not yet matured. Where a negotiable instrument is endorsed to a bank by a customer as security for such debts as may from time to time be due by the customer to the bank, the instrument is good in the hands of the bank against the maker thereof for the amount of the indebtedness of the customer to the bank, and the fact that at some times during the bank's possession of the instrument there is no such indebtedness existing, will not deprive the bank of its rights or of its position as a holder in due course. [Atwood v. Crowdie, 1 Stark. 483, followed.]

Merchants' Bank v. Thompson, 3 D.L.R. 577, 3 O.W.N. 1014, 21 O.W.R. 740.

C. OTHER TRANSACTIONS; DISCOUNTS, ETC.

(§ IV C—110)—SECURITY—AGREEMENT—CONSTRUCTION.

An agreement between bank and depositor, entitling the bank to hold the depositor's securities as security for the payment of all his present and future liability, covers an indebtedness on a promissory note given by him to a third person of which the bank became the holder in due course.

Morgan v. Bank of Toronto, 35 D.L.R. 698, 39 O.L.R. 281.

(§ IV C—111)—GUARANTY—ILLEGAL RATE OF INTEREST.

A director of an incorporated company who has given a written guarantee to a bank that he would pay any indebtedness incurred by the company to the bank, not

exceeding $3,000, is not released by the bank charging the company interest at a rate higher than that allowed by the Bank Act, without the knowledge of the company. The agreement between the bank and the company is not void because of the illegal interest charged, but the bank can only recover interest at the legal rate and the guarantor is liable for the amount which can be legally claimed not exceeding $3,000.

Merchants Bank v. Bush, 42 D.L.R. 236, 56 Can. S.C.R. 512, [1918] 2 W.W.R. 574, reversing 38 D.L.R. 499, 24 B.C.R. 521.

LOAN—INTEREST—AGREEMENT.

Art. 1789, C.C. (Que.), which declares that "the rate of conventional interest may be fixed by agreement between the parties with the exceptions, 1, 2, 3, of banks, etc.," only applies to banks legally constituted as bodies politic, and not to individuals styled bankers and doing financial business.

Rousseau v. Robillard, 53 Que. S.C. 523.

PAYMENT—DEBT OF COMPANY TO BANK—PROMISSORY NOTE HELD BY BANK AS COLLATERAL SECURITY—DEPOSITS MADE IN BANK BY TWO OF THE MAKERS OF SUMS EQUALLING WHOLE INDEBTEDNESS—QUESTION WHETHER DEPOSITS EQUIVALENT TO PAYMENT—EVIDENCE—FINDING OF TRIAL JUDGE—APPEAL.

Royal Bank v. Johnston, 14 O.W.N. 292.

GUARANTY—BILLS OF LADING—IMPAIRMENT OF SECURITY—DISCHARGE.

When a guarantee of the payment of a "draft with bill of lading attached" is given, a condition is implied that the bill of lading shall be in a form which protects the guarantor, and therefore such a guarantor was not liable where the bill of lading was endorsed with a provision that the shipment might be delivered on the shipper's order without production of the bill of lading.

Pioneer Bank v. Bank of Commerce, 31 D.L.R. 507, 53 Can. S.C.R. 570, affirming 25 D.L.R. 385, 34 O.L.R. 531.

GUARANTY NOTE.

A promissory note indorsed to a bank as a guaranty of other notes due and accruing due, may be discounted by the bank and with the proceeds thereof to make payment to itself of the previous notes, and to transmit such notes to the makers. The action on such note may be brought in the ordinary form without alleging any contract of suretyship.

Lemaire v. La Banque Nationale, 25 Que. K.B. 259.

(§ IV C—113)—LIABILITY FOR WRONGFUL DISCOUNTING—AGENT'S DRAFTS.

Where a bank has agreed to furnish "currency" to the plaintiff's agent by "cashing" the agent's drafts on the bank, and where the bank knows that the money supplied is to be used solely for the purchase of grain, it is a breach of trust on the part of the bank to allow the money to be used to reduce the agent's personal or firm account, and where loss has occurred the bank is liable. [Gray v. Johnston, L.R. 3 H.L. 1, followed; Shields v. Bank of Ireland, [1901] 1 Ir. R. 222; Coleman v. Bucks, [1897] 2 Ch. 243, distinguished.] If an agent gives his personal cheque to cover an amount due to his principal for which there are no funds in the bank, but after the cheque has been protested, the agent has drawn on the principal for an amount sufficient to cover the cheque, the bank is justified in paying the cheque and is not liable to the principal. [Toronto Club v. Dominion Bank, 25 O.L.R. 330, followed.]

British America Elevator Co. v. Bank of B.N.A., 26 D.L.R. 587, 32 D.L.R. 181, 33 W.L.R. 625, 9 W.W.R. 1368.

D. CLEARING-HOUSE BUSINESS.

(§ IV D—120)—CLEARING-HOUSE BUSINESS.

The method of clearing-house dealings between banks whereby they form a voluntary association to adjust balances in lieu of separate presentation of maturing securities is not one of which notice is to be imputed to the public dealing with the bank, and unless there is evidence that the customer dealt with the bank subject to the usage of the clearing house, such usages will not per se affect the customer's rights against the bank.

Sterling Bank of Canada v. Laughlin, 1 D.L.R. 383, 3 O.W.N. 643, 21 O.W.R 221.

POWER OF BANKS TO SUBSTITUTE THEIR LIABILITY AS DEBTORS—AWARD OF ARBITRATORS—ARBITRATORS HAVE NO RIGHT TO MAKE SUCCESSFUL PARTY PAY THE COSTS

[Donogh v. Gillespie, 21 O.R. 292, followed.]

Farmers Bank v. Todd, 2 O.W.N. 1389, 19 O.W.R. 703.

SALE OF PLEDGED SECURITIES — NOTICE — BANK ACT, ss. 77, 78.

Healey v. Home Bank, 2 O.W.N. 550, 18 O.W.R. 71.

DEPOSIT IN ONE BANK—MARKED CHEQUE OF ANOTHER BANK—FAILURE OF BANK WHICH MARKED CHEQUE.

Johns v. Standard Bank, 2 O.W.N. 910.

PLAINTIFF DEPOSIT IN BANK OF CHEQUE OF DECEASED—PROCEEDS—ADVERSE CLAIM BY EXECUTORS OF DECEASED.

McLellan v. Sterling Bank, 2 O.W.N. 708, 18 O.W.R. 641.

SECURITY TAKEN ON TIMBER—VALIDITY OF SECURITY UNDER S. 90 OF BANK ACT—COMPANY IN LIQUIDATION — CROWN DUES.

Imperial Paper Mills v. Quebec Bank, 2 O.W.N. 1500, 19 O.W.R. 908.

PROMISSORY NOTE—TRADING COMPANY—INDEBTEDNESS TO BANK — ACCOMMODATION INDORSEMENT—DEPOSIT AS COLLATERAL SECURITY.

Cox v. Canadian Bank of Commerce, 16 W.L.R. 512.

APPROPRIATION OF CUSTOMER'S MONEY TO UNMATURED DEBT—BANKER'S LIEN.

McCready Co. v. Alberta Clothing Co. (Traders Bank Garnishee), 3 A.L.R. 67.

RELEASE BY CUSTOMER OF CLAIM AGAINST BANK—MONTHLY ACKNOWLEDGMENT OF CORRECTNESS OF BALANCE.

Graves v. Home Bank of Canada, 20 Man. L.R. 149, 14 W.L.R. 291.

CONDITIONAL ORAL PROMISE BY BANK MANAGER TO PAY CHEQUE OF CUSTOMER.

Adams v. Craig, 24 O.L.R. 490.

V. Insolvency.

See Companies.

(§ V—125)—FURTHER SECURITY TO—MORTGAGE OF ONTARIO PROPERTY—MORTGAGE OF QUEBEC PROPERTY—LAW GOVERNING—SOLVENCY OR INSOLVENCY OF DEBTOR.

A manufacturing company agreed to give the bank a mortgage on Ontario property and also a mortgage on Montreal property as further security. The court held that as to the Ontario property the Ontario law applied so that the date of the promise to give the mortgage governed and as the company was then solvent the mortgage was valid, but as to the Quebec property the Quebec law applied and only the date when the mortgage was executed could be considered, and as the company was then insolvent the mortgage was invalid.

Clarkson v. Dominion Bank, 46 D.L.R. 281, 58 Can. S.C.R. 448, reversing in part 38 D.L.R. 232, 40 O.L.R. 245.

WINDING-UP—UNCLAIMED DEPOSITS—MINISTER OF FINANCE—POWERS OF REFEREE—APPEAL.

An order for the winding-up of a banking or other company establishes a forum for the determination of all the questions incident to the liquidation and the adjustment of the rights of all interested in the due winding-up—including the distribution of the assets—and to this forum all claiming under the liquidation must resort. It was held, in the case of the winding-up of a bank, that the claim of the Minister of Finance to two sums representing outstanding circulation and unclaimed depositors' balances was within the jurisdiction of and should be adjudicated upon by the referee to whom the powers of the court were delegated by the winding-up order. Re Tobique Gypsum Co., 6 O.L.R. 515; Re Sun Lithographing Co., 22 O.R. 57, distinguished. Held, also that the Minister had no locus standi to appeal from orders of the referee barring all claims that were not put in and proved in response to advertisements.

Re Ontario Bank, 38 O.L.R. 242, 11 O.W.N. 233. [See 12 O.W.N. 245, 333.]

INSOLVENCY—WINDING-UP—PENSION FUNDS—INCHOATE SCHEME—CLAIM ON ASSETS OF BANK.

Re Ontario Bank Pension Fund, 5 O.W.N. 134, 25 O.W.R. 99.

(§ V—128a)—STATUTORY LIABILITY OF SHAREHOLDER.

A shareholder of an incorporated bank cannot escape statutory double liability under s. 125 of the Bank Act (R.S.C. 1906, c. 29) by reason of any irregularity or illegality in the organization meeting, under s. 13, or in relation to the certificate of the Treasury Board, under s. 14.

Re Farmers Bank (Lindsay's Case), 28 D.L.R. 328, 35 O.L.R. 470.

WINDING-UP—DECEASE OF PERSON NAMED ON LIST OF CONTRIBUTORIES—ORDER SUBSTITUTING EXECUTORS—PRACTICE.

Re Farmers Bank (Dewar's Case), 9 O.W.N. 112.

CONTRIBUTORIES.

Upon the winding-up of a bank the liquidator is entitled to place upon the list of contributories all the shareholders in respect to the double liability imposed upon them by s. 125 of the Bank Act, R.S.C. 1906, c. 29.

Re Winding-up Act & Bank of Vancouver, [1917] 1 W.W.R. 163.

WINDING-UP—GIFT OF SHARES TO INFANT—REPUDIATION BY INFANT AT MAJORITY—RATIFICATION BY COURT—LIABILITY AS CONTRIBUTORY.

Re Sovereign Bank (Barnes's Case), 11 O.W.N. 103. [See also 27 D.L.R. 253.]

SALE OF PRIVATE BANKING BUSINESS TO CHARTERED BANK—BANK BECOMING INSOLVENT.

Telford v. Sovereign Bank, 18 O.W.R. 506.

VI. Savings banks.

(§ VI—144)—DEPOSITORS—TRUST COMPANY—LIEN.

The depositor's moneys were placed along with all other moneys of the trust company in one account kept in the Royal Bank of Canada and all payments out were made by cheques on that account. Held, that, to the extent that the depositors could show by positive evidence that their moneys had been used in making the payments on the property in question, they would be entitled to the lien they claimed if such moneys had not been paid back to them; also, following the rule in Clayton's Case, 1 Mer. 572, that there was, in the absence of any evidence of a contrary intention, an appropriation in the order of their respective dates of the sums drawn out to the sums previously deposited, and therefore the withdrawals could not be applied in discharge of the deposits made subsequent to the payments upon the purchase of the property so as to keep alive any lien of the defendants upon the property in respect of the earlier deposits.

British Canadian Securities v. Martin, 27 Man. L.R. 423, [1917] 1 W.W.R. 1313.

VII. Crimes.

(§ VII—150)—A deposit of a quantity of its own bank notes by a chartered bank to its own credit with a trust company subject

to withdrawal by cheque and without any agreement for the return to the bank of the notes so deposited is not a "pledge, assignment, or hypothecation" by the bank of its own notes, the giving or acceptance whereof is an indictable offence under s. 139 of the Bank Act.

The King v. Warren, 17 Can. Cr. Cas. 504.

(§ VII—151)—TAKING DEPOSITS WHEN INSOLVENT.

A warrant for the extradition to a foreign state of a bank officer for receiving deposits with knowledge of the insolvency of the bank may be sustained under s. 405, Crim. Code 1906, providing that everyone is guilty of an indictable offence who, with intent to defraud, by any false pretence, either directly or through the medium of any contract obtained by such false pretence, obtains anything capable of being stolen or procures anything capable of being stolen to be delivered to any other person than himself, and under s. 405a of the Code, s. 6 of 7 & 8 Edw. VII. (Can.) c. 18, making everyone guilty of an indictable offence who, in incurring any debt or liability, obtains credit under false pretences, or by means of any fraud, though that part of the foreign statute pertaining to the receipt of deposits with such knowledge was amended by striking out the words "fraudulently and with intent to cheat and defraud any person." [R. v. Stone, 17 Can. Crim. Cas. 377, applied.]

In re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123, 2 W.W.R. 368.

(§ VII—152)—FALSE RETURNS.

The fraudulent compilation and filing of bank returns is an extraditable offence, under subs. 1 of s. 153 of the Bank Act, R.S.C. 1906, c. 29, making any wilful, false, or deceptive statements in such documents indictable.

In re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123, 2 W.W.R. 368.

VIII. Statutory security to banks.

A. WHAT BANKS MAY LEND ON.

(§ VIII A—160)—LINE OF CREDIT—WRITTEN PROMISE TO PAY — SPECIFIC ADVANCES ON SPECIFIC GOODS—BANK ACT, S. 90 (B)—SECURITY FOR INDEBTEDNESS.

The written promise required by s. 90 (b) of the Bank Act (1906 R.S.C., c. 29) refers to a specific loan then being negotiated for, and to specific goods proposed to be given in security for such loan. Where a line of credit has been renewed from time to time, and after each renewal the bank takes security not only for a present advance but for the whole prior indebtedness, the security taken for the whole debt is only valid for the amount of the loan made at the time it was acquired, but the security given for each individual advance is not released and does not merge in the general security taken and so the bank is entitled to the benefit of all the securities.

Clarkson v. Dominion Bank, 46 D.L.R. 281, 58 Can. S.C.R. 448, reversing in part, 38 D.L.R. 232, 40 O.L.R. 245.

PRIORITIES—WAGES.

The provision of the Bank Act (Can. Stats. 1913 s. 88 (7)) giving priority for wages, salaries or other remuneration over any security given to the bank does not apply to contractors, but only to wage earners.

Battle Island Paper Co. v. Molsons Bank, 38 D.L.R. 372, 27 Que. K.B. 28.

MORTGAGE — SCOPE OF SECURITY — SUBSEQUENT LIABILITY—CREDITOR.

A mortgage to a bank cannot be a valid security for a liability contracted subsequently to its execution. A bank which is secured as to part of a claim may be an unsecured creditor as to the remainder thereof.

Re Edmonton Brewing & Malting Co. (No. 2) (Alta.), 43 D.L.R. 748, 14 A.L.R. 365, [1918] 3 W.W.R. 988.

RENEWAL NOTE—BANK ACT—PLEDGE OF MANUFACTURED GOODS—ESTOPPEL—REMOVAL OF GOODS—CONSENT—EVIDENCE.

In order that a note may be a renewal note within the meaning of s. 90 of the Bank Act, c. 9, 1913 (Dom.), it is not necessary that it be for the same amount between the same parties for the same period as and commencing from the date of maturity of the original note; thus a renewal note may be one for the amount remaining unpaid after a part payment on the original note or it may be a note consolidating two or more original notes. [Barber v. Mackrell, 40 W.R. 618, and Credit Co. v. Pott, 6 Q.B.D. 295, distinguished.] A manufacturing company which had borrowed money from the plaintiff bank on the security of goods alleged to have been manufactured by it, held to be estopped from objecting, on the ground that the goods could not be legally pledged, to their seizure and removal by the bank. The defendant company which had pledged its goods to the plaintiff bank for advances held upon the evidence to have consented to the removal of the goods by the bank.

Merchants Bank of Canada v. Winnipeg Fur Co., [1918] 1 W.W.R. 351.

MORTGAGE—PAST DEBT.

A mortgage to a bank intended as security for a past indebtedness is not in contravention of s. 76 (2) (c) of the Bank Act, Can. 1913, c. 9.

Hutchinson v. Standard Bank of Canada, 36 D.L.R. 378, 39 O.L.R. 286, affirming 11 O.W.N. 183.

CHATTEL MORTGAGE SECURING ASSUMPTION OF LIABILITIES.

A bill of sale as security for a promissory note, assigned to a bank with other securities, covering liabilities to depositors which the bank assumed in acquiring the business of a trust company, is a legitimate exercise of banking powers, and does not

constitute a loan or advance in contravention of subs. 2 (c) of s. 76 of the Bank Act, 3-4 Geo. V. (Can.), c. 9, prohibiting advances or loans upon the security of goods, wares and merchandise.

Ball & Whieldon v. Royal Bank of Can., 26 D.L.R. 385, 52 Can. S.C.R. 254, reversing 22 D.L.R. 647, 21 B.C.R. 267, 8 W.W.R. 734.

ACTION FOR DEBT UNDER VOID MORTGAGE.

Taking a void mortgage as security for a loan does not prevent a bank suing for the loan. [Roland v. La Caisse D'Économie, 24 Que. S.C. 405, referred to.]

Imperial Bank v. Ross, 22 B.C.R. 545, 34 W.L.R. 962.

SECURITY FOR ADVANCES—ASSIGNMENT—CHOSE IN ACTION—UNEARNED FUNDS—PRIORITY ESTOPPEL.

Where a bank, in order to secure present or future advances to a customer, has taken from him an assignment vesting in it the legal title to a chose in action arising out of a contract and subsequently receives notice of another assignment thereof made for a present valuable consideration by the customers to a third person before moneys have been advanced upon the security held by the bank, the claim of the bank for advances made after notice is postponed to that of the other incumbrancer. [Fraser v. Imperial Bank, sub nom. Fraser v. C.P.R. Co., 1 D.L.R. 678, 22 Man. L.R. 58, reversed; Dearle v. Hall, 3 Russ. 1; Hopkinson v. Rolt, 9 H.L. Cas. 514; Bradford Banking Co. v. Briggs, 12 App. Cas. 29, and West v. Williams, [1899] 1 Ch. 132, applied; see Bank Act, R.S.C. 1906, c. 29, s. 76. See also Kennerley v. Hextall (No. 2), 10 D.L.R. 501.]

Fraser v. Imperial Bank, 10 D.L.R. 232, 47 Can. S.C.R. 313, 23 W.L.R. 445, 3 W.W.R. 649.

STATUTORY SECURITY TO BANKS—BANK ACT, R.S.C. c. 29, ss. 76 AND 90.

Under paragraph (a) of subs. 2 of s. 76, and also s. 90 of the Bank Act, a bank cannot acquire goods, or take security, by an indenture made by an executor to secure a previously unsecured debt of his testator.

Klock v. The Molsons Bank (No. 2), 3 D.L.R. 521.

ASSIGNMENT OF LIEN NOTE—STATUTORY SECURITY TO BANK—R.S.C. c. 29, s. 76, SUBS. 2 (c).

Where a borrower from a bank gave his own notes for the money loaned, and at the same time and as part of the same transaction, he transferred a lien note given by a buyer of horses sold by him for the price thereof and endorsed on such lien note an assignment of his interest therein and all his right, title and interest in and to the property covered thereby, such assignment of the borrower's interest in the horses is a violation of subs. 2c of s. 76 of the Bank Act, R.S.C. 1906, c. 29, forbidding banks to lend money upon the security of any goods, wares and merchandise, and therefore, the bank to whom such note was assigned cannot enforce any claim against the horses covered thereby. [Bank of Toronto v. Perkins, 8 Can. S.C.R. 603, applied.]

Alfred Thien v. The Bank of B.N.A., 4 D.L.R. 388, 4 A.L.R. 228, 21 W.L.R. 192, 1 W.W.R. 795.

STATUTORY SECURITY TO BANKS.

The advancement by a bank of money on a demand note under a contemporaneous agreement that a chattel mortgage should be given as security therefor as soon as it could be prepared, constitutes a violation of s. 76, subs. 2 (c) of c. 29, R.S.C. (the Bank Act), which prohibits a bank, either directly or indirectly, lending money or making advances upon the security of any goods, wares, and merchandise. A chattel mortgage taken by a bank cannot be sustained under s. 80 of c. 29, of the Bank Act, as one given for additional security for a debt contracted in the usual course of business, where money was advanced upon a demand note under an agreement that it should be secured by a chattel mortgage as soon as it could be prepared. [Bank of Toronto v. Perkins, 8 Can. S.C.R. 603, referred to.]

Bates v. Kirkpatrick, 4 D.L.R. 395, 21 W.L.R. 607, 2 W.W.R. 513. [Affirmed 7 D.L.R. 806, 22 Man. L.R. 672, 22 W.L.R. 386.]

ADDITIONAL SECURITY—LAND.

A bank may recover upon a promissory note given to secure an advance notwithstanding that titles to land were also lodged with the bank at the time of the advance as additional security. National Bank of Australasia v. Cherry, L.R. 3 P.C. 299, followed.

Royal Bank v. Gold, 24 B.C.R. 145, [1917] 2 W.W.R. 886.

(§ VIII A—167)—EQUITABLE MORTGAGE—GIVING UP—INTENTION.

The giving up of property deposited for the purpose of creating a lien destroys the lien unless an intention to preserve it can be shewn. [Dominion Bank v. Markham, 14 D.L.R. 508, reversed; Re Driscoll, Ir. R. 1 Eq. 285, applied.]

Dominion Bank v. Markham, 17 D.L.R. 1, 7 A.L.R. 456, 28 W.L.R. 145.

B. WHAT BANKS MAY NOT LEND ON.

(§ VIII B—170)—PROHIBITED SECURITIES—LAND—ADDITIONAL SECURITY.

A certificate of title intended as security on land, for an advance by a bank, delivered at a time when a new note was taken on the transaction, held, per Haultain, C.J., and Elwood, J., to be a prohibited security under s. 76 (2) (c) of the Bank Act (R.S.C. 1906, c. 29); per Newlands and Lamont, JJ., that it amounted to a security for a past due debt permissible under s. 80 of the Act. [National Bank of Australasia v. Cherry, L.R. 3 P.C. 299, considered.]

Quebec Bank v. Phillips, 36 D.L.R. 440, 10 S.L.R. 190, [1917] 2 W.W.R. 365.

PROHIBITED SECURITIES — RECOVERY — CONVERSION—MEASURE OF DAMAGES.

Where a bank lends upon a prohibited security, although it may not enforce the security, it may recover the money actually lent thereunder. National Bank of Australasia v. Cherry, L.R. 3 P.C. 299; Ayers v. South Australasian Banking Co., L.R. 3 P.C. 548, applied. The damages recoverable where a bank in breach of the terms of bailment releases a security, are prima facie the value of the instrument held in pledge, but may, according to circumstances, fall considerably short of the face value of the security.

Union Bank v. Farmer (Alta.), [1917] 1 W.W.R. 1361.

(§ VIII B—172)—SECURITY TO BANKS—RENEWAL OF UNSECURED DEBT—MORTGAGES AND HYPOTHECS.

S. 80 of the Bank Act, R.S.C. 1906, c. 29, allows banks to take mortgages and hypothecs on the property of their debtors only in the case of debts already in existence.

Eastern Townships Bank v. Pickard, 13 D.L.R. 389, 23 Que. K.B. 488.

LAND MORTGAGE—MORTGAGE—MORTGAGE TO SECURE PAST INDEBTEDNESS—EFFECT OF INCLUDING FUTURE ADVANCES.

A mortgage taken by a bank on land as security for a large past due indebtedness is not invalidated as to the past indebtedness because it purports to be also for such further and future advances as should be made from time to time to the mortgagor, or which might be represented by bills or notes made or endorsed by the latter, or any renewals thereof, by reason of the prohibition of s. 76 of the Bank Act, R.S.C. 1906, c. 29, 3-4 Geo. V. (Can.) c. 9, against lending money on land, where the instrument was not intended by the parties as a mere colourable or collusive scheme to defeat the restrictions of the act, and no future advances were contemplated or made except in so far as they might be incidental to the working out of the past due account. [Thomson v. Stikeman, 14 D.L.R. 97, 29 O.L.R. 146, affirmed. And see Falconbridge on Banking, 2nd ed., 188, 202, 210.]

Thomson v. Stikeman, 17 D.L.R. 205, 30 O.L.R. 123.

LAND MORTGAGE—BUYING IN AS SUBSEQUENT MORTGAGEE—BANK ACT.

S. 81 of the Bank Act R.S.C. 1906, c. 29, confers on a mortgagee bank the rights of an individual mortgagee as to buying in under a prior mortgage.

Union Bank of Canada v. Bates, 18 D.L.R. 269, 24 Man. L.R. 619, 28 W.L.R. 602, 6 W.W.R. 1170.

(§ VIII B—174)—STATUTORY SECURITY—WHAT BANKS MAY NOT LEND ON—GOODS.

A chattel mortgage, taken by a bank in violation of clause (c) of subs. 2 of s. 76 of the Bank Act (R.S.C. 1906, c. 29) prohibiting banks from making advances "upon the security of any goods, wares and merchandise" (except as authorized by the act), may be valid and enforceable if taken to secure an existing indebtedness, but not otherwise.

Northern Crown Bank v. Great West Lumber Co., 11 D.L.R. 395, 7 A.L.R. 183, 24 W.L.R. 477, 4 W.W.R. 720.

"GOODS"—FARM STOCK.

The word "goods" in subs. 2 of s. 76 of the Bank Act, 3-4 Geo. V. (Can.), c. 9 which prohibits advances upon the "security of any goods, wares and merchandise," covers farm stock, though it does not cover every kind of personal property.

Ball and Whieldon v. Royal Bank of Can., 26 D.L.R. 385, 52 Can. S.C.R. 254, reversing 22 D.L.R. 647, 21 B.C.R. 267, 8 W.W.R. 734.

(§ VIII B—175)—EXECUTION — ASSIGNMENT OF LEASE—CROPS—BILL OF SALE.

A bank, which had notice of executions against a debtor who was also indebted to the bank at the time, advanced money to put in and harvest a crop grown partly on the debtor's homestead which he had leased to his infant son on a crop payment lease, and partly on the other land also leased by the son on a similar lease; both leases were assigned by the son to the bank and both father and son undertook that the proceeds of the sale of the crops would be applied first in payment of the advances and next to the payment of the old debt of the father's to the bank; bills of sale of the severed crop were subsequently given to the bank under a covenant for further assurance in the assignments. Held, that the transactions were not fraudulent as against the father's creditors but as the bank had notice of the executions at the time of entering into the transactions, it lost its security on the father's share of the crop grown on the homestead, but the rest of the grain in which the father had no interest remained as security to the bank. Held, that so far as the bills of sale of the crops were intended to secure the past debt to the bank they were fraudulent and void, and the assignments were void, under s. 15 of the Bills of Sale Ordinance (Con. Ord. N.W.T. c. 43). Also held that the transactions were void under the Bank Act (s. 76, subs. 2 (c)).

McKillop v. Royal Bank of Canada, 40 D.L.R. 556, 56 Can. S.C.R. 220, [1918] 2 W.W.R. 100, reversing in part 33 D.L.R. 268, 10 A.L.R. 304, [1918] 1 W.W.R. 1149.

LOAN OF MONEY TO BUSINESS—BUSINESS HEAVILY INDEBTED TO BANK—GUARANTEE OF PAYMENT BY BANK—AUTHORITY OF MANAGER—SCOPE OF HIS EMPLOYMENT—BANK ACT, 3-4 GEO. V., 1913 (DOM.), C. 9—JUDGMENT AGAINST BANK—APPEAL.

A letter written on the bank's stationery and signed by the bank manager, which guarantees the payment of a debt due a third party is not binding upon the bank. The bank manager has no authority to give

such a guarantee and, in doing so, he is not acting within the scope of his employment. [Bank Act, 3-4 Geo. V. 1913 (Dom.), c. 9, s. 76, referred to; Pole v. Leask, 33 L.J. Ch. 160; Banbury v. Bank of Montreal, 44 D.L.R. 234, [1918] A.C. 626, followed; Ontario Bank v. McAllister, 43 Can. S.C.R. 558, distinguished.]

Merchants Bank of Canada v. Stevens, 49 D.L.R. 528, [1920] 1 W.W.R. 52.

C. Warehouse receipts, bills of lading or statutory securities.

(§ VIII C—180)—Security for advances—Warehouse receipts.

The guarantee obtained by a bank upon all goods or effects for advances of money has the same effect as if the bank had obtained from the owner a warehouse receipt. In such case if there is failure in payment the bank becomes owner of these goods or effects subject only to the lien of the unpaid workmen during a period of three months.

Lord v. Canadian Last Block Co., 51 Que. S.C. 499.

Advances of money—Shipping-bills—Inspection certificates—Non-negotiable instruments—Fraud—Third party—Responsibility—Legal relationship—C.C., art. 1053.

A manufacturer having a contract with the Imperial Munitions Board for the furnishing of boxes of munitions should obtain the delivery of these boxes, and should have on its shipping-bill, a certificate of an inspector named by a company representing the Imperial Munitions Board. This manufacturer who drew money from the plaintiff bank on the transfer of its shipping-bills and inspection certificates, obtained from the inspector a large number of certificates signed in blank on false shipping-bills, and obtained thus fraudulently from the said bank the sum of $46,647.90. It was decided that the company which represented the Imperial Munitions Board and whose employee had committed the imprudence of signing the certificates in blank, was not responsible to the plaintiff bank for the loss suffered by it, and that no legal relationship existed between them. The shipping-bills and the above-mentioned written certificates are not negotiable instruments.

Banque D'Hochelaga v. Canadian Inspection & Testing Laboratories, 56 Que. S.C. 187.

(§ VIII C—181)—In general—Effect of taking securities.

Commercial documents, such as securities under the Bank Act, R.S.C. 1906, c. 29, should not be scrutinized with the same particularity as those of the class usually prepared and examined by solicitors and executed only after having been carefully settled as to form. S. 90 of the Bank Act, R.S.C. c. 29, should be construed liberally and not strictly or critically.

Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 26 O.L.R. 637, 22 O.W.R. 703.

Assignment of chattel mortgage.

An assignment of a chattel mortgage by a mortgagee, a trust company, to a chartered bank on the latter taking over the trust company's securities and giving credit therefor, is not in contravention of s. 76 of the Bank Act (Can.), if the transaction was entered into with good faith and without any intention of evading the provisions of that act. [Bank of Toronto v. Perkins, 8 Can. S.C.R. 603, referred to.]

Royal Bank v. Whieldon, 22 D.L.R. 647, 21 B.C.R. 267, 8 W.W.R. 734. [Reversed in 52 Can. S.C.R. 254, 26 D.L.R. 385, 9 W. W.R. 776.]

Statutory receipt as collateral security—Action for debt prior to accounting.

A bank which has made advances to a lumber company upon assignments and statutory receipts under the Bank Act (Can.), whereby the company thereafter held the logs and lumber as bailees of the bank, may maintain an action against the company for the balance due them in respect of such advances without having rendered prior to the action an account of the proceeds realized under the security so held as collateral; it is sufficient that the details of such accounting should be furnished under oath in the action, and that the defendant has had an opportunity of contesting its accuracy.

Bank of Montreal v. Low Lumber Co., 14 D.L.R. 894, 44 Que. S.C. 391.

(§ VIII C—184)—Articles produced from pledged goods—Security.

Articles manufactured from lumber covered by security under ss. 88, and 90 of the Bank Act, R.S.C. 1906, c. 29, are likewise covered by the security.

Townsend v. Northern Crown Bank (No. 2), 10 D.L.R. 149, 27 O.L.R. 479. [Affirmed 13 D.L.R. 300, 20 D.L.R. 77, 49 Can. S.C.R. 394.]

(§ VIII C—185)—Substituted Goods.

Under subs. 2 of s. 88, of the Bank Act, R.S.C. 1906, c. 29, which enacts that a bank which has taken a statutory security by way of warehouse receipt from a wholesale dealer in products of agriculture, the forest, mine, etc., may allow the goods covered by such security to be removed and other goods to be substituted therefor, if of substantially the same character and of the same value as, or of less value than, those for which they had been so substituted, a bank, which advanced money to a paper manufacturing company upon the security of certain sulphite which the company used in the manufacture of paper, does not lose its security by such sulphite being replaced by other sulphite in accordance with the intention of all parties.

Quebec Bank v. Craig, 6 D.L.R. 573, 3 O.W.N. 1635, 22 O.W.R. 874.

(§ VIII C—188)—Statutory security—Right of bank to sell or assign—S. 88.

There is vested in a bank no implied right to assign the securities which it is specially privileged to take under s. 88 of the Bank Act, R.S.C. 1906, c. 29.

Chesley Furniture Co. v. Krug, 18 D.L.R. 486, 7 O.W.N. 144.

(§ VIII C—189)—Loans by—Statutory security—"Forests product"—Sawn lumber—"Wholesale purchaser."

Sawn lumber is a "forest product" on which a bank may take a statutory receipt under s. 88 of the Bank Act, R.S.C. 1906, c. 29, from a customer, who is a "wholesale purchaser" of lumber, as security for a loan made to him. [Molsons Bank v. Beaudry, 11 Que. K.B. 212, dissented from.] One who purchases lumber in carload lots, both for use in his business as a building contractor and for resale in small lots, is a "wholesale purchaser" of "forest products" from whom a bank may take a statutory receipt pledging his stock as security for a present advance by virtue of s. 88 of the Bank Act, R.S.C. 1906, c. 29.

Townsend v. Northern Crown Bank, 20 D.L.R. 77, 49 Can. S.C.R. 394, affirming 13 D.L.R. 300, 28 O.L.R. 521, affirming 10 D.L.R. 149, which varied 4 D.L.R. 91.

(§ VIII C—191)—Statutory securities—Bank Act (Can.)—Form, latitude in.

A bank may take security for advances from a wholesale manufacturer under subss. 1, 3, 5 and 6 of s. 88 of the Bank Act (Can.), R.S.C. 1906, c. 29, provided the goods involved are capable of ascertainment and identification; the statutory form in the schedule to the act, is not compulsory as to its directions for description of goods and their locality but is intended as a guide. [Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 26 O.L.R. 637, affirmed; Tailby v. Official Receiver, 13 A.C. 523, at 533, applied.]

Imperial Paper Mills v. Quebec Bank, 13 D.L.R. 702, 24 O.W.R. 930.

(§ VIII C—192)—Statutory security—priority for wages — Bank Act (Can.) 1913.

As against a bank taking possession under a statutory security given to it by a wholesaler or other person under s. 88 of the Bank Act (Can.), 1913, the employees of the company may enforce their prior lien to the extent of three months' wages either by resort to the assets or by a claim in debt against the bank which has disposed of the same, the intent of s. 88 being that the bank obtaining the benefits of the security must also assume its burdens. [Richardson v. Willis, 42 L.J. Ex. 68, applied; Pomerleau v. Thompson, 16 D.L.R. 142, referred to.]

Edborg v. Royal Bank, 16 D.L.R. 385, 6 W.W.R. 180, 27 W.L.R. 680, 19 B.C.R. 514.

(§ VIII C—202)—Upon written promise or agreement.

A security under s. 88 of the Bank Act, R.S.C. c. 29, upon some part of a larger number of similar articles is not invalid under s. 90 of that Act because the antecedent promise or agreement in writing, in pursuance of which it is given, does not state the precise amount of the debt to be secured or identify the precise articles to be charged.

Imperial Paper Mills v. Quebec Bank, 6 D.L.R. 475, 22 O.W.R. 703, 26 O.L.R. 637. [Affirmed 13 D.L.R. 702, 24 O.W.R. 930.]

(§ VIII C—203)—Renewed or extended.

Security under s. 90 of the Bank Act, R.S.C. c. 29, which, though given less than 60 days before an assignment by the giver thereof for the benefit of his creditors, is but a continuation of a former security of the like character held by the bank for the indebtedness more than 60 days before the assignment, is not given within 60 days of the assignment so as to throw upon the bank the onus of supporting it.

Townsend v. Northern Crown Bank, 4 D.L.R. 91, 22 O.W.R. 961, 26 O.L.R. 291. [Affirmed, 10 D.L.R. 149, 27 O.L.R. 479, 13 D.L.R. 300, 28 O.L.R. 521, 20 D.L.R. 77.]

Further advances—Unmatured note of third person—General letter of hypothecation.

The making of further advances by a bank to its customer is a consideration which would apply to all the securities held by it at the time of making such advances and place it in the position of a holder in due course of an unmatured note of a third party payable to its customer and by him endorsed to the bank under the terms of a general letter of hypothecation, where the bank had no notice of any defect in its customer's title to the note at the time of making the further advances on the customer's account in respect of which such promissory note was taken as collateral. [Canadian Bank of Commerce v. Wait, 1 A.L.R. 68; Bank of B.N.A. v. McComb, 21 Man. L.R. 58, referred to.]

Canadian Bank of Commerce v. McLeod, 21 D.L.R. 767, 7 W.W.R. 1115, 30 W.L.R. 537.

Advances to vendee of timber—Security under sec. 88 of Bank Act—Validity.

The judgment of Macdonald, J., 13 W.L.R. 282, affirmed.

Mutchenbacker v. Dominion Bank, 21 Man. L.R. 320, 18 W.L.R. 19 (Man.).

Lien-note—Assignment to bank as security for present and future advances—Taking security on goods.

Thien v. Bank of B.N.A., 19 W.L.R. 549 (Alta.).

Winding-up—Curator—Four days' notice—Waiver—Application of rules of practice.

Re Farmers Bank of Canada, 22 O.L.R. 556, 17 O.W.R. 964.

PLEDGING OF GOODS TO A BANK AS SECURITY FOR ADVANCES—WAREHOUSE RECEIPT—BAILEE OF GOODS—CLERK OF THE OWNER—"ACTUAL, VISIBLE AND CONTINUED POSSESSION."

La Banque Nationale v. Royer, 20 Que. K.B. 341.

BARBERS.

AS TRADER.

A barber is not a trader, within the meaning of art. 853, C.P. Que., even though he may occasionally sell to customers perfumes or other things pertaining to the exercise of his art.

Robitaille v. Piset, 51 Que. S. C. 248.

INFECTION FROM SHAVING—LIABILITY.

A barber who in shaving a customer cuts him is liable for the injury resulting from subsequent infection from the cut. His act is not a quasi-délit but a failure to execute the obligation imposed by his contract. Therefore, it is not for the customer to prove that the barber has committed a fault, but for the latter to justify the imperfect carrying out of his obligation by proving that the cut inflicted on the plaintiff happened without fault on his part, by a fortuitous event or force majeure. In order that the injury may be an immediate and direct result of the fault it is not necessary that the consequential damage be probable. It suffices that it is natural and might have been avoided.

Makkinge v. Robitaille, 51 Que. S.C. 17, reversing 50 Que. S.C. 1.

BARRISTERS.

See Solicitors.

RIGHT OF WOMEN TO.

At common law a woman could not be admitted as an attorney or be called to the Bar and this disability continues in British Columbia notwithstanding the general terms of the Legal Professions Act specifying the conditions upon which "persons" may be called to the Bar.

Re Mabel French, 1 D.L.R. 80, 19 W.L.R. 847, 17 B.C.R. 1, 48 C.L.J. 159.

GROUNDS FOR—EXORBITANT COMPENSATION—RESTITUTION.

The removal of a barrister from the rolls for unprofessional conduct, is justified where he entered into a contract with a man without business experience and of very moderate understanding, whereby the barrister was to receive one-third of about £500 that was due the client from an estate in Scotland, and where the barrister knew at the time such agreement was made that the money was ready for remittance, and that all the client had to do to obtain it was to execute a discharge therefor, notwithstanding which the barrister grossly exaggerated the difficulties in the way of obtaining the money, and stated that it might involve litigation, and be some time before the money could be obtained. The fact that such barrister was not a solicitor, will not, under s. 74 of the Law Society Act of Manitoba, prevent him being stricken from the rolls of barristers or being disciplined in the latter capacity. [Re J.B., an attorney, 6 Man. R. 19, distinguished; Re Hulm & Lewis, [1892] 2 Q.B. 261; Re Hurst & Middleton, 56 Sol. Jour. 520, specially referred to, 21 W.L.R. 450.] The fact that such barrister has made restitution, is no defence to an application to strike him from the rolls, it may be taken into consideration in awarding punishment. [Re Solicitor, 62 L.T. 446, and Hands v. Law Society of Upper Canada, 16 O.R. 625, referred to.]

In re Percy E. Hagel, 3 D.L.R. 706, 21 W.L.R. 450, 22 Man. L.R. 746.

SOLICITOR'S LIEN—WHAT IS—DIFFERS FROM ORDINARY LIEN.

A solicitor's lien is not a lien in the ordinary sense of a charge on property in possession, but is a right to acquire a charge on property of the client, but not on property of someone else; unless the costs become the costs of the client there is nothing to which a lien may attach. [Leonard v. Whittlesea, 43 D.L.R. 62, referred to.]

Sutherland v. Spruce Grove, 44 D.L.R. 375, 14 A.L.R. 292, [1919] 1 W.W.R. 281. [See 43 D.L.R. 280.]

AGREEMENT FOR COMPENSATION.

It does not necessarily follow that, because the senior taxing officer has, under the provisions of the recent amendment to the Manitoba Law Society Act, set aside an agreement for compensation obtained by a barrister or solicitor from his client by misrepresentation, that the conduct of the barrister or solicitor will be regarded as unprofessional, as each case must depend upon its own circumstances.

In re Percy E. Hagel, 3 D.L.R. 706, 21 W.L.R. 450, 22 Man. L.R. 746.

BASTARDY.

See also Illegitimacy.

(§ I—1)—TRIAL DE NOVO—AMOUNT OF AWARD.

Where the defendant in bastardy proceedings obtains a trial de novo on an appeal from a magistrate to the County Court sitting with a jury, and without objection allows the case to go to the jury solely upon the question of paternity, he cannot afterwards object that the question of the amount to be awarded should also have been left to the jury and not fixed as it was by the judge in affirmance of the magistrate's order, on the jury finding against the defendant on the question of paternity.

Overseers of the Poor v. Kennedy, 21 D.L.R. 119, 48 N.S.R. 258.

(§ I—5)—MAINTENANCE—FORM OF AFFIDAVIT OF AFFILIATION—CONSTRUCTION OF ILLEGITIMATE CHILDREN'S ACT—"REALLY."

Broderick v. McKay, 39 D.L.R. 795, 40 O.L.R. 363.

ORDER FOR SUPPORT—POWER OF JUDGE—EXPENSES OF BIRTH—AMOUNT.

An order made under an act respecting the support of illegitimate children, c. 39, 1912, by the judge of the District Court wherein the complainant resides is not bad because of the omission of words therein indicating the capacity in which the judge acted, but the order may be amended. A provision in such an order requiring the respondent to pay the expenses incidental to the birth of the child but which does not fix the amount thereof is bad, and where there is no evidence as to such amount the provision should be struck out, but the fact that such provision cannot stand does not make the whole order bad.

Re Holmes (Sask.), [1918] 2 W.W.R. 883.

BOND — FAILURE TO APPEAR — LIABILITY — FILIATION ORDER.

Sureties are liable on a bond under s. 6 of the Bastardy Act (R.S.N.S. 1900, c. 51), upon a failure of the putative father to appear, before any filiation order is made.

Dow v. Parsons, 36 D.L.R. 510, 51 N.S.R. 41.

FILIATION PROCEEDINGS — SETTLEMENT — SECOND ACTION — RES JUDICATA — ACCORD AND SATISFACTION—ILLEGITIMATE CHILDREN'S ACT (R.S.M. 1913, c. 92).

Bonschowski v. Whitledge, 30 D.L.R. 489, 26 Man. L.R. 577, 34 W.L.R. 1077.

ILLEGITIMATE CHILDREN'S ACT—AFFIDAVIT AS NOTICE OF APPEAL.

The filing of the affidavit required by s. 29 of the Illegitimate Children's Act takes the place of the usual notice of appeal directed to be given to the magistrate by s. 750 of the Criminal Code.

Re Pall Sigurdson, 9 W.W.R. 940, 25 Can. Cr. Cas. 291.

BAWDY HOUSE.

See Disorderly Houses.

BENEVOLENT SOCIETIES.

See also Associations; Charities; Religious Institutions.

Lodge benefit certificate, see Insurance.

I. IN GENERAL.
II. LOCAL LODGES.
III. CONSTITUTION, RULES, AND BY-LAWS.
IV. MEMBERSHIP; EXPULSION; LIABILITY.

BENEFIT ASSOCIATION—TRANSFERS BETWEEN LODGES—REGULARITY OF AFFILIATION—PAYMENT OF DUES AND ASSESSMENTS—PRESUMPTION.

Ancient Order of United Workmen (Grand Lodge) v. Turner, 44 Can. S.C.R. 145.

II. Local lodges.

(§ II — 6) — LOCAL LODGES — RIGHTS AND POWERS OF—SALE OF ASSETS TO RIVAL SOCIETY.

McPherson v. Grand Council Provincial Workmen's Association, 16 D.L.R. 853, 50 C.L.J. 588, affirming 8 D.L.R. 672, 46 N.S.R. 417. [Leave to appeal to Privy Council refused, August 4, 1914.]

III. Constitution, rules, and by-laws.

(§ III—10)—EFFECT OF BY-LAW ADOPTED SUBSEQUENT TO CERTIFICATE OF POLICY—ABSENCE OF NOTICE — BREACH OF STATUTORY CONDITIONS — R.S.Q. 1909, ARTS. 7027, 7028 — HOW A BY-LAW CHANGING THE CONSTITUTION MAY BE MADE BINDING ON HOLDER OF CERTIFICATE ISSUED WITHOUT NOTICE OF THE CHANGE—R.S.Q. 1909, ART. 7028, SUBS. (1).

Cousins v. Moore, 6 D.L.R. 37, 42 Que. S.C. 156.

REGULATIONS—NAMING OF ADOPTED CHILD AS BENEFICIARY—PROOF OF ADOPTION.

Notwithstanding that the legal adoption of children is not recognized by the law of Ontario, a mutual benefit association may provide for the payment of benefits to adopted children by a rule or regulation to the effect that they may be named in certificates of insurance as beneficiaries, upon proof of their legal adoption being made to the satisfaction of the supreme secretary of the association. [Ancient Order of United Workmen of Quebec v. Turner, 44 Can. S.C.R. 145, referred to.]

Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 26 O.L.R. 367, 22 O.W.R. 72.

POLICE BENEFIT FUND—ADOPTION OF ORIGINAL BY-LAWS.

A by-law of a Police Benefit Fund Association providing that in no case shall a member be allowed to retire who is in good health and capable of performing his duties, and that a member dismissed from the police force for cause, shall immediately cease to have any interest in the fund of the association and shall not be entitled to any benefit therefrom, does not apply to a member who was forced out of the police service by the Board of Police Commissioners without a hearing.

De La Ronde v. Ottawa Police Benefit Fund Association, 3 D.L.R. 328, 3 O.W.N. 1188, 21 O.W.R. 997 (No. 2), 6 D.L.R. 850, 3 O.W.N. 1282, 22 O.W.R. 123.

AMENDMENT — PAYMENT OF ENDOWMENT POLICY.

The amendment to the Ontario Insurance Act, made by 3 Edw. VII. (Ont.), c. 15, s. 8 [R.S.O. 1914, c. 183, s. 185], enabled a benevolent society subject to the provisions of the Ontario Insurance Act to so amend its constitution as to make the one-half of the benefit which was originally payable in a lump sum to the member on his attaining the endowment age, so that the same would thereafter be payable in fixed

yearly instalments commencing at the endowment age; but the statute does not enable the society in the absence of any reservation to that effect in its constitution to postpone or change the endowment age already fixed. A benevolent society has not right after a benefit in nature of an endowment insurance is accrued due to its member so that he became a creditor of the society for the amount thereof, to forfeit or impair such creditor's rights to his debt, or to postpone his payment, or to make its payment conditional upon the member paying further assessments, although the society had power under its constitution to alter its constitution and by-laws, other than the fundamental declaration under which it was incorporated, which included as one of the objects of the society the payment of endowment at the age in question. [Re Ontario Ins. Act and Supreme Legion Select Knights, 31 O.R. 154, distinguished.]

Grainger v. Order of Can. Home Circles, 21 D.L.R. 110, 33 O.L.R. 116, affirming 31 O.L.R. 461.

ACTION BY MEMBER FOR BENEFITS—COMPLIANCE WITH BY-LAW AS CONDITION PRECEDENT—WAIVER BY PLEA TO MERITS.

A member of a benefit association who makes a claim for benefits which is refused by the executive council, and who without appealing from such decision to the general council of the society sends through his attorney two letters to the association, has sufficiently conformed to a by-law of the association providing, that in order to be entitled to take action against the society in a Civil Court the member must first have exhausted all the means out at his disposal by statute. If in such action the society joins issue upon the merits and calls witnesses, it thereby acquiesces in the jurisdiction of the court.

Routhier v. L'Alliance Nationale, 48 Que. S.C. 193.

INSURANCE — MUTUAL BENEFIT SOCIETY — CONFERRING OF BENEFITS — RELATIONSHIP—PROVISION PROHIBITING THE CONFERRING OF BENEFITS BY WILL—LIBERTY TO MAKE WILL—C.C., ART. 898, 2591.

When the constitution of a Mutual Benefit Society only admits blood relations to the benefits of its endowments, the conferring of a certificate of endowment to a nephew by marriage, whom the insured has falsely declared to be his sister's son, is null and inoperative. In the Province of Quebec, under our present legislation, a member of a Mutual Benefit Society can distribute his endowment benefits by will, notwithstanding the rules of the association to the contrary. These rules have no effect when they conflict with the general law.

Dalziel v. Catholic Order of Foresters, 28 Que. K.B. 443.

BENEFIT CERTIFICATE—SOCIETY SUBJECT TO ACT RESPECTING BENEVOLENT, PROVIDENT AND OTHER SOCIETIES, R.S.O. 1897, c. 211—REPEAL OF ACT BY 7 EDW. VII. c. 34, s. 211 (3) — PRESERVATION OF RIGHTS OF BENEFICIARIES — RULES OF SOCIETY—DESIGNATION OF NEXT OF KIN AS BENEFICIARIES—WILL OF ASSURED—LIEN FOR PREMIUMS PAID.

Re Nicholson & C.O.F., 7 O.W.N. 623.

(§ III—11)—AMENDMENT RAISING ASSESSMENTS—NOTICE OF.

An injunction will be granted to restrain the defendant (a fraternal benevolent society) from taking any proceedings under a certain amendment to the constitution of the defendant society, where it appeared that the amendment in question greatly increased the assessments (or premiums) on the insurance of the plaintiffs, as aged members of the society; and where its constitution required that a copy of all proposed amendments should be forwarded to the Grand Recorder on or before a certain fixed date each year, in order that the Grand Recorder, in turn, might send a copy to each subordinate lodge in time for a full discussion of the proposed amendment before selection of a Grand Lodge representative; and where the constitution also provides that in all important matters the representative in Grand Lodge of a subordinate lodge has as many votes as his lodge has members; and where the Grand Lodge had assumed to pass such constitutional amendment without such notice being given to the Grand Recorder, as provided by the constitution of the society. [Cordiner v. A. O.U.W., 6 D.L.R. 491, 4 O.W.N. 102, affirmed on appeal.]

Cordiner v. Ancient Order of United Workmen of the Province of Ontario (No. 2), 9 D.L.R. 213, 4 O.W.N. 549, 23 O.W.R. 563.

CHANGES IN.

A payment of monthly assessments due on the certificates of a mutual benefit and benevolent brotherhood is not a renewal of the contract under which the members joined it within the meaning of the word "renewed" as used in those provisions of s. 197, 8 Edw. VII. (Que.) c. 69, now contained in subs. (1) of art. 7028 R.S.Q. 1909, and, therefore, as far as concerns those who became members of the society and received their certificates of membership before the section aforesaid was passed there can be no application of the provisions thereof that if an insurance contract made by any company or association is evidenced by a written instrument, the company shall set out all terms and conditions of the contract in full on the face or back of the instrument forming or evidencing the contract, and, unless so set out, no term or condition, stipulation or proviso, modifying or impairing the effect of any such contract made or "renewed" after the coming into force of this act, shall be good and valid or

admissible in evidence to the prejudice of the assured or beneficiary. [Carter v. Brooklyn Life Ins. Co., 110 N.Y. 15, not followed. See also Cousins v. Moore, 6 D.L.R. 35.]

Cousins v. Brotherhood of Locomotive Engineers, 6 D.L.R. 26, 42 Que. S.C. 110. [Affirmed 14 D.L.R. 192, 22 Que. K.B. 307.]

(§ III—12)—Adoption of by-laws.

Where the application for the incorporation of a Police Benefit Fund Association contained a statement that the by-laws governing such corporation and its members should be approved of at the first annual meeting of the corporation after its incorporation or at any general meeting of the members called for that purpose, a portion of a by-law offered at a meeting of the police force who were members of the association, which portion was objected to and not adopted at that or any other meeting of the association is not operative by reason of any ratification or adoption thereof by the board of trustees of the funds of the association.

De La Ronde v. Ottawa Police Benefit Fund Assn. 3 D.L.R. 328, 3 O.W.N. 1188, 21 O.W.R. 997.

Corporations — Illegal assembly — Void deliberations—Action to set aside—Refusal to contest action — Intervention of certain members to defend—Interest—C. proc. art. 77, 220.

A member of a corporation without any other than a common interest cannot, by intervention, substitute himself for the corporation to defend an action brought against it, when without fraud it abstains from defending itself.

Langevin v. L'Union St. Joseph De-Notre Dame-De-Beauport & Delage, 55 Que. S.C. 29.

Reasonableness of regulations — Payment of one-half of benefit certificate if action for damages instituted — By-law — Contribution by employer—Condition precedent to payment of claim—Release.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

IV. Membership; expulsion; liability.

(§ IV—15)—Exclusion of members—Soldier in active service.

A mutual benevolent and benefit association, which has been authorized by its charter to make by-laws for the admission, expulsion or exclusion of its members, may make a regulation to the effect that any person who enlists as a soldier on active service may not be admitted into the association, and that, if he has already been admitted, he shall be excluded therefrom as a matter of course; such a by-law is not contrary to public policy.

Ainslie v. L'Union St. Pierre, 50 Que. S.C. 185.

Expulsion of members.

No member of an association can be expelled without a resolution validly adopted; and verbal decision taken at a meeting cannot supplement the absence of such a resolution and have any effect. In the absence of powers conferred to the parties by the deed of association, no member can be expulsed; and in case of any violation of the by-laws, and of the existence of serious grounds of complaint, recourse must be had to the tribunal.

Wohlk v. Montreal Protective Shoemakers Assn. 54 Que. S.C. 29.

(§ IV—17)—Expulsion of members — Remedy—Injunction—Nominal damages.

The foundation of a court's jurisdiction to prevent an improper expulsion of a club member rests upon the principle that by such expulsion the member may be deprived of his right of property (Baird v. Wells, 44 Ch. D. 661). The remedy is by declaration, and injunction if necessary. Apart from this, the courts take no cognizance of such expulsions except in so far as they may be a breach of contract, and in the latter cases the ordinary principles of assessing damages in contract apply (Wayman v. Perseverance Lodge, [1917] 1 K.B. 677, is not an authority to the contrary). Only nominal damages may, therefore, be recovered for expulsion from membership in a lodge, where it is shown that the only injury which the plaintiff suffered therefrom was the deprivation of the right of access to the lodge room where the lodge meetings and social evenings were held, if such access to the meetings did not confer any pecuniary benefit and attendance at the social gatherings entailed either the payment of an entrance fee or a contribution of refreshments, and no special damages are claimed.

Humphrey v. Wilson (B.C.), [1917] 3 W.W.R. 529, 25 B.C.R. 110. [See also [1917] 3 W.W.R. 937.]

Disputes, withdrawal from membership.

Under the maxim "interest reipublicae ut sit finis litium," the court will refuse to entertain a dispute between a benefit society and a member until the remedies provided by its constitution for the determination of the differences by a trial or appeal within the society itself have been exhausted. [Zilliax v. Independent Order of Foresters, 13 O.L.R. 155, referred to.]

Cordiner v. Ancient Order of United Workmen (Ont.), 6 D.L.R. 491, 23 O.W.R. 65, 4 O.W.N. 102. [Affirmed 9 D.L.R. 213, 23 O.W.R. 863.

Withdrawal from membership — Payment of dues to end of year—Effect of death of withdrawing member before end of year.

A member of a mutual benefit and benevolent brotherhood issuing life accident insurance certificates though he paid his dues to the last day of the year is not a member for the period before that date extending from the time when he voluntarily

withdrew in accordance with the provisions of the brotherhood's constitution on withdrawal of members, though he met with an accident resulting in his death after his withdrawal from the order and before the last day of the year.

Cousins v. Brotherhood of Locomotive Engineers, 6 D.L.R. 26, 42 Que. S.C. 110. [Affirmed 14 D.L.R. 192, 22 Que. K.B. 307.]

POLICE BENEVOLENT ASSOCIATION—PENSION —DISMISSAL OF MEMBER.

Montreal Police Benevolent Assn. v. Laponte, 20 Que. K.B. 315.

(§ IV—19)—SUSPENSION FOR FAILURE TO PAY ASSESSMENT ON TIME—WAIVER BY ACCEPTANCE OF ASSESSMENT BY SUBORDINATE OFFICER—CUSTOM.

That portion of a rule of a benevolent association which provided that a member failing for thirty days after the same was due to pay an assessment which was by another part of the rule made payable on the first day of every month, should ipso facto be deemed suspended from all the privileges of the order and his benefit certificate thereby avoided, is waived by the association where it appears that to the actual though not "official" knowledge of the executive officer of the grand lodge, the officer of a subordinate lodge who was charged with the duty of preparing a statement of collection of assessments and the money collected and delivering the same to another officer of the lodge so that it could be sent to the grand lodge and reach it on or before the 15th of each month, had followed the custom for years of making the return himself to the grand lodge on the 15th of the month, and, before making it, of receiving from the members payment of their assessments shortly before the 15th so that it became the custom of the greater number of the members of the lodge to pay their assessments after the expiration of the thirty days, that is to say, in the first half of the month following that in which the assessments were payable. [Royal Guardians v. Clarke, 6 D.L.R. 12, 21 Que. K.B. 541, affirmed.]

Royal Guardians v. Clarke, 17 D.L.R. 318, 49 Can. S.C.R. 229.

REFERENCE TO BY-LAWS AND CONSTITUTION IN CERTIFICATE—STATUTORY CONDITIONS —WAIVER—R.S.Q. 1909, ART. 7028.

Cousins v. Moore, 6 D.L.R. 35, 42 Que. S.C. 156.

BETTING.

See Gaming; Lottery.

Annotation.

Betting house offences: 27 D.L.R. 611.

(§ I—1)—ON ELECTION RESULT—ACTION TO ENFORCE PAYMENT.

A wager on the result of a parliamentary election was unenforceable at common law; therefore an action does not lie for the amount of a bet made in Ontario on the result of a Dominion parliamentary election, although the bet was made prior to the statute 2 Geo. V. (Ont.) c. 56, declaring such bets to be unenforceable. [Allen v. Hearn, 1 T.R. 56, followed.]

Harris v. Elliott, 12 D.L.R. 533, 28 O.L.R. 349.

(§ I—5) — SERIES OF PRIVATE BETS — ENGAGING IN THE BUSINESS OF BETTING.

A repetition or series of acts of private betting must be proved to constitute an "engaging in the business" of betting or wagering in contravention of Cr. Code, s. 235, subs. (e).

R. v. Hynes, 31 Can. Cr. Cas. 293, 45 O.L.R. 51.

PUBLISHING RACE BETTING INFORMATION.

An unlawful intent to publish, sell, etc., information intended for use in connection with betting on horse-races may be inferred from the fact that the seller of the newspaper which featured "racing tips" was advertised in it as having been appointed "distributor" for the paper. [R. v. Luttrell, 18 Can. Cr. Cas. 295, distinguished.]

R. v. Roher, 26 Can. Cr. Cas. 376, 10 O.W.N. 303.

(§ I—10)—BOOKMAKING OR POOL SELLING —AIDING AND ABETTING.

A person who does or omits an act for the purpose of aiding another in "bookmaking or pool selling or in his business or occupation of betting or wagering," may be convicted of the principal offence (Cr. Code, ss. 69 (b) and 235 (e)).

R. v. Hynes, 31 Can. Cr. Cas. 293, 45 O.L.R. 51.

PUBLISHING OR SELLING RACING INFORMATION INTENDED FOR USE IN BETTING AND POOL SELLING.

The King v. Luttrell, 17 Can. Cr. Cas. 295 (Ont.).

TELEGRAMS—WIRE FROM TRACK—WILFULLY AND KNOWINGLY DESPATCHING BETTING INFORMATION.

The King v. Hogarth, 18 Can. Cr. Cas. 272, 2 O.W.N. 727.

BIGAMY.

(§ I—7) — CONTINUOUS ABSENCE AS DEFENCE.

The continuous absence referred to in Cr. Code, s. 307 (3) as an answer or excuse to a bigamy charge is absence from the person, and it is not essential to a defence under that heading that the absence of the spouse should have been either out of Canada or out of the province in which the first marriage took place and in which both parties were domiciled until their separation, ten years before the alleged bigamous marriage.

R. v. Rafuse, alias Penaul, 28 D.L.R. 182, 25 Can. Cr. Cas. 161, 49 N.S.R. 391.

(§ I—10)—PROOF OF FOREIGN MARRIAGE— DE FACTO OFFICER.

The presumption that a person acting in a public or official capacity in a foreign country is entitled so to act will apply to

the proof of the first marriage in a charge of bigamy to support the testimony of the first wife that she and the accused were married by a justice of the peace in one of the United States, such an officer being shewn by proof of the foreign law to be qualified to perform the ceremony, although there was no formal proof of the election of this particular justice to the office. [R. v. Naoum, 19 Can. Cr. Cas. 102, 24 O.L.R. 316, referred to.]

R. v. Debard, 31 Can. Cr. Cas. 122, 44 O.L.R. 427.

(§ I—12)—Mens rea—Intent—Belief in divorce.

An honest belief on the part of the defendant that he was divorced constitutes no defence to the charge of bigamy either at common law or under ss. 16 and 307 of the Criminal Code (1906). [R v. Brinkley, 14 O.L.R. 434, followed: R. v. Sellars, 9 Can. Cr. Cas. 153, disapproved.]

The King v. Beiler, 1 D.L.R. 878, 21 W.L.R. 18, 19 Can. Cr. Cas. 249, 4 A.L.R. 320.

(§ I—15)—Proof that officiating minister qualified.

On a charge of bigamy the celebration of the first marriage by a minister of some religious denomination "recognized as duly ordained" (R.S.N.S., c. 111), is sufficiently shewn by proof that the person officiating was a clergyman de facto in charge of the church where the ceremony took place and made return thereof as "locum tenens."

R. v. Adeline Cameron (N.S.), 29 Can. Cr. Cas. 113.

Proof of first marriage — Foreign marriage—Admission of accused—Foreign law—Judicial notice.

R. v. Naoum, 24 O.L.R. 306, 19 O.W.R. 689.

Criminal Code, s. 307 — Proof of first marriage — Admissibility of confession—Proof of foreign law.

R. v. Yovan Naoum, alias James Toney, 19 O.W.R. 689, 2 O.W.N. 1347.

BILLS AND NOTES.

I. Nature; requisites and validity.
- A. In general.
- B. Validity generally; delivery.
- C. Consideration.
- D. Negotiability.

II. Acceptance.

III. Indorsement and transfers.
- A. In general.
- B. Liability of indorsers.
- C. Discharge of indorsers.
- D. Transfers without indorsement.

IV. Presentment; demand; notice; protest.
- A. In general; necessity.
- B. Sufficiency.
- C. Notice of protest; certificate.
- D. Damages for nonacceptance, nonpayment and protest.

V. Rights and liabilities of transferees.
- A. Extent of rights and protection generally.
- B. Who are protected as bona fide purchasers.

VI. Actions and defences; acceleration; maturity; extension and renewal.
- A. In general; right to sue.
- B. Maturity; extension; renewal.
- C. Defences.

VII. Recovery back of payment made.

Annotations.

Filling in blanks: 11 D.L.R. 27.

Presentment at place of payment: 15 D.L.R. 41.

Renewal; promissory note; effect of renewal on original note: 2 D.L.R. 816.

How affected by moratorium: 22 D.L.R. 865.

Effect of war on alien bills and notes: 23 D.L.R. 375, 377.

Delay in presenting cheque for payment: 40 D.L.R. 244.

I. Nature; requisites and validity.

A. In general.

Lien note, see Sale.

(§ I A—1)—Signing blank note.

The mere signing of a blank form of promissory note, not done negligently, creates no liability thereon in the absence of authority, or of an intention, to issue or negotiate the document as a promissory note. [The Bills of Exchange Act, R.S.C. 1906, c. 119, ss. 31, 32, considered.]

Sair v. Warren, 34 D.L.R. 268, 10 S.L.R. 120, [1917] 2 W.W.R. 265.

Instrument valid on face as promissory note — Independent memorandum written at bottom—Effect.

A document which on its face complies with all the requirements of a valid promissory note is not invalidated as such by a memorandum written at the foot of the document, which constitutes an independent agreement relating to something to be performed immediately upon payment of the note.

Lecomte v. O'Grady, 44 D.L.R. 756, 57 Can. S.C.R. 563, [1919] 1 W.W.R. 339, affirming 40 D.L.R. 378.

Proof of signature—Mark—Witness.

The signature on a cheque by means of a cross in the presence of the person who signs as witness is legal. The proof of the signature of the witness after his death may be made by oral evidence.

Himbeault v. Banque d'Hochelaga, 51 Que. S.C. 143.

(§ I A—2) — What are — Document in writing—Conditional sale of implement—Absence of absolute and unconditional promise.

Molsons Bank v. Howard, 5 D.L.R. 875, 3 O.W.N. 661, 21 O.W.R. 278.

PROMISSORY NOTE — WHAT IS — INSTRUMENT WITH CONDITIONS INCONSISTENT WITH NATURE OF NOTE.

The character of an instrument as a promissory note is destroyed by a condition to the effect that the payer waived all his statutory exemptions; and that title to the property for which the note was given should remain in the payee until it was paid for; and that, on the refusal of the payer to furnish satisfactory security at any time, or if he should make default in payments, or sell or encumber his land, or if the payee should consider the note, or any renewals thereof, to be insecure, the latter might declare the notes due and enter suit thereon, and also take possession of and hold the property purchased until the note, or renewal notes were paid, or sell it at public or private sale, and apply the proceeds on such indebtedness. [Dominion Bank v. Wiggins, 21 A.R. (Ont.) 275; Bank of Hamilton v. Gillies, 12 Man. L.R. 495; Frank v. Gazelle Live Stock Assn., 6 Terr. L.R. 392, followed; Yates v. Evans, 61 L.J.Q.B. 446; Kirkwood v. Carroll, [1903] 1 K.B. 532, distinguished.]

Douglas Bros. v. Auten & Schultz, 12 D.L.R. 196, 6 A.L.R. 75, 24 W.L.R. 676, 4 W.W.R. 989.

LIEN NOTE — AGREEMENT FOR ADDITIONAL SECURITY—NOT A NEGOTIABLE PROMISSORY NOTE — BILLS OF EXCHANGE ACT (CAN.).

A lien note which contains, in addition to the promise to pay, the promisor's agreement to furnish additional security when demanded and which stipulates for acceleration of the due date by the promisee if he deems himself insecure, is not a negotiable promissory note within the Bills of Exchange Act, Can., and presentment before action thereon is not necessary. [Bank of Hamilton v. Gillis, 12 Man. L.R. 495, applied.]

Greenwood v. Kirby, 20 D.L.R. 725, 24 Man. L.R. 532, 6 W.W.R. 1176.

NEGOTIABILITY—"VALUE RECEIVED" STRUCK OUT — "ACCOUNT OF LUMBER TO BE SHIPPED" ADDED.

An instrument in the form of a promissory note payable to order is none the less a promissory note because of the words "value received" being struck out and the words "account of lumber to be shipped" being inserted in lieu thereof. [Siegel v. Chicago Trust & Savings Bank, 23 N.E.R. 417; First National Bank v. Lightner, 88 Pac. R. 59; Chase v. Kellogg, 13 N. Y. Supp. 351, referred to.]

Merchants Bank of Canada v. Bury, 21 D.L.R. 495, 33 O.L.R. 204.

PROMISSORY NOTE — WHAT CONSTITUTES — "THRESHING MEMORANDUM."

A promise to pay subjoined to a "threshing memorandum" acknowledging the quantity and price of threshing certain grain, may constitute the document a promissory note and therefore transferable by endorsement although the payee is not indicated therein by name, if the document shews with reasonable certainty that the payee is the contractor for the threshing who had acquired a lien under the Threshers Lien Act, Alta.

Case Threshing Machine Co. v. Desmond, 22 D.L.R. 455, 8 A.L.R. 298, 7 W.W.R. 895.

NOTE RESERVING LIEN.

A document containing an unconditional promise to pay at a fixed date, a sum certain in money, is a promissory note, notwithstanding there are additional words expressive of a lien, if such words are meaningless as between the parties. [Frank v. Gazelle Live Stock Association, 6 Terr. L.R. 392; International Harvester Co. v. Maxwell, 15 D.L.R. 654; Kirkwood v. Carrol, [1903] 1 K.B. 531, referred to.

Robert Bell Engine & Thresher Co. v. Topolo (Sask.), 32 D.L.R. 77, 9 S.L.R. 384, [1917] 1 W.W.R. 608.

(§ I A—4)—FILLING IN BLANKS.

A vendor may, after the execution and delivery of a lien note from which his name was omitted, given for personalty purchased at an auction sale, the terms of which required such a note to be given, insert his name in the blank spaces intended therefor.

Bell v. Schultz, 4 D.L.R. 400, 5 S.L.R. 273, 21 W.L.R. 408.

FILLING IN BLANKS.

A person to whom is transferred a blank promissory note with only the signature of the maker thereon has no authority to fill in and perfect the same, the statutory right to complete and fill in a blank note conferred by s. 31 of the Bills of Exchange Act, R.S.C. 1906, c. 119, is limited to the person to whom the signed blank is delivered in order that it may be converted into a bill. [Ray v. Willson, 45 Can. S.C.R. 401; Smith v. Prosser, [1907] 2 K.B. 735; Herdman v. Wheeler, [1902] 1 K.B. 361, and Aude v. Dickson, 6 Ex. 869, distinguished.]

Demers v. Léveillé, 11 D.L.R. 22, 44 Que. S.C. 61.

FORM—LIEN NOTES ON CONDITIONAL SALES.

So-called promissory or lien notes incorporating conditional sale agreements are not promissory notes within the meaning of the Bills of Exchange Act. [Douglas v. Auten, 12 D.L.R. 196, applied.]

International Harvester Co. of Canada v. Maxwell, 15 D.L.R. 654, 27 W.L.R. 41.

FILLING IN BLANKS.

[Demers v. Léveillé, 11 D.L.R. 22, affirmed.]

Demers v. Léveillé, 20 D.L.R. 976, 23 Que. K.B. 346.

CONTEMPORARY AGREEMENT.

A contemporary agreement in respect of a promissory note may be valid, whether oral or in writing.

Shaw v. Hossack, 36 D.L.R. 760, 39 O.L.R. 440, 12 O.W.N. 183. [Reversed in

13 O.W.N. 108, 39 D.L.R. 797, 40 O.L.R. 475.]

BLANK FORM—ALTERATION—HOLDER IN DUE COURSE.

Striking out the place of payment printed in a form which is intended to be used as a promissory note and which has been signed, and delivered, and inserting another place of payment, is a material alteration, and is excluded by s. 31 of the Bills of Exchange Act (R.S.C. 1906, c. 119); the alterations being apparent, an indorsee does not become a holder in due course, but is put upon inquiry, and can stand in no better position than the party endorsing the notes to him.

Bellamy v. Williams, 40 D.L.R. 396, 41 O.L.R. 244, affirming 12 O.W.N. 232.

CHEQUES PAYABLE TO ORDER OF CLUB — AUTHORITY OF SECRETARY TO INDORSE— CHEQUES DEPOSITED TO CREDIT OF SECRETARY IN PRIVATE ACCOUNT WITH TRUST COMPANY.

Toronto Club v. Dominion Bank; Toronto Club v. Imperial Bank; Toronto Club v. Imperial Trusts Co., 25 O.L.R. 330.

JOINT AND SEVERAL LIABILITY.

There is no several liability on a note commencing by the words "We promise to pay, etc.," and signed by two persons.

Brosseau v. Jodoin, 52 Que. S.C. 38.

PROMISSORY NOTE — INCOMPLETE INSTRUMENT — DELIVERY — HOLDER IN DUE COURSE.

Hubbert v. Home Bank of Canada, 20 O.L.R. 651.

PROMISSORY NOTE — INSTRUMENT PAYABLE ON DEMAND.

Decision in Northern Crown Bank v. International Electric Co., 22 O.L.R. 339, 17 O.W.R. 561, 2 O.W.N. 286, affirmed on appeal by the Divisional Court.

Northern Crown Bank v. International Electric Co., 24 O.L.R. 57.

PROMISSORY NOTE — INCOMPLETE INSTRUMENT — DELIVERY TO CUSTODIAN FOR SPECIFIC PURPOSE — FRAUDULENT FILLING UP.

Bank of B.N.A. v. McComb, 16 W.L.R 204 (Man.).

B. VALIDITY GENERALLY; DELIVERY.

(§ I B—5)—VALIDITY GENERALLY—DELIVERY.

Where a promissory note that was void as to its purported maker, a nonexistent company, began "we promise" and was signed by two persons who added the words "president" and "manager" to their respective signatures thereto, such designations will be disregarded and the signers held individually liable thereon under subs. 2 of s. 52 of the Bills of Exchange Act, R.S.C. 1906, c. 119, which requires that the "construction most favorable to the validity of an instrument shall be adopted." [Fairchild v. Ferguson, 21 Can. S.C.R. 484; Watling v. Lewis, [1911] 1 Ch. 414, and Chapman v. Smethurst, [1909] 1 K.B. 927, specially referred to.]

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

VALIDITY — EXCESSIVE INTEREST — MONEY LENDERS ACT.

As the taking of more than 12 per cent per annum in violation of s. 6 of the Money Lenders Act, R.S.C. 1906, c. 122, is an indictable offence, a promissory note taken by a money lender for less than $500 stipulating for a greater rate of interest is absolutely void, and cannot be upheld for the maximum contract rate of interest under s. 7 of the Act, since the latter section permits relief only from excessive payment of interest.

Bellamy v. Porter, 13 D.L.R. 278, 28 O.L.R. 572.

SALE PROHIBITED — CONTAGIOUS DISEASES ACT.

The Contagious Diseases Act, R.S.C. 1906, c. 75, s. 38, is in force in Manitoba notwithstanding R.S.M. 1913, c. 8. The act prohibits and makes illegal the sale of any animal afflicted with an infectious disease, and a promissory note given for the purchase price of such animal is void; knowledge on the part of the vendor is immaterial. [Nickle v. Harris, 3 S.L.R. 200, followed; Manitoba El. & Gas Co. v. Gerrie, 4 Man. L.R. 210; Bartlett v. Vinor, Carthew 252, 90 E.R. 750; Forster v. Taylor, 5 B. & Ad. 887, 110 E. R. 1019; Bensley v. Bignold, 5 B. & Ald. 335, 106 E.R. 1214, referred to.]

Baldwin v. Snook (Man.), 40 D.L.R. 333, [1918] 2 W.W.R. 314.

JOINT AND SEVERAL LIABILITY — INFANT — CLUB.

When several persons sign a note "We promise to pay," they are jointly and severally liable, if the note is given for a commercial debt. It is otherwise if it is a civil debt. A minor, who is a member and officer of an unincorporated athletic association and who signs a note personally for the benefit of the association, without receiving any benefit himself, is not responsible for the amount of the note. A club formed for amusement, which sells cigars and refreshments to its members, in small quantities, does not do an act of trade.

Cassaubon v. Bédard, 54 Que. S.C. 385.

SIGNATURE—AUTHORITY TO WIFE.

A husband who authorizes his wife to sign notes, but only in his absence and for the purpose of his business, is not liable on a note signed by her to pay the debt of their son.

Brodeur v. Dubois, 51 Que. S.C. 14.

PROMISSORY NOTE — ACTION AGAINST MAKERS OF JOINT AND SEVERAL NOTE—DENIAL OF SIGNATURES—ALLEGATIONS OF FRAUD — FINDINGS OF FACT OF TRIAL JUDGE — EFFECT OF ONE OR MORE ALLEGED MAKERS BEING RELIEVED.

McLarty v. Havlin, 6 O.W.N. 330.

PROMISSORY NOTE OF CORPORATION—SIGNATURES — PERSONAL LIABILITY OF DIRECTORS.

In an action upon a promissory note signed by a company and several individuals the question at issue was whether the note was that of the company only or whether the individual signers of it, who were the defendants in the action, were also liable on it. Held, that there was nothing upon the face of the note to indicate that the individual signers of it were not to be personally liable, and that, therefore, they must be held liable. The court then dealt with the extrinsic evidence, and held that the liability of the defendants was even more clearly established by this evidence than by the note itself. [Judgment of Scott, J., 2 A.L.R. 3, reversed.]

Union Bank v. Cross & Everard, 5 A.L.R. 489.

ILLEGAL CONSIDERATION — INSOLVENCY — COMPROMISE.

A promissory note given by a third party to the creditor of an insolvent in order to obtain his consent to a deed of compromise is illegal and void as founded upon an immoral consideration and contrary to public order.

Quebec Bank v. Weinstein, 51 Que. S.C. 60.

NOTE—ALTERATION—INCREASE OF AMOUNT—BLANK—NULLITY—S. REV. 1906, C. 119, ARTS. 145, 146.

In order to render a note void on account of alteration, the alteration must be made in an essential part of the note. Thus a note on which the drawer had written the date and also $250 in figures at the top of the note, leaving the rest blank, and which the holder had changed by adding the figure "1" to make $1,250 and by writing this sum in letters, does not constitute an essential alteration which involves the nullity of the note.

Bombardier v. Crevier, 55 Que. S.C. 163

VALIDITY GENERALLY—DELIVERY.

A promissory note signed, without consideration, by an employee of a bank at the request of his superiors and under the impression that a refusal would cost him his position is void for having been signed through fear.

La Banque Nationale v. Hamel, 43 Que S.C. 425.

(§ I B—8)—BY INTOXICATED PERSON.

One, who, when so drunk as to be incapable of knowing what he is doing, signs an application for life insurance on his children and a note for the premium thereon, and subsequently, when sober enough to know the nature of his actions, signs an amended application, and knows that the children are being medically examined for insurance, and, when informed by his wife that the policies had been sent to the house, makes no objection, and does nothing until payment of the premium note is demanded, will be deemed to have ratified his action when drunk, and will be estopped from raising the defence of incapacity in an action on the premium note, and from saying that there is no contract of insurance upon which he is liable, but he will not necessarily be held to have ratified everything contained in the original application.

Imperial Life Ass'ce Co. v. Audett, 5 D.L.R. 355, 20 W.L.R. 372, 4 A.L.R. 204.

(§ I B—10)—ILLEGAL USE OF MONEY LENT.

Notwithstanding the provisions of the Dominion Elections Act, R.S.C., c. 6, s. 279, the holder of a promissory note given for money used for illegal purposes in connection with an election, is entitled to recover where it does not appear that, at the time of lending the money, he had knowledge of the intended illegal purpose. There is no burden cast upon the party making the loan of proving that, at the time he made the loan, he had no knowledge of the illegal purpose. The court will not give an unreasonable construction to a statute where a more natural meaning and sufficient scope can be given to the words.

Cashon v. Kaulbach, 46 N.S.R. 289.

(§ I B—11)—ILLEGALITY OF CONSIDERATION—VIOLATION OF PROHIBITION ACT.

A bill of exchange given for the sale of liquor in violation of the Prohibition Act is illegal and unenforceable, although such sale was effected by a resident agent for a nonresident creditor not having paid the license fee required by the Act. [Brown v. Moore, 32 Can. S.C.R. 93, followed.]

Wickwire v. Carver, 24 D.L.R. 821.

(§ I B—14)—PAYMENT OF NOTES NOT PRODUCED—RIGHT TO INDEMNITY BOND.

In paying a note which was given by testator and which has been lost or is not produced, his executors are entitled to a bond of indemnity against it from the payee.

Board of Governors of King's College v. Poole, 11 D.L.R. 116, 24 O.W.R. 601, 4 O.W.N. 1293.

C. CONSIDERATION.

(§ I C—15)—CONSIDERATION—EXTENSION OF DEBT.

Where the promissory note of another endorsed by the debtor is given to and accepted by the creditor at the maturity of a debt, the effect is merely to postpone the payment, although the new note was for the exact amount of the debt, unless the debtor proves that the new note so endorsed was given and accepted as an accord and satisfaction.

Worden v. Hatfield, 13 D.L.R. 193, 41 N.B.R. 552.

SALE OF MOTOR CAR—AGREEMENT TO OBTAIN PROMISSORY NOTE OF THIRD PARTY—FAILURE TO OBTAIN—NOTE OF PURCHASER GIVEN IN PLACE OF—CONSIDERATION.

The purchaser of a motor car agreed to give a promissory note made by a third party in part payment. The note was en-

dorsed to the vendor and the car delivered. The vendor objected to the note on the ground that it was written on a piece of note paper and had no place of payment mentioned. The purchaser thereupon agreed to get a new note but failed to do so, and the vendor having ascertained that the third party was not financially sound, the purchaser gave his own note for the amount. Held, that the failure of the purchaser to procure the new note constituted a liability on his part sufficient to furnish a valuable consideration for the note sued on under s. 53 of the Bills of Exchange Act (R.S.C. 1906, c. 119). [Haigh v. Brooks, 10 Ad. & El. 309, 113 E.R. 119; Wilton v. Eaton, 127 Mass. 174; Coggins v. Murphy, 121 Mass. 166, referred to.]

Pedlar v. Carswell, 47 D.L.R. 651, [1919] 3 W.W.R. 277.

CANCELLATION OF SURETYSHIP.

The cancellation of a suretyship contract forms a sufficient consideration for a promissory note.

Standard Bank of Canada v. Alberta Engineering Co., 33 D.L.R. 542, 11 A.L.R. 96, [1917] 1 W.W.R. 1177, varying 27 D.L.R. 707.

CONSIDERATION OF ACCOMMODATION NOTE—RENEWAL—LIABILITY.

McCain Produce Co. v. Lund, 31 D.L.R. 249, 44 N.B.R. 242.

FUTURE DEBTS—RIGHTS OF TRANSFEREE.

A promissory note given on account of an anticipated threshing bill, on which no liability was in fact incurred, is unenforceable for failure of consideration even in the hands of a transferee for value who acquired it with knowledge of its true conditions. [Cossitt v. Cook, 17 N.S.R. 84, applied.]

Harris v. Wilson, 23 D.L.R. 86, 8 S.L.R. 220, 8 W.W.R. 1184, 31 W.L.R. 825.

FORBEARANCE—ACCOMMODATION NOTE.

The forbearance of a creditor, under an arrangement by which the debtor was given a reasonable time to realize on securities owned by him in order to pay the debt, is a sufficient consideration to support an accommodation note given by a third party directly to the creditor as collateral security.

Union Bank v. Dodds, 22 D.L.R. 545, 31 W.L.R. 521.

SUBSTITUTED NOTE — MISREPRESENTATION—FORGERY.

There is a failure of consideration for a substituted promissory note given by the promisor in exchange for what was represented as his original note, but which was in fact a forgery, his original note having been transferred into other hands. [Gurney v. Womersley, 24 L.J.Q.B. 46, 119 Eng. R. 51, and Kennedy v. Panama, etc., Mail Co., L.R. 2 Q.B. 580, applied.]

Pachal v. Schiller, 20 D.L.R. 85, 7 S.L.R. 391.

PROMISSORY NOTE—SIGNATURE—INTENTION—WITNESS—CONSIDERATION.

Apart from any question of estoppel, no liability is created by affixing a signature to a note intending to sign merely as a witness to the signature of the real maker who had already signed and who alone dealt with the payee and got the chattels for which it was given; there is no consensus ad idem, as there was no intention of promising to pay.

Haynes v. Wilson, 20 D.L.R. 569, 29 W.L.R. 381, 6 W.W.R. 1495, 7 S.L.R. 449.

NOTE—REASON FOR—MORAL CONSIDERATION—REPARATION—BILLS OF EXCHANGE ACT—FRENCH AND ENGLISH LAW—C.C. ART. 984, 989, 1140 — BILLS OF EXCHANGE ACT—S. REV. [1906], C. 119, ART. 53.

S. 53 of the Bills of Exchange Act, which has for its object the reason or consideration for a bill of exchange, should be interpreted according to the principles of French law. A person who in good faith and involuntarily has caused injury to another and who moved by a feeling of honour and delicacy, wishes to set right, wrong which he has thus caused, although he is not bound by law to do so, and gives this person a note to cover his loss, he is bound to pay it; he cannot pretend after the event that the note was given without reason or consideration.

Stephen v. Perrault, 56 Que. S.C. 54.

INVESTMENTS.

Money invested by one brother for another, and payments and promises made in connection therewith, held not to constitute any legal liability upon a note given for the original amount of money invested.

Irvine v. Irvine (Man.), [1917] 2 W.W.R. 184.

CONSIDERATION—DEFENCE THAT NOTE GIVEN AS EVIDENCE OF DEBT AND FOR ACCOMMODATION OF PLAINTIFF—ONUS—FAILING TO PROVE FACTS—ABSENCE OF CONSIDERATION.

Pettit v. Barton, 4 O.W.N. 200.

NOTE PAYABLE TO CORPORATION — INDORSEMENT BY OFFICER NO PROOF OF CONSIDERATION.

Due negotiation of a note payable to a company is not proved by simply shewing that it is indorsed by an officer who has general authority to indorse, if no consideration has passed to the company.

Magrath v. Cook, 8 A.L.R. 318, 30 W.L.R. 701, 7 W.W.R. 1350.

ACCOMMODATION NOTE—SECURITY FOR.

The giver of security for the maker of an accommodation note cannot plead want of consideration when he made it expressly to give value to a bill of exchange which without him would not have had such value. The principal debtor for a note cannot be relieved from the obligation to pay it by offering the holder to reimburse him merely what the latter had paid.

David v. Beauregard, 47 Que. S.C. 312.

REQUISITES AND VALIDITY—CONSIDERATION —RIGHTS OF HOLDER—MAXIM "EXPRESSIO UNIUS."

Discussion of the maxim "expressio unius est exclusio alterius" and review of the authorities:—Held, also, that the plaintiff, being the holder of the note and entitled to sue upon it and in a position to deliver possession of it to the maker, and also entitled to sue upon the original consideration for the note; by s. 141 of the Act, the delivery to the maker after maturity would discharge the note, and all rights of action upon it would thereby become extinguished.

Johnson v. L'Heureux, 27 W.L.R. 21, 6 W.W.R. 53.

PROMISSORY NOTES—INDEBTEDNESS OF MAKERS TO PAYEE—FINDING OF TRIAL JUDGE AGAINST PLEA THAT NOTES MADE FOR ACCOMMODATION OF PAYEE—THIRD PARTY ISSUES—INDEMNITY—JUDGMENT—ENFORCEMENT.

Royal Bank of Canada v. Smith, 6 O.W.N. 695.

PROMISSORY NOTES—FAILURE OF CONSIDERATION — LEGACY — WILL — ATTEMPTED CANCELLATION OF NOTE BY CROSS-INSTRUMENT—RENUNCIATION IN WRITING —BILLS OF EXCHANGE ACT—TESTAMENTARY INTENTION — EVIDENCE — FOREIGN DOMICILE—FORUM—COSTS.

Snider v. Snider, 7 O.W.N. 445.

CONSIDERATION.

Davison v. Thompson, 4 O.W.N. 1310, 24 O.W.R. 604.

(§ I C—24)—SUBSTITUTING CURRENT LIEN NOTE.

There is no consideration supporting the making of a lien note in place of another note which is still current for the same indebtedness.

Mellis v. Blair, 27 D.L.R. 165, 22 B.C.R. 459.

DEMAND NOTE MADE BY DIRECTORS OF COMPANY—COMPANY INDEBTED TO BANK—ACTION AGAINST ONE DIRECTOR.

Bank of B.N.A. v. Turner, 28 D.L.R. 363, 30 O.W.N. 196. [Affirmed conditionally in 30 O.W.N. 237.]

ACCOMMODATION NOTE—NOVATION.

The maker of an accommodation note in favour of a third party who, before its maturity, pays the amount of the note to a holder who had discounted it on condition that the holder should deliver to him in writing with the paid note another note signed by himself, becomes a creditor of the latter. There is then in accordance with the provisions of art. 1169, C.C., a novation by a change of debtor from the first maker of the accommodation note to the maker of the second note. The consideration of the second note is that the holder of the first note receives from the maker the amount which he had paid on discounting it, and that he is thus immediately put in funds.

Coté v. Dufresne, 47 Que. S.C. 215.

COLLATERAL NOTE BEFORE RENEWAL OF ORIGINAL.

Where a promissory note is by the payee deposited with a bank together with the usual letter of hypothecation as collateral security to a note made by the payee to the bank—the latter note not having matured at the time of such deposit—and the latter note matures before the due date of the collateral note and is renewed by the bank—the bank at that time not having notice of a defect in the collateral note—the renewal is sufficient consideration for the collateral note. [Can. Bank of Commerce v. Waldenar & Murphy, 30 W.L.R. 857, followed; Can. Bank of Commerce v. Waite, 7 W.L.R. 255; Bank of B.N.A. v. McComb, 18 W.L.R. 94; Merchants Bank v. Williams, 6 W.W.R. 563, distinguished.]

Canadian Bank of Commerce v. Barlow, 31 W.L.R. 664.

(§ I C—27)—FORBEARANCE TO SUE.

Delay in enforcing a claim against copartners and permitting them to transfer the assets of the firm to a company formed by them to take over their business, is a sufficient consideration for a promissory note to hold the makers liable, where the note was void as to the company purporting to be its maker, which was executed by the copartners as president and manager thereof.

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

(§ I C—28)—ILLEGAL CONSIDERATION—PLAINTIFF NOT A HOLDER IN DUE COURSE —FAILURE OF ACTION.

A holder of a promissory note given for an illegal consideration cannot succeed in his action to recover on the note. The holder cannot set up the claim that he is a holder in due course, when the note in question is obtained by his agents, and with his knowledge as to the circumstances under which it was obtained.

U. S. Fidelity & Guarantee Co. v. Cruikshank & Simmons, 49 D.L.R. 674, [1919] 3 W.W.R. 821, affirming [1919] 2 W.W.R. 264.

CONSIDERATION ILLEGAL.

Promissory notes which are in reality given to the holder of a public office as payment for his influence in obtaining a contract for the erection of a public building, although apparently given in payment for shares in a company, are illegal and void as contrary to public order.

Cloutier v. Trudel, 41 D.L.R. 145, 24 Rev. de Jur. 317, 54 Que. S.C. 459.

ILLEGAL CONSIDERATION — CRIMINAL PROCEEDINGS.

Held, the note signed by defendant as part payment of plaintiff's claim against one of defendant's relatives, so as to prevent further criminal proceedings, must be considered as having been given for an unlawful consideration, against public policy, null and void, and defendant cannot be held

liable thereon. Plaintiff's action must therefore be dismissed.

S. B. Townsend v. Holder, 24 Rev. de Jur. 225.

D. Negotiability.

(§ I D—30)—Promissory note—Written condition not appearing on note—Negotiability of — Holder in due course for value—Notice.

A promissory note given to a company upon the express written condition not appearing on the face of the note but in the accompanying correspondence, that the note was for the purchase of certain bonds of the company and was to become null and void in case other parties did not purchase a like amount, is not thereby rendered negotiable and may be recovered in the hands of a holder in due course for value without notice of the condition when he took the note although no bonds were issued.

Auger v. McDonnell, 20 D.L.R. 363, 45 Que. S.C. 427.

Lien note—Days of grace.

A lien note is not a negotiable instrument and does not carry days of grace.

Mellis v. Blair, 27 D.L.R. 165, 22 B.C.R. 450.

Restrictive endorsement—Assignability.

A promissory note payable to "C. only" is not negotiable, but the debt represented by it is assignable. [The Bills of Exchange Act, R.S.C. 1906, c. 119, ss. 60, 68, considered.]

Chandler v. Edmonton Portland Cement Co., 33 D.L.R. 302, 10 A.L.R. 454, [1917] 1 W.W.R. 1408, affirming 28 D.L.R. 732, 10 W.W.R. 653.

"Negotiable paper"—Meaning.

The phrase "negotiable paper or cash" contemplates, not a mere personal note, but a documentary security which could be discounted for cash.

Martin v. Jarvis, 31 D.L.R. 740, 37 O.L.R. 269.

Lien note—Negotiability—Equitable assignment—Farm Implement Act.

Robert Bell Engine Co. v. Topolo, 32 D.L.R. 77, 34 W.L.R. 824, [1917] 1 W.W.R. 608, 9 S.L.R. 384.

Lien note—Conditions.

An instrument in the form of a promissory note given for the price of an article with the added condition that the title to the possession of the property, for which this note is given, shall remain in the vendor until the note is paid, is not a promissory note or negotiable instrument.

Dorval v. Carrier, 51 Que. S.C. 343.

(§ I D—31)—Effect of blanks.

Liability of maker—Blank note filled up and used for unauthorized purpose.

Brown v. Chamberlain, 2 D.L.R. 918, 3 O.W.N. 569, 20 O.W.R. 962.

Signing in blank—Delivery for custody only—Fraudulent filling in of blanks.

An action cannot be maintained, even by a subsequent holder without notice of the fraud, as against the person who signs a blank printed form of promissory note and delivers it to another as custodian only and without any authority to fill up the blank or to make himself payee or to get an advance or borrow money on the note, where the custodian held the same as promoter of a proposed company which when organized was to become the payee as consideration for the signer's stock subscription and where the promotor fraudulently filled up the note by making himself payee (the company not having been incorporated) and making the note payable in sixty days. [Hubbert v. Home Bank, 20 O.L.R. 651; Ray v. Willson, 45 Can. S.C.R. 401; Smith v. Prosser, [1907] 2 K.B. 735, applied; Lloyd's Bank v. Cook, [1907] 1 K.B. 794; Cox v. Canadian Bank of Commerce, 21 Man. L.R. 1, distinguished. And see Falconbridge on Banking, 2nd ed., 506.]

Campbell v. Bourque, 17 D.L.R. 262, 24 Man. L.R. 252, 28 W.L.R. 148, 6 W.W.R. 861

Filling up blanks—Authority.

Filling up a blank in a promissory note at the time of its delivery to the payee completes the negotiability thereof, and where such fact is established by the evidence, the question whether it was filled up strictly in accordance with the authority given, as mentioned in ss. 31 and 32 of the Bills of Exchange Act, R.S.C. 1906, c. 119, has no application, and the note will be enforceable in the hands of an indorsee who had obtained it in due course without knowledge of any defects. [Ray v. Willson, 45 Can. S.C.R. 401; Smith v. Prosser, [1907] 2 K.B. 735, distinguished.]

McBride v. Rusk, 25 D.L.R. 39, 33 W.L.R. 20.

(§ I D—32)—Certainty as to parties.

Persons who sign a promissory note made ostensibly by a company, as president and manager thereof, warrant that such company actually exists. The liability of persons who sign a promissory note as president and manager of a nonexisting company, thereby warranting the existence of such company, is not to be measured by what the holder of the note could have obtained after the subsequent incorporation of the company upon the settlement of its affairs in bankruptcy.

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313.

Director signing note of corporation—"I" or "We."

The word "we" instead of "I" used in a promissory note signed by an officer of a corporation in his individual capacity does

not necessarily imply that the note was that of the corporation.

Lindsay-Walker v. Hilson, 27 D.L.R. 233, 26 Man. L.R. 206, 34 W.L.R. 290.

NEGOTIABILITY—CERTAINTY AS TO PARTIES—NOTE OF COMPANY—SIGNATURE—MANAGER INSERTING NAME—LIABILITY OF COMPANY.

The words "Kasow Electric Company" followed by a dotted line at the end of which were the letters "Mgr." were placed on a promissory note by means of a rubber stamp. Just above the letters "Mgr." appeared the name "C. A. Kasow" in handwriting:—Held, that the promissory note was that of the company and that "C. A. Kasow" was not liable thereon on the ground that the rubber stamp, coupled with the handwritten signature, constituted the signature of the company to the note. [Chapman v. Smethurst, [1919] 1 K.B. 73; Union Bank v. Cross, 2 A.L.R. 3, followed.]

Northern Electric & Mfg. Co. v. Kasow Electric & Seaborn, 29 W.L.R. 582.

(§ I D—33)—REQUISITES — NEGOTIABILITY—ADDED STATEMENT AS TO GUARANTY.

The addition of the words "in guaranty" of bills discounted with the bank (named)" to a promissory note payable to the order of third parties will not prevent the document operating as a promissory note anad being transferable by endorsation to the specified bank.

La Banque Nationale v. Lemaire, 15 D.L.R. 152, 44 Que. S.C. 445.

(§ I D—40)—CERTAINTY AS TO MATURITY.

A promise in writing payable on the happening of any one of a number of events or at any time at the option of the promisee is not a promissory note within the meaning of s. 176 of the Bills of Exchange Act (R.S.C. 1906, c. 119), "To pay on demand or at a fixed or determinable future time." [Robert Bell v. Topolo (Sask.), 32 D.L.R. 77, referred to.]

Gardiner v. Muir, 38 D.L.R. 115, 10 S.L.R. 388, [1917] 3 W.W.R. 1080.

CHEQUE—DATE OF PAYMENT.

The date of payment made by a cheque is not that which the cheque bears, but that of the receipt and acceptance of such bill by the creditor.

Cleveland Stove Co. v. Walters, 54 Que. S.C. 154.

PROMISSORY NOTE—NO DATE FOR PAYMENT—BILLS OF EXCHANGE ACT, S. 23—PAYABLE ON DEMAND—EVIDENCE INADMISSIBLE TO SHOW DATE AGREED ON.

S. 23 of the Bills of Exchange Act does not make a note where no time is expressed for payment a demand note by presumption only, and parol evidence is inadmissible of an agreement fixing a due date for such note (Vachoe v. Straton, 2 Sask. L.R. 72, and Wilton v. Manitoba Independent Oil Co., 9 W.W.R. 202, referred to.]

Polanuk v. Osterberg, [1919] 1 W.W.R. 394.

BILL—AMBIGUOUS TERMS—INTERPRETATION—CONDITIONAL SALE—COLLATERAL SECURITY—ENDORSER—C.C. ART. 1223, C.C.P. ARTS. 532, 535—S. REV. [1906] C. 119 (LETTERS OF EXCHANGE), ART. 176.

When the date of an agreement for the payment of a sum of money, and the date on which the payment ought to be made are ambiguous, the court ought to interpret in the meaning that has been given by the plaintiff and his lawyer, if the defendant does not offer an objection to this interpretation. An agreement providing a sale on terms with retention of property made under form of promise to pay to order with endorsement is not a demand bill but a conditional sale. This agreement can no longer be considered as including only the security of a collateral guarantee not as rendering the bill null in virtue of article 176 S. rev., c. 119 [Letter of exchange]. The endorser of the above-mentioned agreement can in consequence be held as an endorser in virtue of the law of letters of exchange S. rev. [1906], c. 119.

Morin v. Giroux, 25 Rev. Leg. 480.

(§ I D—42)—PROMISSORY NOTE—NATURE—REQUISITES—AUTHORITY TO CONFESS JUDGMENT.

Where a written instrument includes a promissory note form for a stated indebtedness adding a stipulation by the payor authorizing "any attorney of any court of record" to confess judgment against the payor for the amount unpaid thereon "together with costs and $50 attorney's fee;" the provision as to "costs" renders the amount payable uncertain and prevents the instrument from being a promissory note.

Waters v. Campbell, 14 D.L.R. 448, 7 A.L.R. 298, 25 W.L.R. 838.

(§ I D—44)—PROMISSORY NOTE—PROVISION FOR PAYMENT OF ATTORNEY FEE—BILLS OF EXCHANGE ACT—NOT FOR AMOUNT CERTAIN—VALIDITY AS NOTE.

A document purporting to be a promissory note but containing a provision for payment of "10 per cent attorney fee," is not for a sum certain within the meaning of the Bills of Exchange Act, and is not a promissory note.

A. Macdonald Co. v. Dahl, 46 D.L.R. 250, 12 S.L.R. 209, [1919] 2 W.W.R. 156.

(§ I D—46)—NEGOTIABILITY—PROVISIONS FOR DISCOUNT — PAYMENT IN INSTALMENTS—ACCELERATION ON DEFAULT.

A note given for the price of goods is valid and negotiable, though it provides for a discount at a fixed percentage for payment within a specified time from date, though it provides for payments in instalments of fixed amounts on specified dates, and though it provides that default in payment of any instalment shall, at the option of the payee, render the unpaid balance immediately due and payable. [Jury v. Barker, E. B. & E. 459, and Carlon v. Kenealy, 12 M. & W. 139, referred to.]

First National Bank of Iowa City v. Rooney, 11 D.L.R. 358, 6 S.L.R. 72, 24 W. L.R. 163.

II. Acceptance.

(§ II—50)—Acceptances — Renewal of earlier instruments—Agreement—Sale of patent rights—Bills of Exchange Act, ss. 14, 131, 145—Bills not addressed to one of the acceptors—Change in address—Discount of bills by drawers—Adoption of change — Bank — Holder in due course — Evidence — Ratification —Estoppel—Altered bill—Title of bank—Suspicion—Inquiry.

Sterling Bank of Canada v. Thorne, 15 O.W.N. 343, affirming 15 O.W.N. 39.

Bill on drawee personally and without qualification — Acceptance by the drawee for another.

Smith v. Mason, 40 Que. S.C. 75.

III. Indorsement and transfers.

A. In general.

(§ III A—55)—Authority of partners.

A member of a partnership by tendering a note for discount and credit to his firm's account, adopts as genuine an endorsement which purports to be that of his firm. [Magrath v. Cook, 8 A.L.R. 318; Standard Bank v. McCullough, 25 D.L.R. 813, considered.]

Quebec Bank v. Mah Wah, 33 D.L.R. 133, 10 A.L.R. 413, [1917] 1 W.W.R. 1246. [See 34 D.L.R. 191, 10 A.L.R. 417.]

Promissory note payable on demand—Endorsation — Presentation — Payment—Security—Bills of exchange act, R.S.C., ss. 86, 91, 111.

The endorser of a demand note payable by monthly instalments, who undertakes, in writing, with the payee, but without joint and several liability, to secure the maker, does not lose the benefit of the terms if the later makes a judicial assignment for the benefit of his creditors. Although a demand note should be presented for payment and protested within a reasonable time in order to bind the endorser, yet, if the note is payable by instalments, the payee may wait to protest it until the first instalment becomes due after the maker's assignment; and moreover, the endorser did not, by that delay, suffer any prejudice.

Cassidy's v. Katz, 46 Que. S.C. 409.

Fraud—Warranty.

When the transferor of a note or a claim fraudulently conceals the debtor's insolvency, he is a warrantor of the claim transferred by operation of law, in the absence of any express guaranty.

Vezina v. Meilleur, 24 Rev. Leg. 300.

(§ III A—56)—Surety signing conditionally—Condition not fulfilled—Release of surety.

Where a person signs a note as surety on condition that it is not to be used until a co-surety has signed it, any person who, having knowledge of that condition, discounts the note without first obtaining the signature of the cosurety holds its freed from any liability on the part of the surety is released. [Ellesmere Brewing Co. v. Cooper, [1896] 1 Q.B. 75, referred to.]

Ripley v. Vellie, 21 D.L.R. 723, 8 S.L.R. 197, 8 W.W.R. 764, 32 W.L.R. 184.

(§ III A—59)—Liability of indorsee.

Where a promissory note which was payable to the order of the payee, was indorsed to the plaintiff in the name of the payee per the name of another party who was a stranger to the note, the plaintiff cannot recover thereon without shewing that such person was duly authorized by the payee to indorse the note for him.

Hamilton v. Isaacson, 5 D.L.R. 114, 21 W.L.R. 333.

Note—Sureties executing—Condition attached—Release of sureties.

Lonergan & Hansford v. Saskatoon Co., 21 D.L.R. 866, 8 S.L.R. 201, 8 W.W.R. 1031, 31 W.L.R. 673.

Endorsement — Dating of, prior to that of payee—Liability of endorsee —Bills of Exchange Act.

Bank of B.N.A. v. McKinnon, 7 W.W.R. 689.

Endorsement—Dating of.

The law does not require the endorsement to be dated, it does not even impose any penalty for ante-dating or post-dating.

Chaurest v. Provost, 16 Que. P.R. 153.

Promissory note—Forged indorsement —Notice to indorsee—Duty to disclose.

Société Permanent de Construction d'Iberville v. Longtin, 40 Que. S.C. 55.

Promissory note—Liability of indorsee —Indorsement before that of payee —Collateral security.

Johnston v. Macrae, 16 B.C.R. 473, 17 W.L.R. 132.

Promissory note—Indorsement to bank for collection — Subsequent advances by bank to indorser—Liability of accommodation makers—Sureties—Knowledge of bank—Extension of time.

Merchants Bank of Canada v. Thompson, 23 O.L.R. 502, 18 O.W.R. 582.

Promissory notes—Indorsement to bank by de facto officers of foreign company—Capacity to indorse—Irregularities in organization of company.

Canadian Bank of Commerce v. Rogers, 23 O.L.R. 109, 18 O.W.R. 401.

Promissory note—Indorsement—Position of pledgee—Holder in due course.

Bank of B.N.A. v. McComb, 16 W.L.R. 204 (Man.).

B. Liability of indorsers.

(§ III B—60)—Liability of indorser.

Where one who has witnessed the signatures to a promissory note signs a guar-

antee of the payment thereof, upon the back of the note, and adds, after his signature, the word "witness," his signature is complete before the addition of the word "witness," which is thus mere surplusage, and he is liable as an "aval" upon the note.

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

PROCURATION SIGNATURES — AGENT — AUTHORITY.

An endorsement on a note, "Jennie Green, H. Green, Atty.," is sufficient, under s. 51 of the Bills of Exchange Act, R.S.C. 1906, c. 119, to charge with notice that the agent has but a limited authority and that the principal is only bound if the agent was acting within the actual limits of his authority.

Robinson v. Green, 26 D.L.R. 194, 49 N.S.R. 409. [See also 36 D.L.R. 631, 51 N.S.R. 204.]

TO UNENDORSING PAYEE.

A person endorsing a promissory note not indorsed by the payee may become liable as an indorser to the payee. [Bills of Exchange Act, R.S.C. 1906, c. 119, s. 131; Robinson v. Mann, 31 Can. S.C.R. 484, followed.]

Pacific Lumber Co. v. Imperial Timber & Trading Co., 31 D.L.R. 748, 23 B.C.R. 378, [1917] 1 W.W.R. 507.

FRAUDULENT PREFERENCE.

Where creditors agree to give an extension of time to a debtor upon condition that he give them promissory notes for the debts due them, an indorsement of notes given to one debtor, without the knowledge or consent of the others, to procure his consent to the agreement, is void on grounds of public policy, as constituting a secret advantage over other creditors.

Hochberger & Sons v. Rittenberg, 31 D.L.R. 678, 25 Que. K.B. 42. [Affirmed, 36 D.L.R. 450, 54 Can. S.C.R. 480.

INDORSERS REAL PURCHASERS OF PROPERTY FOR WHICH NOTE GIVEN—MAKER AN ACCOMMODATION MAKER ONLY—LACK OF NOTICE OF DISHONOUR—INDORSERS NOT RELEASED FROM LIABILITY.

When the indorsers of promissory notes are the real purchasers of the property for the purchase price of which the notes are given, and are the real makers of the notes, and the ostensible maker is an accommodation maker only, such indorsers are not released from liability through lack of notice of dishonour.

Brunelle v. Benard, 47 D.L.R. 862, [1919] 2 W.W.R. 288, affirming [1918] 3 W.W.R. 809.

PROMISSORY NOTE—ACTION AGAINST ENDORSER—ABSENCE OF PRESENTMENT AND NOTICE OF DISHONOUR—WAIVER—CONDUCT—NOTE MADE BY COMPANY—EVIDENCE—ASSIGNMENT BY COMPANY FOR BENEFIT OF CREDITORS—RELATION OF ENDORSER TO COMPANY.

Heughan v. Short & Binder, 6 O.W.N. 545.

LIABILITY OF ENDORSER—HOLDER IN DUE COURSE—DILATORY EXCEPTION.

The endorser of a promissory note cannot, by a dilatory exception, stop the action of the holder in due course, in order to call in warranty his subsequent coendorsers who have themselves been summoned as codefendants jointly and severally.

Trudeau v. Laurin, 16 Que. P.R. 111.

PROMISSORY NOTES—LIABILITY OF INDORSER—INTENTION—TRANSFER OF CLAIM—EVIDENCE.

Frame v. Hay, 7 O.W.N. 738.

The Terminal City Sand and Gravel Company gave a promissory note to C.G. Johnson & Co., who endorsed it and handed it to the bank as security for general advances. The note was not paid when it fell due, and was charged by the bank back to Johnson & Co., who then sued for the amount. While the note was under discount, and after it was due, the defendant voluntarily handed to the bank a share certificate in his favour from the Terminal Gravel Company (a concern in which defendant was a director and shareholder). This certificate, the evidence shewed, was not deposited in pursuance of any previous arrangement, though probably in the hope of securing forbearance in the future. Held (1), that defendant was liable upon his endorsement, and (2) in the circumstances in which the share certificate was deposited it was not available in satisfaction of the claim upon the note.

Johnson v. McRae, 16 B.C.R. 473.

A person who endorses a promissory note payable to payee or order, and not then endorsed by the payee, is liable to a payee who has given value for it to the maker. [Robinson v. Mann, 31 Can. S.C.R. 484; Pacific Lumber Co. v. Imperial Timber Co., 31 D.L.R. 748, followed.]

Manitoba Bridge & Iron Works v. Minnedosa Power Co., [1917] 1 W.W.R. 731.

ACCOMMODATION MAKER—LIABILITY TO ENDORSEE WHO ADVANCED MONEY UPON SECURITY OF NOTE—NOTE MADE PAYABLE TO BANK—TITLE TO NOTE—HOLDER IN DUE COURSE.

Fox v. Patrick, 13 O.W.N. 400.

INDORSEMENT—ASSIGNMENT.

Negotiation by indorsement of a note payable to order differs in certain respects from the assignment of debts. In an assignment of debts the assignor guarantees only the existence of the debt and the assignee when sued can take advantage of it by exceptions. The holder of a note, who endorses and transfers it, becomes the debtor of the assignee and cannot set up any defence to the action of the regular holder.

Nadeau v. Provost, 52 Que. S.C. 387.

WRITTEN ORDER—ENDORSEMENT—RENEWAL—DELAY—ENGLISH LAW—RESPONSIBILITY OF THE ENDORSER—PROTEST—LIBERATION—C.C. ART. 1961 S. REV. [1906], C. 119, ART. 10.

S. 10 of the law of Bills of Exchange (S.

Rev. 1906, c. 119), which says that the rules of the Common Law of England apply to bills of exchange to notes, and cheques, does not make it necessary to go back to English Law to decide the question of responsibility of the endorser. Whatever may be the laws of this province on this subject, the English Common Law ought to apply only to that which is of the essence itself of bills of exchanges, notes and cheques. The endorser of a bill, after expiration and protest, or where protest has been waived, should be considered as a jointly liable debtor or at least as a jointly liable surety and his responsibility as such as regulated by our civil law. The joint debtor or the joint surety are not freed from their obligation as such, by the act of a creditor who would have given time to the principal debtor for the payment of the guaranteed debt. The endorser of a bill of consent does not find himself discharged of his responsibility because the bank which has discounted the bill has consented to renew it without notifying endorser who had waived protest.

The Bank of Hochelaga v. Leger, 25 Rev. Leg. 158.

(§ III B—62)—Makers or indorsers—True relation between—Whole facts and circumstances to be referred to—Liability of parties—Intention.

For the purpose of ascertaining the true relation to each other of the parties who put their signatures upon a promissory note either as makers or indorsers, the whole facts and circumstances attendant upon the making, issue and transference of the note may be referred to by the court, and reasonable inferences derived from these facts and circumstances are admitted to qualify or alter the relative liabilities which the law merchant would otherwise assign to them.

MacDonald v. MacDonald, 44 D.L.R. 519, 52 N.S.R. 415.

(§ III B—63)—Accommodation indorsers—Mental condition of endorser—Inability to appreciate transaction—Knowledge of holders of notes—Fraud and undue influence of maker of notes—Counterclaim—Moneys applied by bank on indebtedness of maker—Evidence.

Bank of Ottawa v. Bradfield, 1 D.L.R. 904, 3 O.W.N. 688.

Accommodation indorsement—Married woman—Power of attorney.

The business of a married woman conducted for her by her husband and son under a general power of attorney is not of itself sufficient to charge her with liability on an accommodation indorsement executed in her name outside of the scope of the business, in the absence of proof that such indorsement was expressly authorized by the terms of the power of attorney or otherwise.

Robinson v. Green, 26 D.L.R. 194, 49 N.S.R. 409. [See also 36 D.L.R. 631, 51 N.S.R. 204.]

Accommodation endorsers—Order of endorsements—Presumption—Liability.

Each endorsement in blank of a promissory not is presumed, until the contrary is proved, to have been made in the order in which the endorsements appear on the note, and the endorsers are prima facie liable amongst themselves in the same order.

Wickwire v. Passage, 20 D.L.R. 864, 20 B.C.R. 485.

Promissory note—Accommodation note—Endorsement to bank as collateral security for debt of payee—Debt paid before action begun—Claim of bank to hold note for subsequent debt—Evidence—Findings of fact of Trial Judge.

Bank of Ottawa v. Hall, 7 O.W.N. 475.

Promissory note—Endorser—Third parties—Bills of Exchange Act—Fraud—Warranty—Que. C.C. 993.

One who endorses a note to accommodate the holder, and without the note being endorsed by the firm to whose order it is made, is responsible to a third person holding the note in good faith. Such an endorser has no recourse against the maker of the note who only signed it on the endorser's false representations, in settlement of a sale of shares in a fictitious mine.

Charron v. David, 23 Que. K.B. 399.

Accommodation endorser—Surety—Agreement to release principal debtor—Failure to prove—Dividend on debt received by holder of notes from trustee for creditors of principal debtor—Ratable application on portion of claim secured by notes and unsecured portion.

R. H. Thompson Co. v. Brown, 11 O.W.N. 235.

Accommodation—Surety.

An accommodation party on a promissory note is a surety towards the person accommodated, but not with regard to his coindorsers and their juridical relations must be determined according to the principles of suretyship. An indorser by accommodation, who pays the note, can recover, from the maker and the other indorser, only the amount which he paid to the bearer of the note. As a surety he may acquire the claim for which he bound himself, instead of purely paying it, and in such a case he acquires all the rights of the creditor against the debtor.

Jacobs v. Starfilms, 53 Que. S.C. 363.

PROMISSORY NOTE—DEMAND NOTE—ACCOMMODATION ENDORSERS—ADVANCES BY BANK—DEFENCES TO ACTION AGAINST ENDORSERS AGREEMENT FOR PAYMENT—EVIDENCE—UNREASONABLE DELAY IN PRESENTMENT — CONTINUING SECURITY — COLLATERAL SECURITY — ASSENT OF ENDORSERS—BILLS OF EXCHANGE ACT, S. 181.

Bank of Ottawa v. Christie, 37 O.L.R. 646, affirming 37 O.L.R. 330.

(§ III B—64)—EFFECT OF ENDORSEMENT CANCELLED WITHOUT AUTHORITY.

The fact that the endorsation on the original note has been erased after a renewal has been given does not result in novation and does not release such endorser from liability thereon in the event of non-payment of the renewal, when such cancellation has been made unintentionally or without the authority of the holder (e.g., by an assistant manager of a bank acting without instructions).

Bank of B.N.A. v. Hart, 2 D.L.R. 810.

(§ III B—65)—ENDORSEMENT AT OR BEFORE DELIVERY.

In Quebec, one who puts his name on the back of a note before its delivery or endorsement by the payee is an endorser "pour aval," and is liable without notice of protest or dishonor. [Patterson v. Pain, 1 L.C.R. 219; Merrit v. Lynch, 3 L.C.J. 276; Pariseau v. Ouellette, M. Cond. R. 69; Narbonne v. Têtreau, 9 L.C.J. 80, and Pratt v. MacDougall, 12 L.C.J. 243, referred to.]

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

INDORSEMENT BY THIRD PARTY—SUBSEQUENT INDORSEMENT BY PAYEE—LIABILITY—BILLS OF EXCHANGE ACT, R.S.C. 1906, c. 119, s. 131.

When a promissory note is indorsed by a third party, before it is indorsed by the payee, the former is liable as an indorser to the latter. [Robinson v. Mann, 31 Can. S.C.R. 484, followed.]

Grant v. Scott, 50 D.L.R. 250, affirming 52 N.S.R. 360.

PROMISSORY NOTE—ENDORSEMENT PRIOR TO THAT OF PAYEE—LIABILITY OF ENDORSER—BILLS OF EXCHANGE ACT.

A note was made by A., payable to the order of B., and C. endorsed his name on the back of the note before it had been completed by any endorsement by B. C. contended that he was not liable, having endorsed the note previously to the payee, and cited, in support of his contention, the cases of Steele v. McKinlay (1880), 5 App. Cas. 754; Jenkins v. Comber, [1898] 2 Q.B. 168, 67 L.J.Q.B. 780; Shaw v. Holland, [1913] 2 K.B. 15, 82 L.J.K.B. 592; Trimble v. Hill (1879), 5 App. Cas. 342, 49 L.J.P.C. 49:—Held, that under the Bills of Exchange Act, and following Robinson v. Mann 31 S.C.R. 484 (cited by counsel for the plaintiff bank), C. was liable as an endorser within the meaning of the act.

Bank of B.N.A. v. McKinnon, 7 W.W.R. 689.

FAILURE TO ENDORSE BY PAYEE—ENDORSEMENT BY THIRD PARTY—LIABILITY.

A note made by A. payable to the order of B. and not completed by the endorsement of the latter, but endorsed, when still incomplete, by a third party, will render such third party not liable or liable as an endorser of a negotiable instrument. Steele v. McKinlay, 5 App. Cas. 754; Robinson v. Mann, 31 Can. S.C.R. 484, followed.]

Pacific Lumber Agency v. Imperial Timber & Trading Co., 7 W.W.R. 269.

(§ III B—70)—RESTRICTIVE ENDORSEMENTS.

Signing a negotiable instrument in a representative or descriptive character does not per se exempt from personal liability; to escape personal liability an individual must sign in such a way as absolutely to negative his personal liability, and if, through carelessness or otherwise, he fail to do this, he must pay the penalty by being held personally liable. [Wakefield v. Alexander, 17 T.L.R. 217, referred to. See also Falconbridge on Banking and Bills of Exchange, p. 471 et seq.]

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

C. DISCHARGE OF INDORSERS.

(§ III C—75)—DISCHARGE OF ENDORSER.

When a bank draft is purchased from the holder by another bank which forwarded it to the place of payment and delivered it to the paying bank and permitted the latter bank to stamp it as their property in the course of settling balances at the clearing house, the purchasing bank has, by so dealing with it, lost recourse against the party from which it purchased the draft upon his endorsation thereof, and will be held to have surrendered the draft and to have accepted the liability of the paying bank for the clearing-house adjustment, although such liability was not in fact met by reason of the insolvency of and suspension of payment by the paying bank on the same day on which the draft was cleared through the clearing house.

Sterling Bank of Canada v. Laughlin, 1 D.L.R. 383, 3 O.W.R. 643, 21 O.W.R. 221.

DISCHARGE OF ENDORSER—RENEWAL OF NOTE—ALTERATION IN TIME TO RUN.

Where a renewal note endorsed by the same endorser as the earlier note is altered by a change in the time it was to run made after its endorsation and without the endorser's consent, the endorser is discharged from liability on the earlier note as well as on the renewal note.

Bank of B.N.A. v. Hart, 2 D.L.R. 810.

DISCHARGE — SUFFICIENCY OF DEFENCE — FAILURE TO TAKE ACTION—IMPAIRMENT OF SECURITY.

Great Western Securities & Trust Co. v.

McDonald, 30 D.L.R. 573, 9 S.L.R. 99, 33 W.L.R. 728.

ENDORSER'S RELEASE OF BY LAPSE OF TIME—UNREASONABLE DELAY.

The endorser of a cheque is released by the mere lapse of time if the delay is unreasonable and he need not shew that, if the cheque had been presented sooner, it would have been paid. [Firth v. Brooks, 4 L.T.N.S. 467, referred to.]

Harris Abattoir Co. v. Maybee & Wilson, 20 D.L.R. 651, 31 O.L.R. 453.

DISCHARGE OF INDORSER.

The holder of a promissory note payable to order who, on accepting a renewal from the maker, erases the indorser's signature discharges the latter from liability on the former note. Therefore, if by reason of the insufficiency or irregularity of the renewal he wishes to recover the amount his right of action is against the maker only.

Hart v. Bank of B.N.A. 22 Que. K.B. 233.

RETURNING NOTE TO MAKER.

The fact that a bank discounted a note as a renewal of former notes due and accruing due, and that the latter had been transmitted to the makers, does not have the effect of discharging the indorsers of those notes.

Lemaire v. La Banque Nationale, 25 Que. K.B. 259.

PROMISSORY NOTE—ADMISSIBILITY OF EVIDENCE OF AGREEMENT THAT ENDORSER NOT TO BE LIABLE.

In an action against an endorser on a promissory note evidence was held admissible to shew that the endorsement was made after maturity and on the agreement that the endorser was not to be liable on the note.

Yorkshire & Canadian Trust v. Scott, [1919] 2 W.W.R. 87.

ACCOMMODATION ENDORSER — SURETY — AGREEMENT TO RELEASE PRINCIPAL DEBTOR—FAILURE TO PROVE—DIVIDEND ON DEBT RECEIVED BY HOLDER OF NOTES FROM TRUSTEE FOR CREDITORS OF PRINCIPAL DEBTOR—RATABLE APPLICATION ON PORTION OF CLAIM SECURED BY NOTES AND UNSECURED PORTION.

Thompson Co. v. Brown, 11 O.W.N. 235.

(§ III C—76)—INDORSEMENT FOR ACCOMMODATION—RENEWAL.

A note was signed by a company in favour of an accommodation payee who indorsed it and deposited it in a bank to the credit of the maker. The bank after its maturity transferred the note to the directors of the company. While it was in possession of the bank the company gave instructions for its payment out of moneys on deposit. The bank did not carry out the instructions, and the note, on request of the company, was renewed from time to time. In these circumstances, and notwithstanding the renewals, the note should be considered as paid and the indorser could not be held liable in an action by a third party, acting as prête-nom of the directors.

Friedman v. Scott, 24 Que. K.B. 21.

(§ III C—77)—DISHONOUR—NOTICE—DUE DILIGENCE.

The Bills of Exchange Act (R.S.C., c. 119) provides the method and time in which notice of dishonour of a promissory note is to be given; a holder cannot elect to give personal notice if delay is caused thereby.

Dowler v. Edwards, 40 D.L.R. 180, 13 A.L.R. 259, [1918] 2 W.W.R. 345.

D. TRANSFERS WITHOUT INDORSEMENT.

(§ III D—79)—TRANSFERS WITHOUT ENDORSEMENT—EFFECT OF DELIVERY—ONUS OF PROOF.

Where the plaintiff suing on a promissory note is not the payee or endorsee, the onus is on him to prove that he is the holder if delivery to him is disputed by the defence.

Torney v. McNeil, 18 D.L.R. 10, 28 W.L.R. 565, 7 S.L.R. 224, 6 W.W.R. 1146.

TRANSFER WITHOUT ENDORSEMENT — BY SEPARATE INSTRUMENT—ORDER FOR PAYMENT—VALIDITY.

A written order from the payee directing the maker of a promissory note to pay the amount due thereon to a third person, operates as an assignment, and not merely as an order which is revoked by the death of the signor. [Harding v. Harding, 17 Q.B.D. 442; Farquhar v. Toronto, 12 Gr. 187, and Bank of British North American v. Gibson, 21 O.R. 613, referred to.]

Tyrrell v. Murphy, 18 D.L.R. 327, 30 O.L.R. 235.

TRANSFER WITHOUT ENDORSEMENT—HOLDER—DEMAND FOR ENDORSEMENT—EQUIVALENT JUDGMENT—DAMAGES—S. REV. [1906], C. 119 (BILLS OF EXCHANGE ACT), ARTS. 56, 61.

The transferee of a Bill of Exchange, payable to the order of one who receives it from a person to whom the first holder had transferred it without endorsement, is not a regular holder according to the terms of art. 56 of the Bills of Exchange Act. It follows that he cannot, by virtue of art. 61 of that Act, compel the endorsement of the first transferrer. The right is personal between himself and an immediate transferee. The holder in due course, on the refusal of a transferrer to endorse a bill transferred without endorsement, can not only obtain a judgment of the court equivalent to such endorsement, but he has a right of damages.

Grothé v. Juneau, 56 Que. S.C. 193.

IV. Presentment; demand; notice; protest.

A. IN GENERAL; NECESSITY.

(§ IV A—80)—PRESENTMENT—DEMAND—NOTICE—PROTEST.

Presentation of a promissory note is not necessary to hold the maker, and the holder may sue the maker, without presenting it, but if it appears that there were funds available at the place of payment the costs

may be awarded against the plaintiff in an action on the note. [Freeman v. Canadian Guardian Life Ins. Co., 17 O.L.R. 296, followed; Bills of Exchange Act, R.S.C. (1906) c. 119, s. 183; Robertson v. North-west Register Co., 13 W.L.R. 613; Jones v. England, 5 W.L.R. 83, referred to.] Where a promissory note matures payable at a branch bank, which is then the holder thereof, its only duty is to hold the note at the place of payment ready for surrender to the maker upon payment, or to charge it to his account if there is to his credit at such branch bank enough money to pay it.

Union Bank v. MacCullough, 7 D.L.R. 694, 4 A.L.R. 371.

CHEQUES — PRESENTMENT — DEMAND — NOTICE — PROTEST — CLEARING HOUSE —ITS EFFECT—HOW LIMITED.

The time for presentment of cheques on branch banks in the same city is not modified or extended by reason of the establishment of a clearing house system between the banks and of a clearing house rule of the Canadian Bankers' Association purporting to authorize the holding over of cheques at the bank, where presented through the clearing house, until the day after their receipt by such bank; r. 12 of the Clearing House Regulations is not included in the regulations submitted to and approved by the Treasury Board under the act incorporating the Canadian Bankers' Association 63-64 Vict. (Can.) c. 93, and consequently can have no statutory effect in variance of the Bills of Exchange Act, R.S.C. 1906, c. 119.

Bank of B.N.A. v. Haslip; Bank of B.N.A. v. Elliott, 19 D.L.R. 576, 30 O.L.R. 299.

PROMISSORY NOTES — ACTION AGAINST EXECUTORS OF MAKER—NOTES PAYABLE AT PARTICULAR PLACE — BILLS OF EXCHANGE ACT, S. 183—NONPRESENTMENT—EFFECT AS AGAINST MAKER—INTEREST—CLAIM OVER AGAINST THIRD PARTY—PROMISE—DEFENCES TO CLAIM ON—CONSIDERATION—BAR BY LIMITATIONS ACT—PAYMENT MADE BY THIRD PARTY—STARTING POINT FOR STATUTORY PERIOD—ABSENCE FROM ONTARIO—"RETURN" TO ONTARIO—SECTION 52 OF ACT.

The effect of subs. 2 of s. 183, of the Bills of Exchange Act, R.S.C. 1906, c. 119 is that nonpresentation of a note payable at a particular place is no answer to an action against the maker. Freeman v. Canadian Guardian Life Insurance Co., 17 O.L.R. 296, 302, 303, followed. In Oct. 1907, the defendants issued a third party notice and claimed over against the third party upon an undertaking in writing given by him to the original defendant, in Feb. 1906, to pay the notes when due. One of the notes in question was payable in Feb. 1907, and the other in Feb. 1908. There were two defences to this claim—want of consideration for the promise, and that the claim was barred by the Limitations Act:—Held, that the promise was not a guaranty to a creditor that a debtor will pay his debts, but a promise to the original defendant by the third party that, if the defendant gave certain promissory notes to H., the third party would pay them; the defendant did give them upon the faith of the promise, and the signing of them was consideration to support the third party's promise. S. 52 of the Limitations Act, R.S.O. 1914, c. 75, was relied upon as extending the time for commencing the third party proceedings—the third party having left Ontario in 1910; but it was held, assuming that the third party was resident out of and absent from Ontario when the cause of action against him accrued, that, as he retained his commercial interests in and held land in Ontario, and in every month of the year 1911 spent some days in the province, he "returned" to Ontario, within the meaning of s. 52; and, even if the time for the commencement of the period of limitation had been suspended, the suspension ceased more than six years before the proceedings against him were initiated; and so the defendants' claim against the third party failed. [Moore v. Balch, 1 O.W.R. 824, followed. Boulton v. Langmuir, 24 A.R. 618, referred to.]

Sparks v. Conmee, 45 O.L.R. 202.

PRESENTATION—DATE—KNOWLEDGE OF.

A defendant sued as maker of the notes claimed cannot have any interest in knowing the date of their presentation for payment, except in the case provided for by law, in order to establish the amount of damage he has suffered owing to the delay in their presentation for payment.

Chaurest v. Provost, 16 Que. P.R. 153.

(§ IV A—81)—DECLINATORY EXCEPTION—PROMISSORY NOTE—RENEWAL—AMENDMENT—QUE. C.P. 170, 513.

There can be no adjudication on a motion to amend served and filed after the filing and presenting of a declinatory exception until the jurisdiction has been declared by a judgment on that declinatory exception. The fact that the defendant made notes and a draft at Victoriaville, District of Arthabaska, and the fact of electing domicile there for the acceptance of that draft, do not constitute an election of domicile to recover, before the Court of the District of Arthabaska, certain notes given as renewals and dated at Montreal.

Molson's Bank v. Jodoin, 15 Que. P.R. 376.

(§ IV A—85)—FAILURE TO PRESENT—LIABILITY FOR MONEY LENT ENDORSER.

The person who accepts from the debtor the promissory note of another with the debtor's endorsement for the amount of a debt for money lent the debtor, but without an accord or satisfaction in respect of the debt, may still sue on a count for money lent, although he did not protest the note so endorsed or give notice of dishonour thereof, nor will it constitute a defence that the

note was not presented at maturity at the bank where it was payable, unless it is also shewn that the money to pay it was in the bank awaiting presentment of the note.

Worden v. Hatfield, 13 D.L.R. 193, 41 N.B.R. 552.

COSTS UPON NONPRESENTMENT.

The court, in exercising its discretion as to awarding costs under s. 183 (2) of the Bills of Exchange Act, R.S.C. 1906, c. 119, in the case of nonpresentment of a note, should not deprive the plaintiff of his costs unless it appeared that the defendant had been in some way prejudiced by the note not having been presented. [Canadian Bank of Commerce v. Bellamy, 25 D.L.R. 133, 8 S.L.R. 381, followed.]

Hayden, Clinton National Bank v. Dixon, 26 D.L.R. 694, 9 A.L.R. 303, 33 W.L.R. 838, 9 W.W.R. 1269. [See also Union Investment Co. v. Grimson, 27 D.L.R. 208.]

JOINT MAKERS OF LIEN NOTE—DEFAULT BY ONE—NOTICE TO OTHER.

The joint maker of a lien note given for the sale of a plow purchased by another is not entitled to notice of default of the principal obligor in order to hold him liable on the note. [Hitchcock v. Humfrey, 12 L.J. C.P. 235; Carter v. White, 25 Ch.D. 666, applied; Black v. Ottoman Bank, 15 Moore P.C. 472, referred to.]

Massey-Harris Co. v. Baptiste, 24 D.L.R. 753, 9 A.L.R. 71, 32 W.L.R. 435, 9 W.W.R. 149. [Followed in Crown Life Ins. Co. v. Clarke, 25 D.L.R. 519, 9 A.L.R. 97.]

(§ IV A—87)—PROTEST—WAIVER—NOTICE OF DISHONOUR.

Where the endorser of a promissory note, when endorsing, waives protest this imports waiver of notice of dishonour.

Rat Portage Lumber Co. v. Margulius, 15 D.L.R. 577, 24 Man. L.R. 230, 26 W.L.R. 765, 5 W.W.R. 1169. [Affirmed in 16 D.L.R. 477.]

PROMISSORY NOTE—PRESENTMENT FOR PAYMENT—ORAL PROMISE TO MAKE PAYMENTS—WAIVER.

Waiver of presentment of a promissory note at the place of payment is shewn by an oral promise made by the maker after the note fell due to make payments on it at specified times as admitted in his examination for discovery.

Newton v. Husson, 20 D.L.R. 617, 7 S.L.R. 354, 30 W.L.R. 99, 7 W.W.R. 726.

INDORSER—PRESENTMENT—FOR PAYMENT—NOTICE—WAIVER.

Held, under s. 106, subs. (b) 2, of the Bills of Exchange Act, that an endorser of a promissory note who being aware of an omission to give thim due notice of dishonour, gives a written promise to pay the note thereby waives the notice and is liable on the note.

Martin Hargreaves Co. v. Wrigley, 30 W.L.R. 92, 7 S.L.R. 415.

NOTICE OF DISHONOUR—WAIVER—INDORSER — PROMISE TO PAY — STATUTE OF FRAUDS.

If there is an unequivocal promise to pay or admission of liability on the part of the endorser of a promissory note he is deemed to have waived notice of dishonour. Two letters written by the endorser of a note to the holders, in one of which he said, "I hope you can give an extension of time," and in the other, "I think I can promise that you will receive it"—that is, the amount of the note—"in a short time," were held, sufficient, both as to admission of liability and promise to pay, to constitute a waiver of notice. The onus of showing that the defendant gave the promise or made the admission under a mistake of fact was upon him, and he had failed to discharge it. The Statute of Frauds had no application. [Britton v. Milsom, 19 A.R. (Ont.) 96, distinguished.]

Swift Canadian Co. v. Duff & Alway, 38 O.L.R. 163, 11 O.W.N. 140.

B. SUFFICIENCY.

(§ IV B—90)—PROMISE TO PAY.

A promise to pay a promissory note after it has fallen due is prima facie evidence of presentment. [Deering v. Hayden, 3 Man. L.R. 219, followed.]

Sparrow v. Corbett, 18 B.C.R. 356.

CHEQUE—NOTICE OF DISHONOUR—DELAY IN PRESENTATION.

Held, the notice of dishonour of the cheque endorsed by defendant at Ormstown must, under the special circumstances of this case, be considered valid and legal although the same was addressed to defendant at Ste. Martine, whereas said defendant, at the time and long before, resided at Ste. Clothilde. 2. The loss resulting from the tardy presentation of a cheque, when there were sufficient funds to pay the same at the time of the making thereof, must be borne by the party who is at fault. Under the evidence of record in the present instance, such loss must be borne by defendant and in consequence plaintiff's action must be maintained and the action in warranty dismissed with costs.

Sorel v. Hebert, 24 Rev. de Jur. 473.

REASONABLE TIME—DELAY—EXCUSE.

When each of two parties is holder of a note endorsed by the other, the holder of the note first maturing cannot excuse his failure to protest it within a reasonable delay on the ground that then the note would become due before his own which would have been unjust to the other party.

Nadeau v. Provost, 52 Que. S.C. 387.

(§ IV B—91)—NOTICE OF DISHONOUR—BY MAIL—MISCARRIAGE.

Where a notice of dishonour of a promissory note is duly addressed and posted at the place where the note is dated, as provided by R.S.C. 1906, c. 119 ss. 103 and 104, the sender is deemed to have given due

notice of dishonour, notwithstanding any miscarriage by the post office.

Banque D'Hochelaga v. Hanson, 53 Que. S.C. 266.

CHEQUE—BILL—PRESENTMENT BY MAIL.

R. sent to the C. Co. a cheque drawn on the E. Security Co. (not a chartered bank), which was given by the C. Co. to a bank for collection. The bank sent the cheque by mail to the E. Security Co., who debited R's account with the amount thereof, returned the cheque to R. and sent to the collecting bank a draft for the amount drawn on a second bank, which was dishonoured. Shortly afterwards the E. Security Co. failed with heavy liabilities. Held, that the cheque was not a cheque within the meaning of the Bills of Exchange Act, but a bill of exchange. [Trunkfield v. Proctor, 2 O.L.R. 326, followed]; there was a due presentation of the bill for payment by sending it through the post office. [R. v. Bank of Montreal, 1 Can. Ex. 154, referred to]; the draft on the second bank was not accepted as payment; that R. must bear the loss.

Calgary Brewing & Malting Co. v. Rogers, 33 D.L.R. 173, 9 S.L.R. 440, [1917] 1 W.W.R. 670. [Affirmed 34 D.L.R. 252, 10 S.L.R. 246; reversed 40 D.L.R. 238, 56 Can. S.C.R. 165.]

(§ IV B—92)—CHEQUE—"BANK"—DELAY IN PRESENTATION—DISCHARGE.

F., in settlement of a claim for material supplied, sent to R. a cheque drawn on the Dominion Trust Company. R. did not present the cheque for five days. Upon presentation it was dishonoured, the Dominion Trust Co. having suspended payment. Held, that if the Dominion Trust Co. was an incorporated bank or a savings bank so as to come within the definition of bank contained in the Bills of Exchange Act, F. was discharged as to the amount of actual damage suffered by him through the delay in presentation, and R., under s. 166, subs. (b) of the Act, became a creditor in lieu of F. of the Dominion Trust Co. to that amount, but that if the Dominion Trust Co. was not a "bank" within the above definition, not only was F. discharged in respect of the bill, but he was also discharged from his liability on the original consideration for which it was given.

Revelstoke Sawmill Co. v. Fawcett, 8 W.W.R. 477.

(§ IV B—93)—DEMAND NOTE.

To determine what is a reasonable delay for presentation for payment of a note payable on demand, it is necessary to take into account local customs, the character of the note and the special circumstances accompanying the making of it. A demand note for a loan, indorsed by relatives of the maker and providing that interest will be payable semi-annually, although presented for payment and protested more than two years from its date, is nevertheless presented within a reasonable delay and the indorsers are not discharged from their liability.

Vermette v. Fortin, 52 Que. S.C. 229.

(§ IV B—94)—PRESENTMENT—PLACE—NOTE PAYABLE AT BANK—NECESSITY OF PRESENTATION AT.

An action cannot be maintained against the makers of a promissory note which was not presented for payment at a bank designated in the body of the instrument as the place of payment. [Warner v. Simon-Kaye Syndicate, 27 N.S.R. 340, followed; Sanders v. St. Helens Smelting Co., 39 N.S.R. 370, distinguished; Merchants Bank v. Henderson, 28 O.R. 360, considered.]

Albert v. Marshall, 15 D.L.R. 40, 48 N.S.R. 34, 13 E.L.R. 514.

STIPULATION AS TO PLACE—EFFECT OF NON-COMPLIANCE.

Under s. 183 of the Bills of Exchange Act (Can.), a failure to make presentment of payment of a note at the place specified therein does not necessarily discharge the maker from liability on the note; but if upon an action on the note before presentation it appears that there were sufficient funds available at the place of payment to satisfy the note if it had been presented, the court may award the costs of the action against the plaintiff. [Union Bank v. MacCullough, 7 D.L.R. 694, followed; see Annotation, 15 D.L.R. 41.]

Canadian Bank of Commerce v. Bellamy, 25 D.L.R. 133, 8 S.L.R. 381, 33 W.L.R. 8, 9 W.W.R. 587.

MISPRESENTMENT—COSTS.

If no place of payment is specified in the body of note, presentment for payment is not necessary in order to render the maker liable, notwithstanding art. 1152, C.C. Que. and in such a case it is the duty of the debtor to seek his creditor to make payment. Even where the note is made payable at a particular place and a suit is brought without presentment, the maker is not discharged, but the costs are left at the discretion of the court.

Flexlume Sign Co. v. Ettenberg, 50 Que. S.C. 308.

PRESENTMENT—SUFFICIENCY—PAYABLE AT BANK.

Held, following Jones v. England, 5 W.L.R. 83, that, unless the note was presented for payment, the maker was not liable upon it; but, there being no evidence that the note was not presented for payment at the bank at which it was payable, which was the same bank to which it had been endorsed, it might be assumed that the note was there when it fell due, ready for delivery to the maker upon payment; and this would constitute a sufficient presentment to comply with s. 183.

Johnston v. L'Heureux, 6 W.W.R. 53, 27 W.L.R. 21.

PLACE OF PRESENTMENT—COSTS.

Want of presentment of a note where payable is not a defence in an action against

the maker, and the plaintiff will not be deprived of his costs unless funds were deposited at the place of payment to meet the notes. [Bank of Commerce v. Bellamy, 25 D.L.R. 133, followed.]

Anderson v. Hiested, 34 W.L.R. 474, 10 W.W.R. 636.

(§ IV B—96)—Promissory note for $200—Suit in County Court—Note deposited in bank—Not paid—Protested by bank—Unnecessary—Notarial fees—Bills of Exchange Act, s. 109—Competence of Division Court—Costs—Set-off—Costs of appeal.

Under s. 109 of the Bills of Exchange Act, the makers of a note are bound without protest, and so a notice of protest forwarded to them by the holder's agent is unnecessary. Notarial fees for such protest cannot be added to the amount of the note on suit so as to bring it within County Court jurisdiction.

Gowans v. Croker Press Co., 50 D.L.R. 58, 46 O.L.R. 242.

(§ IV B—97)—Partnership note—Joint and several liability.

The promissory note sued upon was signed in the name of what was said to be a partnership composed of the two defendants:—Held, upon the evidence, that the defendant R.L. was not a partner of the defendant F.L., and was not interested in the business carried on under the name referred to, and had not held herself out to the plaintiff as a partner; and, as against the defendant R.L., the action failed:—Held, that the plaintiff's rights were governed by s. 140 of the Bills of Exchange Act; that s. 61 did not apply; and that no re-endorsement was necessary in order to give the plaintiff the right to sue. [Harrop v. Fisher, 30 L.J.C.P. 283, distinguished; Black v. Strickland, 3 O.R. 217, and Moyer v. Jadis, 1 Mood. & R. 247, followed.]

Johnston v. L'Heureux, 6 W.W.R. 53, 27 W.L.R. 21.

C. Notice of protest; certificate.

(§ IV C—100)—Failure to give notice—Loss of thresher's lien—Discharge.

Orders for the payment of money due for threshing, given in connection with an assignment of a thresher's lien as part of the purchase price for a threshing engine, are inland bills of exchange within the meaning of s. 17 of the Bills of Exchange Act, though such orders contained a statement of the transaction; and where no notice of their dishonour is given to the drawer and the holder fails to seize the grain under the lien thereby occasioning the loss of the drawer's security, the latter will thereby be discharged from liability and entitled to have the amount represented by them credited on the purchase price.

International Harvester Co. v. Smith, 26 D.L.R. 102, 9 S.L.R. 46, 33 W.L.R. 540, 9 W.W.R. 1033.

Waiver of protest—Oral proof.

An agreement to waive protest of a bill payable to order can be proved by witnesses, even if the consideration for the bill is not connected with commercial matters.

Kalnitsky v. Hartz, 53 Que. S.C. 391.

Presentment — Demand — Notice — Protest—Promissory note—Indorsement — Address given by indorser—Notice of protest — Mailing to improper address.

Rosenberg v. Johnson, 40 Que. S.C. 511.

D. Damages for nonacceptance, nonpayment and protest.

(§ IV D—104)—Cheque—Unreasonable delay—Discharge of maker.

The maker of a cheque is discharged from his liability if the agent of the payee, instead of insisting on prompt payment out of funds then available, allows an unreasonable time to elapse, and then accepts a draft, which is dishonoured, on another bank, immediately after which the drawee goes into insolvency.

Rogers v. Calgary Brewing & Malting Co., 40 D.L.R. 238, 56 Can. S.C.R. 165, [1918] 1 W.W.R. 965, reversing 34 D.L.R. 252, 10 S.L.R. 246, [1917] 2 W.W.R. 344, 33 D.L.R. 173.

V. Rights and liabilities of transferees.

A. Extent of rights and protection generally.

(§ V A—105)—Extent of rights and protection generally.

A bank taking a promissory note, in the regular course of business, as collateral for an overdraft and without notice of any arrangement between the maker thereof and the payee, who is the depositor of the bank, is entitled to recover on the note from the maker; although as between the original parties to the note there could be no recovery against the maker by the payee by reason of failure of consideration. [Gilegg v. Bromley, 81 L.J.K.B. 1081, and Bank of Commerce v. Wait, 1 A.L.R. 68, distinguished.]

Bank of Nova Scotia v. Harvey, 8 D.L.R. 476.

Striking out special endorsement by holder.

Where the plaintiff was endorsee for value of a promissory note but subsequently endorsed the note specially to a third party, in an action brought by plaintiff on the note as holder and owner, the court may at any time before judgment, allow the plaintiff to strike out the special endorsement, on a proper shewing, negativing any interest in such third party.

Rat Portage Lumber Co. v. Margulius, 15 D.L.R. 577, 24 Man. L.R. 230, 26 W.L.R. 765, 5 W.W.R. 1169. [Affirmed in 16 D.L.R. 477, 27 W.L.R. 688, 6 W.W.R. 395, 24 Man. L.R. 230.]

CONDITIONAL ACCEPTANCE — KNOWLEDGE OF CONDITIONS.

A bank receiving a bill of exchange before maturity, with knowledge of the conditions as to its acceptance, does not stand in the position of a holder in due course, and can only claim on it by way of equitable assignment.

Standard Bank v. Wettlaufer, 23 D.L.R. 507, 33 O.L.R. 441.

PROMISSORY NOTE—TRANSFERRED AFTER MATURITY—SUBJECT TO EQUITIES ATTACHING — SOLICITOR'S FEES — TAXATION OF COSTS.

A promissory note given by the client for solicitor's fees is subject to the equities attaching to it in the hands of the original payees when transferred after maturity; and where the costs would be subject to taxation the transferee will be entitled to judgment only for the amount at which the costs will be taxed on a reference for taxation, but not exceeding the amount of the note.

Newton v. Husson, 20 D.L.R. 617, 7 S.L.R. 354, 30 W.L.R. 99, 7 W.W.R. 726.

NOT HOLDER IN DUE COURSE.

The transferee of a note, not a holder in due course, who is ready and willing to perform the payee's contract for a transfer of land, for which the note was given, is entitled to enforce payment thereon against the maker of the note.

Quebec Bank v. Mah Wah, 33 D.L.R. 133, 10 A.L.R. 413, [1917] 1 W.W.R. 1246. [See 34 D.L.R. 191, 10 A.L.R. 417.]

HOLDER IN DUE COURSE — CONSIDERATION — UNFAIR DEALING — SETTING ASIDE TRANSACTION FOR FRAUD.

Bank of B.N.A. v. McComb, 21 Man. L.R. 58, 18 W.L.R. 94.

REMEDY—RIGHT TO SUE.

Under s. 61 of the Bills of Exchange Act (R.S.C. 1906, c. 119), the transferee of a bill or note, before indorsement, is in the position of an equitable assignee of a chose in action, and may sue in the name of the transferrer, and also enforce by action his right to have the instrument indorsed to him.

Morgan v. Bank of Toronto, 35 D.L.R. 698, 39 O.L.R. 281.

SETTLEMENT OF BUSINESS TRANSACTION — NOTES OF THIRD PARTIES GIVEN IN SETTLEMENT — PERSONAL NOTE GIVEN AS SECURITY — ACTION ON PERSONAL NOTE BEFORE EXHAUSTING MEANS OF COLLECTING ON OTHERS.

Fear v. Hiltz, 45 D.L.R. 761, [1919] 1 W.W.R. 965.

ACCOMMODATION MAKER — EXONERATION.

An accommodation maker of a note is entitled to exoneration by the principal debtor from liability on the note, even before payment of the note is demanded, and may obtain a declaration to that effect in an action against the principal debtor.

Ramey v. Marcus, 39 D.L.R. 725, 52 N.S.R. 8.

JOINT AND SEVERAL LIABILITY—COLLECTION.

A promissory note payable to order may be signed by several persons and in that case they are held jointly and severally liable. If the note commences with the words "I promise" the makers are jointly and severally bound. The holder of a note for collection has the right to sue on it.

Audette v. Heald, 24 Rev. Leg. 230.

JOINT OWNERSHIP.

One who is half owner of a note cannot dispossess the owner of the other half who holds the note.

Beaucage v. Brunette and Sorel, 54 Que. S.C. 383.

EFFECT OF INSOLVENCY.

A transferee, under whose name the insolvent is disguised, has no action for the payment of a note made in favour of the insolvent estate. One who sets up that he is not a holder according to law, does not take advantage of another's right, but of his own right to pay only to the creditor or to some one authorized to receive payment, as to a holder vested with the right of action.

Drouin v. Bertrand, 24 Rev. de Jur. 29.

(§ V A—111)—PROMISSORY NOTE—ENDORSEE AFTER MATURITY AND DISHONOUR—HOLDER IN DUE COURSE, WHEN.

The endorsee of a promissory note after maturity and dishonour is a holder in due course if the endorser from whom he took it obtained it for value before maturity and without notice of any equity attaching to the note in favour of the maker.

Shore v. Mead, 20 D.L.R. 813, 29 W.L.R. 283.

PROMISSORY NOTE — NEGOTIABLE SECURITY —ACCOMMODATION.

Hebert v. Poirier, 40 Que. S.C. 405.

RIGHTS AFTER MATURITY — EQUITIES — RENEWAL.

A note payable to order, endorsed and deposited in a bank by the payee, for collection, is held by the bank in trust for her; if the husband obtains possession of the note after maturity and dishonour, he takes subject to the trust, and any renewal obtained by him does not change the title.

Roblin v. Vanalstine, 38 D.L.R. 159, 40 O.L.R. 99.

PAYABLE ON DEMAND — DEMAND MADE — PAYMENT ON ACCOUNT — PAYMENT VALID — ENDORSER FOR VALUE TAKES SUBJECT TO SUCH PAYMENT.

An endorser for value takes a promissory note, payable on demand, subject to any prior payments made on account to the drawee provided that the drawee has demanded payment of the note, and such note has so become overdue. [Glasscock v. Balls,

24 Q.B.D. 13; Borough v. White, 4 B. & C. 325, 107 E.R. 1080, referred to.]

McDermit v. Eddy, 49 D.L.R. 333, 12 S.L.R. 398, [1919] 3 W.W.R. 576.

HOLDER AFTER MATURITY — EQUITIES — FRAUD.

The maker of a note payable to order can set up against a third party, who has become holder since its maturity, all the defenses which he would be entitled to set up against the payee, especially the procuring of the note under false representations.

Labrecque v. Dombrowski, 49 Que. S.C. 289.

(§ V A—112) — TRANSFER BY RESTRICTIVE ENDORSEMENT.

The holder of a note to whom it was transferred in breach of a condition written on its back that it would be held by the secretary of the payee until due, occupies no superior position to that of the payee and cannot enforce payment of the note if it was fraudulently obtained from the maker. [Canadian Bank of Commerce v. Gillis, 3 O.W.N. 359, affirmed on appeal.]

Canadian Bank of Commerce v. Gillis, 2 D.L.R. 250, 3 O.W.N. 646, 21 O.W.R. 224.

TRANSFER WITHOUT ENDORSEMENT.

One who, before maturity, took a promissory note as security for a loan made the payee, is not a holder in due course for value without notice, where, at the request of the latter, the note was not endorsed to him until after maturity; the effect of the transaction was that such note was in the hands of such holder, subject to all equities between the maker and the payee.

Lilly v. Robertson, 4 D.L.R. 852, 21 W.L.R. 585.

RIGHTS AND LIABILITIES OF TRANSFEREE — TRANSFER WITHOUT INDORSEMENT — ACTION BY TRANSFEREE.

If the payee of a promissory note in writing directs the maker to pay the amount due thereon to a third person, the latter, although not an endorsee of the note, becomes the beneficial owner of the money due thereon, and is entitled to hold the note against all the world; and the absence of an endorsement is no bar to his right to recover the consideration; since he is in a position to deliver the note to the maker on payment.

Tyrrel v. Murphy, 18 D.L.R. 327, 30 O.L.R. 235.

TRANSFEREE WITHOUT INDORSEMENT — LIABILITY — HOW DETERMINED.

Where the holder of a promissory note delivers the note without indorsement to a third party as collateral security for a debt, the latter cannot sue the original maker on the note, in the absence of the indorsement. The Court of King's Bench (Man.), may, in a proper case, when the transferor is a party to the suit, direct the indorsement to be made, and then proceed to determine the liability of the maker, but the County Court has no power to do so. [The Bills of Exchange Act, R.S.C. 1906, c. 119, s. 61, considered. See also Canada Food Co. v. Stanford (N.S.), 28 D.L.R. 689.]

International Securities Co. v. Gerard, 29 D.L.R. 77, 26 Man. L.R. 558, 34 W.L.R. 1070, 10 W.W.R. 1136.

(§ V A—113) — FAILURE OF CONSIDERATION.

An overdraft in a depositor's bank account is a sufficient consideration to constitute the bank a "bona fide purchaser without notice" of promissory notes payable to its customer and transferred by the latter to the bank as collateral security for such overdraft.

Bank of Nova Scotia v. Harvey, 8 D.L.R. 476.

(§ V A—115)—PROMISSORY NOTE—TRANSFER TO BANK BY PAYEE BEFORE MATURITY—HOLDER IN DUE COURSE—BILLS OF EXCHANGE ACT, S. 54(2).

The defendant made a promissory note for $250 in favour of a customer of the plaintiff bank; the note was transferred by the customer to the bank as collateral security to a draft for $150, which was discounted by the bank for the customer, the proceeds, $149.60, being placed to his credit. This draft was not accepted or paid. The customer had in fact no right to pledge the note, but should have given it up to the defendant:—Held, upon the evidence, that the note was completed by the defendant and delivered as a promissory note, and was given to the bank, before maturity, for value, without notice of any defect; and so the bank became the holder in due course, and was entitled to recover from the defendant thereon to the extent of its lien, i.e., $149.60 and interest: Bills of Exchange Act, s. 54, subs. 2.

Sterling Bank of Canada v. Zuber, 32 O.L.R. 123, 7 O.W.N. 189.

HOLDER IN DUE COURSE—AGENT.

An agent, prête-nom, the holder of a promissory note, has an interest sufficient to maintain an action and obtain judgment thereon; the holder of a promissory note, whether he has given value therefor or not who is the transferee of a holder in due course, has himself all the rights of such holder in due course.

Desjardins v. Maccubbin, 50 Que. S.C. 307.

HOLDER IN DUE COURSE—PRESUMPTIONS AS TO.

The law presumes any holder of a bill of exchange to be a holder in due course, to have given value for it, and the obligation arising from the bill of exchange to have a lawful cause.

Chaurest v. Provost, 16 Que. P.R. 153.

RIGHTS OF BONA FIDE HOLDERS.

In an action against the several makers of a joint and several promissory note, the plaintiff's failure to shew that all the de-

fendants signed the note will not preclude him recovering against those shewn to have signed it. Peters v. Perras, 42 Can. S.C.R. 244, followed as to sufficiency of evidence to shew the plaintiffs to be holders in due course.

Park v. Pullishy, 3 A.L.R. 340.

PROMISSORY NOTE — SALE OF LAND — NOTE GIVEN TO VENDOR—NEGOTIATED BY VENDOR BEFORE MATURITY TO HIS VENDOR UNDER ANOTHER AGREEMENT OF SALE — BOTH AGREEMENTS CANCELLED — RECOVERY ON NOTE.

The defendants one of whom signed for accommodation of the other, gave to one S. a promissory note as collateral to an agreement for the sale of land from S. to one of the defendants. S., before maturity negotiated the note to the plaintiff on account of an agreement of sale of certain land from the plaintiff and one T. to S. Both agreements of sale were subsequently cancelled and the respective purchasers executed quitclaim deeds to the respective vendors. The note had not been paid. Held (distinguishing Marckel v. Taplin, 6 S.L.R. 77, 4 W.W.R. 1292, and Wilson v. Abbott, 7 S.L.R. 107, 6 W.W.R. 1097) that as the plaintiff had taken the note before maturity for value the defendants were liable thereon.

Shatsky v. Krosnuk, [1919] 3 W.W.R. 75.

HOLDER IN DUE COURSE—WHEN.

An action upon two promissory notes:—Held, on the facts, the plaintiffs were not holders in due course for valuable consideration, and the plaintiffs' claim was dismissed with costs.

First State Bank v. Clouthier, 31 W.L.R. 594.

(§ V A—116)—ACCOMMODATION CHEQUE—RIGHTS OF BONA FIDE HOLDER—BANK.

A person is not relieved from liability on his accommodation cheque given to the manager of a bank to enable him to buy shares of the bank which the bank paid in good faith: nor will the manager's promise to reimburse the maker of the cheque for moneys so advanced affect such liability, where the transaction was carried on without the knowledge or authority of the bank.

Pyke v. Sovereign Bank, 24 D.L.R. 720, 24 Que. Q.B. 198, affirming 14 D.L.R. 383.

NOTES MADE FOR ACCOMMODATION OF CUSTOMER OF BANK AND DISCOUNTED BY BANK — HOLDER IN DUE COURSE — DEFENCE—RELEASE BY DEALINGS OF BANK WITH CUSTOMER — ONUS — SECURITY—ENTRY IN PASSBOOK — MISTAKE — ESTOPPEL.

Imperial Bank v. Keam, 10 O.W.N. 79.

ACCOMMODATION MAKER—SURETY—LIABILITY TO ENDORSEE WHO ADVANCED MONEY UPON SECURITY OF NOTE—NOTE MADE PAYABLE TO BANK—TITLE TO NOTE—HOLDER IN DUE COURSE—BILLS OF EXCHANGE ACT, S. 70—ESTOPPEL.

Fox v. Patrick, 14 O.W.N. 263, affirming 13 O.W.N. 400.

RIGHTS OF BONA FIDE HOLDER—ACCOMMODATION PAPERS.

Held, that, where a person signed a promissory note for the accommodation of the maker and the said person entrusted the custody thereof to the maker, a bona fide holder who acquired the said note from the latter, obtained thereby an incontestable title thereto and property therein, although in parting with it the maker acted without authority or in breach of express instructions. [London Joint Stock Bank v. Simmons, [1892] A.C. 212; Lloyds Bank v. Cooke, [1907] 1 K.B. 794; Ray v. Wilson, 45 Can. S.C.R. 421, followed.]

Northern Electric & Mfg. Co. v. Kasow Electric & Seaborn, 29 W.L.R. 582.

(§ V A—118)—RIGHTS AND LIABILITIES OF TRANSFEREES—NOTE PROCURED BY FRAUD — NOTICE — ONUS — RIGHTS OF BONA FIDE HOLDERS.

Where a promissory note given for the purchase price of certain property is obtained from the maker by the fraud and deceit of the payee in the inception of the transaction, such fraud being duly established, the burden of proving want of notice of the fraud is on a plaintiff claiming as bona fide holder for value without notice under such payee's endorsement before maturity. An indorsee, who took a promissory note before maturity in good faith for value and without notice of defects in the holder's title, is not, in the absence of circumstances sufficient to put him on inquiry, affected by the fraud and deceit of the holder in obtaining the signatures of the makers. Where a promissory note given for the purchase price of certain property is obtained from the maker by the fraud and deceit of the payee, while such fraud in the inception of the transaction precludes such payee from recovering, yet his endorsee taking the note in due course before maturity without notice of the fraud may recover.

Langley v. Joudrey, 15 D.L.R. 10, 47 N.S.R. 451, 13 E.L.R. 432, affirming 13 D.L.R. 563, 13 E.L.R. 135.

NOTE PROCURED BY FRAUD—ONUS ON ENDORSEE.

Where the promissory note is shewn to have been obtained by fraud, the plaintiff, claiming as endorsee, must prove that before its maturity he, in good faith, gave valuable consideration therefor. Falconbridge on Banking and Bills of Exchange, 2nd ed., 458, referred to.]

Kern v. Tamblyn, 16 D.L.R. 529, 7 S.L.R. 64, 27 W.L.R. 608.

KNOWLEDGE OF EQUITIES—SALE.

The holder of a bill in due course for value is not affected by his knowledge at the time he acquired the bill that it was given for a chattel so defective as to justify the rejection thereof by the purchaser.

Union Bank of Canada v. Benson, 39

D.L.R. 661, 11 S.L.R. 88, [1918] 1 W.W.R. 915.

PROMISSORY NOTE — ACTION AGAINST MAKERS OF JOINT AND SEVERAL NOTE—DENIAL OF SIGNATURES—ALLEGATIONS OF FRAUD—EFFECT OF ONE MAKER BEING RELIEVED—BILLS OF EXCHANGE ACT, S. 49—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

McLarty v. Dixon, 7 O.W.N. 347.

FRAUD—WANT OF CONSENT.

Although the holder in due course of a bill of exchange or promissory note is not as a rule subject to a plea of fraud, it is not so when the defence is want of consent or of capacity. One who, believing that he signs a receipt, accepts drafts upon himself is not bound by his signature and the drafts are a nullity.

Coté v. Brunelle, 51 Que. S.C. 35.

A third party the holder in due course of a note cannot obtain payment from the maker when the making of the note was obtained by fraud. [R.S.C. 1906, c. 119, s. 56–8.]

Lamothe v. Lafontaine, 18 Que. P.R. 184.

(§ V A—121)—PROMISSORY NOTE—UNENDORSED—LEFT FOR COLLECTION WITH AGENT—THEFT OF—PAYMENT MADE TO PERSON PRESENTING — DISCHARGE OF MAKER.

Where an unendorsed promissory note, which has been placed in the hands of a solicitor for collection, is stolen from his office and the maker pays the note in good faith to the person presenting it without notice of or reasonable cause to suspect that it has been stolen, such payment relieves the maker from liability on the note.

Ferguson v. Kemp, 45 D.L.R. 360, [1919] 1 W.W.R. 537, at 540, 14 A.L.R. 554.

LOST CHEQUE FOR WAGES—RIGHTS OF BANK UPON FORGED INDORSEMENT.

There can be no recovery for the amount of wages represented by a cheque which was lost by the payee and later came into the possession of a bank upon a forged indorsement, where for the protection of the maker the payee is unable to deliver possession of the cheque.

Kelly v. C.P.R. Co., 25 D.L.R. 79, 22 B.C.R. 231, 32 W.L.R. 891, 9 W.W.R. 531.

(§ V A—122)—HOLDER IN DUE COURSE—ILLEGAL CONSIDERATION.

Even when a promissory note has been given for illegal consideration and contrary to good morals, the person to whom it has been transferred in good faith, before its maturity for valuable consideration, who is not aware of the circumstances in which the note was made nor of the illegality with which it is affected, is a holder in due course and is entitled to recover the amount thereof.

Dubuc v. St. Vincent, 50 Que. S.C. 288.

B. WHO ARE PROTECTED AS BONA FIDE PURCHASERS.

(§ V B—130)—PURCHASER IN GOOD FAITH WITHOUT NOTICE FOR VALUE BEFORE MATURITY — ENDORSER WITHOUT ANY TITLE—EFFECT.

Under the Bills of Exchange Act R.S.C. 1906, c. 119, a person taking a bill of exchange or promissory note before maturity in good faith without notice of any defect and giving value for same obtains a valid title though he takes it from one who has none by reason of his having obtained it solely for collection on behalf of the previous holder. [London Joint Stock Bank v. Simmons, [1892] A.C. 201; Venables v. Baring Bros., [1892] 3 Ch. D. 527; Raphael v. Bank of England, 17 C.B. 161, applied.]

Campbell v. Ghiz, 20 D.L.R. 27, 7 S.L.R. 326, 30 W.L.R. 95, 7 W.W.R. 763.

HOLDER IN DUE COURSE—NOTE MARKED "RENEWAL"—BANKABLE NOTE.

A promissory note marked "renewable," and indorsed to a bona fide transferee before its maturity does not prevent such transferee from being a holder in due course because of his failure to make inquiries to ascertain the title of the transferor, particularly where the note was originally given as "bankable paper" with power of discounting it.

Pennoyer Co. v. Williams Machinery Co., 24 D.L.R. 607, 34 O.L.R. 493.

KNOWLEDGE OF MAKER'S RELATIONSHIP—SURETY—DUTY AS TO.

When the holder in due course of a promissory note has knowledge that the maker is in reality a surety only for a third person, the creditor, after notice, is bound to do nothing to the prejudice of the surety. [Rouse v. Bradford Banking Co., [1894] A.C. 586, applied.]

Imperial Bank of Canada v. Hill, 33 D.L.R. 218, 10 S.L.R. 47, [1917] 1 W.W.R. 1299, reversing 31 D.L.R. 574.

PROMISSORY NOTE—HOLDER FOR VALUE—ENDORSATION BY PAYEE—ALLEGED CANCELLATION—BURDEN OF PROOF.

Under c. 144 Bills of Exchange Act, R.S.C. 1906, c. 119, the party claiming to be the holder of a promissory note for value, which was alleged to be endorsed by the payee, whose signature was apparently cancelled, must prove that such cancellation was made unintentionally or by mistake, in order to be found the rightful holder of the note in question.

Royal Bank of Canada v. Allen, 49 D.L.R. 572, [1919] 3 W.W.R. 1063.

HOLDER IN DUE COURSE—COLLECTION.

The fact that a note is transferred to a third party for collection is no obstacle to that third party being able to be the regular holder of it and to seek payment.

Gingras v. Chaffee, 49 Que. S.C. 42.

ALTERATION—BLANK—TIME OF PAYMENT.

When a note is transferred to a third person for the purpose of bringing suit and

recovering judgment such person may sue in his own name. It is not an essential alteration of a note in which a blank was left after the word "one," the date of payment not being stated, if the holder fills in such blank by adding the word "month," provided that the time of maturity of the note is not shortened.

Giguère v. Pagnuelo, 53 Que. S.C. 63.

PURCHASER AT JUDICIAL SALE.

One who purchases a note given for a subscription for shares, at a public judicial sale by a liquidator of the book debts of the company in liquidation, can transfer it to a third party at prête-nom and the latter becomes the regular holder of it.

Boulet v. Hudon, 51 Que. S.C. 29.

(§ V B—132)—RELIANCE ON SECURITY.

The fact that the assignment of property covered by a lien note transferred to a bank, as security for money borrowed from the bank by the payee thereof, was invalid, would be no bar to the right of the bank to recover on the note itself. [National Bank of Australasia v. Cherry, L.R. 3 P.C. 299, specially referred to.]

Alfred Thien v. The Bank of B.N.A., 4 D.L.R. 388, 4 A.L.R. 228, 21 W.L.R. 192, 1 W.W.R. 795.

(§ V B—135)—FACTS PUTTING ON INQUIRY — ACTION BY INDORSEE — HOLDING IN DUE COURSE—SUFFICIENCY OF EVIDENCE.

In an action on a note brought by an indorsee and defended on the ground that the note was obtained through fraud, it appearing, among other things, that the indorsee knew that liability on similar notes taken by the same payee had been defended on the same ground, and that in taking the note he knew that interest payments were in arrears and made no inquiry as to the circumstances under which it was given; the indorsee is not prima facie a holder in due course. [Jones v. Gordon, 2 App. Cas. 616, referred to.]

Vaughan v. Schneider, 11 D.L.R. 290, 24 W.L.R. 313, 4 W.W.R. 582.

BANK—KNOWLEDGE OF FRAUD—DIFFICULT COLLECTION AS CIRCUMSTANCE.

The mere fact that a bank, when acquiring a note, knew officers of other banks which have had difficulty in collecting from the same makers does not raise a presumption that the bank had acquired information that the notes were tainted with fraud; and even if a bank has knowledge at the time it acquires a note that other banks had experienced difficulty in collecting other notes of a similar character, that fact would not be sufficient to disentitle the bank to recover as a holder in due course. [S. 58 of the Bills of Exchange Act, R.S.C. 1906, c. 119, considered; Peters v. Perras, 42 Can. S.C.R. 244, 1 A.L.R. 291, referred to.]

Hayden Clinton National Bank v. Dixon, 26 D.L.R. 694, 9 A.L.R. 303, 33 W.L.R. 838, 9 W.W.R. 1269.

HOLDER IN DUE COURSE—BANKING TRANSACTION—KNOWLEDGE OF FRAUD—FACTS PUTTING ON INQUIRY.

A promissory note acquired in an ordinary banking transaction, as collateral security for advances does not necessitate the making of inquiries about it, unless there is something which might reasonably lead to suspect something wrong with the particular note; the fact that a banker, before acquiring the note, knew that similar notes were tainted with fraud or that in some of the actions brought upon them the defence of fraud was raised, does not reasonably lead to suspect that all such notes were tainted with fraud as affecting the right to recover as a holder in due course. [Oldstadt v. Lineham, 1 A.L.R. 416; Jones v. Gordon, 2 App. Cas. 616, distinguished.]

Union Investment v. Grimson, 27 D.L.R. 208, 9 A.L.R. 554, 33 W.L.R. 845, 9 W.W.R. 1430.

HOLDER IN DUE COURSE—ALTERATION—RATE OF INTEREST—BLANKS—ESTOPPEL.

A bill is not lacking in any "material particular" within the meaning of s. 31 of the Bills of Exchange Act (R.S.C. 1906, c. 119) because a space reserved for a rate of interest is unfilled, and filling in a rate, after the maker has signed the note, is a material alteration, if without his authority, which vitiates the note except against a holder in due course. One who acquires the note with knowledge of such alteration is not a holder in due course, nor can he hold the maker liable thereon on the ground of estoppel.

Bank of B.N.A. v. Robertson, 36 D.L.R. 166, 28 Man. L.R. 54, [1917] 2 W.W.R. 1110.

ALTERATION—"APPARENT."

An unauthorized insertion of an interest clause in a promissory note after the making thereof, is a material alteration, but will not affect the rights of a holder in due course acquiring the note after the insertion if the alteration is not "apparent" within the meaning of s. 145 of the Bills of Exchange Act, R.S.C. 1906, c. 119.

Black v. Collin, 36 D.L.R. 665, 28 Man. L.R. 179, [1917] 3 W.W.R. 225.

AGREEMENT — RESCISSION — FRAUD — PROMISSORY NOTE TRANSFERRED UNDER AGREEMENT—RECOVERED BY PAPER FROM TRANSFEREE FOR LESS THAN FACE VALUE—PAYOR'S KNOWLEDGE OF TRANSACTION—TRANSFEROR'S RIGHT TO RECOVER.

An action by the liquidator of the Acadia, Limited, of Vancouver for rescission of an agreement between that company and the Union Trading Co., of Seattle, on the ground of fraud and that D., one of the directors of the Acadia, who was in wrongful possession of a promissory note given by him, was dismissed. Held, on appeal, reversing the decision of Hunter C.J.B.C., that the scheme whereby the agreement was brought about was conceived in fraud

and it should be set aside. Held, further, that D., though not a party to the fraud, having obtained the note from the wrongful holder with full knowledge of the facts, was liable to the plaintiff for its full amount.

Schetky & Acadia v. Cochrane, 26 B.C.R. 257.

PRIOR HOLDERS—AGREEMENT.

The holder in good faith of a promissory note is not bound to take account of the relations between the successive holders prior to the discount of it made by him and he cannot be bound by agreements which were made among them.

Versailles, Vidricaire & Boulais Co. v. Mississiquoi Lautz Corp., 51 Que. S.C. 435.

(§ V B—137)—TAKEN FROM TRUSTEE—PROMISSORY NOTE—EQUITY ATTACHING TO, IN HANDS OF HOLDER ACQUIRING AFTER MATURITY—RENEWALS—ADVANCE—NOTICE OF CLAIM—EVIDENCE.

Binder v. Mahon, 1 D.L.R. 924, 3 O.W.N. 848, 21 O.W.R. 695.

(§ V B—138)—RIGHTS OF HOLDER IN DUE COURSE—ACQUIRING NOTE FOR SHARES FROM OFFICER OF CORPORATION—KNOWLEDGE.

Duplessis v. Edmonton Portland Cement Co., 39 D.L.R. 756, 55 Can. S.C.R. 623, affirming 11 A.L.R. 58, which affirmed [1917] 1 W.W.R. 838; 28 D.L.R. 748, 34 W.L.R. 250, 10 W.W.R. 514.

(§ V B—145)—RIGHTS OF HOLDER FOR VALUE—CONSIDERATION—ANTECEDENT DEBT.

Bank of Montreal v. Pope, 31 D.L.R. 238.

COLLATERAL SECURITY—BANK.

Promissory notes held by a bank as collateral security, though given by the maker as renewals, under pressure of legal proceedings by the bank, entitle the bank, where no fraud is shewn, to recover from the maker as a holder for value, to the extent of its lien. (S. 54 (2) of the Bills of Exchange Act, R.S.C. 1906 c. 119.)

Bank of Montreal v. Weisdepp, 34 D.L.R. 26, 24 B.C.R. 73, [1917] 2 W.W.R. 615.

CHEQUE TAKEN FOR PRE-EXISTING DEBT—PRESUMPTION OF CONDITIONAL PAYMENT—DISHONOUR—REVIVAL OF DEBT—IF GIVEN IN EXCHANGE FOR GOODS—BARTER WITH ALL RISKS.

If a bill, note, or cheque is taken for or on account of a pre-existing debt, the presumption is that it is only a conditional payment, and if it is dishonoured the debt revives; but, if it is given in exchange for goods or other securities sold at the time, the transaction amounts to a barter of the bill with all its risks.

McGlynn v. Hastie, 46 D.L.R. 20, 44 O.L.R. 190.

(§ V B—147)—RENEWALS—TAKEN AS COLLATERAL SECURITY—ORIGINAL NOTE FOR SAME DEBT HOLDING OTHER PARTIES.

A "renewal" of a promissory note under the terms of a security given in respect of its endorsement is not necessarily restricted to another note made by the same parties, but may be shewn by the attendant circumstances to include within the protection of the security, the promissory note of another party; this result will follow where the latter had received the benefit of the original transaction and was obtained to substitute his direct obligation for the first note as a continuation of the original transaction and not with any intention of creating a novation, and where the endorser of the original note had endorsed the substituted note on the faith of such security with the concurrence of all the parties. [De St. Aubin v. Binet, 22 Que. K.B. 564, affirmed.]

De St. Aubin v. Binet, 18 D.L.R. 739.

HOLDER IN DUE COURSE—COLLATERAL TO BANK—NONEXISTENCE OF DEBT.

A promissory note indorsed over a bank by the payee named in the note, even as a collateral, does not necessarily constitute the bank a holder in due course, where there is no existing indebtedness on the part of the payee to the bank and is, therefore, not subject to summary judgment in face of a plea that the note was given to the payee on account of a sale of land to which no title could be made. [Bank of B.N.A. v. McComb, 21 Man. L.R. 58, applied.]

Royal Bank v. Hickney, 24 D.L.R. 525, 9 W.W.R. 60, 32 W.L.R. 349.

COLLATERAL SECURITY TO BANK—HOLDER IN DUE COURSE.

The fact that a note was discounted by a bank on the strength of another note which it had required as collateral security does not in any way negative the fact that consideration was given for the note sued on, which, if received in good faith and without notice of defects in the title of the payee, makes the bank a holder in due course under s. 56 of the Bills of Exchange Act.

Sparta State Bank v. Alberta Financial Brokers, 25 D.L.R. 321, 30 W.L.R. 708, 9 W.W.R. 851.

COLLATERAL SECURITY TO BANK—HOLDER IN DUE COURSE—AUTHORITY OF CORPORATION OFFICER TO INDORSE.

Standard Bank v. McCullough, 25 D.L.R 813, 8 A.L.R. 320.

ACCOMMODATION NOTE—INDORSEMENT TO BANK AS COLLATERAL SECURITY FOR DEBT OF PAYEE—DEBT PAID BEFORE ACTION BEGUN—CLAIM OF BANK TO HOLD NOTE FOR SUBSEQUENT DEBT—EVIDENCE—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Bank of Ottawa v. Hall, 8 O.W.N. 15.

ENDORSEMENT TO BANK AS SECURITY—PRINCIPAL DEBT NOT MATURED—HOLDER IN DUE COURSE.

Where a promissory note of a third party is endorsed by way of collateral security to a bank by a person whose indebtedness to the bank has not matured, the bank having no right to anticipate the day of payment,

the bank are not holders in due course. [Canadian Bank of Commerce v. Wait, 1 Alta. L.R. 68, followed.]

Merchants Bank of Canada v. Williams, 6 W.W.R. 563.

NEGOTIABLE INSTRUMENT — PAYMENT OF FORGED NOTE—ESTOPPEL—PRESUMPTION —DISCOVERY OF FORGERY—DILIGENCE—LIABILITY.

Quebec Bank v. Frechette, 20 Que. K.B. 558.

TAX COLLECTOR PAYING TAXES TO TREASURER —CHEQUE — SUSPENSION OF BANK — CHEQUE IN HANDS OF ANOTHER BANK.

[Boyd v. Nasmith, 17 O.R. 40; Johns v. Standard Bank, 18 O.W.R. 650, 2 O.W.N. 910, followed.]

Wellesley v. McFaddin, 2 O.W.N. 1337, 19 O.W.R. 637.

GIVEN IN PAYMENT OF SHARES—IN FOREIGN COMPANY—NOT LICENSED TO DO BUSINESS IN ONTARIO—ENDORSED TO BANK —HOLDER IN DUE COURSE.

Canadian Bank of Commerce v. Gillis, 3 O.W.N. 359, 20 O.W.R. 622.

PROMISSORY NOTE — SIGNATURE TO BLANK NOTE—AUTHORITY TO USE—CONDITION —BONA FIDE HOLDER.

Ray v. Willson, 45 Can. S.C.R. 401.

PROMISSORY NOTES—ACCOMODATION COMAKER—NOTICE OF NONPAYMENT—LACHES.

Hough v. Kennedy, 3 A.L.R. 114, 13 W.L.R. 674.

PROMISSORY NOTE—ACTION BY HOLDER—NOTE PAYABLE TO A THIRD PARTY.

Levalee v. Burrage, 12 Que. P.R. 382.

HOLDER IN DUE COURSE—CONSIDERATION.

Cox v. Canadian Bank of Commerce, 21 Man. L.R. 1, 18 W.L.R. 568.

VI. Actions and defences; acceleration; maturity; extension and renewal.

A. IN GENERAL; RIGHT TO SUE.

(§ VI A—150) — MATURITY — ACCELERATION — PROVISION FOR — EXERCISE — STRICT COMPLIANCE NECESSARY.

A condition of a lien note that the payee might, should he consider the amount thereof insecure, declare it due and payable and bring action thereon, does not become operative by a mere demand for the payment of the note; since a strict compliance with such condition by declaration that he was insecure, was necessary in order to render it effective.

Gill v. Yorkshire Insurance Co., 12 D.L.R. 173, 23 Man. L.R. 368, 24 W.L.R. 389, 4 W.W.R. 692.

ACCEPTANCE — DISHONOUR — DRAWER'S RIGHTS.

A drawer of a bill of exchange made payable to the order of a third party, and duly accepted, can, upon the dishonour and return of the bill, maintain an action against the acceptor in his own name, without first obtaining the indorsement of the payee.

Cossey v. McManus (N.S.), 40 D.L.R. 369, 52 N.S.R. 235.

REMEDY OF HOLDER — INSOLVENCY.

As a creditor has a right to exercise, at the same time, the different remedies which the law gives him, a holder of a note may put in a claim on the insolvency of one of the makers and, at the same time, sue both of the makers, jointly and severally.

Charest v. Gervais, 24 Rev. Leg. 245.

RIGHTS OF INDORSER — WARRANTY — SERVICE—COSTS.

The indorser of a note may, by dilatory exception, stay the plaintiff's action to call in warranty the signer of the note on which the action is based. If security judicatum solvi has been ordered, the delay for producing such dilatory exception runs from the day of presentation of the security. A plaintiff who untimely contests a dilatory exception of warranty will be ordered to pay the costs of such exception.

Compania Ingeniera, etc. v. San Martin Mining Co., 20 Que. P.R. 274.

WARRANTY—PARTIES.

The maker of a promissory note, sued by the holder, may, by exception, call in warranty the party in whose favour the note was originally made.

Dawson & Co. v. Jago Co., 19 Que. P.R. 157.

COLLATERAL AGREEMENT — NOTES PAYABLE ONLY UPON EVENT WHICH DID NOT HAPPEN—DELIVERY UP AND CANCELLATION OF NOTES HELD BY PAYEE—NOTES TRANSFERRED TO THIRD PERSON—CLAIM FOR DAMAGES FOR TRANSFERRING NOTES — VALIDITY OF AGREEMENT — COUNTERCLAIM—FRAUD AND MISREPRESENTATION —FAILURE TO PROVE.

Burton v. Cundle, 14 O.W.N. 306.

COLLATERAL AGREEMENT — NOTES PAYABLE ONLY UPON EVENT WHICH DID NOT HAPPEN—TRANSFER BY PAYEE TO PLAINTIFF —NOTICE TO TRANSFEREE OF AGREEMENT —TRANSFEREE SUBJECT TO EQUITIES BETWEEN ORIGINAL PARTIES—ACTION ON NOTE RETAINED BY TRANSFEREE — DISMISSAL—DAMAGES FOR FRAUDULENTLY TRANSFERRING OTHER NOTES TO PERSONS WHO COMPELLED PAYMENT — COUNTERCLAIM.

Huff v. Burton, 14 O.W.N. 307.

ACTION BY EXECUTOR OF PAYEE—DEFENSE AND COUNTERCLAIM — NOTES MADE BY SON OF DECEASED PAYEE — BARGAIN ALLEGED TO HAVE BEEN MADE WITH FATHER—STATUTE OF FRAUDS.

O'Neill v. O'Neill, 15 O.W.N. 9.

SEVERAL LIEN NOTES—DEFAULT IN ONE—ACCELERATION CLAUSE—RIGHT TO SUE ON ALL NOTES.

Where several lien notes, given on the conditional sale of a chattel, each contained a proviso that in default of payment of such note or of any of the other notes, the whole

amount of the price and interest and all obligations and notes given therefor should forthwith become due and payable without making presentment or demand, which were thereby waived, the conditional vendor may sue on all of the lien notes where one only is in default; no preliminary notice is necessary of an intention to claim the benefit of the acceleration clause, or, if such were necessary, the service of the writ was sufficient, subject to any right as to costs which might have arisen had the defendant forthwith paid the note which was past due. [Westaway v. Stewart, 2 S.L.R. 178, distinguished.]

International Harvester Co v. Knox, 21 D.L.R. 807.

Right to sue on original consideration—Return of note.

A creditor who has received a promissory note in settlement of his claim may sue on his original claim without producing the note, but if the debtor has reason to believe that the note is in the hands of a third party, he may, under art. 177, C.P. (Que.), par. 2, file a dilatory exception requesting a suspension of the proceedings until the production of the note.

National Breweries v. Guillemette, 32 D.L.R. 365, 50 Que. S.C. 329.

Non-negotiable instrument — Note given for balance of purchase money of land to wife of vendor — Vendor's lien passing with note to wife—Transfer of note for value—Equitable assignment of chose in action—Right of assignee to sue without making assignor party — Rule 85 — Conveyancing and Law of Property Act, R.S.O. 1914, c. 109, s. 49.

Graham v. Crouchman, 39 D.L.R. 284, 41 O.L.R. 22.

Action by money-lender—Usury—Denial of signature by maker—Expert evidence — Finding of fact — Renewal notes—Consideration—Unauthorized alteration by payee of notes after signature — Accommodation maker—Knowledge — Surety — Extension of time granted to principal debtors — Successful defenses raised by amendment—Stale demand—Costs.

Bellamy v. Williams, 12 O.W.N. 232, [Affirmed in 40 D.L.R. 396, 41 O.L.R. 244.]

Promissory notes—Contest as to ownership—Costs.

Hannah v. Robson (No. 2), 13 O.W.N. 215.

Sufficiency of allegations — Privity — Signature.

In an action on a note filed with a declaration it is sufficient, to establish privity between the plaintiff (holder) and the defendant (maker), that the obligation of the latter substantially appears, and there is an allegation that the defendant has made a payment on account. The omission to mention that the defendant signed the note is not of itself fatal if it is implied by other allegations.

Gautier v. Lowe, 52 Que. S.C. 276.

Warranty.

The maker of a note, defendant in an action to recover the amount, cannot by dilatory exception demand that the indorser, to whom he had remitted a sum of money and a note to pay in part and renew for the rest the note sued upon, be summoned in warranty.

Starke-Seybold Co. v. Damiens, 18 Que. P.R. 212.

Actions and defenses—Dilatory exception — Endorsers — Adding parties.

An indorser on a promissory note has the right to stay the proceedings by a dilatory exception to call the maker in warranty, although plaintiff contends that the note was signed for accommodation, even if the note was for accommodation, this question should only be decided when the maker is en cause, so as to constitute chose jugée between all the parties to the note and the case.

Duclos v. Sparrow, 15 Que. P.R. 222.

Promissory note — Action on — Payment — Onus — Failure to satisfy — Interpleader issue — Assignment of chose in action — Validity — Evidence — Fraudulent intent — Creditors under foreign judgment—Proof of judgment—Right to share in fund in court.

St. Jean v. Laurin, 7 O.W.N. 702.

Promissory note — Application of payments — Renewal — Waiver — Guaranty — Misrepresentation — Findings of fact of Trial Judge.

Bank of Toronto v. Hall, 8 O.W.N. 465.

Promissory note — Evidence — Interest.

McKay v. Good & Rochester, 8 O.W.N. 296.

Promissory note — Company — Settlement of differences — Evidence.

Toronto Brick Co. v. Brandon, 7 O.W.N. 646.

Suing on original debt—Stay—Return of note.

As a promissory note has not the effect of novation, the creditor may maintain an action for the recovery of the original debt without offering to return the note. By dilatory exception, the defendant is entitled to have a stay of proceedings in the action until the plaintiff has filed the note.

National Breweries v. Guillemette, 50 Que. S.C. 329.

Promissory note — Action brought in name of company having interest in—Note payable to solicitors for company — Note endorsed by solicitors but not until after action brought—Action begun by specially endorsed writ in County Court—Judgment for plaintiff company entered in County Court without amendment of writ — Rights determinable as of date of writ, but proceedings not a

MERE NULLITY—ADDITION OF SOLICITORS AS PLAINTIFFS AS OF DATE OF WRIT—POWER OF APPELLATE COURT TO MAKE AMENDMENT WITHOUT REQUEST.

Tennessee Fibre Co. v. Smith, 16 O.W.N. 169.

ACTION ON PROMISSORY NOTE — GIFT OF MONEY TO DAUGHTER—NOTE OF SON-IN-LAW HELD BY PAYEE AS TRUSTEE FOR DAUGHTER—NO DEBT DUE BY MAKER OF NOTE.

Malcolm v. Dickie, 12 O.W.N. 54.

SUFFICIENCY AS CAUSE OF ACTION.

In an action upon a promissory note held a good cause of action was disclosed by a statement of claim reading as follows: "The plaintiff's claim against the defendant is for the sum of $2,505, being the amount of a joint and several promissory notes given by McHugh Brothers on August 1st, 1908, in the words and figures following: '$2,505.00. London, England, August 1, 1908. On demand we jointly and severally promise to pay to Mrs. J. J. McHugh or order, Two Thousand and five hundred and five dollars, with interest at 10 per cent, for value received. McHugh Bros.'"

McHugh v. McHugh, 11 A.L.R. 545, [1917] 2 W.W.R. 1044.

BILLS OF EXCHANGE—PAYEE OF NOTE ALSO A COMAKER—NOTE JOINT AND SEVERAL — ACTION MAINTAINABLE BY PAYEE AGAINST OTHER COMAKERS.

Held that an action on a promissory note on which the plaintiff as payee was himself a comaker could be maintained against the other two makers, it being a joint and several note and each maker liable for the whole amount thereof (Beecham v. Smith, El. Bl. & El. 442 followed). The note was made to raise money for an enterprise in which they were all interested and the understanding was that all were to be equally liable for the indebtedness thus incurred; judgment was therefore given plaintiff against defendants for two-thirds of the amount of the note. A defense that the note was inchoate and incomplete in that the payee was to secure the signatures of certain others was, on the evidence, not allowed.

McDermott v. Fraser & McDougall, [1919] 1 W.W.R. 662.

B. MATURITY; ACCELERATION; EXTENSION; RENEWAL.

(§ VI B—155)—MATURITY — PREMATURE ACTION.

There can be no recovery on a note in an action commenced before its maturity, even though forming part of an action on other notes that had matured.

Canadian Bank of Commerce v. Bellamy, 25 D.L.R. 133, 8 S.L.R. 381, 33 W.L.R. 8, 9 W.W.R. 587.

LIEN NOTE — ACCELERATION CLAUSE — INSECURITY — RIGHT OF ASSIGNEE.

The plaintiff being the assignee of three lien notes made by defendant in favour of one Moore, purported, before maturity of any of them, to declare the notes due in pursuance of power therein contained, and brought this action to recover payment. Such power was as follows: "And if default is made in the payment of this note or any renewal or renewals thereof, or should D. H. Moore deem this note or any renewal or renewals insecure, of which he shall be sole judge, he shall have full power to declare this note or any renewal or renewals thereof due and payable at any time;"—Held, that it was incumbent on the plaintiff to prove that the notes were as a matter of fact deemed insecure by him at the time he purported to declare the same due, and the plaintiff having failed to prove this, his action must fail. Quaere, whether in any event the plaintiff could exercise such power since by the terms of the notes such power was given only to Moore and might have been so given because of special personal confidence reposed in Moore by the defendant.

Harris v. Murk, 8 S.L.R. 90, 32 W.L.R. 53, 7 W.W.R. 1338.

PRICE OF WORK DONE—EXCESSIVE CHARGE—ACCEPTANCE OF — RENEWAL OF NOTE —ACTION ON RENEWAL — DEFENSE — FAILURE TO ESTABLISH.

Rose v. Rose, 12 O.W.N. 235.

(§ VI B—158)—ACTION ON ORIGINAL NOTE —EFFECT OF RENEWAL.

When a note is renewed the fact of such renewal does not operate as a novation and it is immaterial whether the holder sues on the original note or on the renewal note; the remedy on the original note is merely suspended until the maturity of the new one.

Bank of B.N.A. v. Hart, 2 D.L.R. 810.

EXTENSION AND RENEWAL.

An agreement set up by the maker of a promissory note that both the original payee and the plaintiff endorsee had agreed before the note was given to grant a renewal thereof at maturity, but not evidenced by any writing, does not disclose a defense entitling the defendant to proceed to trial, where the plaintiff's claim has been verified in the manner required for summary judgment.

Union Bank v. MacCullough, 7 D.L.R. 694, 4 A.L.R. 371, 2 W.W.R. 403.

TAKING MORTGAGE SECURITY — MERGER — DIFFERENT MATURITY DATES.

The acceptance of a mortgage security maturing after the due date of promissory notes for the same debt does not of itself and apart from any express agreement impair or suspend the right of action upon the notes.

Campbell v. Heinka, 17 D.L.R. 586, 28 W.L.R. 297.

AGREEMENT FOR RENEWAL—SCOPE OF.

A promissory note given in payment of merchandise under an agreement that it is to be renewed after maturity for any por-

tion of the goods unsold entitles the maker to but one renewal. [Innes v. Munro, 1 Ex. 473, followed.]

Pennoyer Co. v. Williams Machinery Co., 24 D.L.R. 607, 34 O.L.R. 493.

ACTION ON NOTE — DEFENSES — RENEWAL —ABSENCE OF CONSIDERATION—FAILURE TO ALLOT SHARES—FRAUD.

Crooks v. Cullen, 25 D.L.R. 817, 32 W.L.R. 308.

ALTERATION — RENEWAL — DEPOSIT IN BANK—RIGHTS OF ENDORSER.

If a note given in renewal of a previous note, but without novation, is altered by adding the words "with interest," the holder may sue on the original note. When a depositor owes a bank on several notes, all of the same class, an amount exceeding his deposit, and the maker of the notes has not declared how his payment was to be applied, and has withdrawn all his funds from the bank, the endorser of one of the notes cannot plead payment by compensation.

La Banque Nationale v. Joncas, 24 Rev. Leg. 365.

PROMISSORY NOTES — AGREEMENT FOR RENEWAL — CANCELLATION — MISREPRESENTATION — EVIDENCE — IMMATERIALITY—ACTION ON NOTES—JUDGMENT.

Piggott v. Hedrick, 15 O.W.N. 123.

(§ VI B—159.)—STAY OF ACTION—WAR RELIEF ACT.

A bank may recover against an endorser of a promissory note, notwithstanding that the action is stayed as against the principal debtor by the War Relief Act. The deposit of certificates of title with the bank as additional security at the time the advance was made, although an unenforceable hypothecation, does not relieve the surety from liability.

Royal Bank v. Gold (B.C.), 41 D.L.R. 276, 25 B.C.R. 409, [1918] 2 W.W.R. 745.

NOTE — RENEWAL — PRODUCTION IN COURT — COSTS — DISCRETION OF COURT — C.C.P. ART. 549.

In the case where an action is founded on a note which is only the renewal or the settlement of other notes not brought before the court, the defendant can produce a dilatory exception and ask that he be only compelled to pay the amount of the original notes sent to him, but he has no right to demand the dismissal of the action for this reason. The general rule is that the party who fails should pay the costs, unless, for special reasons the court decides otherwise. But the law has established that these special reasons should appear in the judgment. Basing itself on the facts mentioned in the first paragraph herein, the court can condemn the plaintiff to pay the costs up to his reply, because he has only produced the original note in court with his reply to the defense.

National Drug & Chemical Co. of Canada v. Weinfield, 55 Que. S.C. 268.

ACCOMMODATION NOTE—KNOWLEDGE.

An opposition to judgment in an action on a renewed note, on the ground that it was given for accommodation only, will be dismissed if the defendant does not prove that the holder knew that the original note was an accommodation note.

Versailles Vidricaire & Boulais Co. v. Charlebois, 17 Que. P.R. 394.

CONDITIONS PRECEDENT.

A promissory note for $150 made by a debtor and indorsed by a third party was given upon an undertaking in writing by the creditor that if $60 and interest be paid on the note when it became due he would agree to its renewal for the balance due for a term of three months. The note was protested at maturity and on the following day the debtor tendered $60 with interest and a renewal note for the balance which the creditor then refused to accept. An action to enforce payment of the note was dismissed. Held, on appeal (reversing the decision of Schultz, Co. J.), that where there is a condition precedent such as in this case it must be strictly performed. The agreement to extend the time never came into operation because the condition upon which the right to an extension was based had not been complied with.

Amyot v. Quinby & Watt, 22 B.C.R. 402.

AGREEMENT TO RENEW—ONUS.

Where the defense to an action on a promissory note is an engagement to renew the same, it is incumbent on the defendant to shew that he has taken the proper steps towards such renewal. [Maillord v. Page, L.R. 5 Ex. 312, referred to.]

Norton v. Kennealy, 8 W.W.R. 799.

PROMISSORY NOTE — ENDORSEMENT TO BANK AS COLLATERAL SECURITY TO NOTE FOR SMALLER AMOUNT—POSITION OF MAKER OF NOTE—SURETY—NOTICE TO BANK—TIME GIVEN TO PRINCIPAL DEBTOR FOR PAYMENT OF SMALLER NOTE — EFFECT OF—PREJUDICE.

Royal Bank of Canada v. Wagstaffe, 17 O.W.R. 201.

C. DEFENSES.

(§ VI C—160) — DEFENSES — COUNTERCLAIM BASED ON FRAUD—ADDING PARTIES—PROMISSORY NOTE.

Hamilton v. Harvey, 20 D.L.R. 951.

MISREPRESENTATIONS—TIME OF PAYMENT.

Where there has been no deceit as to the actual terms of the note, fraud is not shewn upon which to invalidate the sale of goods by the selling agent's representation that the buyer would not have to pay anything on the price until May 1, while at the same time the agent obtained the buyer's signature to a promissory note maturing at an earlier date, which note remaining in the possession of the payee, the buyer was not in fact called upon to pay sooner.

McDonald v. Morgan, 22 D.L.R. 705, 49 N.S.R. 1.

LIABILITY OF INDORSER—DEFENSE—INFANCY —EVIDENCE OF.

Held, that in an action on a promissory note where the endorser set up the defense of infancy, the said defense could not be supported by the endorser's own evidence of the date of his birth, which information he got from his mother, and from a copy of a certificate of his birth, since the said evidence was hearsay.

Martin Hargreaves Co. v. Wrigley, 7 S.L.R. 415, 30 W.L.R. 92.

ACTION BY ASSIGNEE FOR CREDITORS—COUNTERCLAIM FOR ACCOUNTING.

The defendant held a promissory note of one Gray, who made an assignment for the benefit of his creditors to the plaintiff. On the note coming due the plaintiff and defendant arranged for the renewal thereof by the defendant signing a note in favour of the plaintiff, who carried the note in his account as assignee for Gray. In an action for payment of the note:—Held, that there should be judgment for the plaintiff, but that the defendant was entitled to counterclaim for an accounting by the plaintiff of the moneys collected by him as assignee of the Gray estate, which were applicable to the debt that Gray owed the defendant. [Macdonald v. Carington, 4 C.P.D. 28, distinguished.]

Scrim Lumber Co. v. Ross, 20 B.C.R. 89.

PURCHASE PRICE OF COMPANY — SHARES — REBATE — CREDIT ON NOTES — COUNTERCLAIM—RECOVERY OF BALANCE DUE ON NOTES—DAMAGES.

Garrett v. Fischer, 7 O.W.N. 666.

CONDITIONAL SIGNATURE BY DEFENDANTS FOR ACCOMMODATION OF UNINCORPORATED ASSOCIATION — BURDEN OF PROOF — EVIDENCE — CONTRADICTORY TESTIMONY — FINDINGS OF FACT OF TRIAL JUDGE—AMOUNT DUE UPON NOTE — CREDITS — APPLICATION OF PAYMENTS — INTEREST AFTER DEMAND—RATE OF.

Bank of Ottawa v. Shillington, 9 O.W.N. 315.

ONUS OF ESTABLISHING DEFENSE.

C.P.R. Co. v. Foster, 10 O.W.N. 442.

ACTION UPON PROMISSORY NOTE—DEFENSE OF PAYMENT — ACCOUNT — NOTE ALLEGED TO HAVE BEEN GIVEN AS SECURITY FOR DEBT OF ANOTHER — PRELIMINARY QUESTION FOR TRIAL—ORDER DIRECTING REFERENCE DISCHARGED—PRACTICE.

Fox v. Patrick, 11 O.W.N. 370.

PROMISSORY NOTE—ACTION ON, BY PAYEE—ABSENCE OF CONSIDERATION—DISMISSAL OF ACTION — DELIVERY UP OF INSTRUMENT.

Helps v. Charette, 13 O.W.N. 412.

ACTION BY ENDORSEE—DEFENSE OF FRAUD—EVIDENCE — PLEADING.

In an action by the endorsee of a promissory note against the makers thereof wherein the defense was set up that the defendants had been induced to sign the note by fraud and the whole of the evidence bearing upon the point was taken upon commission, held, on two grounds, that the court was not justified in refusing to accept the denial by the plaintiff and his brother, who purchased the note for him, of any knowledge concerning the transaction in which the note originated or any suspicion touching the validity of it, the first of such grounds being that the circumstances relied upon by the defendant were insufficient to support a successful impeachment of the testimony in question, and the second, that there was no notice in the pleadings or otherwise shewing the circumstances upon which the defendants relied as sustaining or pointing to their imputations of bad faith and no opportunity was given the witnesses for the plaintiff to explain or qualify the facts or conduct upon which the defendants mainly based their attack (per Duff, J., Davies and Anglin, JJ., concurring; Fitzpatrick, C.J., and Idington, J., dissenting).

Peters v. Perras, 13 A.L.R. 80.

DENIAL OF SIGNATURE—AFFIDAVIT.

Arts. 1233, C.C. (Que.) and 208, C.C.P., only create in favour of the holder of a promissory note who sues the maker, a presumption juris tantum, and the defendant should be allowed to prove that the signature on the note is false, although he has not accompanied his plea with the affidavit required by the said articles.

Blais v. Mathieu, 20 Que. P.R. 244.

PROMISSORY NOTE — ACCOMMODATION MAKERS—NOTE GIVEN AS COLLATERAL TO SECURITY BY CHATTEL MORTGAGE FROM CREDITOR TO DEBTOR — ACTION BY EXECUTORS OF CREDITOR—RELEASE OF MAKERS OF NOTE — EVIDENCE — CORROBORATION—MEANING OF "COLLATERAL"—DISCHARGE OF CHATTEL MORTGAGE—DEALINGS BETWEEN CREDITOR AND PRINCIPAL DEBTOR—SURETIES GIVING UP BENEFIT OF ANOTHER SECURITY.

Bryans v. Peterson, 17 O.W.N. 9.

(§ VI C—163)—AGREEMENT TO RENEW — ACTION ON NOTE—DEFENSE.

Butler v. Butler, 4 O.W.N. 1308, 24 O.W.R. 677.

(§ VI C—164)—PAYMENT OR EXTINGUISHMENT.

When a debtor, in account current with his creditor, informs him that he will be unable to meet a note about to mature, and the creditor obtains from a third party, indebted, or about to be indebted, to the debtor on a contract between them, a note of the same amount, and uses it to take up the maturing note, and it is paid in due course, the operation amounts to a payment made, if not by the debtor, for him and with his money, and the rule of art. 1161, etc., that imputation of it should be made upon the oldest debt due, applies to it. Hence, if the indebtedness from the note taken up with the proceeds of the

other is the oldest in the account, it is extinguished.

Craik v. Macfarlane & Co., 21 Que. K.B. 10.

(§ VI C—167.)—Failure of consideration — Sale of shop fixtures without having title thereto.

Where a promissory note is given for shop fixtures purchased from the assignee of a tenant, and the lease does not clearly entitle the landlord to the fixtures at the expiration of the term, but it appears that the landlord could obtain reformation of the lease so as to entitle him, there is a failure of consideration for the note, even though no claim for reformation has been made by the landlord.

Tew v. O'Hearn, 3 D.L.R. 446, 3 O.W.N. 1116.

Defenses—Failure of consideration — Cancellation of contract for which given.

One who acquired a promissory note after maturity cannot recover thereon from the maker where the consideration for the note failed by reason of the cancellation of the contract for which it was given on account of the nonpayment of the note at maturity. [Jackson v. Scott, 1 O.L.R. 488, referred to.]

Marckel v. Taplin, 13 D.L.R. 118, 6 S.L.R. 77, 25 W.L.R. 149.

Defenses—Partial failure of consideration.

Partial failure of consideration is no defense pro tanto in an action against the maker of a note by the payee, where such partial failure is not a liquidated amount, and it is error to allow judgment for defendant though the jury finds that there was such partial failure, the proper practice being to give judgment for the plaintiff on the note and award the defendant the amount of such failure of consideration found by the jury, as a counterclaim. [Georgian Bay Lumber Co. v. Thompson, 35 U.C.R. 64; Goldie v. Harper, 31 O.R. 284, applied.]

Automobile Sales v. Moore, 10 D.L.R. 184, 4 O.W.N. 700, 24 O.W.R. 26.

Want or failure of consideration.

Where a promissory note is given in payment of a premium upon the admission of the maker into a partnership in the business of the payee, and a partnership between them is in fact created, but no term for its duration is agreed upon, the subsequent dissolution thereof, or even the wrongful expulsion therefrom of the maker of the note, does not give rise to a total failure of consideration for the note, so as to make it unenforceable in the hands either of the payee or of a holder, though the maker may be entitled as against the payee to a return of a proportion of his premium. [Judgment of a Divisional Court, Merchants Bank of Canada, v. Thompson, 23 O.L.R. 502, reversed; Lindley on Partnership, 7th ed., p. 625 et seq., specially referred to.]

Merchants Bank of Canada v. Thompson, 3 D.L.R. 577, 3 O.W.N. 1014, 21 O.W.R. 740.

Promissory note — Failure of consideration—Action to recover amount.

In an action on a promissory note, the consideration for which is the delivery of stock, which has not been delivered, the plaintiff in order to succeed must shew readiness and willingness to deliver the stock.

McGirr v. Youngberg, 50 D.L.R. 113, [1920] 1 W.W.R. 146.

Illegal consideration — Bank trafficking in its own shares.

Promissory notes given to a bank by certain of its directors are not invalidated as for an illegal consideration by reason of the fact that they were given for the purpose of recouping to the bank, moneys which had been unlawfully and without the authority of its shareholders employed in the purchase of the bank's shares in furtherance of a scheme whereby the bank's funds were used in trafficking in its own shares to support the price quotations of same on the stock market. [Stavert v. McMillan, 24 O.L.R. 456, 3 O.W.N. 6, affirmed on appeal.]

McMillan v. Stavert, 13 D.L.R. 761, 24 O.W.R. 936.

Transfer of shares—Failure of consideration.

An executor suing upon promissory notes given by the defendant to the testator under the latter's executory agreement for the transfer to the maker of the note of certain shares in a vessel so soon as the note should be paid, cannot recover on the note if the testator had treated the agreement as nonexistent, made no tender or offer of the shares, made no demand under the notes, and had treated the defendant as having no interest in the vessel by selling the shares in question without referring to the defendant.

Kaulbach v. Begin, 21 D.L.R. 77, 49 N.S.R. 66.

Want of consideration—Conduct of parties — Accommodation paper.

In determining whether or not a promissory note was given only as accommodation, the inconsistency of the conduct of the party denying that such was the case will be considered in conjunction with the indefiniteness and improbability of the agreement which he sets up in answer.

Calhoun v. Williams, 17 D.L.R. 68, 28 W.L.R. 236.

Defenses—Want or failure of consideration for transfer of note—Right of maker to question.

The maker of a promissory note cannot set up the want of consideration for the assignment of a note to the person seeking to enforce it, since the former is a stranger

to the transaction. [Walker v. Bradford Old Bank, 12 Q.B.D. 511, referred to.]

Tyrrell v. Murphy, 18 D.L.R. 327, 30 O.L.R. 235.

ACTION ON CHEQUE FOR PRICE OF GOODS—FAILURE OF CONSIDERATION.

A defense to an action based upon cheques which alleges that the cheques were given for the price of goods part only of which had been delivered, which apart from the remainder of the goods ordered were useless to the purchaser, and the failure to deliver the remainder caused to the latter damages to an amount greater than the sum claimed, is not a demand in compensation but a plea of failure of consideration.

Graham v. Brodeur Co., 47 Que. S.C. 56.

FRAUD AND COLLUSION—FAILURE TO PROVE—GUARANTY—TIME EXTENDED FOR DEFINITE PERIOD BY ARRANGEMENT WITH PRINCIPAL DEBTOR — RELEASE OF GUARANTOR.

North-western National Bank v. Ferguson, 11 O.W.N. 178. [Affirmed, 12 O.W.N. 15.]

ILLEGAL CONSIDERATION — PROMISSORY NOTE — ACCOMMODATION MAKERS — AGREEMENT TO STIFLE PROSECUTION — FAILURE TO SHEW — FINDINGS OF FACT OF TRIAL JUDGE.

Herrington v. Carey, 9 O.W.N. 75, affirming 8 O.W.N. 451.

ILLEGAL CONSIDERATION—STIFLING PROSECUTION.

Any arrangement to take security to stifle a criminal prosecution is against public policy and the holder of a note given in pursuance of such an arrangement (knowing the circumstances under which it was given) cannot recover on it, as the consideration is illegal. [Williams v. Bayley, L.R. 1 H.L. 200; Jones v. Marionethshire Permanent Building Soc., [1892] 1 Ch. 173, followed.]

Johnson v. Musselman, [1917] 1 W.W.R. 527.

MATERIAL ALTERATION AFTER SIGNATURE BY ONE JOINT MAKER — LIABILITY ON RENEWAL NOTE—WANT OF CONSIDERATION.

Where after the signature of a note by one of two makers, the note is materially altered, and thereafter the note is renewed by both makers, the maker who signed the original note prior to its alteration is not liable on the renewed note for want of consideration.

Bank of Hamilton v. Weir & May, 6 W.W.R. 11.]

(§ VI C—168)—BILLS PAYABLE AT SIGHT—DENIAL OF SIGNATURE — AFFIDAVIT—PRESUMPTION—C. CIV. ART. 1222 AND 1223—C. PRAC., ART. 208.

The denial of a signature to a bill payable at sight on which a demand is made, should be accompanied by an affidavit. A defendant who has not complied with this formality cannot be allowed, at the time of the inquiry, to put in a written evidence of the falsity of the signature.

Blais v. Mathieu, 56 Que. S.C. 3.

BANK — PROMISSORY NOTE — MARRIED WOMAN—POWER OF ATTORNEY TO HUSBAND—LIABILITY.

When a bank discounts the note of a married woman signed by her husband without authority, and she deposits the proceeds to her credit, and then gives a power of attorney to her husband to manage her affairs, and leaves the said deposit under his control, the bank can afterwards recover from her the amount of the promissory note, even if the husband has appropriated the amount to his own use.

Banque de St. Jean v. Molleur, 46 Que. S.C. 347.

(§ VI C—169)—SIGNING NAME OF NON-EXISTING COMPANY.

The fact that the defendants, who executed a promissory note in the name of a nonexisting company, added the words "president" and "manager" to their respective personal signatures below the name of the alleged company is not sufficient to absolve them from personal liability thereon under s. 52 of the Bills of Exchange Act, R.S.C. 1906, c. 119, which relieves from liability one who signs an instrument in a manner indicating that he did so on behalf of a principal or in a representative capacity, the mere addition of descriptive words to the signer's name not being sufficient for that purpose. [Crane v. Lavoie, 19 W.L.R. 580, affirmed on appeal.]

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313, 2 W.W.R. 429.

PERSONAL LIABILITY OF SIGNER FOR ASSOCIATION.

The maker of a promissory note whose signature thereon was followed by words describing him as an officer of an association, which was unincorporated, held personally liable thereon. [Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, followed.]

Austin v. Hober (Sask.), [1917] 3 W.W.R. 994.

ACTION TO RECOVER ON — PROTEST FEES — INTEREST — SHARES IN FOREIGN COMPANY—COLLATERAL SECURITY.

Neville v. Eaton, 3 O.W.N. 215, 20 O.W.R. 277.

NOTE GIVEN BY PARTNERSHIP TO BANK — PARTNERSHIP CONVERTED IN JOINT STOCK COMPANY.

Metropolitan Bank v. Austin, 2 O.W.N. 868, 18 O.W.R. 830.

SALE OF LIVERY BUSINESS — DAMAGES IN DECEIT—DAMAGES FIXED—CONCLUSIVENESS.

Howell v. Ironside, 2 O.W.N. 1345, 19 O.W.R. 633.

NOTES GIVEN IN PAYMENT OF THRESHING MACHINE — COUNTERCLAIM FOR DAMAGES.

Case v. Fiegehen, 2 O.W.N. 1370, 19 O. W.R. 718.

BILLS OF EXCHANGE — ACTION TO RECOVER ON—ENDORSEMENT—SALE OF STOCK—THIRD PARTY ISSUE.

Sovereign Bank v. Clarkson, 3 O.W.N. 167, 20 O.W.R. 237.

BILLS OF EXCHANGE.

See Bills and Notes; Cheques; Banks.

BILLS OF LADING.

See Carriers; Shipping.

ENDORSEMENT AND DELIVERY—NOT INTENDED TO PASS PROPERTY—DEALINGS WITH SAME BY HOLDER—THIRD PARTIES MISLED—ESTOPPEL.

An endorsement and delivery of a bill of lading does not pass the property in the goods covered thereby where this has not been intended; and the holder of the bill of lading under such endorsement and delivery cannot, apart from estoppel, convey any greater rights than he himself has, even to a bona fide purchaser for value. But the principle of estoppel is especially applicable to such a case. When one person arms another with a symbol of property he should be the sufferer, and not the person who gives credit to the operation and is mislead by it. And the owner of goods by endorsing bills of lading in blank and delivering them to another, thereby enabling that other to hold himself out as the true owner, and by permitting him to draw demand drafts in his own name and upon his own account to which drafts the bills of lading are attached as security for advances of money, thereby misleading third parties into the reasonable bona fide belief that such other person is the rightful owner of the goods represented by the bills of lading, and into dealing in accordance with such belief, may be estopped as against such third parties, from denying such ownership so believed as aforesaid. The insertion at the owner's request of the owrds "To be held pending instructions," "to be sold on instructions," "to be sold on advice," respectively in certain of the bills of lading is not sufficient to affect such third parties with notice of the true owner's title or to put them upon enquiry.

Bedard v. Spencer Grain Co., [1919] 2 W.W.R. 723.

BILLS OF SALE.

I. IN GENERAL.
II. STATUTORY REQUIREMENTS.
  A. Registration.
  B. Seizure.
III. SUBJECT-MATTER OF BILLS OF SALE.
  A. In general.
  B. Chattels, capable of complete delivery.
  C. Fixtures.
  D. Machinery.
  E. Grantor not owner.
  F. After acquired chattels.
  G. Given as security for debt—rights of creditors.
IV. RIGHTS AND LIABILITIES OF PARTIES.
  A. Rights of grantor.
  B. Rights of grantee.
  C. Transfer.

See Chattel Mortgage; Sale.

Annotation.

Registrability of hiring, lease, or conditional sale of chattels: 32 D.L.R. 566.

I. In general.

(§ I—1)—SALE OF LICENSED RESTAURANT—COVENANTS—RESALE.

The vendor of a licensed restaurant is not authorized either by law or custom, to insert in the deed of sale a clause that, in case of resale of the restaurant, the unpaid balance of the purchase price shall become due and payable, and if the clause is inserted without the consent of the purchaser he can refuse to sign the deed.

Cadieux v. Gagnon, 46 Que. S.C. 393.

VALIDITY AS AGAINST SUBSEQUENT BONA FIDE PURCHASER FOR VALUE — CONSIDERATION NOT TRULY EXPRESSED.

Palmer v. May, 5 S.L.R. 20, 18 W.L.R. 676.

II. Statutory requirements.

A. REGISTRATION.

(§ II A—5)—CONSIDERATION—STATUTORY REQUIREMENTS — SUFFICIENCY SHEWN ON FACE OF INSTRUMENT, WHEN.

Ireland v. Anderson, 20 D.L.R. 964, 29 W.L.R. 329.

STATUTORY REQUIREMENTS — CHANGE OF POSSESSION — CONSIDERATION — PAST DUE NOTE.

Ames-Holden McCready Co. v. Reiben, 19 D.L.R. 871.

AGREEMENTS FOR GROWING CROP NOT INTENDED FOR SECURITY.

S. 9 of the Bills of Sale Act (Alta.) has no application to an agreement for the delivery of a portion of a growing crop for money advances, where the agreement is not intended as a security.

International Harvester Co. v. Jacobsen, 24 D.L.R. 632, 11 A.L.R. 122, 32 W.L.R. 332, 9 W.W.R. 87.

CONSIDERATION FOR — UNTRUE STATEMENT OF—EFFECT.

An absolute bill of sale based on a consideration of future support is void as to the vendor's creditors under s. 6 of the Bills of Sale Act, C.S.N.B. 1903, c. 142, which requires that the consideration shall be truly stated, where there is no change of possession, and the consideration expressed in the bill of sale was untruly stated as being a monetary one.

Ouelette v. Albert, 13 D.L.R. 698, 42 N.B.R. 254, 13 E.L.R. 271.

STATUTORY REQUIREMENTS — STATING CONSIDERATION.

A bill of sale is not made void as not truly expressing the consideration therefor under the Chattel Mortgage Act, R.S.S. 1909, c. 144, s. 13, by reason of the inclusion therein after a statement of the amount of money consideration of general words such as the words "and other valuable considerations" where the latter words were introduced only by the conveyancer and were without special significance in the transaction; and in such case the unnecessary words may be considered as mere surplusage.

Toronto Type Foundry Co. v. Riddett, 10 D.L.R. 633, 6 S.L.R. 212, 23 W.L.R. 951, 4 W.W.R. 292.

NONCOMPLIANCE WITH STATUTORY PERIOD—ATTACK BY LIQUIDATOR.

A chattel mortgage of a corporation, invalid against creditors under the Bills of Sale Ordinance (Alta.), for nonregistration within the statutory period, may be attacked by the liquidator of the corporation as representing the creditors. [Nat. Trust v. Trusts & Guaranty, 5 D.L.R. 459, followed.]

Imperial Canadian Trust Co. v. Wood Vallance, 24 D.L.R. 241, 9 W.W.R. 44, 32 W.L.R. 260.

SALE OF SHIP—WRITTEN INSTRUMENT.

Where a boat is not registered and it is not shewn that she ought to have been registered, a written instrument will not be held to be essential to evidence her sale. [Benyon v. Cresswell, 12 Q.B. 899, 900, applied.]

Olympic Stone Construction v. Momsen & Rowe, 21 D.L.R. 271, 21 B.C.R. 120, 30 W.L.R. 711, 8 W.W.R. 79.

TRUE STATEMENT OF CONSIDERATION—SUFFICIENCY OF AFFIDAVIT — RIGHTS OF CREDITORS.

A bill of sale is not void as against creditors under s. 11 of the Alberta Bills of Sale Ordinance because of an untrue expression of the consideration in the affidavit of bona fides; it is good under s. 9 of the Ordinance, unless the consideration be wilfully mis-stated, with intent to deceive, and the transaction it evidences is not an honest one.

Sutherland v. Clarke, 37 D.L.R. 518, 13 A.L.R. 330, [1917] 3 W.W.R. 672.

GROWING CROPS — SECURITY — BONA FIDE PURCHASER—NOTICE.

A bill of sale of growing crops is not within the registration requirements of the Alberta Bills of Sale Ordinance, nor within s. 15 thereof, if not intended as a security, and is therefore not void as against a subsequent purchaser, even though the consideration was not truly expressed; the status of a bona fide purchaser is not affected by notice which has come to him after he has incurred liability in the transaction.

McMillan v. Pierce (Alta.), 37 D.L.R. 242, 13 A.L.R. 151, [1917] 3 W.W.R. 614.

REGISTRATION OF HIRE RECEIPT OR CONDITIONAL SALE.

Guest v. Diack, 32 D.L.R. 561, 29 N.S.R. 504. [Followed in Chapman v. Mcdonald, 34 D.L.R. 124, 51 N.S.R. 70, reversing 32 D.L.R. 557.]

B.C. BILLS OF SALE ACT—WHETHER A "RECEIPT" AN "ASSURANCE" AND WITHIN SAID ACT.

There being nothing in the British Columbia Bills of Sale Act requiring that sales shall be evidenced by any written document, a debtor can make a secret verbal sale of his personal property and not be affected by the Act; while if the sale is made in writing it comes within its purview. "Receipts for purchase moneys of goods" must be "assurances of personal chattels" to fall within the definition of a bill of sale within said Act. If such a receipt is intended by the parties to it to be a part of the bargain to pass the property in the goods, it is such an "assurance" and bill of sale. A receipt in question was held as not intended simply as a receipt for payment of the money, but as having been expected to operate as proof of the change of ownership and therefore an "assurance," thus coming within said Act and requiring compliance therewith as to registration, etc.

Hendry v. Laird, [1919] 2 W.W.R. 341.

AFFIDAVIT OF BONA FIDES BY OFFICER OF COMPANY—SUFFICIENCY.

An affidavit of bona fides in support of bill of sale made to a company and made by an officer of the company to the effect that such bill of sale "is not for the purpose of holding or of enabling me this deponent to hold" the goods against the creditors of the bargainer, is insufficient.

Walter v. Leduc, 8 W.W.R. 360.

(§ II A—7) — NONREGISTRATION — SUBSEQUENT CREDITOR.

The "creditors of the bargainor," as against whom s. 9 of the Bills of Sale Ordinance, N.W.T., c. 43 (Alta.), makes absolutely void a sale by the bargainor without immediate delivery or actual and continued change of possession or the registration of a bill of sale, includes not only the then existing creditors but also the subsequent creditors of the bargainor. [Barker v. Leeson, 1 O.R. 114, approved; and see Barron & O'Brien on Chattel Mortgages, 2nd revised edition, 454, 455.]

Graf v. Lingerell, 16 D.L.R. 417, 7 A.L.R. 340, 27 W.L.R. 707, 6 W.W.R. 566.

III. Subject-matter of bills of sale.

A. In general.

(§ III A—15)—Description of goods—Consideration—Inaccurate statement of—Absence of fraud—Contract—Sunday—Evidence—Affidavit of bona fides—Affidavit made by assistant-secretary of mortgagee-company—Sufficient authority not shewn—Resolution of directors—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, c. 135, ss. 12 (2), 13—Fatal defect—Interpleader issue.

Cliff Paper Co. v. Auger, 13 O.W.N. 150.

B. Chattels capable of complete delivery.

(§ III B—20)—Change of possession—Goods in custody of bailee.

An unregistered bill of sale of a concrete mixer with the name of the bargainee left blank, in the possession of a bailee who had been notified by the bargainee, after a month's delay, of the change of ownership thereof, does not constitute "an immediate delivery followed by an actual and continued change of possession" within th meaning of s. 3 of the Bills of Sale and Chattel Mortgage Act (Man.), and therefore void against an execution creditor. [Jones v. Henderson, 3 Man. L.R. 433; Jackson v. Bank, 9 Man. L.R. 75; Richardson v. Gray, 29 U.C.Q.B. 360; Ex p. Close, 14 Q.B.D. 386, applied.]

Missisquoi Lautz v. North, 25 D.L.R. 69, 25 Man. L.R. 741, 32 W.L.R. 591, 9 W.W.R. 317.

Contract—Sale of business and chattels—Bill of sale—Action for balance of purchase price—Alleged option to transfer land instead of paying in money—Covenant of vendors not to engage in similar business—Failure to prove breach—Counterclaim—Reformation of contract.

Allen v. Macfarlane, 15 O.W.N. 337.

F. After-acquired chattels.

(§ III F—40)—After-acquired chattels.

The Bills of Sale Act, R.S.N.S., 1900, c. 142, does not by registration protect the grantee as to property to be acquired by the grantor after the making of the bill of sale and which the latter thereby purports to transfer in advance of his obtaining title thereto. [Thomas v. Kelly, 13 A.C. 519, referred to.]

A clause in a bill of sale which purports to include after-acquired property confers as to the latter a mere equitable title which must give way to a legal title obtained bona fide and without notice. [Reeves v. Barlow, 12 Q.B.D. 436, commented on; Holroyd v. Marshall, 10 H.L.C. 191, applied.]

Wynacht v. McGinty, 7 D.L.R. 618, 12 E.L.R. 116.

G. Given as security for debt; rights of creditors.

(§ III G—41)—Taken merely as security for indebtedness—Deposit in bank—Bank manager's knowledge of circumstances—Affidavit of bona fides—Transaction void—Rights of creditors.

Where the irresistible conclusion is that a bill of sale was taken merely as security for an indebtedness, and deposited with the bank as collateral security, the bank manager having full knowledge of all the circumstances surrounding the giving of the bill, the affidavit of bona fides on the bill of sale does not truly set forth the consideration and not being the affidavit of bona fides as required in the case of a chattel mortgage, the transaction is void as against creditors.

Bank of Hamilton v. Hodges, Crane & Hepburn, 46 D.L.R. 72. [See [1919] 1 W.W.R. 342.]

IV. Rights and liabilities of parties.

(§ IV—45)—Rights and liabilities of parties.

A simple contract creditor cannot make an attack upon a chattel mortgage under the Bills of Sale and Chattel Mortgage Act, R.S.M. 1902, c. 11. [Parkes v. St. George, 10 A.R. 496, and Hyman v. Cuthbertson, 10 O.R. 443, followed.]

Empire Sash & Door Co. v. Maranda, 21 Man. L.R. 605.

Rights of parties—Ownership of horses—Bill of sale—Foreign judgment—Interpleader—Secondary evidence—Parol testimony.

Evans v. Evans, 50 Can. S.C.R. 262.

Status of creditor attacking validity.

A creditor defending on behalf of a company cannot attack the validity of an instrument under the Bills of Sale Ordinance where such course is not open to the company.

Capital Trust Co. v. Yellowhead Pass Coal & Coke Co., 27 D.L.R. 25, 9 A.L.R. 463, 33 W.L.R. 873, 9 W.W.R. 1275.

BOARDS.

School Board, see Schools.

Board of Railway Commissioners, see Railway Board.

Board of Public Utilities, see Railway Board.

Board of Commissioners—Sittings—Excluding public—Injunction—Mandamus—Service of writ.

An interlocutory injunction will not be granted to nullify the effect of a resolution of the Board of Commissioners of the city of Montreal, which directs the exclusion of the public and of the representatives of the press from its sittings. The Board of Commissioners has by law discretionary power to decide as to the manner of its sittings, and the right conferred on the Supe-

rior Court by art. 50, C.P.Q., should not be exercised in such case. It is sufficient if the writ of summons is served at the same time as the writ of injunction when the latter is granted. If the Superior Court has the power to compel the commissioners to hold public sessions it can only exercise such power under mandamus.

Star Publishing Co. v. Board of Commissioners of Montreal, 18 Que. P.R. 110.

BOATS.

See Shipping; Admiralty; Collision.
Seamen's Wages, liens for, see Seamen.

BONDS.

I. In general; for private obligations.
II. For indemnity and security.
A. In general.
B. For fidelity of employees or corporate officers.
C. By public officers.
D. By public depository.
III. Commercial and municipal.
A. Corporate bonds.
B. Municipal bonds.

I. In general; for private obligations.

See Principal and Surety; Guaranty.

(§ I—1)—Incompleteness in expressing amount payable—No recovery—Insufficient notice of assignment—Refusal to add assignor as party after trial.

Action on a bond for "the sum of two thousand of lawful money of British Columbia" was dismissed, there being nothing in the document to help in construing said words. [Coles v. Hulme, 8 B. & C. 568, distinguished.] Semble the ambiguity, being patent, could not be cured by extrinsic evidence. Notice of assignment of bond held insufficient to enable assignee to maintain action in his own name, as the persons named in the notice as assignees were not the assignees in the assignment actually made; also as the notice was of assignment of a bond bearing date on or about the 18th day of Sept., 1915, whereas the bond sued on was dated "this eighteenth day of September, one thousand eight hundred and fifteen." The court refused to add of its own motion the assignor as a party after trial and argument and its finding of the notice of assignment insufficient.

Maritime Motor Car Co. v. McPhalen & McPhalen, [1919] 2 W.W.R. 811.

Bond—Illegal consideration—Stifling prosecution — Affixing seals after signatures—Material alteration.

Pease v. Randolph, 19 W.L.R. 625 (Man.).

II. For indemnity and security.

A. In general.

(§ II A—5)—In probate matter—Rights of creditor.

A bond given to secure the due administration of the estate of an intestate cannot be put in suit by a creditor for the purpose of recovering his debt.

Meldram v. Maclure & Houghton, 23 B.C.R. 176.

Indemnity on stay of execution—Want of corporate seal—Liability.

A bond filed to obtain a stay of execution and signed under his own hand and seal in the name of the company by the local agent of a nonresident company, the company having given the agent power to canvass for the company and to issue bonds, is binding, although not under the corporate seal of the company—and if consideration were required to support it the premium paid and the stay of execution obtained were sufficient, as between the company and the person bonded and the obligee respectively. An alternative claim against the agent for damages for breach of warranty of authority was dismissed without costs.

Calhoun v. Maryland Casualty, 31 W.L.R. 269.

(§ II A—6)—Interpleader bond—Executions—Liability.

The liability of obligators upon an interpleader bond is not confined to the amount remaining due on the executions, but other creditors having executions in the sheriff's hands are entitled to share in the funds represented by the bond.

McPherson v. U. S. Fidelity & Guaranty Co., 24 D.L.R. 77, 33 O.L.R. 524.

(§ II A—9)—For indemnity and security—Contractor's bond.

Where a guaranty company entered into a bond which was conditioned that a subcontractor would "well and faithfully in all respects perform, execute and carry out the said contract," and recited that annexed to the bond was a copy of the contract in question, which, however, did not contain some slight alterations made on the final revision of the contract as re-executed by the parties after the date of the bond, the guaranty company are not relieved from liability if the words inserted do not alter the meaning of the contract in any way, since the guaranty company was not prejudiced by an immaterial alteration. [Tolhurst v. Portland Cement Manufacturers, [1903] A.C. 422; Harrison v. Seymour, L.R., 1 C.P. 518; Croyden, etc., Co. v. Dickinson. 2 C.P.D. 46, referred to.]

Niagara & Ontario Construction Co. v. Wyse & United States Fidelity & Guaranty Co., 10 D.L.R. 116, 49 C.L.J. 334, 4 O.W.N. 975, 24 O.W.R. 302.

Contract to build and lease — Scope of liability.

Where in an agreement by the lessor to erect a building, and to lease same when completed, there is no provision similar to that generally contained in a building contract whereby the owner may, upon default of the contractor, proceed with the completion of the building and charge the

amount expended against the contractor, a surety for the performance of such contract unless it is otherwise expressly agreed, cannot be called upon to assume any further liability than for the amounts of liquidated damages expressly fixed by the contract for any delay of performance thereof, and will, therefore, not be liable for the amounts expended by the lessee for the completion of the building. [Wright v. West. Can. Accident, 20 D.L.R. 478, referred to.]

Canadian Fairbanks Morse v. U.S. Fidelity & Guaranty, 26 D.L.R. 12, 22 B.C.R. 157, 32 W.L.R. 316, 9 W.W.R. 48.

BUILDING CONTRACTOR'S BOND—EXTENT OF SURETY'S LIABILITY.

G. agreed to erect a building and to lease the same when completed to M., the agreement containing a stipulation that rent was not to be chargeable until the building was finished, and fixing damages for breach of the agreement at $20 per day. Upon G. becoming financially embarrassed, U. went surety for the performance of the agreement by G. G. becoming further embarrassed, M. at his own cost proceeded with the work: —Held, upon the facts, and inasmuch as the agreement contained no stipulation that M. could, in default of G. completing the building, undertake the work, the surety could not be called upon to assume any further liability than the said $20 per day.

Canadian Fairbanks Morse v. U.S. Fidelity, 26 D.L.R. 12, 22 B.C.R. 157, 32 W.L.R. 316, 9 W.W.R. 48.

B. FOR FIDELITY OF EMPLOYEES OR CORPORATE OFFICERS.

(§ II B—15)—RENEWAL OF BOND—CONTENTS OF APPLICATION.

A new bond replacing an expiring bond of fidelity insurance in the same company and in favour of the same employer upon the same risk is a "renewal" of the original insurance, and the answers of the assured on the application for the original bonding are to be looked at and their materiality considered in an action on the new bond issued without fresh questions to the assured where the original answers were stipulated to be the basis of the bond then applied for "or any renewal or continuation thereof or of any substituted bond." [Town of Arnprior v. U.S. Fidelity, 20 D.L.R. 929, 30 O.L.R. 618, affirmed; Jordan v. Provincial Provident, 28 Can. S.C.R. 554, considered.]

Arnprior v. U.S. Fidelity & Guaranty Co., 21 D.L.R. 343, 51 Can. S.C.R. 94.

FOR FIDELITY OF EMPLOYEES — GUARANTY POLICIES OF INSURANCE — CONDITIONS PRECEDENT — NEGLIGENT SUPERVISION OF INSURED.

Under a guaranty policy of insurance by which the insurers engaged to reimburse the insured for pecuniary loss sustained by him through the fraud or dishonesty of one of his employees, failure on the part of the insured to give notice of a material change in the position of the employee, which change reduced his salary, will avoid the policy, since the company is entitled to know the earning power of the employee to satisfy itself that no temptation is placed in his way by a changed pecuniary position. Failure by the employer to require weekly reports from time to time by the employee of the cash received by the latter and payment of same into the bank and to make a monthly audit, the bank books shewing such payment, all of which was required by the terms of a fidelity insurance bond issued to the employer in respect of such employee, constitutes such a breach of duty to the bonding company as will avoid liability to make good the employee's deficit in his accounts. In matters of guarantee insurance the employer, who is the beneficiary under a policy guaranteeing him against loss by embezzlement or theft of money by his employee, must comply strictly with all material conditions, stipulations and undertakings contained in the policy. [See Lachine v. London Guarantee & Accident Co., 3 D.L.R. 335.]

Gray v. Employers' Liability Ass'ce Corp., 10 D.L.R. 369, 23 W.L.R. 527, 4 W.W.R. 106.

(§ II B—21)—BANK EMPLOYEE—PECUNIARY LOSS FROM THEFT.

Money stolen by a bank clerk, and used by him to make up shortages which occurred before a fidelity bond was given is not a "pecuniary loss" sustained by theft within the meaning of the bond. [Gwynne v. Burnell, 7 Cl. & F. 572, distinguished.

U.S. Fidelity & Guaranty Co. v. Union Bank of Canada, 36 D.L.R. 724, 39 O.L.R. 338.

(§ II B—23)—FIDELITY INSURANCE BOND.

The right of recovery under a fidelity insurance bond, given for the purpose of guaranteeing the assured against loss by reason of any default of a named employee, is not defeated merely by reason of the business of the assured being carried on in the name of a company in which the employee had been given a right to a share of the profits by his employer to encourage greater business activity on the employee's part, where the entire capital had been contributed by the assured and the insurance or bonding corporation knew the true state of affairs when it entered into the bonding contract.

Reichmitzer v. Employers' Liability Ass'ce Corp., 9 D.L.R. 685, 24 O.W.R. 157.

C. BY PUBLIC OFFICER.

(§ II C—29)—CANCELLATION—TERMINATION OF OFFICE.

A municipality cannot be compelled to cancel its treasurer's fidelity bond after the

treasurership had come to an end and the treasurer's account audited and ratified.

Shewfelt v. Township of Kincardine, 26 D.L.R. 700, 35 O.L.R. 344, affirming 35 O.L.R. 39.

(§ II C—37)—Fidelity bonds—Tax collector — Defalcations — Defences —Misrepresentations.

Recovery on a fidelity bond issued to a municipality against loss through the fraud or dishonesty of its tax collector may be denied where it was represented in the answers given on behalf of the municipality with the application to the bonding company that auditors would examine the tax rolls and vouchers yearly, and on each renewal of the bond a further representation was made that the collector's books and accounts had been examined and found correct, when in fact neither the municipal auditors nor any one on behalf of the municipality checked up the collector's tax rolls for arrears of previous years which it was his duty to collect and in respect of which the defalcation occurred. [Town of Arnprior v. U.S. Fidelity & Guaranty Co., 12 D.L.R. 630, reversed.]

Arnprior (Town) v. U.S. Fidelity & Guarantee Co., 20 D.L.R. 929, 30 O.L.R. 618. [Affirmed, 21 D.L.R. 343, 51 Can. S.C.R. 94.]

III. Commercial and municipal.

A. Corporate bonds.

See Companies.

(§ III A—55)—Priority in issuing—Creditors—Money advances.

A second issue of corporate bonds which were by a majority of bondholders declared to constitute a priority over a first issue, for the purpose of enabling the corporation to raise money in readjustment of its finances, will operate as a priority only infavour of holders who acquired them for present money advances to the corporation, but not in favour of creditors holding them as collateral security for past indebtedness.

Re B.C. Portland Cement Co., 22 D.L.R. 609, 21 B.C.R. 534, 31 W.L.R. 938, 8 W.W.R. 1119. [Affirmed, 27 D.L.R. 726, 22 B.C.R. 443, 10 W.W.R. 50.]

Railway—Trustee for bondholders and for municipalities guaranteeing payment of bonds—Accounts—Payments made by trustees under engineer's certificates—Res adjudicata — Bona fides — Interest — Delivery of unguaranteed bonds—Costs.

Stothers v. Toronto General Trusts Corp., 13 O.W.N. 290.

Reduction of railway debentures—Rights of holders.

When a railway company cannot meet its obligations, and the Exchequer Court has decided that each of its debentures shall be reduced, the judgment has the effect of destroying the former debentures and of substituting in their place the reduced ones; and the bearer of these debentures must bear the loss.

Great Northern Construction Co. v. Ross, 25 Que. K.B. 385, 404.

B. Municipal bonds.

(§ III B—60)—Construction of agreement—Bonds guaranteed by municipalities—Progress certificate of engineer to govern.

Re Ontario & West Shore R. Co., 19 O.W.R. 209, 2 O.W.N. 1041.

(§ III B—90)—Irregularities in issue of bonds by a railway company—Bona fide holder for value.

Veilleux v. Atlantic & Lake Superior R. Co., 39 Que. S.C. 127, 12 Can. Ry. Cas. 91.

Right to interest — Vendor and purchaser.

According to well established custom governing the sale of bonds or debentures, when they are purchased for so much on the dollar, without accrued interest, the purchaser and not the seller gets the benefit of the interest on all coupons current and not due.

Les Commissaires d'Ecoles pour le Municipalité Scolaire d'Hochelaga v. Hingston, 24 Rev. Leg. 160.

(§ III B—100)—Payment—Time and place—Novation—Changes.

Novation of a debt by agreement takes place by an instrument in which the creditor and the debtor express the intention to, and actually make, several changes in the minor incidents of the bond, e.g., as to the time and place of payment, and when the debtor consents to additional mortgages to guarantee the carrying of the changes into effect.

Leclerc v. Caron, 46 Que. S.C. 109.

(§ III B—105)—Action for cancellation —Termination of office.

An action brought by the former treasurer of a municipality and his sureties, upon a bond given by them to secure the due performance of the duties of the office, to compel the cancellation of the bond, after the treasurership had come to an end, the treasurer's accounts had been audited and the audit adopted by the municipality, and after payment over by the old to the new treasurer, duly made accordingly, was dismissed with costs.

Shewfelt v. Kincardine, 35 O.L.R. 39. [Affirmed, 35 O.L.R. 344.]

Successive actions on same bond—Presumption in favour of seal—Illegal consideration.

Pease v. Randolph, 21 Man. L.R. 368.

BORNAGE (QUE.)

See Boundaries.

BOUNDARIES.

I. Of Dominion, province or municipality.

II. Of private property.

A. In general; rules for fixing.

B. By highway or passageway.

C. By waters.

I. Of Dominion, province or municipality.

(§ 1—2)—Of state or nation generally.

The right to navigation of the Rainy river is free and open to the use of the subjects of both Canada and the United States, as provided by the terms of the Ashburton Treaty of the ninth of August, 1842, entered into between Great Britain and the United States, by which the said river was established as an international waterway, its thalweg constituting the boundary line between the Dominion of Canada and the United States of America. [Namakan v. Rainy Lake River Boom Corp., 132 N.W. Rep. 259, specially referred to.]

Rainy Lake River Boom Corp. v. Rainy River Lumber Co., 6 D.L.R. 401, 27 O.L.R. 131, 22 O.W.R. 952.

Fences—Evidence.

Dickie v. Chichigian, 6 D.L.R. 911, 4 O.W.N. 303, 23 O.W.R. 268.

Action to determine boundary—Survey.

Horan v. McMahon, 18 O.W.R. 674.

Trespass — Land — Boundary — Overlapping building—Suit to establish title.

McIntyre v. White, 10 E.L.R. 88 (N.B.).

Removing land marks—Boundary marks set by surveyor under resolution of municipal council.

Morissette v. Parish of St. Francois Xavier, 40 Que. S.C. 224.

Agreement by owners—Disputed boundary.

Dansereau v. Gignère, 39 Que. S.C. 462.

Action for encroachment on land—Architect.

Duberuil v. Labelle, 12 Que. P.R. 177.

(§ 1—3)—Harbour boundaries—Power to fix.

The Harbour Commissioners of Montreal have, by the Act of 1894, 57–58 Vict. c. 48, the right themselves to fix the boundaries of their properties, saving to the adjoining owners their recourse by action for rectification of the boundaries.

Chars Urbains v. Commissaries du Havre, 24 Que. K.B. 503.

Public place — Sidewalk — Prescription — Possession — Land surveyors — Measurements.

In an action between a municipal corporation and a riverside proprietor, to establish the boundaries of a public place, the following facts were held not to establish a 30-year prescription from possession. Placing doorsteps on the sidewalk; having cornices and verandahs projecting above the sidewalk; having a sewer which ran along the edge of the land in litigation; putting agricultural implements and other goods on the sidewalk; paying municipal taxes. It is not illegal for land surveyors entrusted with the setting of boundaries to let their chainmen go alone to measure the land, provided that they personally ratify their work and declare the correctness of it; to take their measurements in English feet, if they afterwards reduce them into French measurements; not to verify their standards of measures of length by the Minister of Lands or by some one authorized by him, or by the secretary of the board of management of the land surveyors, as the act prescribes.

Lord v. La Ville de St. Jean, 24 Rev. Leg. 303.

II. Of private property.

A. In general; rules for fixing.

(§ II A—5)—Conventional line—Estoppel.

Whilst land cannot be conveyed by parol, a conventional line established by parol agreement between adjoining landowners, and acted upon by the erection of a fence, constitutes an estoppel as to the agreed boundary line, and is binding on the successors in title. [Woodberry v. Gates, 2 Thom. 255; Lawrence v. McDowell, Ber. [442] 283; Perry v. Patterson, 2 Pug. 367; Leask v. Scott, 3 Q.B.D. 382, followed; Grasett v. Carter, 10 Can. S.C.R. 105, considered.]

Jollymore v. Acker, 24 D.L.R. 503, 49 N.S.R. 148.

Conventional line—Effect on successors in title.

A division line agreed upon and occupied as a common boundary by adjoining occupants of land, fully cognizant of the dispute as to the location of the line dividing their properties, is binding upon their successors in title regardless whether it be the true boundary line or not.

Phillips v. Montgomery, 25 D.L.R. 499, 43 N.B.R. 499.

Mode of location—Reference to subsequent grants.

For the purpose of ascertaining the location of the lines of a Crown grant it is proper to refer to subsequent grants and plans of adjoining lands.

Phillips v. Montgomery, 25 D.L.R. 499, 43 N.B.R. 499.

Bornage—Limits—Contents of lots.

Where in an action en bornage the documents of title filed indicate the precise limits, regard should be had to these limits rather than to the contents. (See arts. 504, 504a, C.C. Que.)

Boivin v. Chicoutimi Water & Electric Co., 25 D.L.R. 361, 24 Que. K.B. 394.

Title to land—Ascertainment of boundary line between tiers of lots—Evidence—Ownership of legal estate—Mortgage — Foreclosure — Possession — Nonuser — Right-of-way — Easement — Injunction — Conveyance to assignee for benefit of creditors—Title outstanding in assignee.

Epstein v. Lyons, 5 O.W.N. 875; 7 O.W.N. 323, 428.

TITLE TO LAND — BOUNDARIES — DESCRIPTIONS IN CROWN PATENTS—MARSH LAND — SINUOSITIES — SURVEYS — AGREEMENT—BONA FIDE PURCHASERS FOR VALUE WITHOUT NOTICE—REGISTRY ACT—LEAVE TO AMEND—POSSESSORY TITLE—EVIDENCE—STATUTE OF LIMITATIONS — ASSESSMENT — DECLARATORY JUDGMENT.

Ledyard v. Young, 7 O.W.N. 146.

ASCERTAINMENT OF LINE BETWEEN ADJOINING LOTS—EVIDENCE—FINDING OF TRIAL JUDGE — APPEAL — EASEMENT — LIGHT —LIMITATIONS ACT, R.S.O. 1914, c. 75, s. 37—OVERHANGING CORNICE.

Soloway v. Gow, 8 O.W.N. 406.

TITLE TO LAND—DISPUTE AS TO OWNERSHIP OF SMALL STRIP—ASCERTAINMENT OF BOUNDARY LINE BETWEEN TOWN LOTS— —SURVEY — EVIDENCE — FENCES — ORIGINAL MONUMENTS — INFERENCE — POSSESSION OF STRIP—LIMITATIONS ACT—ESTOPPEL.

Weston v. Blackman, 12 O.W.N. 96.

BOUNDARIES—EVIDENCE—POSITION OF POST —FINDING OF FACT OF TRIAL JUDGE— APPEAL—ASCERTAINMENT OF DIVISION LINE BETWEEN LOTS—LOST DIVISIONAL POST—LOCALITY OF, NOT ASCERTAINABLE —SURVEYS ACT, SS. 39, 40—COSTS.

Mond Nickel Co. v. Demorest, 16 O.W.N. 299, reversing in part 13 O.W.N. 410.

AGREEMENT AS TO FENCE.

Although the allegation of title to a servitude does not necessarily imply that it was constituted by an instrument in writing, the defendant in a possessory action en reintégrande cannot prove by witnesses that the plaintiff had agreed that a fence separating their two properties should be removed, and the land claimed be the property of the defendant.

Raymond v. Leclerc, 15 Que. P.R. 105.

IN GENERAL—RULES FOR FIXING.

When a bornage has been made between adjoining owners one of whom, refusing to accept it, brings an action to have it declared erroneous and a new bornage made and the other defends on the ground that it is correct, demands acte of the acceptance which he has always been ready to make and asks for dismissal of the action, the court, finding the claim of the plaintiff ill founded should dismiss, each party paying his own costs as the defence was useless.

Mathieu v. Morin, 42 Que. S.C. 484.

BORNAGE—POSSESSION AS TITLE—ERROR IN DESCRIPTION—AMENDMENT.

Possession alone is a sufficient title to maintain an action for fixing boundaries. But if the plaintiff files a title containing an error in description he will be permitted to amend the declaration by alleging that his title has been made good.

Morneau v. Bélanger, 47 Que. S.C. 173.

BORNAGE—PARTIES.

Boundaries shewing the lateral line between adjoining lots need shew only the direction of the line, they need not be placed along the front and the depth of the lots. At all events they cannot determine the lines of the front and depth unless third parties interested joined in the bornage.

Morel v. Bilodeau, 50 Que. S.C. 437.

BORNAGE—CONVENTIONAL AND JUDICIAL.

Per Cannon and Dézy, JJ. In order that there may be a conventional bornage between adjoining owners it is necessary that this bornage should be evidenced by a procès verbal signed by the parties of their free will; so long as the procès-verbal is not signed by the two parties either may repudiate the existence of the bornage agreed upon. There is no form of action by which one of the parties can demand that the other be condemned to sign a procès-verbal of a conventional bornage, or on his default to have the judgment made equivalent to his signature. The only remedy open to either of them is the action en bornage. Per Dorion, J.—The friendly bornage agreed to and settled as to details and executed is a contract the same as any other. In order to have it recognized a right of action exists equivalent to an action for passing title.

Morel v. Bilodeau, 51 Que. S.C. 406.

BORNAGE—REMOVAL OF BOUNDARY—PENALTY.

Art. 5197, R.S.Q. 1909, which renders anyone removing a boundary fence liable to a penalty, applies not only to the removal of stone boundaries placed pursuant to a bornage between individuals but also to the removal of any pole placed by a surveyor in the exercise of his duties. The penalty, however, can only be claimed by a person interested in the bornage affected by the removal, viz.: By one of the parties bound by the bornage or some one of them having rights in it.

Drouin v. Roy, 51 Que. S.C. 339. [Confirmed in review.]

BORNAGE—MISE EN DEMEURE.

The action en bornage should always be preceded by a mise en demeure. When one of the parties declares to the other that he had chosen his surveyor to proceed to the bornage, and the other party replies that he "will attend to the bornage at the proper time," there is a refusal which justifies the bringing of the action en bornage. In such case the defendant should pay the costs of the contestation.

Blais v. Delorme, 52 Que. S.C. 530, 24 Rev. de Jur. 304.

POSSESSION — PRESCRIPTION — TITLE — FENCES.

A peaceful, public, undisputed, quiet and lawful possession of a property for thirty years is a title by which the ownership may be acquired even beyond what is contained in the possessor's own title. The fixing of bounds is a judicial act, which is complete only by the intervention of the court or of a public officer called a "sworn surveyor of the Province of Quebec." The fixing of bounds by agreement, or any other

fixing of bounds de facto, has not the strength of res judicata and does not prevent an action of boundary before the court. Fences put up and recognized for thirty years do not constitute a boundary, but are proof of public and rightful possession.

Clark v. Lacombe, 23 Que. K.B. 466.

PETITORY ACTION—ENCROACHMENT—SETTLEMENT OF BOUNDARIES—QUE. C.C. 504—QUE. C.P. 1059.

When it is necessary to settle boundaries, there must first be a petitory action or possessory action.

Leduc v. Deshaies, 23 Que. K.B. 416.

BORNAGE—WHO ENTITLED TO.

One who has a real right in land bordering on other lands is entitled to a bornage even when he is not the owner.

Chars Urbains v. Commissaires du Havre, 24 Que. K.B. 503.

BOUNDARY ACTION—CONTIGUOUS PROPERTIES—BROOK—POSSESSION.

The fact that between two estates there is a brook owned by one or the other of the parties does not prevent the bringing of a boundary action; even when the defendant, either himself or by others, had occupied his property for more than 30 years.

Ouellette v. Plante, 54 Que. S.C. 150. [Affirmed 28 Que. K.B. 236.]

CONCLUSION — PETITORY JUDGMENT — MISTAKE—APPEAL—REMANDING CASE.

When, in a boundary action, the parties agree to the respective boundaries of their properties, and make no other conclusions except those referring to the boundaries, and the Superior Court adjudicates on the right of ownership of the parties and dismisses the demand; and the plaintiff before the Court of Review, denies having given up her right, and claims to have only consented to the judgment as being "indicative" of the right of property for boundary purposes, and not "attributive" of such a right as in the petitory action, the trial judgment being based on a misunderstanding between the Trial Judge and the plaintiff's attorneys, the Court of Review may order that the record be sent back to the Superior Court so that the parties may proceed there according to their conclusion.

Forget v. Laferte, 24 Rev. Leg. 358.

(§ II A—8)—PLANS—SURVEYS—CONFLICT AS TO MONUMENTS—ONUS.

Rural Municipality of Lorne v. Arnold, 16 D.L.R. 882, 27 W.L.R. 744.

CONFLICTING SURVEYS—FENCE LINE.

In ascertaining the correct division line from conflicting surveys, the line running in the course of an old fence line is likely to be more accurate. [Diehl v. Zanger, 39 Mich. 60, applied.]

McIsaac v. McKay, 27 D.L.R. 184, 49 N.S.R. 476.

(§ II A—9)—DUTY OF VENDOR TO DISCLOSE LOCATION OF.

The vendor is not obliged to shew the vendee where the line is, it is for the buyer to ascertain this.

Lapierre v. Magnan and Viens, 2 D.L.R. 544, 42 Que. S.C. 59.

TITLE TO LAND — SURVEY — BOUNDARIES — NONCOMPLIANCE WITH S. 14 OF SURVEYS ACT—EVIDENCE—ONUS.

Baikie v. Bradley, 16 O.W.N. 51.

COURSES AND DISTANCES—REVERSING CALLS.

If there is difficulty about fixing the beginning boundary in a conveyance of land, the calls may be reversed and the lines traced the other way. [Ayers v. Watson, 137 U.S. 584, applied.]

Halifax Graving Dock v. Evans, 17 D.L.R. 536, 48 N.S.R. 56.

BOUNDARY ACTION — CHAINMEN — COMPLETION OF REPORT—DESCRIPTION OF LANDS—EXPERTS' OPINION — LOCATION OF LANDS—FILING OF PLANS AND SURVEYORS' NOTES—QUE. C.P. 1060—R.S.Q. 8. 5179.

Even if the chainman had proceeded during the surveyors' absence, the report will be valid if the chainmen's figures have subsequently been checked by the surveyors. When English measures are changed to French measures, such changes being necessary, the report is still regular. The court may order the experts to complete their report by filing the plans to which they refer in their conclusions. The measurements of the land are sufficiently described by the titles which contain the cadastral number. The experts' report and plan may be completed by adding thereto the parties' principal contentions. The expression by the experts of their opinion does not bind the court, especially if such an opinion refers to possession or prescription. It is not necessary to mention the number of feet acquired by a party by way of possession. The experts must explain the location of the lands by an illustrating plan, and shew the respective claims of the parties. The surveyors must file the original or the copy of the "special" plans mentioned, and also file their notes and data on the measurements.

Lord v. St. John's (City), 16 Que. P.R. 54.

B. By highway or passageway.

(§ II B—10)—BY HIGHWAYS OR PASSAGEWAY — ALLOWANCE FOR ROAD — ENCROACHMENT — FAILURE TO PROVE — ERECTION OF FENCE—REMOVAL—INJUNCTION—DEDICATION—ESTOPPEL.

Lake Erie Excursion Co. v. Tp. of Bertie, 6 D.L.R. 853, 4 O.W.N. 111, 23 O.W.R. 94.

STREET OR HIGHWAY—REFERENCE.

When a highway or street is referred to in a grant or other conveyance, the way, as opened and actually used, rather than as platted, is construed to be the boundary intended by the parties, but when the grant or conveyance refers to a map, the line of the way as actually surveyed is held to de-

termine the boundary of the line. [5 Cyc. 907, referred to.]

Halifax Graving Dock v. Evans, 17 D.L.R. 536, 48 N.S.R. 56.

CONVENTIONAL BOUNDARY—IMPLIED GRANT — ENCROACHMENT — ON NEIGHBOUR'S LAND—STREET LINE—ACQUIESCENCE IN PUBLIC USER—CONVENTIONAL BOUNDARY — PROJECTING EAVES — DISCHARGE OF WATER—OBSTRUCTION TO LIGHT—EASEMENT — PRESUMPTION — INJUNCTION —DAMAGES—COSTS.

Rous v. Royal Templar Building Co., 7 O.W.N. 161.

PRESCRIPTION—POSSESSION—PUBLIC ROAD—QUE. C.C. 504, 2193.

A public road preserves its character even when it is not closed on each side. There is not uninterrupted, peaceable, public, unequivocal possession necessary for the purposes of prescription when a portion of a public road is in dispute between a municipal corporation and an owner; the public on one side continuing to make use of it and the owner on the other opposing this in every possible way.

Gignac Co. v. Quebec (City) 23 Que. K.B. 397.

C. By waters.

(§ II C—15)—BY WATERS—CHANGE IN WATERS — SHIFTING OF BOUNDARIES, HOW LIMITED.

When boundary lines have once been fixed, a subsequent change in the status of the waters, whether by artificial means or through natural causes, will not have the effect of shifting the boundaries. [5 Cyc. 898, referred to.]

Yukon Gold Co. v. Boyle Concessions, 19 D.L.R. 336. [Affirmed, 27 D.L.R. 672, 23 B.C.R. 103, 34 W.L.R. 436, 10 W.W.R. 595, 50 D.L.R. 742, [1919] 3 W.W.R. 145.

WHARF—CONVENTIONAL LINE—TRESPASS.

In an action claiming damages for trespass to land, the trespass complained of consisted in the erection of a wharf or abutment on plaintiff's land. Plaintiff failed to show that the erection complained of was within the lines of the description of his lot, while defendant, on the other hand, proved that the abutment was erected upon the bed logs of an older abutment. Plaintiff also relied upon a conventional line alleged to have been entered into between plaintiff's predecessor in title and one M., since deceased. Judgment having been given in plaintiff's favour on the trial:—Held, that defendant's appeal must be allowed and plaintiff's action dismissed with costs. Per Sir Wallace Graham, C.J.:—It is exceedingly dangerous when one of the parties is dead to accept too implicitly evidence of the other as to an alleged conventional line which supersedes the boundaries of the documentary title deeds.

McGregor v. Webber, 54 N.S.R. 226.

BEACH—HIGH WATER MARK.

The line of high water, which is the demarcation between the beach and the solid ground, should be understood to be from the mark of the highest waters of the year, namely, those of the month of March in each year, and not from the usual high water mark.

L'Œuvre et Fabrique de St. Bonaventure v. Leblanc, 27 Que. K.B. 286.

(§ II C—16)—RIVER OR CREEK.

Where the water used for power in two adjoining mill properties belonging to different owners but once held by the same person was discharged into the same tail-race through a short channel from each mill, one of which ran on a slanting line past the other mill so as to cut off a triangular piece of land which would have been part of the land on which such other mill was situated had the admitted boundary between the two mills been extended in a straight line back of them, and the earliest conveyances of the land in parcels contained no description by metes and bounds and the water rights appurtenant to each parcel were always transferred therewith, and it appeared from the conduct and dealings of the owners of the two properties and their predecessors in title and from the acquiescence for years by the respective proprietors in everything that was done by his neighbour that the piece of land so cut off was considered and treated as equal and common ground in which each proprietor had equal privileges and equal rights, the respective owners are entitled in common to the use of such piece of land but only in such a way as not to infringe upon each other's rights. [Davey v. Foley-Reiger, 2 O.W.N. 1284, varied on appeal.]

Davey v. Foley-Reiger Co., 2 D.L.R. 479, 3 O.W.N. 856, 21 O.W.R. 408.

BORNAGE—LANDS ADJOINING NON-NAVIGABLE STREAM.

Riparian proprietors, whose lands are bounded each on its own side by a river which is neither navigable nor floatable, have their respective rights up to the middle thread of the water.

Letarte v. Turgeau, 26 D.L.R. 25, 24 Que. K.B. 514.

(§ II C—31)—SURVEYOR—QUEBEC PRACTICE.

In the action en bornage each party is, at the same time, plaintiff and defendant. Therefore, each of them, even if there is no contestation, has a right to have witnesses examined and documents produced to establish their respective claims as to possession, etc., and, therefore, also, they bear the costs in common as those of the bornage itself. The report of the expert surveyor that, without any order from the court "he had heard part of the witnesses for the defence" (whose depositions were not produced) and which was afterwards altered, is irregular and its conclusions should not be adopted. Failure of the defence to oppose the application for its homologatin made by the plaintiff before it was

altered, does not raise a presumption of acquiescence in the altered report.

Juillet v. Leroux, 22 Que. K.B. 245.

BREACH OF PROMISE.

I. In general.

II. Defences.

I. In general.

(§ I—1)—Liability for causing.

One who solicits and obtains the hand of a young woman knowing her to be engaged to a third party does not commit either a délit or a quasi délit and incurs no liability to the disappointed suitor.

Pruneau v. Fortin, 51 Que. S.C. 517.

(§ I—3)—Aggravation of damages.

It is permissibe to plead seduction under promise of marriage in aggravation of damages in an action for breach of promise. [Millington v. Loring, 6 Q.B.D. 190, applied. See also Wood v. Durham, 21 Q.B.D. 501, and Wood v. Cox, 4 T.L.R. 550; Odgers on Pleading, 7th ed., 103, 104.]

Morris v. Churchward, 10 D.L.R. 191, 4 O.W.N. 1008, 24 O.W.R. 313.

Corroboration.

Cockerill v. Harrison, 14 Man. L.R. 366.

Conduct of plaintiff—Canon law.

Beauchamp v. St. Jean, 12 Que. P.R. 140.

II. Defences.

(§ II—5)—Defences—Plaintiff's marriage to another.

Damages for a breach of promise of marriage cannot be recovered when the plaintiff has subsequently married a person other than the defendant.

Pepperas v. LeDue, 11 D.L.R. 193, 4 O.W.N. 1208, 24 O.W.R. 563.

Release—Intention—Onus.

The releasing of the other party from a contract to marry involves an intention on the part of the releasing party to give up whatever rights of action she may have in reference to the engagement, and the onus of establishing such intention is on the defendant in an action for breach of promise of marriage. [Davis v. Bomford, 6 H. & N. 245, distinguished.]

Bellamy v. Robertson, 21 D.L.R. 415, 8 W.W.R. 305, 30 W.L.R. 935, reversing 7 S.L.R. 206, 29 W.L.R. 847, 7 W.W.R. 567.

Defences—Breach of condition—Termination of engagement—Recovery of gifts made in contemplation of marriage.

The defendant promised to marry the plaintiff upon condition of his absolutely refraining thereafter from taking any intoxicating liquor:—Held, upon the evidence, that the plaintiff had broken his promise, and that the engagement came to an end by reason of the breach of the condition on which it was entered into. Held, also, that the plaintiff was not entitled to recover any personal presents which, during the engagement, he made to the defendant in prospect of marriage; aliter, as to articles purchased with the plaintiff's money with a view to furnishing a house upon marriage, and articles and money lent to the defendant. Robinson v. Cumming, 2 Atk. 409, and Ryan v. Whelan, 21 C.L.T. Occ. N. 406, considered. Judgment of the County Court of the County of Waterloo, varied.

Seiler v. Funk, 32 O.L.R. 99, 7 O.W.N. 179.

Abandonment of contract by mutual consent — Damages — Provisional assessment.

Orenstein v. Smith, 8 O.W.N. 50.

Plea of infancy — Evidence — Proof of promise and breach—Verdict of jury Damages — Alien enemy — Right to maintain action.

Latha v. Halyczuk, 14 O.W.N. 219.

Children objecting—Evidence of breach.

The opposition of children, issue of a prior marriage, does not excuse a breach of promise of marriage. A letter by one who has contracted to marry, notifying his fiancee that he abandons the project he had entertained but would always retain a tender affection for her, and his admission in his defence that there had been a conditional promise to marry, are sufficient to constitute a commencement of proof in writing admitting oral testimony.

Poirier v. Trudeau, 52 Que. S.C. 405.

BREACH OF TRUST.

See Trusts.

(§ I—10)—Criminal prosecution for—Assent of Attorney-General.

A charge for criminal breach of trust under Cr. Code, s. 390 brought against the curator of an insolvent estate can only be brought with the sanction of the Attorney-General (Cr. Code, s. 596), and if his authorization is not shown the charge will be dismissed.

R. v. Jacobs, 25 Can. Cr. Cas. 414.

BRIBERY.

See Corruption.

(§ I — 1) — What constitutes — Hiring teams to convey electors—Municipal elections.

The hiring of horses, teams, carriages or other vehicles for the purpose of conveying electors to or from the polls, is bribery within the meaning of s. 245 of the Consolidated Municipal Act (Ont.), no matter what was the motive in so hiring, and disqualifies a member of the council so doing from holding his seat.

R. ex rel. Sabourin v. Berthiaume, 11 D.L.R. 68, 4 O.W.N. 1201, 24 O.W.R. 559.

Counselling and procuring.

To establish a conviction for "counselling and procuring" another to bribe a peace officer, it is essential to prove that the peace officer had in fact been bribed.

R. v. Ryan, 9 D.L.R. 871, 22 Can. Cr. Cas. 115, 4 O.W.N. 622, 23 O.W.R. 799.

(§ I—3)—Attempt to bribe.

It is an indictable offence under Criminal Code, s. 158 (f), to offer a sum of money to a defeated candidate for the legislature who has influence with the government of the province in respect of the appointment of gaoler, to obtain his assistance and recommendation for the position.

The King v. Youngs, 19 Can. Cr. Cas. 98, 3 O.W.N. 411, 20 O.W.R. 696.

To induce another to—Election Act.

It is a bribery offence under the Alberta Election Act, s. 254, to give or offer money to any person "in order to induce any voter to vote or refrain from voting" at any election which is subject to that act, but the essence of the offence is, that the payment or offer of the money should itself influence the mind of the voter; the section does not make it an offence to send $10 to a person who had consented to work for one of the election parties to pay for his own time, trouble and expense in getting to the polls five voters who were believed to have already decided to vote on a plebiscite in the way favoured by such election party.

R. v. Ingram, 26 Can. Cr. Cas. 12, 33 W.L.R. 340, 9 W.W.R. 917.

Attempts — Solicitation of offer to bribe.

For a municipal councillor to ask from a contractor doing business with the municipal council a sum of money for himself for his assistance in obtaining contracts with the municipality and in renewing contracts then current, is not an offence under s. 161 of the Criminal Code if such offer is not acceded to, nor can the councillor be convicted under s. 72 of the Code of attempting the offence of which the contractor would have been guilty under s. 161 had he paid the money or even offered to pay it. But the unsuccessful solicitation by the councillor is a substantive offence under s. 69 (d) of the Code.

The King v. Brousseau, 28 Can. Cr. Cas. 435, 26 Que. K.B. 164. [Affirmed by Supreme Court of Canada, 56 Can. S.C.R. 22, 39 D.L.R. 114.]

(§ I—4)—Parties chargeable with offence.

Bribery is an act to which it is necessary that two persons be parties, the briber and the corrupted party, and an information for the completed offence, should include the names of both as parties charged; but, if only an attempt to bribe is alleged, the offence is unilateral and the information is sufficient, if it charges only the person making the attempt.

Marsil v. Lanctot, 28 D.L.R. 380, 25 Can. Cr. Cas. 223, 20 Rev. Leg. 237.

(§ I—5)—Corrupt offer for official influence.

The corrupt offer to give a sum of money to a member of the Police Commission appointed for a city by its municipal council from amongst its members, for the purpose of inducing such Commissioner to use his official position to aid in procuring the appointment of a third party as Chief of Police by the Board of Police Commissioners is an indictable offense under s. 163 of the Criminal Code. [R. v. Vaughan, 4 Burr. 2494; R. v. Casano, 5 Esp. 231; R. v. Pollman, 2 Camp. 229, referred to.]

R. v. Hogg, 19 D.L.R. 113, 23 Can. Cr. Cas. 228, 7 S.L.R. 467, 7 W.W.R. 107.

Reward for assistance to procure official position.

An attempt to improperly procure the appointment of another to the position of Chief of Police for a city by promising a reward to a member of the appointing board for his influence, will not support a charge under subs. (b) of Codes. 162 making it an indictable offence directly or indirectly to give a reward for the purchase of an appointment to an office or to agree or promise to do so; such facts do not disclose an attempted sale or purchase of an office under s. 162 (b), but may sustain a count laid for an attempted offence under s. 163 (b) relating to giving or procuring rewards "for any interest, request or negotiation about any office."

R. v. Hogg, 19 D.L.R. 113, 23 Can. Cr. Cas. 228, 7 S.L.R. 467, 7 W.W.R. 107.

Frauds upon the government—Attempt to bribe.

The King v. Youngs, 20 O.W.R. 698.

BRIDGES.

I. In general.
II. Defects; injuries on.
III. Toll bridges.

Annotation.

Liability of municipal corporations for nonrepair of bridges and highways: 34 D.L.R. 589.

I. In general.

See Highways; Railways.

(§ I—1)—Of county or township—Length—Approaches.

The embankments which afford approaches to a bridge should not be considered part thereof in declaring it a county bridge under s. 449 of the Municipal Act, R.S.O. 1914, c. 192. [The Municipal Act, R.S.O. 1914, c. 192, ss. 442, 449, considered; Re Mud Lake Bridge, 12 O.L.R. 159, distinguished; Re Tp. of Maidstone & County of Essex, 12 O.W.R. 1190, overruled.]

Re Tp. of Ashfield & County of Huron, 34 D.L.R. 338, 38 O.L.R. 538. [Varied as to costs in 36 D.L.R. 785, 39 O.L.R. 332.]

Extension of road—Necessary bridges—Burden of maintenance.

Coté v. County of Nicolet, 39 Que. S.C. 421.

Crossing by engines—Condition precedent.

Goodison Thresher Co. v. Tp. of McNab, 44 Can. S.C.R. 187.

(§ I — 2) — County bridge — Length — "Maintaining."

The power of a County Court Judge to declare a bridge less than 300 feet in length a "county bridge" (s. 449 Municipal Act, R.S.O. 1914, c. 192) applies to existing bridges, and does not authorize a declaration in reference to a bridge proposed to be built.

Re Tp. of Malahide & County of Elgin, 34 D.L.R. 559, 38 O.L.R. 600.

Municipal law — Bridges and water courses—Proces-verbal under C.M. 758—Jurisdiction—C.M. 758, 761, 858 and 878.

Corp. of Holy Sacrament v. Laberge, 18 Rev. de Jur. 280.

(§ I—7)—Cost of construction and maintaining.

A bridge is more than 100 feet in width within the meaning of s. 616 of the Consolidated Municipal Act, 1903, and should be built, kept and maintained in repair by the county municipal corporation in which it is situate, where the water crossed by it, though normally less than 100 feet wide, rises in the spring of each year, and occasionally at other times, to such an extent as to be more than 100 feet wide and to overflow the road at each end of the bridge. [Village of New Hamburg v. County of Waterloo, 22 Can. S.C.R. 296, followed.]

Re Village of Caledonia & County of Haldimand, 6 D.L.R. 267, 22 O.W.R. 961.

Municipal corporations — Bridge across river dividing city and county — Liability for cost of construction and maintenance — Ascertainment of boundary between city and county — Municipal Act, R.S.O. 1914, c. 192, s. 452 — Territorial Division Act, R.S.O. 1914, c. 3, s. 9—Joint undertaking — Originating notice — Municipal Act, s. 456 (1).

Re Ottawa & County of Carleton, 6 O.W.N. 615.

County bridge—Work done is at the cost of the taxpayers or occupants of the land—C.M. Que. 445, 521, 522, 579, 594, 596.

In law the words, "or the said note" and the words "and route" ought to be erased from the conclusion of the declaration because the paragraphs of the declaration make no mention of the proposed route, more especially since a certain part only of the taxpayers are obliged to contribute to the work and to the upkeep.

St. Michel D'Yamaska v. Corp. of Comte D'Yamaska, 25 Rev. de Jur. 448.

(§ I—8)—Duty to erect.

Where a municipality, to which the plaintiff had agreed to sell land for a highway as soon as he had acquired title thereto, constructed such road, and then an adjoining municipality, under s. 516 of the Municipal Act, R.S.M. 1902, c. 116, constructed a ditch along the side of the highway, the plaintiff is not, apart from negligent construction of the ditch, entitled to damages from the latter municipality because he could not cross such ditch with teams and vehicles without the construction of a bridge.

Lamontagne v. Woodlands, 5 D.L.R. 524, 22 Man. L.R. 495, 21 W.L.R. 881.

Duty to erect.

Where an irrigation company had received, under the North-West Irrigation Act, 61 Vict. (Can.), c. 35, now R.S.C., 1906, c. 61, a license to take water to use in its business in the North-West Territory and obtained authority to cross with its works road allowances not yet used as public highways reserved from its lands by the Crown for future use as public highways, such company is itself bound, it being the party for whose convenience and profit the road allowances had been interfered with, to build bridges when the road allowances afterwards become public highways on both sides of the works constructed across them by the company, even though it had never stipulated that it would maintain the necessary bridge or bridges at the points indicated in an accompanying plan, where their works crossed road allowances or public highways as provided by subs. (b), s. 11, of the said Irrigation Act, now subs. 1 (b), s. 15 R.S.C. 1906, c. 61, which it did in an application required of every applicant for license under the act to file with the Commissioner of Public Works for the North-West Territories, by the aforesaid subs. for the right to construct any canal, ditch, reservoir, or other works referred to in the memorial, across any road allowance or surveyed public highway, which may be affected by such works. [R. v. Alberta R. and Irrigation Co., 3 Alta. L.R. 70, affirmed on appeal: Alberta R. & Irrigation Co. v. The King, 44 Can. S.C.R. 505, reserved on appeal.]

R. v. Alberta R. & Irrigation Co., 7 D.L.R. 513, [1912] A.C. 827.

Duty to erect—Assumption of street by town for public use, what amounts to.

A dedication, as well as an acceptance and assumption by a town of a street for public use sufficient to render it liable under s. 606 of c. 19 of the Ontario Consolidated Municipal Act of 1903, for not replacing a bridge, is sufficiently shewn notwithstanding that the bridge was built by and the connecting street which was not on an original road allowance, was laid out to the stream by a private individual, and the street was afterwards, by a duly registered plan continued from the opposite bank, if statute labour was performed on the street for a number of years, and the town council on several occasions ordered and paid for repairs to the bridge, and the

general public had free and uninterrupted use of same for over thirty years.

Strange v. Tp. of Arran, 12 D.L.R. 41, 28 O.L.R. 106.

II. Defects; injuries on.

(§ II—11)—Defective condition of draw—Collision with ship—Liability—Railway and municipality.

[Loach v. B.C. Electric R. Co., 23 D.L.R. 4, [1916] 1 A.C. 719, referred to.]

Star S.S. Co. v. City of Vancouver & B.C. Electric R. Co., 30 D.L.R. 484, 34 W.L.R. 1188.

Nonrepair—Injury to motorist—Municipal liability — Rural Municipalities Act (Sask.), ss. 218, 220 — "Highway"—"Public road."

The words "public road" and "highway" as used in s. 218 of the Rural Municipalities Act (R.S.S. 1909, c. 87), do not include bridges or approaches thereto, and a municipality is not liable for their nonrepair under s. 220 in the absence of evidence that the control of the bridge was transferred to the municipality.

Robertson v. Rural Mun. of Sherwood, 34 D.L.R. 147, 10 S.L.R. 83, [1917] 2 W.W.R. 106, affirming 33 D.L.R. 177, [1917] 1 W.W.R. 588.

Municipality — Automobile — Accident—Common fault.

Municipalities are not bound to take all the precautions necessary for absolute protection from automobiles in public streets, or upon public bridges, nevertheless if an automobile is thrown below a bridge because the hand rail is completely rotten, the municipality is responsible for having contributed, in part, to the accident. When an automobile wheel turns to the left at a right angle, and thereby causes the automobile to be thrown below a bridge, and the turning of the wheel cannot be explained, the machine must be deemed to have been in bad order, and the owner should be held responsible for a contributory part of the damage which he suffered.

La Ville de Beloeil v. Rioux, 27 Que. K.B. 329.

(§ II—13)—Injury to property owner by failure of town to replace bridge—Necessity of notice of injury.

Subs. 3 of s. 606 of Consolidated Municipal Act of Ontario, 1903, c. 10, providing that the failure to give notice to a town of an accident due to negligence in keeping a street or highway in repair, does not extend to an action for an injury occasioned an adjacent property owner by the failure of the town to replace a bridge after it was swept away.

Strang v. Tp. of Arran, 12 D.L.R. 41, 28 O.L.R. 106.

(§ II—14)—By-law governing crossing of bridges with traction engines—Action to recover damages occasioned by fall of bridge—Contributory negligence.

Marion v. Rur. Mun. of Montcalm, 34 W.L.R. 683.

III. Toll bridges

(§ III—21)—Toll bridges—Abandonment to municipality.

A bridge is not an intermediate part of a road within the meaning of the General Road Companies Act, when the terminus of the road, including one end of the bridge, is assumed by a municipality which has extended its boundaries; and a road company owning the bridge may then abandon the remainder of the bridge without the consent of the municipality in whose territory such remainder of the bridge lies by passing a by-law to that effect and giving notice thereof under the General Road Companies Act (Ont.).

Ottawa & Gloucester Road Co. v. Ottawa, 10 D.L.R. 218, 4 O.W.N. 1015, 24 O.W.R. 344. [Affirmed, 13 D.L.R. 944.]

BRITISH NORTH AMERICA ACT.

See Constitutional Law.

BROKERS.

I. Stock brokers.

II. Real estate brokers.

A. In general; authority and liability of.

B. Compensation; commissions.

III. Business and general brokers.

Agency in general, see Principal and Agent.

Insurance agents, see Insurance.

As affecting agreement for sale of lands, see Vendor and Purchaser.

Annotations.

Real estate brokers; agent's authority: 15D.L.R. 595.

Real estate agent's commission; sufficiency of services: 4 D.L.R. 531.

I. Stock brokers.

(§ I—1)—Stock broker.

Where a stock broker is given a limited authority to sell certain company shares on terms requiring a deposit of ten per cent in cash and he receives a lesser deposit with an application for the shares, he is not warranted in forwarding such deposit to his principal, and will himself be liable to the prospective purchaser for its return. [McPherson v. Fidelity Trust & Savings Co., 17 B.C.R. 182, judgment of Hunter, C.J., at trial, affirmed on appeal.]

McPherson v. Fidelity Trust & Savings Co., 6 D.L.R. 530, 17 B.C.R. 182.

Stock brokers — Clearing house — Customer — Status of each in option deals.

A person buying and selling options on a stock exchange which employs a clearing house association, is taken to accept the

usage of putting the transactions through the clearing house with the result that the association will, in the ordinary course become the opposite party in each contract he makes, while he will be represented by his own broker as the nominal principal.

Richardson v. Beamish, 13 D.L.R. 400, 23 Man. L.R. 306, 21 Can. Cr. Cas. 487, 24 W.L.R. 514, 4 W.W.R. 815.

STOCK BROKERS—AUTHORITY TO SELL STOCK RIGHT TO PLEDGE — RESTRICTIVE ENDORSEMENT.

Power to pledge a certificate of shares of company stock for the total amount thereof is not conferred on a broker by the delivery to him by the registered owner of a certificate for forty-six shares for the purpose of having the broker sell twenty-five of them, where the certificate bore a restrictive endorsement to the effect that "for value received . . . hereby sell, assign and transfer unto . . . twenty-five shares," etc.; since such endorsement gave notice that the broker had authority to deal with only twenty-five shares for the purpose of sale. [Colonial Bank v. Cady, 15 A.C. 267, followed; Smyth v. Rogers, 30 O.R. 256, distinguished.]

Mathers v. Royal Bank of Canada, 14 D.L.R. 7, 29 O.L.R. 141.

STOCK BROKER — SALE OF SHARES ON DEFAULT OF CLIENT TO PAY—CONVERSION.

A stock broker who, on the refusal of a client to pay for shares purchased on his order, sells them, is liable for a conversion; since, in the absence of a pledge of the shares with the broker, his rights are limited to holding them until paid for.

Buchan v. Newell, 15 D.L.R. 437, 29 O.L.R. 508.

STOCK BROKER—FAILURE TO GIVE NOTICE OF EXECUTION OF ORDER—DELAY IN DELIVERY OF STOCK CERTIFICATE.

A stock broker who gives his client speedy notice of the purchase of shares of stock for him is not answerable, in the absence of damage to his client, for a delay in the delivery of the stock certificate, where the latter could have dealt with the shares and negotiated them on the strength of such notice, and the delay in the delivery of the certificate was due to the conduct of a competent broker employed by the first broker with the implied consent of the client, to purchase the shares in another city.

Buchan v. Newell, 15 D.L.R. 437, 29 O.L.R. 508.

WHEN LIABLE AS PRINCIPLE — ACTING AS PURCHASER.

A broker constituting himself the actual purchaser of bonds, though he is to receive a certain allowance in the nature of a commission by way of deduction from the price is liable, in the event of his refusal to accept the bonds in accordance with the contract, in the capacity of principal and not as agent.

McKinnon v. Doran, 26 D.L.R. 488, 35 O.L.R. 349, affirming 25 D.L.R. 787, 34 O.L.R. 403. [Affirmed in 31 D.L.R. 307, 53 Can. S.C.R. 609.]

INSTRUCTIONS TO SELL AT CERTAIN PRICE—SALE AT LOWER PRICE—LIABILITY.

Gearhart v. Quaker Oats Co. (Sask.), 42 D.L.R. 791.

SALE OF GRAIN — MARGINS — CHEQUE TO COVER—RETURN OF MONEY DEPOSITED.

Pootmans v. Regina Grain Co. (Sask.), 42 D.L.R. 787, [1918] 2 W.W.R. 1093.

Where, on three occasions during the period of three years, a broker delivered to his client certificates of stock transactions, known as "bought and sold notes," signed by one of his employees on his behalf, the client is justified in the belief that the employee has proper authority from the broker for that purpose, and the broker is responsible and bound towards the client by a subsequent irregular or false certificate, of the same nature, signed in a similar manner.

Bolton v. MacDougall, 20 Que. K.B. 544.

POWER TO AGREE ON CONDITIONAL ACCEPTANCE OF SHARES — PRIVILEGE TO RETURN.

A broker or agent of a joint stock company, who has a mandate to procure subscriptions for shares in the capital stock of the company, cannot accept subscriptions on the understanding that if the subscriber does not wish to take the shares he will not be obliged to pay for them.

Forget v. Cement Products Co., 24 Que. K.B. 445. [Affirmed, 28 D.L.R. 717.]

(§ 1—2)—MARGINS—RIGHTS AND LIABILITIES.

The broker is protected only in so far as he acts reasonably thereunder, by a clause in bought and sold notes of a grain broker, that he reserves the right in case at any time margins are running out or approaching exhaustion, to close the trades by purchase or sale upon the exchange without calling for additional margins or the giving of further notice.

Nelson v. Baird, 22 D.L.R. 132, 25 Man. L.R. 244, 8 W.W.R. 144, 30 W.L.R. 822.

GRAIN—COMMISSIONS—PRIVITY OF PRINCIPALS.

A grain broker who does not procure privity of contract between a seller and a purchaser is not entitled to his commissions as for a sale nor to damages resulting to him from a refusal to deliver by the seller.

Smith Grain Co. v. Pound, 36 D.L.R. 615, 10 S.L.R. 368, [1917] 3 W.W.R. 516.

MARGIN—RULES OF STOCK EXCHANGE.

An order to purchase shares "subject to the rules and regulations of the Montreal Stock Exchange" imports into the contract the custom or usage of brokers on that Exchange, and if it is a usage thereof to buy shares on another Exchange if necessary to fill an order, such a purchase is valid; a broker of such other Exchange

buying to fill such an order is an agent of the original broker, not a principal.

McDougall v. Riordan, 38 D.L.R. 198, 24 B.C.R. 446, [1917] 3 W.W.R. 1076.

GRAIN EXCHANGE—MARGIN—CR. CODE.

Dealing in "futures" on the grain exchange where the intent of the transactions is to meet the obligations to deliver by a set-off of a contract to purchase a like quantity of grain, and to adjust the differences between the selling and the buying prices and by thus dealing in such differences to make grain or profit by an anticipated fall in the price of the merchandise, are in contravention of s. 231 of the Criminal Code. [Beamish v. Richardson, 23 Can. Cr. Cas. 394, 16 D.L.R. 855, 49 Can. S.C.R. 595, 6 W.W.R. 1258, applied.]

Richardson v. Gilbertson, 39 D.L.R. 56, 39 O.L.R. 423, 28 Can. Cr. Cas. 431.

PURCHASE OF CORN ON MARGIN—FURTHER MARGIN CALLED — FAILURE TO COVER — SALE BY BROKER.

A person dealing in margins on the stock exchange is deemed to have knowledge of the rules which authorize brokers to sell stock carried on margin for their own protection, and failing to cover when called upon must bear the loss. Such a transaction is not within the provisions of s. 231, Cr. Code.

Maloof v. Bickell & Co., 50 D.L.R. 590, [1920] 1 W.W.R. 407.

DEALINGS FOR CUSTOMER ON MARGIN IN COMPANY SHARES — COMMISSION — EXTRA CHARGES OF AGENTS—CONTRACT — SALE NOTES — ALLEGED ORAL VARIATION—SELLING OUT WITHOUT NOTICE —ACTION FOR DAMAGES—COSTS.

Goad v. Kiely Smith & Amos, 12 O.W.N. 198.

STOCK CARRIED ON MARGIN — RIGHT TO PLEDGE.

[Leave to appeal to Privy Council was refused, 13th December, 1911.]

Clarke v. Baillie, 45 Can. S.C.R. 50.

ACTION FOR COMMISSION ON SALE OF STOCK —AGREEMENT WITH ANOTHER BROKER— NOT WITH COMPANY—ONUS.

Brown v. The Security Life Ins. Co. of Canada, 3 O.W.N. 85, 20 O.W.R. 68.

RULES OF STOCK EXCHANGE—AUTHORITY OF BROKER TO PURCHASE STOCK TO FILL AN ORDER.

Rosenthal v. Pitblado, 20 Que. K.B. 566, varying as to quantum of damages, 37 Que. S.C. 443.

STOCK BROKERS—SALE OF STOCK ON MARGIN.

On an ordinary purchase of stock on margin through a broker, if the broker fails to deliver the shares upon a demand being made with a tender of the balance due on them, the purchaser is entitled to the value of the shares at the time of such tender and demand, less any balance owing upon them and less commission and interest. In a stock margin deal, the "bought notes" are not in themselves conclusive in establishing the terms of the actual purchase. [Aston v. Kelsey, [1913] 3 K.B. 314; Johnston v. Kearley, [1908] 1 K.B. 514, considered.] In a transaction between a stock broker and his customer for stocks on margin, a stipulation saving the broker from liability for "any kind of failure or default on the part of (such broker's) correspondents" is to be construed as referring to the correspondents' possible neglect in executing the order, and not as covering the contingency of the correspondents' bankruptcy or its effect on the customer's order. A condition printed upon a stock broker's "bought note" sent to the customer after the order is executed will not bind the purchaser unless he has assented thereto or has failed to express immediate dissent under circumstances which cast upon him the duty of notifying the broker forthwith that he does not agree to the conditions expressed. [Price v. Union Lighterage Co., [1903] 1 K.B. 750, 20 Times L.R. 177, applied; Ewing v. Dominion Bank, 35 Can. S.C.R. 133, referred to.] In a stock margin deal where the buyer's broker in the usual course of the transaction would select and employ a foreign broker to complete the transaction, the fact that the customer was charged with the entire cost of the shares at the foreign price plus the foreign broker's commission, without distinction being made as to the commission or notice to the customer that the commission was included, and the customer is also charged a commission by his own broker, is evidence to shew that the foreign broker was the agent only of the local broker, and that the local broker was himself responsible to the customer for putting through the transaction and not merely an agent to transmit the order to the foreign broker.

Croft v. Mitchell, 14 D.L.R. 914, 5 O.W.N. 481, 25 O.W.R. 503, affirming 10 D.L.R. 695.

STOCK BROKERS — MARGINS — "REAL" OR "FICTITIOUS" TRANSACTIONS—"BUCKET SHOP" DEFINED.

"Bucket shops," inhibited by virtue of s. 31 of the Criminal Code (Can.) 1906, c. 146, are places where bets are made against the rise or fall of stocks or commodities and where the pretended transactions of purchase or sale are fictitious. [Pearson v. Carpenter, 35 Can. S.C.R. 380, 382, referred to. Forget v. Ostigny, [1895] A.C. 318, applied.]

Richardson v. Beamish, 13 D.L.R. 400, 23 Man. L.R. 306, 21 Can. Cr. Cas. 487, 24 W.L.R. 514, 4 W.W.R. 815.

PURCHASE OF SHARES ON MARGIN — CONTRACTS—TERMS—FAILURE TO KEEP UP MARGIN—RESALE BY BROKERS.

Gray v. Buchan, 6 D.L.R. 875, 23 O.W.R. 210. [Affirmed, 9 D.L.R. 880, 24 O.W.R. 70.]

GRAIN EXCHANGE — MARGIN TRANSACTIONS —CRIMINAL CODE, S. 231 — SET-OFF AGAINST LEGAL TRANSACTION.

One who knowingly is a party to and acquiesces in a transaction inhibited under s. 31 of the Criminal Code cannot set-off an amount owing under such transaction from a member of a company against an amount due to such company from a legal transaction.

Medicine Hat Grain Co. v. Norris Commission Co., 45 D.L.R. 114, 14 A.L.R. 235, [1919] 1 W.W.R. 161, reversing 37 D.L.R. 188.

TRANSACTION IN COMPANY SHARES—"BORROWING STOCK" — PAYMENT MADE BY BORROWER, WHETHER FOR "MARKING UP" OR "CLOSING OUT" TRANSACTION—EVIDENCE—FINDING OF FACT OF TRIAL JUDGE—REVERSAL ON APPEAL.

The plaintiff in Feb. 1916, "borrowed" from the defendants, stockbrokers, a block of shares of the stock of a mining company, and paid them the market price of the stock on that day, as security. In such a transaction, the lender can at any time call in the loan, and then the borrower must return the stock, receiving his money back; but the more usual course is for the borrower to pay the lender the amount representing the rise in value of the stock and allow the loan to be continued until a new demand by the lender—this is called "marking up." If the borrower fails to return the stock or to "mark up," the lender may buy in to protect himself and charge the borrower with the difference in price. On April 29, 1916, the defendants asked the plaintiff to "close out the account" on May 1, and threatened to close it out on that day if the plaintiff did not "bring the stock in." A day or two after May 1, the plaintiff went to the defendants' office and paid $400 by a cheque which had no memorandum on its face as to the object for which it was given. This was the sum which he should have paid to entitle him to retain the stock as his own and so close out the account: it was equally the sum which he should have paid to "mark up"—being the amount by which the stock had risen. In Oct. or Nov., 1917, the plaintiff offered to return the stock and demanded the return of his money. The defendants refused to return the money, and this action was brought to recover it. The defendants asserted that they had, on the 1st May, 1916, bought stock to replace the borrowed stock, and had advised the plaintiff, but the plaintiff did not know of the purchase, and received no notice till long afterwards. The plaintiff swore that he paid the $400 for "marking up," and there was no contradiction:—Held, that, upon the evidence, it must be found that the money was paid for "marking up," and that the plaintiff was entitled to recover the amounts he had paid, on his handing back the borrowed stock. Judgment of Rose, J., Trial Judge, reversed; the majority of the court disagreeing with him upon the facts. [Beal v. Michigan Central R.R. Co., 19 O.L.R. 502, and Dempster v. Lewis, 33 Can. S.C.R. 292, followed.]

Jarvis v. Connell, 44 O.L.R. 264.

(§ I—3)—RIGHTS TO CLAIM SHARES—DETINUE.

Since "borrowing" in stock-broking circles does not imply a return of the very stock certificates borrowed, the borrower having the right to return the stock at any time and demand the return of money paid as security, a stock broker, who lends mining stock to another broker upon the customary security representing the marked value, cannot after his refusal to comply with the borrower's demand for a return of the money and to take back the shares when the values declined, compel the delivery of the shares upon a rise of the price, or recover their value where the shares have meanwhile been sold.

Wills v. Ford and Doucette, 26 D.L.R. 500, 35 O.L.R. 126.

TRANSFER OF SECURITIES—STOCKS HELD FOR RESALE ON CUSTOMER'S ACCOUNT.

Long v. Smiley, 6 D.L.R. 904, 4 O.W.N. 229, 23 O.W.R. 229.

(§ I—4)—STOCK BROKERS—FIDUCIARY RELATIONSHIP — BROKER'S OWN STOCK — PROFITS.

An agent cannot make a profit at the expense of his principal; and a broker employed to purchase stock at the market price who issues to the customer a bought note in respect of the broker's own stock cannot escape from the operation of the rule unless he makes full disclosure to his principal, nor is the broker's duty in that respect performed by putting through the stock exchange a transaction whereby he sold proforma to an officer of the exchange at a quotation at which he, the broker, had made a bid to either buy or sell without obtaining any acceptance, repurchased proforma at the same quotation from such officer, and charged his principal with the price, adding commissions and carrying charges.

Playfair v. Cormack, 13 D.L.R. 816, 5 O.W.N. 35, 24 O.W.R. 501, affirming 11 D.L.R. 128, 4 O.W.N. 1195, 24 O.W.R. 988.

II. Real estate brokers.

A. IN GENERAL, AUTHORITY AND LIABILITY OF.

(§ II A—5)—LISTED LANDS—AUTHORITY TO SELL.

Where a principal has merely instructed a broker to place lands on his list of properties for sale, such "listing" does not of itself constitute an authorization to the broker to enter into a contract for the sale of the lands on behalf of his principal.

Peacock v. Wilkinson, 23 D.L.R. 197, 51 Can. S.C.R. 319, 8 W.W.R. 600, affirming 18 D.L.R. 418, 7 S.L.R. 259, 29 W.L.R. 373, 7 W.W.R. 85.

CANCELLATION OF AUTHORITY.

Where a broker is given charge of the sale separately of a number of lots and is to receive a percentage on the net profits on the total sales, he would not be subject to dismissal, after having started on his work until it was completed, except for cause; but if the broker neglects the work of selling where it was a part of the arrangement that he should give his personal attention to the business, the property owner may cancel his authority.

Gier v. Van Aalst, 22 D.L.R. 438, affirming 16 D.L.R. 870, 28 W.L.R. 665.

REAL ESTATE—AGENCY CONTRACT—NECESSITY FOR WRITING, HOW LIMITED.

The Alberta statute, 1906, c. 27, requiring real estate agent's commission contracts to be in writing does not apply to a contract by the recipient of a commission from the owner to divide it with another person through whose influence such recipient obtained the listing from the owner. [Heaton v. Flater, 16 D.L.R. 78, followed.]

Karrar v. Schubert, 19 D.L.R. 804, 8 A.L.R. 21, 29 W.L.R. 540, 7 W.W.R. 189.

REAL ESTATE—AGENCY CONTRACT, WHEN WRITING NECESSARY.

Chapter 27 of the Alberta Statutes of 1906, providing against action being brought for commission on realty sales unless the contract therefor or some note or memorandum thereof is in writing, does not apply to a case for apportionment of commission where three persons agree to share between themselves a commission earned by their joint efforts, the intent of the statute being not to operate in favour of any one except the person to whom the services are alleged to have been rendered.

Heaton v. Flater, 16 D.L.R. 78, 8 A.L.R. 21, 5 W.W.R. 1228, 27 W.L.R. 98. [Followed in Karrar v. Schubert, 19 D.L.R. 804.]

REAL ESTATE BROKERS.

To prove that a person was appointed by the owner as his agent for the sale of land there must appear in some shape an offer upon the one hand and an acceptance on the other, out of which there grew a contract establishing the mutual rights and responsibilities of the relation of principal and agent.

Maybury v. O'Brien, 6 D.L.R. 268, 26 O.L.R. 628, 22 O.W.R. 677.

REAL ESTATE BROKERS—COMPENSATION—SHARING OF COMMISSION.

The mere receipt of a secret commission from his own principal would not disentitle the broker from the benefit of an agreement between himself and the broker for the other party for sharing the latter's commission, where it did not involve the plaintiff in any conflict of duties. [Miner v. Moyie, 19 Man. L.R. 707, referred to.]

Sargent v. Eidsvig, 13 D.L.R. 752, 25 W.L.R. 366.

REAL ESTATE BROKERS—COMPENSATION—SALES OF MINING PROPERTIES.

Crichton v. Ewyer, 25 O.W.R. 391.

REAL ESTATE—AUTHORITY—"TO BRING A PURCHASER," CONSTRUED.

In an agreement between an owner of land and an agent employed to procure a customer, the words "to bring a purchaser," or "to produce," or "to introduce," or "find a purchaser," have no real difference in meaning so far as liability of the seller to pay the commission is concerned, if the steps taken by the agent were the efficient cause of bringing the owner into relation with the person who finally became the purchaser.

Spenard v. Rutledge (No. 2), 10 D.L.R. 682, 23 Man. L.R. 47, 23 W.L.R. 623, 3 W.W.R. 1088, reversing 5 D.L.R. 649.

REAL ESTATE BROKERS—LISTING AGREEMENT—AUTHORITY TO CONCLUDE SALE.

Where an owner places land in the hands of an agent for sale, under a listing agreement, which does not contain an express authorization to conclude a contract of sale, the authority of the agent is limited to finding a purchaser, and the agreement does not give him the right to conclude a contract of sale binding on the owner; and this is true whether the listing agreement authorizes the agent "to list the property for sale," or "to sell it." [Hamar v. Sharpe, L.R. 19 Eq. 108; Prior v. Moore, 3 T.L.R. 624; Chadburn v. Moore, 61 L.J. Ch. 674, and Gilmour v. Simon, 37 Can. S.C. R. 422, applied; Rosenbaum v. Belson, [1900] 2 Ch. 267, doubted; Boyle v. Grassick, 6 Terr. L.R. 232, followed; Schaefer v. Millar (No. 1), 8 D.L.R. 706, affirmed.]

Schaefer v. Millar and Good (No. 2), 11 D.L.R. 417, 6 S.L.R. 395, 23 W.L.R. 913, 4 W.W.R. 490. [Appeal to Supreme Court of Canada, dismissed.]

REAL ESTATE AGENT—RE-SALE—ALTERNATIVE PROMISE TO TAKE PROPERTY HIMSELF.

Where a real estate agent, in order to induce a proposed purchaser to buy certain land orally promises the proposed purchaser that he would make a profit of a stated sum within 60 days on the deal or take the property himself, such promise is to be construed as indivisible, but it cannot be enforced because of its uncertainty where it does not appear whether or not the latter alternative of "taking the property" was to include the suggested profit, nor was any time fixed for carrying it out, nor specification made as to the liabilities or encumbrances which the purchaser had assumed with the property.

Fletcher v. Holden, 17 D.L.R. 461, 19 B.C.R. 567, 27 W.L.R. 896, 6 W.W.R. 693.

REAL ESTATE BROKERS—COMMISSION TO PURCHASER'S AGENT AS CONDITION OF CONTRACT—EFFECT.

Where a real estate broker enters into negotiations with the owner to buy for an undisclosed purchaser, and on concluding the bargain includes in it a condition which the owner accepts, that the latter to whom he was under no fiduciary obligation should

pay him a commission on the sale, such will not alone constitute the broker an agent of the vendor.

Alexander v. Enderton, 15 D.L.R. 588, 5 W.W.R. 1022, 50 C.L.J. 277, 26 W.L.R. 535. [Affirmed, 19 D.L.R. 897.]

REAL ESTATE—DUTY TO OBTAIN HIGHEST PRICE, HOW LIMITED—REASONS.

Where the prices of large acreages of farm lands are fixed approximately on well-understood standards, the owner who in the usual course employs a selling agent and names the selling price either adding the agent's commission to that price or allowing the agent to retain whatever amount he can secure from a purchaser over and above the price named, cannot invoke the ordinary rule which imposes upon an agent the duty of obtaining the highest possible price for his principal. [Morgan v. Elford, 4 Ch. D. 352, applied.]

Complin v. Beggs, 13 D.L.R. 27, 24 Man. L.R. 596, 24 W.L.R. 871, 4 W.W.R. 1081.

REAL ESTATE BROKERS—AUTHORITY—LISTING AGREEMENT, TO "SELL," EFFECT.

Where an owner in a listing agreement gives authority to a real estate agent to "sell his property," and in such agreement reserves the right to sell the property either by himself or through other agents, such reservation is to be interpreted as an intimation that the agent's authority is limited to finding a purchaser, since to hold otherwise would place the owner in an embarrassing situation if he had such an agreement with several agents. [Wilde v. Watson, 1 L.R. Ir. 402, referred to; Schaefer v. Millar (No. 1), 8 D.L.R. 706, affirmed.]

Schaefer v. Millar and Good (No. 2), 11 D.L.R. 417, 6 S.L.R. 395, 23 W.L.R. 913, 4 W.W.R. 490, affirming 8 D.L.R. 706. [Appeal to Supreme Court of Canada dismissed.]

SALE OF LAND—BROKER'S COMMISSION—EVIDENCE.

Chapman v. McWhinney, 23 O.W.R. 834.

PROOF OF EMPLOYMENT.

A mandate to sell property given to a real estate agent cannot be proved by witnesses. Although oral evidence may be admissible to establish that the immovable was for sale and that the agent had found a purchaser to whom he had sold it, these facts alone are not sufficient to entitle him to a commission. He should prove that his services were retained by the owner to effect the sale.

Dudemaine v. Pelletier, 47 Que. S.C. 154.

REAL ESTATE BROKER—SALE OF LAND—COMMISSION—TIME LIMIT TO AGENCY—LAPSE OF AUTHORITY—EVIDENCE—PRODUCTION OF PLAINTIFFS' DIARY—ALTERATION IN—FINDINGS OF FACT BY TRIAL JUDGE—DUTY OF APPELLATE COURT.

Currie v. Hoskin, 23 O.W.R. 676.

(§ II A—6)—REAL ESTATE—OPTIONS TO PURCHASE OR SELL—MONEY LENT.

Where the owner of property employs an agent, under a combined option and agency contract for the sale of such property at a fixed price, with stipulation that the agent shall advance moneys to keep up the property for the promotion of the sale, a provision that, in case the sale is effected by the owner himself, such advances shall be deemed a loan and repayable to the agent is governed not by the principles applicable to an option automatically ending at a fixed time and importing forfeiture, but rather as a loan constituting a debt due from the owner to the agent.

Nebraska v. Moresby, 17 D.L.R. 790, 19 B.C.R. 341, 27 W.L.R. 973, 6 W.W.R. 1040.

REAL ESTATE AGENT—OPTION TO PURCHASE OR SELL.

Beer v. Lea, 14 D.L.R. 236, 29 O.L.R. 255, affirming 7 D.L.R. 434.

REAL ESTATE BROKERS—OPTION TO PURCHASE.

An option contract for the purchase of land made in favour of a firm of real estate brokers who were under no fiduciary relationship to the owner who gives the option, may also provide for payment by the owner to the firm of brokers of a stated commission whether they become the buyers themselves or procure another to carry out the terms of the option as the purchaser in substitution for the brokers; and such stipulation for payment of commission will not alone constitute the brokers the agents of the owner so as to create the fiduciary relationship of principal and agent between them. [Livingstone v. Ross, [1901] A.C. 327, 85 L.T. 382, distinguished.] The fact that the payment of a commission, if a sale was made, was provided for in an agreement giving a person an option to purchase property does not constitute him the vendor's agent.

Kelly v. Enderton, 9 D.L.R. 472, [1913] A.C. 191, 107 L.T. 781, 23 W.L.R. 310, 3 W.W.R. 1003, affirming 5 D.L.R. 613.

PROCEEDS APPLIED ON CUSTOMER'S ACCOUNT STATUTE OF LIMITATIONS.

The business transactions between stockbrokers and one of their customers having been begun, and always carried on, under an agreement in writing whereby when stocks held by the brokers for the customer were sold the proceeds were to be applied on the customer's account and the customer was to pay interest at "such rate or rates" as the brokers "might notify" the customer of from "time to time," a sale of the customer's stocks and the application of the proceeds towards payment is a payment made by the customer, which saves the broker's claim out of the Statute of Limitations under which it otherwise would be barred. [Waters v. Tompkins, 2 C.M. & R. 723, followed.]

Stark v. Sommerville, 41 D.L.R. 496, 41 O.L.R. 591, affirming 40 O.L.R. 374.

REAL ESTATE AGENT—OPTION TO "PURCHASE OR SELL."

Where a real estate agent in the ordinary

course of his business listed certain property for sale on commission at the request of the owners and afterwards, without severing his relation as agent, secured from the latter an option "to purchase or sell" the same, which also provided for a commission to the agent "in the event of a sale being made," and he found a purchaser willing to pay a price much greater than the figure placed on the property by the owners plus the agent's commission and gave him a receipt for his deposit, which stated that it was "given by the undersigned as agent and subject to the owner's confirmation," he continued to be the agent of the owner and was bound to disclose all information he had of circumstances that pointed to an enhanced price for the property, and he is not entitled to specific performance of the option.

Bentley v. Nasmith, 3 D.L.R. 619, 22 W.L.R. 209, 46 Can. S.C.R. 477, 2 W.W.R. 301, reversing 16 B.C.R. 308.

REAL ESTATE AGENT—OPTION TO PURCHASE OR SELL.

Where an agent for the sale of land, who also holds an option to purchase the property, agrees for a re-sale at an advanced price, he cannot exercise his option until he has divested himself of his character as agent, and, in order so to divest himself, he must disclose his contract for resale. [Bentley v. Nasmith, 3 D.L.R. 619, 46 Can. S.C.R. 477, followed.]

Beer v. Lea, 7 D.L.R. 434, 4 O.W.N. 342, 29 O.L.R. 255, 23 O.W.R. 826.

(§ II A—7)—REAL ESTATE AGENT'S PURCHASE IN OWN NAME—LIABILITY TO ACCOUNT FOR PROFITS.

A real estate agent cannot make a secret profit for himself at the expense of his principal, and where he secretly purchases the land himself and afterward makes a profit on the resale, he must account to his principal for the amount of such profit. [See also Miller v. Hand, 10 D.L.R. 186, and Re Blaylock, 16 D.L.R. 487.]

Simpson v. Davis, 17 D.L.R. 413, 7 S.L.R. 250.

REAL ESTATE AGENTS—FIDUCIARY RELATIONSHIP TO THEIR PRINCIPAL—DUTY TO DISCLOSE INFORMATION.

Where real estate agents, while acting in a fiduciary relation to the property owner, become aware of a change of circumstances affecting the property, but not known to the owner, which would make wholly inadequate the price at which the owner had previously authorized them to sell, they are bound as agents to disclose the fact to their principal and to advise him to seek independent advice before taking from him an option of purchase in their own names at the price he had named. [See also 1 Halsbury's Laws of England, p. 189.]

Laycock v. Lee & Fraser, 1 D.L.R. 91, 17 B.C.R. 73, 19 W.L.R. 841.

REAL ESTATE BROKER—PAYMENT OF COMMISSION—AGENT—FIDUCIARY RELATION—OPTION TO PURCHASE OR SELL.

The fact that the payment of a commission, if a sale was made, was provided for in an agreement giving a person an option to purchase property does not constitute him the vendor's agent. The fact that, without the knowledge of the vendor, commissions he had agreed to pay to a real estate agent upon the sale of property the latter had an option to purhase, were paid by such agent to a person who, in the negotiations for the purchase ostensibly acted as agent for the person to whom the property was conveyed, but really purchased it for his own benefit, will not make him the vendor's agent, or create a fiduciary relation between them.

Kelly v. Enderton, 5 D.L.R. 613, 22 Man. L.R. 277, 21 W.L.R. 337, 2 W.W.R. 453. [Affirmed 9 D.L.R. 472, 23 W.L.R. 310, 3 W.W.R. 1003.]

PURCHASE BY REAL ESTATE AGENT SUBSEQUENT TO AGREEMENT TO SELL—DIFFERENCE IN PRICE—FIDUCIARY RELATIONSHIP.

Stevenson v. Sanders, 3 D.L.R. 790, 20 W.W.R. 242, 20 W.L.R. 787.

REAL ESTATE AGENT—AGENT PURCHASING FROM PRINCIPAL BOUND TO DISCLOSE HIS IDENTITY—VALIDITY OF CONTRACT.

A real estate agent purchasing from his principal the lands which the latter has listed with him for sale is bound to disclose to the latter that he is the purchaser; and, although the sale may be fair and reasonable in other respects, yet if the vendor has not been made aware that the real purchaser is his agent, such a sale cannot be supported unless the principal chooses to ratify it after knowledge of such fact. [McPherson v. Watt, 3 A.C. 254, 263, followed.]

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 5 A.L.R. 245, 22 W.L.R. 91, 2 W.W.R. 1036, reversing 4 D.L.R. 460.

BREACH OF DUTY—SECRET COMMISSION—FRAUD.

Where an agent employed to make a purchase of property for his principal has taken a secret commission from the vendor the principal is not only entitled to recover from the agent the amount of such commission, but is released from his obligation to pay a commission to the agent, and is entitled to recover the secret commission received by the latter. [See also Andrews v. Ramsay, 72 L.J.K.B. 865; Manitoba & North-West Land Co. v. Davidson, 34 Can. S.C.R. 225, and Hutchison v. Fleming, 40 Can. S.C.R. 134.]

Stapleton v. American Asbestos Co., 6 D.L.R. 340.

FIDUCIARY RELATIONSHIP—RIGHT OF OWNER TO RECOVER AMOUNT REALIZED ON SALE—EXCESS OVER NET PRICE.

A real estate broker with whom the owner of land had listed the same for sale at a

price net to the owner at a certain amount per acre plus the broker's commission at a certain figure per acre, secured, without informing the owner, a purchaser through a third person at a higher price per acre than the net price to the owner plus the owner's commission, and agreed to give the third person such excess for his commission, and was paid a cash price from which he subtracted his commission and the excess over the net price of the whole of the land, the owner of the land sold, in an action brought by her for the balance of the cash payment less the commission she promised the broker, is entitled to recovery.

Cram v. Biehn, 5 D.L.R. 572, 5 S.L.R. 247, 21 W.L.R. 937, 2 W.W.R. 813.

Real estate agent's purchase in own name—Liability to account for profits.

An agent selling land cannot make a profit for himself at the expense of his principal; and so if the agent fraudulently purchases the land himself, and afterwards makes a profit on the resale he is accountable to his principal for the amount of his profit less the commission on such profit.

Miller v. Hand (No. 2), 10 D.L.R. 186, 4 O.W.N. 956, affirming 8 D.L.R. 465, 24 O.W.R. 523.

Real estate brokers—Fiduciary relationship—Broker buying clandestinely from his principal, effect.

Where real estate agents enter into an agreement as agents with the owner of lands to negotiate a sale of the property, and where in such capacity they induce the owner to sell at a reduced price to a third party, who is merely a pretended purchaser and who has no interest in the transaction except to lend his name to the agents, who themselves are the real purchasers, the pretended contract of sale may be repudiated by the vendor on discovering the true facts, by reason of the fraud of the agents for whose benefit the pretended contract was made.

Watts v. Robertson, 9 D.L.R. 375, 23 Man. L.R. 534, 23 W.L.R. 261, 3 W.W.R. 936.

(§ II A—8)—Real estate—Employment of subagents—Onus of proof.

Where the real estate agent suing for commission on a sale of lands completed by him entered into the negotiations as the subagent of another broker with whom the owner had listed the property, and who also laid claim to the commission, the onus of proof is strictly on the former to shew an agreement with the owner whereby he became the latter's agent in substitution for the agent through whom he had been introduced into the transaction. [Great-orex v. Shackle, [1895] 2 Q.B. 249, 64 L.J.Q.B. 634, referred to.]

Morris v. Walton, 18 D.L.R. 655, 24 Man. L.R. 361, 28 W.L.R. 547.

Commission—Real estate agent—Transaction closed by principal—Employment of subagents—Absence of authority or ratification.

Westaway and Greaves v. Close, 7 D.L.R. 849, 21 W.L.R. 582.

Employment of subagent.

The business of selling real estate is one in which the right of an agent to employ another to dispose of the lands listed with him may reasonably be presumed.

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 5 A.L.R. 245, 22 W.L.R. 91, 2 W.W.R. 1036.

B. Compensation.

(§ II B—10)—Sale of land—Agent—Subagent—Commission—Privity of contract.

Gladue v. Walch (Man.), 43 D.L.R. 757, 29 Man. L.R. 226, [1918] 3 W.W.R. 975.

Surplus above amount of sale—Variation of terms.

An agreement, whereby a real estate broker is entitled to the surplus over and above the amount of the sale by way of commissions, does not entitle the broker upon his procuring the purchaser, to claim such commissions from the funds paid by the purchaser to the vendor's agents under terms at variance with the commission agreement.

Chalmers v. Machray, 26 D.L.R. 529, 26 Man. L.R. 105, 33 W.L.R. 656, 9 W.W.R. 1435, reversing 21 D.L.R. 635, 30 W.L.R. 836, 8 W.W.R. 27. [Affirmed, 39 D.L.R. 396, 55 Can. S.C.R. 612.]

Commissions — Agreement — "On any terms whatever" — Remuneration from other party.

Herbert v. Anderson (Man.), 33 D.L.R. 171.

Authority of solicitor to employ agent—Liability of principal—Mistake.

A solicitor, with whom land is placed for sale, has no implied authority to employ a broker to effect the sale, and, if acting under the solicitor's directions, the principal is led to sign a contract of sale containing a promise by the principal to pay the broker his commissions on the sale, without having his attention directed to it, the principal will not be bound by such promise. [Foster v. Mackinnon, L.R. 4 C.P. 704; Lewis v. Clay, 67 L.J.Q.B. 224; Carlisle, &c., Co. v. Bragg, [1911] 1 K.B. 489, followed.]

Rose v. Mahoney, 24 D.L.R. 326, 34 O.L.R. 238.

Default of purchaser.

In the absence of any stipulation to the contrary, a real estate agent is entitled to his commission although the vendor has taken back the property and forfeited the purchaser's rights under the contract of sale for default in paying the second instalment of purchase money. [McCallum v. Russell, 2 S.L.R. 444, followed.]

Rothesay Park Co. v. Montgomery Bros., 22 D.L.R. 677, 8 W.W.R. 205, 31 W.L.R. 8.

Modification of terms by vendor—Effect.

The subsequent alteration, by mutual agreement of the vendor and purchaser, of the terms of payment set forth in their agreement of sale of a leasehold interest in lands, will not deprive the real estate agent who made the sale under vendor's authority, of his right to remuneration or postpone the date of payment of same. [Burchell v. Gowrie, [1910] A.C. 614, referred to.]

Chalmers v. Campbell, 21 D.L.R. 635, 8 W.W.R. 27, 30 W.L.R. 836.

Customary commissions.

In ordinary business transactions where the parties have not settled the salary (remuneration) of the mandatory, the salary, under Quebec law, depends upon the usage of the place where the transaction took place or upon the equitable determination of the judge.

Wright v. The King, 22 D.L.R. 269, 15 Can. Ex. 203.

Real estate broker—Sale—Variation in terms—Commission contract—Right to commission.

Schliefer v. Kaufman, 20 D.L.R. 984, 47 Que. S.C. 145.

Real estate agents — Compensation — Agreement to divide commissions.

Dixon v. Comley, 16 D.L.R. 882, 27 W.L.R. 276.

Real estate — Compensation — Onus of proving contract express or implied.

In order to entitle a real estate broker to a commission there must be proved a contract therefor with the vendor either express or implied; proof that the broker's services were not gratuitous because of an agreement with the buyers whereby they paid half commission if the vendor paid none, tends to negative any presumption arising from acceptance of the service and to establish a defence that the vendor stipulated that he would pay no commission.

Bouthillier v. Des Gagnes, 17 D.L.R. 733, 28 W.L.R. 388.

Compensation — Sale on unauthorized terms.

Where an agent authorized to sell company shares and assets negotiates a sale at the price but upon terms not authorized by his principal as to the limit of liability of the purchasers in case of their default and the terms are not acquiesced in by the principal, the agent is not entitled to the stipulated commission.

Merritt v. Corbould, 19 D.L.R. 585, 28 W.L.R. 456, 6 W.W.R. 1346, affirming 11 D.L.R. 143.

Real estate broker—Commissions under option contract—Default of principal.

Where as part of an agency agreement with a real estate agent, an option contract was given to him stipulating for the payment out of the purchase money of a sum as "commission" in the event of the sale of the property before the expiry of the option, the optionee is entitled to such commission where the owner refused to sell to a person produced by the optionee within the stipulated time, who was able and willing to buy on terms of the option. [Kelly v. Enderton, 9 D.L.R. 472, referred to.]

Booker v. O'Brien (No. 2), 12 D.L.R. 509, 6 S.L.R. 291, 24 W.L.R. 899, 4 W.W.R. 1228, affirming 9 D.L.R. 801.

Compensation of real estate agent—Contingent commission—Net price to owner.

Where land is listed with a real estate agent for sale under a contract of special employment whereby he is to negotiate a sale to net the owner the latter's minimum price over and above the commission, it is the owner's duty to ask from prospective purchasers with whom he may negotiate, a sufficient price to cover both the net price and the commission; but, where the purchaser will not pay more than the net price and there is no collusion between the owner and the purchaser to deprive the agent of his commission, the owner will not be liable for any commission on a sale bona fide closed at the net price, although the purchaser was introduced by the agent. [See Wrenshall v. McCammon, 5 D.L.R. 608.]

Chappell & McKeen v. Peters, 9 D.L.R. 584, 6 S.L.R. 16, 22 W.L.R. 960, 3 W.W.R. 738.

Real estate—Contingent compensation —Resales.

A real estate agent who purchases lands for his principal with a stipulation for commission on such purchase only when the lands shall be resold at a profit either by the purchaser or the agent is not necessarily disentitled by the lapse of time to payment of his commission on the owner himself reselling the same two years later.

Manchester v. Brown, 13 D.L.R. 148, 25 W.L.R. 157.

Compensation of real estate agent.

In an action by a real estate agent for a commission on a sale, it is for the jury to say whether the contract was or was not brought about by the agent by his introduction or intervention; the test is, was the sale brought about in consequence of the introduction and is it traceable thereto; and if it resulted directly from the continuation of the negotiations begun by the agent, the latter is entitled to compensation. [Morson v. Burnside, 31 O.R. 438; Wolf v. Tait, 4 Man. L.R. 59, and Re Beale, Ex p. Durrant (1888), 5 Morrell 37, specially referred to. See also Leake on Contracts, 6th ed., 366, 367; Phipson on Evidence, 5th ed., 75.]

Singer v. Russell, 1 D.L.R. 646, 25 O.L.R. 444, 21 O.W.R. 24.

Of real estate—Right to compensation —Commissions—Failure to procure purchaser within time specified.

An agent is not entitled to his com-

mission where by the term of the contract he was to procure a purchaser by a certain hour of the day, unless the purchaser is brought in within the time fixed; and this is true notwithstanding that the principal later negotiated with the person introduced by the agent after the expiration of the time limit.

Sibbitt v. Carson (No. 2), 8 D.L.R. 791, 27 O.L.R. 237, affirming 5 D.L.R. 193, 26 O.L.R. 585.

REAL ESTATE AGENT'S COMMISSION—LANDS TAKEN AS PART PAYMENT ON AN EXCHANGE OF PROPERTIES.

Where the owner of farm lands authorizes an agent to dispose of them and agrees to pay him the usual commission, and the latter succeeds in bringing about an agreement whereby the lands were taken as part payment in an exchange for city property, the owner of the farm lands is liable to the agent for commission on the sale.

Lewis v. Buckman, 1 D.L.R. 277, 20 W.L.R. 4, 1 W.W.R. 760.

COMPENSATION—EQUAL DIVISION OF PROFITS ON A RESALE—TITLE OR INTEREST IN LAND.

Where a purchaser of land enters into a contract with a real estate agent, whereby the purchaser is to furnish the purchase money less the commission payable to the real estate agent, and the profits on a resale of the property are to be divided equally between them, this does not create a partnership between the parties, and the real estate agent acquires no title or interest in the land in question.

Donough v. Moore, 2 D.L.R. 525, 22 Man. L.R. 79, 20 W.L.R. 334, 1 W.W.R. 845.

COMPENSATION.

The fact that real estate brokers after their employment by the landowner take to themselves an option from the owner to sell to them at the price fixed, does not preclude them from claiming the commission originally agreed upon, if the option was not intended to be in substitution for the previous agreement, but was given for the express purpose of satisfying a prospective purchaser of the agent's right to sell. [For cases on the general law of options, see Hughes's Law of Options, 36 Can. Law Journal 521.]

Nixon v. Dowdle (No. 1), 1 D.L.R. 93, 19 W.L.R. 775, 1 W.W.R. 455. [Reversed on a different point 2 D.L.R. 397, 20 W.L.R. 749, 2 W.W.R. 198.]

PRINCIPAL AND AGENT—SALE OF LAND—AGENT'S COMMISSION—AUTHORITY TO SELL, BUT NOT EXCLUSIVE RIGHT—SALE BY PRINCIPAL WITHOUT NOTICE TO AGENT—SAME PROPERTY SOLD BY AGENT BEFORE NOTICE—RIGHT TO COMMISSION IN RESPECT THEREOF.

Hammans v. McDonald & Co., 4 S.L.R. 320, 19 W.L.R. 741.

PRINCIPAL AND AGENT — COMMISSION ON SALE OF LAND — CONTRACT FOR PAYMENT OF COMMISSION — SALE TO BE WITHIN LIMITED TIME — SALE AFTER TIME BY VENDOR INDEPENDENTLY OF AGENT—QUANTUM MERUIT—RIGHT OF AGENT TO RECOVER UPON.

Blackstock v. Bell, 4 S.L.R. 458, 16 W.L.R. 363.

A claim for the value of services rendered as agent in buying and selling land does not come under the law relating to summary procedure. The plaintiff in such case will be allowed to amend on payment of the costs of the exception to the form.

Lamaire v. Charbonneau, 14 Que. P.R. 60.

PRINCIPAL AND AGENT—SALE OF MINERAL CLAIMS — COMMISSION ON — OPTION — CONTRACT — SUBSTITUTED CONTRACT — ERASURES IN DOCUMENT—EVIDENCE AS TO—INADMISSIBILITY.

Beveridge v. Awaya Ikeda & Company, 16 B.C.R. 474, 17 W.W.R. 674.

AGENT'S COMMISSION ON SALE OF LAND—OPTION FOR LIMITED TIME—EXPIRY OF OPTION — SUBSEQUENT SALE TO PURCHASER FOUND BY AGENT.

Hubbard v. Gage, 4 O.W.N. 901, 24 O.W.R. 184.

REAL ESTATE AGENT — COMMISSIONS — RIGHT TO—NEW CONDITIONS BY PRINCIPAL—CIVIL CODE ARTICLE 1534.

An owner who gives a real estate agent an option to sell his property cannot, after the latter has made a sale, insert in the deed of sale clauses which were not in the option, such as to pay interest on the balance of the unpaid purchase money; and, if the purchaser refuses to sign the deed so drawn, the agent has, nevertheless, a right to his commission. 2. An option of sale of real estate for $1,000 cash, $2,500 in a year, and the balance in 2 years, does not require payment of interest on the balance of the purchase money.

Merineau v. Viau, 46 Que. S.C. 197.

REAL ESTATE BROKERS—COMMISSION ON EXCHANGE OF LANDS—CLAIM FROM BOTH PARTIES—CUSTOM OF LAND BROKERS.

Unless in exceptional cases, where both parties are aware that a double commission is charged and agree to it, an agent is not entitled to commission from both vendor and purchaser, as he must not place himself in a position causing a conflict between duty and interest; and this principle applies to an exchange of lands. [Thordarson v. Jones and Thordarson v. Heal, 17 Man. L.R. 295, distinguished.] The plaintiff's claim to be paid a commission by the defendants, to whom he brought a proposal for exchange of lands from two other persons, his principals, which was carried out, was denied. If a rule of the local association of land brokers or a custom by which a land broker was entitled to a commission from both parties to an exchange could be

shewn, it was in contravention of the general law, and therefore bad.

Bradley v. Coaffee, 28 W.L.R. 520.

COMMISSION ON SALE OF REAL ESTATE—SALE BY PROPRIETOR AT A PRICE BELOW.

One who instructs an agent or real estate broker to sell a property at a fixed price, in consideration of a commission of 2½ per cent within a period of three months, or afterwards "as long as he does not give him written notice to the contrary;" and who, after being put in touch with a purchaser, by the agent within 3 months, agrees to a sale to such purchaser after the three months at a price less than that fixed, but without having given any notice to the agent, owes the latter the commission on the sale price, at the amount agreed upon.

Leclerc v. Fissiault, 45 Que. S.C. 182.

REAL ESTATE BROKER—COMMISSION—CONTINGENT OFFER TO PURCHASE—AGREEMENT—COMPLETION OF SALE.

When it is agreed between an owner and a real estate agent that the latter's commission shall consist of the surplus over the fixed price of sale, and that it shall be payable out of the first moneys received from the price of sale, the agent has no recourse against the owner if the purchaser refuses to carry out the contract of sale. Although, as a rule, a sale is completed solely by the agreement of the parties, nevertheless, in a case in which the parties manifest their intention that the agreement appearing from the informal documents is to be followed by a notarial deed, upon the usual conditions, the sale is not complete and the property is not transferred until the execution of such deed.

Petit v. Lussier, 46 Que. S.C. 195.

AGENT'S COMMISSION ON SALES OF LAND—PAYMENTS — DEDUCTIONS — ACCOUNT —REFERENCE—INDULGENCE—COSTS.

Grills v. Canadian Securities Co., 7 O.W.N. 546.

REAL ESTATE BROKERS—PRINCIPAL AND AGENT—AGENT'S COMMISSION ON SALE OF LAND — AGREEMENT — EVIDENCE —FAILURE OF CLAIM FOR COMMISSION —COSTS.

Hunt v. Emerson, 7 O.W.N. 15, 26 O.W.R. 789

SALE OF LAND—COMMISSION—RIGHT OF AGENT TO.

Appeal from the Court of Appeal for British Columbia, which dismissed an appeal by defendant from the trial judgment of Morrison, J., in favour of plaintiff upon a verdict of a jury in an action for a commission on a sale of land. The Supreme Court of Canada unanimously dismissed the present appeal with costs.

Tucker v. Massey, 5 W.W.R. 1227.

PRINCIPAL AND AGENT—AGENT'S COMMISSION ON SALE OF LAND.

Shorey v. Powell, 7 O.W.N. 44, 26 O.W.R. 807.

COMMISSION ON SALE OF REAL ESTATE—CUSTOM—QUE. C.C. 1722.

It is the custom that a real estate agent who sells a property has a right to a commission of 2½ per cent, payable by the vendor, unless there is a stipulation to the contrary.

Raymond v. Marcotte, 46 Que. S.C. 384.

OPTIONS—SUFFICIENCY OF ACCEPTANCE.

A document, which states that an owner sells his property to a real estate agent on the conditions mentioned in it and ends by a promise to pay to the agent a commission of 5 per cent upon the price of sale which he, the vendor, will accept, is not a sale in view of nonacceptance by the purchaser as the delivery of this document to the real estate agent cannot be considered a sufficient acceptance. In any case the agent can claim from the owner his commission for having found a purchaser on the vendor's conditions only by tending the portion of the price of sale payable in cash.

Langevin v. Duval, 47 Que. S.C. 511.

AGENT PROCURING OPTION—SALE TO ANOTHER.

Although a person who instructs a real estate agent to sell his property is obliged to pay him the usual commission even without a provision therefor if the agent succeeds in finding a purchaser, such commission is not due when the agent obtains an option for some days at a fixed price without commission and after the expiration of the time the owner sells to another purchaser even introduced by the agent. The reason is that in such case the owner never employed the agent to sell his immovable.

Peasant v. Garrett, 24 Que. K.B. 335.

AGENT'S COMMISSION ON SALE OF LANDS—TIME LIMIT—PURCHASER SECURED BUT OPTION NOT ACCEPTED WITHIN.

Meikle v. McRae, 3 O.W.N. 206, 20 O.W.R. 308.

AGREEMENT FOR SALE OF LAND—DEPOSIT PAID TO AGENT—AGENT EXCEEDING AUTHORITY — ACTION BY PURCHASER AGAINST AGENT FOR RETURN OF MONEY PAID.

McManus v. Porter, 3 S.L.R. 335.

AGENT'S COMMISSION ON EXCHANGE OF PROPERTIES—WRITTEN MEMORANDUM—AGENT NOT NAMED.

MacLeod v. Peterson, 18 W.L.R. 162 (Alta.).

AGENT'S COMMISSION ON SALE OF LAND—AGREEMENT AS TO PARCELS SOLD BY PRINCIPAL.

Hammans v. McDonald, 19 W.L.R. 741 (Sask.).

AGENT'S COMMISSION ON SALE OF MINING PROPERTIES.

Ruthrauff v. Black, 19 W.L.R. 437 (B.C.).

AGENT'S COMMISSION ON SALE OF LAND—SALE NOT BROUGHT ABOUT BY AGENT.

Dicker v. Willoughby Sumner Co., 19 W.L.R. 142 (Sask.).

AGENT'S COMMISSION ON EXCHANGE OF LANDS —QUANTUM MERUIT.

Barteaux v. McLeod, 19 W.L.R. 138 (Man.).

AGENT'S COMMISSION ON SALE OF LAND—AMOUNT OF COMMISSION—NET PRICE OF LAND.

Cunningham v. Hall, 17 W.L.R. 497 (B.C.).

AGENT'S COMMISSION ON SALE OF LAND—SALE MADE BY PRINCIPAL AFTER TERMINATION OF AGENCY — RELATIONSHIP BROUGHT ABOUT BY AGENT.

Blackstock v. Bell, 16 W.L.R. 363 (Sask.).

AGENT'S COMMISSION ON SALE OF LAND—SPECIAL CONTRACT—NONPERFORMANCE.

Counsill v. Devine, 16 W.L.R. 675 (Man.).

AGENT'S COMMISSION ON SALE OF MINERAL CLAIMS — OPTION — SUBSTITUTED CONTRACT.

Beveridge v. Awaya Ikeda & Co., 17 W.L.R. 674, 16 B.C.R. 474.

AGENT'S COMMISSION ON EXCHANGE OF PROPERTIES—MISREPRESENTATIONS BY AGENT—REVOCATION OF AUTHORITY—JUSTIFICATION.

Northern Colonization Agency v. McIntyre, 17 W.L.R. 270 (Sask.).

BROKER'S COMMISSION—BREACH OF DUTY TO PRINCIPAL—EXCHANGE OF LANDS WITH AGENT.

Onsum v. Hunt, 2 A.L.R. 480.

CLAIM FOR WORK DONE BEFORE REVOCATION —COMMISSION ON SALE OF LAND — QUANTUM MERUIT.

Aldous v. Grundy, 21 Man. L.R. 559.

COMMISSION ON SALE OF REAL PROPERTY—CONTRACT—CONSTRUCTION—EVIDENCE.

McCallum v. Williams, 9 E.L.R. 141, affirming 8 E.L.R. 376.

COMMISSION—QUANTUM MERUIT—CONVEYANCERS ACT—ILLEGAL AGREEMENT.

McMillan v. Barratt, 16 W.L.R. 209, (Man.).

COMMISSION ON SALE OF LAND—SALE BY OTHER AGENTS.

Robins v. Hees, 2 O.W.N. 938, 18 O.W.R. 894.

COMMISSION—PROCURING PURCHASER—NET PRICE.

Rowlands v. Langley, 16 B.C.R. 72, 17 W.L.R. 443.

COMMISSION ON SALE OF LAND—PURCHASER INTRODUCED BY AGENT—SALE CONCLUDED BY OTHER AGENTS.

Sager v. Sheffer, 2 O.W.N. 671, 18 O.W.R. 485.

CONTRACT FOR SALE OF LAND—AUTHORITY OF AGENT OF VENDOR TO MAKE—RECEIPT SIGNED BY AGENT IN HIS OWN NAME—NAME OF PRINCIPAL NOT DISCLOSED.

Maybury v. O'Brien, 25 O.L.R. 229, 20 O.W.R. 683.

INTRODUCTION OF PURCHASER — EFFICIENT CAUSE OF SALE—COMPLETION OF CONTRACT BY OWNER ON ALTERED TERMS.

Stratton v. Vachon, 44 Can. S.C.R. 395.

LISTING — NET PRICE — COMMISSION — CHANGE IN TERMS.

Holmes v. Lee Ho and Lou Poy, 16 B.C.R. 66, 15 W.L.R. 226.

POWER TO SELL ON COMMISSION WITHIN A DELAY—PURCHASER FOUND WITHIN, BUT SALE ONLY EFFECTED AFTER THE DELAY.

Massicotte v. Lavoie, 40 Que. S.C. 258.

REAL ESTATE AGENT—VENDOR'S AGENT BECOMING PURCHASER.

Calgary Realty Co. v. Reid, 19 W.L.R. 649, 4 A.L.R. 4.

REAL ESTATE AGENT—COMMISSION.

Gross Real Estate Agency v. Racicot, 20 Que. K.B. 394.

REAL ESTATE BROKER—AUTHORITY TO SIGN CONTRACT.

Standard Realty Co. v. Nicholson, 24 O.L.R. 46, 19 O.W.R. 373.

REAL ESTATE AGENT—FINDING A PURCHASER — COMMISSION — WHEN EARNED — EXCLUSIVE AGENT.

Robins v. Hees, 19 O.W.R. 277, 2 O.W.N. 1150.

REAL ESTATE AGENTS—PRACTICE IN COLLECTING RENTS—CUSTOM NOT PROVED.

The Toronto General Trusts Co. v. Robins, 19 O.W.R. 212, 2 O.W.N. 1023.

SALE OF BUSINESS — COMMISSION — QUANTUM MERUIT.

Cronk v. Carman, 19 O.W.R. 145, 2 O.W.N. 1027.

SALE OF LAND—LISTING FOR TIME CERTAIN — UNDERTAKING TO GIVE NOTICE OF WITHDRAWAL—PROPERTY SOLD BY OWNER—SUBSEQUENT SALE BY AGENT.

Goddard v. Elliott, 16 B.C.R. 379.

SALE OF LAND BY REAL ESTATE AGENT—COMMISSION — PURCHASER REFUSING TO CARRY OUT CONTRACT.

Hunt v. Moore, 19 O.W.R. 73, 2 O.W.N. 1017.

SALE OF LAND—AGENT ACTING FOR PURCHASER AS WELL AS VENDOR—NONDISCLOSURE —FRAUD.

Wolfson v. Oldfield, 18 W.L.R. 449 (Man.).

SALE OF LAND — COMMISSION "WHENEVER SALE TAKES PLACE."

McCallum v. Williams, 44 N.S.R. 508.

SALE OF LAND—SECRET PROFIT BY REAL ESTATE BROKER—IMPLIED PARTNERSHIP —LIABILITY TO ACCOUNT.

Coy v. Pommerenke, 44 Can. S.C.R. 543.

(II B—11)—VENDOR ACTING AS PURCHASER'S AGENT—SHARE OF PROFITS.

Where in an agreement for the sale of land by the plaintiff to the defendant, the former agreed to act as agent in its sale, and to subdivide it into lots and advertise them for sale, for which he should receive one-half of the net profits from the sale

thereof after repaying to the defendant the purchase money, and where, on the failure of the plaintiff to perform such covenant the defendant did not terminate his agency in the manner required by the agreement, nor proceed to do what the plaintiff should have done, but sold the land en bloc without any subdivision into lots, the plaintiff is entitled in the absence of any provision to the contrary in the agreement, to the agreed proportion of the profits obtained by the sale en bloc.

Cruikshank and Brien v. Irving, 6 D.L.R. 237, 4 A.L.R. 348, 21 W.L.R. 172, 2 W.W.R. 134.

COMPENSATION—ACTING AS AGENT FOR PURCHASER—NONDISCLOSURE THAT HE WAS MEMBER OF FIRM PURCHASING.

A firm of real estate brokers is not entitled to a commission from a vendor for securing a purchaser for land, who was, without the fact being disclosed to the vendor, a member of such firm and bought the land for its benefit.

Edgar v. Caskey, 4 D.L.R. 460, 5 A.L.R. 245, 21 W.L.R. 444, 2 W.W.R. 245.

REAL ESTATE AGENT — COMPENSATION CLAIMED AGAINST BOTH PARTIES.

A real estate agent employed by a prospective purchaser for the purpose of buying a property is not, in the absence of a special contract to that effect, entitled, after the sale has been concluded, to claim a commission on the purchase price from the vendor who did not retain his services, any custom obtaining amongst real estate brokers notwithstanding. [Carroll v. O'Shea, 18 N.Y. Supp. 146, approved.]

Lemieux v. Seminary of St. Sulpice, 3 D.L.R. 639.

ACTING FOR BOTH PARTIES—COMPENSATION FROM BOTH—COLLUSION.

If a real estate agent entrusted to find a purchaser of property directly or indirectly colludes with the purchaser and so acts in opposition to the interests of the principal, he is not entitled to any commission. [Andrews v. Ramsay [1903] 2 K.B. 635, applied; see also vol. 1, Halsbury's Laws of England, p. 196, sec. 416.]

Canadian Financiers, v. Hong Wo, 1 D.L.R. 38, 17 B.C.R. 8, 19 W.L.R. 843, 1 W.W.R. 677.

REAL ESTATE AGENTS—COMPENSATION—COLLUSION—FIDUCIARY RELATIONSHIP.

A real estate agent is not entitled to commission on an alleged sale of his principal's land to a salesman in the agent's own office, holding, moreover, a close relationship with the agent, where the alleged purchaser's position was not disclosed to the principal and the latter on learning thereof repudiated the agreement.

Arnold v. Drew, 11 D.L.R. 72, 24 W.L.R. 51, 4 W.W.R. 435.

FORMALITIES OF CONTRACT FOR COMMISSION —WRITING REQUIRED BY STATUTE (ALTA.)

The signed memorandum essential in Alberta in a contract for commission to a real estate broker (6 Edw. VII., Alta., c. 27) must be one to which the sale relied upon is referable; and the statutory requirement is not satisfied by the production of a written authority to the real estate broker to sell as one parcel a section and a half section of land for cash for a stipulated price, and to pay thereupon five per cent commission, when the contract made by the principal with the customer whom the broker had introduced, was an essentially different transaction not including the half section and accepting other lands in exchange for the section as part payment therefor, although the stipulated price for the section on the exchange was at a rate per acre higher than the rate per acre at which the broker had been authorized to sell the "section and a half" of land. [Herron v. Como, 9 D.L.R. 381, 23 W.L.R. 328, reversed.]

Como v. Herron, 16 D.L.R. 234, 49 Can. S.C.R. 1, 5 W.W.R. 662 and 678, 27 W.L.R. 165, reversing 9 D.L.R. 381.

[Leave to appeal to P.C. refused, March 20, 1914.]

AGENT ACTING FOR BOTH PARTIES.

The general rule is that a real estate agent cannot at the same time represent the vendor and the purchaser, but there are exceptions to this principle. Thus when a party gives a mandate to a person whom he knows to be agent of the party with whom he may enter into a contract, he cannot afterwards raise the objection that this agent is unable to act for both of them. The real estate agent is entitled to his commission even when there has been no sale if it failed from the fact that the property to have been sold was not in a condition provided for by the parties, so much so that either of them may properly refuse to carry out the agreement, for instance, in the case of the sale of a licensed hotel if the transfer of the license cannot be obtained.

Lamarre v. Clairmont, 48 Que. S.C. 461.

The defendant, agreed with the plaintiffs, land agents, that they should endeavour to procure a purchaser for his land at $45,000 before the end of September, and to leave it in their hands for that purpose until that time, and to pay them the regular commission if they did procure a purchaser. The plaintiff's spent time and money in advertising and in bringing the property to the notice of probable purchasers. The defendant on the 27th September revoked the plaintiff's authority; but before that the plaintiffs had introduced the property to M., who was able to buy it at the price and on the terms mentioned. M., before the revocation, had made up his mind to buy the property and had told the plaintiffs' manager that he believed he would buy it, and requested him to call again, and the manager understood that M. intended to buy, but he had not definitely agreed to do so before the revocation. After the revocation, later on the same day, M. definitely agreed to buy and gave the plaintiffs a cheque

for $500 as a deposit on the purchase, and was at that time ready, able and willing to complete the purchase at the price and on the terms mentioned, within the time limited by the defendant. It was held, that the plaintiffs were entitled to a quantum meruit on the basis of compensation for services, fixed at one-half the regular commission. Aldous v. Swanson, 20 Man. L.R. 101, 21 Man. L.R. 559, followed. The judgment of Mathers, C.J.K.B., 17 W.L.R. 230, was affirmed on appeal.]

Aldous v. Grundy, 20 W.L.R. 550.

PROOF OF AUTHORITY—ACTING FOR BOTH PARTIES.

A real estate agent cannot claim a commission for the sale of a grocery without proving his mandate. Any doubt should be interpreted against him. An agent who wishes to act for both contracting parties should obtain a formal mandate from each of them.

Caron v. Fagnan, 51 Que. S.C. 543.

(§ II B—12)—SUFFICIENCY OF SERVICE—CONDITIONAL SALE.

A broker is only entitled to commission if he carries out the terms of his employment in their entirety. An action for commission for the sale of a chattel is therefore premature if the sale is subject to a condition which has not been complied with at the time the action is brought.

Greer v. Godson, 40 D.L.R. 218, 25 B.C.R. 229.

LOAN—POWERS OF CORPORATE OFFICER—CONDITION OF PROPERTY.

The principle that a real estate agent has a right to his commission when he had found a purchaser, and that it was the vendor's fault that the sale was not made, applies equally to a loan. So, an agent can claim his commission if the loan was not made because the lender discovered that the property offered in guarantee was likely to become enclosed, and that the borrower could not succeed in getting rid of such impediment. The borrower, in such case, is liable for the commissions, even if the mandate contained the words "no commission to be paid until the amount of the loan is received." The secretary-treasurer of a company authorized by it to borrow has power to stipulate that the real estate agent employed to find the money shall have the right to a commission. A purchaser or a lender has a right to count upon the apparent condition of the property offered for sale or guarantee; and if the actual condition of the property is different he may refuse to carry out the contract.

Regent Construction Co. v. Johnson, 24 Rev. Leg. 328.

SALE BY OWNER—REVOCATION OF AUTHORITY—DAMAGES—PAROL EVIDENCE.

One who gives a real estate agent a mandate to sell his property without limiting the time, but for a fixed price and for a commission, reserving the right to sell it himself, who in fact does sell the property, thereby tacitly revokes the mandate which he had given to his agent. In such case the agent cannot claim the commissions, but he has a right to damages he has sustained if the revocation was not warranted. In order to get damages, the agent must prove that he had actually found a purchaser. A mandate to a real estate agent for the sale of a property cannot be proved by witnesses without commencement of proof in writing. Such commencement of proof exists, when the principal so sued pleads admitting the mandate but maintaining that it had been agreed that if sale was not made by the agent he had no right to commissions.

Caron v. Couture, 24 Rev. Leg. 44.

SUFFICIENCY OF BROKER'S SERVICES.

In an action by the plaintiff as real estate agent for commission for alleged sale of lands setting up a written authority to them from the owner with a provision worded as follows:—"In case you find such a purchaser, or in case you bring the property directly or indirectly to the attention of any one who becomes a purchaser upon any terms whatsoever, you are to be paid by me a commission of five per cent;" such a provision means that the agents must bring the property, directly or indirectly, to the attention of some person who shall thereby become a purchaser; and where the plaintiffs actually brought the property to the attention of a third party who, however, did not thereupon agree to buy, but on the contrary gave up all idea of buying, yet subsequently took the matter up afresh with another agent and purchased, the plaintiffs, as a matter of law, had nothing to do with effecting such sale and are not entitled to any commission.

Herbert et al. v. Bell ("The Locators" v. Bell), 8 D.L.R. 763, 6 S.L.R. 10, 22 W.L.R. 884, 3 W.W.R. 608.

SUFFICIENCY OF SERVICES—OPTION.

An agreement taking an option is not a sale, since the proposed purchaser need not express his readiness to buy until the period given by the option has expired; until that time when the purchaser actually binds himself as such a real estate agent cannot say he has found a purchaser ready and willing to buy, so as to be able to claim his commission.

Huff v. Maxwell, 27 D.L.R. 400, 9 A.L.R. 458, 10 W.W.R. 214.

CHARTER PARTY—PROCURING CAUSE.

A ship broker employed to procure a charter party, has earned his commission when, having brought the parties together, an agreement to charter has resulted. The fact that the shipowner succeeded in procuring a slightly better rate than the broker does not justify an inference that the broker was not the efficient cause in procuring the charter party. [Burchell v. Gowrie, [1910] A.C. 625; Austin v. Can. Fire Engine Co., 42 N.S.R. 77, followed. See also Chalmers v. Machray (Man.), 26

D.L.R. 529; Powell v. Montgomery (Sask.), 23 D.L.R. 213; Kennerley v. Hextall (Alta.), 24 D.L.R. 418; Whyte v. National Paper Co. (Can.), 23 D.L.R. 180; Cyr v. Lecours, 47 Que. S.C. 86; Jacques v. Leonard, 47 Que. S.C. 344].

Backman v. Ritcey, 28 D.L.R. 485, 50 N. S.R. 80.

COMMISSIONS—PROCURING CAUSE OF SALE—ANOTHER AGENT.

Gamble v. Excelsior Life Ass'ce Co. (Sask.), 36 D.L.R. 592.

COMMISSIONS—SUFFICIENCY OF SERVICES—DISTINCTION BETWEEN PROCURING LOAN AND AGREEMENT TO LEND.

Johnson v. Regent Construction Co. (Que.), 37 D.L.R. 790, 23 Rev. de Jur. 575.

SUFFICIENCY OF SERVICE—CANCELLED SALES.

A stipulation in an agreement authorizing an agent to retain the commissions owing and due him of each sale out of the instalments collected from the purchaser, but that he was to collect the various instalments without further charge, entitles the agent to his full commissions on each sale approved by the principal, notwithstanding its subsequent cancellation in consequence of the default of the purchaser in the payment of instalments.

Powell v. Montgomery, 23 D.L.R. 213, 8 S.L.R. 224, 21 W.L.R. 759.

EXCHANGE OF LANDS—SUFFICIENCY OF SERVICES.

A real estate broker negotiating an exchange of lands for his customer is in no better position to claim that he procured a party ready, able and willing to exchange on the authorized terms than he would have been if the sale had been for a fixed price which the purchaser was unable to pay, if the proposed exchange fell through because the other party to it was not able to give what he had agreed to give in exchange for the property of such customer, nor was any exchange effected or finally agreed upon by the document which the defendant signed.

Business Brokers v. Diner, 22 D.L.R. 305, 25 Man. L.R. 471, 31 W.L.R. 455.

REAL ESTATE BROKERS — COMMISSION — WRITTEN MEMORANDUM.

The written memorandum which, by Alberta Statutes, 6 Edw. VII. c. 27, is necessary to support an action for a real estate agent's commission may consist of the owner's written offer to the agent to sell at a higher price than that which was eventually accepted, to which offer there was added an agreement to pay the agent a fixed percentage on the "purchase-price" by way of commission; such result will follow if the conduct of the parties shews that the words "purchase-price," as used in the offer, had not sole reference to the price mentioned in the offer, but related to that or any other sum which the owner might accept; the conduct of the parties in such case settling any doubt or ambiguity as to whether there was a mere option at the stated price, or a general retainer to sell. [Toulmin v. Millar, 58 L.T. 96, and Burchell v. Gowrie, [1910] A.C. 614, referred to.]

Howard v. George, 16 D.L.R. 468, 49 Can. S.C.R. 75, 5 W.W.R. 1152, 27 W.L.R. 425, affirming 4 D.L.R. 257, 10 D.L.R. 498.

REAL ESTATE BROKERS — SUFFICIENCY OF BROKER'S SERVICES — PROCURING CAUSE —COMPENSATION.

When a proprietor with the view of selling his estate goes to an agent and requests him to find a purchaser, naming at the same time the sum which he is willing to accept, that will constitute a general employment; and should the estate be eventually sold to a purchaser introduced by the agent, the latter will be entitled to his commission, although the price paid should be less than the sum named at the time the employment was given. [Toulmin v. Millar, 58 L.T.R. 96; Burchell v. Gowrie, [1910] A.C. 614; Stratton v. Vachon, 44 Can. S.C.R. 395; McBrayne v. Imperial, 28 O.L.R. 653; Stewart v. Henderson, 30 O.L.R. 447, applied.]

Hunt v. Emerson, 20 D.L.R. 381.

REAL ESTATE — COMPENSATION — SUFFICIENCY OF BROKER'S SERVICES—SALE BY OWNER.

Where a real estate agent's commission on "all lands" sold within a specific subdivision during the continuance of his contract, is stipulated to be payable upon certain services and expenses by him promoting the sale, whether the lands be sold "by the agent, by the owner, or by any other person"; a sale in block by the owner to a corporation for a price fixed by him substantially all of which is paid in corporation stock, is basis for the commission, the services and outlay by the agent being established. [See also Kennerley v. Hextall, 9 D.L.R. 609, as to premature action.]

Kennerley v. Hextall, 18 D.L.R. 375, 7 A.L.R. 469.

REAL ESTATE—LISTING OF WIFE'S PROPERTY AUTHORIZED BY HUSBAND — WIFE'S REFUSAL TO SELL WHEN PURCHASER FOUND.

Fraser v. Lande, 19 D.L.R. 886.

REAL ESTATE — COMPENSATION — SUFFICIENCY OF BROKER'S SERVICES.

That a real estate agent, authorized by the owner to find a purchaser, but not having the exclusive agency, had introduced the property first to the eventual buyer, who had then declined to negotiate for it, will not entitle the agent to any compensation or commission on a sale being later effected through another agent if what the first agent did was not the efficient cause of the sale, nor was the fact of such introduction by him notified to his principal until after the sale had been effected through the other agent.

Astley v. Garnett, 20 D.L.R. 457, 7 W.W. R. 538, 20 B.C.R. 526, 29 W.L.R. 796.

Real estate—Participation in fraud on land laws—Effect on claim for services.

Where persons are employed to make applications under the B.C. Land Act, 8 Edw. VII. (B.C.) c. 30, ss. 34 and 36, for the purchase by each in his own name of a tract of public land in British Columbia, allotted under settlement conditions as to improving the same before a Crown grant would be obtainable, and it is the purpose of the arrangement that they should hold the lands for the benefit of the employer until sold by him and thereby enable him to evade the statutory provision limiting purchases under such statutory provision to one tract for each person, an agreement entered into by parties to the original scheme for the purpose of carrying out the fraud upon the Land Act, is unenforeable; and this applies to nullify, as tainted with the illegality of the scheme as a whole, an alleged agreement by such employer to pay the person who had previously acted as his agent in getting nominees to apply for the lands, an additional compensation for his services in securing purchasers. [Followed in Clark v. Swan, 16 D.L.R. 382.]

Brownlee v. MacIntosh, 15 D.L.R. 871, 48 Can. S.C.R. 588, 26 W.L.R. 906, 5 W.W.R. 1137, affirming 9 D.L.R. 400.

Real estate — Compensation — Sufficiency of broker's services—Special agency contract — Quantum meruit, when.

Where the defendant purchases certain lands through the plaintiffs for the disclosed purpose of reselling at a profit, listing the property for resale with the plaintiffs as his exclusive real estate agents for a fixed period at a fixed minimum price on a special contract for commission and expenses; and where the plaintiffs, pursuant to and during the period of the agency contract, expend time and money in efforts to make a sale, including the transportation charges in taking a proposed purchaser on a trip of inspection to the lands; and where later, while the agency contract is still in force, the owner, through another agent, effects a sale at the minimum price, the plaintiffs are entitled to recover upon a quantum meruit for their services, and are not limited to the actual value of the time given or the moneys expended, but are entitled to a substantial sum to be fixed by regard being had to the defendant's profit from the transaction. [Aldous v. Swanson, 14 W.L.R. 186, and Aldous v. Grundy, 17 W.L.R. 230, applied.]

Balfour & Broadfoot v. Calderwood, 9 D.L.R. 397, 6 S.L.R. 14, 22 W.L.R. 957, 3 W.W.R. 750.

Real estate agents—Sale of part ratified by principal.

A real estate agent authorized to sell acreage land in one lot at a price not less than a fixed minimum per acre will be entitled, unless the contract of agency provides to the contrary, to recover commission at the stipulated rate upon a sale of a part of the land at a higher acreage rate made through him and accepted by his principal.

Herron v. Como, 9 D.L.R. 381, 23 W.L.R. 328, 3 W.W.R. 923.

Sufficiency of broker's services.

Where property is listed with a real estate agent for sale, with a stipulation that the sale was to net the owner a certain price per acre, and the agent's commission was to be a certain price per acre above the net price, the employment is a special one and the sale must be made above the stipulated net price in order to entitle the agent to a commission. [Wrenshall v. McCammon, 5 D.L.R. 608, considered; Rowlands v. Langley, 17 W.L.R. 443; Stratton v. Vachon, 44 Can. S.C.R. 395, distinguished.] Where the employment of the real estate broker by the owner is a general one as distinguishd from a special employment, and a minimum price is fixed for a certain period with a proviso for notice thereafter of withdrawal from sale or of increase or decrease in price, the broker will be entitled to commission at the stipulated rate per acre although the selling price finally agreed upon between the owner and the purchaser whom the agent procured is less than the price named to the agent as the lowest at which he might sell. [Burchell v. Gowrie & Blockhouse Collieries, [1910] A.C. 614, followed.] If an agent employed to sell real estate has a special employment as distinguished from a general employment, he is entitled to commission only when he brings himself within the terms of the special employment. [Monro v. Beischel, 1 S.L.R. 238, followed.]

Chappell & McKeen v. Peters, 9 D.L.R. 584, 6 S.L.R. 16, 22 W.L.R. 960, 3 W.W.R. 738.

Compensation — What constitutes "ready, willing and able"—Failure by lessee to consummate sale of unexpired lease.

Herbert v. Vivian (No. 2), 11 D.L.R. 839, 23 Man. L.R. 525, 24 W.L.R. 803, 4 W.W.R. 891, affirming 8 D.L.R. 340.

Real estate — Compensation — Negotiations without principal's knowledge, when sufficient.

The right of a real estate agent to commissions for procuring a customer for his principal is not dependent upon the knowledge of the principal that the agent was the means of bringing the parties together, if as a matter of fact the agent was the efficient cause of the sale, and asserted his rights to the commissions promptly. [Stratton v. Vachon, 44 Can. S.C.R. 395, applied; Spenard v. Rutledge (No. 1), 5 D.L.R. 649, reversed.] A real estate agent employed to procure a customer, and whose acts in bringing the buyer and seller together were the effective cause of the sale, is entitled to the commission, although the

sale was finally completed through another agent whom the prospective customer had brought in under a scheme to deprive the real agent of his commission, the real agent acting promptly in claiming the commission from the seller before it was paid over to the other agent. [Stratton v. Vachon, 44 Can. S.C.R. 395; and Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614, applied; Spenard v. Rutledge (No. 1), 9 D.L.R. 649, reversed.]

Spenard v. Rutledge (No. 2.), 10 D.L.R. 682, 23 Man. L.R. 47, 23 W.L.R. 623, 3 W.W.R. 1088.

Real estate—Relinquishment of rights —Commission—Payment of purchase price.

An agreement by an agent, who has become entitled to commission for the sale of land and who has been paid part of it, that he waives all claim for the balance of his commission in the event the second instalment is not paid by the purchaser on the due date, does not amount to a waiver of the agent's contractual rights unless there is a consideration to support such an agreement.

DeSalis v. Jones, 11 D.L.R. 228, 24 W.L.R. 65, 4 W.W.R. 522.

Right to commission—Half interest in real estate.

A contract by defendants to pay plaintiff a broker's commission on all such sales respecting a townsite owned by defendants as should be effected through his introductions, does not limit the right to commission to sales of lots made to a company in contemplation as prospective purchasers when the contract was made, and entitles plaintiff to a commission on an accepted sale of an undivided half interest in the townsite made through his introduction, especially where all the initial transactions negotiated were merged into the final sale. [Burchell v. Gowrie & Blockhouse Collieries, [1910] A.C. 614, and Stratton v. Vachon, 44 Can. S.C.R. 395, distinguished.]

Tucker v. Massey, 11 D.L.R. 309, 18 B.C. R. 250, 24 W.L.R. 296, 4 W.W.R. 755. [Affirmed, 5 W.W.R. 1227.]

Real estate agents — Sufficiency of services.

Impett v. Ives, 11 D.L.R. 857, 24 W.L.R. 345.

Agent's commission on sale of land— Introduction of purchaser by agent —Purchase from principal of a different property from that which agent employed to sell.

Moody v. Kettle, 11 D.L.R. 844, 4 O.W.N. 1410, 24 O.W.R. 676.

Compensation—Sufficiency of broker's services—Introducing to client person forming company to purchase.

A broker, who introduces a prospective purchaser to his client is entitled to a commission on a sale being subsequently made by the latter to a company which such prospective purchaser assisted in forming as he intended doing when introduced to the client, although the company was organized on different lines than had been originally planned, where no person other than the broker assisted in bringing about the sale. [Burchell v. Gowrie & Blockhouse Collieries, [1910] A.C. 614; Stratton v. Vachon, 44 Can. S.C.R. 395, and Imrie v. Wilson, 3 D.L.R. 826, 883, 3 O.W.N. 1145, 1378, followed; Robins v. Hees, 2 O.W.N. 938, 1150, and Travis v. Coates, 5 D.L.R. 807, 27 O.L.R. 63, distinguished.]

McBrayne v. Imperial Loan Co., 13 D.L.R. 448, 28 O.L.R. 653.

Sufficiency of brokers' services — Evidence.

Chapman v. McWhinney, 9 D.L.R. 872, 4 O.W.N. 699, 24 O.W.R. 189, varying 4 O.W.N. 417.

Agent's commission on sale of land.

An introduction by an agent for the sale of land of one who does not in fact purchase the land, but himself introduces a purchaser to the owner, though it may be a causa sine qua non, is not the causea causans of the sale, and the agent is not entitled to commission. [Stratton v. Vachon, 44 Can. S.C.R. 395, distinguished. See also Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614.]

Imrie v. Wilson, 3 D.L.R. 826, 3 O.W.N. 1145, 21 O.W.R. 962.

Real estate agent—Lower price accepted by principal after agent's refusal.

Where there has been an oral contract of employment of the real estate agent by the owner without a limitation of time, or stipulation of the price to be obtained other than that the agent shall obtain a satisfactory offer, the owner must pay the agent's remuneration in respect of a sale which the owner makes directly to the prospective purchaser at a price which the latter has offered the agent, but at which the agent does not submit a written offer because of instructions from the owner to demand a higher price. Where the prospective purchaser with whom the agent is negotiating goes to the vendor direct and buys at a price lower than the limit given by the owner to the agent, the agent is entitled to a commission based upon the price at which the property was sold. A real estate agent is entitled to a commission from the person who employs him to sell his property, if his introduction of the parties was the foundation of the negotiations which resulted in a sale being made by the principal to the buyer even at a lower price than that which the agent was authorized to accept. [Green v. Bartlett, 14 C.B.N.S. 681; Stratton v. Vachon, 44 Can. S.C.R. 395; Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614, followed]

Singer v. Russell, 1 D.L.R. 646, 25 O.L.R. 444, 21 O.W.R. 24.

SALE OF LAND—COMMISSION—QUANTUM MERUIT—TERMINATION OF EMPLOYMENT—OFFER TO PURCHASE ON OWN BEHALF.

Westergaard v. Weyl, 7 D.L.R. 847, 21 W.L.R. 403.

REAL ESTATE BROKERS — COMPENSATION — FAILURE TO COMPLETE TRANSACTION—RESTRICTED SPECIAL AGENCY.

Where the plaintiffs and the defendants are real estate agents, and the defendants to the knowledge of the plaintiffs hold a restricted special contract from the option-holders of certain lands under which the defendants are to receive not a variable percentage commission, but the lesser lump sum of $1,000 for negotiating at a stipulated price and terms a sale of the lands, and where the defendants agree to pay to the plaintiffs $500 as one-half of the lump sum for negotiating the sale at the price and terms so fixed, and where, under that agreement, the plaintiffs introduce to the option-holders a proposed purchaser, who, however, fails to agree definitely with the option-holders upon the terms or to make the purchase, but instead purchases a few days later directly from the owners at the same price on terms undisclosed in the evidence, the plaintiffs cannot, under such a restricted special contract, recover any compensation. Although vendors may sometimes be held liable where the vendors themselves proceed to sell to parties introduced by those agents on terms other than those on which the agents were instructed to procure purchasers, upon the ground that a vendor may not, after making such a sale and taking the benefit of the agent's services, refuse to pay therefor, such a principle cannot apply in an action by a real estate agent as against his employer, another real estate agent, who derives no benefit whatever and is no party to the change in the terms of sale.

Cairns v. Buffet, 8 D.L.R. 53, 22 Man. L.R. 556, 22 W.L.R. 402, 3 W.W.R. 352.

REAL ESTATE AGENT—COMMISSION—PAYMENT OUT OF PURCHASE MONEY.

Where the plaintiff, a real estate agent, procured a written offer from a person to purchase land owned by the vendor, which the latter accepted, and where the only agreement shewn as to the payment of the plaintiff's commission was a stipulation in such offer that it was to be paid out of the purchase money, the agent is not entitled, upon the refusal of the purchaser to complete the purchase, to recover a commission from the vendor, unless the latter is at fault in not carrying out the purchase.

Robinson v. Reynolds, 4 D.L.R. 63, 3 O.W.N. 1262.

REAL ESTATE AGENT—RIGHT TO COMMISSION—ABSENCE OF BEING THE REAL AND EFFICIENT CAUSE OF SALE.

A real estate agent cannot recover a commission if, not withstanding the original introduction of a purchaser by him, his act is not the real and efficient cause of the sale. [Gillow & Co. v. Lord Aberdare, 9 T.L.R. 12, affirming 8 T.L.R. 876, followed.] A real estate agent is entitled to a commission if the relation of buyer and seller was really brought about by his act, however trifling, though the actual sale was not affected by him. [Green v. Bartlett, 14 C.B.N.S. 681, at p. 685, and Steere v. Smith, 2 T.L.R. 131, referred to.] A real estate agent is not entitled to any commission, upon the ground that while his services were a causa sine qua non they were not a causa causans, where it appeared that he communicated with a prospective purchaser and went to the owner and asked her if she would sell her house and she authorized him to obtain a purchaser upon the usual terms as to commission, and finally an agreement of sale was entered into between the owner and the prospective purchaser, who signed nothing, and could, not, therefore, be compelled to carry out the contract, and he afterwards repudiated the contract, and the owner went to the agent she had first employed, and he, after having been approached by the wife of the purchaser aforesaid, finally brought about a sale of the property to him. [Imrie v. Wilson, 3 D.L.R. 826, 3 O.W.N. 1145, affirmed, 3 D.L.R 833, 3 O.W.N. 1378; Barnett v. Isaacson, 4 T.L.R. 645; Taplin v. Barrett, 6 T.L.R. 30, specially referred to; Wilkinson v. Alston, 48 L.J.Q.B. 733, 41 L.T.R. 394, distinguished.] The right to a commission on the part of a real estate agent is not lost by his discharge and the withdrawal of the lands from his hands before the sale if his acts were the efficient cause of the sale. [Wilkinson v. Martin, 8 C. & P. 1; Lumley v. Nicholson, 2 T.L.R. 118, per Lord Chief Justice Coleridge, at p. 119, referred to.]

Travis v. Coates, 5 D.L.R. 807, 27 O.L.R. 63, 22 O.W.R. 917.

REAL ESTATE AGENT—COMMISSION—SUFFICIENCY OF SERVICES.

Where land was listed with an agent to sell at a price net to the owner, the agent to receive for his services anything he could obtain over that amount, and the agent found a purchaser ready, willing and able to purchase for a price at a slight advance over the net price and on the terms given by the owner to the agent, and the owner refused to sign an agreement for sale for the reason that the price was not enough, the agent is entitled to recover on a quantum meruit the difference between the net price to the owner and the price the purchaser was willing to pay. [Bagshawe v. Rowland, 13 B.C.R. 262, specially referred to.]

Wrenshall v. McCammon, 5 D.L.R. 608, 5 S.L.R. 286, 21 W.L.R. 842, 2 W.W.R. 767.

REAL ESTATE AGENT—SUFFICIENCY OF SERVICES—SALE AFTER EXPIRATION OF EXTENDED OPTION.

A real estate broker exclusively employed for a specified time is not entitled to any commission upon a sale by his principal

after the expiration of the agency to two persons, of whom one (the other having had no negotiations with the agent) verbally agreed to take some interest in a syndicate to be formed to purchase the property and in a subsequent dispute between himself and the agent as to the amount of such interest finally withdrew from the agreement and declined to have anything whatever to do with the agent and immediately put himself into communication with the principal for the purpose of buying the property. [Burchell v. Gowrie & Blockhouse Collieries, [1910] A.C. 614; Stratton v. Vachon, 44 Can. S.C.R. 395, and Rice v. Galbraith, 2 D.L.R. 859, 26 O.L.R. 43, distinguished. See also Singer v. Russell, 1 D.L.R. 646.]

Sibbitt v. Carson, 5 D.L.R. 193, 26 O.L.R. 585, 22 O.W.R. 640.

AGENCY—COMMISSION—SALE OF LANDS—CAUSA CAUSANS—LIABILITY OF VENDOR FOR TWO COMMISSIONS.

Where two actions are brought by two separate land agents, each claiming, as against the vendor, commission on the same sale of the same property, the right to commission is his who was causa causans or the efficient cause of the sale to the exclusion of the other agent so claiming. [Burton v. Hughes, 1 T.L.R. 207, specially referred to.]

Walker and Webb v. MacDonald; Graham v. MacDonald, 6 D.L.R. 501, 4 O.W.N. 1, 22 O.W.R. 964.

EMPLOYMENT OF AGENT TO SELL LAND—PURCHASER PROCURED BY AGENT REFUSING TO CARRY OUT PURCHASE—RIGHT TO COMMISSION—CONTRACT—SCOPE OF—FINDING—APPEAL.

Robinson v. Reynolds (No. 2), 6 D.L.R. 855, 4 O.W.N. 111, 23 O.W.R. 144.

COMMISSION OF REAL ESTATE AGENT—CAUSA CAUSANS.

Where an agent claims commissions under a contract for negotiating the sale of lands, the determining principle is that he must have brought the vendor and purchaser together, not necessarily a personal introduction, but one through which the purchaser knew that the land of the vendor was for sale; and the absence of that element is fatal to the claim. Although it is clearly the law that an agent may not be disentitled to the commission on a sale of lands merely because the actual sale takes place without his knowledge, if his acts really brought about the relation of buyer and seller; yet, in a case in which the agent fails to shew that some act of his was the causa causans or an efficient cause of the sale, he cannot recover. [Burchell v. Gowrie, [1910] A.C. 614, specially referred to.]

St. Germain v. L'Oiseau, 6 D.L.R. 149, 48 C.L.J. 711, 5 A.L.R. 420, 22 W.L.R. 125, 2 W.W.R. 1007.

REAL ESTATE AGENT'S COMMISSION—REQUISITES OF LIABILITY.

In order to entitle a real estate agent to commission, he must have been the "efficient cause" of the sale; it is not enough that there was an introduction and that such introduction was a causa sine qua non. [Burchell v. Gowrie, [1910] A.C. 614; Stratton v. Vachon, 44 Can. S.C.R. 395, followed; Boyle v. Grassick, 6 Terr. L.R. 232; Miller v. Radford, 19 T.L.R. 575, referred to.]

Strayer v. Hitchcock, 7 D.L.R. 689, 5 S.L.R. 302, 22 W.L.R. 469, 3 W.W.R. 196.

COMPENSATION—PAYMENT FOR LOTS ACTUALLY SOLD—ALLEGED AGREEMENT—CLAIM FOR COMMISSION ON LOTS SOLD BY OTHER PARTIES.

Wright v. MacLachlan, 4 D.L.R. 354, 20 W.L.R. 646.

REAL ESTATE AGENT—RIGHT TO COMMISSION—PURCHASER FOUND BY ANOTHER BROKER—"QUANTUM MERUIT."

The plaintiff, a real estate agent, in whose hands the defendant had placed property for sale, but not exclusively, cannot recover commissions from the latter on a quantum meruit where a purchaser was found by another broker purporting to act independently of and without the plaintiff's assistance, although the attention of the other broker, to whom a commission had been paid by the defendant for effecting the sale, had been called to the property by the plaintiff, but without notice from the latter to the owner that such other broker had been referred to the property by him, was paid a commission by the defendant on the sale being made.

Scott v. Moachon, 4 D.L.R. 372, 5 S.L.R. 150, 21 W.L.R. 864, 2 W.W.R. 774.

VERDICT—INSUFFICIENT ANSWERS OF JURY—DISAGREEMENT IN PART ONLY.

Where a vendor and the agent who sold land for him agreed that the agent's commission should be paid him in instalments, as the payments of the vendee fell due, the latter is not entitled to credit for payments made to the agent, to apply on his commission, when made without authority from the vendor.

Emerson v. Cook, 5 D.L.R. 232, 3 O.W.N. 968.

REAL ESTATE AGENT—COMMISSION—LIABILITY OF OWNER OF LAND—PROPOSED PURCHASE ON UNAUTHORIZED TERMS.

The defendant, the owner of property that he had placed for sale in the hands of the plaintiff, a real estate agent, is not liable to the latter for commissions where the agent found a purchaser for the property on terms he had no authority to offer, and which the defendant refused to accept, notwithstanding that the proposed purchaser testified at the trial that he had been and was ready and willing to buy upon the defendant's terms, which fact he had not until then communicated to either the plaintiff or the defendant.

Haffner v. Grundy, 4 D.L.R. 529, 21 W.L.R. 460, 2 W.W.R. 451.

COMPENSATION—SUFFICIENCY OF SERVICE—MISREPRESENTATION.

Where the defendant, a woman, refused to give the plaintiff an exclusive right to sell a piece of property for her, but, on the representations of the plaintiff that she would still have the right to sell it without becoming liable to him for commissions, she was induced to sign a written agreement prepared by the plaintiff which in fact gave him for thirty days the exclusive right of selling the property for an agreed compensation, the plaintiff cannot, upon the defendant making a sale of the property within such period, recover the agreed compensation where all he did towards making a sale was to advertise the property in a newspaper. [Hart-Parr v. Eberle, 3 S.L.R. 386, referred to.]

Cadwell v. Stephenson, 3 D.L.R. 759, 5 S.L.R. 308, 21 W.L.R. 199, 2 W.W.R. 291.

REAL ESTATE AGENT—SALE BY OWNER DIRECT—AGENT'S PREVIOUS DEALINGS WITH PURCHASER.

If a real estate agent is employed by the owner to sell his property and brings it to the notice of a prospective purchaser, the owner, who subsequently makes the sale himself to the same purchaser without knowing that the purchaser came to him through the agent, is liable to pay the agent's commission if there has been no revocation of the agent's authority, and the contract of employment specified no time limit. [Locators v. Clough, 17 Man. L.R. 659, doubted; Wilkinson v. Alston, 48 L.J.Q.B. 733, approved; Burchell v. Gowrie, [1910] A.C. 614; Stratton v. Vachon, 44 Can. S.C.R. 395, and Sagar v. Sheffer, 2 O.W.N. 671, specially referred to.]

Rice v. Galbraith, 2 D.L.R. 859, 26 O.L.R. 43, 21 O.W.R. 571.

SALE OF GRAIN—DIFFERENT BUYERS—LOSS—COMMISSION—NO PRIVITY OF CONTRACT.

A broker who does not procure privity of contract between two principals, and fails to establish performance of the contract for which he was employed, cannot succeed in an action for loss sustained by him and for commission. [Beamish v. Richardson, 13 D.L.R. 400, 16 D.L.R. 855, 49 Can. S.C.R. 595; Smith Grain Co. v. Pound, 36 D.L.R. 615, 10 S.L.R. 368 followed.]

Canadian Grain Co. v. Nichol, 50 D.L.R. 431, [1920] 1 W.W.R. 160.

COMMISSION—INTRODUCTION BY AGENT—SUBSEQUENT PURCHASE THROUGH THIRD PARTY — COMMISSION TO ORIGINAL AGENT.

When the steps taken by an agent bring the future purchaser of land into touch with the principal, and purchase is subsequently completed, even through the medium of another agent, the original agent is entitled to a commission on the sale. [Spenard v. Rutledge (No. 2), 10 D.L.R. 682; Burchell v. Gowrie & Blockhouse Collieries, [1910] A. C. 614; Vachon v. Stratton, 3 S.L.R. 286, 44 Can. S.C.R. 395, referred to.]

Pettypiece v. Holden, 49 D.L.R. 386.

SALE OF LAND — COMMISSION — "SPECIAL EMPLOYMENT" — AGREEMENT SIGNED — UNSATISFACTORY—QUANTUM MERUIT.

An agent, who obtains a fixed price and stated percentage of commission on real estate listed with him by his principal, cannot recover the full commission when he concludes a sale for a much lower price, and on entirely different terms than those set out by his principal in their agreement. [Smith v. Barff, 8 D.L.R. 996; Herbert v. Vivian, 8 D.L.R. 340; McCallum v. Russell, 2 S.L.R. 442, referred to.]

Bannerman v. Bradley, 49 D.L.R. 391, [1919] 3 W.W.R. 952.

SPECIAL AGENCY—GENERAL AGENCY—SUFFICIENCY OF BROKER'S SERVICES.

The listing of lands for sale for a period of two months constitutes a contract of special and not general agency, and such contract is not converted into one of general agency by the addition of a clause to give ten days' notice of withdrawal or increase or decrease in price. The agent not having performed the special contract cannot recover. [Toulmin v. Millar, 58 L.T. 96, distinguished; Chappell v. Peters, 9 D.L.R. 584, 6 S.L.R. 16, followed.]

Fitchell v. Lawton, 49 D.L.R. 185, [1919] 3 W.W.R. 728.

SALE OF LAND—COMMISSION AGREEMENT—SUFFICIENCY OF BROKER'S SERVICES.

An agent is not entitled to commission under an agreement to get a purchaser for lands at a certain price per acre, where he introduces a party who has previously negotiated with the owner for a trade which is subsequently completed.

Brown v. Patchell, 49 D.L.R. 198, 12 S. L.R. 430, [1919] 3 W.W.R. 701.

COMMISSION — "GENERAL EMPLOYMENT" — "SPECIAL EMPLOYMENT"—DEFINITION.

An agent, who has been employed to sell real estate, has been given a price by his principal has a right to the commission on any sale made by his principal to a purchaser introduced by him, even though such sale be at a lower price than the one given, unless the terms of his contract with his principal are such as would shew "special employment" only. [Stratton v. Vachon, 44 Can. S.C.R. 395; Burchell v. Gowrie & Blockhouse, [1910] A.C. 614; Colonial Real Estate v. Sisters of Charity, 45 D.L.R. 193, 57 Can. S.C.R. 585, referred to; see also Bridgman v. Hepburn, 42 Can. S.C.R. 228; Prentice v. Merrick, 38 D.L.R. 388.]

Wright v. Smith & Nelson, 49 D.L.R. 408, [1919] 3 W.W.R. 1094.

SALE OF LAND—COMMISSION.

Plaintiff at one time obtained an option on defendant's ranch, with the idea of promoting a syndicate to purchase it. In this he was unsuccessful, and then undertook the sale of the ranch on a commission

basis, $100,000 being the purchase price, and his commission or profit to be made by adding $5,000 thereto. He endeavored to effect a sale in various quarters, and ultimately introduced H. to the defendant, telling the former that the price was $105,000 and asking the latter to protect him at that price. H. stayed for some days on the ranch inspecting it, and, having concluded to purchase, asked defendant his price and was told $100,000, which he paid. Held, on appeal, affirming the verdict of the jury at the trial, that plaintiff was entitled to recover the commission of $5,000 from the defendant (vendor).

Langley v. Rowlands, 46 Can. S.C.R. 626, affirming 16 B.C.R. 72.

PRINCIPAL AND AGENT—COMMISSION ON SALE—NEGOTIATIONS BETWEEN AGENT AND PURCHASER — SUBSEQUENT SALE WITHOUT KNOWLEDGE OF AGENT'S INTERVENTION—RIGHT OF AGENT TO COMMISSION.

Dicker v. The Willoughby Sumner Co., 4 S.L.R. 251.

AGENT'S COMMISSION ON SALE OF LAND AND BUSINESS—PURCHASER FOUND BY AGENT AND AGREEMENT SIGNED—PARTIES NOT AD IDEM—SALE NOT COMPLETED—PAYMENT OF DEPOSIT BY PROPOSED PURCHASER TO AGENT—RIGHT OF PRINCIPAL TO RECOVER FROM AGENT—COUNTERCLAIM.

Moody v. Murray, 8 O.W.N. 138.

The agreement by which a property owner nominates a person as his sole agent, for three years, to sell his immovables on payment of a commission and expenses is a mandate and not a hiring of services, and is, therefore, revocable at any time, subject to liability for damages in case of revocation without cause or reason.

Hudson v. Cool, 42 Que. S.C. 228.

COMPENSATION FOR SERVICES.

An agreement (commonly called an option), by which the owner of real estate promises to sell it to a party, at a stated price, within a stated delay, enlarged by a subsequent covenant, and followed by another promise within such enlarged delay, to sell to a third party at an advanced price, the difference to be shared between the owner and the first promise, but which is not carried out, does not create the relation of principal and agent between the owner and the first promisee that entitled the latter to reward or commission, on a subsequent sale made by the former.

Reddy v. Rutherford, 43 Que. S.C. 289. [Affirmed 20 D.L.R. 981, 23 Que. K.B. 493.]

REAL ESTATE—COMPENSATION—SUFFICIENCY OF SERVICE.

The broker or agent who sues to recover a commission on a sale of immovables for the price of $15,000, may prove by witnesses facts which establish that it was, to the knowledge of the owner, due to his intervention and his actions that the former was able to effect the sale.

Dudemaine v. Pelletier, 44 Que. S.C. 239.

REAL ESTATE BROKER—SUFFICIENCY OF SERVICES—COMMISSIONS.

A real estate broker, to whom an owner entrusts a sale, is not bound to do more than find a person who may be accepted as a purchaser. He is thereupon entitled to his commission without being obliged to complete the contract of sale, or the payment, by the purchaser, of that part of the price which is payable in cash. [Judgment of Superior Court of Quebec affirmed.]

Girouard v. Beaudoin, 46 Que. S.C. 57.

SUFFICIENCY OF AGENT'S SERVICES—FINDING PURCHASER SUITABLE TO VENDOR.

There is no necessity for a mise en demeure when it is impossible for the debtor to fulfil his obligations, but the creditor should not content himself with proving this fact, but should also establish that he himself is in a position to fulfil his own obligations. Thus, a real estate agent who sues for his commission, without mise en demeure, alleging that the owner had himself sold his immovable to the prejudice of his rights as agent, should prove that the purchaser he had found was ready to purchase upon the conditions imposed by the vendor. In order that an owner whose immovable is sold by an agent should be bound to the purchaser produced by the latter it is necessary that the acceptance of such purchaser should conform to the terms of sale.

Cyr v. Lecours, 47 Que. S.C. 86.

WHEN RIGHT TO COMPENSATION ACCRUES—PURCHASER SIGNING DEED.

To be entitled to claim his commission on the sale of an immovable the agent who claims to have found a purchaser should prove that the latter has signed the deed of sale and made a tender of the price within the delays agreed upon. If this is not proved and the sale has not taken place the agent is not entitled to his commission.

Hoffman v. Desaulniers, 48 Que. S.C. 15.

SALE AT LOWER PRICE.

When it is agreed that a real estate agent shall receive a commission if he sells a property at a price named he is not entitled to his commission if it is sold at a lower price.

Jacques v. Léonard, 47 Que. S.C. 344.

COMMISSIONS—OUT OF SURPLUS.

A real estate agent, who sues on a contract by which it had been agreed that if he sold certain lots for more than a certain amount, the surplus would belong to him, cannot, if he is unable to establish that there has been a surplus, claim the usual commission. An allegation that the sum claimed represents the value of the services rendered is not sufficient for this purpose. The agent has no right to claim this sum

by reason of mistake and misunderstanding between the purchaser and the owner.

Simard v. Dubors, 26 Que. K.B. 81.

SALE BY ANOTHER AGENT.

In a contract between an owner and a real estate agent, it was stipulated that if the property is sold after the delay granted to effectuate a sale to a party with whom the agent was in negotiation, he shall be entitled to a commission of 2½%. After the expiry of the delay, the property was sold through another agent. It was proved that the first agent had dealings with the same buyer before the delay had expired, but that he had abandoned them. Under these circumstances the agent was not entitled to his commission.

Browne v. Major Mfg. Co., 24 Que. K.B. 270.

(§ II B—13)—REAL ESTATE—COMMISSIONS—SALE WITHOUT BROKER'S AID.

A sale of land directly by the owner, after it had been listed for sale with a broker, does not entitle the latter to his commissions, merely because it happened to be a purchaser with whom he negotiated in a previous transaction.

Gilbert Bros. v. McDill (Alta.), 36 D.L.R. 324.

REAL ESTATE—INTRODUCTION—SALE UNSUCCESSFUL — COMMISSION — INDEPENDENT NEGOTIATIONS.

Where a real estate broker has negotiated with a certain person or introduced him to the owner, but his efforts to sell to such person have proved unsuccessful and have been abandoned, he can claim no compensation on a sale afterwards made as the result of independent negotiations with which such broker was in no way connected. [Stratton v. Vachon, 44 Can. S.C.R. 395, distinguished.]

Chadburn v. Pinze, 20 D.L.R. 741, 45 Que. S.C. 442.

REAL ESTATE BROKERS—RESERVING RIGHT OF INDEPENDENT SALE—AGENT'S OFFER PRODUCED BEFORE INDEPENDENT SALE LEGALLY EFFECTED.

Where the owner employing a real estate broker expressly reserves the right of independent sale he will be liable to the broker for the agreed commission on the latter submitting an offer in accordance with the listing terms from a purchaser able and willing to carry it out; and such right to commission is not displaced by the owner's offer previously made independently of the agent for the sale of the property to a company subject to approval and acceptance by the company's directors, but not in fact accepted by them until after the offer of the agent's customer had been submitted, where the owner was not legally committed or bound to the company at the time when the agent submitted his customer's offer, and this, although the owner completes the transaction with the company and not with the agent's customer.

Domina v. Guillemaud, 9 D.L.R. 622, 23 W.L.R. 41, 3 W.W.R. 787.

REAL ESTATE BROKERS—TRANSACTION EFFECTED WITHOUT BROKER'S AIDS

Allard v. Meunier, 14 D.L.R. 399, 46 Que. S.C. 193.

COMPENSATION—AGENCY TO SELL TO ONE PERSON—SALE TO ANOTHER—SALE EFFECTED WITHOUT BROKER'S AID.

A broker whose agency permitted him to sell to a designated person only and who fails to effect such sale, is not entitled to a commission on a subsequent sale being made by his principal to a different person. [Toppin v. Healey, 11 W.R. 466, referred to.]

Naffeznger v. Hahn, 13 D.L.R. 430, 6 S. L.R. 111, 25 W.L.R. 155, 4 W.W.R. 1348.

REAL ESTATE BROKER — COMPENSATION — TRANSACTION EFFECTED WITHOUT BROKER'S AID.

A real estate broker cannot recover a commission, on the sale of land by his client before the expiration of the period for which the broker had the exclusive listing, by procuring, before notice of such sale, a prospective purchaser, unless it appears that the latter had decided or promised to buy the land before becoming aware of its prior sale.

Edmonton Securities v. Lepage, 14 D.L.R. 66, 6 A.L.R. 282, 25 W.L.R. 532, 5 W.W.R. 188.

AGENCY—COMMISSION—SALE OF LANDS—PURCHASER INDUCING VENDOR TO LOWER PRICE BY MISREPRESENTING THAT VENDOR'S AGENT HAS EARNED NO COMMISSION — INDEMNITY BY PURCHASER — THIRD PARTY.

Where a purchaser of real estate, in assuming to be making the deal entirely without the intervention of the vendor's agent, misrepresents to the vendor that the vendor's agent has earned no commission on the sale, and thereby misleads the vendor and induces him to lower his price by the amount of the commission which would otherwise be payable, in an action subsequently brought by vendor's agent against the vendor (adding the purchaser as a third party) establishing the claim for commission, the purchaser may be held bound to make good to the defendants the amount of such commission.

Walker & Webb v. MacDonald; Graham v. MacDonald, 6 D.L.R. 591, 4 O.W.N. 1, 22 O.W.R. 964.

EFFECT OF PRINCIPAL'S FRAUD—PURCHASER'S MISREPRESENTATIONS.

One who, in dealing with an agent for the sale of land, acts as the owner thereof and as the person liable for commission, cannot, in the event of a sale, escape liability for such commission on the ground that

he is not in fact the owner. [Jones v. Littledale, 6 A. & E. 490, referred to.]

Imrie v. Wilson, 3 D.L.R. 826, 3 O.W.N. 1145, 21 O.W.R. 964.

REAL ESTATE — EFFECT OF PRINCIPAL'S FRAUD—COLLUSION TO AVOID PAYING COMMISSION.

The land owner who listed his property for sale with a real estate agent is under a legal obligation to do nothing calculated to deprive the agent unfairly of his commission.

Complin v. Beggs, 13 D.L.R. 27, 49 C.L.J. 22, 24 Man. L.R. 596, 24 W.L.R. 871, 4 W.W.R. 1081.

REAL ESTATE BROKERS—RIGHT TO COMPENSATION—SALE AFFECTED BY PURCHASER'S MISREPRESENTATIONS AS TO KNOWLEDGE OF AGENT.

Where a real estate broker is engaged by the owner to sell an undivided lot of land and he succeeds in selling half of the lot and is paid his commissions for that sale, and later, with the knowledge of the owner, engages with a prospective purchaser for the sale of the other half, but the parties cannot agree as to the price, and several months later the prospective purchaser goes to the owner and offers him a price which offer he tells the owner is made independently of the agent, and the owner believing he would have no commissions to pay, accepts the offer, the owner is liable for commission at the ordinary rate, where it appears that the instructions of the agent had never been countermanded and all that the agent did was consistent with a contract of agency between himself and the owner. [Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614; Stratton v. Vachon, 44 Can. S.C.R. 395, followed.]

Copeland v. Wagstaff, 9 D.L.R. 13, 4 O.W.N. 567, 23 O.W.R. 679.

SUBDIVISION LANDS—SALE EN BLOC BY PRINCIPAL—RIGHTS OF AGENT.

Where an agency agreement stipulates that the agent is to receive his commissions from the sales of all lands within a subdivision, whether sold by the agent, the owner, or any other person, a transfer of the unsold residue of the subdivision en bloc by the owner in consideration of shares of stock, though constituting a sale, is not such a sale as contemplated in the agreement to entitle the agent to the stipulated commissions, but the remedy of the agent is to damages for breach of an implied obligation on the part of the principal to do nothing to prevent the agent from earning his commissions. [Burchell v. Gowrie & Co., [1910] A.C. 614; Inchbald v. Western etc. Co., 34 L.J.C.P. 15, followed; Kennerley v. Hextall, 18 D.L.R. 375, 7 A.L.R. 469, varied.]

Kennerley v. Hextall, 24 D.L.R. 418, 8 A.L.R. 500, 31 W.L.R. 558, 8 W.W.R. 922.

AUTHORITY TO SELL IN LOTS—SALE EN BLOC.

Owners of land divided into building lots, who instruct a real estate agent to sell their lots, can be sued after the sale of the land by a partnership of which the agent is a member, the sale being carried out by the partnership to the knowledge of the owner. Athough the land was to be sold in lots as subdivided, the agent has a right to the usual commission if the owners by his intervention have sold them en bloc.

Bousquet v. Mignault, 48 Que. S.C. 5.

ABANDONMENT OF SALE BY AGENT—SUBSEQUENT SALE BY PRINCIPAL.

A real estate agent who receives in advance a note for a sum of money representing his commission, in case of sale of an immoveable within a certain delay conformably to the contents of a written contract between him and the owner, but who delivers up the note and the written contract to the owner, abandons thereby his commission and is unable to claim it, if later the owner himself sells his property.

Brunet v. Caron, 47 Que. S.C. 244.

(§ II B—14)—COMMISSIONS — QUANTUM MERUIT—PROCURING CAUSE.

Where land is sold through the instrumentality of a broker, to a purchaser procured by him, for a less sum than that for which he was employed to sell, the broker is entitled to his commissions, or to a quantum meruit equal to the amount of commissions.

Jardine v. Prescott Lumber Co., 37 D.L.R. 342, 44 N.B.R. 505.

REAL ESTATE AGENT — TAKING OFFER AND CONTRACT IN HIS OWN NAME.

A real estate agent who without disclosing that he is a real estate agent obtains in his own name a contract of sale of a property at a fixed price and disposes of it to a third party is not entitled to charge the vendor with any commission on the sale of such property inasmuch as there is no contract of agency whatsoever. [Stratton v. Vachon, 44 Can. S.C.R. 395, referred to. And see Haftner v. Grundy, 4 D.L.R. 529.]

Besner v. Levesque, 8 D.L.R. 494, 18 Rev. de Jur. 60.

COMPENSATION—OPTION TAKEN FROM PARTY FROM WHOM COMMISSION CLAIMED.

A real estate agent who had been attempting to sell a certain tract of land for the owner, and who afterwards took from the latter an option for its purchase made in his own favour, which contained no stipulation that if the agent produced another purchaser to take his place under the instrument the agent was to have a commission for the sale of the land to the substitute, and there was no other contemporaneous agreement to that effect, cannot claim any commission after the transfer of the property to a new purchaser, especially where it is shewn that the owner, upon being so requested, refused to stipulate in his contract of sale with the substituted purchaser that the agent should have a commission, and the latter then abandoned

his claim rather than have the sale fall through.

Nixon v. Dowdle (No. 2), 2 D.L.R. 397, 20 W.L.R. 749, 2 W.W.R. 198, reversing on the facts, 1 D.L.R. 93, 19 W.L.R. 775, 1 W.W.R. 455.

AMOUNT OF COMPENSATION.

Where a broker obtains an option in his own name and thereby puts himself in the relation of purchaser as regards the owner, he is not entitled to claim remuneration, in the absence of a special agreement to that effect, in respect of a sale afterwards made by the owner without reference to the option to a prospective purchaser whom the broker had introduced within the time limit of the option, the option itself not having been taken up by the broker.

Sutherland v. Rhinhart, 2 D.L.R. 204, 20 W.L.R. 584, 1 W.W.R. 1060, 5 S.L.R. 343.

JOINING WITH THIRD PERSON IN PURCHASING PROPERTY—COMPENSATION TO BROKER—DUTY OF VENDOR.

Where an agent employed to sell property on commission, himself joins with a third person in purchasing it at a price which is larger by the amount of the commission than that at which he could himself have bought the property, it is the duty of the vendor, when aware of the relation between the broker and the third person, to inform the latter of the existence of the agency, and of the arrangement to pay a secret commission to one of the purchasers.

Hitchcock v. Sykes, 13 D.L.R. 548, 29 O.L.R. 6, reversing 3 D.L.R. 531, 3 O.W.N. 1118.

COMMISSION — LIABILITY OF BROKERS BETWEEN THEMSELVES — ADMISSIBILITY OF EVIDENCE.

King v. Irvine, 31 D.L.R. 562.

AGENT TAKING OPTION TO HIMSELF.

A real estate agent who obtains from an owner an option for the purchase of property and at the same time the promise of a commission of $500 if he should effect the sale of the immovable, cannot claim the commission if he himself purchases under the option. The owner who admits having promised a commission to a real estate agent for the sale of his property, but who maintains at the same time that the latter renounced it, makes an admission which is indivisible.

Lecours v. Dagenais, 47 Que. S.C. 1.

(§ II B—15)—REAL ESTATE — COMPENSATION—FAILURE TO COMPLETE TRANSACTION—DIVISION OF PROFITS.

Gier v. Van Aalst, 16 D.L.R. 870, 28 W.L.R. 665.

FAILURE TO COMPLETE TRANSACTION.

As the information contained in a list of property listed for sale with a real estate exchange and sold by it to brokers, who made sales therefrom, is held out and guaranteed by the exchange to be correct, and their subscribers are invited to act thereon, it is immaterial, in an action for the loss of commissions on a sale of property improperly listed by the exchange, that a long time elapsed between the listing and the sale by the plaintiff where it appeared that before the latter acted he was informed by the exchange that the property was still for sale.

Austin v. Real Estate Exchange, 2 D.L.R. 324, 17 B.C.R. 177, 20 W.L.R. 924, 2 W.W.R. 88.

REAL ESTATE — COMMISSIONS — PROCURING SALE — TIME — SALE BY OWNER.

Where by the terms of an agreement a broker is to effect a sale of land within a specified time, and does procure a purchaser within such time but the transaction falls through, he is not entitled to his commission, when after the expiration of the time limit the land is sold to such purchaser by the owner directly. [Stratton v. Vachon, 44 Can. S.C.R. 395, distinguished.

Colonial Real Estate Co. v. Sisters of Charity, 45 D.L.R. 193, 57 Can. S.C.R. 585, affirming 27 Que. K.B. 433.

(§ II B—16)—ACT OF PRINCIPAL PREVENTING SALE.

A sale of land cannot be said to have been prevented by the wrongful act of the principal in refusing to accede to terms in variation with those first agreed upon between him and the broker.

Huff v. Maxwell, 27 D.L.R. 400, 9 A.L.R. 458, 10 W.W.R. 214.

FAILURE TO COMPLETE TRANSACTION — LEASE BY PRINCIPAL PREVENTING.

Where a real estate broker's claim for commission is based upon his having procured a purchaser ready, willing and able to carry out the deal upon the terms specified, and that the vendor himself made a lease which prevented the carrying out of the proposed sale, the broker must shew that, had it not been for the lease, the proposed purchaser was ready and willing to carry out the deal on the terms upon which the property was listed.

Dumphy v. Cariboo Trading Co., 22 D.L.R. 658, 21 B.C.R. 484, 8 W.W.R. 716.

REAL ESTATE AGENTS — COMPENSATION ON PRINCIPAL'S FAILURE TO COMPLETE.

Where a real estate broker employed to sell, has obtained a contract of purchase and the landowner after accepting the deposit of the purchaser declines to carry it out and gets the purchaser to take back the deposit, the claim of the broker for negotiating a sale has nevertheless accrued for the full commission stipulated for, as upon the complete performance of the broker's part of the contract, and is not restricted to a claim upon a quantum meruit. [Austen v. Canadian Fire Engine Co., 42 N.S.R. 77, applied. As to real estate brokers' commissions generally.]

Burchell Co. v. Dillon, 9 D.L.R. 607, 13 E.L.R. 6.

REAL ESTATE BROKERS — COMPENSATION — FAILURE TO COMPLETE.

Where an employee of a real estate brokerage company having property listed for sale, introduced a probable buyer who paid for a ten-day option signed by the owner's representative or agent, and on the option holder electing to buy within the limited period it was discovered that the owner himself had sold the property in the interval, and the company's employee received from the owner's representative a sum of money in lieu of commission as compensation for having lost the sale of the property, the money so paid must be accounted for to the brokerage company without deduction for any payment thereout made by the employee to the option holder without the company's authorization.

Canadian Loan & Mercantile Co. v. Lovin, 12 D.L.R. 582, 18 B.C.R. 236, 24 W.L.R. 963.

REAL ESTATE BROKERS—DEFAULT OF PRINCIPAL—COMMISSION UNDER OPTION CONTRACT.

A real estate broker who takes an option contract from the landowner with a stipulation for payment out of the purchase price of a fixed sum as "commission" provided sale is made before the expiry date, cannot obtain specific performance of the option purchase if he did not himself become the purchaser; but he is entitled to judgment for the agreed commission in respect of a sale, made and notified to the owner before the expiry of the option, to a purchaser able and willing to purchase on the terms authorized although the owner declines to carry it out.

Booker v. O'Brien, 9 D.L.R. 801, 23 W.L.R. 719, 4 W.W.R. 79, 6 S.L.R. 56. [Affirmed, 12 D.L.R. 509.]

REAL ESTATE AGENTS—DEFAULT IN MAKING TITLE—BROKER'S WARRANTY OF OWNERSHIP.

Real estate agents who, on making a contract of sale, misrepresent to the purchaser that the party whose name is then disclosed by them as being the vendor and with whom the contract purports to be made, has been ascertained by them to be the registered owner of the property, will be held liable not only for the return of the payments made to them on the faith of the contract but for damages in not carrying out the contract where no effort had been made by them to get in the outstanding title which was in a third party so as, if possible, to carry out the sale. [O'Neil v. Drinkle, 1 S.L.R. 402, applied. See also Reeve v. Mullen (Alta.), 14 D.L.R. 345.]

Peacock v. Wilkinson, 15 D.L.R. 216, 26 W.L.R. 396, 5 W.W.R. 1012.

DEFAULT OF PRINCIPAL—REVOCATION OF AUTHORITY.

Where a real estate agent procures a written offer of purchase made in good faith by a person able and willing to carry out the same, of which written offer the owner signs an acceptance, and the offer contains a stipulation that the owner shall pay a certain percentage "provided he accepts the offer," the agent's mandate is fulfilled and the commission earned, although the owner declines to carry out the sale; so far as concerns the agent's right of action for his commission, the signing of the agreement under private signature is an acceptance of the offer, although his principal refuses to complete the sale. [Lightball v. Caffrey, 6 L.N. 202; Thomas v. Merkley, 32 L.C. Jur. 207; Gohier v. Villeneuve, R.J.Q. 6 S.C. 219; Brown v. McDonald, R.J.Q. 6 S.C. 491, and Massicotte v. Lavoie, R.J.Q. 40 S.C. 258, specially referred to.]

Brotman v. Meyer, 1 D.L.R. 371, 41 Que. S.C. 433.

FAILURE TO COMPLETE TRANSACTION — DEFAULT OF PRINCIPAL.

A vendor, who is the cause of a sale falling through, is obliged to pay the commission to the real estate agent that he employed. If it is agreed that he would transfer to him an hypothecary debt in payment of his commission and he is unable to do so, he will be obliged to pay it in money.

Roch v. Joron, 48 Que. S.C. 39.

FAILURE TO COMPLETE TRANSACTION — DEFAULT OF PRINCIPAL.

If an owner gives to a real estate agent the following mandate: "I, the undersigned, undertake to pay a commission of 2½ per cent to Jarry & Jarry for a property situated on Daniel Street at the corner of Boyer, if this property is sold by their intervention," and the agent finds, on the conditions agreed upon, a purchaser whom the principal refuses, and the latter subsequently by intervention of another agent sells this property to the same purchaser on the same conditions, he should pay to his first agent the commission agreed upon in the written contract.

Jarry v. Baril, 48 Que. S.C. 475.

FAILURE TO COMPLETE TRANSACTION — DEFAULT OF PRINCIPAL.

Real estate agents were to receive a commission of $1,000 from the purchaser for the purchase of land at the price of $40,000. The sale fell through by the default of the purchaser, but the latter obtained by the intervention of the same agents two-fifths of the property, which was sold for $9,000. The agents claimed $300 as commission for the value of their services. It was decided that they had a right to the commission claimed against the purchaser.

Shipman v. Péloquin, 48 Que. S.C. 492.

(§ II B—17)—REAL ESTATE — COMPENSATION — DEFAULT OF OTHER PARTY.

An agent to whom an owner of realty has promised a commission in the event of his finding a purchaser, is for the loss of this commission entitled to damages against the defendant who after offering to purchase refuses without cause to carry out

his undertaking which was duly accepted by the owner at the agent's instance; although the agent may by fresh and renewed efforts have later on earned a commission by finding another purchaser for the same property.

Moscovitch v. Desambor, 18 D.L.R. 230, 21 Rev. de Jur. 81.

COMPENSATION — PAYMENT OUT OF PURCHASE MONEY — INABILITY OF PURCHASER TO COMPLETE.

A real estate broker who procures an offer to purchase land, stipulating that his commission should be paid "out of and form part of the purchase money," is not entitled to a commission from his client, or to retain as such a deposit made by the purchaser, where, without the client's fault, the sale was not completed by reason of the inability of the prospective purchaser to carry out his contract. [Mackenzie v. Champion, 12 Can. S.C.R. 649; Copeland v. Wedlock, 6 O.W.R. 539, and Smith v. Barff, 8 D.L.R. 996, 27 O.L.R. 276, distinguished.]

Fletcher v. Campbell, 15 D.L.R. 420, 29 O.L.R. 501.

REAL ESTATE BROKERS — COMPENSATION — DEFAULT OF PURCHASER INSTIGATED BY BROKER.

A real estate broker selling lots in his principal's subdivision on terms upon which small down payments are accepted to cover the commission and the balance is left outstanding upon contract, is under a duty, even after leaving the principal's employ, not to induce the respective purchasers to abandon the contracts so made and to purchase in their stead other lots which the broker then has for sale either on the broker's own account or as salesman for another.

Millard v. Dominion Townsite Co., Shaw v. Dominion Townsite Co., 14 D.L.R. 294, 25 W.L.R. 695.

DEFAULT OF OTHER PARTY.

Where a real estate agent was employed to "sell" certain property and he found a purchaser and obtained an agreement of sale to be entered into between such purchaser and his principal, a subsequent written agreement between the agent and his principal whereby it was stipulated that the latter should pay the agent a stated percentage as commission "for selling my property" is to be construed as contemplating merely an agreement of sale with a person of substance against whom it might be enforced; and the commission will be payable although the sale was not completed by reason of the purchaser's default in carrying it out and the dishonour of his cheque given for the deposit. [Robinson v. Reynolds, 4 D.L.R. 63, 3 O.W.N. 1262, distinguished; Mackenzie v. Champion, 12 Can. S.C.R. 649, referred to.]

Smith v. Barff, 8 D.L.R. 996, 27 O.L.R. 276.

III. Business and general brokers.

A. IN GENERAL.

(§ III A—30) — COMPENSATION — BUSINESS BROKERS.

Where to the knowledge of the seller of a business as a going concern, a person who assisted in the sale was in the employ of the purchaser and was also a member of a firm of business brokers, it is properly assumed, in the absence of an express contract to the contrary, that services rendered by such person in obtaining the listing for another brokerage firm and assisting in the sale are referable to his employment for the purchaser so as to bar a claim by the firm of which he was a member to a division of the commission paid to the other brokerage firm in pursuance of the listing agreement, such person is not entitled to a commission for making the sale.

Mowat v. Martindale, 13 D.L.R. 215, 18 B.C.R. 220, 24 W.L.R. 818.

BROKERS GENERALLY — COMPENSATION — SALE OF LIQUOR LICENSE.

Where the licensee of a license transferable only with the consent of the license commissioners agrees to sell this license to a purchaser, the negotiations being carried on by a real estate agent, and where the transfer cannot be effected owing to the refusal of the license commissioners to approve the same, there is no sale at all for lack of object to the contract, and the agent who negotiated the transaction is not entitled to any commission.

Lepage v. Bouchard, 8 D.L.R. 395, 43 Que. S.C. 181, 19 Rev. de Jur. 217.

MINING PROSPECTOR.

Where a mining prospector at the request of a prospective purchaser of mining property examines a mine and reports favourably thereon, he is not entitled, if the purchaser buys such mine, to remuneration on the basis of a commission on the purchase price in the absence of an agreement to that effect; the custom existing in the Cobalt district which allows mining commissions to "grub-stakers" who discover and stake out for another a claim on land of the government open for discoveries does not extend to such a case.

Lee v. Jacobs, 8 D.L.R. 447.

AUTHORITY — PRINCIPAL AND AGENT.

Authority to an agent to effect a sale of certain company bonds, shares and assets at a stated price does not involve an authority to include as a stipulation in the agreement of purchase obtained from the purchasers that the latter should be liable to no damages over and above the deposit or other sum which they may have paid, in the event of the purchaser's default.

Merritt v. Corbould, 19 D.L.R. 585, 28 W.L.R. 456, 6 W.W.R. 1346, affirming 11 D.L.R. 143

BUSINESS AND GENERAL BROKERS.

It is the duty of an insurance broker to the client by whom he is employed to place the latter's fire insurance, to see that any policy which he obtains for his client appears to be in valid form, and that it is in conformity with the class of risk which his client has submitted; so, therefore, if the policy is issued with a wrong specification of the concurrent insurance the broker will be liable in damages where he fails to discover the error through neglect to inspect the policy when received, and the client not becoming aware of the discrepancy is compelled to accept a lesser amount from the insurer than he would otherwise have received.

Rudd Paper Box Co. v. Rice, 3 D.L.R. 253, 3 O.W.N. 534, 20 O.W.R. 979.

SHIPMENT OF GOODS FOR SALE — ACCOUNT SALES—CHARGE FOR "COMMISSION AND GUARANTEE"—"GUARANTEED ADVANCE."

Kelly v. Stevenson, 5 O.W.N. 10, 25 O.W.R. 37.

INSURANCE BROKERS—LIABILITY FOR PREMIUMS—CUSTOM AS TO.

Where persons make a business of soliciting insurance and of placing the insurance so solicited with one or more of the insurance companies doing business in the city, there is a custom in the City of Vancouver that the persons thus placing insurance in insurance offices are liable for the premiums on the insurance so placed by them, and such custom will be noticed by the court.

Wright, Cameron & Co. v. Bullock, 5 W.W.R. 1226.

B. COMPENSATION; COMMISSIONS.

(§ III B—35) — BUSINESS AND GENERAL BROKERS — COMPENSATION — SUFFICIENCY OF SERVICES — INTERMEDIATE ABORTIVE NEGOTIATIONS ON STIPULATED COMMISSION—QUANTUM MERUIT.

Where an agent is employed to bring together his employers (as vendors) and a prospective purchaser, and where subsequently (after negotiations and a tentative agreement of sale) his employers, believing a bargain within reach enter into an agreement with the agent fixing his commission on the basis of the presumed selling price and making the payment of same contingent on the deal going through, the agent is still entitled to remuneration if the bargain at the presumed price is not carried out, but a sale is effected by the principal at a lower price; under such circumstances the agent is entitled to recover as upon a quantum meruit. [See as to right to commission generally, Singer v. Russell, 1 D.L.R. 646.]

Strong v. London Machine Tool Co., 10 D.L.R. 510, 4 O.W.N. 1062, 24 O.W.R. 365.

BUSINESS AND GENERAL BROKERS — COMPENSATION — SUFFICIENCY OF SERVICES —PRINCIPAL STEPPING IN.

Sales agents selling machinery on commission are entitled to their commission, when it was through their efforts that the vendors and purchasers were brought together, even though the vendors stepped in and closed the sale irrespective of the agents. [Burchell v. Gowrie and Blockhouse Collieries, [1910] A.C. 614, 80 L.J. P.C. 41, applied.]

Nichols & Shephard v. Cumming, 18 D.L.R. 234, 8 A.L.R. 51, 28 W.L.R. 810, 6 W.W.R. 1325.

COMMISSION — STIPULATION FOR "WHEN MONEYS OR CORPORATE STOCK RECEIVED" —RIGHT OF ACTION ACCRUES, WHEN.

Under a contract to pay an agent a commission on a sale of a secret process, as and when the moneys or considerations in corporate stock or otherwise are received, a judgment in favour of the agent will be limited to an award of the commission on the amount actually received by the defendant, leaving it open to the plaintiff to bring action from time to time as further sums might accrue due in respect of the defendant's receipts under a contingent contract of sale; it is improper to order by a present judgment an inquiry by a referee from time to time as to the future rights. [Bright v. Tyndall, 4 Ch. D. 189; Kevan v. Crawford, 6 Ch. D. 29; Honour v. Equitable Life, [1900] 1 Ch. 852, referred to.]

Stewart v. Henderson, 19 D.L.R. 387, 30 O.L.R. 447.

AGENT'S COMMISSION ON SALE OF SHARES— AGREEMENT — LIMITATION TO SHARES SOLD TO ONE PERSON.

Blackie v. Seneca Superior Silver Mines, 5 O.W.N. 252, 25 O.W.R. 202.

COMMISSION ON SALE OF MACHINERY—CONFLICTING CLAIMS BETWEEN AGENTS.

Mason v. Reeves, 4 S.L.R. 205.

AGENT'S COMMISSION ON SALE OF HOTEL— NOTE GIVEN IN PART PAYMENT OF PURCHASE-MONEY — RENEWALS — NOTICE OF AGENT'S INTEREST.

Binder v. Mahon, 3 O.W.N. 318, 20 O.W.R. 542.

AGENT EMPLOYED TO SELL PATENT—PATENT ACTUALLY SOLD BY PRINCIPAL — COMMISSION—DAMAGES.

Wilson v. Deacon, 3 O.W.N. 163, 20 O.W.R. 348, affirming 19 O.W.R. 433.

BUILDING CONTRACTS.

See Contracts; Mechanics' Liens.

For erection of church, validity, see Religious Institutions, VII.

Subcontractor, assignment, privity, see Crown, II.

Delay in performance, loss of profits, conclusiveness of award, see Damages, III.

Annotations.

Failure of contractor to complete work: 1 D.L.R. 9.

Architect's duty to employer: 14 D.L.R. 402.

(§ I—1)—Agreed price—Payment by instalments — Retention of certain amount by owner—Construction.

A building contract for the erection of an elevator, for an agreed price provided for payment by the owner to the contractor, in instalments, of all wages, for labour done and performed and sums paid for materials supplied, upon certified vouchers and "Provided that the total amount so paid by the owner during the progress of the work, shall not exceed a sum equal to 80 per cent of the amount of work done, and materials furnished on the premises at the contract price And . . . the owner shall be and is hereby authorized to retain out of the moneys payable to the contractors the sum of 20 per cent of the amount of the contract. . . . Their Lordships held that the proper interpretation of the proviso was that the owner was entitled to make payments for all work certified as actually done, and materials as actually supplied provided that the total of such payments did not exceed 80 per cent of the total contract price. A clause in the contract providing for the entry of the owner upon the work in default of the contractors, in order to finish it, in which case the contractors should not be entitled to receive any further payment under the contract until the work was wholly finished, . . . did not disentitle the owner from paying orders which effected given assignments of moneys due to the contractors up to the limits within which the contractors were entitled to be paid, although such payments were actually made at a date subsequent to the owners taking over the work in default of the contractors.

American Surety Co. v. Calgary Milling Co., 48 D.L.R. 295, [1919] 3 W.W.R. 98, affirming 37 D.L.R. 589, 11 A.L.R. 583, [1917] 2 W.W.R. 1253, which reversed 31 D.L.R. 549.

Failure to present claims.

Failure to present a claim, as provided for and required by the terms of a building contract, for work done, is, if urged and relied on, a complete bar to an action.

Gilbert Bros. Engineering Co. v. The King, 40 D.L.R. 723, 17 Can. Ex. 141. [Affirmed by the Supreme Court of Canada, 45 D.L.R. 755.]

BUILDING AND LOAN ASSOCIATIONS.

I. In general.
II. Stock; advance dues.
III. Loans; mortgages.
IV. Powers generally.

I. In general.

Terminating shares contract—Premium—Fines—Onerous terms—Absence of consensus.

Colonial Investment Co. v. Borland, 19 W.L.R. 588 (Alta.).

II. Stock; advance dues.

(§ II—5)—Stock — Part paid shares — Sharing in earnings — When to be credited on shares.

The holder of building and loan shares issued at a reduced rate under a provision that, in addition to a specified rate per annum, they should receive their "proportion of the entire earnings" of the association, is not entitled to have such earnings credited to his shares from time to time, or to receive dividends thereon, until the earnings equal the amount remaining unpaid of his shares, where such was the plan under which they were issued. [Leslie v. Canadian Birkbeck Co., 10 D.L.R. 629, 4 O.W.N. 1102, affirmed.]

Leslie v. Canadian Birkbeck Co., 15 D.L.R. 78, 5 O.W.N. 558, 25 O.W.R. 513.

Stock — Part paid shares—Sharing in earnings — Transferring earnings from credit of shares to reserve fund.

The fact that for a number of years the earnings of a building and loan association, in excess of a fixed rate payable annually on its shares, which were issued at a reduced rate, and which were entitled also to share in the entire earnings of the association, were credited on the books of the association to the shareholders, does not prevent their subsequent transfer from such accounts to a reserve fund, where the shareholders were not entitled to have the excess earnings credited on their shares until the amount thereof equalled the unpaid balance thereon; since the matter was a mere matter of bookkeeping without any intent on the part of the officers of the association to improperly divert such earnings.

Leslie v. Canadian Birkbeck Co., 15 D.L.R. 78, 5 O.W.N. 558, 25 O.W.R. 513.

III. Loans; mortgages.

(§ III—10)—Right to interest where borrower has elected to retire shares.

Section 6 of the Interest Act, R.S.C., c. 120, prevents the recovery of any interest where a mortgage to a loan company contains a covenant for monthly payments of interest at the rate of 12 per cent per annum, and also a proviso giving to the mortgagor the option of making certain monthly payments on account of shares in the company, subscribed for by him, which shall be accepted in full payment of principal and interest, and the proviso does not shew what is the rate of interest per annum if the method of payment thereby allowed be adopted, nor does the covenant for interest shew that the rate thereby provided for is the same, and in fact it is not the same in result as the payment under the proviso, and the mortgagor has adopted the method of payment allowed by the proviso.

The Colonial Investment Co. v. Borland,

6 D.L.R. 211, 22 W.L.R. 145, 2 W.W.R. 960, 5 A.L.R. 71.

IV. Powers generally.

(§ IV—39)—Powers generally — As to dividends.

The amount of surplus profits of a building and loan association, after payment of preferred dividends, to be made available for distribution among the holders of shares is to be determined by the directors, after making in good faith all reasonable and proper provision for the safety and prosperity of the association, having regard to expenses, contingencies, actual and possible losses, and the necessity of keeping a reserve fund. [Bain v. Ætna Life Ins. Co., 21 O.R. 233, applied.] Dividends on shares of a building and loan association, in addition to a stipulated rate per annum, from their "proportion of the entire earnings" of the association, are payable only from the excess receipts over and above all expenses properly chargeable to revenue account. [Leslie v. Canadian Birkbeck Co., 10 D.L.R. 629, 4 O.W.N. 1102, affirmed; Whicher v. National Trust Co., 19 O.L.R. 605; National Trust Co. v. Whicher, 5 D.L.R. 32, [1912] A.C. 377; Re National Bank of Wales, [1899] 2 Ch. 629, and Guthrie v. Wheeler, 51 Conn. 207, specially referred to.]

Leslie v. Canadian Birkbeck Co., 15 D.L.R. 78, 5 O.W.N. 558, 25 O.W.R. 513.

BUILDINGS.

I. Statutory and municipal regulations.
  A. In general.
  B. Fire escapes.
II. Private rights.

Annotations.

Municipal regulations of building permits: 7 D.L.R. 422.

Restrictions in contract of sale as to the user of land: 7 D.L.R. 614.

I Statutory and municipal regulations.

A. In general.

(§ I A—1) — Municipal regulation of buildings—Apartment house—Structural alterations requiring municipal approval — Neglect to submit plans to city architect—Municipal Act—R.S.O. 1914, c. 192, s. 400 (4)—Building constructed in accordance with by-law—Refusal to order destruction—Declaratory judgment—Costs.

Toronto v. Ryan, 7 O.W.N. 89.

(§ I A—5)—Distance from streets—Municipal by-law regulating building fronting or "abutting" on street—Validity of.

A municipal by-law regulating the distance at which buildings may be built or erected on lots fronting or "abutting" on a designated street is not authorized by 4 Edw. VII. (Ont.), c. 22, s. 19, permitting municipal councils to regulate and limit by by-law the distance from the line of the street in front thereof at which buildings on residential streets may be built, since the word "abutting" in the by-law was not authorized by such act. [Justices of Bedfordshire v. Commissioners, for the Improvement of Bedford, 7 Ex. 656, and Governors of the Bedford General Infirmary v. Commissioners, 7 Ex. 768, distinguished. A house upon a corner lot facing and opening upon one street with one side abutting on another street, is not within a municipal building restriction prohibiting the erection of houses within 40 feet of the line of the latter street where the authority to restrict was further limited to streets "in front of" the building. [Re Dinnick and McCallum, 5 D.L.R. 843, 26 O.L.R. 551, reversed.]

Re Dinnick & McCallum, 11 D.L.R. 509, 28 O.L.R. 52.

Municipal by-law — Regulation of distance from street line.

A municipal by-law passed under the authority of the Municipal Amendment Act, 4 Edw. VII. c. 22, s. 19, regulating the distance from the street line at which buildings on a residential street may be built, need not be confined to such buildings as front on the residential street, and a prohibition in such a by-law against the erection of any building within the given distance from the street line is therefore valid. [Toronto v. Shultz, 19 O.W.R. 1013, dissented from, and question referred to a Divisional Court.]

Dinnick v. Toronto, 3 D.L.R. 310, 3 O.W.N. 1061, 21 O.W.R. 897.

Distance from street line.

If the wall of a building which supports the superstructure and its roof is not nearer than fifty-five feet to the centre line of a certain specified street, there is no violation of a building restriction requiring the main wall of buildings on such street to be no nearer than such distance to its centre, though the wall of the bay-windows of the building is nearer to the centre of the street than fifty-five feet.

Holden v. Ryan, 4 D.L.R. 151, 3 O.W.N. 1585, 22 O.W.R. 767.

(§ I A—7) — Semidetached house — Municipal regulation — Apartment house — Meaning of "appurtenant."

A building structurally divided into two equal divisions by a wall extending its whole height with no internal communication, common staircase, or common front door, constitutes a pair of semidetached buildings, and to erect such a building upon a lot which has a frontage of only forty feet on a specified street would be a violation of a building restriction that every pair of semidetached buildings shall be upon land having a frontage on such street of at least fifty feet. [Ilford Park Estates v. Jacobs, [1903] 2 Ch. 522, followed.] In a building restriction requiring that

every building on certain lots "shall have appurtenant to it land having a frontage on" a certain street of at least a specified number of feet, the word "appurtenant" is not to be given a strict legal meaning, but its ordinary popular meaning that the buildings in question must be erected upon lots having the required frontage on such street. It is a violation of a building restriction that buildings erected upon certain lots having a frontage upon some other street as well as upon a specified street shall have its front upon such specified street, to erect an apartment building on the corner of such street and another street with an entrance to only one of the apartments on the specified street and the main entrance for all the other apartments on the other street, there being no connection between them and the one apartment entered from the specified street.

Holden v. Ryan, 4 D.L.R. 151, 3 O.W.N. 1585, 22 O.W.R. 767.

BUILDING PERMITS—APPLICATION—FEE FOR INSURANCE—MANDAMUS.

A refusal on the part of a municipal officer to grant a building permit before a written application is made therefor, pursuant to a by-law, does not excuse the necessity for a tender of such written application as a condition precedent to the applicant's right to compel the issuance of the permit. The application for a permit provided for in paragraph 9 of the building by-law of the city of Winnipeg (by-law No. 4283) before a permit will issue, means a written application. A city has a right to charge a moderate fee for the issuing of a building permit. [Montreal v. Walker, Montreal L.R. 1 Q.B. 469, followed.] Where applicants for a building permit were not acting bona fide in respect of their building, but were following out a system of selecting lots of land in portions of the city where high class residences prevailed, and threatening to build apartment blocks on such lots, with a view to being bought out by the residents of the neighbourhood, such a course of conduct, though it might be termed reprehensible from a strictly moral point of view, is nevertheless within their legal rights. In a mandamus proceeding to compel the issuance of a building permit, the onus is upon the applicant to shew that he is in all respects entitled to the permit in question. [As to the subject generally of "Municipal regulation of building permits," see annotation, 7 D.L.R. 422.] On a motion for a mandamus to compel the issuing of a building permit, where the applicants are asserting a purely legal right, their motives cannot be inquired into. (Dictum per Galt, J.).

Frankel v. Winnipeg, 8 D.L.R. 219, 22 W.L.R. 597, 3 W.W.R. 405, 23 Man. L.R. 296.

BUILDING PERMITS — MUNICIPAL REGULATIONS — ALTERATION IN PLANS — AMENDMENT IN EFFECT A FRESH APPLICATION.

Where a building permit is regularly granted to an applicant by the city architect of a municipal corporation for an apartment house and subsequently, owing to certain building restrictions affecting his title, the owner is compelled to deviate substantially from the original plans, and applies to the city architect for his assent to the alterations, such later application being for a building substantially different from that originally proposed, although in form an application for leave to alter the plans of the original building, is in truth a fresh application for a building permit, and the architect may legally apply to such fresh application the civic by-laws and regulations in force at its date, including those passed in the interim since the date of the first permit. Toronto v. Wheeler, 4 D.L.R. 352, 3 O.W.N. 1424, distinguished. An applicant for a building permit within a municipal corporation who regularly obtains same from the city architect of the municipality and proceeds to erect and partially completes his building pursuant to the permit, acquires a vested right only with respect to the building plans submitted with and approved upon the granting of the permit, which cannot be interfered with by subsequent municipal by-law unless the statute under which the by-law is based clearly discloses such intent.

Re Ryan & McCallum, 7 D.L.R. 420, 4 O.W.N. 193, 23 O.W.R. 193.

BUILDING PERMITS — PROHIBITION AND REGULATION — MEANING OF "STORE" COMPARED WITH "SHOP."

The purpose of a city by-law under the Municipal Act, 1903 (Ont.), s. 541a, as amended by 4 Edw. VII. c. 22, s. 19, is to protect residential districts in cities from being disturbed by proximity of buildings in which general business is actively carried on and goods kept for sale, or wares are bought and sold, or machinery or other commodities are manufactured, repaired, or otherwise generally dealt in. [Toronto v. Foss, 5 D.L.R. 447, 3 O.W.N. 1426, Century and English Imperial Dictionaries sub voce "store," and Hall on North American Vocabularies, referred to.] Under a by-law based on the Municipal Act, 1903 (Ont.), s. 541a, as amended by 4 Edw. VII. c. 22, s. 19, a city corporation may properly issue a permit for a building as a place for the storage of commodities, providing that machinery or other articles which may be stored therein shall not be repaired, refurbished, painted, traded in, bought or sold, as would ordinarily be done in a repair shop, salesroom, or factory. A permit to erect a building for the mere purpose of storage or safekeeping of furniture or machinery or implements does not fall within the classes of buildings for "laundries, butcher-shops,

stores, and manufactories," which may be prohibited by city by-law under the Municipal Act, 1903 (Ont.), s. 541a, as amended in 1904 by 4 Edw. VII. c. 22, s. 19.

Re Hobbs & Toronto, 6 D.L.R. 8, 4 O.W.N. 31, 23 O.W.R. 8.

STATUTORY REGULATION — RESIDENTIAL STREET — CORNER LOT — MUNICIPAL ACT (ONT.), S. 541A, AS ENACTED BY 4 EDW. VII (ONT.), C. 22, S. 19.

A building is on a residential street and the residential street is in front of the building, within the meaning of s. 541a of the Consolidated Municipal Act, 1903, as enacted by the Municipal Amendment Act, 4 Edw. VII. (Ont.), c. 22, s. 19, when it is on a corner and one side faces upon the residential street, though the front of it faces upon another street.

Re Dinnick v. McCallum, 5 D.L.R. 843, 26 O.L.R. 551, 22 O.W.R. 546.

PERMITS FOR ERECTING — APARTMENT HOUSES.

Toronto v. Ford, 12 D.L.R. 841, 4 O.W.N. 1386, 24 O.W.R. 717.

BUILDING PERMITS — STATUTORY BUILDING LINE—FRONT STEPS.

The steps, as a means of access to the front of a building extending out across the prescribed building line but the building itself being within the prescribed line, is not within the prohibition of a municipal by-law authorized by s. 406, subs. 10, of the Municipal Act, R.S.O. 1914, c. 192, prohibiting the placing of a building on a residential street nearer to the street line than a certain prescribed distance, as to disentitle one to a building permit. [Paddington Corporation v. Attorney-General, [1906] A.C. 1, specially referred to.]

Re Masonic Temple Co. & Toronto, 22 D.L.R. 458, 38 O.L.R. 497.

MUNICIPAL REGULATIONS — LOCATION—MUNICIPAL ACT (ONT.) — REVOCATION OF BUILDING PERMIT.

A permit by a municipality to build is merely a license revocable by the city where nothing has been done by the builder after the granting of the permit, to change the situation, and no outlay has been incurred by him under it. The mere getting of a permit to erect an apartment house without doing work in pursuance thereof does not amount to a "location" of the house within the meaning of the statute 2 Geo. V. (Ont.), c. 40, s. 10, giving municipalities having a population of not less than 100,000 the right "to prohibit, regulate and control the location on certain streets to be named in a by-law of apartment or tenement houses and garages to be used for hire or gain." Where a statute gives a municipality the right to prohibit the location of apartment houses on certain streets and a by-law is passed pursuant to this statute and revoking former permits, the municipality is not estopped where the only acts that were done under the former permit and prior to the passage of the by-law were the preparation of the plans and specifications from enforcing the new by-law as to the property covered by such permit. [Toronto v. Wheeler, 4 D.L.R. 352, 3 O.W.N. 1424, distinguished.]

Toronto v. Williams (No. 2), 8 D.L.R. 299, 4 O.W.N. 58, reversing 5 D.L.R. 659, 27 O.L.R. 186.

NUISANCE—ERECTION OF STABLES AND WAGGON-SHEDS IN RESIDENTIAL NEIGHBOURHOOD IN CITY — ACTION BY PROPERTY OWNER QUI TAM TO RESTRAIN—INTERIM INJUNCTION—MOTION TO CONTINUE UNTIL TRIAL—BY-LAW OF CITY COUNCIL—PERMIT — ADDITION OF CITY CORPORATION AS DEFENDANT—STATUS OF PROPERTY OWNER TO MAINTAIN ACTION.

Preston v. Hilton Bros., 17 O.W.N. 106.

BY-LAW — PERMIT FOR BUILDING — ANTICIPATED USE OF BUILDING IN BREACH OF POLICE COMMISSIONERS' BY-LAW—NUISANCE — RISK OF OWNER— ACTION TO RESTRAIN ISSUE OF PERMIT — STATUS OF PLAINTIFF AS RATEPAYER AND ADJOINING OWNER — JUDGMENT — RESERVATION OF RIGHTS AS TO FUTURE PROCEEDINGS.

Mackenzie v. Toronto, 7 O.W.N. 820.

(§ I A—9a)—GARAGES — LOCATION — BY-LAW PROHIBITING ERECTION.

The prohibition of the "location" of garages on certain streets of a city by a by-law is a different thing from the "erection and use" thereof, and a garage that was in the course of construction under a permit from the city, at the time such by-law was adopted, was completely "located" by virtue of such permit, so as not to be affected by the subsequent adoption thereof.

Toronto v. Wheeler, 4 D.L.R. 352, 3 O.W.N. 1424, 22 O.W.R. 326.

ERECTION OF APARTMENT HOUSE — CORNER LOT — MUNICIPAL BUILDING RESTRICTIONS.

Although it is a violation of a building restriction that a building erected upon any of certain lots having a frontage upon some other street as well as upon a specified street shall have its front upon such specified street, to erect an apartment building on the corner of such street and another street with an entrance to only one of the apartments on the specified street and the main entrance for all the other apartments on the other street, there being no connection between them and the one apartment entered from the specified street; yet when the building is subsequently altered so that the end fronting the specified street will be the predominating front of the building constituting the main entrance from the outside to all the apartments, this is a sufficient compliance with the requirement of the restriction, and the fact that the side entrance is more imposing is not material.

[Holden v. Ryan, 4 D.L.R. 151, referred to.]

Holden v. Ryan, 10 D.L.R. 90, 4 O.W.N. 668, 23 O.W.R. 961.

MUNICIPAL REGULATION — ROOM IN DWELLING USED FOR LADIES TAILORING — "MANUFACTORY."

The use of a room in a dwelling house as a sewing room for three or four persons who make up clothes for customers who furnish the material, does not constitute the premises a "manufactory" within the meaning of a municipal by-law, prohibiting the location, erection or use of manufactories in certain districts. [Toronto v. Foss (No. 2), 8 D.L.R. 641, 27 O.L.R. 264, affirmed.]

Toronto v. Foss (No. 3), 10 D.L.R. 627, 27 O.L.R. 612.

MUNICIPAL REGULATIONS — LOCATION OF APARTMENT HOUSES — WHAT CONSTITUTES LOCATION.

The staking out of the site for a building, entering into contracts with builders and the commencement of the work of excavation, particularly the construction of a trench for foundation walls, is within the meaning of the word "location" in a by-law prohibiting the location of an apartment or tenement house, and if done before the passing of the by-law exempts the land from the operation of the by-law. [Toronto v. Wheeler, 4 D.L.R. 352, 3 O. W.N. 1424; Toronto v. Williams, 5 D.L.R. 659, 27 O.L.R. 186, followed; Re Dinnick and McCallum, 11 D.L.R. 509, 4 O.W.N. 687, referred to.]

Toronto v. Stewart, 10 D.L.R. 193, 4 O.W.N. 1027, 24 O.W.R. 323.

MUNICIPAL RESTRICTIONS — APARTMENT OR TENEMENT HOUSE.

Where it appears from the plans and specifications filed with the city architect and superintendent of buildings that the applicant sought to erect a building with three or more sets of rooms for separate occupancy by one or more persons, it is within the prohibition of by-law No. 6061 of the city of Toronto forbidding the erection of apartment or tenement houses within certain districts, notwithstanding the applicant called the building a hotel, and notwithstanding provision made for a dining room in which all meals would be served to the tenants by the landlord. [Re Coleman and McCallum, 11 D.L.R. 138, 4 O.W.N. 1127, reversed.]

Re Coleman & McCallum (No. 2), 12 D.L.R. 140, 4 O.W.N. 1449, 24 O.W.R. 754. [Appeal to Can. S.C. dismissed, Oct. 1913.]

BUILDING PERMITS — MUNICIPAL REGULATIONS—BY-LAW, ULTRA VIRES—WHEN.

A fire limit by-law under the Municipal Act, 1903 (Ont.), which authorizes a municipal council to prohibit the erection of any building the main walls of which are not of "brick, iron or stone" will be invalid for excess of jurisdiction if it purports to include in the prohibition buildings with main walls not constructed of "brick, stone, concrete or other approved of incombustible material," for under the latter heading the by-law contemplates some one approving of the proposed incombustible material and that his approval shall be necessary to the taking of the proposed building out of the prohibited class: this as to buildings to be constructed of galvanized iron is beyond the powers conferred by the statute. [Attorney-General v. Campbell, 19 Gr. 299; State v. Fay, 44 N.J. Law 474, referred to.]

Toronto v. Elias Rogers Co., 19 D.L.R. 75, 31 O.L.R. 167.

REGULATION OF BUILDINGS — "GARAGES TO BE USED FOR HIRE OR GAIN" — GARAGE TO BE USED BY TENANTS OF APARTMENT HOUSE.

Toronto v. Delaplante, 5 O.W.N. 69, 25 O.W.R. 16.

MUNICIPAL CORPORATION — REGULATION OF BUILDINGS — RESIDENTIAL STREETS — "FRONTS" — MUNICIPAL ACT, R.S.O. 1914, c. 192, s. 406 ('9) — MUNICIPAL BY-LAW—HIGHWAY—APPROVAL OF PLAN OF SUBDIVISION — MUNICIPAL AMENDMENT ACT 4 GEO. V. c. 33, s. 20— MANDAMUS TO CITY ARCHITECT — APPROVAL OF PLANS OF BUILDING.

Re Charlton & Pearce, 7 O.W.N. 174.

BUILDING RESTRICTION — POWERS OF CITY COUNCIL UNDER CHARTER — DISCRIMINATION.

Re Wood & Winnipeg, 21 Man. L.R. 426, 19 W.L.R. 366.

BY-LAW — RESTRICTIONS — DISTANCE FROM STREET.

Toronto v. Schultz, 19 O.W.R. 1013.

B. Fire escapes.

(§ I B—11)—DEATH BY FIRE—PROXIMATE CAUSE.

A mere noncompliance with the Factory Shop and Office Building Act, 3 & 4 Geo. V., c. 60 (R.S.O., c. 229), in not providing fire-escapes and the nonseparation of combustible or inflammable material, does not entitle the personal representatives or dependents to recover for the death of a person who lost his life in a building when it was burnt, where the evidence fails to establish that the noncompliance with the statutory provisions was the immediate cause resulting in the person's death.

Birch v. Stephenson; McDougall v. Stephenson, 22 D.L.R. 404, 33 O.L.R. 427.

II. Private rights.

(§ II—15)—PRIVATE RIGHTS.

The obligation resting upon the owner or occupier of a building to which the public is invited to commit themselves or their property is to have the structure in a reasonably safe condition so far as the exercise of reasonable care and skill can make it so. [Pollock on Torts, 8th ed., p. 508,

512, referred to. See also Underhill on Torts, 9th ed., p. 171.]

Gunn v. C.P.R. Co., 1 D.L.R. 232, 20 W.L.R. 219, 1 W.W.R. 804, 22 Man. L.R. 32.

MANUFACTURING PURPOSES — PILING AND FILLING IN—AWARD—RES JUDICATA.

Upon a bill to set aside an award made under a covenant in a lease to pay for "any buildings or erections for manufacturing purposes:"—Held, affirming the decision of the court below, that the award should be set aside because the arbitrators did not value the filling in on the premises, that the meaning of the covenant was res judicata, and the decisions of this court in Sleeth v. The City of Saint John, 38 N.B.R. 542 and 39 N.B.R. 56, were that the word "erections" included the piling, capping, or woodwork in use or capable of being used as a foundation for buildings for manufacturing purposes even though no buildings actually thereon at the time the land was taken over and also filling in made with the object and intent and effect of strengthening and making solid such foundations, and that the decree should be amended accordingly. The lease in question was made after a surrender of a former lease. The covenant for valuation provided for valuation of buildings and erections put on the premises during the lease "with any such now thereon, if then being thereon." Held, this included buildings and erections put on the premises prior to the lease in question.

Gordon v. The City of Saint John; Quinlan v. The City of Saint John, 40 N.B.R. 541.

ENCROACHMENT OF BUILDING UPON CITY STREET—FAILURE TO PROVE BOUNDARY OF STREET — EVIDENCE — PLANS AND SURVEYS.

Toronto v. Pilkington Bros., 7 O.W.N. 806, 8 O.W.N. 486.

(§ II—18) — RESTRICTIONS — DWELLING HOUSE—APARTMENT HOUSE AS.

A covenant that certain land shall be used only for a detached dwelling house is not broken by the erection of an isolated apartment house on the land. [Pearson v. Adams, 7 D.L.R. 139, 27 O.L.R. 87, reversed; Pearson v. Adams, 3 D.L.R. 386, restored.]

Pearson v. Adams (No. 3), 12 D.L.R. 227, 28 O.L.R. 154.

BUILDING RESTRICTIONS — CONSENT TO REMOVE RESTRICTION — CONDITION INADVERTENTLY OMITTED.

Where by the terms of a contract for the sale of land the purchaser took subject to a certain restriction, but subsequently the vendor obtained from his grantor a consent that the restriction be removed subject to a certain condition, which consent was reduced to writing by the agent who brought about the sale, but the condition was inadvertently omitted, the purchaser has no right to have that part of the consent that was reduced to writing performed, unless the condition upon which it was obtained is carried out.

Ellis v. Zillias, 10 D.L.R. 358, 4 O.W.N. 744, 24 O.W.R. 48.

SEMIDETACHED HOUSES — SIZE OF LOT — ALTERATION TO SINGLE HOUSE.

Although a building structurally divided into two equal divisions by a wall extending its whole height with no internal communication, common staircase, or common front door, constitutes a pair of semidetached buildings, and to erect such a building upon a lot which has a frontage of only forty feet on a specified street would be a violation of a building restriction that every pair of semidetached buildings shall be upon land having a frontage on such street of at least fifty feet; yet when the building is subsequently altered by constructing and maintaining a door as a permanent passageway through the dividing wall, the structure becomes only one building within the meaning of the restriction in the deed [Ilford Park Estates Limited v. Jacobs, [1903] 2 Ch. 522, 526, considered; Holden v. Ryan, 4 D.L.R. 151, referred to.]

Holden v. Ryan, 10 D.L.R. 90, 4 O.W.N. 668, 23 O.W.R. 961.

RESTRICTIONS.

A clause in an agreement of sale of vacant land that "the purchaser" will use the property for the erection of a church and buildings in connection therewith, and for no other purpose does not disclose an intention to bind subsequent purchasers and mortgagees to the restriction, and a caveat under the Land Titles Act, R.S.S. 1909, in respect thereof should, therefore, be discharged, even if such constituted an interest in land under the statute.

Re Grand Trunk Pacific Development Co., 7 D.L.R. 611, 5 S.L.R. 313, 22 W.L.R. 193, 2 W.W.R. 1068. [Affirmed on different grounds, 10 D.L.R. 490.]

(§ II—21)—DANGEROUS WALLS.

Where the walls of a building are dangerous because of a fire, the owners of the damaged building from time to time are under a legal duty to the adjoining owner to take all reasonable measures to prevent the wall from falling over to the injury of his neighbour's property. [Ryland v. Fletcher, L.R. 3 H.L. 330, and Attorney-General v. Tod Heatley, [1897] 1 Ch. 560, applied.] If the purchaser of land and of a building thereon which had been ruined by fire takes measures for the preservation of the building which were adapted only to the winter season, and for the support of the structure only while the debris caused by the fire remained a frozen mass and neglects to put in more substantial supports on taking out the debris in warmer weather, he will be liable to the adjoining owner whose building is injured by the fall of the wall, although he had followed the advice of the city building inspector, and of his own architect that the walls were

sufficiently braced for the changed conditions. [Dalton v. Angus, 6 App. Cas. 740; Jolliffe v. Woodhouse, 10 T.L.R. 553; Valiquette v. Fraser, 39 Can. S.C.R. 1, applied; Ainsworth v. Lakin (Mass.), 57 L.R.A. 132, approved. And see 3 Halsbury's Laws of England, p. 315.]

McNerney v. Forrester, 2 D.L.R. 718, 22 Man. L.R. 220, 20 W.L.R. 732, 1 W.W.R. 1235.

RESPONSIBILITY—DECAY OF A WALL—PRESUMPTION — CONTRARY EVIDENCE — VIS MAJOR AND ACCIDENT—TRAMWAY —RAINFALL—C.C. ART. 17, S. 24, 1055.

In the case of decay of a building no presumption of wrong exists against the owner. Thus it is incumbent on the person who claims damages by reason of the decay of a wall of a house, to prove that the decay has been caused by a defect in the construction or in its maintenance. According to the doctrines of jurisprudence, the decay of a wall caused by the vibration of a tramway which passes on the street, or by heavy rains followed by severe frosts, is not an accident or vis major.

Levinson v. Asselin, 56 Que. S.C. 130.

LAND TITLES—MOTION TO DISCHARGE BUILDING CONDITION—EVIDENCE OF COMMON BUILDING SCHEMES — NOTICE TO INTERESTED PARTIES.

Re Baillie, 2 O.W.N. 816, 18 O.W.R. 642.

PROHIBITION OR ERECTION OF BUILDINGS WITHIN FIXED DISTANCE FREM STREET LINE IN RESIDENTIAL LOCALITY — REMOVAL OF PROHIBITION IN FAVOUR OF INDIVIDUAL OWNER — WINNIPEG CHARTER.

Wood v. Winnipeg, 21 Man. L.R. 426.

BUILDING RESTRICTIONS — "DETACHED HOUSE" — USE FOR "RESIDENTIAL PURPOSES" — PURPOSES OF "TRADE" — APARTMENT HOUSE — LETTING IN SUITES.

Re Robertson & Defoe, 25 O.L.R. 286, 20 O.W.R. 712.

BULK SALES.

See Sale, IV.

BY-LAWS.

Of Corporations, see Companies.

Of municipality, see Municipal Corporations.

CANALS.

See Waters; Harbours; Collision.

CANCELLATION OF INSTRUMENTS.

Of contracts generally, see Contracts, V.

Of subscription to corporate stock, see Companies.

Of deed, see Deed.

Revocation of will, see Wills.

Of contract of sale, see Vendor and Purchaser.

Of instruments under Land Titles Acts, see Land Titles.

Annotations.

Rescission of contract for fraud or misrepresentation: 21 D.L.R. 329.

Cancellation of share subscription for fraud or misrepresentation: 21 D.L.R. 103.

(§ I—1)—PROMISSORY NOTE — MISREPRESENTATION AS TO IDENTITY OF ORIGINAL MAKER.

Where the payee of a note agreed to accept a renewal not executed by the original makers to replace a note which he held and in which the makers were father and son, and the renewal note was executed by the son and a woman who the payee honestly believed was the son's mother, while, as a matter of fact, it was executed by the son's wife, of whose existence the payee had no knowledge; but the payee knowing that the mother was a responsible party, was content to accept her in lieu of her husband, as one of the makers, the payee is entitled on discovering the error to have the cancellation of the original note set aside, as made under an honest mistake of fact, and to sue the father and son on the original note.

Ward v. Wray, 9 D.L.R. 2, 4 O.W.N. 562, 23 O.W.R. 719.

FRAUD.

Where the evidence shews that the alleged vendor under a contract for the sale of land signed the agreement of sale on the representation of one of the alleged vendees, whom she hired as agent to sell the land, that it was an agreement in blank to be used by him in the event of obtaining a purchaser for the land, while as a matter of fact the agent wrote his own name and that of another in the agreement as vendees, the vendor is entitled on discovering the facts to have the agreement in question delivered up for cancellation and to an order for the removal from the register of the caveat and any lis pendens filed by the vendees.

Hess v. Ross, 8 D.L.R. 798, 22 W.L.R. 742, 3 W.W.R. 521.

PROMISSORY NOTE — SIGNATURE — SCHEME IMPRACTICABLE AND VISIONARY — ABSENCE OF ANY BENEFIT.

Where a signature to a promissory note, antedated and overdue at the time of signing, has been obtained from a person unaccustomed to business affairs by a representation that the giving of the note is part of a scheme to obtain by legal proceedings a sum of money for a company in which the maker is a shareholder, and, though there was no intention on the part of the payee to defraud, the scheme and proceedings were in fact visionary and impracticable, and the maker received no benefit from the giving of the note, the court may

order the payee in whose hands it remains to deliver it up for cancellation.

Kinsman v. Kinsman, 5 D.L.R. 871, 3 O.W.N. 966, 22 O.W.R. 979.

INSCRIPTION EN FAUX—IRREGULARITY—CERTIFIED COPY.

Even though the original of a document sous seing privé is informal and irregular, there cannot be an inscription en faux against a copy of it, certified by a public officer who has the legal custody, if such copy is a faithful reproduction of the document deposited. A copy certified by a prothonotary has not the effect of curing irregularities which affect the original. The party who takes exception to these irregularities can prove them and obtain the annulment of the document without having recourse to the inscription en faux.

St. Narcisse Butter & Cheese Makers v. Demers, 49 Que. S.C. 404, 50 Que. S.C. 6.

PROMISSORY NOTES AND MORTGAGE BY WIFE—UNDUE INFLUENCE OF HUSBAND—NO INDEPENDENT ADVICE.

Chalmers v. Irion, 2 O.W.N. 869, 18 O.W.R. 645.

DEED—ALLEGED FORGERY BY DECEASED GRANTEE—EVIDENCE.

Deevy v. Deevy, 4 O.W.N. 555, 23 O.W.R. 895.

(§ I—5)—IMPROBATION — PRODUCTION OF DOCUMENT.

Improbation proceedings should only be commenced when it is contended that the allegations in the document are false, or that the signatures are false; when the contention is merely that an alleged copy of the document is not a true copy, the proper proceeding would be to compel production of the instrument filed.

Thibault v. Coulombe, 32 D.L.R. 765, 50 Que. S.C. 461.

DEED—TRUST—FINDINGS OF FACTS—VARIATION OF JUDGMENT.

Smith v. Benor (No. 2), 10 D.L.R. 824, 24 O.W.R. 521, 4 O.W.N. 985, modifying 10 D.L.R. 808.

CANCELLATION OF INSTRUMENTS—CANCELLATION OF TRANSFER AND CERTIFICATE OF TITLE OBTAINED BY FRAUD.

Annable v. Coventry, 5 D.L.R. 661, 2 W.W.R. 816.

GROUNDS FOR.

The purport of the words "saving the rights of creditors who contract in good faith," which were introduced by an amendment in 1904 to art. 1301 C.C. (Que.), is to authorize the courts to distinguish between the creditors who unwittingly and in good faith violate the terms of art. 1301, and those who violate it in bad faith, and to protect only the creditors of the former class from the nullification of their security. Where a person lends a sum of money and accepts as security a mortgage on an immovable belonging to the borrower's wife, by means of a deed of sale of the property secured with right of redemption or otherwise, he has no action against the wife for the recovery of the money loaned, and the wife can have the deed set aside as being in violation of art. 1301 C.C. (Que.), which makes void any obligation contracted by the wife with or for her husband otherwise than as being common as to property, saving the rights of creditors who contract in good faith.

Lebel v. Bradin, 7 D.L.R. 470, 19 Rev. Leg. 16.

WHEN REMEDY REFUSED—INSTRUMENT NOT NEGOTIABLE.

An action to have a valid instrument, not negotiable, delivered up to be cancelled, does not lie unless there is some real danger of its being used for an improper purpose, to the loss, in some way, of the party seeking its cancellation; and in a case in which there is a possibility that the instrument has not fulfilled all its purposes, there can, even where that danger may exist, be no such right of action. Brooking v. Maudslay Son & Field, 38 Ch. D. 636, and Guaranty Trust Co. of New York v. Hannay & Co., [1915] 2 K.B. 536, referred to for the practice of Courts of Equity in decreeing cancellation of valid instruments and making declaratory judgments.

Shewfelt v. Kincardine, 35 O.L.R. 39, 9 O.W.N. 237.

(§ I—6)—FALSE REPRESENTATION OF LAW.

A false representation as to a matter of law is sufficient to have a document signed under such misrepresentation annulled.

Lamoureux v. Craig, 2 D.L.R. 148. [Reversed, 14 D.L.R. 399.]

CANDIDATES.

See Elections; Officers.

CAPIAS.

See Arrest.

CARNAL OFFENCES.

See Adultery; Disorderly house; Rape; Seduction.

CARRIERS.

I. WHO ARE COMMON CARRIERS; RELATION TO PUBLIC.

II. CARRIERS OF PASSENGERS AND OTHER PERSONS.

- A. In general.
- B. Rules and regulations.
- C. Who are passengers.
- D. Abuse of passengers; insulting language, etc.
- E. Assault.
- F. Arrest; false imprisonment.
- G. Measure of care required; negligence generally.
- H. Ejection of passenger or trespasser.
- I. Leaving at destination; stopover.
- J. Disabled or incompetent passengers.
- K. Getting on or off.
- L. Safety of stations, approaches, and platforms.

M. Tickets; conditions; fares.
N. Blackboard announcements as to trains; time-tables.
O. Baggage or property of passenger.
P. Corpse.
Q. Connecting carriers.
III. Carriers of freight.
A. In general; powers of agents.
B. Duty to receive and transport.
C. Loss of, or injury to property.
D. Delivery by carrier; delay.
E. Liability and lien for freight charges; rates.
F. Carrying live stock.
G. Stipulations as to liability.
H. Contract or duty to furnish cars.
I. Demurrage on cars.
J. Connecting carriers.
K. Criminal transportation.
IV. Governmental control; rates; discrimination; duty as to stopping places.
A. In general.
B. Compulsory connection and interchange of business; discrimination between carriers; hackmen, etc.; through rates.
C. Rates discrimination between passengers or shippers; rebates; passes.
D. Duty as to depots; stopping trains; duty to run trains.
E. Restriction as extension of liability by Railway Commission.

Annotations.

Regulation of rates: 26 D.L.R. 627.

The Crown as a common carrier: 35 D.L.R. 285.

I. Who are common carriers; relation to public.

See Railways; Street Railways; Railway Board; Shipping.

(§ I—4)—Ferryboat — Horse — Common fault—Damages.

Although a ferryman, who carries passengers and vehicles from one bank of a river to the other by means of a ferryboat towed by a gasoline yacht, is not a carrier, he is responsible for accidents caused by his negligence or faulty management of the boat. But one who takes on board such boat a horse hitched to a carriage should take precautions to assure its being quiet. Where both parties are negligent, there is common fault, and the damages should be divided.

Gauvin v. Legault, 24 Rev. Leg. 32.

II. Carriers of passengers and other persons.

A. In general.

(§ II A — 10) — Additional passenger train service.

Where the gross earnings per passenger train mile on a passenger train between Lachute and Montreal are not only much below the average return of the whole system, but are also below the average costs of the system, the Board would not be justified in directing that an additional passenger train should be put into service between the same points.

Massiah v. C.P.R. Co., 18 Can. Ry. Cas. 358.

Traffic — Movement — Shorter route — More direct — More economical — Toll situation — Mileages — Reduction.

It is the duty of a rail carrier in the interests of the shippers to take the shorter, more direct, more economical traffic movement route, but since under the present toll situation the whole of the economy is obtained by the rail carrier, the mileage via the Ladysmith transfer ought to be reduced to the milage via the Esquimalt transfer to Nanaimo, and the mileages of stations served by the Ladysmith transfer reduced in the same manner plus the mileage from Ladysmith to destination.

Nanaimo Board of Trade v. C.P.R. Co., 23 Can. Ry. Cas. 92.

Additional passenger service — Unjust discrimination.

The Board is not justified in directing additional passenger service where the passenger train mile earnings would be one-half of the passenger train mile cost of operation in the absence of any evidence of similarity of conditions and of affirmative evidence that the difference in passenger-train service has resulted that persons and localities located on one section of railway have profited at the expense of those on another section so as to shew unjust discrimination. [Toronto & Brampton v. G. T. and C.P.R. Cos. (Brampton Commutation Rates Case) (No. 2), 11 Can. Ry. Cas. 370, followed.]

Wood v. C.P.R. Co., 18 Can. Ry. Cas. 365.

Accidents of traveling — Preliminary request—Authorization to sue—S. Rep. (1909), art. 7347.

The presentation of the preliminary request to obtain permission to sue in accordance with law of accidents while traveling, is a formality destined above all to furnish an opportunity for conciliation. It should not be refused unless the acts are such that the law cannot manifestly be invoked.

Gauthier v. Cohen, 25 Rev. Leg. 40.

(§ II A—12)—Duty to transport generally.

A railway company cannot lawfully carry passengers over a road that has not been opened for traffic by an order of the Board of Railway Commissioners under s. 261 of the Railway Act, except labourers employed in the construction thereof.

Re G.T.P.R. Co., 3 D.L.R. 819.

PASSENGERS—OPERATION—CARS —THROUGH — POINTS — TERMINAL AND INTERMEDIATE—39 VICT. C. 87 (O.)—3 AND 4, GEO. V. C. 36 (O.)—AGREEMENT—BY-LAW.

Neither the Act of Incorporation of the defendants, 39 Vict. c. 87 (O.), nor the agreement with, and the by-law of the City of Hamilton, contains any limitation upon the right of the defendants to operate through cars between terminal points without stopping, and by the absence of any regulation by the Ontario Railway and Municipal Board under the Ontario Railway Act, 3 and 4, Geo. V, c. 36, the defendants have the same right as steam railways to run trains or cars from one point on its line to another without making any intermediate stops.

Fielding v. Hamilton & Dundas Street R. Co., 18 Can. Ry. Cas. 82.

B. RULES AND REGULATIONS.

(§ II B—20)—AS TO TICKETS OR FARES.

In a special passenger tariff filed with the Board of Railway Commissioners specifying that the tolls to be charged persons attending a convention would be a one-way fare plus twenty-five cents, it is unnecessary to state that the twenty-five cents is a "fee" and is charged for the purpose of defraying the expenses in viseing the railway certificates entitling such persons to a return trip without the payment of a return fare.

Canadian Fraternal Assn. v. Canadian Passenger Assn. 5 D.L.R. 171, 13 Can. Ry. Cas. 178.

C. WHO ARE PASSENGERS.

(§ II C—35)—INJURY TO BRAKEMAN—NEGLIGENCE—CROWN.

The death of a brakeman while riding on a box car in the discharge of his duties on the Intercolonial Railway, occasioned by the overturning of the car when it suddenly jumped the track, the roadbed and the car being in perfect condition and the train traveling at a moderate speed, must be regarded as an accident of an unforeseen event and is not attributable to the "negligence of any officer or servant of the Crown . . . in or about the construction, maintenance or operation of the Intercolonial Railway," within the meaning of s. 20 of the Exchequer Court Act.

Thibault v. The King, 41 D.L.R. 222, 17 Can. Ex. 366.

(§ II C—40)—WHO ARE PASSENGERS—PERSON OBTAINING REDUCED FARE BY WRONGFUL USE OF COMMERCIAL TRAVELER'S CARD—LIABILITY OF CARRIER FOR INJURY TO.

The fact that a person who was injured by the derailment of a passenger car, obtained his ticket at a reduced rate by presenting a commercial traveler's card after he had ceased to be entitled to use it, does not make him a trespasser on the train so as to relieve the carrier from liability.

Ashbee v. C.N.R. Co., 14 D.L.R. 701, 6 S.L.R. 135, 25 W.L.R. 884, 5 W.W.R. 543 and 550.

(§ II C—44)—LIVE STOCK—INJURY TO PERSONS IN CHARGE TRAVELING ON PASS.

Goldstein v. C.P.R. Co., 23 O.L.R. 536, 18 O.W.R. 977, 12 Can. Ry. Cas. 485.

D. ABUSE OF PASSENGERS; INSULTING LANGUAGE, ETC.

(§ II D—55)—ABUSE OF PASSENGER.

Held, common carriers are liable, for insulting language and conduct of their servants to their passengers, in damages measured by circumstances, such as the sex and social standing of the party aggrieved, and the nature and gravity of the offence. Hence, when a railway conductor, in a controversy with a lady passenger, as to the fares of her children, says he does not believe her, and persists in speaking to her, though told to desist, and, when she moves away, follows her with the annoyance, the company will be condemned to pay her $100, the full amount of her action.

Tudor v. Quebec & Lake St. John R. Co., 41 Que. S.C. 19, 13 Can. Ry. Cas. 387.

F. ARREST; FALSE IMPRISONMENT.

(§ II F—65)—NO ACTION TO RECOVER DAMAGES FOR FALSE ARREST WILL LIE IN FAVOUR OF A PARTY WHO PLEADS GUILTY TO CHARGE OF TRESPASS PREFERRED AGAINST HIM WHEN ARRESTED.

Mignault v. G.T.R. Co., 40 Que. S.C. 475, 13 Can. Ry. Cas. 52.

G. MEASURE OF CARE REQUIRED; NEGLIGENCE GENERALLY.

(§ II G—70)—MEASURE OF CARE REQUIRED —LIABILITY FOR INJURY TO PASSENGERS.

A carrier of passengers is liable only for negligence and not as an insurer of their safety.

Hughes v. Exchange Taxicab & Auto Livery, 11 D.L.R. 314, 24 W.L.R. 174, 4 W.W.R. 556.

PASSENGER STEPPING OFF TRAIN—INVITATION TO ALIGHT.

A conductor of a passenger train, who after telling a passenger that the next stop is his station, "where you get off," opened the door guarding the steps of the car, and allowed the passenger to go down the steps from which the passenger stepped off, while the train was still going at a high rate of speed, was not guilty of negligence; the conductor was entitled to assume that the passenger would act with ordinary prudence and discretion.

G.T.R. Co. v. Mayne, 39 D.L.R. 691, 56 Can. S.C.R. 95, 22 Can. Ry. Cas. 218, reversing 34 D.L.R. 644.

STOPPING CAR SUDDENLY NOT AT STOPPING PLACE.

The stopping of a street car in the middle of a block, not being necessary or justifi-

able under the circumstances, a jury is justified in finding negligence, where the car was brought to a violent or sudden stop, which caused a passenger standing in the car to fall and sustain injuries.

Billington v. Hamilton Street R. Co., 34 D.L.R. 708, 39 O.L.R. 25.

BUMPING OF CAR.

Failure to detect bumping by a railway car, which later overturned, does not of itself imply negligence.

Pyne v. C.P.R. Co., 37 D.L.R. 751, 28 Man. L.R. 266, [1917] 3 W.W.R. 836.

MEASURE OF CARE REQUIRED—NEGLIGENCE—DISCHARGING PASSENGERS AT DANGEROUS SPOT—STREET RAILWAYS.

If the act of a third party, ex. gr. the city municipality, in reconstructing a street paving, has rendered dangerous an alighting place chosen by the street railway, the latter must, even at the risk of inconvenience to the passenger, choose another point of alighting for the time being at least: or it should take reasonable and prudent steps to cause the threatened danger for the time being to disappear or should warn of the danger a passenger who is about to alight.

Blakeley v. Montreal Tramways Co., 20 D.L.R. 643.

COLLISION — DEATH OF PASSENGER — NEGLIGENCE.

Abbey v. Niagara, St. Catharines & Toronto R. Co., 11 O.W.N. 241.

INTOXICATED PASSENGER—EVIDENCE OF NEGLIGENCE—NONSUIT.

Beck v. C.N.R. Co., 2 A.L.R. 549. [New Trial ordered 47 Can. S.C.R. 397, 23 W.L.R. 576.]

(§ II G—96)—STREET CAR APPROACHING RAILWAY CROSSING—NEGLIGENCE OF MOTORMAN IN CROSSING TRACK—COLLISION WITH WORK TRAIN—INJURY TO PASSENGER FALLING OFF CAR—DAMAGES.

An electric railway company which by the inexcusable negligence and breach of rules of one of its motormen, places the passengers of a car in a position of great peril from imminent danger of collision with a railway work train, is liable in damages for the death of one of the passengers who becoming terrified jumps or falls off the car and is killed by the train. The railroad company whose employees could have prevented the accident by prompt action, are equally liable and cannot plead as an excuse from such liability, the fact that, but for the negligence of the Electric Railway Company, the accident would not have taken place.

Winnipeg Electric R. Co. v. C.N.R. Co.; Re Bartlett, 50 D.L.R. 194, 59 Can. S.C.R. 352, [1920] 1 W.W.R. 95, reversing in part, 43 D.L.R. 326, 23 Can. Ry. Cas. 381, 29 Man. L.R. 91, which affirmed 28 D.L.R. 186.

(§ II G—100)—TOWARDS HOLDER OF ORDINARY TICKET ENTERING PULLMAN.

A passenger in a day coach who finds the ordinary mode of exit at the rear vestibule closed at his destination, and who thereupon enters the adjoining Pullman car in search of an opened vestibule, is not a trespasser as to such Pullman coach so as to disentitle him to damages for personal injuries received in alighting therefrom.

McDougall v. G.T.R. Co., 8 D.L.R. 271, 4 O.W.N. 363, 23 O.W.R. 364.

(§ II G—101)—PASSENGER ON TRAIN—REFUSAL TO STOP TRAIN FOR HIM TO ALIGHT—AGREEMENT OF BRAKEMAN TO SLOW UP—PASSENGER JUMPING UNDER DIRECTION OF BRAKEMAN—INJURY—LIABILITY OF COMPANY.

A traveler on a railway train who, wishing to alight at a station where the train does not stop and which is not the destination to which he has bought his ticket, assents to a suggestion of the brakeman that the train should be slowed down in order that he may jump from the moving train, takes all the risk of alighting, although he acts under the direction of such brakeman as to when it is safe to do so. [G.T.R. Co. v. Mayne, 39 D.L.R. 691, approved.]

C.P.R. Co. v. Hay, 46 D.L.R. 87, 24 Can. Ry. Cas. 359, 58 Can. S.C.R. 283, [1919] 1 W.W.R. 806, reversing 40 D.L.R. 292, 23 Can. Ry. Cas. 275, 11 S.L.R. 127.

(§ II G—103)—RAILWAY—INJURY TO PASSENGER CROSSING TRACKS AT STATION—FINDINGS OF JURY — IMMATERIALITY——NONSUIT—EVIDENCE—STATEMENT OF STATION-MASTER — INADMISSIBILITY — NEW TRIAL—ABSENCE OF GROUNDS FOR.

Antaya v. Wabash R.R. Co., 24 O.L.R. 88.

(§ II G—110)—INJURY TO PASSENGER ALIGHTING FROM CAR ON WRONG SIDE—INVITATION — INJURY CAUSED BY UNGUARDED HOLE IN RUNNING BOARD.

Jones v. Hamilton Radial Electric R. Co., 5 O.W.N. 282, 25 O.W.R. 267.

(§ II G—111)—NEGLIGENCE—ELECTRIC RAILWAY—EXPLOSION IN CONTROLLER—INJURY TO PASSENGER.

A carrier is liable for an injury received by a street car passenger as the result of an explosion in the controller of the car due to a defect that should have been discovered by proper inspection.

Toronto R. Co. v. Fleming (No. 2), 12 D.L.R. 249, 47 Can. S.C.R. 612, 15 Can. Ry. Cas. 386, 49 C.L.J. 386, affirming 8 D.L.R. 507, 27 O.L.R. 332.

(§ II G—114)—PASSENGER—DERAILMENT OF CARS—CAR DEFECTIVE—NEGLIGENCE—PROOF.

The plaintiff was injured by the derailing of a passenger coach in which he was riding as a passenger on defendants' railway; the cause of the derailment was the breaking of an equalizing bar. Their Lordships concurred in the finding of the Manitoba Court of Appeal that the maxim res ipsa loquitur applied and that by proving that the car in which he was riding ran off the track the plaintiff made a prima facie case of negli-

gence and that the duty then devolved upon the defendant to shew that the accident was not due to any fault or carelessness on its part. There was evidence to support the jury's conclusion that the defendant had not acquitted itself of this burden of explanation. As carriers of passengers the defendants' undertaking was to exercise a high degree of care, and to carry safely as far as reasonable care and forethought could attain that end. The verdict of the jury that the negligence of the defendant consisted "in not having proper inspection or testing of equalizing bars" was justified on the evidence.

C.P.R. Co. v. Pyne, 48 D.L.R. 243, [1919] 3 W.W.R. 125, affirming 43 D.L.R. 625, 23 Can. Ry. Cas. 281, 29 Man. L.R. 139. [See 37 D.L.R. 751.]

(§ II G—124)—Contributory negligence—Crossing track—Not continuing to look, effect.

A railway company is not liable for injuries sustained by a person who crosses a street in front of a moving street car without keeping the car in sight until he has crossed the street, and trusts blindly to an opinion formed on leaving the sidewalk that there was ample time to cross.

Myers v. Toronto R. Co., 10 D.L.R. 754, 24 O.W.R. 452, 4 O.W.N. 1120. [Reversed in 18 D.L.R. 335; 30 O.L.R. 263.]

(§ II G—130)—Riding on platform or footboard.

B.C. Electric R. Co. v. Dynes, 47 Can. S.C.R. 395, 23 W.L.R. 577.

(§ II G—131)—Injury to passenger—Riding on step of car—Permission of defendant—Negligent operation of car.

An intending passenger may recover for injuries sustained through the negligent operation of a crowded car, notwithstanding the fact that he was riding on the step of the car, where such was a practice commonly permitted by the company. [Williams v. B.C. Electric R. Co., 7 D.L.R. 459, affirmed.]

Williams v. B.C. Electric R. Co. (No. 3), 12 D.L.R. 770, 18 B.C.R. 295, 25 W.L.R. 77, 4 W.W.R. 1294.

H. Ejection of passenger or trespasser.

(§ II H—140)—Riotous or disorderly conduct of passengers—Ejection from train.

Riotous or disorderly conduct, or the use of indecent or profane language in a railway passenger coach, works a forfeiture of a passenger's right to be carried as such, and he may for such conduct be ejected from the train, unless he is through drunkenness or other cause bereft of all intelligence and is put off and left on a track or other dangerous place, under such circumstances that the conductor ought to have known that putting him off was equivalent to putting him to death.

Dunn, Administrator v. Dominion Atlantic R. Co., 45 D.L.R. 51, 25 Can. Ry. Cas. —. [Reversed by Supreme Court of Canada, 52 D.L.R. —.]

(§ II H—141)—For injury to—Negligent eviction.

Even to trespassers a railway company owes a duty not to wilfully injure them nor endanger their safety; and where trespassers are stealthily riding on a ledge 14 inches wide at the back of the tender, and the brakeman, while in the course of his employment and without ascertaining the dangerous position of the trespassers as a reasonable man would, forces one of them from the ledge thereby knocking him against the other and causing the latter to fall beneath the train and seriously injuring him, it is sufficient to warrant a jury's finding of the company's negligence; whether or not the brakeman had knowledge of their position or whether he acted as a reasonable and prudent man, are questions of fact for the jury. [G.T.R. Co. v. Barnett, [1911] A.C. 361, 22 O.L.R. 84, applied; Bondy v. S.W.A.R. Co., 24 O.L.R. 409, considered; Lowery v. Walker, [1911] A.C. 10, distinguished. See also Nolan v. Montreal Tramways Co., 26 D.L.R. 527.]

Diplock v. C.N.R. Co., 26 D.L.R. 544, 9 S.L.R. 31, 33 W.L.R. 453, 9 W.W.R. 1052. [Affirmed, 30 D.L.R. 240, 53 Can. S.C.R. 376.]

(§ II H—155)—Ejection of passenger—Refusal to produce hat check.

A passenger on a railway subject to the Dominion Railway Act, R.S.C. 1906, c. 37, who has lost the "hat check" given him on the surrender of his ticket by the conductor for the latter's own convenience, is not liable to expulsion from the train in default of paying another fare under a railway by-law purporting to authorizing the company to put off the train any passenger who refuses to produce and deliver up his "ticket" on demand. [G.T.R. Co. v. Beaver, 22 Can. S.C.R. 498, considered; Butler v. Manchester, Sheffield and Lincolnshire R. Co., 21 Q.B.D. 207, applied.]

Haines v. G.T.R. Co., 15 D.L.R. 714, 29 O.L.R. 558, 16 Can. Ry. Cas. 359.

Carriage of passengers—Right to a seat—Passenger carried standing—Expulsion from train.

The contract between a railway company and a passenger to whom the company sells a ticket, gives the passenger the right to a seat in a car. If the company cannot, on account of the number of travelers, give him a seat, the traveler can refuse to be carried standing; he can get off the train and exercise his right to recover damages for nonfulfilment of the contract. But if he prefers to stay on the train and be carried standing, he cannot refuse to give up his ticket, or to pay his fare. Such a refusal gives the conductor the right to put him

out of the train, as provided by art. 6637, of R.S.Q. 1909. Vide, also, R.S.C. 1906, c. 37, s. 281.) This can only be done at a usual station, and, if it is done elsewhere, the expelled passenger has the right to recover the damages which result.

Langlois v. Quebec & Lake St. John R. Co., 45 Que. S.C. 223.

K. Getting on or off.

(§ II K—209)—Allowing time to alight—Assistance to passengers.

The plaintiff was riding as a passenger on one of the defendant company's cars. Upon the conductor collecting her fare she asked him to let her off at a certain place, to which he answered, "All right." He then went into the motor vestibule in front and stayed there until after the accident. After turning a corner at plaintiff's destination the car stopped, and as the plaintiff was about to alight it started up again, throwing her to the ground, and from the fall she sustained injuries. At the time of the accident there were but three passengers in the car. The jury gave a verdict for $1,000 for the plaintiff and $500 for her husband:—Held, on appeal, that there was evidence upon which the jury might reasonably come to the conclusion that the company was negligent.

Armishaw v. B.C. Electric R. Co., 14 D.L.R. 393, 18 B.C.R. 152.

(§ II K—210)—Failure to open vestibule door at station.

Where a railway company negligently omitted to open the vestibule door of a day coach on arrival at a passenger's destination and the passenger in his efforts to get off the train went to the next coach to find an open vestibule from which to alight, and the train was, by that time, pulling away from the station at a speed of three or four miles an hour, there was nothing in the rate at which the train was proceeding to make it manifestly dangerous for the plaintiff to attempt to get off, and such course of his part was not contributory negligence. [Keith v. Ottawa & New York R. Co., 5 O.L.R. 116, applied.] Where a railway company negligently closes a passenger's natural means of getting off a train, without notice to him, such company is guilty of negligence in starting the train before the passenger has sufficient time to get off by the means he adopts, provided such means be reasonable.

McDougall v. G.T.R. Co., 8 D.L.R. 271, 27 O.L.R. 369, 23 O.W.R. 364.

(§ II K—212)—Injury to street car passenger—Allowing time to alight—Sudden starting of car.

A passenger may recover damages for being thrown from a street car by its sudden starting as he was about to alight in compliance with the conductor's request that all passengers should disembark as the car was going no further.

Montreal Street R. Co. v. Marins, 12 D.L.R. 620.

Negligence of street railway—Allowing time to alight.

Where the circumstances of the case are such that positive and direct evidence on specific negligence cannot be given, as where a street car had stopped to permit a passenger to alight, and the latter, while in the act of alighting, is rendered unconscious so as not to be able to remember what happened after getting to the car step, and where it is proved that when the car had proceeded only a short distance ahead without knowledge of the accident by any one on it, the passenger was found injured and unconscious by the track, and where there was no evidence to indicate any intervening cause, the jury may infer in the absence of any evidence for the defence, that the car had been negligently started before the passenger had alighted, and that such negligence caused the fall and consequent injuries. [McArthur v. Dominion Cartridge Co., [1905] A.C. 72, and G.T.R. Co. v. Hainer, 36 Can. S.C.R. 180, referred to.]

Winnipeg Electric R. Co. v. Schwartz, 16 D.L.R. 681, 27 W.L.R. 439, 5 W.W.R. 1298, 49 Can. S.C.R. 80, 17 Can. Ry. Cas. 1, affirming 9 D.L.R. 708, 23 Man. L.R. 60, 5 W.W.R. 1298.

Government railway—Failure to afford opportunity to alight at station platform—Passenger standing on lower step of car—Injury—Right to recover damages.

Suppliant purchased a ticket entitling him to travel as a passenger on a railway between the stations at B and M and return. On the return journey to B, the train, instead of proceeding to the station platform and giving the passengers an opportunity to alight there, pulled up at a tank, before reaching the platform, for the purpose of watering the engines. While the train was at the tank, a period of from 10 to 13 minutes, the greater number of the passengers alighted; but the suppliant did not, expecting the train to pull up at the station platform. During this same interval the suppliant went out of the car in which he was being carried, and stood upon the lower step of the platform of the car preparatory to alighting at the station. The conductor, apparently on the assumption that all the passengers for B. had previously alighted, started the train and allowed it to pass the station platform at a considerable speed. As the train was passing the station the suppliant was thrown from the step of the car to the ground between the station platform and the rail of the track, and was severely injured:—Held, that the suppliant was justified in assuming that the conductor would stop the train at the station, after leaving the tank, and

that under the circumstances he was justified in remaining on the step where he was standing. That the accident would not have happened had the conductor fulfilled his duty under the law and regulations, and stopped his train at the platform of the station.

Schaffer v. The King, 14 Can. Ex. 403.

DUTY OR NEGLIGENCE OF—STREET RAILWAY —PASSENGERS—ALIGHTING.

Reeves v. Toronto R. Co., 25 O.W.R. 91.

(§ II K—225)—PASSENGER KILLED BY TRAIN WHEN ALIGHTING FROM ANOTHER TRAIN AT STATION—INVITATION TO ALIGHT—COUNTERMAND—FAILURE TO BRING TO KNOWLEDGE OF PASSENGER—DUTY OF CONDUCTOR AND TRAINMEN TO CARE FOR SAFETY OF PASSENGERS—FATAL ACCIDENTS ACT—DAMAGES.

Posha v. C.P.R., 14 O.W.N. 135.

CONTRIBUTORY NEGLIGENCE—IN GETTING OFF.

Bergiven v. Quebec & Lake St. John R. Co., 43 Que. S.C. 38.

L. SAFETY OF STATIONS, APPROACHES, AND PLATFORMS.

(§ II L—240)—STATION HOUSE—FAILURE TO PROVIDE—EXPOSURE OF PASSENGER TO ELEMENTS—ILLNESS—LIABILITY FOR.

The failure of a railway company to provide a suitable station house at a regular stopping place, as required by s. 284 of the Canada Railway Act, renders it liable for the resultant illness occasioned a passenger from exposure to the elements while waiting at night for a train.

Morrison v. Pere Marquette R. Co., 12 D.L.R. 344, 15 Can. Ry. Cas. 406, 28 O.L.R. 319, affirming 15 Can. Ry. Cas. 402, 27 O.L.R. 551.

CONVENIENT MODE OF DESCENT—NEGLIGENCE.

A tramway company is bound to procure for its passengers a convenient mode of descent, and if it has no station should provide some easy means of descending and indicate to passengers where they should descend, and the negligence of the passenger does not excuse the torts of the carrier.

Montreal Street R. Co. v. Chevandier, 24 D.L.R. 349, 24 Que. K.B. 48.

(§ II L—245)—SAFETY AT STATIONS—AS TO THROWING OFF BAGGAGE.

Negligence cannot be predicated against a railway company merely on its failure to protect an intending passenger, standing on a station platform on its line, from injury due to the unauthorized action of a passenger unconnected with the railway company, in throwing off his baggage while the train passed through without stopping. [Blain v. C.P.R. Co., 5 O.L.R. 334, distinguished.]

Galbraith v. C.P.R. Co., 17 D.L.R. 65, 24 Man. L.R. 291, 28 W.L.R. 307, 6 W.W.R. 908.

FAILURE TO PLACE TRAIN ON SIDING AT ARRIVAL—COLLISION.

There is gross negligence on the part of the conductor of a railway company whose train arrives at a station when the conductor knows that another train which should have the right of way would arrive in a few moments, if the train remains from 8 to 10 minutes in the station in order to receive his instructions without giving any order to have the train placed safely upon a siding, and in such case the company is liable for the damages caused by a collision.

G.T.R. Co. v. Brassard, 47 Que. S.C. 369.

M. TICKETS; CONDITIONS; FARES.

(§ II M—273)—CONDITIONS AND LIMITATIONS—BAGGAGE.

A condition stated on a passage ticket for transportation upon a boat whereby the transportation company was not to be liable for injury to the passenger or baggage, (inter alia) from perils of the sea or defects in the boat fittings, where reasonable means had been used to send the boat to sea in a seaworthy state, will bind the passenger where the latter had ample opportunity to read the ticket and to get notice therefrom and from the posted notices of the limitation of liability if the company did all that was reasonably required to bring the conditions to the attention of prospective passengers.

Dill v. G.T.P. Coast S.S. Co., 21 D.L.R. 392, 21 B.C.R. 182.

(§ II M—287)—REQUIREMENTS AS TO STAMPING RETURN PART.

The charge made by a passenger association formed by the principal railway and steamship companies of Canada for viséing railway certificates entitling persons attending a convention who had paid a one-way fare to a return trip without payment of a return fare is a "toll" within the meaning of 7 and 8 Edw. VII. (Can.) c. 61, s. 9, defining "toll" or "rate" to mean and include "any toll, rate, charge or allowance charged or made either by the company . . . or by any person on behalf or under authority or consent of the company, in connection with the carriage and transportation of passengers," though in a special passenger tariff filed with the Board of Railway Commissioners such charge was stated to be a "fee" and to be made for the purpose of defraying the expenses of viséing the certificates.

Canadian Fraternal Assn. v. Canadian Passenger Assn., 5 D.L.R. 171, 13 Can. Ry. Cas. 178.

(§ II M—295)—PASSES.

The plaintiff's husband was an employee engaged as a mechanic in the company's workshops and was traveling thither to his work on one of the company's passenger cars, as a passenger, without payment of fare. A freight car became detached from a train, some distance ahead of the passenger car and proceeding in the same direc-

tion, it ran backwards down a grade, collided with the passenger car and the plaintiff's husband was killed. The manner in which the freight car became detached was not shewn. On the body of the deceased there was found a permit or "pass," which was not produced, and there was no evidence to shew any conditions in it, nor over what portion of the company's lines nor for what purposes it was to be honoured. On the close of the plaintiff's case, the defendants adduced no evidence whatever, and the jury found that the company was at fault, owing to a defective system of operation of their trains, and assessed damages, at common law, for which judgment was entered for the plaintiff. Held, that there was a presumption that deceased was lawfully on the passenger car, and, in the exercise of their business as common carriers of passengers, the company were, therefore, obliged to use a high degree of care in order to avoid injury being caused to him through negligence; that there was nothing in the evidence to shew that deceased occupied the position of a fellow servant with the employees engaged in the operation of the trains which were in collision; and that, in the absence of evidence shewing any agreement, express or implied, or some relationship between the company and deceased which would exclude or limit liability, the plaintiff was entitled to recover damages at common law. [Nightingale v. Union Colliery Co., 35 Can. S.C.R. 65, distinguished.]

B.C. Electric R. Co. v. Wilkinson, 45 Can. S.C.R. 263, 13 Can. Ry. Cas. 382, affirming 16 B.C.R. 113.

PASSES—CONTRIBUTORY NEGLIGENCE IN GETTING OFF.

The stipulation by a railway company printed on the back of a pass, that it will not be liable for injury by accidents, becomes a legal contract on acceptance by the donee. It relieves the company from liability for accidents resulting from imprudence or slight fault but not for those caused by the gross negligence of its employees. The passenger traveling on a pass is deemed to know the conditions under which he accepts it and which are printed on it.

Bergevin v. Quebec & Lake St. John R. Co., 43 Que. S.C. 38.

ACCIDENT—RAILWAY—ACTIONS UNDER QUE. C.C. 1056—PASS — CONDITION — WIDOW'S RIGHT—RENUNCIATION—DOMICILE —QUE. C.C. 6, 8, 982, 989, 1056, 1250.

The signature to a renunciation of damages, on the back of a pass, or permission to travel, is a presumption juris tantum that the signer knew the terms of the renunciation, but this presumption can be negatived by other presumptions, or by positive proof. Though a pass given gratuitously or for a consideration, and which admits a renunciation of a contingent remedy in damages, is valid, the renunciation, without consideration, to a right certain, or simply contingent, constitutes a contract null (nudum pactum). The right of the wife and the children to an indemnity according to art. 1056 Que. C.C. is a personal right, conferred on them by law, which no act performed by the husband with a third person can compromise, and which gives them an action different from that which the husband would have had against the author of the quasi offence. The widow's indemnity under art. 1056 Que. C.C. results from her personal or matrimonial status, and this indemnity ought to be regulated by the law of domicile of her husband. In order to know what the law is which governs contracts, it is necessary to take into consideration the intention of the parties making the contract, but they are supposed to have been according to the law of their domicile. A deed contrary to the law of domicile, and prohibited by it as prejudicial to the rights of the wife, made by the husband with the sanction of the law of another place, is null, as being made in fraud of the law of domicile.

Parent v. C.P.R. Co., 46 Que. S.C. 319.

(§ II M—296)—PASSES—LIMITATION OF LIABILITY — MASTER AND SERVANT — RAILWAY—DEATH OF SERVANT FROM INJURY IN A COLLISION ON COMPANY'S LINE—SERVANT TRAVELING ON A PASS—WHETHER PRINTED CONDITION ON PASS RELIEVING COMPANY OF LIABILITY WAS KNOWN TO SERVANT—RES IPSA LOQUITUR—APPLICATION OF TO RELATION BETWEEN MASTER AND SERVANT—COMMON EMPLOYMENT.

Held, on appeal, that it is for the plaintiff to shew that the accident was due to some specific act of negligence for which the defendants were responsible.

Farmer v. The B.C. Electric R. Co., 16 B.C.R. 423.

(§ II M—310)—PASSENGERS, INJURIES TO —LIMITATION OF LIABILITY—DAMAGES —JURY FINDINGS.

The verdict of a jury in an action claiming damages for injuries, resulting from an accident on a railway, which awards the plaintiff (of the age of 45 years and earning $2,000 per annum), in addition to his disbursements for medical treatment, $1,000 for past suffering, $1,500 for future suffering and medical treatment and $18,000 for other damages, is not excessive when it is proved that the injuries he sustains have diminished by one-half his physical faculties and subjected him to trouble from insomnia, vertigo, etc., as well as to morbid fits for the rest of his life. The failure of the jury to state the nature of the other damages, though required to do so in the question submitted is not a ground for setting aside their verdict when the reasons and object of the allotment sufficiently appear from their answer to other questions.

C.P.R. Co. v. Roy, 22 Que. K.B. 459.

(§ II M—317)—Shipper of stock.

A contract exempting entirely a railway company from liability in respect of the death or injury of a passenger who is the holder of a ticket issued by the railway company, which ticket was sold at a reduced rate good for passage on a train conveying live stock belonging to the passenger, does not destroy all the liability of the railway company in "respect of the carriage of any traffic" and is therefore not a contravention of s. 340, subs. 1 of the Railway Act (Can.), where the exemption contracted for is restricted to the transportation of the passenger and not to the transportation of the live stock. [The Railway Act, R.S.C. 1906, c. 37, ss. 2 (31) and 340, considered.]

Heller v. G.T.R. Co., 2 D.L.R. 114, 21 O.W.R. 219, 25 O.L.R. 488, affirming 25 O.L.R. 117.

N. Blackboard announcements as to trains; time-tables.

(§ II N—320)—Time-table—Changes in—Public convenience.

Public convenience does not demand the restoration of a former time-table, where the railway company has justified the change in it by shewing that the early mail arrives at the point in question, as usual, early in the morning; and its trains by leaving the point of departure, later, in the morning, serve the convenience of the traveling public by enabling them to make close connections from various points with the later morning trains.

Picton Board of Trade v. C.N.O.R. Co., 18 Can. Ry. Cas. 363.

O. Baggage of property of passenger.

(§ II O—325)—Incidental powers as to carriage of baggage.

The carriage of baggage to and from its own stations is a power fairly "incidental" to the statutory powers of a railway company.

G.T.R. Co. v. James, 29 D.L.R. 352, 10 A.L.R. 109, 21 Can. Ry. Cas. 429, 34 W.L.R. 1067, 10 W.W.R. 1075 at 1081, affirming judgment of Walsh, J. [See also 22 D.L.R. 915.]

Contents lost or stolen—Liability—Onus.

In an action against a common carrier for the value of baggage lost or stolen from a valise during transportation, the onus of proof is upon the person who made the shipment to shew that the things lost or stolen were in the valise at the time it was delivered to the carrier.

Coté v. G.T.R. Co., 50 Que. S.C. 92.

Baggage delivery service — Conditions limiting liability.

Conway v. Canadian Transfer Co., 40 Que. S.C. 89.

Liability of stage-coach proprietor as common carrier of passenger and for loss of luggage—Limitation to personal luggage—Exclusion of professional instruments.

The defendant, the proprietor of a stage-coach, was held liable as a common carrier for the loss of the plaintiff's luggage carried by the defendant in the coach with the plaintiff. The recovery was limited to the value of personal articles contained in the bag which was lost, nothing being allowed for professional instruments also contained in the bag. In carrying a passenger's luggage along with the passenger without any additional remuneration for the luggage, the stage-coach proprietor must be taken, following the general usage and conduct of business, to have impliedly contracted to carry safely only what it designated as a passenger's personal luggage; the liability should be no wider than that of a railway company in the like circumstances. Review of the authorities.

Kent v. Petrine, 28 W.L.R. 542, 6 W.W.R. 1111.

(§ II O—329)—Check room—Receipt—Limitation of liability.

The receipt of a railway company to a passenger delivering baggage to its parcels office for safe keeping, on payment of five cents, is not a contract of hiring, but a merely voluntary deposit or hiring of services, which renders the depositary or lessor liable for the loss of the deposited articles only in case of negligence; the burden of proof of such is on the depositing party. One who obtains the receipt, without informing himself of the conditions thereon limiting the company's liability, is guilty of negligence; and if such person is accustomed to travel on that railway and often makes use of the parcels office, the court will presume that he had knowledge of the conditions printed thereon.

Dorion v. G.T.R. Co., 53 Que. S.C. 106.

(§ II O—337)—Loss of baggage—Delay in removing—Whether status of carrier of warehousemen.

Vineberg v. G.T.R. Co., 13 A.R. (Ont.) 93; Penton v. G.T.R. Co., 28 U.C.R. 376, followed.

Hamel v. G.T.R. Co., 19 O.W.R. 533.

(§ II O—340)—Skiffs, canoes and rowboats—Limitation of liability—Warehouseman.

Canoes, skiffs and rowboats are not such articles of necessity or personal convenience as are usually carried by passengers for their personal use so as to be "baggage." [Macraw v. G.W.R. Co., L.R. 6 Q.B. 612, considered.] The construction of the words, "owner's risk," used in r. 12 (Baggage Rules) is a matter for decision by the courts. The Board has power under s. 340 of the Railway Act (Canada) to sanction the limitation of the carrier's liability to $100 in the case of baggage checked free of charge, and the limitation is a reasonable

one. The Board is not given any jurisdiction under s. 340 of the Railway Act to limit the carrier's liability as a warehouseman. [Rule 2, ss. (c), 11 and 26 (c) of the Baggage Rules also considered. S. 283 of the Railway Act (Canada) considered.]

Re Baggage Car Traffic Rules, 33 W.L.R. 54.

(§ II O—365)—Negligence—Limitation of liability—Check room.

The liability of a common carrier with respect to baggage checked for safe keeping is that of a bailee for hire, and he is liable for a loss thereof through misdelivery notwithstanding a condition on the receipt limiting the liability of which the holder had no notice.

McEvoy v. G.T.R. Co. (Que.), 35 D.L.R. 301.

Baggage or property of passenger—Limitation of liability for loss—Condition on back of check—Want of notice—Effect.

A passenger who checks his baggage on a ticket previously purchased is not bound by a condition printed on the check but not on the ticket, limiting the liability of the carrier in case of loss, where such condition was not brought to the notice of the passenger, and the circumstances disclosed no assent either actual or constructive to such condition by the passenger. [Lamont v. Canadian Transfer Co., 19 O.L.R. 291, considered.]

Spencer v. C.P.R. Co., 13 D.L.R. 836, 29 O.L.R. 122.

Limitation of liability.

Where baggage is checked without extra charge upon an ordinary railway ticket and would ordinarily be forwarded upon the next passenger train, but the passenger who might have traveled by that train purposely delays his journey until a later train in the expectation that his baggage will have preceded him, the railway company is a gratuitous bailee and liable only for gross negligence as regards its custody of the baggage at the point of destination, after the time when it should have been claimed by the passenger, had he taken the earlier train. [See MacMurchy and Denison's Law of Railways, 1911 ed., p. 443 et seq.]

Carlisle v. G.T.R. Co., 1 D.L.R 130, 20 O.W.R. 860, 25 O.L.R. 372.

Loss of baggage—Whether carrier or warehousemen — Reasonable time—Provisions of Railway Commissioners—R. 99.

[Vineberg v. G.T.R., 13 App. R 93; Penton v. G.T.R., 28 U.C.R. 376, followed.]

Hamel v. G.T.R. Co., 19 O.W.R. 533, 2 O.W.N. 1286.

Q. Connecting carriers.

(§ II Q—369)—Connecting carriers.

A carrier by land, who receives goods to be forwarded by other carriers, is not liable, in the absence of notice of special cause for delivery within a given time, for damage arising from delay caused by congestion of traffic in the hands of the next succeeding carrier. [Clarke v. Holliday, 39 Que. S.C. 499, followed.] A stipulation in a bill of lading, by a carrier of goods to be forwarded by him and other carriers, limiting his liability to loss or injury caused by his own negligence, is valid and binding, though the shipper's attention is not specially drawn to it.

Ram v. Boston & Maine R. Co., 41 Que. S.C. 68, 13 Can. Ry. Cas. 370.

Duty to carry passenger safely.

Hill v. Winnipeg Electric R. Co., 21 Man. L. R. 442.

Injury to passenger crossing tracks at station—Evidence.

Antaya v. Wabash R.R. Co., 24 O.L.R. 88, 19 O.W.R. 354, 12 Can. Ry. Cas. 448.

Negligence — Physical injuries — Mental shock—Severance of damage.

Toronto R. Co. v. Toms, 44 Can. S.C.R. 268, 12 Can. Ry. Cas. 250.

Liability of carrier for delay—Damages.

Miner v. Canadian P.R. Co., 18 W.L.R. 476 (Alta.).

Person "stealing ride" on freight train — Ordered off — Personal injury.

Brown v. C.P.R. Co., 2 O.W.N. 773, 18 O.W.R. 409.

Liability for tort—Insulting language and conduct by servants to passengers.

Tudor v. Quebec & Lake St. John R. Co., 41 Que. S.C. 19.

III. Carriers of freight.

A. In general; powers of agents.

(§ III A—370)—Authority to sign bills of lading—Estoppel from disputing.

It is not open to a railway company which has actually received grain for transportation to dispute the bill of lading or shipping bill issued on its regular form merely on the ground that its agent had not by reason of some inside regulations between the company and its servants the power to sign the bill, where the company received and carried the grain, collected the freight and made delivery pursuant to its terms. [Erb v. G.W.R. Co., 5 Can. S.C.R. 179; Oliver v. G.W.R. Co., 28 U.C.C.P. 143, distinguished.]

Randall, Gee & Mitchell v. C.N.R. Co., 21 D.L.R. 457, 25 Man. L.R. 293, 19 Can. Ry. Cas. 343, 8 W.W.R. 413.

Warehouse receipts—Release of goods—Shortages—Contribution.

A railway company maintaining warehouses as a necessary incident to its business is bound by the act of its agent, acting within the scope of the authority, which it holds him out to the world to possess, in signing warehouse receipts; it is therefore liable for shortages, in consequence of the agent's release of the goods to the shipper, without the permission of a bank to which they were hypothecated as collateral secur-

ity, the railway company, however, is entitled to contribution from the shipper to the amount recovered by the bank for such shortages.

C.P.R. Co. v. Bank of Commerce; McDonald v. C.P.R., 30 D.L.R. 316, 44 N.B.R. 130, 21 Can. Ry. Cas. 415.

PRACTICE — CARS — LOADING — "SHIPPERS LOAD AND COUNT" (S.L.&C.)—BILL OF LADING — REASONABLE AND LAWFUL — RAILWAY ACT, SS. 284 (7), 340.

The practice of carriers in endorsing on a bill of lading, the provision "shippers load and count" where cars are loaded by the shipper on private sidings and not checked by the carrier is reasonable and lawful. See ss. 284 (7) 340.

Bole Grain Co. v. C.P.R. Co., 24 Can. Ry. Cas. 25.

TRAFFIC—FACILITIES—SAND AND GRAVEL —GRAIN—CIRCUMSTANCES AND CONDITIONS—DISSIMILAR—SPECIAL DOORS—RAILWAY ACT, S. 317.

Carriers will not be ordered to supply special doors for box cars, used to carry sand or gravel, as in the case of grain shipments, the circumstances and conditions (see s. 317) of sand and gravel traffic being dissimilar to those of grain traffic.

McKenzie v. C.P. & C.N.R. Cos., 23 Can. Ry. Cas. 99.

HEATERS IN CARS—MESSENGERS—SHORTAGE —FREE TRANSPORTATION.

During the shortage of 1917-18 caused by the European War, the Board declined to direct carriers to supply men to see that heaters in cars were properly looked after, when under the tariff shippers' messengers are provided with free transportation for that purpose.

Okanagan Valley Growers v. Canadian Freight Assn., 24 Can. Ry. Cas. 55.

IN GENERAL—POWERS OF AGENT.

Plaintiff company, a British Columbia concern, sought from the defendant company's agent at Seattle, Wash., U.S.A., information as to the rate on plaster from a point in Kansas and was given a certain figure per ton. There was some dispute as to whether the rate quoted was from Kansas to Seattle (according to defendant company's contention) or to Vancouver, B.C. (according to plaintiff company's contention), but a letter from an official of defendant company confirming the quotation of a rate to Vancouver was put in evidence. There was no evidence that there had been any carelessness or recklessness shewn in giving the information. Held, on appeal, reversing the finding of the Trial Judge, that an action of deceit did not lie in the circumstances. Held, further, that there is no duty cast upon a common carrier to give correct verbal information as to rates. Held, further, that to entitle plaintiff company to succeed, the wrong complained of, having been committed in the State of Washington, must be shewn to be actionable in British Columbia as well. [Urquhart Co. v. C.P.R. Co., 2 A.L.R. 280, 12 Can. Ry. Cas. 500, disapproved of.]

Gillis Supply Co. v. Chicago, Milwaukee, & Puget Sound R. Co., 13 Can. Ry. Cas. 35, 16 B.C.R. 254.

AS TO CARS FOR HORSES.

Where a special horse-car was ordered from a railway station agent for the purpose made known to the agent, of carrying horses to be exhibited at a winter fair, and the agent had previously supplied cars upon similar orders. His action in this instance having been ratified by his superiors, there being no notice to the plaintiff of any limitation of the agent's authority, the company is bound by the agent's action in accepting the order for the car and is liable in damages for failure to supply it.

Mancell v. Michigan Central R. Co., 19 Can. Ry. Cas. 246.

(§ III A—373)—PAYMENT OF FREIGHT TO AGENT'S WIFE.

Payment of freight charges to the wife of the local agent before his dismissal by the railway company, who was permitted frequently to act about the office in the agent's capacity, constitutes payment to the company, notwithstanding a notice on the bill that all cheques should be made payable to the railway company.

G.T.P.R. Co. v. Opperthauser & Sons, 26 D.L.R. 209, 9 W.W.R. 1173. [See also Continental Oil v. C.P.R. Co., 28 D.L.R. 269.]

(§ III A—378)—JURISDICTION—STOP-OVER PRIVILEGES—DISCRETION OF CARRIERS—STORAGE, INSPECTION OF COMPLETION OF CARLOAD—UNJUST DISCRIMINATION.

It is entirely within the discretion of the carriers to grant or withhold stop-over privileges on carload and part carload shipments during its transportation to final destination at concentration points for the purpose of storage, inspection or completion of carload; therefore, where the stop-over privilege is not granted, unjust discrimination not having been established, the Board is without jurisdiction to direct that this privilege shall be given by the carrier.

Simcoe Fruits & Ont. Fruit Growers' Assn. v. G.T. & C.P.R. Cos., 14 Can. Ry. Cas. 370.

STOP-OVER PRIVILEGE—POINTS—SHIPPING—DESTINATION—TOLLS—"DIRECT RUN"—EXTRA DISTANCE—ROUTES.

Where a tariff provided specific freight tolls to apply to designated distances, but also provided that stop-over privileges, at a point out of the direct run between shipping point and destination, should be permitted on payment of a stop-over charge and an additional toll per mile of extra distance, the railway company was held entitled to enforce the latter provision, and the toll specified for the mileage between shipping point and destination by the circuitous route was held not applicable.

Hannah v. G.T.R. Co., 24 Can. Ry. Cas. 123.

(§ III A—379)—Settler's effects—Carload lot—Agent—Scope of duties—Excess charged—Recovery of—Railway Act—R.S.C. 1906, c. 37.

Excess freight charges collected at destination in respect of carload lot of settler's effects over and above the amount quoted at the point of shipment and on the faith of which quotation the shipment was made, may be recovered by the shipper who paid the same under protest: the contract by the railway agent for a lower rate than the ordinary one was within the apparent scope of the agent's authority, and being in respect of settler's effects it was permissible under s. 341 of the Railway Act, R.S.C. 1906, c. 37, for the railway to make a specific bargain to carry one lot of such goods at a reduced rate subject to the action which the Railway Commission may take under s. 341 to extend or restrict the railway's power in that respect, and the low rate quoted inadvertently was therefore not illegal as an unjust discrimination. [Toronto v. G.T. R., 11 Can. Ry. Cas. 365, and Brampton v. G.T.R., 11 Can. Ry. Cas. 370, distinguished.]

Watson v. C.P.R. Co., 20 D.L.R. 472, 32 O.L.R. 137, 7 O.W.N. 186, 19 Can. Ry. Cas. 161.

B. Duty to receive and transport.

(§ III B—380)—Duty to receive and transport.

Application directing the respondent to furnish an adequate supply of cars suitably equipped for the carriage of fresh meat and packing house products and to disallow the increase in rates. The respondent neglected to supply cars with cross pieces in the top so that the shipper might hang his meat to hooks inserted in them. On the 3rd October, 1910, the respondent issued a tariff effective on the 10th October, granting certain commodity rates on the commodities in question. This tariff remained in effect until 1st August, 1911, when a supplement was filed more than doubling the rates and raising the minimum C.L. weight from 17,000 to 20,000 lbs. It was said that these charges were made in error and that they should have been upon a mileage basis at 9 cents per 100 lbs. Held, 1. That suitable accommodation for carrying the traffic under s. 284 of the act included furnishing cross pieces in the top of the car for the shipper to put his hooks in for his meat. 2. That the tariff of 1st August, 1911, should be cancelled and the tariff of 10th October, 1910, reinstated and should remain in effect for at least one year, and during that time if the respondent can shew that the tariff is not fair or remunerative, an opportunity will be given it to increase the rates. 3. That the Board had no jurisdiction to order a refund.

Vancouver-Prince Rupert Meat Co. v. G.N. R. Co., 13 Can. Ry. Cas. 15.

Stations—Regular and flag—Traffic—Consigned to order—Bill of lading—Tolls—Freight—Rebilling—Demurrage.

Traffic to flag stations consigned "to order" should be billed to the nearest regular station short of the flag station and sent on to destination, after the endorsed bill of lading has been produced and surrendered and the freight tolls paid. For unloading into the freight shed and reloading and for rebilling L.C.L. traffic from regular to flag stations, forwarding to and unloading at the said station, the carrier should receive the local toll between the two stations, and for C.L. traffic the through toll should be charged with an additional toll of 83 per car for rebilling and terminal charges. The detention allowance of 48 hours free time is computed from the time of notice of the arrival of the car by the agent to the consignee after which the carrier will be entitled to charge the authorized demurrage toll. [Canadian Manufacturers' Assn. v. Canadian Freight Association. (Interswitching Rates Case), 7 Can. Ry. Cas. 302, followed.]

McMahon v. Canadian Freight Assn., 16 Can. Ry. Cas. 230.

Interswitching — Carriers compelled to furnish service—Public interest—Tracks—Interchange—Equality of service.

Interswitching, having regard to the public interest, should be treated as a right, and carriers should be compelled at all times, according to their powers, to furnish an interswitching service, as to all their tracks, including team tracks, equal to the service accorded to their own traffic at all points, where interchange tracks are now installed, or may hereafter be provided.

In re Interswitching Service, 24 Can. Ry. Cas. 324.

(§ III B—384)—Railway in course of construction.

A railway company may rightfully carry as freight over a road that is in course of construction, for an independent contractor, who was building it, ordinary construction and camp supplies necessary to such work, and, as passengers, it may also carry labourers for employment thereon, notwithstanding the road has not been opened for general traffic by an order of the Board of Railway Commissioners under s. 261 of the Railway Act.

Re G.T.P.R. Co., 3 D.L.R. 819.

C. Loss of, or injury to property.

(§ III C—385)—Delivery to—Loss of part of goods—No explanation—Presumption of negligence—Liability for loss.

Where goods are shewn to have been delivered to a railway company for carriage, and they are not delivered, at their destination, and no explanation is furnished, negligence may be presumed. Where the initial carrier undertakes the entire transporta-

tion, the connecting carriers through whose hands the goods pass in the performance of the contract are the agents of the initial carrier, who is liable for their negligence. [Ferris v. C.N.R. Co., 15 Man. L.R. 134; Henry v. C.P.R. Co., 1 Man. L.R. 210, followed.]

Scanlin v. C.P.R. Co., 44 D.L.R. 352, 23 Can. Ry. Cas. 336, 29 Man. L.R. 233, [1918] 3 W.W.R. 984.

Loss of goods entrusted to—No explanation—Presumption of negligence of.

In the absence of evidence that the loss of goods entrusted to a railway company for carriage was not caused by the negligence of the railway company, the rule res ipsa loquitur applies and the carrier is responsible. [Ferris v. C.N.R. Co., 15 Man. L.R. 134; Randall C.N.R. Co., 21 D.L.R. 457, 19 Can. Ry. Cas. 343, 25 Man. L.R. 293; Scanlin v. C.P.R. Co., 44 D.L.R. 352, 23 Can. Ry. Cas. 336, followed.]

Ogilvie Flour Mills Co. v. C.P.R. Co., 47 D.L.R. 226, [1919] 2 W.W.R. 718.

Common carriers—Liability for loss of goods—When it begins—Goods laden by shipper on car on siding—Delivery to railway company.

The liability of common carriers under art. 1674 C.C. begins only from the time of delivery of the goods, and when a shipper, for his own convenience, puts them himself on board the cars of a railway company, on a siding near his warehouse, the delivery to the company takes place when it seals the cars, or otherwise takes charge of them, and hands the shipper a bill of lading. It incurs no liability for loss from pilfering, etc., that occurs before that.

Spedding v. G.T.R. Co., 13 Can. Ry. Cas. 46, 40 Que. S.C. 463, 10 E.L.R. 369.

Loss of, or injury to, property.

Plaintiffs having carried on business for over twenty-five years, and having shipped live stocks frequently, should have known of the conditions mentioned in the company defendant's bill of lading, and plaintiffs having failed to prove any fault or negligence on the part of the company defendant, the latter must be declared relieved of any responsibility for the loss of live stock in transit, under the terms of the bill of lading duly signed by plaintiffs.

Hatte v. The G.T.R. Co., 18 Rev. de Jur. 320.

Warranty — Carriers — Mis en cause — Motion—C.C., art. 1053, 1675—C.P. art. 183.

An action in warranty does not exist, unless there is privity of contract (lien de droit) between the principal plaintiff and the party called in warranty. When goods sold are delivered for transportation to a railroad company, which, at the terminus of its line, handed them over to another railway company, the buyer (consignee) cannot by motion, obtain the permission to call in the case the seller and the first carrier, in order that they may be condemned, if they are found responsible for the damaged condition of the merchandise.

Clogg v. G.T.R. Co., 28 Que. K.B. 187.

(§ III C—386)—Shipment of grain—Placing in elevator — Failure to notify shippers — Loss by fire in elevator—Insurance—Marine policy — Adjustment — Insufficiency of amount to cover loss—Negligence of carriers—Damages.

Richardson v. C.P.R. Co., 7 O.W.N. 458, and 8 O.W.N. 221.

(§ III C—387)—By freezing.

Where, under a bill of lading which required protection of goods from frost, a carrier has had possession, for an unreasonably long time during very cold weather, of a consignment of figs, which were found to be frozen upon arrival at their destination, a primâ facie case of negligence on the part of that carrier is established which casts the onus upon it, in order to escape liability of shewing that the consignment was in a damaged condition when received from the connecting carrier.

Albo v. G.N.R. Co., 2 D.L.R. 290, 17 B.C.R 226, 14 Can. Ry. Cas. 82, 20 W.L.R. 844, 1 W.W.R. 1105.

Perishable goods—Heated cars—Limitation of liability.

The carrier should be obliged to accept shipments of perishable commodities, providing heated cars, subject to the stipulation that the shipper must sign a release waiving all claim for frost damage unless he can prove that the heating appliances were missing, with a further exception that if the fires in the heaters are allowed to go out through the negligence of carrier, the damages recoverable will be limited to one-half the freight tolls charged on the shipment in question.

Fernie-Fort Steele Brewing Co. v. C.P.R Co., 28 D.L.R. 383, 18 Can. Ry. Cas. 426.

Carriage of goods—Negligence—Damage by freezing—Finding of fact of Trial Judge.

Algoma Produce Co. v. C.P.R. Co., 13 O.W.N. 16.

(§ III C—388)—By lack of proper refrigeration — Shipment of perishable goods in box car—Shipper's omission to order refrigerator car at higher rate.

Lessard v. C.P.R. Co., 7 D.L.R. 901, 14 Can. Ry. Cas. 277, 3 W.W.R. 57.

Shipment of flax—Loss in transit—Presumption as to negligence.

Where the bill of lading called for "eleven hundred bushels more or less" of flax and the evidence proved the delivery of over 900 bushels in a carload lot, the onus is upon the railway company to account for the deficiency on the car arriving at destination with only half the quantity stated in the bill; where no satisfactory explanation of the loss is given by the railway, negligence

may be presumed against it. [Ferris v. C. N.R. Co., 15 Man. L.R. 134, referred to.]

Randall, Gee & Mitchell v. C.N.R. Co., 21 D.L.R. 457, 25 Man. L. R. 293, 19 Can. Ry. Cas. 343, 8 W.W.R. 413.

(§ III C—390)—Loss of cargo—Water Carriage Act.

The owner of a seaworthy freight vessel is not liable under the Water Carriage Act (R.S.C. 1906, c. 113, s. 964) for loss of cargo due to the fault of navigation on the part of the captain of the tug towing such vessel.

Alex. McFee & Co. v. Montreal Transportation Co., 42 D.L.R. 714, 27 Que. K.B. 421.

(§ III C—392)—Liability as warehouseman—Goods in car on siding—Degree of care.

A railway company is in the position of a warehouseman in respect of a carload lot in bond held on a siding after the arrival at destination where the holding of the car is subject to demurrage charges until the consignee shall remove the contents; the onus is upon the railway to shew affirmatively that it had exercised reasonable care in an action for nondelivery of the goods which were lost from the car while under demurrage and had probably been stolen.

Great West Supply Co. v. G.T.P.R. Co., 23 D.L.R. 780, 8 A.L.R. 478, 19 Can. Ry. Cas. 347, 31 W.L.R. 259, 8 W.W.R. 720.

Acceptance of goods for carriage—Negligence—Liability for injury.

A railway company which, by its local station agent, accepts and receives goods for carriage is bound to use reasonable care for the protection of such goods. If they are carelessly left on the station platform uncovered overnight and thereby become damaged, the company is liable.

Fisher v. C.P.R. Co., 44 D.L.R. 517, 55 Que. S.C. 60.

(§ III C—394)—Care of property—Unclaimed freight.

The purpose of a bill of lading is satisfied when the transit is complete except as to any rights of lien or of absolution from claims not promptly made; and where the consignee fails to take over the goods under a condition that the consignee should pay the charges and take the goods within twenty-four hours after their arrival, the railway company is in the position of an involuntary bailee thereof. [Mayer v. G.T.R., 31 U.C.C.P. 248, distinguished; G.T.R. Co. v. Frankel, 33 Can. S.C.R. 115, referred to.]

Swale v. C.P.R. Co., 15 D.L.R. 816, 29 O.L.R. 63, 16 Can. Ry. Cas. 363.

D. Delivery by carrier; delay.

(§ III D—395)—Proof of delivery—Receipt—Onus.

A receipt for goods by the consignee's agent is not necessarily conclusive as to their actual delivery; the burden of proof is upon the carrier to shew that the goods were in fact delivered.

Henderson v. Inverness R. & Coal Co., 33 D.L.R. 374, 50 N.S.R. 518. [For previous decision in same case, see 16 D.L.R. 420, 47 N.S.R. 530.]

Delay in transmitting request for return of goods—Carriers or warehousemen—Stipulation as to damages—Value of goods at date of shipment.

Certain packages of leather were carried by the defendants for the plaintiffs to Galt, and on the 20th May, 1915, delivery thereof was tendered to the plaintiffs, who refused delivery; and it was found that thereafter the defendants became warehousemen of the goods, and retained possession of them as such until the 21st January, 1916, when the defendants sold them for unpaid charges for transportation and storage. On the 18th January, 1916, the plaintiffs requested the chief agent of the defendants at Galt to deliver the goods to the plaintiffs, and undertook to pay the charges thereon; the agent, on behalf of the defendants, accepted the undertaking; and it was found that prepayment or tender of tolls and charges was thereby effectually waived. At that date, the goods had been forwarded to Montreal to be sold there; and, in consequence of delay in communicating to the proper authority at Montreal the request to return the goods to Galt, the request did not reach the proper hands in Montreal until after the goods had been sold; and this delay was found to have arisen from the negligence of the defendants' clerks. In these circumstances, it was held, that the defendants were liable in damages; and, although on the 21st January, 1916, they held the goods as warehousemen, they were entitled to the benefit of a provision in the shipping contract that "the amount of any loss or damage for which the carrier is liable shall be computed on the basis of the value of the goods at the place and time of shipment. . . ." When the stipulation is one which, by its terms, is to apply to a state of things which may arise after the goods have arrived at their destination, it remains in force notwithstanding that the transit is ended. [Swale v. C.P.R. Co., 29 O.L.R. 634, distinguished; Mayer v. G.T.R. Co., 31 U.C.C.P. 248, referred to.] The damages were accordingly computed on the basis of the value of the goods in May 1915.

Getty & Scott v. C.P.R. Co., 40 O.L.R. 260.

Bill of lading—Condition—Delivery of goods shipped on payment of draft—Delivery without payment—Action by vendors against carriers—Damages—Third party—Costs.

Reo Sales Co. v. G.T.R. Co., 8 O.W.N. 482.

Delay in delivery of merchandise.

A carrier who has no notice of special cause for the delivery of the goods within a given time, is not liable for general damages for delay.

Clarke v. Holliday, 39 Que. S.C. 499.

(§ III D—400)—Notice of arrival—Person other than consignee—Practice of companies—Delay.

Where a railway bill of lading is issued with the name and address of a party other than the consignee as a person to be notified on bulk grain reaching the destination, the railway is under obligation to send notice to such person, and is not relieved therefrom by the practice of the terminal elevator companies of forwarding weight certificates; and the railway is liable for delay in giving notice due to the freight conductor's error in naming in the waybill as the party to be notified another firm having no interest in the matter. [Golden v. Manning, 3 Wils. 429, and Collard v. South Eastern Ry. Co., 30 L.J.Ex. 393, applied.]

Armstrong v. C.N.R. Co., 20 D.L.R. 695, 6 W.W.R. 1578, 7 S.L.R. 214, 19 Can. Ry. Cas. 333, 29 W.L.R. 265.

Onus of proving delivery.

The onus of proving a valid delivery of the goods under a bill of lading, by which they were consigned to the consignors or their assigns, is upon the railway company which received the goods for the last portion of the transportation from the preceding carrier.

Wolsely Tool & Motor Car Co. v. Jackson Potts & Co., 21 D.L.R. 610, 33 O.L.R. 90. [Affirmed in 33 O.L.R. 587.]

(§ III D—402)—Notice of arrival—Limitation of liability.

A carload of coal carried by a railway company under a condition in a bill of lading approved by the Railway Board (s. 340 of the Railway Act, R.S.C. 1906, c. 37), that "goods in carloads destined to a station where there is no authorized agent shall be at the risk of the carrier until placed on the delivery siding," manifests no intention as to require the carrier to give notice of the arrival of the car at such station, the failure of which cannot render the carrier liable for the contents stolen therefrom after the car has been placed upon the delivery siding.

Rogers Lumber Co. v. C.P.R., 27 D.L.R. 414, 9 S.L.R. 188, 20 Can. Ry. Cas. 432, 34 W.L.R. 287, 10 W.W.R. 258.

(§ III D—404)—Notice of arrival—Delivery of notice—Demurrage.

An advice note mailed to a consignee, but not received by him, is not notice within the meaning of a bill of lading subjecting the goods to demurrage charges if not removed after "written notice has been sent or given;" the burden of proving that the notice reached the consignee is upon the sender.

Duquette v. C.P.R. Co., 37 D.L.R. 298, 23 Rev. de Jur. 416, 52 Que. S.C. 188.

(§ III D—406)—Termination of liability—Arrival of goods—Reasonable time for delivery.

The liability of carriers by railway qua carriers terminates upon the arrival of the goods carried at their destination and the expiration of a reasonable time for delivery. Where a car of potatoes arrives at a station at 5 A. M. on Saturday in very cold weather the freight should be paid and delivery taken on the same day. 2. The court will not give evidentiary value to statements made over the telephone by an unidentified person. [Grand Trunk Ry. Co. v. McMillan, 16 Can. S.C.R. 543, followed.]

Lockshin v. C.N.R. Co., 47 D.L.R. 516, 24 Can. Ry. Cas. 362, [1919] 2 W.W.R. 898.

Consignees' delay in unloading—Notice to shipper—Charges—Action.

When a railway company has delivered to a consignee goods which it undertook to carry, it is not bound to notify the shipper of delay caused by the consignee in unloading, and of the costs incurred by the consignee in consequence. If the shipper subsequently pays such costs, to the discharge of the consignee, he has no action in repetition (i.e., money paid under a mistake) against the railway company.

Raine v. G.T.R., 54 Que. S.C. 474.

(§ III D—410)—Wrongful delivery—Liability to consignor after instructions to return goods.

Where a shipper entrusted goods to a carrier for delivery to a consignee and the consignee refuses to accept the goods and on being informed thereof by the carrier, the shipper acquiesces in such refusal and instructs the carrier to return the goods immediately, the carrier is responsible for the value of such goods if he deliver them to another party, even if he does so on the consignee's order presented by a third party who holds himself out as the shipper's agent.

Zimmerman v. C.P.R. Co., 8 D.L.R. 990, 15 Can. Ry. Cas. 78, 43 Que. S.C. 297.

Carriage on perishable goods—Wrongful delivery—Damages—Loss of market—Rejection of goods by purchaser.

If a legal right is invaded or a contract broken, the person injured thereby may maintain an action, notwithstanding that no real damage is shewn; and the vendors were entitled to maintain that the taking of the goods into the purchaser's warehouse on the 17th February was a wrongful delivery, contrary to the bill of lading, and were entitled to recover, not the value of the goods, but the damages sustained by the wrongful act, i.e., their real loss caused by the deprivation of control over the goods from the 18th February, when the purchasers inspected and rejected, until the 21st February, when the plaintiffs' control was re-established, if they chose to exercise it. [Sanquer v. London & South-Western R. Co., 16 C.B. 163, and Hiort v. London & North-Western R. Co., 4 Ex. D. 188, applied and followed. Judgment of Falconbridge, C.J. K.B., reversed.]

Lemon v. G.T.R. Co., 32 O.L.R. 37, 25 O.W.R. 720.

SHORTAGE IN DELIVERY—RECEIPT—PRIMA FACIE EVIDENCE.

The plaintiff, intending to move his business from A. to T., sent a number of packages of goods to the railway station at A., and was allowed to place them in a car. A few minutes before his own departure from A., the plaintiff applied to the defendants' agent there for a shipping bill for the packages in the car. The agent handed him a bill but did not count the packages; the bill stated the number of packages, according to the plaintiff's statement, with the addition of "S. L. & C.," which was said to mean "shipper's load and count." The car was immediately sealed by the agent, with the packages uncounted. In due course the car arrived at T., accompanied by its waybill, and when it arrived it had not been tampered with. It was unloaded by a checker, and it was found that there were four packages short of what were called for in the waybill. The plaintiff was advised of the arrival of the car; he paid the freight, and delivery was made, the delivery-notice being marked "four pieces short." This was based upon the documents and the count made by the checker:—Held, that, as regarded the plaintiff, no effect could be given to the placing of "S.L. & C." upon the shipping bill, nor to the explanation given to him by the agent, that, there being no opportunity to count, his count would have to be accepted; also, that, while the shipping bill was a receipt for the goods, it was not conclusive, and might be controverted by evidence shewing that the goods were not received: The agent had no authority to make a contract of carriage binding on the defendants, save in respect of goods actually received by him; the receipt was prima facie evidence, and it was upon the defendants to explain it away. [Leduc v. Ward, 20 Q.B.D. 475, 479; Smith & Co. v. Bedouin Steam Navigation Co., [1896] A.C. 70, followed.] And held, upon the evidence—weighing the preponderating probability, having regard to the burden of proof—that the defendants had delivered to the plaintiff all the goods that they actually received from him.

Nathanson v. G.T.R. Co., 43 O.L.R. 73, 23 Can. Ry. Cas. 328.

MISDELIVERY OF FREIGHT — GOVERNMENT RAILWAY.

Plaintiff shipped two trunks by the Intercolonial Railway and received a bill of lading in which she was named as consignee. The railway agent delivered the trunks to another party on demand and without presentation of the bill of lading. Plaintiff sued the Government Railways Managing Board in a County Court under 9 and 10 Edw. VII. (Dom.) c. 26, for damages caused by the loss of the trunks, alleging negligence, and recovered judgment. On appeal, held, there was sufficient evidence of negligence on the part of the railway agent. The cause of action was the breach of duty by negligently misdelivering plaintiff's goods, and therefore plaintiff was entitled to sue in a County Court, under 9 and 10 Edw. VII. (Dom.) c. 26. While the Crown in its operation of the Intercolonial Railway is not subject to the common law in regard to carriers it is made liable for negligence of its servants on the Intercolonial Railway, resulting in loss of goods by the Government Railway Act, R.S.C. 1906, c. 36, and the Act, 9 and 10 Edw. VII. (Dom.) c. 19, s. 1, amending the Exchequer Court Act, R.S.C. 1906, c. 140. This was a case of negligent misfeasance and the cause of action could be maintained without relying on or proving a contract.

Government Rys. Managing Board v. Williams, 41 N.B.R. 108, 11 E.L.R. 10.

MISDELIVERY—WRONGFUL DELIVERY—BILL OF LADING—FORGED ENDORSEMENT—RAILWAY COMPANY — RESPONSIBILITY OF, FOR GENUINENESS OF SIGNATURE.

Bank of Hamilton v. G.T.R. Co., 49 C.L.J. 705.

RAILWAY—CARRIAGE OF GOODS—CLAIM FOR VALUE OF GOODS NOT DELIVERED—CONTRACT—CHANGE IN DESTINATION—NEW CONTRACT—LIABILITY OF RAILWAY COMPANY FOR FULL VALUE—INAPPLICABILITY OF CONDITION LIMITING LIABILITY—EVIDENCE—FINDING OF FACT OF TRIAL JUDGE—ASCERTAINMENT OF VALUE OF MISSING GOODS.

Laurin v. C.P.R. Co., 6 O.W.N. 281.

(§ III D—420)—LIABILITY FOR DELAY—MOVING PICTURE FILMS.

A carrier in the habit of receiving moving picture films, to be delivered for their exhibition on a certain date, is liable to the shipper for the loss occasioned by a delay in the delivery until after that date.

Victoria Dominion Theater Co. v. Dominion Express Co., 35 D.L.R. 728, 23 B.C.R. 396.

UNREASONABLE DELAY—DEFENCES.

Common carriers, in keeping wheat in a car in their yard 47 days, delayed delivery an unreasonable length of time, and should not, under the circumstances, be allowed to set up as a defence the abnormal moisture of the year, they having undertaken to move the crop with full knowledge of the conditions; that the defence of unusual pressure of business and congestion of traffic had not been proved and the defendants were liable for the loss caused by the wheat heating in the car.

Central Grain Co. v. C.P.R. Co., 34 W.L.R. 899.

DELIVERY—DELAY—FORTUITOUS EVENT.

Defendant has failed to prove that the delay in transit was due to a fortuitous event and also that if the horses remained at St. Cuthbert over night, it was due to the negligence of plaintiff; consequently defendant is guilty of negligence.

Auger v. C.N.Q.R. Co., 20 Rev. de Jur. 585.

(§ III D—421)—Injuries due to delay.

Where it appears that the climate at the point of shipment precludes the frosting of a consignment of figs at the time of their delivery to an initial carrier, and that a connecting carrier had possession of them for an unreasonably long time in very cold weather without offering any acceptable explanation for the delay, a strong presumption arises that if they were damaged by frost it was while in the latter's possession.

Albo v. G.N.R. Co., 2 D.L.R. 290, 17 B.C.R. 226, 14 Can. Ry. Cas. 82, 20 W.L.R. 844, 1 W.W.R. 1105.

Breach of contract—Delay in delivery of trunk—Damages—Article belonging to brother of plaintiff contained in plaintiff's trunk—Joinder of brother as coplaintiff—Costs—Scale of.

Wilkinson v. Westlake, 17 O.W.N. 98.

Transportation—Delay—Agreement of railway company to furnish special car for transport of horses to fair—Breach—Damages—Limitation of liability—Freight tariff—Failure to take initiatory steps towards transportation—No necessity for tender of horses—Authority of agent of company—Items of damages—Loss of advertising by failing to shew horses at fair—Evidence—Knowledge of agent.

Mancell v. M.C.R. Co., 6 O.W.N. 451.

E. Liability and lien for freight charges; rates.

(§ III E—425)—Sale of goods—Railway company contracting to deliver—Failure to deliver—Nonperformance of contract.

Northern Pacific R. Co. v. Fullerton, 47 D.L.R. 705, [1919] 2 W.W.R. 92.

Freight—Nonpayment of—Shipper primarily liable—Mistake—Consignee—Action against.

The person who is primarily liable for the payment of freight on a railway shipment is the shipper of the goods; a contract to pay freight is to be implied from the mere fact that he has placed the goods with the carrier for the purpose of being carried to their destination; and where by mistake of the railway the goods were delivered without collecting the freight indicated by the way bill from the consignees who were agents holding the goods for sale as factors only and who by reason of the railway's mistake were led to suppose that the freight had been prepaid, the railway has no right of action against the latter for the freight.

C.P.R. Co. v. Watts, 20 D.L.R. 607, 8 A.L.R. 174, 19 Can. Ry. Cas. 338, 30 W.L.R. 126.

Liability of shipper for freight charges.

A contract by a carrier to transport by mule packs a quantity of freight, divisible in its nature, at a stipulated rate per item, will support an action for the freight charges pro rata, on the part delivered, where it does not appear that the parties contemplated the delivery of the complete consignment as a condition precedent to the recovery of any freight whatever, and the delay in delivery of the balance was not due to any fault of the carrier. [Ritchie v. Atkinson, 10 East 295, 103 E.R. 787, followed; Spaight v. Farnsworth, 5 Q.B.D. 115; Brown v. Muckle, 7 U.C.L.J. (O.S.) 298; B.C. Saw Mill Co. v. Nettleship, L.R. 3 C.P. 499, 37 L.J.C.P. 235, specially referred to.]

Charleson v. Royal Standard Investment Co., 16 D.L.R. 478, 19 B.C.R. 226, 27 W.L.R. 538, 6 W.W.R. 455.

Transportation of feed—Freight and express charges.

Two transportation companies entered into a contract whereby the one agreed to carry for the other "mail and express" upon certain terms. Feed (hay and oats) was offered for carriage under the contract "as express," but the carrier refused to accept delivery as "express," and carried it as "freight." It appeared from the evidence that both parties had been engaged in the transportation business within the area in question for some years and were familiar with the custom and usages established, and that it had always been the custom to carry feed as freight. In an action for freight charges for the feed carried by the plaintiff for the defendant:—Held, that the parties knew that it was the custom to carry feed (hay and oats) as freight, and that it was in their minds when they entered into the contract.

B.C. Express Co. v. Inland Express Co., 21 B.C.R. 178.

Tolls — Commodities — Classification—Analogous.

Shell blanks being a transient article of commerce are not specifically provided for in the freight classification, but are covered where necessary by commodity tolls, these void the "analogous articles" rule of classification, even if the blank and billet are assumed to be analogous, the cutting and addition of ten per cent in value does not make the shell blank a billet and entitle it to the steel billet toll.

Imperial Munitions Board v. C.P.R. Co., 24 Can. Ry. Cas. 169.

Action for freight—Deduction of sum for damages—Judgment for amount due for freight without prejudice to future action.

Canada Steamship Lines v. Steel Co., 9 O.W.N. 351, 10 O.W.N. 17.

(§ III E—426)—Tolls—Reasonable—Weight—Universal basis—Comparison—Product — Raw material — Impracticable.

The universal basis in fixing tolls is the weight of the product carried, a comparison therefore between the toll on a carload of the product and the quantity of raw ma-

terial required to produce it is impracticable. The tolls on logs between Dorr and Baynes, B.C., not shewn to have been unreasonable.

Adolph Lumber Co. v. G.N.R. Co., 24 Can. Ry. Cas. 173.

(§ III E — 427) — UNCLAIMED FREIGHT — LIEN AND SALE FOR CHARGES—EMPLOYMENT OF AUCTIONEER.

Where a consignee fails to pay the charges and take over the goods at the destination, the railway company has a right to detain them and to sell them for unpaid charges under the statutory authority conferred by the Railway Act, R.S.C. 1906, c. 37, ss. 345 and 346, and the goods remain "at owner's risk" while in the custody of the railway; but the railway company is not excused thereby from responsibility for the default of an auctioneer to whom the goods are handed over to sell for unpaid charges to account for the surplus of the goods not required for that purpose and the railway company will be liable for such negligence of its agent, the auctioneer, as would make a bailee liable for damages or would constitute conversion. [Dixon v. Richelieu Navigation Co., 15 A.R. (Ont.) 647, referred to.] The Railway Act, R.S.C. 1906, c. 37, does not require the employment of a licensed auctioneer to carry on the sale of unclaimed freight for unpaid tolls; the statutory right conferred on the railway company to sell by auction goods on which the charges have not been paid is one necessary to the carrying on of a railway business and such right cannot be qualified by any limitations imposed by provincial authority. [G.T.R. Co. v. Attorney-General of Canada, [1907] A.C. 65, applied.]

Swale v. C.P.R. Co., 15 D.L.R. 816, 29 O.L.R. 634, 16 Can. Ry. Cas. 363. [See also 6 O.W.N. 93.]

(§ III E—429) — TOLLS — DELIVERY — SWITCHING — TRAFFIC — DESTINATION —REFUND.

A carrier is bound to have a place of delivery for traffic destined to a point to which it has quoted a tariff of tolls free from the imposition of a switching toll on shipper or consignee, therefore, an order may go permitting the respondent to refund the moneys it has collected under their switching conditions at the point in question.

Grain Growers B.C. Agency v. C.N.R. Co., 23 Can. Ry. Cas. 169.

INITIAL—INTERSWITCHING—LINE HAUL—BILLS OF LADING—THROUGH.

The Board will not order initial switching carriers to issue through bills of lading covering interswitching of traffic over their lines and the lines of carriers who enjoy the line haul; in the absence of arrangement, two bills of lading are necessary, one by the switching carrier and the other by the line haul carrier.

Renfrew Machinery Co. v. Canadian Freight Assn., 24 Can. Ry. Cas. 31.

CARRIAGE OF GOODS—"SWITCHING CHARGES."

G.T.R. Co. v. Laidlaw Lumber Co., 2 O.W.N. 548, 18 O.W.R. 340.

F. CARRYING LIVE STOCK.

(§ III F—430)—SHIPMENT OF FOXES—LIMITATION OF LIABILITY.

Several boxes of foxes were shipped under a contract containing a clause providing that in case of carload shipments, if the owner or attendant travel, accompanying the animals, free transportation will be furnished the attendant, and the animals during transportation in charge of the attendant will be at owner's risk. On the back of the contract was an attendant's contract, signed by the shipper, providing that if free transportation was furnished by the company it would not be liable for any injury or loss occurring to the owner or attendant. One of the owners traveled on the same car, the foxes being in the express car with the other express parcels. No free transportation was furnished:—Held, that the attendant's contract only applied in case of carload shipments, and the Trial Judge was right in directing the jury that it did not apply to the shipment in question, and the company was liable if the foxes died during transportation through its negligence.

Trenholm v. Dom. Express, 43 N.B.R. 98.

(§ III F—437)—RESPONSIBILITY—RAILWAY—HORSE—LANDING PLACE—DAMAGES—C.C. ARTS. 1053, 1675.

A railway company should apply to the carriage of goods and animals entrusted to it, all the care of a good father of a family. It has not carried out its obligations in the following case: A horse was placed on one of its cars at Ottawa, destined for Joliette. At the latter place, it let the horse out in front of a freight shed instead of taking it to the landing place for animals, and there, at a very bad place for many reasons so that the horse took fright and was severely injured. In these circumstances, the railway company is responsible for the decrease in value of the horse.

Desormiers v. The Canadian Northern Quebec R., 56 Que. S.C. 156.

(§ III F—439)—INJURY TO CARETAKER—LIMITATION OF LIABILITY.

A condition in a live stock contract between shippers and a railway company, relieving the company of liability for injury or death of men in charge of cattle while being carried by the railway, is binding on the men so in charge if they accept passes, granted under the contract containing substance of the conditions, the acceptance or otherwise is a question of fact.

C.P.R. Co. v. Parent, 33 D.L.R. 12, [1917] A.C. 195, 20 Can. Ry. Cas. 141, 23 Rev. Leg. 292, 33 T.L.R. 180, reversing 21 D.L.R. 681.

LIABILITY TO CARETAKER.

Where the general form of a shipping contract has been approved by the Board of

Railway Commissioners of Canada and it provides for exemption of the railway from liability for personal injuries through negligence of the railway of a shipper of live stock under a ticket issued by the railway at half fare, permitting him to ride on the train on which the live stock was being carried for the purpose of looking after the same while in transit, such exemption will apply notwithstanding that the shipper signed the contract without reading the same over or knowing its contents.

Heller v. G.T.R. Co., 2 D.L.R. 114, 25 O. L.R. 488, 21 O.W.R. 210, affirming 25 O.L.R. 117, 13 Can. Ry. Cas. 363.

G. STIPULATIONS AS TO LIABILITY.

(§ III G—440)—"AT OWNER'S RISK."

Where the carrying of goods is stipulated in the bill of lading to be "at owner's risk," this does not have the effect of excusing a common carrier from its liability for damages caused by its fault, or the fault of those for whom it is responsible.

Ottawa Forwarding Co. v. Ward, 23 D.L.R. 645, 47 Que. S.C. 171.

(§ III G—441)—LIABILITY TO CARETAKER OF STOCK—REDUCED FARE.

One who travels upon a railway in charge of live stock at a reduced fare paid by the shipper of the stock under a special contract between the shipper and the railway company, and pays no fare himself, and has no other ticket or other authorization entitling him to be upon the train, cannot be heard to deny that he is traveling under the provisions of the special contract, though he has neither read nor signed it, and is bound by a provision therein relieving the railway company from liability for his death or injury, though caused by the negligence of the company.

G.T.R. Co. v. Robinson, 22 D.L.R. 1, [1915] A.C. 740, 19 Can. Ry. Cas. 37, 31 W.L.R. 241, reversing 12 D.L.R. 696, 47 Can. S.C.R. 622.

(§ III G—443)—LIABILITY FOR DELAY—CONNECTING LINE—JOINT TARIFF.

An initial carrier, who contracted to be liable to the shipper for loss on connecting railways, unless expressly stipulated otherwise, has the burden of proof of the existence of such stipulation.

Ouellet v. Manager of Government Rys., 32 D.L.R. 655, 49 Que. S.C. 494.

(§ III G—450)—INJURY TO ARTICLE DELIVERED FOR CARRIAGE—NEGLIGENCE—LIABILITY.

If a carrier injures an article delivered to him for carriage, the owner of such article may recover damages, not only for the amount which it may be necessary to spend for repairs but also for the loss of the article injured during the period that the repairing may occupy. The damages must, however, be such as may be reasonably supposed to have been in the contemplation of the parties when the contract was made.

Davis v. Canadian Express Co., 44 D.L.R. 454, 23 Can. Ry. Cas. 340, 52 N.S.R. 392.

IMMUNITY AS TO NEGLIGENCE OF SHIP'S CREW—PUBLIC POLICY.

Although the court should accept the decision of the Supreme Court in the case of Glengoil S.S. Co. v. Pilkington, 28 Can. S.C.R. 146, namely, that a condition in a bill of lading to the effect that the owner of a ship will not be responsible for the negligence of the master or other employees, or for the equipment, is not contrary to public order nor to the laws of the province of Quebec, nevertheless this principle, which is not in accord with the general jurisprudence of our courts, should not be extended. Thus, this clause for immunity should be strictly interpreted and should not be applied when there is no proof of the manner in which damage was caused to the goods carried.

Dechêne v. C.P.R. Co., 47 Que. S.C. 431.

LOSS OF GOODS—NEGLIGENCE—ONUS.

The stipulation of the carrier, that he will not be responsible for any damage unless he is guilty of negligence, has not the effect of throwing the burden of proof of negligence upon the consignor, but of rendering the carrier free from liability if he proves that he is not at fault.

De Tonnancourt v. Canadian Express Co., 49 Que. S.C. 113.

(§ III G—455)—LOSS OF PART OF SHIPMENT—VALUE.

Where the contract of shipment fixes the value of the goods shipped and limits the liability of the carrier to that value, in case of a loss of part of the shipment, the shipper may recover the real value of the property lost, not exceeding the limits of liability stipulated in the contract, and is not limited to a recovery of such proportion of the amount named in the contract as the value of the property destroyed bore to the value of all the property shipped. [Gibbon v. Paynton, 4 Burr. 2298, 98 E.R. 199; Bradley v. Waterhouse, 3 C. & P. 318; McCance v. London and N.W.R. Co., 3 H. & C. 343, distinguished.]

Spaner Bros. v. Central Canada Express Co. (Alta.), 43 D.L.R. 400, 23 Can. Ry. Cas. 332, [1918] 3 W.W.R. 140.

AS TO AMOUNT.

The fact that an express company is enabled by statute to make use of a special form of contract impairing, restricting, or limiting its liability does not prevent the company from contracting upon the basis of a more extended liability as upon its contractual rights at common law, although such special form has received the approval of the Railway Commissioners of Canada, exercising governmental powers of supervision over common carriers.

Wilkinson v. Can. Express Co., 7 D.L.R. 450, 14 Can. Ry. Cas. 267, 27 O.L.R. 283.

Liability—Immunity clause—Knowledge—Evidence—French and English carriers contract—C.C., arts. 1576, 1673, 1674, 1675, 1682c.

The clause that a carrier company places in a company contract stipulating that it will not be responsible for the carriage of packages, trunks or goods consigned to it, except up to the sum of $50 only binds those who have knowledge of it. The carrier must prove this knowledge. Carriers must deliver a copy of their carrying contract printed in French and in English.

Jolicoeur v. Dom. Express Co., 55 Que. S.C. 455.

Live-stock—Special contract limiting liability—Contravention of Lord's Day Act—Action in tort—Negligence—Proximate cause.

Rise v. C.P.R. Co., 3 A.L.R. 154, 14 W.L.R. 635.

(§ III G—457)—Absence of express agreement—Negligence of carrier—Damage to goods—Measure of liability.

In the absence of express terms in the agreement, a carrier's liability for goods damaged in transit, through negligence, must be computed on the market price or value of the goods at the time of shipment and at the place of consignment.

Dominion Textile Co. v. Canada Steamship Lines, 46 D.L.R. 255, 25 Rev. de Jur. 164.

(§ III G—460)—Stipulation as to notice of loss—Failure to give.

A bill of lading, approved by the Railway Board, containing a clause releasing the carrier from liability if notice of the loss is not given within four months of a reasonable time for delivery, is binding upon the shipper and will bar his right of recovery for a lost shipment where the required notice is not in fact given.

Drury v. C.P.R. Co., 48 Que. S.C. 326.

(§ III G—467)—"Effects of climate"—Negligence.

A stipulation in an English bill of lading against liability for damage from the "effects of climate," or from negligence, includes damage from freezing while discharging cargo at an intermediate port, and the negligence clause is binding between the parties.

Vipond v. Furness, Withy & Co., 35 D.L.R. 278, 54 Can. S.C.R. 521, affirming 31 D.L.R. 635, 25 Que. K.B. 325.

H. Contract or duty to furnish cars.

(§ III H—470)—Contract to furnish cars.

Where the railway company makes a continuing offer and in effect says "order our cars and we will supply them at a certain rate of freight" a complete contract is established between a railway company and a shipper the moment the shipper gives the order in consequence. [G.N.R. Co. v. Witham, L.R. 9 C.P. 16; Wellington v. Apthorp, 145 Mass. 69; Cleveland Ry. Co. v. Closser, 126 Indiana 368, referred to.]

Starratt v. Dominion Atlantic R. Co., 16 D.L.R. 777, 48 N.S.R. 82.

Foreign cars—Jurisdiction of Board.

The obligation of a carrier under s. 317 of the Railway Act is to supply cars according to their respective powers. Where a carrier is called upon to supply a car which is not carried on its equipment register, it is within its powers to supply a car on its equipment register which is nearest available to the length asked for. When foreign cars of larger sizes than are carried on their equipment register are available, carriers may furnish such cars, but the Board has no jurisdiction to compel carriers to supply a larger car of foreign equipment.

Hunting-Merritt Lumber Co. v. C.P. & B.C. Electric R. Cos., 20 Can. Ry. Cas. 181.

Duty to furnish heated cars—Perishable commodities—Recovery back of freight tolls.

The carrier should be obliged to accept shipments of perishable commodities providing heated cars, subject to the stipulation that the shipper must sign a release waiving all claim for frost damage unless he can prove that the heating appliances were missing, with a further exception that if the heaters are allowed to go out through the negligence of the carrier, the damages recoverable will be limited to one-half the freight tolls charged on the shipment in question.

Fernie-Fort Steele Brewing Co. v. C.P.R. Co., 28 D.L.R. 383, 18 Can. Ry. Cas. 426.

Grain—Congestion—Public interest.

The Board having satisfied itself that a very large quantity of grain (estimated at 60 per cent of the year's crop) remained in the Goose Lake District at the end of February, 1916, awaiting transporation, was in danger of deterioration and loss, and that the Canadian Northern Railway Company was unable to move the crop quickly enough to serve the public interest, made an order under 6 & 7 Geo. V. c. 2, s. 317 (a) of the Railway Act, as follows:—(a) Requiring the Canadian Northern Ry. Co. to supply at once 1,200 cars and 36 engines to be used solely in that district in carrying grain to the terminal elevator at Saskatoon and to the transfer track of the Grand Trunk Pacific Ry. Co. there (b) Requiring the Grand Trunk Pacific Ry. Co. (which had cars idle) to use all available rolling stock in carrying grain from the Saskatoon elevator to eastern points and to supply the Canadian Northern with one empty box car for each car of grain received at the transfer track. (c) Directing the railway companies to fix proportionals of the through rate (which was not to be increased) in such manner as to give the Canadian Northern a larger share than it would

receive on a mileage basis as its proportion of the through rate.

In re Goose Lake District Grain, 21 Can. Ry. Cas. 38.

LOADING CAPACITY—MINIMUM WEIGHT.

A reduction in the general minimum weight will not be made because in a particular instance it is slightly in excess of the average loading capacity of the car.

Hay & Still Mfg. Cos. v. G.T.R. & C.P.R. Cos., 21 Can. Ry. Cas. 43.

MINIMUM WEIGHT OF CARS.

Kootenay Shingle Co. v. G.N.R. Co., 21 Can. Ry. Cas. 92.

CONTRACT OR DUTY TO FURNISH CARS—TRAFFIC—CANADIAN AND INTERNATIONAL—ADEQUATE FACILITIES—BOX AND ORE CARS—EXTRA WEIGHT TOLL FROM MOISTURE.

The duty of a railway in furnishing adequate facilities for traffic includes supplying cars for business originating on its lines in Canada, independently of whether or not box cars are received from the United States waiting to be unloaded and returned, and it is neither necessary nor desirable to hold any particular cars exclusively for Canadian traffic. Box cars are suitable—in many cases necessary—for ore traffic, and must be supplied where required, since the extra weight in open dump cars used for carrying ore, caused by absorption of moisture in wet weather or winter time, would make the toll prohibitive.

Iron Mountain, Hudson Bay & Queen Mines v. G.N.R. Co., 15 Can. Ry. Cas. 311.

I. DEMURRAGE ON CARS.

(§ III I—475)—STOP-OVER—EXTRA TOLLS.

A stop-over privilege of 72 hours after arrival at Cartier is sufficient time for a trader to decide where to send his grain, and an extra toll should be paid for cars remaining on hand waiting for furtherance orders after the expiration of that period.

C.P.R. v. Montreal Corn Exchange Assn., 28 D.L.R. 560, 19 Can. Ry. Cas. 257.

DEMURRAGE TOLLS — REFUND — DISCRIMINATION—CAR SERVICE RULES.

Under the car service rules, demurrage tolls in force in 1912-13, where the consignee was in default from December 15, 1912, to March 31, 1913, he was subject to the penalty fixed by the filed tariff of demurrage tolls effective December 15, 1912, to March 31, 1913 (higher than $1 per day), but demurrage tolls on cars on and after March 31, 1913, must be reduced to the $1 per day toll basis, irrespective of the date transportation commenced or when the right to collect demurrage first accrued. Tariffs are not retroactive and carriers can only collect for the transporation of traffic the tolls authorized and in force at the time of shipment. No charge for demurrage as such is included in any ordinary transportation toll, consequently the car service demurrage toll in force at the time of arrival of cars at destination may be charged by the carrier.

Security Traffic Bureau v. Canadian Freight Assn., 21 Can. Ry. Cas. 57.

DEMURRAGE — FREE TIME — TRANSSHIPPING GRAIN—CARS—VESSELS.

A period of 5 days excluding Sundays and legal holidays, is sufficient time free from demurrage for transshipping grain from cars to vessels at St. John, N.B.

Montreal Board of Trade v. C.P.R. Co., 23 Can. Ry. Cas. 10.

SHIPPING—ACTION FOR FREIGHT AND DEMURRAGE.

Det Dansk Russike Dampskibsselskab v. Musgrave, 10 E.L.R. 27 (N.S.).

TOLLS—TERMINAL—TRAFFIC.

The holding of C.L. traffic until directions are given to place upon a specific siding would involve great confusion, delay and loss, and would be impracticable owing to the large amount of space required for sufficient yardage at important terminal points. A toll of $3 was approved for diversion of cars, at large terminals.

Montreal Board of Trade v. C.P.R. Co., 22 Can. Ry. Cas. 335.

TOLLS — DEMURRAGE — JURISDICTION — COMITY OF NATIONS.

An application for a rehearing in this case was refused.

American Coal & Coke Co. v. Michigan Central R. Co., 21 Can. Ry. Cas. 15, affirming 17 Can. Ry. Cas. 256.

CAR SERVICE TOLLS—ARRIVAL AT DESTINATION.

The obligations of carriers under contracts of carriage cease when notice of the arrival of the car has been given or it has been placed for unloading and the free time allowed under the car service rules has elapsed. The car service tolls are independent of the toll applying on the shipment and the car is liable to the car service tolls in force at the time of its arrival at destination.

Security Traffic Bureau v. Canadian Freight Assn., 20 Can. Ry. Cas. 186.

CARS—DEMMURRAGE RULES—REVISED AND ADOPTED.

Canadian Car Demurrage Rules were revised and adopted by the Board. Discussion of average and reciprocal demurrage was postponed until after the conclusion of the war.

In re Car Demurrage Rules, 24 Can. Ry. Cas. 180.

DEMURRAGE—TOLLS—SWITCHING ORDERS—BILL OF LADING—TRAFFIC—THROUGH—C.L.—JURISDICTION—PUBLIC INTEREST—CONTRACTS OF CARRIAGE—COMITY OF NATIONS.

Contracts made in the United States for the carriage of C.L. Traffic passing from one point to another in the United States through Canadian territory are under the control of the Interstate Commerce Commission, and the Board (having regard to

international comity) will not make an order as to demurrage charged for delay of such traffic in Canada, when no Canadian interest is involved, where the effect of such order would be to nullify a previous order of the Interstate Commerce Commission on the same subject-matter.

American Coal & Coke Co. v. Michigan Central R. Co., 17 Can. Ry. Cas. 256.

ACTION FOR RECOVERY OF MONEY—COST OF DEMURRAGE—DELAY OF CONSIGNEE TO UNLOAD—SHOULD THE CARRIER NOTIFY THE SENDER?—C.C. ARTS. 1672, 1673, 1681.

When a railway company has delivered to a consignee the goods which it contracted to carry, it is not obliged to notify the sender of a delay on the part of the consignee to unload and of the costs incurred by the latter in consequence. If the sender finally pays the costs and acquits the consignee of blame, he has no right of action to recover the money from the Railway Company.

Kaine v. G.T.R. Co., 56 Que. S.C. 223.

(§ III I—476)—REASONABLENESS OF CHARGE.

Demurrage charges upon cars, due to slowness in unloading them by reason of a longer haul, may be considered as an element of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which tracks cars of coal and lumber could be quickly and cheaply unloaded directly into such yard, where, by reason of such removal, such commodities had to be hauled by the owner of such yard from a greater distance in a slower manner.

Robinson v. C.N.R. Co., 5 D.L.R. 716, 14 Can. Ry. Cas. 281, 21 W.L.R. 916.

(§ III I—482)—UNDUE DETENTION.

Application by the Canadian Freight Association to revise the charges provided by the Car Service Rules with reference to refrigerator cars. The association proposed to leave the charge, as at present, for the first two days at $1.00 per car per day after the expiration of the 48 hours free time; but to charge for the next two days $3.00 per car per day or fraction thereof; and for each succeeding day thereafter $4.00 per car per day or fraction thereof. With the object of obtaining the benefit of the cold or warm storage at the nominal charge of $1.00 per car per day until the contents of cars were disposed of, consignees have been holding perishable freight loaded in refrigerator cars very frequently from 10 to 15 days, commonly 20 days, and in various cases over a month. The said charges of $1.00 was cheaper than that in any other cold storage warehouse in Winnipeg or any other city in the west. Held, 1. That cars were transportation facilities, not a portion of the warehousing premises of the consignee leased from a railway at a nominal rental. 2. That such undue detention of cars for storage purposes was contrary to the public interest and a hardship where refrigerator cars were required. 3. That section 6 of the bill of lading in use by carriers should be sufficient to enable them to deal with the matter. 4. That though it appeared that a grievance existed, the Board should not take any action or make any direction until it was affirmatively shewn that the matter could not be adequately dealt with under the said action.

Canadian Freight Assn. v. Winnipeg Board of Trade & Canadian Manufacturers' Assn., 13 Can. Ry. Cas. 122.

J. CONNECTING CARRIERS.

(§ III J—485)—CONNECTING—BILL OF LADING—TOLL—THROUGH—INLAND DESTINATION — JURISDICTION — CARRIAGE —CONDITIONS.

A bill of lading issued by a steamship company containing the inland destination and the through toll thereto is made a through bill of lading although it does not contain the conditions of carriage by rail. By Order No. 7562, dated July 15, 1909, the Board prescribed the form of bill of lading for inland carriage from a Canadian seaport. S. 2 of the Order provides that the carrier issuing the bill of lading shall be liable for any loss, damage or injury sustained to the goods carried under such bill of lading, but the delivering carrier is not made liable unless it be so de facto. Where a shipment was carried under a through bill of lading issued by a steamship company from India to Boston, Mass., and thence to final destination at Winnipeg, where delivery was made by the last connecting carrier, the Board has no jurisdiction over the steamship company nor over the initial carrier at Boston, and the delivering carrier is not liable for the shortage of goods received by it "short" from its connections.

Smart-Woods v. C.P.R. Co., 20 D.L.R. 771, 17 Can. Ry. Cas. 340.

CONNECTING CARRIERS—COMMON CARRIERS' LIABILITY—SHIPMENT FORWARDED TO DESTINATION BY SEVERAL DIFFERENT CARRIERS—LIABILITY OF EACH.

In the case of a shipment forwarded to its destination by different successive carriers, each one is liable only for his handling of it, and is in no wise the warrantor of the others. Hence, if it arrives in a damaged condition, the consignee or owner has no action against the last carrier, unless the latter have, himself, by neglect or otherwise, caused the damage.

McCready v. G.T.R. Co., 15 Can. Ry. Cas. 179, 43 Que. S.C. 160.

CONNECTING—HAULS—TWO OR MORE LINES — TOLLS — THROUGH — DIVISION — REASONABLE.

The division of the through toll as between connecting carriers on hauls over two or more lines is a matter of domestic concern, and so long as the through toll is not unreasonable, it does not matter to the public how it is divided. [Continental, Prairie & Winnipeg Oil Cos. v. C.P.R. Co., 13 Can. Ry. Cas. 158 at p. 159; Manitoba Dairy-

men's Assn. v. Dominion & Canadian Northern Express Cos., 14 Can. Ry. Cas. 142 at p. 148; International Paper Co. v. G.T., C.P. & C.N.R. Cos. (Pulpwood Case), 15 Can. Ry. Cas. 111; Blind River Board of Trade v. G.T., C.P.R., Northern Navigation & Dominion Transportation Cos., 15 Can. Ry. Cas. 146; In re Western Tolls (Western Tolls Case), 17 Can. Ry. Cas. 123 at p. 203; Dominion Sugar Co. v. G.T.,C.P., Chatham, Wallaceburg & Lake Erie & Pere Marquette R. Cos., 17 Can. Ry. Cas. 231, at p. 239, reheard, 17 Can. Ry. Cas. 240 at p. 244; Auger & Son, & D'Auteuil Lumber Co. v. C.P. & G.T.R. Cos., 19 Can. Ry. Cas. 401; In re Eastern Tolls (Eastern Tolls Case), 22 Can. Ry. Cas. 4, followed.]

West Virginia Pulp & Paper Co. & Northern Mills Group v. C.P.R. Co., 23 Can. Ry. Cas. 153.

CONNECTING — OPERATION — CONDITIONS — EXTRAORDINARY — TOLLS — JOINT — LOCAL—NET—REDUCTION.

The Board refused to reduce the tolls on the respondent power company's line, on account of its extraordinary operating conditions, but made a reduction in the respondent railway company's toll by following the practice in Eastern Canada, where connecting carriers having no joint tolls, each takes one cent from its local toll, subject to a minimum net toll. [Fullerton Lumber & Shingle Co. v. C.P.R. Co., 17 Can. Ry. Cas. 79, distinguished.]

Stoltze Mfg. Co. v. C.P.R & Western Can. Power Cos., 17 Can. Ry. Cas. 282.

SHIPMENT OF GRAIN—LIABILITY OF INTERMEDIATE CARRIERS.

When a shipment of grain is despatched in a sealed car over several lines of railway consecutively, the intermediate carriers are only answerable for damage arising from their own acts. In the absence of proof to this effect, they are relieved of all liability.

Duchesneau v. C.N.R. Co., 23 Que. K.B. 19.

THROUGH CONTRACT—LOSS WHILE IN POSSESSION OF INTERMEDIATE CARRIER — NONDELIVERY—NEGLIGENCE.

Jenckes Machine Co. v. C.N.R. Co., 11 Can. Ry. Cas. 440.

DELAY IN TRANSIT—DELAY IN GIVING NOTICE TO CONSIGNEE —PERISHABLE GOODS — CONNECTING LINE—FOREIGN CONTRACT.

Corby v. G.T.R. Co., 23 O.L.R. 318, 12 Can. Ry. Cas. 494, 18 O.W.R. 766.

(§ III J—487)—CONNECTING CARRIERS — CONTRACT AT THROUGH RATE.

Downing v. Jaques, 19 D.L.R. 885.

(§ III J — 495) — CONNECTING — TOLLS — ROUTES—SHORTEST.

Connecting carriers should route shipments of vegetables and fruit via the shortest possible mileage routes and file appropriate tariffs of tolls.

Similkameen Farmers Institute v. C.P. & C.N.R. Cos., 24 Can. Ry. Cas. 125.

(§ III J—499)—RIGHT TO BENEFIT OF SHIPPER'S CONTRACT WITH OTHER CARRIER.

A person who forwards his railway baggage checks to an express company with instructions to take delivery of the baggage and reforward it by express may claim damages for its loss in transit while in their custody as upon the company's common law liability, and is not bound by a condition of a shipping receipt issued to the railway company on receiving delivery from it, purporting to limit the maximum liability of the express company in case of loss, where the contract evidenced by such shipping receipt is in its terms made between the express company and the railway company only and its provisions were not communicated to the owner of the baggage. [But see Edwards v. Sherratt, 1 East. 604; Lohden v. Calder, 14 T.L.R. 311; Hayward v. C.N.R. Co., 6 Can. Ry. Cas. 411; Mercer v. C.P.R., 8 Can. Ry. Cas. 372.]

Wilkinson v. Canadian Express Co., D.L.R. 450, 14 Can. Ry. Cas. 267, 27 O.L.R. 283.

CAR SHORTAGE—ALTERNATIVE ROUTES—INITIAL OR ORIGINATING RAILWAY.

Imperial Steel & Wire Co. v. G.T.R. Co., 11 Can. Ry. Cas. 395.

PIANOS — SHIPPING SYSTEM — HEATING — CARLOAD WEIGHT—MINIMUM.

Canadian Piano & Organ Manufacturers' Assn. v. Canadian Freight Assn., 12 Can. Ry. Cas. 22.

CARS—BOX AND FLAT OR OPEN—SHIPPING SYSTEM — STAKES AND FASTENINGS — WEIGHT ALLOWANCE.

Canadian Manufacturers' Assn. v. Canadian Freight Assn. 12 Can. Ry. Cas. 27.

MARINE RAILWAY—CONTRACT FOR HAULING VESSEL—CONDITION EXCLUDING LIABILITY.

Gorton-Pew Fisheries Co. v. North Sydney Marine R. Co., 44 N.S.R. 493.

CHARTER-PARTY — CONSTRUCTION OF — CARGO—DAMAGE BY ACCIDENT TO SHIP —REFUSAL BY CONSIGNEES TO PAY FREIGHT — CAPTAIN DISCHARGING FREIGHT AT INDEPENDENT WHARF TO HIS OWN ORDER.

Parratt v. The Ship "Notre dame d'Avor," 16 B.C.R. 381, 13 Can. Ex. 456.

SHIPPING — CONTRACT — CHARTER OF STEAMER FOR CERTAIN VOYAGE—DEVIATION AT INSTANCE OF CHARTERER—DAMAGE TO SHIP — LIABILITY OF CHARTERER.

Reid & Archibald v. Tobin, 9 E.L.R. 180 (N.S.).

ADMIRALTY LAW — SHIPPING — CHARTER-PARTY — DEMURRAGE — BILLS OF LADING.

Re Silverstream, 10 E.L.R. 73.

REBATE ON FREIGHT—BY-LAW OR RULE.

Kennedy v. Quebec & Lake St. John R. Co., 39 Que. S.C. 344, 14 Can. Ry. Cas. 153.

IV. Governmental control; rates; discrimination; duty as to stopping places.

A. In general.

(§ IV A—515)—Milling-in-transit—By-product of breweries—Unjust discrimination.

No instance can be found where a milling-in-transit privilege on the by-product has been granted, apart altogether from the main product, a brewing company, therefore is not entitled to a milling-in-transit privilege on the offal of malt grain carried by the respondent on its line from Fort William to Sudbury, and there brewed in the applicant's brewery. Shippers are not entitled to a milling-in-transit privilege as a matter of right, and its allowance in the public interest by carriers to shippers in one section must be without unjust discrimination to shippers in another section served by its line. [Koch v. Pennsylvania R. Co., 10 I.C.C.R. 675; Ontario & Manitoba Flour Mills v. C.P.R. Co., 16 Can. Ry. Cas. 430, followed.]

Sudbury Brewing & Malting Co. v. C.P.R. Co., 26 D.L.R. 673, 18 Can. Ry. Cas. 410.

Interswitching—Milling-in-transit.

The toll for the milling-in-transit privilege does not include the toll for interswitching necessary to take the traffic from the line of one railway company to another. [Anchor Elevator Warehousing & Northern Elevator Cos. v. Can. North. and C.P.R. Cos., 9 Can. Ry. Cas. 175, followed.]

Taylor & Can. Flour Mills Co. v. C.P.R. & Pere Marquette R. Cos., 28 D.L.R. 557, 19 Can. Ry. Cas. 264.

Freight rates—Tariff—Misdescription of goods.

A common carrier cannot collect freight rates on "metal scrap" at a rate different from that established by the Railway Board tariff, simply because the shipper innocently misdescribed the goods in the bill of lading, what was in fact "metal scrap" being described as "copper ingots."

Pere Marquette R. Co. v. Mueller Mfg. Co., 48 D.L.R. 468, 45 O.L.R. 312.

Tolls—Basis—Fixed percentage—Overhead or capital charges—Comparison — Foreign carriers — Standard tariffs—Mileage tolls—Maximum—Railway Act, s. 326.

The contention that rates should be made on the basis of cost plus a fixed percentage to cover overhead or capital charges cannot be sustained nor can effect be given to contentions based upon results obtained by lines in the United States. [Boileau v. Pacific & Lake Erie R. Co. 22 I.C.C.R. 640, at p. 653, followed.] It is in the public interest that railway tolls should be of such a character as to attract investment and render railway securities marketable. These tolls should be such as to give a fair return to the railway company independent of the reserves of liabilities of such company. The Board decided that the five standard tariffs under s. 326 of the Railway Act known as:—

(1) The Manitoba Scale.
(2) The Saskatchewan Scale.
(3) The Mountain Scale.
(4) The Lake Scale between Lake Ports in B.C.
(5) The Lake and Rail and Inter Lake Scale B.C. in effect at the time of the inquiry should be reduced to three to be called:—

(1) The Prairie Standard Tariff extending from the Great Lakes to the Rocky Mountains.

(2) The Pacific including mainland rail lines in B.C., and

(3) The B.C. Lakes including inland navigable waters in that province. The Board should not assist the construction of the additional railway lines required in these provinces by authorizing higher rates over a railway system than would be reasonable having regard to the older portions of the railway producing satisfactory traffic returns. Thus railway tolls in Western Canada cannot be based upon consideration of the position of anyone of the three existing lines of railway either completed or partially completed, viz., C.P.R., C.N.R., or G.T.P.R. The question to be decided is what tolls are fair irrespective of the financial position of any of such companies. The Board found also that through the paralleling of existing lines a certain amount of overlapping exists in all the western provinces, and that control by the government is necessary to prevent unnecessary duplication of railway facilities in the future. The existing railway mileage is inadequate for the needs of those engaged in farming (in Saskatchewan and Alberta). In the former province, 39 per cent. and in the latter 48 per cent of the total acreage is unprovided with railway facilities within a haul of ten miles. Thus, farmers living at greater distances spend more in hauling the grain to the railway than it costs to haul the grain by rail from the railway station to Fort William. The governments of these provinces are therefore justified in assisting railway construction so as to shorten the average haul for the farmers.

Re Western Tolls, 19 D.L.R. 43, 17 Can. Ry. Cas. 123.

Interswitching—Public interest—Justification — Tolls — Commodity and class — Competition — Use of terminals—Line traffic—Interchange.

The only justification for subjecting the facilities of one carrier to the business of another is the public interest, and orders as to interswitching should not be used for the purpose of enabling one carrier to take from another not only the use of its terminals but line traffic. Where, therefore, the shipper expressly requires interswitching from team tracks, and the interswitching carrier is equipped and actually ready, in accordance with its published tariffs of tolls to carry to destination and to afford the

same delivery and facilities itself, or through its connections, or by interswitching, at the same toll as the competing carrier, the interswitching carrier should be allowed to charge, instead of an interswitching toll, the appropriate toll of its published class or commodity tariff to the point of interchange, which toll should be made an additional charge against the shipment, provided however, that in case of failure to place cars within a reasonable time, ordinary interswitching tolls only should apply. In view of the fact that interswitching from and to private spurs has been freely accorded in the past by the carriers to one another, those provisions of General Order No. 230, issued pursuant to the judgment of May 15, 1918, which were designed to protect the initial carrier in its enjoyment of the line haul, were amended by General Order No. 252, so as to apply to team tracks only, and not to be applicable to shipments interswitched from private spurs. [G.T.R. Co. v. C.P.R. Co. & London (London Interswitching Case), 6 Can. Ry. Cas. 227, at p. 231, followed.] Distinction should be made between team tracks and private or industrial spurs as to terms of interswitching, the service to team tracks being subject to the consideration (a) that the first duty to the carrier owning the terminal facilities is to provide for its own traffic, and (b) that the carrier owning the terminal is entitled to fair remuneration for the use of its property. Interswitching tolls in the case of team tracks should be higher than for private or industrial spurs, and should be absorbed by the line carrier, as in the case of private spur.

In re Interswitching Service, 24 Can. Ry. Cas. 324.

WATER COMPETITION—DISCRETION—TOLLS — LOW — REASONABLE — COMPETITION—UNJUST DISCRIMINATION.

A carrier is not obliged to meet water competition, and is free in its discretion to take out low competitive tolls provided there is no unjust discrimination, and the tolls made effective are reasonable in themselves.

Martin & Robertson & Imperial Rice Milling Co. v. Canadian Freight Assn., 24 Can. Ry. Cas. 141.

TOLLS — SEPARATE — DISTINCTION — SLACK COAL—INCREASE.

In the decision of the Board in the 15 per cent Increased Rates Case, 22 Can. Ry. Cas. 49, allowing an increase on coal of 15 cents per ton, there is no separate toll for slack coal and no distinction can be made in the tolls on slack lump or run of the mine coal.

Twin City Coal Co. v. C.P., C.N. & G.T.P.R. Cos., 23 Can. Ry. Cas. 181.

DISCRETION—COMMODITIES—MILEAGE SCALE — TOLLS — SPECIAL — REASONABLE — LOW — COMPARISON — TRAFFIC — VOLUME.

Comparing the commodity mileage scale on agricultural limestone with the special commodity tolls on crushed stone, and taking into consideration that the volume of traffic of agricultural limestone to large consuming points is not comparable with crushed stone, and that the latter commodity has been granted low commodity tolls by the carriers in their discretion, it has not been established that the existing toll basis is unreasonable. [Provincial Stone & Supply Co. v. G.T.R. Co., 22 Can. Ry. Cas. 411, at p. 413, followed.]

Crushed Stone, & Henderson Farmers' Lime & Phosphate Co. v. G.T.R. Co., 23 Can. Ry. Cas. 132.

TOLLS — REASONABLE — INCREASE — BASIS — TAPERING — HAULS — SHORTER AND LONGER—EASTERLY AND WESTERLY—COMPARISON.

An increase in freight tolls on potatoes and turnips from points in New Brunswick to points in Ontario and Quebec was approved by the Board, with the exception that tolls west of Hamilton and Guelph should be reduced one cent upon the general basis of 8th class under the classification tapered downwards for the shorter easterly haul from New Brunswick in comparison with the longer haul from the western provinces.

New Brunswick Vegetable Growers v. C.P. & Temiscouata R. Cos., 23 Can. Ry. Cas. 128.

TOLLS — DUAL — HIGHER — UNIFORM — SAME COMMODITY—ULTIMATE USE—RETURNED EMPTIES.

Dual tolls, charging a higher toll on cream for domestic use than on that for butter making are anomalous and inexpedient. [Manitoba Dairymen's Association v. Dominion and Canadian Northern Express Cos., 14 Can. Ry. Cas. 142, followed.] In dealing with the question whether the rules as to carriage of cream should provide for delivery, the Board follows the principle of "all or none" since it is unfair and inexpedient to make the use of delivery service at a given point optional with individual consignees. The toll for a returned empty is a charge for a service distinct from that of handling the incoming package and the existence of this toll is justifiable.

Riley v. Dominion Express Co., 17 Can. Ry. Cas. 112.

COLONIZATION LINES—BRANCH—TRANSCONTINENTAL SYSTEM—MOUNTAIN SCALE.

A "Mountain" scale of tolls may be authorized by the Board where the railway is a colonization line with but little developed traffic and bears to the transcontinental systems the relation of a branch line.

Re Edmonton, Dunvegan & B.C.R. Co., 22 Can. Ry. Cas. 1.

TOLLS—INCREASE—STANDARD AND SPECIAL —RAILWAY ACT.

Notwithstanding that standard tariffs of tolls have heretofore been filed with and approved by the Board as required by s. 327 and that the increased tolls proposed by the

applicants to be imposed under special tariffs of tolls are lower than those set out in such standard tariffs of tolls, the onus is nevertheless upon the applicants to shew cause for the increase of tolls under the present special tariffs of tolls which must prima facie be considered to have been fixed as fair and reasonable. To justify increase in tolls under special freight tariffs of tolls the applicants must shew that the existing tolls have been found to be unremunerative; that costs have increased; or that conditions or exigencies of traffic have changed; and only such increases will be authorized as are just and reasonable under existing conditions. Freight tolls in Eastern Canada should not be called upon to support investments by the G.T. in the G.T.P. or deficits upon operation of subsidiary lines in the United States, notwithstanding that these subsidiary lines supplied a large tonnage to be carried over the company's lines in Canada. In the interest of shippers and the public, railway companies should be allowed to charge tolls which will yield a return sufficient to provide facilities and rolling stock. Tolls in Eastern Canada and in Western Canada should be brought to a parity, so far as this can reasonably be done. Loss of traffic by reason of competition of new lines, or the need of new lines themselves for traffic returns which would make them self-supporting, does not in itself justify increase of tolls. Advances in tolls cannot be allowed simply because the carriers require money; nor can percentage increases be authorized simply to augment revenue; each toll must be determined with regard to its reasonableness for services performed. On the facts presented, the Board found that in general a case for increase of tolls in Eastern Canada had been made out.

Re Eastern Tolls, 22 Can. Ry. Cas. 4.

TOLLS — INCREASE — JURISDICTION — WAR MEASURES ACT.

The War Measures Act, 5 Geo. V. c. 2, does not confer on the Board any jurisdiction to increase tolls, or to advise the Governor-in-Council to increase them, in aid of the finances of carriers; the Board's jurisdiction in that regard is that given by the Railway Act. The Act of the Parliament of Canada, 60-61 Vict. c. 5, providing for a subsidy to the Canadian Pacific Ry. Co. in respect of the "Crow's Nest line" and for a limitation of freight tolls on lines then in operation between Fort William and points to the west thereof, is a special act within the meaning of s. 3 of the Railway Act. It therefore overrides any provisions of the Railway Act inconsistent with it and limits the general jurisdiction of the Board as to tolls. The Board has no power to advance tolls on the C.P.R. within that territory beyond the maximum fixed by the special Act. The Act of the Legislature of Manitoba (Manitoba statutes, 1901, c. 39) limiting tolls to be charged over lines of the C.N.R. System within that province is ultra vires as regards the C.N.R. Co., a Dominion corporation; and as regards subsidiary companies incorporated by the province and subsequently declared to be for the general advantage of Canada; it is superseded by the Railway Act in so far as the two are inconsistent and also by 1 Edw. VII. c. 53, s. 3 (Dom.); so that the Board's general jurisdiction under the Railway Act as to tolls is not limited or affected thereby. The Board, in considering tolls to be authorized, declined to give effect to an agreement to limit tolls made between a railway company and a province and confirmed by provincial legislation, where the company had afterwards passed under Dominion jurisdiction, and the agreement if observed would either have prevented an increase of tolls necessary in the public interest, or resulted in discriminatory lower tolls in that province as compared with other provinces with similar conditions. [Crow's Nest Pass Coal Co. v. C.P.R. Co., 8 Can. Ry. Cas. 33, at p. 41; Regina Board of Trade v. C.P. and C. N. Ry. Cos. (Regina Toll Case), 11 Can. Ry. Cas. 389, at p. 391, followed.] The Board can neither order nor enforce tolls which are unremunerative to the carriers without infringing the principle of the Railway Act by denying carriers a fair and just toll. An unduly low rate constitutes an unreasonable rate just as much as an unreasonable high one, and the question whether a rate is unduly low or unduly high can only be determined with a knowledge of the cost entailed by the service. An agreement to limit tolls entered into by a railway company will not be enforced or regarded by the Board unless made binding upon the Board by valid enactment, if it is found that the tolls agreed upon are unremunerative and improvident, so that the railway cannot be properly maintained and operated. In the public interest, when tolls reserved by contract prove unreasonably low in the face of changed conditions and increased costs, the tolls must be made reasonable notwithstanding the contract. [B.C. Pacific Coast Cities v. C.P.R. Co. (Vancouver Interior Rates Case), 7 Can. Ry. Cas. 125, at p. 146, followed.] Holding that under 60-61 Vict. c. 5, it could not increase rates beyond the maximum rates thereby fixed on lines of the C.P.R. Co. in operation when that act was passed, the Board also held that to prevent discrimination the same maximum should be applied to the whole system of that company as now operated; and that similar rates must be applied to other railways in the territory affected. The Board, having regard to increased cost of maintenance and operation and finding that tolls theretofore charged had been unremunerative and insufficient to ensure a proper service, authorized the railway companies concerned to submit new standard freight and passenger tariffs providing for a general increase of maximum mileage tolls on a percentage

basis, subject to the Crow's Nest Pass agreement and statute (60-61 Vict., c. 5), and to certain provisions and exceptions set out in the judgment of the Board.

Re Increase in Passenger and Freight Tolls, 22 Can. Ry. Cas. 49.

TOLLS — MEASURE — COMPARISON — REASONABLENESS.

The toll charged by one carrier is not necessarily a measure of what another should charge. Conversely it would appear that where different schedules are voluntarily adopted the higher toll existing on one railway is no conclusive measure of the toll properly chargeable for the same distance by the other carrier. [Dominion Sugar Co. v. Canadian Freight Association, 14 Can. Ry. Cas. 188, at p. 192, followed.] A consideration of the tolls in themselves, as well as a comparison with those the Board has found reasonable, shews that a toll from Hagersville to Windsor on a 65 cent basis is out of line, therefore a toll not exceeding 75 cents from Hagersville to Windsor is reasonable. [Doolittle & Wilcox v. G.T. and C.P. Ry. Cos. (Stone Quarry Toll Case), 8 Can. Ry. Cas. 10, followed.]

Hagersville Crushed Stone Co. v. Michigan Central R. Co., 22 Can. Ry. Cas. 84.

TOLLS—JOINT—INCREASE—TRAFFIC.

The railway companies having filed cancellations of a large number of joint tariffs, the effect being to increase tolls by substituting the sum of the local tolls for the joint tolls formerly in force, the Board intimated that the action was objectionable and would not be allowed. Subsequently, after a hearing, it directed that the joint tolls and service be maintained, and that the companies should file joint tariffs setting out the tolls based upon the increase authorized by the Board in the Eastern Rates Case, 22 Can. Ry. Cas. 4.

Canadian Freight Assn. v. Montreal Board of Trade, 22 Can. Ry. Cas. 88.

TOLLS — WATER COMPETITION — TERMINAL CHARGES.

A tariff quoting a toll from Sorel to Montreal on steel forgings "issued to meet water competition," but which does not limit the movement under it, covers either a local movement to Montreal or to the shipside at Montreal for export, and a further charge to cover "terminal charges" at Montreal cannot be supported under it.

Munitions & Machinery v. Quebec, Montreal & Southern R. Co., 22 Can. Ry. Cas. 90.

TOLLS — DEMURRAGE — INSPECTION — DELAY—GRAIN ACT.

Carriers are entitled to recover demurrage tolls for detention of equipment owing to delay in inspection of grain by government officials and the shipper has the right, under the Canada Grain Act, 2 Geo. V. c. 27, s. 71, to recover from the inspector for neglect or refusal to inspect. The latter are liable to shippers under the Canada Grain Act, 2 Geo. V. c. 27, s. 71, for neglect or refusal to make such inspection.

Toronto Board of Trade v. Canadian Freight Assn., 22 Can. Ry. Cas. 93.

TOLLS—ICING IN TRANSIT—REFRIGERATOR CARS—ACTUAL COST.

Railway companies should not profit by shipments handled except as carriers. The tolls for in transit icing of refrigerator cars should be made up on the basis of the average actual cost of the ice and the placing thereof upon the cars. Upon an analysis of the different cost factors the proposed increase in the icing tolls is not justified. The tolls on salt in refrigerator cars owing to the gradual development of its use in connection with the packing industry have been treated as an incident of its refrigeration, and it is claimed is properly included in the icing toll therefor. The carriers have justified the toll for salt over and above a toll for icing in the tariffs of tolls now in force. [Ontario Fruit Growers Assn. v. C.P.R. Co. (Canadian Freight Assn.) (Fruit Growers case), 3 Can. Ry. Cas. 430, distinguished and followed.]

Ontario Fruit Growers Assn. & Packing House Cos. v. Canadian Freight Assn., 22 Can. Ry. Cas. 98.

SWITCHING—SPURS.

The Board disallowed a toll of $2 for switching and spotting movements on spurs more than 1,000 feet in length of cars loaded with coal, without expressing any opinion on the general question of fixing a limit for free switching service.

Premier Coal Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 123.

BUREAU OF EXPLOSIVES—INITIAL CARRIER.

An initial carrier is under no obligation to become a member of the Bureau of Explosives if it satisfies the Board that a competent inspector has been appointed and proper arrangements made for the inspection of shipments of explosives orignating on its line. Under s. 317 of the Railway Act, connecting carriers must accept such shipments of explosives when presented for transportation and cannot under s. 286 exercise their discretion by declining to accept the shipments.

C.N.R. Co. v. G.T. & C.P.R. Cos., 20 Can. Ry. Cas. 220.

TOLLS—JOINT—LOCAL—LEGAL.

It is a fundamental principle that when a toll, joint or limited to points situate on one line of railway, has come into force under the Railway Act, it is the only legal toll in respect of the traffic and between the points mentioned.

Montreal Board of Trade v. C.P.,O. & N.Y. & I.R. Cos., 18 Can. Ry. Cas. 6.

DOMINION RAILWAY COMPANY—CONVICTION UNDER MUNICIPAL BY-LAW—EMISSION OF SMOKE—NUISANCE—OPERATION OF RAILWAY—REGULATIONS OF DOMINION BOARD OF RAILWAY COMMISSIONERS—JURISDICTION OF MUNICIPALITY—CONSTITUTIONAL LAW.

R. v. C.P.R. Co., 7 O.W.N. 568.

(§ IV A—518)—GRAIN—CARS—SWITCHING.

It is in the public interest that there should be no congestion of the railway facilities at elevator terminals. Accordingly, an application for switching cars of grain to private elevators at Fort William after the cars had been placed for unloading at other elevators was refused. Under the provisions of s. 8 of the Bulk Grain Bill of Lading, delivery may be made at any of the elevators at Port Arthur, Fort William or West Fort, without waiting 48 hours after written notice of arrival has been sent or given.

Ostrander v. C.P., C.N. and G.T.P.R. Cos., 28 D.L.R. 558, 19 Can. Ry. Cas. 251.

EQUIPMENT OF FOREIGN CARS—RAILWAY ACT—COUPLERS—SHORT LEVERS.

For a railway company to haul a box freight car owned by a foreign company, which was equipped with a coupling lever so short that it could not be operated without going between the ends of the cars, is a violation of s. 264 (1) of the Railway Act, R.S.C. 1906, c. 37, requiring all freight cars to be equipped with couplers that can be uncoupled without the necessity of men going between the ends of the cars. [Stone v. C.P.R. Co., 4 D.L.R. 789, 14 Can. Ry. Cas. 61, 3 O.W.N. 973, 26 O.L.R. 121, reversed.]

Stone v. C.P.R. Co., 13 D.L.R. 93, 15 Can. Ry. Cas. 408, 47 Can. S.C.R. 634.

A railway company, as carriers, must furnish equipment reasonably suitable for carrying the traffic of the shipper. In each case it is a question of fact whether the particular equipment is or is not suitable for carrying the particular traffic that is offered. And in this case, where the complaint was, that a sufficient number of suitable cars were not furnished for the shipping of meat, the Board found as a fact that "suitable accommodation" included the furnishing of cars with cross pieces at the top for the shippers to put their hooks on for their meat; and that the complaining shippers were not furnished with enough cars of that kind; and an order was made requiring the company to provide cars accordingly. If the carrier is required, under the law, to furnish a higher or more expensive class of equipment for carrying a certain kind of traffic than for another, the law intends that the extra expense shall be provided for in the rate that is obtained. On the 3rd October, 1910, the railway company issued a tariff of rates upon shipments of meat; the tariff went into effect and traffic moved under it. It remained in effect from October, 1910, until the 1st August, 1911, when a supplementary tariff was filed, under which the rates were more than doubled. It was held, upon a complaint of shippers, that, as the railway company had not given any evidence to shew that the old tariff was not remunerative, an order should be made cancelling the new tariff, and directing the railway company to reinstate the old one, which should remain in effect for at least a year. The Board has no jurisdiction to order rebates of any kind.

Vancouver and Prince Rupert Meat Co. v. G.N.R. Co., 20 W.L.R. 625.

(§ IV A—519)—AUTHORIZATION OF CONTRACT EXEMPTING FROM LIABILITY.

It is within the power of the Railway Board under the provisions of the Railway Act, R.S.C. c. 37, to authorize a contract relieving the company from liability to one traveling in charge of live stock at a reduced fare, for injuries caused by the negligence of the company or otherwise. [Robinson v. G.T.R. Co., 12 D.L.R. 696, 47 Can. S.C.R. 622, reversed.]

G.T.R. Co. v. Robinson, 22 D.L.R. 1, [1915] A.C. 740, 31 W.L.R. 241, 19 Can. Ry. Cas. 37, reversing 12 D.L.R. 696, 47 Can. S.C.R. 622, which reversed 8 D.L.R. 1002.

BOARD OF RAILWAY COMMISSIONERS—POWER TO PERMIT STREET RAILWAY TO DEVIATE LINE.

As the Toronto and York Radial Railway Company is not authorized by legislation to deviate its line from Yonge street, in the city of Toronto, to a private right-of-way, the Ontario Railway and Municipal Board is without jurisdiction to permit it to do so.

Toronto & York Radial R. Co. v. Toronto, 15 D.L.R. 270, affirming 12 D.L.R. 331, 15 Can. Ry. Cas. 277, 28 O.L.R. 180, 25 O.W.R. 315.

BOARD OF RAILWAY COMMISSIONERS—ORDER IMPOSING UNENFORCEABLE CONDITIONS—ACCEPTANCE IN PART.

An order of the Board of Railway Commissioners imposing some conditions on an applicant railway company that the Board did not have power to impose in invitum, is void unless such conditions are assented to by the company, as it cannot accept part and reject the remainder of the order; and if the terms upon which the Board's order was made are rejected by the applicant company, and an appeal taken instead of a motion to rescind the order, it may be declared upon appeal that the order shall remain inoperative unless or until the terms are accepted.

C.N.R. Co. v. Taylor, 11 D.L.R. 435, 15 Can. Ry. Cas. 298, 4 W.W.R. 416.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—PARTIALLY ORGANIZED COMPANY, STATUS—PROVISIONAL DIRECTORS.

A railway company whose organization has not been completed as required by the provisions of the Railway Act, but which

is assuming to carry on business through its provisional directors, has no standing to file detailed plans of its undertaking with the Board of Railway Commissioners, it being necessary, on the part of the company, to file evidence with the Board shewing that the provisions of the Railway Act relating to organization have been complied with as a condition precedent to its right to file such plans, or its right to any recognition by the Board of any such partially organized company. The Board of Railway Commissioners will not pass on any issue arising between provisional directors of a railway company and municipalities in regard to the legality of payments for calls on subscriptions made by the provisional directors, or other issues of such character.

Re Burrard Inlet Tunnel & Bridge Co., 10 D.L.R. 723, 15 Can. Ry. Cas. 289, 24 W.L.R. 214.

RAILWAY BOARD—JURISDICTION OF—STATUTORY PROVISIONS—AMALGAMATION OF RAILWAY COMPANIES—LEASE DISTINGUISHED.

Amalgamation of railways is essential to the operation of Railway Act, R.S.C. 1906, c. 37, s. 362, which gives an amalgamated company all powers possessed by the consolidated railways; and, hence, the section does not apply to make one company of both where a lease has been made of a provincial railway to a Dominion company for 999 years, though the only occasion for the continued corporate existence of the lessor company appears to be the issuance of stock, bonds and debentures, and the receipt of rent. S. 361 of the Railway Act, R.S.C. 1906, c. 37, which provides for sale or lease of one railway company's line to another, and which requires the agreement therefor to be submitted to the Board of Railway Commissioners, with application for recommendation to the Governor-in-council for sanction, does not give the Board jurisdiction of a lease of a provincial line to the C.P.R., though the statute 2 Geo. V. (Can.) c. 78, s. 14, provides that, subject to ss. 361–363 of the Railway Act, that company may, for any of the purposes specified in s. 361, enter into an agreement with the provincial company, and may lease its railway and undertaking. [Preston & Berlin Street R. Co. v. G.T.R. Co., 6 Can. Ry. Cas. 142, referred to.]

Re Quebec Central R. Co., 11 D.L.R. 267, 15 Can. Ry. Cas. 105.

GOVERNMENTAL CONTROL—ORDERS OF THE RAILWAY AND MUNICIPAL BOARD—JURISDICTION—6 EDW. VII. (ONT.) C. 30, S. 57, SUBS. 6.

Where under subs. 6, of s. 57 of the Ontario Railway Act, 1906, 6 Edw. VII. c. 30, the Railway and Municipal Board makes an order declaring that s. 57 shall apply to two railways, as to one of which it has jurisdiction to make such an order, but not as to the other, the intention being to bring about an interchange of traffic between them, the Court of Appeal will not strike out that part of the order which is beyond the Board's jurisdiction and let the remainder stand, when the effect of so doing would be to name a different order from that which the Board intended to make, and in fact, made. Upon the proper construction of subs. 6 of s. 57 of the Ontario Railway Act, 1906, 6 Edw. VII. c. 30, the Ontario Railway and Municipal Board has power only to declare that that section shall apply to a particular railway, without any limitation as to the railways with which such railway may thereby become liable to interchange traffic, but such a declaration does not restrict the power of the Board to refuse subsequently to order an interchange of traffic between such railway and any other railway, or to impose such terms of interchange as it may see fit.

Re Toronto & Toronto R. Co., 3 D.L.R. 561, 14 Can. Ry. Cas. 422, 21 O.W.R. 723.

GOVERNMENTAL CONTROL—ORDER OF BOARD OF RAILWAY COMMISSIONERS.

Where a railway company had been carrying passengers over a newly constructed road that had not been opened for traffic by an order of the Board of Railway Commissioners under s. 261 of the Railway Act, the Board will refuse to make any order directing the company to open the road for traffic on that account, but will forbid the company from continuing to carry passengers except under the provisions of the Railway Act. The Board of Railway Commissioners cannot compel a railway company to open and operate for passenger and freight traffic a newly constructed road, as the determination as to when it shall be opened for traffic rests solely with the railway company.

Re G.T.P.R. Co., 3 D.L.R. 819.

CONSTRUCTION OF SPECIAL AND GENERAL ORDERS OF BOARD OF RAILWAY COMMISSIONERS—ERECTIONS NEAR TRACK—NOT RETROACTIVE—SPECIAL ORDERS.

A special order of the Board of Railway Commissioners, under subs. (g) of s. 30, c. 37, R.S.C. 1906, providing that water stand pipes shall be placed not less than 7 feet 6 inches from the centre of the tracks of the C.P.R., is not abrogated by the subsequent general order, not retroactive in effect, which prohibited the placing of water stand pipes so that there should be less than 2 feet 6 inches between them and the widest engine cab, so as to render the railway company liable to a brakeman who was injured by coming in contact, while riding on a ladder on the side of a car, with a stand pipe which was 7 feet 6 inches from the centre of the track, but not 2 feet 6 inches from the side of the widest engine cab. A general order of the Board of Railway Commissioners, under subs. (g), s. 30, c. 37, R.S.C. 1906, providing that thereafter no structure more than 4 feet in height shall be placed within 6 feet from

the nearest rail of a railway track, and that no water stand pipe shall be placed so that there shall be less than 2 feet 6 inches between it and the widest engine cab, is not retroactive, and does not contemplate the removal of stand pipes within such prohibited distance erected under a special order of such Board permitting the C.P.R. to maintain its stand pipes at a lesser distance. [Kutner v. Phillips, [1891] 2 Q.B. 267, specially referred to.]

Clark v. C.P.R. Co., 2 D.L.R. 331, 17 B. C.R. 314, 14 Can. Ry. Cas. 51, 1 W.W.R. 1213, 20 W.L.R. 877.

TARIFFS — MIXED COMMODITIES — HIGHEST MINIMUM WEIGHT.

The provision in the respondent's tariffs, west of Lake Superior, that different commodities may be consolidated into C.L. lots at C.L. tolls, but when these commodities in such mixture take different ratings if shipped separately in straight C.L. lots, the entire mixed lot is charged the highest C.L. tolls and the highest minimum weight; (rule 2 (c)) follows the practically universal rule in freight classification and will not be disturbed by the Board.

B.C. Central Farmers Institutes v. C.P.R. Co., 21 D.L.R. 649, 17 Can. Ry. Cas. 431.

RAILWAY COMMISSION—QUESTION OF JURISDICTION—POINT OF LAW—STATED CASE—ALTERATION IN CONSTRUCTED LINES—RAILWAY ACT, R.S.C. 1906—REQUEST OF RAILWAY COMPANY.

The Railway Commission of Canada may, of its own motion, submit a stated case for the opinion of the Superior Court of Canada upon a question of its jurisdiction which in the opinion of the Commission involves a point of law. The Railway Commission (Can.) has no power under the Railway Act, R.S.C. 1906, c. 37, to order deviations, changes or alterations, in a constructed line of railway of which the location has been definitely established, except on the request of the railway company.

Hamilton v. Toronto, Hamilton & Buffalo R. Co., 20 D.L.R. 935, 50 Can. S.C.R. 128, 17 Can. Ry. Cas. 370.

TARIFF—CARRIAGE OF TRAFFIC—OPENING—SERVICE—ILLEGAL—RAILWAY ACT, S. 261—REFUNDS.

The carriage of traffic (other than for construction purposes) before the railway has been authorized to be opened therefor, under s. 261, is illegal, and no legal toll or tariff applies to such traffic. Refunds apply where the railway company, performing a legal service, charges a greater toll than allowed by appropriate tariff on file with the Board. [Baker, Reynolds & Co. v. C.P.R. Co., 10 Can. Ry. Cas. 151, followed.]

Randall, Gee & Mitchell v. C.P.R. Co., 20 D.L.R. 826, 17 Can. Ry. Cas. 252.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—STANDARD, COMPETITIVE OR THROUGH TARIFFS—RAILWAY ACT, S. 321.

S. 321 of the Railway Act (Can.) applies to all tariffs whether standard, competitive or through tariffs.

C.P.R. Co. v. Canadian Oil Cos.; C.P.R. Co. v. British American Oil Co., 19 D.L.R. 64, [1914] A.C. 1022, 29 W.L.R. 122.

LOWER TOLLS—COMPETITION—DISSIMILAR CONDITIONS.

The general scope of s. 315 makes it clear that the Board is empowered to recognize the existence of competition and its effects, therefore, when it is satisfied that such competition exists, it may allow a lower toll on the section of railway where the dissimilar circumstances and conditions created by such competitions exist. [Malkin & Sons v. G.T.R. Co. (Tan Bark Tolls Case), 8 Can. Ry. Cas. 183, at pp. 186, 187; Almonte Knitting Co. v. C.P. and M. C.R. Cos. (Almonte Knitting Co. Case), 3 Can. Ry. Cas. 441, followed. Fredericton Board of Trade v. C.P.R. Co., 17 Can. Ry. Cas. 433, reheard and reversed.]

Fredericton Board of Trade v. C.P.R. Co., 21 D.L.R. 790, 17 Can. Ry. Cas. 439.

BOARD — JURISDICTION — TOLLS — REFINING-IN-TRANSIT—INTERNATIONAL TRAFFIC.

The Board has no jurisdiction to regulate refining-in-transit rates except when such rates discriminate unjustly in favour of one point against another. The Board has no jurisdiction to regulate an international rate except in so far as the haul within Canada is concerned.

Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188.

JURISDICTION—PROVINCIAL RAILWAY—RAILWAY ACT, SS. 176, 227, 229—1 & 2 GEO. V. C. 11—2 GEO. V. C. 49.

The St. John & Quebec R. Co., a provincial railway company, having applied to the Board under ss. 227 and 229 of the Railway Act for authority to connect its tracks with those of the C.P.R. Co. and operate its trains over them between certain points, to rearrange certain tracks of the C.P.R. Co., construct and operate switches from its lines at certain points, and make other physical changes. The Board refused the application on the ground that the benefits of the provisions of the Railway Act allowing one railway company to use the lines and appliances of another can only be given to Dominion railways, and that the statutes 1 and 2 Geo. V. (1911) c. 11, and 2 Geo. V. (1912) c. 49, do not place the applicant railway under the jurisdiction of the Board. [Preston & Berlin Street R. Co. v. G.T.R. Co., 6 Can. Ry. Cas. 142, followed.]

St. John & Quebec R. Co. v. C.P.R. Co., 14 Can. Ry. Cas. 360.

GOVERNMENT CONTROL — JURISDICTION OF BOARD OF RAILWAY COMMISSIONERS—COMPLETION OF RAILWAY—LOCATION PLANS—APPROVAL—OPENING FOR TRAFFIC—APPLICATION FOR.

The Board has no jurisdiction to entertain an application for the completion of a line of railway where the route map has

been approved. Its jurisdiction is confined to approval of the location plans and upon application to open the railway lines for traffic when constructed.

Mervin Board of Trade v. C.N.R. Co., 14 Can. Ry. Cas. 363, 23 W.L.R. 611.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—NONEXISTENT RAILWAY—RECONSTRUCTION—FACILITIES.

The Board has no jurisdiction to entertain an application where the wrong complained of happened ten years before the Board was constituted, nor can it compel a railway company, the successor in title of the respondent, to reconstruct and reopen for traffic, with proper facilities, a portion of its railway which has become nonexistent.

Chambers of Commerce Federation v. South Eastern R. Co., 14 Can. Ry. Cas. 367.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION AND ORDERS.

Under 7 and 8 Edw. VII. c. 61, s. 9 the jurisdiction of the Board is confined to a consideration of the reasonableness of the tolls charged for the services rendered.

Kelowna Board of Trade v. C.P.R. Co., 15 Can. Ry. Cas. 441.

Notwithstanding provisions in an agreement under which a private industrial spur or siding has been constructed entitling the railway company to make use of it for the purpose of affording shipping facilities for themselves and persons other than the owners of the land upon which it has been built, the Board of Railway Commissioners for Canada, except on expropriation and compensation, has not the power, on the application under s. 226 of the Railway Act (R.S.C. 1906, c. 37), to order the construction and operation of an extension of such spur or siding as a branch of the railway with which it is connected. [Blackwoods Ltd. v. The C.N.R. Co., 44 Can. S.C.R. 92, applied.]

Clover Bar Coal Co. v. Humberstone; G. T.P.R. & Clover Bar Sand & Gravel Cos., 13 Can. Ry. Cas. 162, 45 Can. S.C.R. 346.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—ORDERS.

The railway company, in view of the double tracking of its main line from Vancouver to Hammond, applied to terminate a siding agreement made with the storage company on the 1st November, 1911; but the storage company opposed, and made the suggestion that the siding agreement should stand, and that the new double track should be placed on the other side of the company's right-of-way. The agreement contained a clause that either party should have a right to terminate, at any time by leave of the Board, upon notice:—Held, that, in view of the necessity of a double track in the interests of public traffic, such a condition was proper and sufficient to justify the cancellation. Held, also, that the Board would not be justified in changing the location of the new track. Held, therefore, that the agreement should be terminated, upon proper compensation to the storage company for the expense and inconvenience of rearranging its warehouses.

Re C.P.R. Co. & Vancouver Ice & Cold Storage Co., 23 Can. Ry. Cas. 1, 23 W.L.R. 607.

TRAFFIC — OPENING — TOLLS — TARIFFS—OPERATION AND CONSTRUCTION—JURISDICTION—RAILWAY ACT, S. 261.

Under s. 261, a section of railway is either open or not for the carriage of traffic, and the Board has no jurisdiction to enlarge the act by allowing a railway company to charge tolls under construction tariffs during the period of construction. [Baker, Reynolds & Co. v. C.P.R. Co., 10 Can. Ry. Cas. 151, followed; Lenhart v. C.N.R. Co., 17 Can. Ry. Cas. 93, referred to.]

Riverside Lumber Co. v. C.P.R. Co., 18 Can. Ry. Cas. 17.

RAILWAY — COLLISION — NEGLIGENCE — DEATH OF PERSON TRAVELING AS CARETAKER OF LIVESTOCK AT REDUCED RATE—SPECIAL CONTRACT — APPROVAL OF RAILWAY BOARD — EXEMPTION FROM LIABILITY—KNOWLEDGE OF DECEASED—ACTION UNDER FATAL ACCIDENTS ACT.

Barry v. C.P.R. Co., 15 O.W.N. 455. [Affirmed 16 O.W.N. 202.]

FREIGHT RATES—TARIFF'S COMPLIANCE WITH ORDER OF BOARD—INTERPRETATION OF ORDER.

Upon a complaint by the Board of Trade of the City of Regina that the C.P. and C.N.R. Cos. had not, in their filed and published freight tariffs, complied with an order of the Board made on the 19th December, 1911; that the order had never been carried into effect; and that the decision of the Board of July, 1912, interpreting the order and declaring its meaning, did not give proper effect to the order or the reasons on which it was based, the Board refused to reverse its considered finding of July, 1912, and reaffirmed the position that the question of the difference between the Manitoba and Saskatchewan scales—which was a factor in connection with the Saskatchewan "term" tariff, that, however, not being a part of the application with which the order dealt—should be passed upon as a necessary part of the investigation of western rates.

Re Regina Board of Trade & C.P.R. Co., 27 W.L.R. 816.

BOARD OF RAILWAY COMMISSIONERS—APPROVAL OF BILL OF LADING—CLAUSE INVOKED NOT APPROVED BY NONCOMPLIANCE, C.C. 672-1675.

A clause in a bill of lading which would be, if lawful, an exception to the general law, is binding only after it has been approved by the Board of Railway Commissioners.

Auger v. C.N.Q.R. Co., 22 Rev. de Jur. 585.

POWER OF BOARD OF RAILWAY COMMISSIONERS—CONSTRUCTION AND LOCATION OF RAILWAY—CONDITION AS TO COMPENSATING ABUTTING OWNERS—ULTRA VIRES—RESCISSION OF ORDER OF BOARD.

G.T.P.R. Co. v. Landowners, etc., Fort William, [1912] A.C. 224, 28 T.L.R. 37.

The Board has no jurisdiction to order a reduction in rates for the carriage of oil or other goods from initial points in the United States. [Discussion of question of discrimination in commodity rates.]

Continental Oil Co. v. C.P.R. Co., 21 W.L.R. 633.

Upon evidence brought before the Board of Railway Commissioners, it was held, that the applicant had been overcharged 60 cents upon a shipment of goods; but the Board had no jurisdiction to order a refund, and could do no more than find that an overcharge had been made. The Board declined to order the railway company to reimburse the applicant the expense that he had been put to in coming before the Board and establishing the overcharge; but intimated that it might be necessary at some future time to make a precedent, if railway companies do not take steps to rectify palpable errors.

Currie v. C.P.R. C., 20 W.L.R. 638.

FREIGHT RATES—JOINT TARIFF—DISALLOWANCE BY BOARD—DISCRETION.

Re Robertson & C.P.R. Co. & G.N.R. Co., 25 W.L.R. 969.

RAILWAY—PRACTICE OF ADVANCING CARTAGE CHARGES AND COLLECTING FROM CONSIGNEES—DISCONTINUANCE.

Re Advanced Cartage Charges, 25 W.L.R. 981.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—ORDERS.

The use of a subway, constructed by a railway company upon a public highway of a city, for street railway purposes, was authorized by order of the Board, without any provision as to compensation or remuneration to the railway company.

Re McPhillips Street Subway, Winnipeg, 23 W.L.R. 583.

BOARD OF RAILWAY COMMISSIONERS.

The Board refused to rescind or vary orders made by the Board in 1907 and 1909, with reference to the construction of a portion of a road in the municipality of Delta, ordered to be built by the railway company—the period of maintenance, within which the municipality might have been applied, having expired.

Re Municipal Corp. of Delta & the V.V. & E.R. & Navigation Co., 23 W.L.R. 588.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—ORDERS.

An application for a Pullman car service between Winnipeg and Le Pas was refused, the possible business being insufficient to warrant it.

Re Le Pas, 23 W.L.R. 600.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—ORDERS.

Upon an application to rescind or vary orders previously made by the Board in respect of freight accommodation at Entwisle, and in particular for an order that the railway company should be compelled to discharge freight addressed to Entwisle at what was called the King street siding, the Board, after a report from their chief operating officer that the location of the siding was unsafe from an operating standpoint, declined to make any order.

Re Municipality of Entwistle, 23 W.L.R. 605.

BOARD OF RAILWAY COMMISSIONERS—RUNNING RIGHTS OF OTHER ROADS OVER "CUT-OFF."

Re C.N.R. Co., 23 W.L.R. 120, 24 W.L.R. 217.

B. COMPULSORY CONNECTION AND INTERCHANGE OF BUSINESS; DISCRIMINATION BETWEEN CARRIERS; HACKMEN, ETC.; THROUGH RATES.

(§ IV B—520)—SIDE-HAUL TOLL—DISCRIMINATION.

Wylie Milling Co. v. C.P.R., 8 D.L.R. 953, 14 Can. Ry. Cas. 8.

GROUP ARRANGEMENT—DISTANCE—PUBLIC CONVENIENCE—MILEAGE BASIS—MARKETS.

A group toll arrangement endeavours to average distance and public convenience. If each point of a group is to be singled out for special treatment on a mileage basis, then the group disappears and the points with the shortest mileage get an advantage in marketing, therefore the Board cannot lightly interfere with a grouping arrangement simply on a presentation as to one portion of the arrangement.

Fullerton Lumber & Shingle Co. v. C.P.R. Co., 17 Can. Ry. Cas. 79, 27 W.L.R. 389.

STATIONS—PASSENGERS—ARRIVAL AND DEPARTURE—FACILITIES—REGULATIONS.

The obligations of a carrier are to provide proper facilities for the arrival and departure of passengers subject to regulations for the proper policing of its station premises. [Twin City Transfer Co. v. C.P.R. Co., 15 Can. Ry. Cas. 323, followed.]

Twin City Transfer Co. v. C.P.R. Co., 16 Can. Ry. Cas. 435.

TOLLS AND RATES—UNJUST DISCRIMINATION—GEOGRAPHICAL ADVANTAGE—FOREIGN RAIL ROUTES.

In considering geographical advantage as an element in rate regulation the Board must recognize existing rail conditions in Canada as it finds them, and as, e.g., Wallaceburg and Montreal are practically equidistant from Winnipeg by rail routes within Canada, Wallaceburg is not entitled to a lower rate than Montreal by reason of geographical advantage though over foreign roads its distance from Winnipeg is much shorter.

Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188.

JOINT TOLLS—RELIEF.

Under s. 338 of the Railway Act, R.S.C. 1906, c. 37, no joint toll can be disregarded by the carriers until it has been superseded or disallowed by the Board. If the carriers desire to get relief from concurrence in joint tolls they must apply to the Board making out a case justifying the extension of such relief.

Re Joint Tolls & Concurrence, 19 Can. Ry. Cas. 379.

INTERNATIONAL JOINT TARIFFS.

As a matter of practice the Board in the past has dealt with international joint tariffs having regard to the outward movement only, and speaking generally it has not interfered in any way with any tariff properly filed under the practice prevailing in the United States directly applying to a joint movement into Canada.

Auger & Son & D'Auteuil Lumber Co. v. G.T. & C.P.R. Cos., 19 Can. Ry. Cas. 401.

INTERCHANGE TRAFFIC — FACILITIES — PUBLIC INTEREST.

Public interest, economy of movement to shippers and convenience must be established before the Board will grant to one carrier interchange traffic facilities with another. No carrier is entitled to such facilities as of right. The property and advantages of one carrier should not be interfered with for the mere benefit of another, but objections by a carrier on the ground that the other carrier will thereby obtain a great advantage at its expense will be overruled in the interest of the public.

C.N.O.R. Co. v. C.P. Ry. Co., 20 Can. Ry. Cas. 200.

SPECIAL FREIGHT TARIFFS—JOINT TOLLS—DISCRIMINATION—REASONABLENESS.

The scheme of the act is that traffic moving over the lines of two or more carriers shall be considered and carried as through traffic on one bill of lading; and not that local tolls shall be filed as proportionals and the traffic moved under separate bills. The duty is cast upon the carriers to establish joint tolls for such traffic. This duty can be enforced under s. 334 of the act; and the Board will not approve special freight tariffs in contravention of this principal made for the purpose of carrying out special arrangements between carriers and individual shippers. Special freight tariffs and commodity tolls permitted by the Act are just as much subject to the provisions relating to equality and to joint toll movements as are the original standard tariffs. Artificial or unjustly discriminatory tolls must not be made in order to take away from distributing points or manufacturing centres the natural advantages of their geographical situation; nor to favour a manufacturer in one locality against his competitor in another. Traffic must be moved on the tariffs filed—no more and no less; and these tariffs must be free of unjust discrimination and comply not only with the general sections, but in cases where applicable, with the joint traffic sections of the act. The Board disallowed as contrary to s. 326 (3), 333 and 337 of the act a special freight tariff filed by a carrier to cover carriage of a specified commodity over its own lines, Toronto to Regina only, where the toll was made applicable only to shipments originating at Sarnia (on another railway), and was less than the toll by standard tariff from either Sarnia or Toronto to Winnipeg, an intermediate point. The Board will not give effect to an application to compel a railway company to file a tariff fixing lower rates than the tariff in force, unless the existing tariff be shewn to be unreasonable. The principle that larger quantities may be carried at tolls proportionately lower than those for smaller quantities of the same commodity is properly recognized in the lower toll approved for C.L. as against L.C. L. shipments; but it should not be extended as any further application of it would handicap the smaller dealer in competition with the larger.

Imperial Oil Co. v. Canadian Freight Assn., 20 Can. Ry. Cas. 171.

TRAFFIC—INTERCHANGE—SENIOR AND JUNIOR—COST.

The general practice of the Board when an application is made for an interchange track for the purpose of interchanging traffic, where it appears that the effect of establishing such interchange is to subdivide the traffic by diverting it from the older line, is to place the full cost of construction and maintenance on the junior line.

G.T.P.R. Co. v. C.P.R. Co., 21 Can. Ry. Cas. 187.

TRAFFIC — INTERCHANGE — TRANSFER TRACK—REMOVAL—ROLLING STOCK.

The Board may authorize the removal of a transfer track used for the interchange of traffic, when the interchange can be done at another point, resulting in economy of rolling stock movement in the public interest, thus relieving the strain on the existing facilities by removing the track and using the rails and ties at other points where there is urgent need.

C.P.R. Co. v. Saskatoon & Moosejaw Boards of Trade, 22 Can. Ry. Cas. 349.

CABMEN AND 'BUSMEN — DESIGNATION OF PLACES FOR VEHICLES TO STAND—DISCRIMINATION—TICKETS FOR FREE TRANSPORTATION.

A cabman or 'busman carrying on a general business has no special rights in connection with traffic to or from a railway station. He has a general right to take his cab or 'bus to the station for the purpose of discharging passengers; and he has the same right to back his 'bus up to the station platform, at a convenient spot for receiving passengers. The railway company is under an obligations to see that passengers are not unduly importuned by cabmen or 'busmen at or on its platform; and in the discharge of that obligation, the railway company has the right to designate the points where the

traveling public will be received from cabs and 'busses, and where they will go for such conveyances on the arrival of trains. In this case it was held, that there was no discrimination by the railway company against the complainant, a 'busman. A question of fact in regard to tickets entitling passengers to free transportation by 'bus from the railway station at Saskatoon to the city, was found against the complainant.

Re Purcell & G.T.P.R. Co., 28 W.L.R. 689.

(§ IV B—521)—Public Utilities Commission Quebec — Authority — Submission of Dominion company to same—Right to order trains of one company to run over lines of the other.

The Public Utilities Commission Quebec, has no authority over Dominion Utilities but it has the right to order trains of a Dominion company to run over the lines of a company over which it has supervision, when the Dominion company does not question its jurisdiction, and is ready and willing to submit to its authority. R.S.Q. (1909), art. 742.

Canada & Gulf Terminal R. Co. v. Fleet, 50 D.L.R. 635. [Affirmed 43 D.L.R. 291, 57 Can. S.C.R. 140.]

Governmental control—Compulsory interchange of business—Municipal owned railway—6 Edw. VII. (Ont.) c. 30, s. 57.

S. 57 of the Ontario Railway Act, 1906, 6 Edw. VII. c. 30, does not apply to a railway owned by a municipal corporation. (Per Magee, J.A.) Subs. 4 of s. 57 of the Ontario Railway Act, 1906, 6 Edw. VII. c. 30, applies only to railways actually in existence and operation at the time of the application to the Ontario Railway and Municipal Board thereby provided for, and there is no difference in this respect when the railways in question, or any of them, are street railways.

Re Toronto & Toronto R. Co., 3 D.L.R. 561, 14 Can. Ry. Cas. 422, 21 O.W.R. 723.

Connection switches—Interchange of traffic.

The Railway Commission may order discontinued an embargo placed by a railway against receiving, for interswitching delivery, upon private sidings of their line, the loaded cars of another railway from stations on such other railway, if taken merely as a means whereby to recover cars of the railway placing such embargo located along the line of the railway from which the shipments originated, where there were at the points of shipment no cars belonging to the railway seeking to enforce such embargo available for the use of the shippers affected thereby.

Marchand Sand Co. v. C.P.R. Co., 8 D.L.R. 73, 14 Can. Ry. Cas. 224, 22 W.L.R. 448.

Traffic facilities—Interchange track—Dominion and provincial companies.

The Board will order, in the public interest, an interchange track for transferring passengers and freight, to be built by a Dominion railway company connecting its line with that of a provincial railway company, upon condition that the provincial company contribute one-third of the expense.

Cumberland Board of Trade v. E & N. R. Co., 18 Can. Ry. Cas. 48.

Full tariff tolls—Commodity—Connecting carrier — Unremunerative business.

The Board ordered an express company to establish a commodity toll for carriage of milk by express for delivery to a connecting express company in the United States, and in so doing overruled the respondent company's objection that it did not want the business unless at its full tariff tolls, but suspended operation of the order pending proof that a toll had been agreed upon with the foreign connecting carrier which would permit the carriage of the commodity to its destination in the foreign country.

Farmers' Dairy & Produce Co. v. C.P.R. Co., 17 Can. Ry. Cas. 106.

Facilities — Traffic — Stations — Sidings — Existing highway — Disadvantages — Offset.

The Board will not order a carrier to provide facilities for traffic, such as stations or sidings in order to offset existing highway disadvantages. The Board refused to order the construction of a freight shed, shelter and siding half way between two stations, eight miles apart. [Pheasant Point Farmers v. C.P. Ry. Co., 14 Can. Ry. Cas. 13, followed.]

Kelly v. G.T.R. Co., 24 Can. Ry. Cas. 367.

Construction of side tracks.

An order was made by the Board, under s. 226 of the Railway Act of Canada, requiring the railway company to construct a spur to serve the applicant company's mill —the Board's engineer having reported a scheme by which the spur could be constructed without danger.

Re Delta Shingle Co. & G.N.R. Co., 3 W.L.R. 604.

(§ IV B—521a)—Construction of side tracks — Distance apart — Convenience of shipper—Hardship on railway—Order of Board of Railway Commissioners.

Re Pheasant Point Farmers & C.P.R. Co., 7 D.L.R. 887, 14 Can. Ry. Cas. 13, 21 W.L.R. 381.

(§ IV B—522)—Joint through tolls—Railway Board — Jurisdiction — Absence of executive order.

The Board of Railway Commissioners for Canada has jurisdiction by virtue of the Railway Act, s. 26 to make a declaratory order as against the carrier that rates exacted by it between certain dates were illegal, although by reason of a subsequent change in the authorized tariff no executive order was necessary nor was any made by the Board. [C.P. v. Canadian Oil Cos., 47

Can. S.C.R. 155, 14 Can. Ry. Cas. 201, affirmed.]

C.P.R. Co. v. Canadian Oil Co's.; C.P.R. Co. v. British American Oil Co., 19 D.L.R. 64, 111 L.T. 950, [1914] A.C. 1022, 29 W.L.R. 122.

TOLLS—REASONABLE—JOINT.

The Board, following the General Interswitching Order, approved a joint toll of 50 cents per ton on sand over a distance of 12.3 miles (3 miles over M.C.R. and 9.3 miles over G.T.R.) from the sand pit to Merritton, subject to a minimum weight of 60,000 lbs. [Dolittle & Wilcox v. G.T. & C.P.R. Cos. (Stone Quarry Toll Case), 8 Can. Ry. Cas. 10, at p. 13; Continental, Prairie & Winnipeg Oil Cos. v. C.P.R. Co., 13 Can. Ry. Cas. 156, at p. 159; Canadian Manufacturers' Assn. v. Canadian Freight Assn. (General Interswitching Order), 7 Can. Ry. Cas. 392, followed.]

St. David's Sand Co. v. G.T. & M.C.R. Cos., 20 D.L.R. 901, 17 Can. Ry. Cas. 279.

THROUGH RATES.

The Board of Railway Commissioners is without jurisdiction to require carriers of express from points within the United States to Canadian points to join with a Canadian express carrier in the establishment of joint through tariffs on traffic originating in such foreign country. The Board of Railway Commissioners cannot, without the concurrence of the foreign express company, require the re-establishment of a joint through tariff on express traffic between points in the United States and Canadian points.

Stockton & Mallinson v. Dominion Express Co., 3 D.L.R. 848.

INCREASE — CARRIER — CHARACTER — TRAFFIC—NATURE—CONDITIONS.

The Board, in dealing with an application to increase tolls, will consider the character of the railway, the nature of the traffic carried by it, average haul, average tonnage per train, and other conditions affecting its traffic, as well as, the tolls charged and sanctioned upon the lines, and the traffic conditions of the latter. [International Paper Co. v. G.T., C.P. & C.N.R. Cos. (Pulpwood Case), 15 Can. Ry. Cas. 111, referred to.]

Eastern Tps. Lumber Co. v. Temiscouata Ry. Co., 16 Can. Ry. Cas. 260.

JOINT TARIFFS—TOLLS—SUM OF LOCALS—COMMODITY — MILEAGE DISTANCES — LONGER AND SHORTER—RAILWAY ACT, S. 338.

Under s. 338 of the Railway Act, the Board is not a mere recorder of supersession, but has the right to exercise discretion based upon its judgment of the facts, and thereupon to disallow a superseding tariff, and declare the former joint tariff to be still in force.

Robertson v. C.P.R. Co., 17 Can. Ry. Cas. 108.

TOLLS — INCREASE — EFFECT — CONTRACTS—CONSIGNOR AND CONSIGNEE.

Notwithstanding the provision in the Railway Act, that, tolls may be increased on thirty days' notice, the Board, in sanctioning an increase, will take into consideration the effect such increase is likely to have upon existing long-term contracts between consignors and consignees, and will, when necessary, suspend the increase for a reasonable period so that it shall not fall unfairly upon the shipper in such cases.

Eastern Tps. Lumber Co. v. Temiscouata R. Co., 16 Can. Ry. Cas. 260.

TOLLS—THROUGH—SUM OF LOCALS—JOINT—DIVISION — UNREASONABLE — JURISDICTION.

The Board has no jurisdiction over the tolls for the transportation of commodities by carriers in a foreign country, and a joint toll in excess of the sum of the locals being prima facie unreasonable, it is within its jurisdiction to direct that a Canadian carrier should not, as its division of a through toll exceed its local. [In re Joint Freight & Passenger Tariffs, 10 Can. Ry. Cas. 343; Continental Prairie & Winnipeg Oil Cos. v. C.P.R. Co., 13 Can. Ry. Cas. 156, at p. 161, followed.]

Fullerton Lumber & Shingle Co. v. C.P.R. Co., 17 Can. Ry. Cas. 79, 27 W.L.R. 389.

TOLLS — INCREASE — REASONABLENESS — UNJUST DISCRIMINATION — DIFFERENT SYSTEMS—MILEAGE BASIS — TERMINAL CHARGES — LOCAL AND IMPORTED PRODUCTS.

The difference in toll treatment between two points does not necessarily create an unjust discrimination since they are on different systems of railways. Upon comparing the toll on imported wood pulp with the toll on the local product, and taking into consideration the mileage involved and the terminal charges on the imported product, the Board found that the toll on the imported product was reasonable.

Howell Co. v. G.T., C.P., & C.N.R. Co., 17 Can. Ry. Cas. 97.

CONNECTING CARRIERS—THROUGH TOLLS.

When two connecting carriers are separate legal entities, and the former operates and tariffs the latter as a separate property, the latter is under no obligation to put a construction toll of the former into effect on its line, but the shipper is entitled, on a through bill of lading, to the benefit of the through toll to the point of delivery. [See Wylie Milling Co. v. C.P. & K. & P.R. Cos., 14 Can. Ry. Cas. 5.]

Oliver-Serim Lumber Co. v. C.P. & E. & N.R. Cos., 17 Can. Ry. Cas. 324.

THROUGH TOLLS—UNJUST DISCRIMINATION —JOINT TARIFFS—INCREASED RATES.

Where the carrier reduced the local tolls on the raw material even lower than on firewood, having the assurance of the second haul of the pulp or paper products, and under the schedules in force prior to September, 2, 1912, the proportions accruing to

the Canadian carriers from through shipments to the United States are lower than the tolls paid by Canadian manufacturers, there is no unjust discrimination against their foreign competitors, the tolls for Canadian delivery being based on the resultant traffic. Joint tariffs increasing the through tolls on pulpwood from shipping points in Eastern Canada to manufacturing points in the Eastern States of the United States were authorized by the Board. In the apportionment of the through tolls between two or three and, in some cases four carriers, it is reasonable that the joint through tolls should be on a higher basis than for similar distances on the line of a single company. [Continental Prairie & Winnipeg Oil Cos. v. C.P.R. Cos., 13 Can. Ry. Cas. 156, followed.] The right of the carrier to consider the resultant traffic as a reason for the lower toll on the original commodity where hauled to points of manufacture on the carrier's line is well established. [Michigan Sugar Co. v. Chatham, Wallaceburg & Lake Erie R. Co., 11 Can. Ry. Cas. 353, followed.]

International Paper Co. v. G.T., C.P.R. & C.N.R. Cos., 15 Can. Ry. Cas. 111.

COMPLETION OF CARLOADS—STOP-OVER PRIVILEGES—RE-ESTABLISHMENT OF FORMER ARRANGEMENT—TOLLS IN AND OUT—THROUGH—JOINT ROUTE—RESHIPMENT.

For a number of years carriers carried a certain fruit commodity to concentration points for storage, inspection, or completion of carload and reshipment at a reduction of one-third of the local tolls, the combination of these tolls in and out not to be less than the through toll from the first shipping point to final destination plus 2 cents per 100 lbs., and if to the concentration point a joint route had to be used, the reduction applied only to the portion of the earnings that the carrier received from the second haul or reshipment from that point, the railways not having satisfactorily justified withdrawing the completion of carload concession and restricting the storage and inspection privileges to carloads, an order should be made directing that the former arrangement should be re-established.

Simcoe Fruits & Ont. Fruit Growers' Assn. v. G.T. & C.P.R. Cos., 14 Can Ry. Cas. 370.

(§ IV B—523)—UNJUST DISCRIMINATION—STATION GROUND—REASONABLE REGULATIONS.

An appeal from the judgment of the Board restraining the respondent from unjustly discriminating in favour of the Saskatoon Forwarding Co., or any other transportation agency, against the applicant, was dismissed with respect to the existing special circumstances, but without intending by such dismissal to cast any doubt upon the right of the appellants to take such steps as may be necessary to maintain order within the limits of its station ground. [Purcell v. G.T.P.R. Co., 13 Can. Ry. Cas. 194, affirmed.]

G.T.P.R. Co. v. Purcell, 15 Can. Ry. Cas. 314.

UNJUST DISCRIMINATION—TRANSFER COMPANIES.

A carrier may allot space in its stations to transfer companies on different terms for each without coming within the inhibitions as to discrimination contained in ss. 284, 317.

Banff Livery & Busmen v. C.P.R., 19 Can. Ry. Cas. 425.

TOLLS—EXPRESS COMPANIES—REDUCTION—COMPETITION—MARKETS—UNJUST DISCRIMINATION.

An express company may reduce its tolls for furtherance to meet the market competition of another company, but it must at the same time answer any allegation of unjust discrimination as to traffic received under substantially similar circumstances, at points to which the reduced tolls do not apply.

Aylmer Condensed Milk Co. v. American Express Co., 17 Can. Ry. Cas. 100.

UNJUST DISCRIMINATION—TOLLS—LOW—COMPETITION—MARKETS.

It is not unjust discrimination to charge too low a toll to one market as compared with that to another market, when no competition exists between them.

Guest Fish Co. v. Dominion Express Co., 18 Can. Ry. Cas. 1.

CARRIERS OF FREIGHT—EXPRESS COMPANY—CHARGES ON SHIPMENTS OF CREAM—DEDUCTION WHERE COLLECTION AND DELIVERY SERVICE NOT FURNISHED—DECLARATORY ORDER.

Upon the proper construction of C.R.C. tariff No. 4139, rr. 1, 2, 3, dealing with the charges of the express company upon shipments of cream, it was held, as to the area adjacent to a "point," but not included within the collection and delivery area, that the deduction of 5 cents per can "where a collection and delivery service is not furnished," as set out in r. 3, should be made. It was held, also, that the Board, in making a declaratory ruling as to the deduction to be made under the tariff, could not take into consideration undercharges alleged by the express company to have been made to the applicant dairy company. The obligation is on the express company to collect in accordance with the tolls in its tariffs legally published and in force: s. 344 of the Dominion Railway Act.

Re Edmonton City Dairy Co. v. Dominion Express Co., 28 W.L.R. 697.

(§ IV B—524)—STATIONS—HACKS, CARRIAGES, ETC., AT—EXCLUSIVE PRIVILEGES—DISCRIMINATION—EFFECT OF CANADA RAILWAY ACT.

The grant by a railway company to one transfer or bus company of the exclusive privilege of soliciting passengers on depot property is not an unjust discrimination.

against another transfer company within the inhibition of ss. 284, 317 of the Railway Act (R.S.C. 1906, c. 37), which prevents discrimination between passengers, shippers and consignees of freight, but does not concern the agencies employed for receiving or delivering traffic, at, to, or from railway stations. [Purcell v. G.T.P.R. Co. 13 Can. Ry. Cas. 194, distinguished.] Since a railway station is private property as between a railway company and the general public excepting persons who have occasion to use it for the purpose of transportation, the company may grant the exclusive privilege to a bus or transfer company of soliciting within its stations the carriage of passengers and baggage.

Twin City Transfer Co. v. C.P.R. Co., 11 D.L.R. 744, 15 Can. Ry. Cas. 323, 24 W.L.R. 208.

UNJUST DISCRIMINATION BETWEEN HACKMEN—ACCESS TO STATION—TRESPASSER — EXCLUSIVE CONTRACT — CONVENIENCE OF PASSENGERS—REASONABLE REGULATIONS—RAILWAY PROPERTY—ABSOLUTE CONTROL—RAILWAY ACT, S. 317.

It was not open to the respondent to enter into an exclusive contract for the conveyance of passengers from its station.

Purcell v. G.T.P.R. Co., 13 Can. Ry. Cas. 194, 21 W.L.R. 638.

RATES—BOARD OF RAILWAY COMMISSIONERS—TOLLS—CARTAGE.

Although cartage companies per se are not under the jurisdiction of the Board, the charge made for cartage by railway companies is a toll under s. 2 (30) of the act, and must be approved by the Board. The tariff of tolls filed by the railway companies increasing the tolls for cartage to the shipping public from two cents a hundred and fifteen cents for smalls to three cents and twenty cents, respectively, was amended by the Board to two and a half cents a hundred, and the present toll on smalls continued. The increase was approved on account of the advance in the cost of horses, wages and feed during the last few years.

Re Cartage Tolls, 14 Can. Ry. Cas. 372, 23 W.L.R. 598.

CARTAGE.

Under the Railway Act cartage is not a railway service or facility, although by the interpretation clause, s. 2 (30), "toll" included charges for cartage, it is not included in any tariff of tolls approved by the Board for line haul. The question of who should pay cartage is a matter of contract between the consignor and consignee and the Board should not attempt to interfere between them. [Sowerby v. G.N.R. Co., 60 L.J.Q.B. 467, 65 L.T. 546; Stewart v. C.P.R. Co., 11 Can. Ry. Cas. 197, followed.]

Re Cartage Tolls, 19 Can. Ry. Cas. 389. [Affirmed 24 Can. Ry. Cas. 80.]

CARTAGE — EQUALIZATION — INTERSWITCHING.

Cartage equalization, and the substitution of cartage for interswitching are not wholly prohibited by paragraph 11 of the General Interswitching Order (No. 4988, July 8, 1908, 7 Can. Ry. Cas. 332), but are permissible so long as the carrier complies with its obligations under s. 315, to observe equality in its treatment of shippers, and also sets out the free service in a clear and definite tariff published in accordance with the act. [Canadian Mfg. Assn. v. Can. Freight Assn. General Interswitching Order, 7 Can. Ry. Cas. 302, followed.]

Re General Interswitching Order, 19 Can. Ry. Cas. 376.

CARTAGE.

Upon the evidence of cost of service the Board fixed 81.75 per car as the proper toll for handling carload freight traffic between car barge and land team tracks or private sidings at Kelowna, B.C. [Kelowna Board of Trade v. C.P.R. Co., 15 Can. Ry. Cas. 441 referred to.] (Complaint against the toll of $2.50 per car made by the respondent for handling cars from the docks at Kelowna to and from the various warehouses.)

Kelowna Board of Trade v. C.P.R. Co., 19 Can. Ry. Cas. 414.

C. RATES; DISCRIMINATION BETWEEN PASSENGERS OR SHIPPERS; REBATES; PASSES. (§ IV C—525)—REGULATION OF RATES AND TOLLS.

Fonthill Gravel Co. v. G.T.R. Co., 20 D.L.R. 976; 17 Can. Ry. Cas. 248.

REFUND—JOINT TARIFF—CANCELLATION.

The Board has no power to authorize a refund from a toll properly quoted under a tariff duly filed. However, under s. 338, a joint tariff cannot be cancelled without a new one being filed in substitution thereof, and a railway who charged a toll under a cancelled joint tariff, was authorized to make a refund of the difference between such toll and that chargeable under the substituted tariff.

Quebec Central R. Co. v. Dominion Lime Co., 28 D.L.R. 559, 19 Can. Ry. Cas. 281.

REGULATION OF RATES—TOLLS—ADJUSTMENT—INCREASE—RESTRICTION.

It is a well-established principle of rate regulation that where a business has been built up relying upon a particular rate adjustment, an increase in this rate adjustment should not be made without amply sufficient reasons. The rate on pressed brick from Bradford, Penn., to Windsor, Ontario, formerly 81.60 was increased to $2.00 per ton. Under the former rate the Grand Trunk received 88 cents as its proportion and the B.R. & P. (United States carrier) 72 cents. Under the new rate the Grand Trunk received an increase of 32 cents and the B.R. & P. of 8 cents. Upon complaint being made of the increase in rate, held, that in the absence of evidence shewing any increase of cost to justify the increase of 32 cents in the rate from Bradford to Windsor the 88 cent division of the through rate which formerly prevailed should be re-established by the Canadian carriers as a proportional limited to brick ex Bradford and Bradford

points for furtherance. [Metropolitan Paving Brick Co. v. Ann Arbor R. Co., 17 I.C.C.R. 197, referred to.] A toll established in the first instance by a carrier of its own volition, having remained some time in force, is presumptively reasonable, and the onus is on the carrier to shew, with reasonable conclusiveness, that changed conditions or increased cost of operation justified an inrease. [Laidlaw Lumber Co. v. G.T.R. Co., 8 Can. Ry. Cas. 192, at 194; Montreal Produce Merchants' Assn. v. G.T. & C.P.R. Cos., 9 Can. Ry. Cas. 232, at 238; Canadian Manufacturers' Assn. v. Canadian Freight Assn. (Interswitching Rates Case), 7 Can. Ry. Cas. 302, at 308, followed.]

Canadian Freight Assn. v. Cadwell Sand & Gravel Co., 12 D.L.R. 48, 15 Can. Ry. Cas. 156, reversing 14 Can. Ry. Cas. 172.

EXTENSION BY BOARD OF RAILWAY COMMISSIONERS OF TARIFF—NEW POINTS IN FOREIGN COUNTRY.

The Board of Railway Commissioners is without jurisdiction to extend a formerly existing tariff on express traffic between points in the United States and Canada so as to apply to points in the United States to which it was not formerly applicable.

Stockton & Mallinson v. Dominion Express Company, 3 D.L.R. 848.

POWER OF BOARD OF RAILWAY COMMISSIONERS TO FIX EXPRESS RATES—REVISING LOCAL TARIFF ON CREAM — FORMER ORDERS.

Re Dominion & Canadian Northern Express Co., 7 D.L.R. 868, 14 Can. Ry. Cas. 142, 22 W.L.R. 36.

RATES—REGULATION OF—UNJUST DISCRIMINATION — TOLLS — DISTRIBUTING — REFUND.

It is unjust discrimination to refuse to grant distributing tolls to a point within the Regina zone on the ground that the respondent had no direct route to the point in question, but the Board cannot order a refund of the excess toll charged.

Lehnhart v. C.N.R. Co., 17 Can. Ry. Cas. 93.

UNJUST DISCRIMINATION TOLLS—MILEAGE—STATION TO STATION—EXTRA—TRAFFIC—SWITCHING AND HANDLING—COMPETITION—RAILWAY ACT, S. 315 (4).

When it appears that, at a large number of places in Ontario, under more or less similar circumstances and conditions, no extra charge is made for switching traffic from sidings located between stations, it is unjust discrimination to make an extra charge of $3 per car for switching traffic of the aplicant, a brick maker, from a siding 2¼ miles distant from a staiton, C., who is in competition with brick makers at said station. [Christie, Henderson & Co. v. G.T.R. Co., 9 Can. Ry. Cas. 502, followed.]

Pilon v. G.T.R. Co., 16 Can. Ry. Cas. 433.

DIFFERENTIATION—WEIGHTS—MINIMUM.

A carrier is not justified in imposing tolls on the same commodity differing according to the use to which it is put and the same inhibition attaches to a differentiation of minimum weights based on the use to which the commodity is put. [Riley v. Dominion Express Co., 17 Can. Ry. Cas. 112, followed.]

Western Retail Lumbermen's Assn. v. C.P., C.N. & G.T.P.R. Cos., 20 Can. Ry. Cas. 155.

RATES — OVERCHARGE — DIMENSIONS OF CARS.

Kootenay Shingle Co. v. G.N.R. Co., 21 Can. Ry. Cas. 92.

DISCRETION — TOLLS — REDUCTION — COMPETITION BY WATER—UNJUST DISCRIMINATION.

Carriers may, in their discretion, meet effective water competition from one point to other points by reducing their tolls, and it is not unjust discrimination for them to charge higher tolls from another point having a limited efficiency in such competition to these points. [Blind River Board of Trade v. G.T., C.P.R., Northern Navigation & Canadian Transportation Cos., 15 Can. Ry. Cas. 146, followed.]

Dominion Sugar Co. v. G.T., C.P., Chatham, Wallaceburg, & Lake Erie & Pere Marquette, 17 Can. Ry. Cas. 231.

WHEN REDUCTION OF TOLLS REFUSED—CONNECTING CARRIERS.

The Board refused to reduce the tolls on the respondent power company's line, on account of its extraordinary operating conditions, but made a reduction in the respondent railway company's toll by following the practice in Eastern Canada, where connecting carriers having no joint tolls, each takes one cent from its local toll, subject to a minimum net toll. [Fullerton Lumber & Shingle Co. v. C.P.R. Co., 17 Can. Ry. Cas. 282, distinguished.]

Stoltze Manuf. Co. v. C.P.R. & Western Canada Power Cos., 17 Can. Ry. Cas. 282.

TOLLS ON LUMBER—PRAIRIE DESTINATIONS.

The tolls on lumber from Golden, on the main line of the C.P.R., to prairie destinations, should be put on a parity with the tolls from corresponding points on the Crow's Nest Branch to the same destinations via the same common point.

Mountain Lumber Mfg. Assn. v. C.P.R. Co., 17 Can. Ry. Cas. 285.

BOARD — TOLLS — INCREASE — COMMODITY RATES—UNJUST DISCRIMINATION.

The Board allowed tariffs which had the effect of cancelling commodity rates less than 5th class theretofore enjoyed for many years on rope in carload lots out of Montreal upon its appearing that Montreal was the only point in Canada where a less than 5th class rate applied and that there had, therefore, been unjust discrimination in favour of Montreal against other Canadian points. [Town of Welland v. Canadian Freight Assn. (Plymouth Cordage Co.'s Case), 13 Can. Ry. Cas. 140, followed.]

Consumer's Cordage v. G.T. & C.P.R. Cos., 14 Can. Ry. Cas. 222.

LATITUDE IN REGULATING RATES — BOARD —EXPRESS TOLLS OVER TWO OR MORE LINES—SUM OF THE LOCALS.

Traffic handled by two or more companies over connecting lines may well bear a heavier toll than if handled by one only and where two companies charged tolls equal to the sum of the locals over their respective lines, the Board refused to interfere in the absence of proof that the charges were excessive, notwithstanding that a lower through rate had formerly been charged when one express company operated over both lines.

Shippers by Express v. Canadian Northern Express Co. & Central Ontario R. Co., 14 Can. Ry. Cas. 183.

REDUCTION — REASONABLENESS — WEIGHTS —MINIMUM—ADJUSTMENT.

The obligation of carriers is to charge a reasonable toll, and they are not called upon, through the reduction of the toll, to guarantee that a shipper will always be able to carry on business at a profit, nor are carriers under any obligation to so adjust their minimum weights as to offset any inherent disadvantages of a business. [Canadian Portland Cement Co. v. G.T. & Bay of Quinte R. Cos., 9 Can. Ry. Cas. 209; Canadian Oil Cos. v. G.T.,C.P. & C.N.R. Cos., 12 Can. Ry. Cas. 350; B.C. News Co. v. Express Traffic Assn., 4 D.L.R. 239, 13 Can. Ry. Cas. 176, followed.]

Western Retail Lumbermen's Assn. v. C. P., C.N. & G.T.P.R. Cos., 20 Can. Ry. Cas. 155.

CLASSIFICATION — THIRD CLASS — WEIGHT —MINIMUM.

Solid rubber tires with a minimum weight of 24,000 lbs., and pneumatic rubber tires with a minimum weight of 16,000 lbs., were both rated third class.

Canadian Rubber Manufacturers v. Canadian Freight Assn., 23 Can. Ry. Cas. 50.

CARS — SINGLE DECK — MINIMUM — C.L. —WEIGHT.

The Board declined to approve a reduction in the minimum C.L. weight on sheep from 16,000 lbs. to 12,000 lbs. in single deck cars.

South Alberta Wool Growers' Assn. v. C.P.R. Co., 24 Can. Ry. Cas. 54.

CLASSIFICATION OF COMMODITIES—LOADING —EARNING POWER.

In the case of two commodities, pulpwood and brick, which are both tenth class, moving at a commodity toll, identity of classification, rating and similarity of price justify a similar toll treatment, unless there are additional traffic conditions to be considered such as loading and consequent earning power. [Canadian Freight Assn. v. Cadwell Sand & Gravel Co., 15 Can. Ry. Cas. 156; International Paper Co. v. G.T., C.P. & C.N.R. Cos. (pulpwood case), 15 Can. Ry. Cas. 111, followed.]

Auger & Son & D'Auteuil Lumber Co. v. G.T. & C.P.R. Cos., 19 Can. Ry. Cas. 401.

INTERSWITCHING.

The General Interswitching Order is not a mandatory order requiring interswitching wherever possible, but merely a regulative order fixing tolls to be charged when interswitching service is performed.

Re General Interswitching Order, 19 Can. Ry. Cas. 376.

GENERAL GOODS—SETTLERS' EFFECTS.

General goods cannot be carried as settlers' effects; the exceptional toll only applies to the actual possession of persons moving from the east to the west with a view of living there, and the present tariff is to be strictly enforced in this regard.

Re Settlers' Effects, 19 Can. Ry. Cas. 387.

MILK IN CAR LOADS.

As a general order for milk in car loads (C.L.) would be practically ordering a paper tariff and little or no milk would move under it the Board will not fix a C.L. toll based upon a minimum number of cans of milk. The general order providing that shippers supply men to assist in unloading empty milk cans was affirmed.

Milk Shippers v. G.T., C.P. & N.Y. & H.R.R. Cos., 19 Can. Ry. Cas. 383.

INTERPRETATION OF TARIFFS—MACHINERY.

Tariffs are not to be construed by intention. They are to be construed according to their language. Where a tariff prescribing certain tolls is headed for "machinery," although the articles contained in the item are those used in connection with tanning, the same tolls are available for machinery of other types such as for a pulp mill.

Spanish River Pulp & Paper Mills v. C.P.R. Co., 19 Can. Ry. Cas. 381.

JURISDICTION OF BOARD — STOP-OVER PRIVILEGE—DISCRIMINATION.

The Board has no jurisdiction to compel carriers to put in a milling-in-transit or stop-over privilege of a similar character. It is in the discretion of the carrier to grant it or not. The Board can only intervene when unjust discrimination or undue preference has been shown.

Shingle Agency v. C.P., C.N. & G.N.R. Cos., 21 Can. Ry. Cas. 9.

WATER COMPETITION.

It is not contrary to the Railway Act that carriers should meet water competition in a measure when it is effective and afterwards meet it in a less degree when it is less effective.

Dominion Canners and Glassco v. Canadian Freight Assn., 22 Can. Ry. Cas. 312.

DISCRETION—TOLLS — WATER COMPETITION.

Carriers may in their discretion meet water competition by reducing tolls; they may also in their discretion restore tolls to a normal basis when water competition ceases. [Dominion Millers Assn. v. G.T. & C.P.R. Cos., 12 Can. Ry. Cas. 363, at p. 368, followed.]

Regina Board of Trade v. C.P.R., 22 Can. Ry. Cas. 315.

DISCRETION — TOLLS — REDUCTION — WATER COMPETITION.

Tolls reduced by a railway company to meet water competition may, at the discretion of rail carriers, be brought up more closely to the normal level when water competition becomes less effective. [Dominion Millers Assn. v. G.T. & C.P.R. Cos., 12 Can. Ry. Cas. 363, at p. 368; In re Western Tolls (Western Freight Rates Case), 17 Can. Ry. Cas. 123, at pp. 123, 124, 159, 166, followed. Canadian Oil Cos. v. G.T., C.P. & C.N.R. Cos., 12 Can. Ry. Cas. 350, at p. 351. Blind River Board of Trade v. G.T., C.P.R., Northern Navigation & Dominion Transportation Cos., 15 Can. Ry. Cas. 146. Boards of Trade of Western Cities & Canadian Manufacturers' Assn. v. Canadian Freight Assn., 22 Can. Ry. Cas. 324.

FACILITIES — TRANSPORTATION — COMPETING LINES — CARS — SHORTAGE — EQUIPMENT.

Shippers located on one line of railway are not entitled to as good transportation facilities as if located on two or more competing lines. In times of car shortage it is the duty of a carrier to retain its equipment so as to serve shippers on its own line. [C.P.R. Co. v. Nelson & Fort Sheppard R. Co., 11 Can. Ry. Cas. 400, followed.] The initial or originating carrier is entitled to as long a haul as reasonable on its own lines. [Imperial Steel & Wire Co. v. G.T.R. Co., 11 Can. Ry. Cas. 395; C.P.R. Co. v. Nelson & Fort Sheppard R. Co. (Memorandum), 11 Can. Ry. Cas. 400; Jacobs Asbestos Co. v. Quebec Central Ry. Co., 19 Can. Ry. Cas. 357; Plymouth, Devenport & South Western Junction R. Co. v. Great Western R. Co., 10 Ry. & Ca. Tr. Cas. 68; Riddle v. Pittsburgh & Lake Erie R. Co., 1 I.C.C.R. 374, followed.] The Board laid down the following rules for the movement of coal, not only to points on the originating line but also to points on other lines: (a) Cars must be supplied for this purpose as well as for delivery at points on the originating line to the full extent cars are available; (b) where the originating or receiving line enjoys the long haul it must supply the cars; (c) where the line that ought to supply the cars is unable to do so, then the other line although not enjoying the long haul should supply the cars and be paid by the defaulting line a per diem toll of $1.25 instead of 45 cts. from the time the car leaves until it is returned to the owning line, but no existing freight toll may be increased to cover the additional per diem toll; (d) it is the duty of the receiving line to return the cars promptly to the owning line, either at the junction point where the car was received or, in case return loads can be obtained, to another junction point on the line of the return movement. To provide for an emergency due to shortage of equipment and scarcity of coal, railway companies without sufficient equipment were ordered to make forthwith the necessary changes in flat or live stock cars to enable them to carry coal. Re Coal Transportation Facilities, 22 Can. Ry. Cas. 338.

CLASSIFICATION—COST OF TRANSPORTATION —LUXURIES.

Classifications must be arranged according to the ability of the various articles to bear their share of the cost of transportation to admit of cheaper goods being carried any distance; thus luxuries which move in comparatively small quantities, are given a higher classification than indispensables. While the present war conditions may affect tolls per se these should have no bearing on classification.

Horne Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 344.

CLASSIFICATION — WEIGHTS — MINIMUM —COMMODITY.

Fibre board cheese boxes, rated in the classification as fifth class with a minimum weight in C.L. lots of 20,000 lbs., are entitled to the same rating as wooden cheese boxes with the same minimum weight, either by a change in the classification or by a commodity toll of general application.

Canada Cheese Box Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 347.

JURISDICTION — INTERNATIONAL TRAFFIC — EXPORT—PARITY—CLASSIFICATION.

The Board has no jurisdiction to vary or modify the U.S. official classification in the case of C.L. traffic moving from a Canadian point to a Canadian port, and, under s. 321 (2, 3, 4), the only jurisdiction the Board has is when such classification is used with respect to traffic to or from the United States, and the carriers, being under no statutory obligation to use the classification, may, in their discretion, with the leave of the Board, do so on export business from Canadian points to Canadian ports in order to assure a parity of treatment as to tolls and ports in the United States. Subject to the provisions of the Railway Act in respect to unjust discrimination, it is entirely within the discretion of carriers whether they shall or shall not fix tolls to meet the competition of markets. When export tolls have been installed the Board has directed their continuance, or re-establishment to maintain a parity of ports, but the Board will not direct export tolls to be put into force where no such tolls have existed. [Montreal Produce Merchants Assn. v. G.T. & C.P.R. Cos., 9 Can. Ry. Cas. 232; B.C. Sugar Refining Co. v. C.P.R. Co., 10 Can. Ry. Cas. 169, at p. 172; Canadian Lumbermen's Assn. v. G.T. & C.P.R. Cos., 10 Can. Ry. Cas. 306, at p. 319; Canadian Oil Cos. v. G.T., C.P. & C.N.R. Cos., 12 Can. Ry. Cas. 350, at p. 356; Edmonton Clover-Bar Sand Co. v. G.T.P.R. Co., 17 Can. Ry. Cas. 95, at p. 97, followed. British American Oil Co. v. G.T.R. Co. (Stoy Oil case), 9 Can. Ry. Cas. 178, at p. 184; Dominion

Millers Assn. v. G.T. & C.P.R. Cos., 12 Can. Ry. Cas. 363, referred to.]

Graham Co. v. Canadian Freight Assn., 22 Can. Ry. Cas. 355.

INTERNATIONAL TRAFFIC — TOLLS — CONTINUOUS ROUTE.

The rule that a joint or through toll between any two points properly filed is the only legal toll in respect of the particular traffic between such points, applies also to international traffic, where a joint tariff of tolls for a continuous route has been filed for part of the distance, the through toll for the continuous route plus the local toll to the point beyond the end of the continuous route is the only toll that can be charged.

General Traffic Service Co. v. C.P.R. Co., 22 Can. Ry. Cas. 372.

EXPRESS—LIMITS—ZONES—SCALE.

Municipal boundaries may usually be taken as suitable limits for free express delivery service, in villages, towns and small cities, but not in large cities where municipal boundaries are enlarged from time to time. The Board established a central zone in Toronto with free pick-up and delivery service. Outside of the central zone, additional areas, as a toll zone, were established in and about Toronto comprising any place within half a mile from the nearest free zone limit, except the southern limit on the water front. A graduated scale of charges, according to weight, was fixed for delivery of parcels in the toll zone. After a year's operation a report is to be made to the Board, upon which a revision of conditions may be made if deemed necessary by the Board.

Toronto & Citizens' Committee v. Express Traffic Assn., 22 Can. Ry. Cas. 375.

TOLLS — AGREEMENT — SPUR — CARS — INTERSWITCHING.

The Board is not bound, nor may the provisions of the Railway Act be defeated, by an agreement between two railway companies respecting tolls. A provision in an agreement made in 1901 between two railway companies, whereby the former in consideration of the latter undertaking to build a spur from its line to a pulp mill, agreed to build a connection between the two lines and switch loaded and empty cars for the latter company at $1.50 per loaded car, was abrogated by the Board in 1917, the tolls being found unremunerative, and the regular interswitching charge of 1 cent per 100 lbs. applied under the General Interswitching Order No. 4988. [Crow's Nest Pass Coal Co. v. C.P.R. Co., 8 Can. Ry. Cas. 33; Lake Superior Paper Co. v. Algoma Central & Hudson Bay R. Co., 22 Can. Ry. Cas. 361, followed. Village of Fergus v. G.T.R. Co., 18 Can. Ry. Cas. 42, distinguished.]

C.P.R. Co. & Spanish River Pulp & Paper Mills v. Algoma Eastern R. Co., 22 Can. Ry. Cas. 381.

INCREASE — "SPREAD" BETWEEN COMPETITORS—RAIL AND WATER TOLLS.

The Board will not authorize an increase of remuneration in lake and rail tolls for the purpose of lessening a prohibitive "spread" between them and all-rail tolls of the same and other carriers between the same points, in order to induce part of the traffic to move all rail and so to prevent the all-rail tolls from being "cut" by a carrier having no lake and rail route and desiring to participate in the traffic. Having regard to the decision in the Eastern Rates Case allowing an increase in general freight tolls east of Fort William, 22 Can. Ry. Cas., 4, and the reasons for that decision the Board held that reasonable increases in the tolls on grain and grain products east of Fort William should be allowed and approved revised tolls accordingly.

Dominion Millers Assn. v. G.T. & C.P.R. Cos., 22 Can. Ry. Cas. 393.

MAIL ORDER BUSINESS — DISTRIBUTING POINTS.

Lower or joint tolls will not be granted to a retail dealer, in a distant point (such as Winnipeg), seeking to do a mail order business (L.C.L. lots) through a well-established distributing point (such as Edmonton, 848 miles from Winnipeg), into territory tributary thereto (the Peace River Country), which would give the shipper a toll lower than the local toll at the distributing point (Edmonton). [In re Western Tolls (Western Tolls case), 17 Can. Ry. Cas. 123, at p. 156; In re Edmonton, Dunvegan & B.C.R. Co. (Mountain Scale Tolls case), 22 Can. Ry. Cas. 1, referred to.]

Newman v. Edmonton, Dunvegan & B.C.R. Co., 22 Can. Ry. Cas. 399.

CLASSIFICATION — DISTRIBUTING POINTS.

Two L.C.L. classification ratings will not be granted on the same commodity differing in value. Where a C.L. classification rating from Wallaceburg, a manufacturing centre, to Winnipeg was voluntarily put in by the carriers, it is only reasonable that similar commodity tolls should be given from Wallaceburg to Toronto and Montreal, similar distributing centres in the east. [Ledoux Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 3, distinguished.]

Wallaceburg Cut Glass Works v. Canadian Freight Assn., 22 Can. Ry. Cas. 408.

TOLLS—JOINT—FOREIGN COUNTRY.

Under s. 336 a joint tariff of tolls must be filed covering a continuous route traffic movement from a point in a foreign country into Canada. Without passing on the question of the jurisdiction of the Board to regulate a through toll from a point in the United States to a point in Canada, it may be said in general that where a through toll is attacked as being unreasonable because it is in excess of the sum of the locals the Board has jurisdiction only as far as to direct a reduction for the future, but pos-

sesses no power to direct a refund of a portion of the toll charged.

Security Traffic Bureau v. C.N.R. Co., 22 Can. Ry. Cas. 414.

TOLLS—UNJUST DISCRIMINATION — UNDUE PREFERENCE.

A toll of 22 cents per 100 pounds on newsprint paper from Thorold, Ontario, to Chicago, Illinois, U.S.A., was not found to constitute an unjust discrimination or undue preference in favor of competitors in the Chicago market.

Ontario Paper Co. v. G.T.R. Co., 24 Can. Ry. Cas. 177.

CLASSIFICATION — TRADE CONDITIONS — CARS—CARRYING POWER—REASONABLENESS.

In matters of classification and tolls established trade conditions or obligations, while not of necessity conclusive obstacles in the way of change, must be considered; it is a question of judgment what is a fair mean between the physical carrying power of the car and the public interest as affected thereby and the conditions under which business is carried on. [Western Retail Lumbermen's Assn. v. C.P., C.N. & G.T.P.R. Cos., 20 Can. Ry. Cas. 155, referred to.] The Board is not concerned with equalizing costs of production; its juri-diction relates only to reasonableness of tolls. [Hudson Bay Mining Co. v. G.N.R. Co., 16 Can. Ry. Cas. 254, at p. 259; Canadian Portland Cement Co. v. G.T. & Bay of Quinte R. Cos., 9 Can. Ry. Cas. 209, at p. 211, followed.]

Dominion Millers' Assn., Toronto Board of Trade & Montreal Corn Exchange v. Canadian Freight Assn., 21 Can. Ry. Cas. 83

DISCRETION — TOLLS — COMMUTATION — UNJUST DISCRIMINATION — RAILWAY ACT, S. 341.

Within the limits of the standard passenger toll per mile, railway companies have discretion to vary the toll under certain conditions, that discretion may be exercised by the granting of commutation tolls to one point and not to another, such difference in the treatment of different places is not necessarily unjust discrimination, and in the absence of affirmative evidence of actual discrimination, resulting in the positive detriment to a place to which such tolls are refused, the Board will not interfere. [Wegenast v. G.T.R. Co., 8 Can. Ry. Cas. 42; Toronto & Town of Brampton v. G.T. & C.P.R. Cos., 11 Can. Ry. Cas. 370, at pp. 374, 375; B.C. News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 178, followed.]

Massiah v. C.P.R. Co., 17 Can. Ry. Cas. 88.

ROUTES—RAIL AND WATER—COMPETITION.

Rail carriers engaged in the business of transportation via a rail and water route in competition with an all-water route may, in their discretion, meet water competition if they see fit, and may also determine the extent to which they shall meet it, and the Board cannot interfere with the tariff of tolls filed. [Blind River Board of Trade v. G.T., C.P.R., Northern Navigation & Dominion Transportation Cos., 15 Can. Ry. Cas. 146, followed.]

Boards of Trade of Montreal & Toronto & Canadian Manufacturers' Assn. v. Canadian Freight Assn., 21 Can. Ry. Cas. 77.

CLASSIFICATION — C.L. RATING — PEANUT BUTTER — GROCERY LIST — RAILWAY ACT, S. 317 (3) (c).

Peanut butter, having been included in the grocery list, should be given a fourth class carload rating, with jams and jellies with which it is in competition.

Application directing the respondent to provide a C.L. rating as of the fourth class for peanut butter.

Toronto Board of Trade v. Canadian Freight Assn., 16 Can. Ry. Cas. 442.

COST OF PRODUCTION—EQUALIZATION—COMPETITION—MINIMUM WEIGHTS.

It is not part of the obligation of carriers to equalize the cost of production through lower tolls, so that all may compete on an even keel in the same market.

Carriers are not justified in imposing tolls on the same commodity differing according to the use to which it is put; the same inhibition attaches to a differentiation of minimum weights for the same reason, nor are they under obligation to so adjust minimum weights as to offset any inherent disadvantages of the business. [Western Retail Lumbermen's Assn. v. C.P.R. Co., 20 Can. Ry. Cas. 155, followed.]

Hay & Still Mfg. Co.'s v. G.T. & C.P.R. Co.'s, 21 Can. Ry. Cas. 43.

JOINT—TOLLS—SINGLE LINE.

A joint toll of 47 cents per ton (3 cents over the single line haul toll) was established on coal over the Michigan Central and Niagara, St. Catharines & Toronto R. Cos. from the Niagara frontier to St. Catharines and adjacent points, in the proportion of 27 cents to the Michigan Central and 20 cents to the Niagara, St. Catharines & Toronto R. Co.

Niagara, St. Catharines & Toronto R. Co. v. Canadian Retail Coal Assn., 21 Can. Ry. Cas. 28.

HIGHER TOLLS—BRANCH LINES.

A slightly higher toll basis is justifiable from branch and lateral line points than from adjacent main line points. [Almonte Knitting Co. v. C.P. & Michigan Central R. Cos. (Almonte Knitting Co. Case), 3 Can. Ry. Cas. 441; Malkin & Sons v. G.T.R. Co. (Tan Bark Rates Case), 8 Can. Ry. Cas. 183; Oyler & Bridgeport Lumber Co. v. Dominion Atlantic R. Co., 20 Can. Ry. Cas. 238, followed.]

Hunting-Merritt Lumber Co. v. C.P. & B.C. Electric R. Cos., 20 Can. Ry. Cas. 181.

PASSENGER TRAIN SERVICE—MILK TRAFFIC—MIXED TRAINS.

The Board refused to order a carrier to give passenger train service on a milk train when it appeared that the milk traffic had

originally been carried on a mixed train, No. 81, and had been transferred to a special milk train in order that No. 81 might run as a passenger train only and the passenger service be thereby improved.

Town of Massena Springs v. G.T.R. Co., 21 Can. Ry. Cas. 34.

PASSENGERS — TRAFFIC — THROUGH JOINT TICKETS—REASONABLENESS.

The Board is not concerned with the disputes of rival railway companies as such, or with the fact that one desires to do business with another to the exclusion of a third; its only interest being that of the public in the transportation of passengers and freight. Under the special circumstances of this case the respondent Michigan Central R. Co. are obliged under ss. 317 and 334 of the Railway Act to make reasonable traffic arrangements to enable the applicant to do business with it, by issuing through joint tickets for the transportation of passengers.

London & Lake Erie R. Co. v. Michigan Central & London & Port Stanley R. Cos., 20 Can. Ry. Cas. 194.

SHORT LINE COMPETITION.

The Railway Act does not require carriers to meet short line competition if they do not desire to do so. [Edmonton Clover Bar Sand Co. v. G.T.P.R. Co., 17 Can. Ry. Cas. 95, followed.]

In re Passenger Tolls, 20 Can. Ry. Cas. 223.

TRAFFIC — SERVICE — SPECIAL TRAIN MOVEMENTS—MILEAGE—JUNCTIONS.

The obligation of carriers is to furnish such service as the traffic demands, but not to treat it as special train movement, and require a guarantee of a certain number of cars to be handled. In dealing with the reasonableness of tolls charged on a slight traffic movement, the Board has recognized that under certain conditions tolls to or from a point on a branch line may be higher than in the case of a main line movement. [Almonte Knitting Co. v. C.P. & Michigan Central R. Cos. (Almonte Knitting Co. Case), 3 Can. Ry. Cas. 441; Malkin & Sons v. G.T.R. Co. (Tan Bark Rates Case), 8 Can. Ry. Cas. 183, followed.] A somewhat higher toll basis is justifiable, where, on account of the urgency of the grain movement, leave is given before completion to a branch line to engage in the carriage of traffic. In general standard mileage tolls may properly be charged to the junction point where the special mileage tolls become effective on the branch line.

Oyler & Hicks & Son v. Dominion Atlantic R. Co., 20 Can. Ry. Cas. 238.

TERMINAL TOLL—COMPETITION—BY WATER —DISCRIMINATION.

If a carrier does not choose to meet water competition, the Board's whole right to interfere with a toll is confined to a case where the toll charged is unreasonable for the services rendered, therefore, where a carrier changes the route of its car ferry it is not unjust discrimination for it to charge a reasonable toll for the rail haul necessitated, instead of the former terminal toll only. [Plain & Co. v. C.P.R. Co., 9 Can. Ry. Cas. 223; Canadian Oil Cos. v. G.T., C.P. and C.N.R. Cos., 12 Can. Ry. Cas. 350; Blind River Board of Trade v. G.T., C.P. Rys., Northern Navigation and Dominion Transportation Cos., 15 Can. Ry. Cas. 146, followed.]

Nanaimo Board of Trade v. C.P.R. Co., 20 Can. Ry. Cas. 224.

COMPETITION—BY WATER.

It is in the carrier's discretion whether it will meet water competition, and it is not the privilege of the shipper to demand less than normal tolls because of such competition, which the carrier in its own interest does not choose to meet. [Plain v. C. P.R. Co., 9 Can. Ry. Cas. 222, at p. 223; Blind River Board of Trade v. G.T., C.P.R., Northern Navigation & Dominion Transportation Cos., 15 Can. Ry. Cas. 146, followed.] Where the carrier is subject to effective water competition in varying degree, and also to potential water competition, it is in its discretion whether it shall meet it and the fact that it has met the competition at one point does not place it under any obligation to meet it at another point nor is the toll as it is put in to meet such competition to one point a necessary measure of the toll to another. [Dominion Millers' Assn. v. G.T. & Can. R. Cos., 12 Can. Ry. Cas. 363; Re Western Tolls, 19 D.L.R. 43, 17 Can. Ry. Cas. 123, followed.]

Bowlby v. Halifax & South Western R. Co., 20 Can. Ry. Cas. 231.

DEMURRAGE — ADJUSTMENT — LONG AND SHORT HAUL.

The long and short haul clause, s. 315 (5) of the Railway Act is superior to any toll in any tariff approved by the Board which conflicts therewith. Where freight tolls demanded by a carrier are proved to be incorrect, the consignee is not properly charged demurrage because he refuses to unload until the freight tolls are adjusted. A toll which violates a provision of the Railway Act is unlawful even if shewn on a filed tariff. Where, therefore, a toll of 12 cents per 100 lbs. was charged on a carload of logs from Warren, Mich., to Tilbury, Ont., and at the same time there was a special toll of 5½ cents from Utica, Mich., to Tilbury, Warren being an intermediate point, the toll of 12 cents is illegal by the long and short haul clause, s. 315 (5).

Canadian Handle Mfg. Co. v. Michigan Central R. Co., 21 Can. Ry. Cas. 12.

TOLLS—C.L.—GOODS—MIXED.

C.L. tolls are only given for the purpose of mixing on account of the varied nature of the goods that can be mixed.

Canadian Rubber Manufacturers v. Canadian Freight Assn., 23 Can. Ry. Cas. 50.

TOLLS — ORIGINAL SHIPMENT — RESHIPMENT—MILLING-IN-TRANSIT OR ANALOGOUS PRIVILEGES.

The rates from point of reshipment chargeable on grain under tariffs allowing milling-in-transit or analogous privileges are those effective at the time of the original shipment, not those effective at the time of reshipment, unless the tariff under which the grain originally moved clearly provides otherwise.

United Grain Growers v. Canadian Freight Assn., 24 Can. Ry. Cas. 128.

TOLLS—C.L.—WATER COMPETITION — REDUCTION.

The Board refused to restore a toll on rice in carloads (60,000 lbs. minimum) of 65 cents per 100 lbs. from Vancouver and Victoria to Toronto and Montreal points, in place of a toll of 75 cents (30,000 lbs. minimum) temporarily reduced on account of water competition.

Martin & Robertson & Imperial Rice Milling Co. v. Canadian Freight Assn., 24 Can. Ry. Cas. 141.

TOLLS — CONSTRUCTION — SAME — EXPORT.

Upon the proper construction of the tariff C.R.C. E. 3677, which specifically names Collingwood as a point taking Toronto tolls, a shipper at Collingwood is entitled to the same toll as a shipper at Toronto on nails for export to China and Japan via Pacific Coast ports.

Imperial Steel & Wire Co. v. G.T. & C.P.R. Co., 24 Can. Ry. Cas. 150.

LINED AND RACKED BOX CARS — REFRIGERATOR — SHORTAGE — HEATERS SUPPLIED BY SHIPPERS — NO REMUNERATION —FREE RETURN.

Where the shortage of refrigerator cars has been relieved by supplying lined and racked box cars, but the carrier has been unable to secure a sufficient number of heaters for them, such heaters ought to be supplied as far as possible at the tolls provided by the tariffs, but in cases where heaters are supplied by the shippers, the carrier is entitled to no remuneration, and should also return the shippers' heaters from destination to point of origin free of cost.

Okanagan Valley Growers v. Canadian Freight Assn., 24 Can. Ry. Cas. 55.

CLASSIFICATION — COMPETITION — UNJUST DISCRIMINATION — TOLLS — C.L. — SHIPMENTS — MIXED.

It would be unjust discrimination to authorize the shipment of rubber boots and shoes in mixed carload lots at third class tolls in competition with manufacturers who have not the same privilege of mixing their leather or felt boots with other leather or felt commodities which are entitled to the same classification in C.L. lots.

Canadian Rubber Manufacturers v. Canadian Freight Assn., 23 Can. Ry. Cas. 50.

RESHIPMENT — REVENUES — TOLLS — INCREASE — REASONABLE — HAULS — SINGLE LINE.

Considering the tolls approved on analogous forest products on single line hauls, where the two Canadian carriers have no reshipment advantages and revenues accruing therefrom, an increase in tolls of 1 cent per 100 lbs. on pulpwood from territory west of Montreal via Ottawa or St. Polycarpe Jct. to Rouse's Point is not unreasonable.

West Virginia Pulp & Pape Co. & Northern Mills Group v. C.P.R. Co., 23 Can. Ry. Cas. 153.

TOLLS — MILEAGE — BASIS — BLANKETED — COMPETITION — COMMON MARKET.

Where tolls are blanketed, a too rigid adherence to a mileage basis, thereby giving a sudden break in the middle of a coal shipping area between coal mines competing with each other in a common market, is undesirable. [Galbraith Coal Co. v. C.P.R. Co., 10 Can. Ry. Cas. 325, followed.]

Great West, Byers Mine Coal Cos. & Edmonton Collieries v. G.T.P.R. Co., 23 Can. Ry. Cas. 175.

JUSTIFICATION — TOLLS — LOWER — COMPETITION — HAULS — LONG AND SHORT — POINTS — TERMINAL — INTERMEDIATE — TRAFFIC — CIRCUMSTANCES AND CONDITIONS — SUBSTANTIALLY SIMILAR —RAILWAY ACT, S. 315 (5).

Under s. 315 (5) where traffic moves under substantially similar circumstances and conditions, carriers are justified in charging lower tolls to Victoria, B.C., an ocean terminal point, for the longer haul than for the shorter haul to Sidney, B.C., an intermediate point, where Victoria is, and Sidney is not, subject to competition.

Sidney Board of Trade v. G.N.R. Co., 23 Can. Ry. Cas. 173.

UNJUST DISCRIMINATION — CONTRACT — TOLLS — FAIR AND REASONABLE — SCALE—GENERAL.

The Board will give no effect to a contract fixing a toll so unreasonably low and so out of proportion to the general scale, that it constitutes in effect unjust discrimination in favour of one shipper as against other shippers on the respondent carrier's line. The Board ordered the respondent to remove such unjust discrimination by filing tariffs providing for a fair and reasonable toll.

Lyons Fuel & Supply Co. v. Algoma Central & Hudson Bay Ry. Co., 23 Can. Ry. Cas. 146.

(§ IV C—527)—POSTING OR FILING RATES.

A uniform charge of twenty-five cents included in a tariff of passenger tolls as a special charge to be added to single first-class fare on the sale of excursion or return tickets at single fare plus twenty-five cents, sold in connection with conventions and payable on viséing the tickets for free return, is not objectionable as a discrimination because of such extra charge being

payable in respect of transportation for any distance within the excursion radius, and, where the total charge to the passenger is less than the authorized tariff allows for regular rates, the Board of Railway Commissioners will not interfere to annul or vary the visé charge.

Canadian Fraternal Assn. v. Canadian Passenger Assn., 5 D.L.R. 171, 13 Can. Ry. Cas. 178.

BOARD OF RAILWAY COMMISSIONERS — JURISDICTION AS TO EXCURSION TICKETS.

The Board of Railway Commissioners has no authority under the Railway Act, R.S.C. 1906, c. 37, to compel a railway company issuing tickets at special rates to 300 people or more to offer such privilege to a less number.

The Board of Railway Commissioners has no jurisdiction to compel railway companies to make special excursion rates.

Canadian Fraternal Assn. v. Canadian Passenger Assn., 5 D.L.R. 171, 13 Can. Ry. Cas. 178.

FILING TARIFFS — FOREIGN CARRIER — THE RAILWAY ACT, S. 336.

Notwithstanding s. 336 of the Railway Act requires joint tariffs to be filed covering all traffic carried from foreign countries into Canada, the Board of Railway Commissioners cannot require the initial carrier to file such tariffs.

Stockton & Mallinson v. Dominion Express Co., 3 D.L.R. 848.

An agreement between a provincial railway company and a shipper for a rebate of tolls for carrying the latter's goods is only a contravention of art. 5172, R.S.Q. 1888 (art. 6607 et seq. R.S.Q. 1909) if it involves an advantage or undue privilege. Hence, if it is given on special conditions, for example, that the shipper shall give to the company for carriage all the goods he manufactures himself paying the charges both of loading and discharging, etc., the agreement will be deemed valid until it is proved that an injustice results therefrom. The directors of the company have power to enter into such an agreement without special authorization from the shareholders.

Kennedy v. Quebec and Lake St. John R. Co., 21 Que. K.B. 85, reversing 39 Que. S.C. 344.

(§ IV C—528)—CARRYING SHIPMENT OVER ROUTE AT HIGHER TOLL—LIABILITY FOR OVERCHARGE.

A shipment of household goods, originating at Kingsville, consigned to Bridgeburg, Ontario, was delivered by the Windsor, Essex & Lake Shore Rapid R. Co., to the C.P.R. Co. at Lake Shore Junction, and by that line delivered to the G.T.R. Co. at London—the initial carrier, without instructions from the owners, having chosen a route at a higher toll than that available via Michigan Central R. from Lake Shore Junction to Bridgeburg, and being under obligation, in the absence of specific instructions as to the routing off its own lines, to send the goods forward on the lowest toll combination available, should make adjustment accordingly.

Sinclair v. Windsor, Essex & Lake Shore Rapid R. Co., 18 Can. Ry. Cas. 344.

REDUCTION OF TOLLS BY BOARD — FREIGHT TRAFFIC—UNFAIR—UNREMUNERATIVE.

The annual statistical returns made by railway companies shewing the average revenue per ton per mile of all freight movements, will not justify a reduction by the Board of tolls. In every case the traffic moved must be of sufficient volume and the hauls of sufficient length to insure proper remuneration. Without prejudice to a pending application for increased tolls a flat blanket C.L. toll of 50 cents per ton for any distance up to and including 50 miles on gravel was voluntarily conceded under s. 341 by railway companies concerned to aid municipalities in Western Ontario in prosecuting the "good roads" movement. The Board cannot order railway companies to put in an unremunerative toll so low as to be unfairly out of line with tolls which are necessary to be maintained in order to permit the continuance of satisfactory operation of railways, due regard being had to proper consideration of the value of the commodities shipped and the services performed, it cannot take into account matters of business policy and railway administration, but can only inquire whether tolls are excessive or unfair.

Western Ontario Munic. v. G.T., M.C. & P.M.R. Cos., 18 Can. Ry. Cas. 329.

(§ IV C—529)—OVERCHARGE REFUND.

Application for a refund of an overcharge on the transportation by water of a shipment of carbide from Vancouver to Alberni, B.C., and for a reimbursement of expense in obtaining redress. Held, 1. That the Board had jurisdiction under s. 7 of the act, over the charges for transportation by water when such transport is under the control of a railway company. 2. That the Board could only declare the overcharge illegal, having no jurisdiction to order a refund in a case of mistake. 3. That the Board has not set a precedent by ordering reimbursement of expense in obtaining redress, but that means should be adopted by railway companies to rectify plain and palpable errors leading to overcharges and that if this is not done it may be necessary for the Board to compel railway companies to reimburse those incurring expense in similar cases.

Currie v. C.P.R. Co., 13 Can. Ry. Cas. 31.

TOLLS — ILLEGAL — REFRIGERATOR CARS — HEATERS — ADDITIONAL — REFUND.

Where the toll from the point of shipment to destination provided for a heated refrigerator car, and the transportation of a messenger, a charge made by the carrier for supplying additional heaters is not cov-

ered by the tariff of tolls, is illegal, and refund should be allowed.

Plunkett & Savage v. C.P.R. Co., 23 Can. Ry. Cas. 178.

(§ IV C—539) — COMMERCE — RAILWAY TOLLS — "MUSICAL INSTRUMENTS" — GRAMOPHONES.

Gramophones and graphophones are "musical instruments" and therefore may be shipped over Canadian railways in mixed carload lots with pianos and other musical instruments at the general carload rate applicable to musical instruments generally under the tariff of tolls fixed by the Canadian freight classification with the approval of the Railway Commission.

Re The Berliner Gramophone Co., 3 D.L.R. 496, 14 Can. Ry. Cas. 175.

REGULATING RAILWAY RATES—FREIGHT AND PASSENGER CHARGES — BOARD OF RAILWAY COMMISSIONERS.

As a railway company is entitled to earn a fair and reasonable return upon the money invested in it, the Board of Railway Commissioners will not reduce the freight and passenger tolls where the results would be an annual deficit to a company, whose net earnings under existing tolls, permitted a dividend of but one per cent upon its outstanding stock. Improper inflation of the stock of a railway company, which is all held by the original builders of the road, may be taken into consideration by the Board of Railway Commissioners in determining whether a reduction of its freight and passenger tolls would permit fair and reasonable earnings upon the money actually invested. The fact that, in the past, the stockholders of a railway company have received back in stock and cash dividends all of their original investment will not justify a reduction by the Board of Railway Commissioners of the freight and passenger tolls which would, with its present earnings, result in a deficit.

Dawson Board of Trade v. White Pass & Yukon R. Co., 2 D.L.R. 532, 21 W.L.R. 7, 13 Can. Ry. Cas. 527.

ROUTES—LONGEST HAUL.

The right of the initial carrier to the "longest haul" is recognized by Canadian decisions, and founded on sound principle: the initial carrier in choosing between two routes, equally advantageous to the shipper as to time, toll, and facilities, may select the route which will give it the longest haul, notwithstanding routing directions of the shipper to the contrary, and the principle will be applied where the railway of the initial carrier, technically owned by a separate company maintaining a distinct organization, is, in fact, operated under lease as part of a larger system. [Imperial Steel Wire Co. v. G.T.R. Co., 11 Can. Ry. Cas. 395, followed.]

Jacobs Asbestos Co. v. Quebec Central R. Co., 19 Can. Ry. Cas. 357.

FOREIGN CARRIERS—JURISDICTION.

The Board has no jurisdiction over tolls charged by carriers in a foreign country (U.S.A.). The toll on steel via Minnesota Transfer (St. Paul), over the Soo Line to Moose Jaw, and thence by C.P.R. to Calgary being higher than via Winnipeg to Calgary, but there being no difference in the toll treatment in respect of movements in Canada as between similar movements into and out of Winnipeg and into and out of Moose Jaw, no relief can be given by the Board. (Complaint against freight tolls on steel to be fabricated for bridge construction.)

Sask. Bridge & Iron Co. v. Sault Ste. Marie R. Co., 19 Can. Ry. Cas. 443.

JURISDICTION OF RAILWAY BOARD — DECLARATORY ORDERS—JOINT TARIFF.

The Board of Railway Commissioners for Canada has power upon an application by the shipper to make a declaratory order as to what is the proper tariff of tolls applicable to a certain class of goods although no consequential relief was granted to the complainant on the application. The tariffs of tolls applicable to shipments of petroleum and its productions from the United States into Canada is the "joint tariff" of January 1907, filed with the Board to the exclusion of subsequent tariffs filed, but not sanctioned by the Board. [Canadian Oil Cos. v. G.T., C.P. & C.N.R. Cos., 12 Can. Ry. Co. 360 affirmed.]

C.P.R. Co. & G.T.R. Co. v. Canadian Oil Companies, 14 Can. Ry. Cas. 201, 47 Can. S.C.R. 155, 23 W.L.R. 216.

CARS—SHIPPING SYSTEM—C.L. TRAFFIC—TRACK SCALE WEIGHT—CARE OF CARS—ABSORPTION OF MOISTURE—ACCUMULATION OF SNOW, ICE AND REFUSE—ALLOWANCES — BLOCKING — DUNNAGE —TEMPORARY RACKS.

Application directing the respondents to continue the allowances for blocking, dunnage and temporary racks and that the railway companies' weighmen should not be allowed to estimate by guesswork the allowances to cover the weight of accumulated ice, snow or refuse which may be in or upon the car.

Canadian Manufacturers', Canadian & Montreal Lumbermen's Assn. v. Canadian Freight Assn. & Railway Cos., 13 Can. Ry. Cas. 3, 20 W.L.R. 614.

(§ IV C—535) — REASONABLENESS OF RATES.

Notwithstanding the Board of Railway Commissioners cannot require a foreign express company to file or concur in a joint tariff on traffic originating in the United States for Canadian points, if they do concur with a Canadian express carrier in a joint through tariff that is fair and reasonable, the latter may be required to file it. The Board of Railway Commissioners cannot require the re-instatement of a joint through tariff that formerly existed on express traffic from points in the United States to Canadian points, so as to apply

to points in Canada to which it was not formerly applicable, where the reasonableness of the rate to the new point is not shewn and the foreign carrier did not concur therein, as, in order to do so, it would be necessary to impose the cost of the additional haul upon the Canadian carrier, which would be unfair, as no portion thereof could be imposed by the Board upon the foreign carrier.

Stockton and Mallinson v. Dominion Express Co., 3 D.L.R. 848.

TOLLS — REDUCTION — HIGHER — COMPARISON—EASTERN AND WESTERN CANADA—DISCRIMINATION.

The history of toll making in Canada East and West of Fort William was reviewed, the Board finding that no reduction in tolls had heretofore been made in Eastern Canada as a result of charging higher tolls in Western Canada, although it was admitted that the tolls are higher in Western than in Eastern Canada, and that primâ facie discrimination in such tolls exists.

Re Western Tolls, 19 D.L.R. 43, 17 Can. Ry. Cas. 123.

WHARFAGE—REASONABLENESS.

Upon complaint made against a charge of one cent per 100 lbs. with a minimum of 85 per car for switching from boat to rail at Port Arthur, the carrier pointed out that the toll was the usual one for interswitching, except that the minimum was 85 instead of $3, also, that there was a greater service provided because in ordinary switching the carrier that does the work merely takes a loaded car from one point to another, whereas in the case under discussion the carrier must place its empty car, load it, and then switch it to destination. The Board held that the charge was reasonable whether taken by itself or in connection with a wharfage charge of 2½ cents per 100 lbs., imposed for other services and facilities.

Fort William Board of Trade v. C.P.R. Co., 19 Can. Ry. Cas. 392.

MOUNTAIN AND PRAIRIE SCALES — REASONABLENESS.

The Board gave temporary approval for three months to the applicants' tariff of tolls on the higher mountain scale, under the particular circumstances of the case and without any finding as to the reasonableness of such tolls.

Re Edmonton, Dunvegan & B.C.R. Co., 19 Can. Ry. Cas. 395.

JURISDICTION — TOLLS — REASONABLENESS — EXPERIMENTAL — INDUSTRY —DEVELOPMENT.

The jurisdiction of the Board is confined to dealing with the reasonableness of tolls, and it is not its function to put in experimental tolls with a view to developing industry. [B.C. News Co. v. Express Freight Traffic Assn., 13 Can. Ry. Cas. 176, at p. 178, followed.]

Southern Alberta Hay Growers v. C.P.R. Co., 21 Can. Ry. Cas. 226.

TOLLS—COMPARISON—MOVEMENT.

Tolls for crushed stone of $1.10 and 70 cents per ton from Burritts, Ontario, to Montreal, 121 miles, and to Ottawa, 34 miles, respectively, were found not to be unreasonable in comparison with other tolls in force in the same territory and the large movement of crushed stone thereunder. [Doolittle & Wilcox v. G.T. and C.P. R. Cos. (Stone Quarry Toll case), 8 Can. Ry. Cas. 10, at p. 13, distinguished.]

Provincial Stone & Supply Co. v. C.P.R. Co., 22 Can. Ry. Cas. 411.

TOLLS — REASONABLENESS — CONTRACT — ADEQUACY OF CONSIDERATION.

The Board will not consider adequacy of consideration in a contract as any justification for favoured treatment by a carrier of a shipper in respect of tolls. [Crow's Nest Pass Coal Co. v. C.P.R. Co., 8 Can. Ry. Cas. 33, at pp. 40, 41, followed.] While it is proper to take into consideration the period a toll has been established, the investment of capital made in the belief that such toll would continue and the further commitments made, there is no property in a toll, mere continuance is only one factor, its general reasonableness must be considered. [International Paper Co. v. G.T., C.P. & C.N.R. Cos. (Pulpwood case), 15 Can. Ry. Cas. 111, followed.] The through toll or the division of the through toll between two points is not necessarily a test of the reasonableness of the local toll to an intermediate point. A blanket toll put in for development of traffic, with but little attention to the resultant profit, does not create an obligation to continue an unduly low toll basis. [International Paper Co. v. G.T., C.P. & C.N. R. Cos. (Pulpwood case), 15 Can. Ry. Cas. 111, followed.] The Board found that the tolls charged by the respondent for the shorter hauls are lower as compared with other carriers in Eastern Canada, and having regard to the nature and volume of traffic, the tolls and scaling in the tariffs of tolls are not unreasonable.

Lake Superior Paper Co. v. Algoma Central & Hudson Bay R. Co., 22 Can. Ry. Cas. 361.

TOLLS — INCREASE — LOW — COMPETITION — JUSTIFICATION — MISAPPREHENSION.

The respondent is justified in increasing the toll charged, through misapprehension, on asbestos cement in a plastic form, where it is in competition with stove putty used for the same purpose.

Sterne & Sons v. Canadian Freight Assn., 23 Can. Ry. Cas. 171.

Application under s. 323 of the Railway Act to disallow the proposed increase in the tolls on hay shipped from Ontario and Quebec to certain points in the United

States. The respondent had increased the toll 2 cents per 100 lbs. making the local and export tolls equal. The respondent submitted that the old tariff was not fairly remunerative when the nature of the service and the conditions under which it was rendered was taken into account and that the following conspicuous peculiarities distinguish this from other traffic: (1) Movement spasmodic, not capable of being foreseen and not occurring with any regularity as to volume; (2) movement affected by usages of the trade and lack of terminal facilities at the chief markets of the United States, resulting in extreme detention of cars and their diversion to remote places. It was also submitted that there had been a great and unforeseen increase in the cost of construction and operation. Held, 1. That the points urged were factors that might properly be considered in making commodity rates but were not reasons for increasing the rates already established with the knowledge possessed by the framers of traffic conditions. 2. That the volume of general traffic had increased almost pari passu with the increase in the cost of construction and operation. 3. That the present tolls were fairly remunerative and all that the traffic can bear. 4. That all the tariff increases should be disallowed, the respondents not having justified them.

Montreal Hay Shippers' Assn. v. Canadian Freight Assn., 13 Can. Ry. Cas. 142.

Dominion Railway Board ordered that the freight rate on binder twine, from Auburn, in U.S.A. to points in Canada, less two cents, should be the maximum rate to Welland, the present rate being unreasonable.

Welland v. Canadian Freight Assn., 13 Can. Ry. Cas. 140, 22 O.W.R. 260.

DESTINATION — CHANGE — TRAFFIC — "C.L" IN TRANSIT — TOLLS — REASONABLE.

Common carriers under the jurisdiction of the Board will be allowed to make a uniform charge of $3 a car, as a reasonable toll for changing destination of C.L. traffic in transit.

Hyde & Webster v. Can. Freight Assn., 18 Can. Ry. Cas. 40.

TOLLS — REASONABLE — SIMILAR CIRCUMSTANCES.

Tolls as arrived at in the United States are not the criteria of reasonable tolls in Canada unless the circumstances in both cases are on all fours. [Manitoba Dairymen's Assn. v. Dominion & Canadian Northern Express Co., 14 Can. Ry. Cas. 142, followed.]

Riley v. Dominion Express Co., 17 Can. Ry. Cas. 112.

TOLLS—REASONABLE—LOW—HIGH—PUBLIC INTEREST.

A toll is unreasonable where it is too low just as much as where it is too high. Tolls must be reasonable, having regard to the carrier just as much as to the travelling public.

Burlington Beach Commission v. Hamilton Radial Electric R. Co., 24 Can. Ry. Cas. 39.

PLACING CARS—PRIVATE SIDING—COMPENSATION.

A carrier which, for the convenience of shippers or consignees and at their request, places their cars on a private siding owned by other parties, is entitled to charge against such shippers or consignees the amount of compensation payable by the carrier to the owners of the siding for such use of it.

Canyon City Lumber Co. v. C.P.R. Co., 24 Can. Ry. Cas. 9.

TOLLS — THROUGH — ARRANGEMENTS — AMBIGUOUS — CONSTRUCTION — REASONABLE AND PROPER — MILLING-IN-TRANSIT OR ANALOGOUS PRIVILEGES — SHIPMENTS—INWARD AND OUTWARD—SAME MOVEMENT.

Tariffs when ambiguous are to be construed in case of the shipper, when they can reasonably and properly be so read. Where the milling-in-transit or analogous privileges are exercised the inbound and outbound shipments are to be treated as part of the same movement, under the contract, and subject to a through rate arrangement.

United Grain Growers v. Canadian Freight Assn., 24 Can. Ry. Cas. 128.

DISCRETION — TOLLS — REASONABLE — JURISDICTION—DEVELOPMENT OF BUSINESS.

Carriers in their discretion may fix tolls to develop business; the Board's jurisdiction is concerned only with the reasonableness of tolls. [Canadian Portland Cement Co. v. G.T. & Bay of Quinte R. Cos., 9 Can. Ry. Cas. 211; Blaugas Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 303, at p. 304; B.C. News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 76, at p. 78; Hudson Bay Mining Co. v. G.N.R. Co., 16 Can. Ry. Cas. 254, at p. 259; Canadian China Clay Co. v. G.T., C.P. & C.N.R. Cos., 18 Can. Ry. Cas. 347; Roberts v. C.P.R. Co., 18 Can. Ry. Cas. 350, followed.]

Waterloo v. G.T.R. Co., 24 Can. Ry. Cas. 143.

TOLLS—FLAT—UNIT OF WEIGHT.

The Board upholding the principle of charging on the unit of weight, refused to grant a flat toll instead of a toll by weight on shipments of wood from Algonquin Park, Ontario, to municipalities for distribution among their citizens at cost.

Waterloo v. G.T.R. Co., 24 Can. Ry. Cas. 143.

ELECTRIC LINE — UNDERTAKING — VALUE — OPERATION — CHANGE IN SYSTEM — COSTS—INCREASE—CAPITAL CHARGES—REVENUE—TOLLS.

The London & Port Stanley Ry., a steam railway recently operated by electricity in a densely populated part of Ontario, may

be taken as shewing in the highest degree, the economies of electric railway operation. To provide for capital charges on the value of the undertaking, and cost of change in the system of operation, as well as for the large increases in wages of employees and costs of supplies, an increased revenue is necessary in order to operate the line as a commercial venture, without loss to the owners or depreciation in the property. Accordingly the passenger toll of 2½ cents per mile was increased by 15 per cent, and the toll on coal by 15 cents per ton, as in the case of steam railways. The Board will extend similar relief to any other electric line whose operation and financial condition require it. [In re Eastern Tolls (Eastern Toll Case), 22 Can. Ry. Cas. 4; In re Increase in Passenger & Freight Tolls (Increase in Rates Case), 22 Can. Ry. Cas. 49, followed.]

In re London & Port Stanley R. Co., 24 Can. Ry. Cas. 160.

CLASSIFICATION — LOWER — REASONABLE —TOLLS—POULTRY.

Poultry shipments move under a lower classification in Canada than in the United States, and third-class rating for live poultry in carloads is not unreasonable. Live poultry in carloads is not entitled to the same classification and the same tolls as live stock, and in making a freight toll reshipment of the finished product is always taken into consideration.

Warrington v. Canadian Freight Assn., 24 Can. Ry. Cas. 155.

TOLL — SPECIAL — HIGHER — REASONABLE — REFUND — JURISDICTION.

The Board refused to give a ruling that a special toll which had already expired was unreasonable, where no further shipments will be made, and the ruling was desired solely for the purpose of claiming a refund from a higher toll charged on the shipment in question. [British American Oil Co. v. C.P.R. Co., 12 Can. Ry. Cas. 327, at p. 333, followed; British American Oil Co. v. G.T.R. Co. (The Stoy Case), 9 Can. Ry. Cas. 178; Canadian Condensing Co. v. C.P.R. Co., 12 Can. Ry. Cas. 1, at p. 3, referred to.]

St. Lawrence Pulp & Lumber Corp. v. C.P.R. Co., 24 Can. Ry. Cas. 107.

INCREASE OF TOLLS—ABSORPTION—FOREIGN MANUFACTURER—CANADIAN PRODUCER.

No attention need be paid to the consideration that the toll charged upon the raw material should be such as would conserve the resources of the country. If the toll is an improper one, with which the Board is alone concerned, there is no reason why it should be allowed to stand because the foreign manufacturer absorbs the increase instead of the Canadian producer.

International Paper Co. v. G.T.R., C.P. & C.N.R. Cos., 15 Can. Ry. Cas. 111.

TOLLS AND RATES—REASONABLENESS—RELATION OF RATES ON RAW MATERIAL AND FINISHED PRODUCT—EQUALIZING COST OF PRODUCTION AT VARIOUS POINTS—INCREASE OF PREVIOUSLY EXISTING RATES —ONUS.

Carriers are not required to adjust their rates (apart from the general question of reasonableness) in such manner as to equalize cost of manufacturing production in different sections; nor is it necessary that rates on raw material and finished product should be so related as to tend to that result. Where special circumstances have operated for a time, e.g., effective water competition, to induce a carrier to give a low rate, the burden of disproving unreasonableness is not necessarily upon the carrier when the rate is subsequently increased.

Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188.

REASONABLENESS OF TOLLS—EX-LAKE—REDUCTION—COMPETITION BY WATER—UNJUST DISCRIMINATION—AGAINST COMMODITIES.

It has not been shewn that either in point of water competition, or in point of conditions affecting carriage, there was such a difference of condition as to justify the discrimination between the ex-lake toll on corn and that on wheat, oats, and barley, and corn should, therefore, be given the same treatment as the latter, where an ex-lake toll on it was in effect. It did not appear that there was any such essential difference between the commodities corn and wheat and oats as would justify a higher toll basis in the case of corn.

Montreal Board of Trade v. G.T. & C.P.R. Cos., 14 Can. Ry. Cas. 351.

TOLLS—PARITY—LONG AND SHORT HAUL—COMPETITION.

The tolls to points midway between Montreal and Toronto and to certain points at the same distance from Montreal as others from Toronto, were placed on a parity, but to points immediately west of Montreal a reduction below fifth class was refused because the advantage of the shortness of the haul against the long haul of the competing Ontario manufacturers would result in equalizing the tolls. The object of a freight classification is the distribution of the cost of transportation, but a refinement of it is impossible with the limited number of merchandise classes, and goods have therefore to be broadly grouped. A reduction in the rating of the dearer commodities that are able to bear higher carrying toll must necessarily tend to curtail the ability of the carrier to make lower tolls, without which cheaper commodities cannot move at a profit.

Montreal Board of Trade v. Canadian Freight Assn., 15 Can. Ry. Cas. 429.

REASONABLENESS OF RATES.

Where a railway company transports cars from the end of its line by means of barges, and the cars are unloaded at the dock by

a winch, and then hauled by horses over spur tracks, leading to warehouses, proper delivery is made at the dock, and a further charge for hauling and placing cars under an agreement is reasonable although under the tariff filed with the Board through tolls are quoted from the point of shipment to destination, including water transportation.

Kelowna Board of Trade v. C.P.R. Co., 15 Can. Ry. Cas. 441.

REASONABLENESS — EQUALIZATION AS TO CONDITIONS.

The Board has no right to attempt to equalize geographical, climatic or economic conditions affecting cost of production, but is only concerned with the reasonableness of the toll which the carrier is seeking to collect for the transportation of a given commodity.

Canadian China Clay Co. v. G.T., C.P. & C.N.R. Cos., 18 Can. Ry. Cas. 347.

REASONABLENESS OF RATES—TOLLS.

The rates of one railway company are not to be taken as a conclusive measure of what it is reasonable to charge on another railway. It is in the discretion of a railway company to take into consideration, not only the rate on the in-bound raw material, but also the rate on the out-bound product. The circumstances affecting the rate charged on the movement of ore over the C.P.R. differ to such an extent from those attaching to the movement on the Nelson and Fort Sheppard Ry. that it would not be just to take the rate of the former company as a measure of what should be charged by the latter. The Board made an order for additional and lower rates on the movement of ore from Salmo to Nelson, when the valuation does not exceed $15 and $20 per ton. [Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 192; Michigan Sugar Co. v. C. W. & L.E.R.W. Co., 11 Can. Ry. Cas. 363, followed.]

Re Hudson Bay Mining Co. & G.N.R. Co., 24 W.L.R. 932.

(§ IV C—536)—THROUGH FREIGHT — TWO COMPANIES' LINES—LOCAL SHUNTING —ONE COMPANY FOR SAME DISTANCE— CHARGES—RAILWAY COMMISSION.

Dominion Sugar Co. v. G.T., C.P., C., W. & L.E., & P.M.R. Cos., 20 D.L.R. 975, 17 Can. Ry. Cas. 240.

TOLLS—REASONABLE—THROUGH AND LOCAL —COMPETITION BY WATER.

The proposed through tolls on pulpwood which were not attacked as unreasonable per se through (being held down by water competition) and being lower than the tolls between the same points on other rough forest products (in force some time without complaint) may fairly be considered reasonable.

International Paper Co. v. G.T., C.P.R. & C.N.R. Cos., 15 Can. Ry. Cas. 111.

TOLLS—JOINT—SUM OF THE LOCALS—UNREASONABLE—UNJUST DISCRIMINATION —ONUS—CARRIERS.

To charge a joint toll in excess of the sum of the locals is prima facie unreasonable and unjustly discriminatory, and the onus of disproof should, in individual complaints, be on the carrier or carriers concerned. [In re Joint Freight & Passenger Tariffs, 10 Can. Ry. Cas. 343, followed.]

Montreal Board of Trade v. C.P., O. & N.Y., & I.R. Cos., 18 Can. Ry. Cas. 6.

TOLLS—INTERPRETATION—LITERAL.

Tariffs of tolls should be interpreted literally without reference to unexpressed intentions of carriers framing them.

Imperial Steel & Wire Co. v. G.T. & C.P.R. Cos., 24 Can. Ry. Cas. 150.

TOLLS — UNREASONABLE — THROUGH — DIVISION.

A through toll of $1.00 per ton on moulding sand from Fonthill to Toronto, a distance of 78 miles, whereof the G.T.R. Co. receives 78 cents and the Niagara, St. Catharines & Toronto R. Co. 22 cents, was held not unreasonable. [Canadian Manufacturers Assn. v. Canadian Freight Assn. (General Interswitching Order), 7 Can. Ry. Cas. 302, followed.]

Fonthill Gravel Co. v. G.T. & Niagara, etc., R. Cos., 20 D.L.R. 976, 17 Can. Ry. Cas. 248.

SHIPMENT OF CHINA CLAY FROM ENGLAND— THROUGH TOLLS—CONNECTING RAIL CARRIER—EQUALIZATION.

Where china clay from Cornwall, England, for Canadian delivery, moves under through bills of lading at a through toll to the point of destination, any change advancing the rail carriers' import toll representing part of the through movement would result in the Canadian carriers not being able to hold the business in competition with foreign ports and rail carriers quoting a lower through toll, and where the point of production of the Canadian product is from 60 to 80 miles further than Montreal from the majority of the western destinations, and a two-line haul has to be employed as against one, the Board will not make the local joint toll from the point of Canadian production equal to the Montreal import toll to the same points of destination.

Canadian China Clay Co. v. G.T., C.P. & C.N.R. Cos., 18 Can. Ry. Cas. 347.

(§ IV C—537)—EXPERIMENTAL TOLLS—DEVELOPMENT OF BUSINESS.

It is not the function of the Railway Board to order experimental tolls, against the objection of the carrier, with a view to develop business, but the Board is to deal with the reasonableness of the transportation charges, recognizing the right of the carrier to a reasonable profit. [Florida Fruit Co. v. A.C.L. R. Co., 17 I.C.C.R. 560, specially referred to.]

B.C. News Co. v. Express Traffic Assn., 4 D.L.R. 239, 21 W.L.R. 5.

DISCRETION—TOLLS — UNJUST DISCRIMINATION—COMPETITION.

A toll obtaining on one railway cannot be

claimed to be unjustly discriminatory simply because a toll on another which is put into effect for competitive reasons is lower, it being within the discretion of a carrier whether it shall meet competition or not.

Edmonton, Clover Bar Sand Co. v. G.T.P.R. Co., 17 Can. Ry. Cas. 95.

(IV C—538)—CLASSIFICATION—C.L. AND L.C.L. TRAFFIC.

The Board refused an application to add flannelette sheets to the dry goods list of the Canadian Freight Classification at the same rating provided for "Cotton piece goods," viz., L.C.L. 2nd class, and C.L. 4th class, instead of a rating 1st class in any quantity with no C.L. rating as in United States Official and Western Classifications.

Montreal Board of Trade v. Canadian Freight Assn., 15 Can. Ry. Cas. 429.

(IV C—540)—SEASONED AND UNSEASONED WOOD — EQUALIZATION — DISCRIMINATION.

Railway companies are not obliged to equalize the disadvantages of the shippers from the standpoint of the costs of production. The basis of toll-making so far as the unit of weight is concerned is 100 lbs., and the tolls vary with the weight. The Board will not require seasoned and unseasoned wood to be carried at the same C.L. toll, irrespective of weight, in order to equalize the disadvantage arising to shippers without capital as compared with shippers having capital, to do so would create unjustly discriminatory conditions. [Canadian Portland Cement Co. v. G.T. & Bay of Quinte R. Cos., 9 Can. Ry. Cas. 241; Blangas Co. v. Can. Freight Assn., 12 Can. Ry. Cas. 303, at 304; B.C. News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 176 at 178; Can. China Clay Co. v. G.T., C.P. & C.N. R. Cos., 18 Can. Ry. Cas. 347, followed.]

Roberts v. C.P.R. Co., 26 D.L.R. 621, 18 Can. Ry. Cas. 350.

TOLLS — UNJUST DISCRIMINATION — UNDUE PREFERENCE — QUESTION OF FACT — EFFECTIVE COMPETITION—BY WATER AND FOREIGN CARRIERS.

The Railway Act does not forbid all discriminations and preferences, but only forbids unjust discrimination or undue preference, and whether either one or the other exists in any particular case is a question of fact to be decided. The Board found that the existing discrimination between the tolls in Eastern and Western Canada is not unjust, but is justified by effective water competition, and by the competition of U.S. Railways throughout Eastern Canada [The International and Toronto Board of Trade Rate Case].

Re Western Tolls, 19 D.L.R. 43, 17 Can. Ry. Cas. 123.

DISCRIMINATION—REBATES—PASSES.

A claim of unjust discrimination, between tolls charged for delivery of freight at different points, some of which have and others have not, further railway communication before final delivery is made, cannot be supported where the same circumstances and conditions do not and cannot exist.

Kelowna Board of Trade v. C.P. R. Co., 15 Can. Ry. Cas. 441.

DISCRIMINATION—REBATE—PASSES.

Application that the tolls charged were unjustly discriminatory and that they should be reduced, being unreasonable per se. The applicant submitted that the existing commodity or fifth-class rate from Auburn in the United States to points in Canada, less two cents, should be the maximum subject to the qualification that when the rates from Welland, Ontario, to shorter distance points were less than the Auburn rate they should apply as maximum. It was alleged by the respondent and admitted by the applicant that there was no movement of binder twine from Auburn into Canada. Held, 1. (Mr. Commissioner McLean):—That since the rate from Auburn was only a paper rate there could be no competition and no unjust discrimination. 2. Held, however (the Chief Commissioner and Mr. Commissioner Mills):—That the toll was unreasonable and the Auburn rate less two cents should be applied.

Town of Welland v. Canadian Freight Assn., 13 Can. Ry. Cas. 140, 22 O.W.R. 260.

Complaint of unjust discrimination against the respondent, alleging that the tolls for export from Routhier and other points north of Nomining to Montreal are excessive and bear a higher proportion to the locals from points north of Nomining than from points south of it. Held, that the export tolls at Montreal from Loranger, Hebert and Campeau must be reduced to 5 cents from Routhier and Mont Laurier to 6 cents and a tariff to that effect filed. [Canadian Lumbermen's Assn. v. G.T. and C.P.R. Cos. [Export Tolls on Lumber (No. 2)], 11 Can. Ry. Cas. 344, referred to.]

Cox & Co. v. C.P.R. Co., 13 Can. Ry. Cas. 20, 10 E.L.R. 379.

UNJUST DISCRIMINATION—PREFERENCE.

A mere statement as to difference of tolls is not conclusive as shewing the existence of unjust discrimination or undue preference; there must be evidence of the traffic moving and the effect thereon, and the discrimination must be one creating actual detriment to complainants to make it unjust.

London Board of Trade v. Express Traffic Assn., 19 Can. Ry. Cas. 420.

JURISDICTION—COMPETITION—UNJUST DISCRIMINATION—COMMODITY RATE—PROPORTIONATE REDUCTION—THROUGH RATE —THROUGH TRAFFIC—BASING POINT.

Continental, Prairie & Winnipeg Oil Cos. v. C.P., C.N., Minnesota, St. Paul & Sault Ste. Marie, G. N. & Northern Pacific R. Cos., 13 Can. Ry. Cas. 156.

TOLLS — PERMISSIVE — JURISDICTION — AMENDATORY — UNJUST DISCRIMINATION — RAILWAY ACT, S. 341 (a).

The Board has no power under s. 341 (a)

to extend the carriage of traffic so as to include a practice not already existing where no question of unjust discrimination arises. The granting of the tolls provided for by s. 341 is permissive so far as the carrier is concerned; the jurisdiction of the Board under that section is simply amendatory.

Waterloo v. G.T.R. Co., 24 Can. Ry. Cas. 143.

WHARFAGE TOLLS ON THROUGH SHIPMENTS—UNJUST DISCRIMINATION.

It is not unreasonable that the combined tolls on shipments from the east contracted to Fort William, delivered and stored there, and subsequently shipped west should exceed those charged from the same eastern shipping point to the same western destination, for the trans-shipping of which the carrier must necessarily provide facilities at Fort William, as in the latter case there is but one transaction or contract, whilst in the former there are two; therefore it is not unjust discrimination against Fort William to impose a wharfage toll on shipments to that point and not to exact it on through shipments.

Fort William Board of Trade v. C.P.R. Co., 18 Can. Ry. Cas. 401.

STANDARD FREIGHT MILEAGE TARIFF—MAIN AND BRANCH LINES—UNJUST DISCRIMINATION.

Difference in density of traffic as between main and branch lines does not affect the application of a standard freight mileage tariff; therefore, all points, whether on a main or branch line, within the same mileage group, should be given the same toll, and it is unjust discrimination to make a different toll against one point of the group.

Two Creek Grain Growers' Assn. v. C.P.R. Co., 18 Can. Ry. Cas. 403.

RAILWAYS — CONSTRUCTION OF STATUTE — "THE RAILWAY ACT." R.S.C. (1906), c. 37, ss. 77, 315, 318 (2), 323—(D). 1 EDW. VII. c. 53—(MAN.) 52 VICT. c. 2; 53 VICT. c. 17; 1 EDW. VII. c. 39—BOARD OF RAILWAY COMMISSIONERS—COMPLAINT — EVIDENCE — AGREEMENT FOR SPECIAL RATES—UNJUST DISCRIMINATION—PRACTICE—FORM OF ORDER IN REFERENCE.

C.P. & C.N. R. Cos. v. Regina Board of Trade, 13 Can. Ry. Cas. 203, 45 Can. S.C.R. 321.

(§ IV C—541)—UNJUST DISCRIMINATION—PASSENGER TOLLS—COMPETITION.

Under s. 315, unjust discrimination does not exist, where there is actual competition at the initial and terminal points reached by railway lines, and the potential choice of a passenger at an intermediate point whereby he may elect to buy a through ticket for the whole distance between the initial and terminal points, cheaper than one on a mileage basis from such intermediate point to the terminal point, spreads the effect of competitions over the whole journey.

Fredericton Board of Trade v. C.P.R. Co., 21 D.L.R. 790, 17 Can. Ry. Cas. 439, reversing 17 Can. Ry. Cas. 433.

UNJUST DISCRIMINATION—STOP-OVER PRIVILEGES — CANNERS — DIFFERENT LOCALITIES.

The Board held that it was unjust discrimination to grant stop-over privileges to canners in one locality and refuse them to canners in another locality.

British Canadian Canners v. G.T. R. Co., 14 Can. Ry. Cas. 346.

REDUCTION OF TOLLS—FARMERS ATTENDING AGRICULTURAL CONVENTION — UNJUST DISCRIMINATION.

Under ss. 77, 315, 341, the Board has no jurisdiction to compel a railway company to issue reduced tolls to farmers attending agricultural conventions, or to any other class of the community. It is entirely within the discretion of the carriers whether they will do so or not, and for the Board to do so would be unjust discrimination against other classes of the community.

Roy v. Can. Passenger Assn., 17 Can. Ry. Cas. 320.

COMMUTATION TICKETS — CANCELLATION — STANDARD PASSENGER TOLLS — UNJUST DISCRIMINATION.

For many years the respondent company sold ten-trip tickets between Quebec and St. Catherine station for $4, and similar tickets to other suburban points. Upon these tickets being cancelled the Board refused an application for their re-establishment. No contract was shown with any of the applicants who built summer cottages at St. Catherine, that if these were established on the line of the railway they would forever give these ten-trip tickets. It is a well-settled principle that a railway company will not be ordered to establish passenger tolls less than its standard toll unless it can be shewn that an undue or unreasonable preference or advantage has been given to any particular description of traffic or that unjust discrimination has been shewn to exist between different localities under substantially similar circumstances and conditions.

Brown v. Quebec & Lake St. John R. Co., 18 Can. Ry. Cas. 342.

(§ IV C—542a)—COMPETITION—DISSIMILAR CONDITIONS.

It constitutes an unlawful preference and discrimination, under s. 317 of the Railway Act, for a railway company to carry for an independent contractor over a road he is constructing which had not yet been opened to the public for traffic by an order of the Board of Railway Commissioners under s. 261 of the Railway Act, camp and contractor's supplies other than those actually necessary for the construction of the road, to be sold by the contractor for his own benefit. The fact that the officers of a railway company that gave a contractor, who was building it, a preference in the transportation of freight over the road be-

fore it was opened for traffic to the public by an order of the Board of Railway Commissioners, under s. 261 of the Railway Act, did not have knowledge that the goods transported were being sold by the contractor for his own benefit, or that they were not camp and contractor's supplies necessary for the construction of the road, will not relieve the company from the charge of giving an unlawful preference under s. 317 of the act, where no attempt was made by them to ascertain if the goods transported were actually necessary to the construction of the road.

Re G.T.P. R. Co., 3 D.L.R. 819.

TOLLS — DIFFERENCES — QUANTITIES — TRAFFIC—C.L. AND L.C.L.—TRAINLOAD.

While it is justifiable to base differences in a toll on quantity as between C.L. and L.C.L. traffic movement, it is not justifiable to make a difference in a toll based on the distinction between carload and train-load movements.

St. David's Sand Co. v. G.T. & M.C.R. Cos., 20 D.L.R. 901, 17 Can. Ry. Cas. 279.

TOLLS—ALL RAIL AND LAKE AND RAIL—ROUTES — COMPETITION — UNJUST DISCRIMINATION—EAST AND WESTBOUND.

The tolls for the lake and rail route being on a competitive basis and the all-rail route eastbound having the advantage of one cent over the rail portion of the route westbound to Winnipeg there was no unjust discrimination. The Board is concerned with seeing that tolls are on a relatively equal basis. It is not its function to equalize costs of production and upon the evidence a case for reduction in tolls was not made out. [Canadian Portland Cement Co. v. G.T. & Bay of Quinte R. Cos., 9 Can. Ry. Cas. 209, followed.]

Imperial Rice Milling Co. v. C.P.R. Co., 14 Can. Ry. Cas. 375, 23 W.L.R. 594.

UNJUST DISCRIMINATION—BETWEEN LOCALITIES — TOLLS — COMMODITY — FIFTH CLASS—HIGHER BASIS—COMPETITION.

The fifth class tolls on wire fencing from Montreal, westbound being on a higher basis than the commodity tolls, on shipments moving from Ontario points eastbound, there was unjust discrimination against the Montreal manufacturer in competition with the Ontario manufacturer.

Montreal Board of Trade v. Canadian Freight Assn., 14 Can. Ry. Cas. 347.

UNJUST DISCRIMINATION—BETWEEN LOCALITIES — TOLLS — REDUCTION — COMPARISON—TOLL BASIS—EAST AND WESTBOUND—COMPETITION.

An application that the alleged unjust discrimination in favour of Eastern refineries be removed and for lower freight tolls from Vancouver to all points in Alberta and Western Saskatchewan, raises the point: Is the difference in rate basis eastbound over the mountains from the Pacific Coast justifiable as compared with the rate basis from Montreal and from the head of the lakes westbound? which is part of the pending Western Rate Investigation, and a ruling will not be given on this particular case in advance of the ruling on the general case. [Reg. Board of Trade v. C.P. & C.N.R. Cos. (Reg. Toll Case), 11 Can. Ry. Cas. 380, referred to.]

B.C. Sugar Refining Co. v. C.P.R. Co., 14 Can. Ry. Cas. 354.

TOLLS—COMPETITION BY WATER—DISCRETION OF CARRIERS.

In the case of a compelled toll based on water competition, it is the privilege of a carrier, in its own interests, to meet water competition, but it is not the privilege of the shipper to demand less than normal tolls because of such competition, which railway in its discretion does not choose to meet. [Plain & Co. v. C.P.R. Co., 9 Can. Ry. Cas. 223; Canadian Oil Cos. v. G.T., C.P. & C.N.R. Cos., 12 Can. Ry. Cas. 350, followed.]

Blind River Board of Trade v. G.T.R., C.P.R. & Dominion Trans. Cos., 15 Can. Ry. Cas. 146.

UNJUST DISCRIMINATION—MILLING IN TRANSIT—COMMON MARKET.

It is unjust discrimination to charge a higher milling-in-transit toll on the same commodity moving from different localities by different routes under similar circumstances and conditions to a common competing market. [Ontario & Manitoba Flour Mills v. C.P.R. Co., 16 Can. Ry. Cas. 430, at p. 431, referred to.]

Dominion Millers Assn. v. Canadian Freight Assn., 22 Can. Ry. Cas. 125.

TERMINAL — UNJUST DISCRIMINATION — JURISDICTION—AMENDMENTS AND SUPPLEMENTS.

Where no unjust discrimination is shewn among shippers, it is not the function of the Board to exercise its jurisdiction by inquiring into the status of connecting carriers, approving amendments and supplements to the tariffs of tolls of the line carriers engaged in international traffic for the purpose of removing a terminal carrier as a participator on the ground that it is of the character known in the United States as an industrial railway. The Essex Terminal R. Co. (Incorporated 2 Edw. VII., c. 62) was found by the Board upon the evidence not to be an industrial railway within the terms of the Industrial Railways Case, 29 I.C.C.R. 212. Amendments to the tariffs of line carriers engaged in international traffic removing the Essex Terminal as a participating carrier therefrom were suspended.

Essex Terminal R. Co. v. G.T., M.C. Wabash and N.Y.C.R. Cos., 22 Can. Ry. Cas. 301.

UNJUST DISCRIMINATION — JURISDICTION — REFUND.

It is unjust discrimination, other things being equal, to charge a higher toll from one point of origin as compared with another, at practically the same distance from the same point of destination. The Board has

no jurisdiction to direct a refund of a portion of a toll charged and collected under a tariff legally in force. [Montreal Board of Trade v. G.T. and C.P. Ry. Cos., 14 Can. Ry. Cas. 351; Dominion Sugar Co. v. G.T., C.P., Chatham, Wallaceburg & Lake Erie & Pere Marquette R. Cos., 17 Can. Ry. Cas. 240, at p. 247, referred to.]

Midland Lumber Shippers v. G.T.R., 22 Can. Ry. Cas. 387.

COMPETITION BY WATER—UNJUST DISCRIMINATION.

It is not unjust discrimination nor undue or unreasonable prejudice or disadvantage under ss. 315 (5), 318, for a carrier to charge lower than normal toll from the point of shipment to a destination point owing to effective water competition, than on shipments from the same point to an intermediate point where such competition is not effective.

City of Chatham & Chatham Board of Trade v. C.P.R., 22 Can. Ry. Cas. 391.

UNJUST DISCRIMINATION—MILLING IN TRANSIT—CANADIAN AND FOREIGN MILLERS—TOLLS — ADJUSTMENT — COMPETITION —PARTICIPATING CARRIERS.

Unjust discrimination in favour of United States milling points as against Canadian milling points is not established by proof that, (in order to meet the toll of United States lines and participate in the business), milling-in-transit privileges and tolls are allowed over Canadian lines in respect of shipments milled at the former points, and not to shipments milled at the latter, where it appears that the Canadian milling points can enjoy similar tolls and privileges by an alternative route through the United States to the same destinations so that there is no actual disadvantage in practice. Unjust discrimination is not a matter of tolls in the abstract, and the Board is not justified in interfering on that ground without an affirmative shewing that there is actual detriment resulting from the existing toll adjustment. The abrogation of milling-in-transit privileges, formerly allowed in respect of shipments milled at points on the respondent's line in Canada destined to points on or via participating lines and their connections, was held not to be unjust discrimination, as it was shewn that the participating carriers did not grant the privileges in question to millers on their own lines under similar conditions.

Empire Flour Mills v. Michigan Central R. Co., 16 Can. Ry. Cas. 425.

DISCRETION—WATER COMPETITION—TOLLS—TERMINAL COMBINATION—RAIL AND WATER — ALL RAIL — LOWER — COMMON DISTRICT—OPERATING AND TRAFFIC CONDITIONS—SIMILAR AND DISSIMILAR—UNJUST DISCRIMINATION—TRAFFIC MOVEMENT—SMALL VOLUME.

The main question in this case relates to the terminal toll which represents the toll quoted from points in eastern territory to those in western and vice versa, where the movement is open by water, or where the distance from water is so short that the combination rail and water toll is lower than the regular all rail toll, the Board has invariably held that carriers, in their discretion, may or may not meet water competition or competition of any form, and may elect to attempt to get business at small remuneration or do without it altogether, subject to the qualification that when competition is met the competitive toll should be extended to all points in a common district where similar operating and traffic conditions obtain. The volume of traffic moving by water into Nanaimo being very small as compared with that into Victoria, conditions are dissimilar, there is no unjust discrimination. [Nanaimo Board of Trade v. C.P.R. Co., 20 Can. Ry. Cas. 224, reheard and affirmed; B.C. News Co. v. Express Traffic Assn., 13 Can. Ry. Cas. 176; Midland Lumber Shippers v. G.T.R. Co., (Pine Lath Refund Case) 22 Can. Ry. Cas. 387, followed.]

Nanaimo Board of Trade v. C.P.R. Co., 23 Can. Ry. Cas. 92.

UNJUST DISCRIMINATION—MILLING-IN-TRANSIT—THROUGH TOLLS COMPETITION.

The Board, in the exercise of its jurisdiction to prevent unjust discrimination has power to order that milling-in-transit be allowed to flour mill owners applying therefor, upon proof that circumstances and conditions with respect to the traffic from the applicants' mill are substantially similar to those of mills already enjoying such rate.

Ontario & Manitoba Flour Mills v. C.P.R. Co., 16 Can. Ry. Cas. 430.

UNJUST DISCRIMINATION — TOLLS — MAXIMUM — TRAFFIC — POLICY — COMPETITION.

It is unjust discrimination for the respondent from considerations of traffic policy to extend the advantage of the competitive toll to points where competition does not exist.

Fredericton Board of Trade v. C.P.R. Co., 17 Can. Ry. Cas. 433.

TOLLS—PARITY—COMMON POINT.

The tolls on lumber from Golden, on the main line of the C.P.R., to prairie destinations, should be put on a parity with the tolls from corresponding points on the Crow's Nest Branch to the same destinations via the same common point.

Mountain Lumber Mfg. Assn. v. C.P.R. Co., 17 Can. Ry. Cas. 285.

UNJUST DISCRIMINATION — JURISDICTION — REFUNDS—STANDARD TARIFFS—TOLLS —MILEAGE—RAILWAY ACT, S. 327.

Upon a section of railway being completed and taken over by the operating department, the railway company should file and put in force standard tariffs under s. 327. There is unjust discrimination where an unreasonably long time elapses after

completion before lumber mileage tolls are put in force on such section.

Riverside Lumber Co. v. C.P.R. Co., 18 Can. Ry. Cas. 17.

COMPETITION BY WATER—UNJUST DISCRIMINATION.

Where the underlying principle of competition by water affects the whole toll structure, a point unaffected by such competition is not unjustly discriminated against in not receiving as favourable tolls as points that are affected.

Cowichan Ratepayers Assn. v. C.P.R. Co., 18 Can. Ry. Cas. 395.

STORAGE TOLLS—UNJUST DISCRIMINATION—COMPETITION.

The practice of railway companies in granting lower forwarding storage tolls than the local storage tolls is not unjust discrimination, because tolls which otherwise of necessity might be charged on a parity may differ one from the other as a result of competitive conditions.

Port Arthur & Fort William Boards of Trade v. C.P.R. Co., 18 Can. Ry. Cas. 406.

COMPETITION—FOREIGN ROAD—TOLLS AND RATES—REASONABLENESS.

A carrier is not obliged to meet a lower rate made by a competing foreign road and failure to meet it is not necessarily evidence of the unreasonableness of the higher rate. [Davy v. Niagara, St. Catharines & Toronto & Michigan Central R. Cos., 12 Can. Ry. Cas. 61; Dominion Millers' Assn. v. G.T. & C.P.R. Cos., 12 Can. Ry. Cas. 363; Canadian Portland Cement Co. v. G.T. & Bay of Quinte R. Cos., 9 Can. Ry. Cas. 211; B.C. Sugar Refining Co., v. C.P.R. Co., 10 Can. Ry. Cas. 159, followed.]

Dominion Sugar Co. v. Canadian Freight Assn., 14 Can. Ry. Cas. 188.

DISCRETION—TOLLS—EXPORT AND DOMESTIC—COMPETITION BY WATER — UNJUST DISCRIMINATION.

The Board has on many occasions decided that the extent to which carriers may meet water competition, as long as there is no unjust discrimination, is within their own discretion. [Canadian Lumbermen's Assn. v. G.T., C.P., & C.N.R. Cos., 11 Can. Ry. Cas. 306, followed.]

Canadian Lumbermen's Assn. & Montreal Board of Trade v. G.T., C.P. & C.N.R. Co., 17 Can. Ry. Cas. 102.

(§ IV C—543)—DRIED FRUIT — BLANKET TOLL—COMPETITION—LONG AND SHORT HAULS.

Dried fruit is carried eastward from the Pacific Coast under tariffs giving a blanket toll of $1.10 from San Francisco to, e.g., St. Paul, Duluth, Buffalo and New York. The same toll is applied to junction points adjacent to the international boundary, and there is the same toll to Winnipeg. The toll to Toronto is the same as to Buffalo, while Montreal has the same toll in competition with New York. The toll to Fort William is the toll to Duluth, plus the by water toll from Duluth to Fort William, and wharfage charges at Fort William. Competition is thus more effective in favour of Toronto than Fort William. There being no movement of dried fruit via Winnipeg and Fort William to Toronto—the traffic moving through United States points only—therefore, there is no violation of the long and short haul clause, s. 315 (5), and the existing toll adjustment has not been shewn to work detrimentally to Fort William.

Mathias v. C.P., C.N. & G.T.P.R. Cos., 19 Can. Ry. Cas. 410.

INTERSWITCHING CHARGES—LONG AND SHORT HAUL.

Under the General Interswitching Order No. 4988 (July 4, 1908) (see 7 Can. Ry. Cas. 332), the carrier that has the right or obligation to perform the interswitching service is entitled to the interswitching toll applicable to any distance within four miles, however short it may be, so long as the toll is not graduated according to distance.

Brampton Milling Co. v. C.P.R. Co., 18 Can. Ry. Cas. 337.

INTERSWITCHING TOLLS—DISTRIBUTION AS TO ZONES.

It is a principle of tariff making to break the toll groups at flag stations or unimportant points as far as practicable. Acting upon this principle the Board refused an application to distribute the zones in respondents' city of Hamilton terminals, within which interswitching tolls of 1 cent and 1½ cents per 100 lbs. respectively prevailed.

Steel Co. of Canada v. Toronto, Hamilton & Buffalo R. Co., 18 Can. Ry. Cas. 339.

UNJUST DISCRIMINATION — TOLLS — REDUCTION—REASONABLENESS.

The application of Montreal manufacturers for a reduction in tolls below the fifth class on shipments to points on the branches north of the main line of the C.P., Montreal to Toronto, and north of the Grand Trunk main line, Toronto to Sarnia, was refused because all manufacturers shipping to the northern localities were subject to the fifth class, and the Board was not dealing with the reasonableness of the tolls, but with unjust discrimination against Montreal.

Montreal Board of Trade v. Canadian Freight Assn., 14 Can. Ry. Cas. 347.

(§ IV C—544)—DISCRETION—UNJUST DISCRIMINATION — FACILITIES — EQUAL BASIS — SPURS — SWITCHING TOLLS — SPECIAL OR ARBITRARY—RAILWAY ACT, s. 226.

The object of s. 226 was to compel carriers, instead of leaving it entirely to their discretion, to construct spurs furnishing facilities to all traders on an equal basis, not subject to any special or arbitrary switching toll for the use of such spur, and failure to do so is unjust discrimination, but if, after the spur has been constructed, the traffic moved is not sufficient to warrant

its construction, the loss is on the trader and not on the carrier.

Hepworth Silica Pressed Brick Co. v. G.T.R. Co., 18 Can. Ry. Cas. 9. [Affirmed 21 D.L.R. 480, 19 Can. Ry. Cas. 365, 51 Can. S.C.R. 81.]

(§ IV C—545) — EXPRESS AND C.O.D. CHARGES.

It is an unjust discrimination against a shipper, as well as an excessive charge, for an express company to remit money collected on a C.O.D. shipment to the shipper by an express money order instead of sending him the money therefor, and to exact for such service the regular merchandise C.O.D. rate which was greatly in excess of that chargeable for the money order.

Boyes v. Dominion Express Co., 4 D.L.R. 653, 21 W.L.R. 389.

EXPRESS AND C.O.D. CHARGES — EXPRESS COMPANIES — RATES FOR CARRIAGE OF CREAM.

Re Express Rates on Cream, 25 W.L.R. 971.

EXPRESS AND C.O.D. CHARGES.

It appeared that the rates charged by an express company between certain points were higher than those of another express company for similar or greater distances, but that such rates were within the maximum prescribed by the Board in the general inquiry relating to express companies' rates; as a result of the judgment upon that inquiry, the discrimination will disappear when the new rates come into force.

Re Canadian Northern Express Co., 24 W.L.R. 583.

(§ IV C—546)—UNJUST DISCRIMINATION—AGAINST COMMODITIES—MILEAGE BASIS—DIFFERENT COMMODITIES.

Putting the tolls on cornmeal on a mileage basis by reducing them from 17½ cents to 15 cents per 100 lbs., from Montreal to New Brunswick points, would be unjust discrimination against the Maritime millers, and these tolls should not be disturbed.

Montreal Board of Trade v. G.T. and C.P.R. Cos., 14 Can. Ry. Cas. 351.

(§ IV C—547)—PROVINCIAL RAILWAYS—FREIGHT TOLLS—REBATE AGREEMENT—ANTI-REBATE RAILWAY ACT (QUE.).

An agreement between a provincial railway company in Quebec and a shipper, whereby a rebate is allowed upon freight tolls, is not necessarily a violation of the Anti-rebate Act, Que. 1906 (art. 6607 et seq., R.S.Q. 1909), although it stipulates that the shipper is to give the railway all his shipments, where the rebate is granted in respect of other valuable considerations moving from the shipper, such as the assumption of the task of loading and unloading; and a railway company which has received tolls paid to it on the faith of such an agreement made prior to the passing of the Anti-rebate Act, cannot set up the statute in answer to the shipper's action for recovery of rebates where the rebates are not shewn to constitute an unjust discrimination, particularly where the tolls paid had not been authorized by any provincial order-in-council. [Kennedy v. Quebec & Lake St. John R. Co., 14 Can. Ry. Cas. 161, 21 Que. K.B. 85, affirmed in the result.]

Quebec & Lake St. John R. Co. v. Kennedy, 15 D.L.R. 400, 48 Can. S.C.R. 520, 13 E.L.R. 566.

TOLLS ON FREIGHT—SPUR LINE—REBATE.

In subs. 3 of s. 226 of the Railway Act, Can., the words "tolls charged by the company in respect of the carriage of traffic for the applicant over the spur line" mean the tolls charged for the transportation, on the railway company's line, of goods carried to or from the applicant's premises and not tolls charged for the movement of freight on the spur alone; consequently a railway ordered to build a spur line to an industrial plant under s. 226 at the expense of the applicant and to move cars over it without additional toll, may be directed by the Railway Commission to rebate to the applicant a fixed sum per car from the tolls on business done with the applicant and carried over the spur line until the cost of construction shall have been repaid by the railway.

G.T.R. Co. v. Hepworth Silica Pressed Brick Co., 21 D.L.R. 480, 51 Can. S.C.R. 81, 19 Can. Ry. Cas. 365, affirming 18 Can. Ry. Cas. 9.

D. DUTY AS TO DEPOTS; STOPPING TRAINS; DUTY TO RUN TRAINS.

(§ IV D—550)—DUTY AS TO DEPOTS—STOPPING TRAINS—DUTY AS TO STOPPING PLACES—BOARD OF RAILWAY COMMISSIONERS—REGULATION OF LOCATION OF STATIONS AND SIDINGS—RAILWAYS EXPLOITING TOWNSITE—DISREGARD OF PUBLIC CONVENIENCE.

Re Cutknife Stations, 7 D.L.R. 844, 21 W.L.R. 382.

TRAIN SERVICE—PASSENGERS.

In answer to complaints that a railway company during a period of depression has decreased and impaired the passenger service upon one of its local lines forming part of its system, the company submitted figures shewing a deficit as a result of the operations of its system as a whole within the province. It appeared, however, that the earnings of the local line in question shewed a decrease in the passenger traffic but there had been an increase in its freight earnings, resulting in net increase, the Board held that the local line should not be blamed for the deficit on the system generally (due to the operation of lines which could hardly be said to have passed beyond the construction stage), that the former passenger service should be restored, and it so ordered.

Re Trenton, Maynooth & Bancroft Line, 28 D.L.R. 557, 19 Can. Ry. Cas. 268.

TRAIN SERVICE—EARNINGS—BONUS.

Where the total freight and passenger earnings on a section of railway are unre-

munerative, the Board will not order the former train service to be restored, but where, under a by-law of the municipality, in consideration of a bonus of $5,000, the railway company's predecessor in title undertook to run a train from Sydenham to Harrowsmith in the forenoon and one back in the afternoon every week day, and if the company should at any time hereafter "fail to . . . run said train, they can only do so upon repaying said bonus of $5,000 to said municipality," it was held that this obligation was not met by running a train leaving Sydenham at 1.59 a.m. and arriving at Harrowsmith at 2.09 a.m., and that the bonus must be repaid unless the morning service was restored.

Tp. of Loughboro v. C.N.R. Co., 28 D.L.R. 558, 19 Can. Ry. Cas. 276.

GOVERNMENTAL REGULATION—RAILWAY COMMISSION—LOCATION OF DEPOT.

The Board of Railway Commissioners, on fixing the location for a railway station on the Transcontinental Railways at one of two conflicting sites proposed by representatives of settlements closely situated to each other and bearing similar names, will not restrain the location of a second station at the other site on the application of the railway on a case for additional facilities being made out.

Kelly v. G.T.P.R. Co., 5 D.L.R. 303, 14 Can. Ry. Cas. 15, 21 W.L.R. 810.

GOVERNMENTAL REGULATION—LOCATION OF STATION—ENGINEERING DIFFICULTIES—PUBLIC CONVENIENCE.

Re South Hazelton, 8 D.L.R. 1036, 22 W.L.R. 445.

GOVERNMENTAL REGULATION — ERECTION OF STATION — CONTRADICTORY EVIDENCE — BOARD OF RAILWAY COMMISSIONERS.

Re Druid Station, 7 D.L.R. 884, 14 Can. Ry. Cas. 20, 21 W.L.R. 813.

GOVERNMENTAL REGULATION AS TO ERECTION OF STATION—BOARD OF RAILWAY COMMISSIONERS—APPROVAL OF WORKS CONSTRUCTED IN CONTRAVENTION OF THE RAILWAY ACT.

Re G.T.P. Branch Lines, 7 D.L.R. 885, 14 Can. Ry. Cas. 12, 21 W.L.R. 379.

FLAG STATION ON RAILWAY—COMPELLING APPOINTMENT OF CARETAKER.

The railway commission may, if it sees fit, order a railway company to maintain at a flag station a caretaker to receive, protect and deliver freight, express goods and mail bags.

Rutter Station Patrons v. C.P.R. Co., 8 D.L.R. 711, 14 Can. Ry. Cas. 1.

TRAIN SERVICE—STOPPING PLACES—STOPS FIXED BY FRANCHISE BY-LAWS OF MUNICIPALITY.

The Board of Railway Commissioners will not permit a railway company to change the places at which its predecessors in title were compelled to make stops where by its act of incorporation the municipal by-laws granting franchises for the building of road and designating such stopping places were continued in force.

Re London & Lake Erie Transportation Co., 10 D.L.R. 211.

TRAIN SERVICE—ELECTRIC RAILWAYS.

Suburban populations, usually dependent on electric railways for ingress and egress to and from large cities, should have a satisfactory train service.

East Greenfield Park v. Montreal & Southern Counties R. Co., 21 Can. Ry. Cas. 208.

TRAIN SERVICE—STEAM AND ELECTRIC—BREACH OF AGREEMENT—JURISDICTION.

Where respondent steam lines have been pararreled by electric lines, which have taken practically all the business, and ordering the respondent to give an increased service, might secure a better service from the electric line, such an order would not be justified in the public interest, where this could only be done at an unjustifiable cost and entail a continuing loss to the respondent. A specific breach of an agreement must be shown to give the Board jurisdiction under 8 & 9 Edw. VII., c. 32, s. 1.

City of Hamilton v. G.T.R., 21 Can. Ry. Cas. 211.

FLAG STATIONS—AGENTS—EARNINGS.

The practice of the Board is not to direct that a flag station shall be made an agency point unless there is a business of $15,000 per annum at the point in question. Carriers with a view to expanding business, have a wider discretion to make ventures in creating agency points than the Board. Where the earning power of a carrier at a station is low the matter to be considered is what accommodation it is reasonable for the public to expect.

Re Lower Argyle Station, 21 Can. Ry. Cas. 434.

FACILITIES — FLAG STATION — THROUGH TRAFFIC.

In adjudicating on the location of stops the Board will take into consideration the average of convenience to the public and the obligation of the carriers to afford reasonable facilities, having in view the nature of traffic on the railway, and will give due regard to the effect of additional stops on the ability of the carriers to give efficient through service in competition with other lines. The general intention of the Railway Act is that the inital discretion as to the location of station shall be with the carrier. The Board is justified in intervening only when there has been an unreasonable exercise of this discretion, or when there are exceptional circumstances.

Hartin v. C.N.R., 21 Can. Ry. Cas. 437.

TRAIN SERVICE—LOSS OF REVENUE—DIVERSION OF TRAFFIC.

It would not be reasonable to compel a carrier to operate its train service in connection with a competing carrier and thus lose revenue by the diversion of its traffic

to its competitor, if it can handle it as well, or reasonably as well, over its own lines.

Cole v. C.N.R. Co., 22 Can. Ry. Cas. 429.

TRAIN SERVICE — AGREEMENT — PASSENGER AND FREIGHT—STATION—JURISDICTION —PUBLIC INTEREST.

By agreement between the G.T. and C.P. R. Cos., dated May 13, 1896, confirmed by statute, 59 Vict. c. 6 (C), the Canadian Pacific were given a lease for a period of 50 years of the joint use of the Grand Trunk line between Hamilton Junction and the city of Toronto, known as the "Joint Section." By the 16th clause of the agreement, the Canadian Pacific agreed to do through passenger and freight business over the joint section, but not local business between either Hamilton or Toronto and an intermediate station on the joint section. Oakville is a town on the joint section, with a population of over 3,000 inhabitants, about 21 miles west of Toronto. Many of its residents have their offices or places of business in Toronto. For many years the G.T.R. gave a fairly satisfactory suburban service between Oakville and Toronto, until in January, 1917, the 11.45 p.m. train out of Toronto was discontinued to economize fuel, and the Canadian Pacific voluntarily agreed to stop its 7.15 p.m. train out of Toronto for Buffalo. In June, 1917, the Grand Trunk re-established its 11.45 p.m. train and discontinued it again in September, 1917. The Canadian Pacific being unwilling, the Board ordered its 7.15 p.m. train out of Toronto to stop at Oakville. Assistant Chief Commissioner:—The confirmatory act is not a special act within the meaning of s. 3 of the Railway Act, but merely validated a private arrangement between two railway companies and, does not make any enactment affecting the general public. Commissioner McLean:—The confirmatory act is a special act within the meaning of s. 3 of the Railway Act, but there is no such repugnancy between the provisions of the special act and the Railway Act as to oust the jurisdiction of the Board in matters of train service. [G.T. & C.P.R. Cos. v. Toronto (Viaduct Case), 11 Can. Ry. Cas. 38, at p. 39; Municipality of La Salle v. C.P. & New York Central R. Cos., 20 Can. Ry. Cas. 190, at pp. 192, 193, followed.]

Town of Oakville v. G.T. & C.P.R. Cos., 22 Can. Ry. Cas. 433.

FACILITIES—POLICE REGULATIONS.

The obligations of a carrier are to provide proper facilities for the arrival and departure of passengers, subject to regulations for proper policing of its station premises within which the allotment of space falls. [Twin City Transfer Co. v. C.P.R. Co., 15 Can. Ry. Cas. 323, 16 Can. Ry. Cas. 435, followed.]

Banff Livery & Busmen v. C.P.R. Co., 19 Can. Ry. Cas. 425.

PASSENGER FACILITIES—UNJUST DISCRIMINATION.

A carrier's obligation, at a station to its passengers, is to provide proper facilities for their arrival and departure, but it is not permitted to discriminate between passengers so using its facilities by ss. 284 and 317. [Twin City Transfer Co. v. C.P. R. Co., 15 Can. Ry. Cas. 323, 16 Can. Ry. Cas. 435; Cuneo Fruit & Importing Co. v. G.T.R. Co., 18 Can. Ry. Cas. 414, followed.]

Congreave v. C.P.R. Co., 19 Can. Ry. Cas. 423.

TRAIN SERVICE—STOPPING AT STATIONS.

Ordinary local trains should stop at stations where there is a sufficient volume of traffic to call for additional train service, as the operating conditions and control of operations are entirely different and distinct from through express trains. It is no answer to such a claim that the existing service is unremunerative.

Municipalty of La Salle v. C.P. & New York Central R. Cos., 20 Can. Ry. Cas. 190.

Under s. 333 (3) of the Railway Act, when a rail carrier subject to the jurisdiction of the Board owns, operates or uses a water carrier as a direct connection with the parent rail carrier, between any Canadian terminus of the rail carrier and another port in Canada, the earnings for the water portion should be considered as part of the through route and toll. Applying this principle to shipments of silver lead ore from New Hazelton to Vancouver, the earnings at the former station were found by the Board to justify the retention of a station agent at that point.

G.T.P.R. Co. v. Town of New Hazelton, 20 Can. Ry. Cas. 169.

PRIVATE SIDING—TRAFFIC FACILITIES.

A private siding, not on the railway right of way, is not part of the railway, and a carrier cannot be ordered, at the instance of a stranger, to connect it with the railway for the purpose of operating it as part of the railway or to place cars upon it for receipt of traffic.

Kammerer v. C.P.R., 21 Can. Ry. Cas. 74.

TRAIN SERVICE — CONNECTIONS — INCONVENIENCE.

Upon an application for better train service, the Board declined to make an order where it appeared that the proposed change would disrupt the existing schedule of connections, cause longer waits at some junction points, break connections at others, and result in increased inconvenience to persons using the line who were not parties to the application.

Town of Massena Springs v. G.T.R. Co., 21 Can. Ry. Cas. 34.

PASSENGER TRAIN SERVICE—MILK TRAFFIC — CONGESTION — PUBLIC INTEREST — DISCRIMINATION.

The Board refused to direct the previously existing passenger train service to be restored, where a change made in such service upon the opening of new station at

North Toronto relieved the congestion of traffic at the Union Station, but incidentally involved unloading milk at West Toronto instead of Parkdale, in the City of Toronto, the change appearing to be in the public interest and to involve no unjust discrimination or unfairness in the treatment of the particular interests prejudicially affected.

Harris & Son v. C.P.R., 21 Can. Ry. Cas. 31.

Train service—Stop—Tolls—Low—Higher — Commutation — Earnings — Fractional — Emergency — Transportation of passengers—Inconvenience—Connections.

The applicant having accepted on its express train in question the respondent's tickets issued at specially low commutation tolls to Oakville out of which it only receives a fraction of the earnings and the emergency which justified the previous order having ceased, it is inequitable that the applicant should be forced to continue the train service stop, or that larger numbers of passengers who pay for their transportation at a higher toll should be inconvenienced and their connections jeopardized. In view of the fact that it has been found impossible to set back the running time of train G.T.R. No. 89, leaving Toronto at 5.45 p.m. and that train G.T.R. No. 7 formerly leaving Toronto at 11.45 p.m. has been restored, the Board cannot consistently order any further train service to or from Oakville, as the trains are reasonably spaced and sufficient for the accommodation of passengers and the previous order to stop the C.P.R. train should be rescinded. [Oakville v. G.T. & C.P.R. Co., 22 Can. Ry. Cas. 433, order rescinded.]

C.P.R. Co. v. Town of Oakville & G.T.R. Co., 24 Can. Ry. Cas. 375.

Unjust discrimination — Stations — Transfer companies — Railway Act, ss. 284, 317.

A carrier may rent space in its stations to transfer companies on different terms for each without coming within the inhibitions as to discrimination contained in ss. 284, 317 of the Railway Act.

Twin City Transfer Co. v. C.P.R.Co., 16 Can. Ry. Cas. 435, 27 W.L.R. 384.

Stations—Location.

The Board refused an application for an order directing a railway company to establish a station at the crossing of another railway about two miles distant from its existing station where a townsite had been located, elevators erected and a municipality organized, the usual distance between stations being eight or ten miles. [Eby v. G.T.P.R. Co., 13 Can. Ry. Cas. 22, followed.]

Town of Forward v. C.P.R. Co., 14 Can. Ry. Cas. 377.

The board will not require the establishment of a station within two or three miles of another one. In this case the board declined to interfere with the location of stations proposed by a railway company.

Eby v. G.T.P.R. Co., 20 W.L.R. 629.

Location of stations—Discrimination—Establishment of station without approval of Board—Dominion Railway Act, s. 258.

Upon a former application, the Board decided that it was impossible to direct the railway company to give freight and passenger accommodaton at King street in the village of Entwistle, and approved of a station site for Entwistle at another point, suggested by a railway company; and the Board now declined to reconsider the matter, no new facts being disclosed, upon the application of the village corporation. Reference was made upon the application to a station established at Pembina Mines as a discrimination against the village; but the board pointed out that the company had established this station without approval, in disregard of the specific requirements of s. 258 of the Railway Act.

Entwistle, Village of, & G.T.P.R. Co., 27 W.L.R. 832.

(§ IV D—551)—Maintenance of agent at station—Amount of revenue.

The Board has fixed an arbitrary amount of $15,000 as the revenue which a railway company should derive at a station to warrant it in ordering the maintenance of an agent.

Ozias v. C.P.R. Co., 18 Can. Ry. Cas. 425.

Station agent—Adequate service—Appointment.

The Board refused an application for the appointment of an agent where it appeared that it was almost impossible for railways to obtain agents to man stations much more important than the 4th class station in question, and an agent could not be installed without depriving a more important station of adequate service.

Edmonton Board of Trade v. C.N.R. Co., 24 Can. Ry. Cas. 7.

Stations—Flag stations—Necessity for approval of Board.

When a railway company opens a station and appoints a permanent agent there, business in that locality is built up on the assumption that the station will continue to be a permanent station; and the railway board should be consulted and the representatives of the public heard, before such a station is closed, or turned into a mere flag station.

Re Removal of Agents from Agency Stations, 27 W.L.R. 387.

Maintenance of depots.

A former order of the Board approving of the location of a station at Prince George was rescinded, and a new location at a point three thousand feet east of the eastern boundary of Fort George townsite was approved, notwithstanding an engineering difficulty, Mr. Commissioner McLean dissenting. Matters to be considered in de-

termining the location of a station site, discussed.

Re G.T.P.R. Station Site, 24 W.L.R. 584.

(§ IV D—552)—Terminal traffic facilities—Refusal to fruit dealers—Unjust discrimination.

Under the Railway Act, the statutory duties of the railway company to furnish facilities relate, in so far as the terminal station is concerned, merely to the unloading and delivery of the goods, and do not include facilities for their sale; thus the prohibitions against undue preference or unjust discrimination in furnishing facilities do not apply to the failure or refusal of a railway company to allot space to a wholesale fruit firm in a building owned by it used by other fruit dealers as a market into which railway tracks run. [Re Western Tolls, 17 Can. Ry. Cas. 123, pp. 148 to 156; Twin City Transfer Co. v. C.P.R. Co., 15 Can. Ry. Cas. 323, followed. Purcell v. G.T.P.R. Co., 13 Can. Ry. Cas. 194; Donovan v. Pennsylvania R. Co., 199 U.S.R. 279; South Western Produce Distributors v. Wabash R. Co., 20 I.C.C.R. 458; Cosby v. Richmond Transfer Co., 20 I.C.C.R. 72; Perth General Station Committee v. Ross, [1897] A.C. 479, Barker v. Midland R. Co., 18 C.B. 46, referred to.]

Cuneo Fruit & Importing Co. v. G.T.R. Co., 18 Can. Ry. Cas. 414.

(§ IV D—554)—Practice—Train service — Revenues — Remunerative — Jurisdiction—Municipal agreements—By-laws—7 & 8 Edw. VII. c. 117 (C) s. 10.

Under the established practice, train service without such cash remunerative revenues as will enable the carrier to continue its operations cannot be ordered by the Board under the Railway Act, but in view of municipal by-laws and agreements confirmed by s. 10 of 7 & 8 Edw. VII. c. 117 (C.), the Board can only exercise in the present instance the jurisdicton which enables it to order that the by-laws should be carried out by furnishing the train service stipulated for therein, even though such service cannot be furnished except at a loss to the company. [Hamilton Radial R. Co. v. Hamilton, 23 Can. Ry. Cas. 114, followed.]

Burlington Beach Commission v. Hamilton Radial Electric R. Co., 24 Can. Ry. Cas. 39.

Train service—Traffic—Increase in—Unnecessary — Curtailment — Minimum—"Carry on business."

As traffic increases, train service must be increased, but even where business is decreasing, such minimum train service as will enable the necessary and ordinary business of the country to be carried on should be given.

Lethbridge Board of Trade v. C.P.R. Co., 24 Can. Ry. Cas. 34.

Passenger train service—Reduction in number of trains weekly.

On the 1st November, 1913, the company were ordered by the Board to furnish a daily (except Sunday) train passenger service on their line of railway west of Alsask; but, on the application of the company, the order was now varied by authorizing the company to reduce the daily service to a three-times-a-week service each way between Kindersley and Hanna till the 1st June, 1914.

Re C.N.R. Co., 27 W.L.R. 386.

(§ IV D—555)—Potatoes—Special equipment—Operating conditions and efficiency.

The fitting of cars used for shipping potatoes with special equipment, such as air spaces in the sides and bottoms, to prevent damage by freezing, is a matter concerned with operating conditions and efficiency, and the Board is not justified in making an experimental order requiring carriers to so equip cars, there being no assurance that an improvement will be effected.

Potato Shippers v. C.P.R. Co., 24 Can. Ry. Cas. 46.

Regulation of refrigeration cars—Rates.

Upon an application by the Canadian Freight Assn. to revise the charges provided by the Car Service Rules with respect to refrigerator cars, the chief complaint was as to the detention of the cars by consignees. Held, that no order could be made until it was affirmatively shewn that the provisions of s. 6 of the form of bill of lading authorized by the order of the Board No. 7562, of the 15th July, 1909, were insufficient to furnish a remedy for the grievance. Semble, that, if it is shewn that s. 6 is inadequate for the purpose, there is sufficient of a grievance to warrant an increase of charges on refrigerator cars detained more than two days over the authorized free time.

Canadian Freight Assn. v. Winnipeg Board of Trade & Canadian Manufactures' Assn., 21 W.L.R. 646.

(§ IV D—556)—Conductor demanding illicit commission from shippers for empty cars—Railway Act, R.S.C. c. 37, s. 317, subs. 3 (a), (b), (c), s. 427, and s. 431 subs. 3—Refusal of Board to interfere—Remedy, Act 8-9 Edw. VII, c. 33.

A conductor of a railway company was in the habit of refusing to give to shippers empty cars in which to load their goods unless the applicant paid a sum of money either directly, or, as alleged, through the agent of a certain lumber company. The Board refused to take action against the conductor under the Railway Act, R.S.C. c. 37, s. 317, subs. 3 (a), (b), (c), s. 427, and s. 431, subs. 3, on the ground that it was not in the best interest of railway administration for the Board to interfere with the proper disciplining by a company of em-

ployees at fault unless there was a failure on the part of the railway company to administer such discipline as the public safety demanded:—Held, that the proper remedy was criminal proceedings under the provisions of the Secret Commissions Act, 8-9 Edw. VII, c. 33.

Re Conductor, 29 W.L.R. 449.

TO FURNISH CARS.

The shipper should have something to say with regard to the equipment necessary for the purposes of his business. Box cars were held, upon the evidence, to be suitable —and in many cases necessary—for the shipping of ore; and the railway company was ordered to supply to mining companies when requested. Upon a complaint as to the insufficiency of rolling stock of the railway company, it was held, that the proper practice was for the company to supply the equipment necessary for the handling of traffic from Canada, as well as in Canada, that such practice entailed, to the extent of international traffic, the common use of a portion of the equipment provided for United States traffic; that the company had failed to provide adequate facilities for its Canadian traffic; that it must so provide; and that the Canadian business must not depend on whether or not there are box cars from the United States waiting to be unloaded and returned. Consideration of the question of freight rates was postponed until the work of collecting further data should be completed.

Re Salmo Mine-Owners & Great N. R. Co., 24 W.L.R. 204.

E. RESTRICTION OR EXTENSION OF LIABILITY BY RAILWAY COMMISSION.

(§ IV E—561)—POWER OF RAILWAY COMMISSION TO RESTRICT LIABILITY.

The power of the Dominion Railway Commission under s. 340 of the Railway Act to sanction a form of shipping contract impairing, restricting or limiting the liability of the railway company, includes the power to sanction a contract whereby the liability which would otherwise arise would be entirely destroyed or abrogated. [The Railway Act, R.S.C. 1906, c. 37, s. 340, considered.]

Heller v. G.T.R. Co., 2 D.L.R. 114, 25 O.L.R. 488, 21 O.W.R. 219.

(§ IV E—562)—POWER OF RAILWAY COMMISSION—EXPRESS COMPANIES—EXCLUSIVE OPERATION.

The Board cannot compel an express company to operate and compete over the line of a railway from which it has withdrawn by reason of the acquirement of the line by a railway operating an express service through its allied express company. [Continental, Prairie and Winnipeg Oil Cos. v. C.P.R. Cos., 13 Can. Ry. Cas. 156, followed.]

Shippers by Express v. Canadian Northern Express Co. & Central Ontario R. Co., 14 Can. Ry. Cas. 183.

RAILWAY COMMISSIONERS—COMPLAINTS—EVIDENCE—AGREEMENT FOR SPECIAL RATES—UNJUST DISCRIMINATION—FORM OF ORDER ON REFERENCE.

C.P.R. Co. and C.N.R. Co. v. Reg. Board of Trade, 45 Can. S.C.R. 321.

TOLLS—UNJUST DISCRIMINATION—SPECIAL JOINT TOLLS OR "NORMAL" TOLLS.

Dominion Millers' Assn. v. G.T. & C.P.R. Cos., 12 Can. Ry. Cas. 363.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—PRIVATE SIDING.

Blackwood Ltd. v. C.N.R. Co., 44 Can. S.C.R. 92, 12 Can. Ry. Cas. 45.

BOARD OF RAILWAY COMMISSIONERS—JURISDICTION—PRIVATE SIDING.

Clover Bar Coal Co. v. Humberstone, 45 Can. S.C.R. 346.

RAILWAY COMMISSIONERS—MAKING ORDER OF, A RULE OF COURT—VAGUENESS AND UNCERTAINTY IN LANGUAGE OF ORDER.

Strathclair v. C.N.R. Co., 21 Man. L.R. 555.

ONTARIO RAILWAY AND MUNICIPAL BOARD—FRANCHISE FOR ONLY SINGLE TRACK—NO POWER TO ORDER DOUBLE TRACK.

Waddington v. Toronto & York Radial R. Co., 18 O.W.R. 621.

TRAMWAY—THROUGH TRAFFIC—RAILWAY COMMISSION—JURISDICTION.

Leave was granted to appeal to the Privy Council from the decision of the Supreme Court of Canada.

Montreal Street R. Co. v. Montreal, 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203.

SIGNBOARDS AT LIMITS OF MUNICIPALITIES AND YARDS—LOCOMOTIVES RUNNING TENDER FIRST.

In re Brotherhood of Locomotive Engineers, 11 Can. Ry. Cas. 330.

TRAIN SERVICE — INADEQUACY — REGULAR STATIONS.

New Westminster & Surrey Board of Trade v. G.N.R. Co., 11 Can. Ry. Cas. 324.

APPEAL FROM RAILWAY COMMISSIONERS.

Gatineau Valley Railway Case; C.P.R. Co. v. Ottawa Residents, 44 Can. S.C.R. 329n; C.P. v. Reg. Board of Trade, 44 Can. S.C.R. 328, 12 Can. Ry. Cas. 369.

TRAIN SERVICE—CANADIAN AND FOREIGN RAILWAYS.

Stewart & Village of St. Cyprien v. Napierville Junction R. Co., 12 Can. Ry. Cas. 399.

DAMAGES — TRAFFIC FACILITIES — LIMITATIONS OF ACTIONS.

Leave was granted to appeal to the Privy Council from the judgment of the Supreme Court of Canada.

C.N.R. Co. v. Robinson, 43 Can. S.C.R. 387, 11 Can. Ry. Cas. 308, which affirmed the decision in Robinson v. C.N.R., 19 Man. L.R. 300, 11 Can. Ry. Cas. 289.

REASONABLENESS—COMPETITION—RAIL AND WATER—MILEAGE DISTANCES.

Canadian Oil Cos. v. G.T., C.P. & C.N.R. Cos., 12 Can. Ry. Cas. 350.

CLASSIFICATION — RATING — INCREASE — APPROVAL.

Canadian Freight Assn. v. Tobacco Merchants, 12 Can. Ry. Cas. 229.

CLASSIFICATION—MINIMUM WEIGHT—REDUCTION—MIXED CARLOADS.

Lamontagne v. Canadian Freight Assn., 12 Can. Ry. Cas. 291.

CLASSIFICATION—COMMODITIES—RATIOS OF THE TOLLS—VALUES OF COMMODITIES.

Blaugas Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 303.

CARLOAD RATING—MINIMUM WEIGHT—REDUCTION.

Battle Creek Toasted Corn Flake Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 11.

UNJUST DISCRIMINATION — OVERCHARGE — PROPER TOLLS—JOINT TARIFF—SUM OF THE LOCAL TOLLS.

Canadian Oil Co. v. G.T. & C.P.R. Cos., 12 Can. Ry. Cas. 334.

UNJUST DISCRIMINATION—JOINT TARIFF—LEGAL AND THROUGH TOLLS.

British American Oil Co. v. C.P.R. Co., 12 Can. Ry. Cas. 327.

TOLLS — INCREASE — JUSTIFICATION — COMPETITION.

Myles v. G.T.R. Co., 12 Can. Ry. Cas. 289.

UNJUST DISCRIMINATION—PERSONS OR LOCALITIES—DIFFERENTIALS.

Halifax & Halifax Board of Trade v. G.T.R. Co., 12 Can. Ry. Cas. 55.

CLASSIFICATION — RATING — REDUCTION —CUT GLASSWARE—CHINAWARE.

Cut Glassware Importers v. Canadian Freight Assn., 12 Can. Ry. Cas. 10.

CLASSIFICATION — EXCEPTION — CARTAGE TARIFFS — DIFFERENT WEIGHTS AND TREATMENT.

Taylor v. Canadian Freight Assn., 12 Can. Ry. Cas. 8.

INTERSWITCHING CHARGES — ABSORPTION — SPECIAL COMMODITY TARIFF.

Atikokan Iron Co. v. C.P.R. Co., 12 Can. Ry. Cas. 6.

REFUND — MISTAKE — MINIMUM CARLOAD.

Canadian Condensing Co. v. C.P.R. Co., 12 Can. Ry. Cas. 1.

COMPETITION — TRAFFIC — DIVERSION — CANADIAN AND FOREIGN RAILWAYS.

G.N.R. Co. v. C.N.R. Co., 11 Can. Ry. Cas. 424.

THROUGH TRAFFIC — JOINT TARIFF — RAIL AND WATER ROUTE.

Dawson Board of Trade v. White Pass & Yukon R. Co. (No. 2), 11 Can. Ry. Cas. 402.

COMMUTATION TOLLS — DISALLOWANCE — DISCRETION OF RAILWAY COMPANIES.

Toronto & Town of Brampton v. G.T. & C.P.R. Cos., 11 Can. Ry. Cas. 370.

BASING POINTS—WHOLESALE AND DISTRIBUTING POINTS—SPECIAL TARIFFS.

[See also C.P. v. Regina Board of Trade, 44 Can. S.C.R. 328.]

Regina Board of Trade v. C.P. & C.N.R. Cos., 11 Can. Ry. Cas. 380.

COMMUTATION TOLLS.

Toronto v. G.T.R. Co. & C.P.R. Cos. (Brampton commutation Rate case, No. 2), 11 Can. Ry. Cas. 365.

EXCESSIVE TOLLS — PARTICULAR CIRCUMSTANCES AND CONDITIONS—JOINT TARIFF.

Michigan Sugar Co. v. Chatham, Wallaceburg & Lake Erie R. Co., 11 Can. Ry. Cas. 353.

CARLOAD RATING—C.L. AND L.C.L. LOTS.

Ledoux Co. v. Canadian Freight Assn., 12 Can. Ry. Cas. 3.

UNJUST DISCRIMINATION—IMPORT AND DOMESTIC TOLLS—PROPORTIONALS.

Mount Royal Milling & Manufacturing Co. v. G.T. & C.P.R. Cos., 11 Can. Ry. Cas. 347.

TOLLS—WATER COMPETITION.

Canadian Lumbermen's Assn. v. G.T. & C.P.R. Cos., 11 Can. Ry. Cas. 344.

JOINT TARIFF—INCREASE IN TOLLS.

Davy v. Niagara, St. Catharines & Toronto & Michigan Central R. Cos. (No. 2), 12 Can. Ry. Cas. 61.

FREIGHT RATES — INJURY BY INTENDING SHIPPER AS TO RATE—INCORRECT RATE QUOTED BY AGENT.

Gillis Supply Co. v. Chicago, Milwaukee & Puget Sound R. Co. (No. 2), 16 B.C.R. 254, 18 W.L.R. 355.

CAUSA MORTIS.

See Gift.

CAVEAT.

See Land Titles— Vendor and Purchaser.

Annotations.

Interest in land; Land Titles Act; priorities under: 14 D.L.R. 344.

Parties entitled to file: what interest essential: land titles: (Torrens system) 7 D.L.R. 675.

CEMETERIES.

(§ 1—1)—CEMETERY ACTS, R.S.O. 1914, c. 261—POWERS OF MUNICIPALITIES AS TO PROHIBITING INTERMENT OF DEAD—MUNICIPALITIES CANNOT DIVEST THEMSELVES OF SUCH POWERS.

By s. 37 of the Cemetery Act (R.S.O. 1914, c. 261) the legislature conferred on urban municipalities the power in perpetuity of passing by-laws prohibiting the interment of the dead within the municipality, and such municipality is unable by contract to divest itself of such powers or abridge them. An agreement under seal requires no other consideration, but if there in fact be one it must be a lawful one. [Ayr Harbour Trustees v. Oswald, 8 App. Cas. 623; Montreal Park & Island R. Co. v. Chateauguay & Northern R. Co., 35 Can. S.C.R. 48, referred to.]

Town of Eastview v. Roman Catholic Episcopal Corp. of Ottawa, 47 D.L.R. 47, 44 O.L.R. 284.

CEMETERY COMPANY—INCORPORATION UNDER ONTARIO COMPANIES ACT—POWER TO SELL LANDS NOT REQUIRED FOR CEMETERY PURPOSES—REINCORPORATION OF COMPANY UNDER COMPANIES ACT, 2 GEO. V. C. 31—ADDITIONAL POWERS—ACT RESPECTING CEMETERY COMPANIES, R.S.O. 1897, C. 213—BY-LAW—PETITION—ORDER IN COUNCIL—FALSE REPRESENTATIONS.

Smith v. Humbervale Cemetery Co., 7 O.W.N. 462.

CENSORSHIP.

As to War Measures Act and Regulations, see Military Law.

CERTIORARI.

I. JURISDICTION; USE OF WRIT GENERALLY.
A. In general.
B. Existence of other remedy.
II. PROCEDURE; HEARING; DETERMINATION.

Annotation.

Prosecution for same offence after conviction or commitment quashed on certiorari: 37 D.L.R. 126.

I. Jurisdiction; use of writ generally.

A. IN GENERAL.

(§ I A—1)—RIGHT TO—TAKING AWAY BY STATUTORY IMPLICATION.

The jurisdiction to review on certiorari a summary conviction for an offence under the Liquor License Act, N.B. Con. Stat. 1903, c. 22, is not in effect taken away by the declaration of s. 104 (1) of the Act that a conviction thereunder shall be "final and conclusive." The right to review a conviction for a criminal offence on certiorari can be taken away only by an express statutory declaration to that effect. [Ex parte Hebert, 4 Can. Cr. Cas. 153, 34 N.B.R. 455, explained.]

R. v. Allingham; Ex parte Keefe, 12 D.L.R. 9, 21 Can. Cr. Cas. 268, 41 N.B.R. 558, 12 E.L.R. 504.

MINISTERIAL IRREGULARITIES—RIGHT OF APPEAL.

Certiorari will not lie to remove a ministerial act; consequently it will not be granted to quash an examination for discovery where the issue is irrelevant, and the special examiner has neither jurisdiction nor authority; if the examination be used in an action, the remedy is by appeal; any irregularity in County Court proceedings should be brought to the notice of that court, not to the Appellate Division.

Re Elliott v. McLennan, 30 D.L.R. 729, 36 O.L.R. 573, affirming 9 O.W.N. 468.

An objection to a summary conviction that the same is made under a statute or part of a statute, claimed to be no longer effective because of subsequent legislation, is properly raised by a certiorari proceeding.

Kokoliades v. Kennedy, 18 Can. Cr. Cas. 495.

JURISDICTION—USE OF WRIT GENERALLY.

A Circuit Court in the Province of Quebec has no jurisdiction to issue a writ of certiorari in respect of a charge of assault heard before justices of the peace.

Dion v. Champagne, 18 Can. Cr. Cas. 489, 13 Que. P.R. 36.

MUNICIPALITIES ACT—BY-LAWS—REGULARITY OF PROCEEDINGS.

An application by way of certiorari to quash a decision of a County Council will be refused when the Council has acted in accordance with the Municipalities Act, N.B., 2 Geo. V., 1912, and the by-laws of the municipality, and there has been no gross miscarriage of justice.

Ex parte Fawcett, 39 D.L.R. 296, 45 N.B.R. 324.

RIGHT OF APPEAL.

Where no appeal is given, the case may be evoked before judgment, or the judgment may be revised by means of a writ of certiorari.

Henry Morgan Co. v. Montreal, 24 Rev. Leg. 486.

JURISDICTION OF JUDGE OF KING'S BENCH.

A Judge of the King's Bench Division has jurisdiction under O. 62, rr. 1–3, of the Judicature Act, 1909, in certiorari proceedings, and the jurisdiction there given is not limited by the Act 3 Geo. V. (1913), c. 23, to the Appeal Division or a judge thereof.

The King v. Borden; Ex parte Kinnie, 42 N.B.R. 641.

IN GENERAL—ORDER OF COUNTY COUNCIL AS TO VOTING.

A vote having been taken of the ratepayers in a parish under s. 20 of the Liquor License Act, C.S. 1903, c. 2, as amended by 9 Edw. VII. c. 16, s. 21, a writ of certiorari was applied for to remove and quash the order of the county council directing the vote to be taken and the proceedings upon which this order was based, on the ground of irregularities in the petition for the election:—Held, certiorari did not lie, the acts complained of not being judicial.

Ex parte Doyle, 41 N.B.R. 138, 11 E.L.R. 548.

IN GENERAL.

In case of doubt as to the validity of the proceedings below the court will order the issue of a writ of certiorari. [Thomas v. Matthews, 1 Q.L.R. 354, followed.]

Laberge v. Langelier, 14 Que. P.R. 186.

NOTWITHSTANDING STATUTORY RESTRICTION.

The Superior Court may issue a writ of certiorari when the applicant appears to have suffered an injustice even though the statute under which the proceedings attacked purport to take away the right to certiorari. In the present case there was no injustice caused by the recorder of the town of Maisonneuve, in condemning the

applicant to pay a fine of $10, made it payable to prothonotary to be appropriated as provided by law and not to His Majesty.

Boivin v. Senecal, 14 Que. P.R. 183.

JURISDICTION IN GENERAL.

The Superior Court has no power, in virtue of a writ of certiorari, to review the evidence given before the court below whose decision is final, as far as the facts are concerned.

Kastel Hotel Co. v. The Recorder's Court, 15 Que. P.R. 139.

JURISDICTION TO GRANT — DETERMINING LICENSING OF JUSTICES.

Certiorari will lie to bring up the determination of licensing justices, where such justices lack personal qualification or where the subject-matter is outside the jurisdiction.

Re New Westminster Board of License Commissioners, 6 W.W.R. 681.

(§ 1 A—2)—NONCOMPLIANCE WITH CRIMINAL CODE—APPELLATE COURT QUASHING.

An Appellate Court on certiorari will quash an order of a justice under the Master and Servants Ordinance where the proceedings have not complied with the provisions of part 15 of the Criminal Code.

Dierks v. Altermatt, 39 D.L.R. 509, 13 A.L.R. 216.

MAGISTRATE'S CONVICTION — CROWN PRACTICE RULES.

In cases to which Nova Scotia Crown Rule 32 does not apply, a motion to quash a magistrate's conviction as upon certiorari cannot be made without the conviction being brought into the superior court, even where the issue of a writ of certiorari is waived by the prosecutor. Unless the convictions are brought into court there is no jurisdiction to deal with them, and in cases to which Crown Rule 32 (N.S.) applies the order to quash is effective only upon a return being made.

R. v. Rusko (N.S.), 29 Can. Cr. Cas. 433.

N. S. TEMPERANCE ACT—MAGISTRATE'S JURISDICTION.

Although certiorari is taken away by statute in respect of offences against the Nova Scotia Temperance Act, 1910, it is open to the Court to review on certiorari the jurisdiction of the magistrate; but where the jurisdiction to make an order for the destruction of liquors seized depends upon the person arrested and brought before him being in fact the "occupant" of the premises where the liquor was found, the court will not interfere if there was some evidence, whether direct or circumstantial, upon which the magistrate could have found him so to be. [R. v. Walsh, 29 N.S.R. 531; R. v. Hoare, 24 Can. Cr. Cas. 279, 49 N.S.R. 119, referred to.]

R. v. Collier, 35 D.L.R. 131, 28 Can. Cr. Cas. 87, 51 N.S.R. 64.

POWER TO LOOK AT DEPOSITIONS.

The general power of supervision of interior Courts by certiorari process includes the right to look at the depositions taken before the convicting magistrate on a summary trial under Part XVI. of the Criminal Code and authenticated so as to become in effect a part of the record, to ascertain whether there is any evidence to support the conviction; and if there is none, to order the conviction to be quashed. [R. v. Carter, 28 D.L.R. 606, 26 Can. Cr. Cas. 51; R. v. Walsh, 29 N.S.R. 521, not followed; King v. Mahoney, [1910] 2 Irish R. 695; Reg. v. Bolton, 1 Q.B. 66; Colonial Bank v. Willan, L.R. 5 P.C. 417, distinguished.]

R. v. Emery, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 A.L.R. 139, [1919] 1 W.W.R. 337. [Applied in R. v. Barb, 35 D.L.R. 102.]

ALBERTA LIQUOR ACT.

S. 41 of the Alberta Liquor Act has not the effect of taking away certiorari except in the two cases of charges against or respecting a "vendor" or a druggist (subs. 2) and not then unless an appeal would not afford an adequate remedy (subs. 8).

R. v. Covert, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 A.L.R. 349, [1917] 1 W.W.R. 919.

SUMMARY TRIAL—THEFT.

Certiorari proceedings do not lie for the review of a conviction made on summary trial by the police magistrate of a city of over 25,000 population, proceeding without the consent of the accused upon a charge of theft of less than $10; the offence in such case being triable under Code, s. 777. S. 1013 applies to restrict appeals to the Court of Appeal (Code, ss. 2 (7) and 1013) to those provided for in ss. 1013-1021. [R. v. Thornton, 30 D.L.R. 441, 26 Can. Cr. Cas. 120, cited.]

R. v. Sinclair, 32 D.L.R. 796, 28 Can. Cr. Cas. 350, 38 O.L.R. 149, quashing appeal from 31 D.L.R. 265, 36 O.L.R. 510.

REMEDY AGAINST CONVICTION UNDER QUEBEC GAME LAWS—C.C.P. ART. 1292; R.S. QUE. 1909, ARTS. 2309, 2358; 7 GEO. V. (1916), C. 26.

Hudson Bay Co. v. Dion, 38 D.L.R. 477, 28 Can. Cr. Cas. 265, 52 Que. S. C. 69.

WHERE NO ADEQUATE REMEDY BY APPEAL.

Where the Court before which a certiorari motion is brought in respect of a conviction for an offence subject to the Ontario Summary Convictions Act, R.S.O. 1914, c. 90, cannot find that an appeal which was available would not have afforded "an adequate remedy" (s. 10) had such appeal been prosecuted, the motion to quash the conviction will be refused although the appeal had been quashed for failure to perfect the requisite security. [R. v. Keenan, 13 D.L.R. 125, 21 Can. Cr. Cas. 467, 28 O.L.R. 441, referred to.]

R. v. Chappus, 28 Can. Cr. Cas. 157, 38 O.L.R. 576. [Affirmed in 28 Can. Cr. Cas. 411, 39 O.L.R. 329.

Where the law provides an appeal which practically enables the accused to have a retrial of the case in which he was sum-

marily convicted, such appeal affords an adequate remedy for raising the question that there was no evidence to shew that the alleged offence had been committed, and if the particular offence is subject to a statute which takes away the right of certiorari where there is another adequate remedy, a certiorari will be allowed only for want or excess of jurisdiction. If the Justice had the right to enter upon the inquiry and the summary conviction is good on its face, the court, in view of the statutory restriction, cannot look either at the depositions or at affidavits to ascertain whether or not the justice came to a proper conclusion. [R. v. Bolton, 1 Q.B. 66; R. v. Morn Hill Camp, [1917] 1 K.B. 176, applied.]

R. v. Chappus (No. 2), 28 Can. Cr. Cas. 411, 39 O.L.R. 329, affirming 28 Can. Cr. Cas. 157, 38 O.L.R. 576.

To review of judicial decisions.

The court on certiorari will not exercise its judgment upon the credit or weight due to the facts from which the magistrate's conclusion was drawn if such facts would be sufficient to be left to a jury on a trial.

The King v. Kolotyla, 19 Can. Cr. Cas. 25, 21 Man. L.R. 197.

Jurisdiction—Game laws, R.S. Que. 1909, arts. 2334, 2338, 2342—Beaver skins appearing to have been taken in a close season—Exception as to possession of furs of game animals killed outside of Quebec.

A person found in possession during a close season of skins of game animals which appeared to have been taken or killed during the close season and charged with illegal possession thereof under the Quebec game laws (R.S. Que. 1909, art. 2334) must prove to the satisfaction of the magistrate that the game was killed or taken outside of the Province of Quebec in order to be entitled to the exemption in that respect contained in R.S. Que., art. 2338. If credence is not given by the magistrate to evidence given on that point, the magistrate has jurisdiction to convict and certiorari will not lie on the ground that such evidence should have been credited, if there was a trial upon the merits and there were no gross irregularities in the proceeding to lead to the belief that justice had not been done (C.C.P. art. 1293). [See also Hudson Bay Co. v. Dion, 38 D.L.R. 477, 28 Can. Cr. Cas. 265; R. v. Morin, 28 Can. Cr. Cas. 414; R. v. Covert, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 A.L.R. 349.

Halpern v. St. Cyr & Hudson Bay Co., 31 Can. Cr. Cas. 214.

Review of summary conviction — Sufficiency of evidence.

Upon a motion to quash a summary conviction for keeping intoxicating liquor for sale contrary to the Liquor License Act (Ont.), upon the ground that there was no evidence of the offence, the court will not quash the conviction if there was evidence upon which it was open to the magistrate to find that the liquor found was intoxicating and that it was illegally kept for sale.

R. v. Scaynetti, 25 Can. Cr. Cas. 40, 34 O.L.R. 373.

Canada Temperance Act.

Where certiorari is taken away by statute (ex. gr. under the Canada Temperance Act, R.S.C. 1906 (c. 152)), and the magistrate has proceeded regularly with the enquiry and heard witnesses in support of the charge, the court will not look at the depositions on a certiorari application for the purpose of seeing whether there was evidence before the magistrate which would warrant the conviction, that ground not being strictly one of jurisdiction so as to be available notwithstanding the statute taking away the remedy of certiorari. [R. v. Wallace, 4 O.R. 127, followed; R. v. Carter, 26 Can. Cr. Cas. 51, referred to; R. v. Coulson, 24 O.R. 246, 1 Can. Cr. Cas. 114; R. v. Coulson, 27 Ont. R. 59; R. v. Borin, 15 D.L.R. 737, 29 O.L.R. 584, 22 Can. Cr. Cas. 248, distinguished.]

R. v. Berry (Ont.), 28 Can. Cr. Cas. 129, 38 O.L.R. 177. [See 39 O.L.R. 20, 28 Can. Cr. Cas. 341.]

Ontario Temperance Act—Special findings of magistrate.

The limitation of the right of certiorari under s. 10 of the Ontario Summary Convictions Act, R.S.O. 1914, c. 90, is excluded as regards convictions under the Ontario Temperance Act, 1916, by s. 92 (1) of the latter act, and there being no prohibition of certiorari, the court may examine the evidence to ascertain whether the magistrate had jurisdiction. The magistrate's opinion on the facts must be presumed to be such as will support the conviction unless his express findings are otherwise; these may be certified to the court along with the summary conviction and proceedings or may be brought up on a stated case under Part XV. of the Criminal Code and sec. 4 of the Ontario Convictions Act. [R. v. Borin, 15 D. L.R. 737, 22 Can. Cr. Cas. 248, 29 O.L.R. 584, applied; R. v. Berry, 38 O.L.R. 177; R. v. Cantin, 39 O.L.R. 20, referred to.]

R. v. Thompson, 28 Can. Cr. Cas. 271, 39 O.L.R. 108.

Magistrate's jurisdiction to enter upon the inquiry.

Where certiorari is taken away by statute, the court may still review a summary conviction for want of jurisdiction of the magistrate, but such ground can be supported only if it were made to appear that the magistrate's commission did not justify him in exercising jurisdiction in the locus or that he was not in fact proceeding on an alleged violation of the act under which the charge was brought. A conviction under the Canada Temperance Act, by s. 148 of which certiorari is taken away, will not be quashed for an alleged mistake in the conclusions arrived at by the magistrate if he had jurisdiction to enter upon the in-

quiry. [Colonial Bank v. Willan, L.R. 5 P.C. 417, applied.]

R. v. Cantin; R. v. Weber, 28 Can. Cr. Cas. 341, 39 O.L.R. 20. [See 38 O.L.R. 177.]

To review inferior appellate tribunal.

Certiorari will not be granted in respect of a County Judge's order setting aside a magistrate's decision unless a want or excess of jurisdiction be shewn or some gross miscarriage of justice.

R. v. McLatchy, 28 Can. Cr. Cas. 277, 44 N.B.R. 402.

Quashing order made without jurisdiction—Service out of province.

An order for review made by a Judge of the County Court will be quashed on certiorari if made without jurisdiction. Service of an order for hearing of a review on the opposite party out of the province is not sufficient to confer jurisdiction on the reviewing judge under C.S. 1903, c. 122, s. 6, and an order based on such a service will be quashed on certiorari.

The King v. Jonah; Ex parte Pugsley, 43 N.B.R. 166.

The order of a County Court Judge upon review, under C.S. 1903, c. 122, is final, if within his jurisdiction.

The King v. Wedderburn; Ex P. Carnwath, 40 N.B.R. 285.

Certiorari — Recorder's sentence — Defendant not represented at hearing —Que. C.P. 82.

A sentence of the recorder, which condemns the accused to pay a penalty and costs for violation of a city by-law, will be annulled if the case was not heard on the day for which it was fixed, and the defendant's advocates were not present. A certiorari will be granted.

Montreal v. Robin, 16 Que. P.R. 70.

(§ I A—3)—Conviction of having cocaine in possession—Reasonable excuse—Dom. Statutes, 1 & 2 Geo. V. c. 17, s. 3—Certiorari taken away by statute—Examination of depositions.

R. v. Featherstone, 46 D.L.R. 665, [1919] 1 W.W.R. 829. [See The King v. Vroom, 45 D.L.R. 494.]

In criminal case—Ancillary writ in aid of habeas corpus.

A second motion for a certiorari in aid of a habeas corpus, being purely ancillary, may be made before another judge after the dismissal of one application on the same facts, in like manner as a motion for a writ of habeas corpus may be renewed before another judge. [As to the Province of Ontario, there is a statutory restriction of renewed applications for habeas corpus, with right of appeal in substitution; see article in 1 Can. Cr. Cas. 213.]

R. v. Weiss; R. v. Williams (No. 2), 13 D.L.R. 632, 22 Can. Cr. Cas. 42, 6 A.L.R. 262, 25 W.L.R. 354, 5 W.W.R. 48.

Review of jurisdiction to hear summary conviction appeal.

Notwithstanding s. 1122 of the Criminal Code, certiorari will lie to review the jurisdiction of a District Court Judge to hear an appeal under Cr. Code, s. 749, from a summary conviction. Certiorari can be maintained on the ground of a total want of jurisdiction even where there is a statutory direction that proceedings of a certain tribunal shall not be removed by certiorari; express words taking away the certiorari are inapplicable where there is a want or excess of jurisdiction, but would apply to a mere irregularity in the exercise of jurisdiction.

Fauchaux v. Georgett; R. v. Georgett (No. 2), 25 Can. Cr. Cas. 76, 8 S.L.R. 325, 32 W.L.R. 863, 9 W.W.R. 458.

Summary trail for indictable offence—Crown's admission.

Where it appears that a plea of guilty to a charge of kidnapping was entered by the accused without the advise of counsel and without due appreciation of the character of the charge as distinct from the offence of abduction, a conviction for kidnapping made on summary trial by a magistrate without taking any testimony, may be quashed on certiorari by a court of superior criminal jurisdiction on an admission by the Crown that the offence, if any, was not kidnapping, but abduction, but with leave to institute fresh proceedings for the latter charge.

R. v. Steckley, 23 Can. Cr. Cas. 263.

Illegal conviction—"Person aggrieved."

Where an information is laid for an assault occasioning actual bodily harm to the complainant (Cr. Code, s. 295), and on the return of the process issued thereon, two justices illegally proceed to try the charge instead of holding a preliminary enquiry (Cr. Code, s. 668), the complainant who has by such illegality been deprived of the right to have her complaint dealt with according to law, is a "person aggrieved" by an illegal conviction, made by the justices for common assault and is entitled to apply for a certiorari to quash such conviction. [R. v. Groom, [1901] 2 K.B. 162, applied.]

R. v. Law, 25 Can. Cr. Cas. 251, 33 W.L.R. 569, 9 W.W.R. 1075.

Erroneous finding by magistrate.

An objection of defect of jurisdiction is not available on certiorari if it rests solely on the ground that the magistrate has erroneously found a fact which was essential to the validity of his order, but which he was competent to try. [Colonial Bank v. Willan, L.R., 5 P.C. 417, applied; R. v. Walsh, 29 N.S.R. 521, referred to.]

R. v. Pudwell, 26 Can. Cr. Cas. 47. [Followed in R. v. Carter, 28 D.L.R. 606.]

Irregular conviction—Defective depositions.

Where depositions in a summary conviction matter returned on certiorari contained no caption (Code form 16), nor were they annexed to the information or otherwise identified as pertaining thereto, the court may decline to peruse them for the

purpose of supporting, under Cr. Code, s. 1124, a conviction irregular on its face because not under seal. [Bond v. Conmee, 15 Ont. R. 716 and 16 A.R. 398, approved.]

R. v. Dickey, 25 Can. Cr. Cas. 55, 9 W.W. R. 142, 32 W.L.R. 404.

CONVICTION FOR OBSTRUCTING PEACE OFFICER—INTOXICATING LIQUOR ACT—APPEAL.

A certiorari will not lie to remove a conviction for resisting or wilfully obstructing a peace officer in the execution of duty, whether the complaint is laid and conviction made for an offence under s. 169 of the Criminal Code, 1906, or s. 153 of the "Intoxicating Liquor Act, 1916," unless under the former act there are exceptional circumstances, because an appeal is provided under s. 749 of that Act, or under the latter Act because certiorari is taken away by s. 111 of that Act, and the ground relied upon to quash does not go to the jurisdiction. Under the present practice as to certiorari objection to the writ may be made on the return of the rule nisi to quash.

The King v. O'Brien, 45 N.B.R. 275.

CONVICTION—EVIDENCE—PREVIOUS OFFENCE—IDENTITY.

An accused found guilty of a second offence, may by way of certiorari, obtain the annulment of the judgment pronounced against him, if the record contains no evidence of the first offence or of the identity of the accused with the person condemned the first time. Any extra judicial knowledge with a magistrate may have of the first offence, or of the identity of the person found guilty, cannot take the place of evidence of such fact.

Duberger v. Morkill, 20 Que. P.R. 49.

ADULTERATION ACT — SENTENCE TO HARD LABOUR—COSTS—PUBLIC OFFICER.

A sentence of hard labour in default of payment of the fine imposed by s. 31 of the Adulteration Act will be set aside on certiorari. A public officer who has succeeded before a magistrate will not be condemned to the costs of the certiorari issued against the conviction which he has secured.

Therrien v. Leet, 19 Que. P.R. 380.

GAME LAW OF QUEBEC—EVIDENCE.

If an accused, found in possession of furs, claims that the animals were not killed in the province, a writ of certiorari cannot be had against the conviction of the accused after hearing evidence on this point.

Halpern v. St. Cyr, 20 Que. P.R. 65.

CONVICTION WITHOUT HEARING—RECORD—IMPROBATION.

If an accused, in a petition for certiorari, alleges that he has been condemned without being heard, and if the documents filed with the magistrate's report declare that the accused has been duly called, the petitioner applying for the writ of certiorari may proceed by improbation against such documents.

Lajeunesse v. Court Recorder of the City of Maisonneuve, 19 Que. P.R. 333.

IN CRIMINAL CASE.

Accused was convicted before a police magistrate for a city of over 5,000 inhabitants of an offence over which the magistrate had jurisdiction only by consent. The record stated "accused consents to jurisdiction and pleads not guilty," and the conviction "the accused having consented to jurisdiction." The accused denied that she had been informed of her right, but the magistrate filed an affidavit, corroborated by the chief constable, shewing that the necessary preliminaries had been taken. On motion to quash the conviction:—Held, before the magistrate has jurisdiction to try the accused there must be at least a substantial compliance with the provision of s. 778 of the Criminal Code. 2. In considering whether these provisions were complied with, the record is the only evidence that can be considered in support of the conviction, and affidavits cannot be received for that purpose. 3. Such proceedings must shew on their face that jurisdiction has been acquired, and the simple statement, "the accused consents to jurisdiction," does not sufficiently shew what steps were taken by the magistrate to acquire jurisdiction. 4. Nothing should be inferred in support of the jurisdiction of an inferior court. 5. The Crown having asked for leave to begin de novo, such leave should be granted.

R. v. Crooks, 4 S.L.R. 335.

INTOXICATING LIQUORS — SEARCH — OBSTRUCTING INSPECTOR—CERTIORARI REFUSED.

Appeal dismissed with costs from judgment refusing certiorari where it appeared that an inspector under the Nova Scotia Temperance Act entered defendant's premises for the purpose of searching for liquor and was obstructed by defendant and interfered with in the discharge of his duty.

The King v. Solomon, 52 N.S.R. 258.

(§ I A—4)—MILITARY SERVICE ACT, N.B.—CONVICTION—REVIEW—CRIMINAL CODE—APPEAL.

Certiorari will not lie in New Brunswick to remove a conviction under the Military Service Act (1917, 7-8 Geo. V. c. 19, Dom.), unless there are exceptional circumstances, because a review is provided by s. 749 of the Criminal Code which provides for an appeal by either the prosecutor or complainant to a County Court Judge. [The King v. O'Brien; Ex parte Theriault, 45 N.B.R. 275, followed.]

The King v. Hanson; Ex parte Dunster, 49 D.L.R. 161.

(§ I A—5)—STATUTORY ABOLITION OF REMEDY.

Where a special statute expressly takes away the right to remove a conviction on certiorari, there are only two grounds upon which that procedure can still be resorted to by an accused, (1) lack of jurisdiction in the magistrate, and (2) fraud in obtaining the conviction. [Colonial Bank of Australasia v. Willans, L.R. 5 P.C. 417, followed.]

A statutory provision taking away the right to certiorari forbids the operation of r. 824, because, although that rule provides a procedure for sending upon conviction different in form from a writ of certiorari, the only jurisdiction to make the rule at all is under the power given to deal with certiorari.

R. v. Richmond, 39 D.L.R. 117, 29 Can. Cr. Cas. 89, 12 A.L.R. 133, [1917] 2 W.W. R. 1200.

INSUFFICIENCY OF EVIDENCE.

Where certiorari is taken away by statute, as under the Canada Temperance Act, the court will not take cognizance of any supposed miscarriage in the enquiry before the justice from the insufficiency or irregularity of the evidence. [Ex parte Morrison, 16 Can. Cr. Cas. 28, 39 N.B.R. 298, followed.]

Ex parte Doyle; R. v. Lawlor, 31 D.L.R. 90, 27 Can. Cr. Cas. 60, 47 N.B.R. 90.

(§ I A—8)—USE OF REVIEW OF TAX ASSESSMENT—STATUTORY PROHIBITION—WANT OF JURISDICTION.

A writ of certiorari may issue to review a tax assessment notwithstanding the prohibition of s. 69 of 53 Vict. (N.B.) c. 73, that such writ shall not be issued until after an appeal to the town council, where the objection to the assessment goes to the jurisdiction of the assessor to make it.

The King v. Town of Grand Falls, 13 D.L.R. 266, 42 N.B.R. 122, 13 E.L.R. 240.

RECORDER'S JUDGMENT—CONSTRUCTION OF RESOLUTION AS TO TAXES.

A judgment by one of Montreal's recorders which construes a resolution of the municipality of Rosemount stipulating exemption from taxes as applying to real estate taxes only, and not to business taxes, is intra vires and will not be revised by way of certiorari.

Lapierre & Geoffrion v. Montreal, 16 Que. P.R. 250.

(§ I A—9)—INTOXICATING LIQUOR—PLACE OTHER THAN PRIVATE DWELLING—EVIDENCE.

On a charge of having liquor in a place other than a private dwelling, without having first obtained a license therefore, unless it is shewn that the place in which the liquor was, was a place other than a private dwelling within the meaning of the act, the magistrate has no jurisdiction to try the case, and a conviction will be quashed on certiorari.

Note.—This case is considered important by many of the profession in N.B. as widening the scope of certiorari when expressly taken away by the Act, c.f. ss. 125, 126 of the N.B. Act (1916, 6 Geo. V. c. 20) with ss. 100 and 101 of the Manitoba Temperance Act (1916, c. 112).

The King v. Vroom; Ex parte McDonald, 45 D.L.R. 494, 31 Can. Cr. Cas. 316, 46 N.B.R. 214.

INTOXICATING LIQUOR ACT, N.B.—RIGHT OF APPEAL—ABOLITION OF.

The Intoxicating Liquor Act (New Brunswick) having taken away the right of certiorari as well as the right of appeal, the court is powerless to afford any redress or relief or interfere with the decision of the magistrate, no matter how erroneous or unjust the conviction may be if he had in law jurisdiction to make the conviction. [Ex parte Daley, 27 N.B.R. 129, followed; The King v. Vroom; Ex parte McDonald, 45 D.L.R. 494, 46 N.B.R. 214, referred to.]

The King v. Vroom; Ex parte Merchant, 49 D.L.R. 5.

MAGISTRATES—NECESSITY OF MAKING NOTE OF APPLICATIONS AND ORDERS—TO BE FURNISHED ON REQUEST OF EITHER PARTY.

Magistrates should be specially careful either to make a note themselves or to see that a note is made of every application, and of very ruling made during the course of a case before them, so that no party may possibly be deprived of any advantage he may be entitled to, and having taken, or caused to be taken, such notes, to return them along with the depositions in answer to a notice by way of certiorari or to furnish them on request to either party to the proceedings, who is prepared to pay the proper fees.

R. v. Dominion Drug Stores; R. v. C.N.R. Co., 44 D.L.R. 382, 30 Can. Cr. Cas. 318, [1919] 1 W.W.R. 285. [Affirmed in 14 A.L.R. 384, 31 Can. Cr. Cas. 86.]

LIMITATIONS OF REVIEW—EVIDENCE.

The absence of any evidence of the offence is not sufficient ground for quashing a summary conviction on certiorari, nor does it raise any question of jurisdiction of the magistrate; and a court hearing a certiorari application in respect of a summary conviction valid on its face should not look at the depositions in furtherance of an enquiry as to whether there is any evidence of the offence. [Reg. v. Bolton, 1 Q.B. 66, and Colonial Bank v. Willan, L.R. 5 P.C. 417, applied: R. v. Hoare, 24 Can. Cr. Cas. 279; R. v. Weiss, 3 D.L.R. 632; R. v. Holyoke, 13 D.L.R. 225; R. v. Allingham, 12 D.L.R. 9; R. v. McElroy, 14 D.L.R. 520, referred to; R. v. Coulson, 27 Ont. L.R. 59, and R. v. McPherson, 26 D.L.R. 503, 25 Can. Cr. Cas. 62, dissented from; R. v. C.P.R., 7 Terr. L.R. 443, and R. v. Pudwell, 26 Can. Cr. Cas. 47, followed.]

R. v. Carter, 28 D.L.R. 606, 26 Can. Cr. Cas. 51, 9 A.L.R. 481, 34 W.L.R. 448, 10 W.W.R. 602.

CONVICTION UNDER LIQUOR ACT—EVIDENCE.

The court on certiorari will not consider the weight of conflicting evidence but where there is no legal evidence at all to support the finding, the conviction cannot be upheld; and a summary conviction for illegally keeping liquor for sale where there were no facts from which an inference of guilt could be drawn and where the testimony

for the accused was corroborated and uncontradicted that he purchased the liquor then in transit as the agent for friends of his, and was to be reimbursed only the amount expended will be set aside notwithstanding a statutory provision such as that contained in the Sales of Liquor Act (Sask.), s. 128, that the burden of proving the right to keep liquor shall be on the person accused of improperly or unlawfully keeping for sale. [Re Trepanier, 12 Can. S.C.R. 111; R. v. McArthur, 14 Can. Cr. Cas. 343; R. v. Allingham, 12 D.L.R. 9, 21 Can. Cr. Cas. 268; R. v. McElroy, 14 D.L.R. 520, 22 Can. Cr. Cas. 123, referred to.]

R. v. McPherson, 26 D.L.R. 503, 25 Can. Cr. Cas. 62, 8 S.L.R. 412, 33 W.L.R. 21, 9 W.W.R. 613, reversing 25 Can. Cr. Cas. 60, 32 W.L.R. 385.

INTOXICATING LIQUOR CASES—REFUSAL TO CREDIT CROSS-EXAMINATION AS AGAINST DEPOSITION IN CHIEF.

On a charge of unlawful sale of liquor it is for the magistrate to decide whether he will believe the evidence in chief, to the effect that the witness bought a bottle of whisky from the accused, or the evidence brought out on cross-examination of the same witness that he had given the accused the money to buy the whisky for him and that the accused had done so; and the fact that the magistrate gave credence to the former and not to the latter statement is not a ground for quashing a conviction on certiorari.

R. v. McElroy, 14 D.L.R. 520, 5 O.W.N. 284, 25 O.W.R. 279, 22 Can. Cr. Cas. 123.

JURISDICTION—USE OF WRIT—INTOXICATING LIQUOR CASES—LICENSE COMMISSIONERS—DECISION OF—REVIEW.

The proceedings of a Board of License Commissioners in granting a license for the sale of intoxicating liquors may be reviewed on certiorari. (Per Macdonald, C.J., and Irving, J.) [R. v. Woodhouse, [1906] 2 K.B. 501; Re Constables of Hipperholme, 5 D. & L. 79; Reg. v. Aberdare Canal Co., 14 Q.B. 854, 117 Eng. Rep. 328, followed; Boulter v. Kent Justices, [1897] A.C. 556, and Bunburry v. Fuller, 9 Ex. 109, considered.]

R. v. License Commissioners of Point Grey, 14 D.L.R. 721, 18 B.C.R. 648, 26 W.L.R. 46, 5 W.W.R. 572.

REVIEW PROHIBITED BY STATUTE—QUESTIONING JURISDICTION OF MAGISTRATE—DEPOSITIONS AND EVIDENCE.

Where certiorari has been taken away by a statute as regards summary convictions for offences thereunder, the rule in New Brunswick is that the court will not look at the depositions to ascertain whether the evidence adduced establishes the offence, if the convicting magistrate had jurisdiction, over the subject-matter and, by virtue of the information, jurisdiction also over the accused and the particular offence charged, ex. gr., infraction of the Canada Temperance Act. [Ex parte Daley, 27 N.B.R. 129, and R. v. Hornbrook; Ex parte Morrison, 39 N.B.R. 298, considered. But see R. v. Coulson, 27 O.R. 59; R. v. Hughes, 29 O.R. 179, 2 Can. Cr. Cas. 5; R. v. St. Clair, 27 A.R. (Ont.) 308, 3 Can. Cr. Cas. 551.]

R. v. Holyoke; Ex parte McIntyre, 13 D.L.R. 225, 21 Can. Cr. Cas. 422, 42 N.B.R. 135, 13 E.L.R. 210.

JURISDICTION—WANT OR INSUFFICIENCY OF EVIDENCE—LIQUOR LAW TAKING AWAY CERTIORARI.

Where a magistrate has jurisdiction to enter upon the inquiry as to an offence under a liquor law, he is not ousted from that jurisdiction by any want or insufficiency of the evidence to support the charge, at least where there was relevant evidence and it was not palpably inadequate, and a certiorari application must be dismissed if the right to certiorari has been taken away by statute as to offences of that class. [Ex parte Daley, 27 N.B.R. 129, considered.]

R. v. Davis; Ex parte Miranda, 19 D.L.R. 475, 23 Can. Cr. Cas. 33, 42 N.B.R. 338.

POWER TO LOOK AT DEPOSITIONS.

In view of the express provision of the Manitoba Temperance Act, 6 Geo. V. Man., c. 112, preserving the right to certiorari although denying any right of appeal from a summary conviction under it, and the references contained in it (ss. 100 and 101) to the sufficiency of the evidence to support the case and the disposal of a certiorari application upon the merits, the court hearing a certiorari application is bound to look at the evidence taken before the magistrate in conformity with ss. 682 and 683 of the Criminal Code to see whether there is evidence or not to prove the offence. [R. v. Brady, 13 Ont. R. 356; R. v. Borin, 15 D.L.R. 737, 22 Can. Cr. Cas. 248, 29 O.L.R. 584; R. v. Covert, 34 D.L.R. 662, 28 Can. Cr. Cas. 25; R. v. Emery, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, discussed.]

R. v. Hoffman, 38 D.L.R. 289, 28 Man. L.R. 7, 28 Can. Cr. Cas. 355, [1917] 2 W.W. R. 839.

Cr. Code, s. 1124, which gives power to the court on certiorari to peruse the depositions in order to ascertain if an offence of the nature described in the conviction attacked has been committed, conclusively shews that the depositions in a summary conviction matter form a part of the record and that the court on certiorari may read the depositions with the view of ascertaining if there is evidence to support the conviction and, if there is none, the conviction may be quashed. [R. v. Emery, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 A.L.R. 139, approved. See R. v. Barb., 35 D.L.R. 102, 28 Can. Cr. Cas. 93.]

Lacasse v. Fortier (Que.), 30 Can. Cr. Cas. 87.

DEPOSITIONS WRONGLY ADMITTED—MAGISTRATE'S CERTIFICATE.

Where the magistrate wrongly admitted

in evidence the depositions of a witness in another case, the court on certiorari may conclude that he was influenced by such depositions and quash the conviction on that ground notwithstanding the certificate of the magistrate that he was not so influenced. [R. v. Melvin, 34 D.L.R. 382, 27 Can. Cr. Cas. 350, 38 O.L.R. 231, applied.]

R. v. Bracci, 29 Can. Cr. Cas. 351, 14 O.W.N. 305.

SUMMARY CONVICTION—EVIDENCE—JURISDICTION.

Evidence by affidavit is admissible on a certiorari motion to quash a summary conviction to prove that the accused did not plead guilty as set forth in the magistrate's record of proceedings; and in like manner affidavits are admissible contra to support the claim that the plea was correctly recorded by the magistrate. If it be found that the magistrate's record of the proceedings was wrong in that respect, the conviction made in his belief that the defendant pleaded guilty must be set aside on certiorari because of lack of jurisdiction to convict without evidence or a plea of guilty. [R. v. Richmond, 29 Can. Cr. Cas. 29, referred to.]

R. v. Barlow (Alta.), 29 Can. Cr. Cas. 381, [1918] 1 W.W.R. 499.

TO QUASH CONVICTION — INTOXICATING LIQUORS — SECOND OFFENCE — AMENDMENT OF STATUTE—EVIDENCE.

R. v. Clarke, 41 D.L.R. 713, 13 A.L.R. 468, 30 Can. Cr. Cas. 200.

LIQUOR LICENSE COMMISSIONERS—REVIEW OF JURISDICTION—DISCRETION.

Certiorari to review the jurisdiction of license commissioners in granting a license upon a petition, said to have been insufficiently signed, is discretionary with the court where the applicant is not specially aggrieved beyond the injury suffered by the public generally. A sufficiently signed petition under the B.C. Liquor License Act is a condition precedent to the founding of jurisdiction in the license commissioners to act thereupon, and their acceptance of the petition as being sufficiently signed is open to review on certiorari.

The King v. Bryson, 21 D.L.R. 777, 21 B.C.R. 313, 31 W.L.R. 307.

INTOXICATING LIQUOR CASES.

Failure to prove that notice of cancellation of the license has been given in conformity with the Licensing Act, R.S. Que. 1909, s. 1077, constitutes a serious irregularity which will warrant the issue of a writ of certiorari.

Metropole Co. v. Recorder's Court, 18 Can. Cr. Cas. 492.

A conviction for selling liquor or keeping liquor for sale in contravention of a local option municipal by-law prohibiting the issue of liquor licenses is a conviction under the Liquor License Act for selling or keeping for sale "without a license," and is subject to the same limitations as to review on certiorari and habeas corpus as a conviction against a nonlicensee in a district in which licenses are issued.

Re Leach & Fogarty, 18 Can. Cr. Cas. 487, 21 O.W.R. 919.

JURISDICTION—FINDING ON QUESTION OF FACT.

The court will not review on certiorari the magistrate's finding upon a question of fact which he was competent to try. [R. v. Cunerty, 2 Can. Cr. Cas. 325, 26 Ont. L.R. 51, applied.]

R. v. Reinhardt Salvador Brewing Co.; R. v. McFarline, 27 Can. Cr. Cas. 445, 11 O.W.N. 346.

LIQUOR CASES—FINDING AS TO PRIOR CONVICTIONS.

The question whether the defendant, found guilty of a third offence against the Canada Temperance Act, had been previously convicted or not, or how often or when, is a matter entirely within the jurisdiction of the magistrate, and, certiorari being taken away by that statute, the magistrate's finding as to prior convictions is conclusive. [R. v. Brown, 16 Ont. R. 48; Ex parte Batson, 10 Can. Cr. Cas. 240, referred to.]

Ex parte Gogan; R. v. Steeves, 24 Can. Cr. Cas. 371, 43 N.B.R. 285.

INTOXICATING LIQUOR CASES—CANADA TEMPERANCE ACT—CONVICTION CONTRARY TO EVIDENCE—CARRIERS.

The King v. Holyoke; Ex parte Blair, 41 N.B.R. 223.

JURISDICTION—INTOXICATING LIQUOR CASES—LICENSE—COMMISSIONERS GRANTING A LICENSE—VALIDITY.

Held (Martin, J.A., dissenting), that by virtue of Crown Office r. 35, a judge could proceed with a motion for an order absolute where a verified copy of an order of a Board of License Commissioners directing the issue of a license was not before him since the absence of the said copy was accounted for to his satisfaction by reason of the fact that he granted leave to file said copy:—Held, that certiorari proceedings are the proper proceedings by which to question a decision of a Board of License Commissioners. [R. v. Board of License Commissioners for the Municipality of Point Grey, 18 B.C.R. 648, followed.]

Freeman v. License Commissioners of New Westminster, 20 B.C.R. 438, 29 W.L.R. 892, 7 W.W.R. 963.

The court refused to set aside a search warrant issued under the Canada Temperance Act where the informant's grounds of suspicion were written on a separate piece of paper attached to the information, but not initialled.

The King v. Wilson; Ex parte Harrington, 40 N.B.R. 384.

Where an information under the Canada Temperance Act was laid within three months after the offence, but no summons was issued thereon for a year and fourteen days after information laid:—Held, that the delay in issuing summons did not deprive the magistrate of jurisdiction. The

magistrate issued his summons upon an information alleging only information and belief without previously examining witnesses, and, upon proof that the summons had been duly served, and the failure of the defendant to appear, he issued a warrant, upon which the defendant was arrested and brought to trial. Upon certiorari:—Held, the conviction is good even though the warrant was improperly issued. No sworn information being necessary where defendant disobeys a summons. Per Barry, J.:—The warrant is bad because a sworn information is necessary and where no witnesses are examined the information must contain a positive statement that an offence was committed.

The King v. Peck; Ex parte O'Neill, 40 N.B.R. 339.

Intoxicating liquor—License Commissioners—Delay.

There is no express provision in the Code as to the delay within which a writ of certiorari must issue after having been granted; all that is necessary is that it should have issued without unreasonable delay. See 14 Que. P.R. 186.

Re Leberge & Langelier, 15 Que P.R. 226.

B. Existence of other remedy.

(§ I B—10)—Other remedy — Objection to preliminary proceedings — Raising same question at trial.

The court may exercise its discretion by refusing a certiorari when sought to remove into a superior court an information and proceedings thereon before a magistrate under which the defendant was held to bail with sureties to appear at the County Court for trial upon a quasi-criminal charge under a provincial statute, if the same grounds upon which the claim of irregularity or nullity in the magistrate's proceedings is founded would be open to the defendant on the hearing in the County Court, while a rule for a certiorari, if granted, would not be returnable until a later date and might prejudice the enforcement or renewal of the recognizance of bail.

Ex parte Seriesky, 10 D.L.R. 612, 21 Can. Cr. Cas. 140, 41 N.B.R. 475, 12 E.L.R. 387.

Reserved case—Evidence in writing.

Where the magistrate making a conviction on summary trial refuses to reserve a case for the consideration of the Court of Appeal as to the sufficiency of the evidence, the remedy of certiorari is still applicable to quash the conviction on the ground that the magistrate did not have the evidence reduced to writing. [R. v. Harris, 18 Can. Cr. Cas. 392, followed.]

R. v. Perron; Perron v. Sénécal, 26 Can. Cr. Cas. 442, 22 Rev. Leg. 448.

Remedy by review.

The court has a discretion to refuse a writ of certiorari, even for an alleged lack of jurisdiction in the magistrate to try the case, if there was an alternative remedy by review and no special circumstances are shewn as to why that remedy was not pursued.

Ex parte St. Onge, 25 Can. Cr. Cas. 169, 43 N.B.R. 517.

Appropriate remedy after proceedings taken by inferior tribunal in capacity in which jurisdiction excluded—Double qualification of tribunal as recorder and as a justice.

Certiorari and not an appeal from the summary conviction is the proper remedy in respect of proceedings taken before a person adjudicating in his capacity of a recorder or as presiding over the Recorder's Court in a matter outside of his jurisdiction as such, although the same person would have had jurisdiction had he proceeded in the capacity of an ex officio justice of the peace and in that event an appeal would have been proper. [Paradis v. Dunham, 15 Que. P.R. 189, referred to.]

Latendresse v. Piette & The Corp. of Joliette, 31 Can. Cr. Cas. 248.

Statutory restriction — Other "adequate remedy."

Where certiorari is taken away only in the event of an appeal affording an "adequate remedy" it may, notwithstanding, be maintained if the prosecution was conducted in such a way as misled the accused in regard to what he had to answer, and so avoided a motion by the defence before the taking of testimony began for a postponement of the trial.

R. v. Dominion Drug Stores (No. 2), 31 Can. Cr. Cas. 86, [1919] 2 W.W.R. 413.

Criminal law—Preliminary objections to motion—Length of notice—Affidavits in support—Time of filing—Filed same day as notice served—Assumption as to priority of time—Cr. Code 749 (f)—Proper court of appeal — Cr. Code 1122 — Notice of appeal to wrong court—Appeal to right court but judge holding he has no jurisdiction—Certiorari not lost — Certiorari granted notwithstanding possible remedy by mandamus.

Under the Saskatchewan Crown Practice Rules and the Rules of Court thereby made applicable to Crown matters, the notice required to be given application for certiorari is limited to at least two clear days. Where affidavits in support are required to be filed prior to notice of motion, and it appears that the affidavits were filed and the notice of motion served on same day, the assumption is that the affidavits were filed first. The District Court to which appeal is given by the Code s. 749 (b) is the District Court of the Judicial District within which the cause of complaint arose. Where notice is given of appeal to the wrong court, such notice is of no effect to defeat the right of certiorari under s. 1122 of the Criminal Code, as the appeal is not "authorized by

law." Where appeal is made to the right court, but the judge of that court, in error, holds he has no jurisdiction, it is not an appeal contemplated by said s. 1122 so as to take away the right of certiorari (R. v. Delegarde; Ex parte Cowan, 36 N.B.R. 503, 9 C.C.C. 454, referred to); and in such case certiorari should be allowed notwithstanding the possible remedy by way of mandamus. The granting of a writ of mandamus is a matter within the discretion of the court; and it ought not to be granted where another remedy is provided which is not less convenient, beneficial and effectual. (Reference to authorities.)

R. ex rel. Poppoff v. Deer, [1919] 1 W.W.R. 410.

(§ I B—11)—Remedy by appeal.

A provincial law which makes provision for appeals in summary proceedings under it, and which further declares that the "proceedings on such appeals" shall in other respects be "governed" by the same rules as appeals from summary convictions or orders made by justices of the peace under the Cr. Code, does not make applicable to such appeals the provision of Cr. Code, s. 1122, forbidding a certiorari to remove a conviction when an appeal has been taken; Code, s. 1122 deals rather with the consequences of an appeal than with the proceedings thereon, and semble, even if it applied, would not prevent the granting of a certiorari on the question of jurisdiction. [Johnston v. O'Reilly, 12 Can. Cr. Cas. 218, 16 Man. L.R. 405; R. v. St. Pierre, 5 Can. Cr. Cas. 365; R. v. Horning, 8 Can. Cr. Cas. 268; R. v. Ashcroft, 2 Can. Cr. Cas. 385, referred to.]

Davis v. Feinstein, 24 D.L.R. 798, 24 Can. Cr. Cas. 160, 25 Man. L.R. 507, 31 W.L.R. 635, 8 W.W.R. 1003.

Right of appeal—Common assault.

Where there is a right of appeal certiorari will be granted only under very exceptional circumstances; a conviction for a trifling offence, such as common assault, involving a small penalty, is not reviewable on certiorari. [Ex parte Doucet, 24 Can. Cr. Cas. 347, 43 N.B.R. 361; Ex parte Price, 23 N.B.R. 85; Ex parte Damboise, 39 N.B.R. 265, referred to.]

The King v. Shaw; Ex parte Kane, 27 D.L.R. 494, 26 Can. Cr. Cas. 156.

Discretionary writ — Manifest injustice—Discretion in favour of writ—Right to appeal — Does not bar remedy by.

The writ of certiorari is a discretionary writ and where a manifest injustice has been done, such as assessing a ship, under the Nova Scotia Assessment Act, to one to whom it does not belong, such discretion will be exercised in favour of applying the remedy which certiorari provides, although the party applying has not availed himself of the right of appeal. The existence of an appeal does not displace the remedy by means of a writ of certiorari. [R. v. Jukes, 101 E.R. 1536; Golding v. Wharton Salt Works, 1 Q.B.D. 374; Re Assessment School Rate, 9 N.S.R. 122, referred to.]

Re Maritime Fish Co., 46 D.L.R. 108.

Summary conviction—Appeal.

Where the magistrate's jurisdiction is attacked, certiorari will not be refused merely because an appeal might have been taken from the summary conviction in question, unless some express statutory prohibition so directs.

Ex parte Pelchat, 26 Can. Cr. Cas. 75, 49 Que. S.C. 195.

Remedy by review.

A certiorari will not be granted with a view of quashing a judgment of an inferior court for want of jurisdiction in the trial justice in the absence of a satisfactory explanation of why the remedy by review was not taken.

Ex parte Beloni St. Onge, 43 N.B.R. 517, 25 Can. Cr. Cas. 169.

Use of writ—In criminal cases—Taking away—Does not apply to writ in aid of habeas corpus.

The writ of certiorari in aid of habeas corpus is taken away by s. 19 of 2 Geo. V. (Ont.) c. 17, R.S.O. 1914, c. 90, where adequate relief is afforded by appeal, in respect of a summary conviction under an Ontario statute, and imprisonment thereunder. Appeal and not certiorari is the appropriate procedure affording an adequate remedy for reviewing a summary conviction on the merits, where the question involved is one of fact only and not of jurisdiction.

R. v. Keenan, 13 D.L.R. 125, 28 O.L.R. 441, 21 Can. Cr. Cas. 467.

Right of appeal.

If there is a right of appeal from a summary conviction but it has not been taken advantage of, certiorari will not be granted unless there are exceptional circumstances. [Ex parte Doucet, 24 Can. Cr. Cas. 347, 43 N.B.R. 361, and Ex parte Young, 32 N.B.R. 178, followed.]

R. v. O'Brien; R. v. Theriault (N.B.), 41 D.L.R. 97, 29 Can. Cr. Cas. 141.

A conviction for an indictable offence tried by a police magistrate under s. 777, Pt. XVI., of the Criminal Code, will not be quashed on certiorari, a remedy by way of appeal having been provided by s. 1013, Pt. XIX., of the Code.

The King v. Limerick, 45 N.B.R. 269.

From summary conviction after stated case—Cr. Code, s. 1122.

The dismissal of a stated case by a justice for lack of compliance with preliminary requirements and not upon the merits does not bar a motion to quash the summary conviction by certiorari process.

R. v. Gainor, 30 Can. Cr. Cas. 357, [1919] 1 W.W.R. 801.

Failure to appeal in time.

Where the justice's jurisdiction was not in question nor was any exceptional reason

set up, such as gross perversion of justice, the court will exercise its discretion by refusing to quash a summary conviction removed on certiorari, if the accused might have appealed from the conviction had he given notice of appeal in due time under Cr. Code, s. 750. [R. v. Delegarde; Ex parte Cowan, 9 Can. Cr. Cas. 454, 36 N.B.R. 503; Ex parte Ross, 1 Can. Cr. Cas. 153; Reg. v. Herrell (No. 2), 3 Can. Cr. Cas. 15, referred to.]

Ex parte Doucet; R. v. O'Brien, 24 Can. Cr. Cas. 347, 43 N.B.R. 361.

(§ I B—12)—Invalid conviction — Appeal—Costs.

Where a complaint in a summary matter was invalid as disclosing no offence known to the law and as not shewing on its face the authorization to prosecute which was an essential under the particular statute invoked, certiorari lies at the instance of the accused to quash the conviction made upon his plea of guilty to such defective complaint and this although he might have taken an appeal to another tribunal; but his failure to raise his objections before the magistrate disentitles him to costs of the certiorari proceedings. [Kokoliades v. Kennedy, 18 Can. Cr. Cas. 495, referred to.]

Ex parte Richard, 30 D.L.R. 364, 26 Can. Cr. Cas. 166.

Discretion — Defect of jurisdiction — Waiver.

Ex parte Giberson (No. 3), 18 Can. Cr. Cas. 355; R. v. McQuarrie; Ex parte Giberson, 40 N.B.R. 1.

Previous application for writ to another judge which was dismissed—Amended affidavits used on second application.

R. v. McKay, 9 E.L.R. 121 (N.S.).

Jurisdiction—Canada Temperance Act.

R. v. Allen; Ex parte Gorman, 10 E.L.R. 214 (N.B.).

Possible excess of penalty—Imprisonment in default of paying fine—Thirty days or one month—Revision of penalty.

The King v. Rudolph, 17 Can. Cr. Cas. 206 (Ont.).

Removal of indictment of General Sessions into High Court.

R. v. Atlas, 2 O.W.N. 800, 18 O.W.R. 638.

Proof of offence—Lack of proof not a ground for certiorari — Canada Temperance Act.

Ex parte O'Regan (No. 2), 17 Can. Cr. Cas. 160, 39 N.B.R. 428.

Discretion — Concurrent right of appeal —Jurisdiction — Insufficiency of evidence.

The King v. Gallagher, 18 Can. Cr. Cas. 347, 39 Que. S.C. 407.

Statutory prohibition—Discretion.

Demetre v. Montreal, 12 Que. P.R. 232.

Discretion—Concurrent right of appeal —Insufficient evidence.

An application of a writ of certiorari to quash a conviction will not be entertained when there is a right of appeal therefrom either upon the ground of lack of evidence or upon that of insufficient evidence.

Gallagher v. Chauveau, 39 Que. S.C. 407, 18 Can. Cr. Cas. 347.

Summary conviction — Criminal cause —Circuit Court (Que.).

A Circuit Court in the Province of Quebec has no jurisdiction to issue a writ of certiorari in respect of a charge of assault heard before justices of the peace.

Dion v. Champagne, 18 Can. Cr. Cas. 489, 13 Que. P.R. 36.

Return of amended conviction — Right independently of court's power to amend — Misdescription of magistrate's official capacity.

The King v. Fitzgerald, 19 Can. Cr. Cas. 39, 19 W.L.R. 462 (Alta.).

Affidavit in support.

The complainant whose information before a magistrate is dismissed has a right to a writ of certiorari as well as the defendant who is convicted. When all the facts and circumstances of the cause are stated in the application for certiorari an affidavit mentioning merely that the facts so stated are true is sufficient.

Lacouture v. Lacroix, 12 Que. P.R. 428.

Recognizance on application — Dismissing motion for irregularity in recognizance affidavits — Fresh application.

The King v. McKay, 17 Can. Cr. Cas. 1 (N.S.).

Summons served by constable where himself the informant and prosecutor — Invalidity — Objection not raised before magistrate.

Re Kennedy, 17 Can. Cr. Cas. 342 (P.E.I.).

Crown Office Rules—Crown Costs Act, 1910—Criminal cases.

R. v. Jones, 18 Can. Cr. Cas. 414, 16 B.C.R. 117, 16 W.L.R. 429.

Recognizance—Practice.

R. 36 of the Crown Office Rules does not require that the defendant should enter into a recognizance before applying for a writ of certiorari. The recognizance is to be given after the writ has been ordered to issue, for the prosecution of it.

R. v. Ferguson, 19 Can. Cr. Cas. 31, 16 B.C.R. 287, 19 W.L.R. 72.

II. Procedure; hearing; determination.

(§ II—15) — Appeal from protection order.

An appeal lies under the Judicature Act, R.S.O. 1914, c. 56, s. 26, from so much of an order quashing a summary conviction as grants protection to the magistrates under the Public Authorities Protection Act, R.S.O. 1914, c. 89, from a civil action in respect of the conviction so quashed.

Re Lascelle & Wholehan, 34 D.L.R. 360, 27 Can. Cr. Cas. 369, 38 O.L.R. 119.

HEARING—REVIEW OF CONVICTION—QUASHING—RETURN OF FINE AND COSTS PAID.

Where a conviction is quashed on certiorari, the amount of the fine and costs paid in the lower court by the applicant will be ordered restored to him. [Mercier v. Plamondon, 6 Can. Cr. Cas. 223; Re Enderlin State Bank, 4 N. Dak. 319, 26 L.R.A. 593, and Haebler v. Myers, 132 N.Y. 363, 15 L.R.A. 588, specially referred to.]

R. v. Hung Gee (No. 2), 13 D.L.R. 6, 21 Can. Cr. Cas. 411, 6 A.L.R. 173, 24 W.L.R. 862, 4 W.W.R. 1133.

SUMMARY CONVICTION — COSTS OF OPPOSITION BY PERSONS UNSUCCESSFULLY OPPOSING MOTION TO QUASH — QUEBEC LICENSE LAW.

Persons who appear and contest both the issue of a writ of certiorari and the motion to quash a summary conviction under the Quebec License Law may be ordered to pay the costs occasioned by such contestation if the conviction is quashed. [Compare R. v. Hackam, 30 Can. Cr. Cas. 414, 44 O.L.R. 224; R. v. Knowles, 13 D.L.R. 773, 22 Can. Cr. Cas. 66 (Alta.).

Duberger v. Morkill, 31 Can. Cr. Cas. 271, 20 Que. P.R. 49.

MOTION FOR WRIT OF — POWER OF JUDGE TO MAKE ORDER ABSOLUTE ON FIRST HEARING—NOTICE OF MOTION SIGNED BY SOLICITOR — SUFFICIENCY — RR. 28, 33 CROWN OFFICE RULES.

R. v. Wong Joe (B.C.), 26 B.C.R. 337, [1918] 3 W.W.R. 581.

(§ II—16)—TIME OF APPLICATION—INTERVENING TERM OF COURT—EFFECT—DISCRETION TO ALLOW—QUESTIONING JURISDICTION.

The discretion of a judge in granting a rule to review a conviction on certiorari will not be interfered with, although two terms of court elapsed before the application was made, where the application is based on jurisdictional grounds. [Ex parte Long, 27 N.B.R. 495; Ex parte Moore, 23 N.B.R. 229, specially referred to.]

R. v. Holyoke; Ex parte McIntyre, 13 D.L.R. 225, 21 Can. Cr. Cas. 422, 42 N.B.R. 135, 13 E.L.R. 210.

NOTICE OF MOTION TO QUASH CONVICTION—TIME LIMIT.

The onus is upon the party moving to quash a summary conviction under the Liquor License Act (Ont.) to prove that notice of the motion was served on the magistrates within twenty days from the date of conviction as required by s. 95 of the revised Act, R.S.O. 1914, c. 215, formerly 9 Edw. VII. c. 82, s. 25.

Re Elliott, 23 Can. Cr. Cas. 163.

(§ II—18)—SUBSTITUTING PROCEDURE BY NOTICE OF MOTION FOR PROCEDURE BY WRIT.

The effect of s. 576 of the Criminal Code, 1906, is not to authorize the provincial courts to create a new practice as to certiorari nor to change the practice altogether; it is limited to a "regulation" of the practice and it is to be doubted whether there is power thereunder to substitute a procedure by notice of motion to quash a conviction for the procedure by writ of certiorari (Ont. Crown Rules, 1908, r. 1279).

R. v. Titchmarsh, 19 D.L.R. 366, 22 Can. Cr. Cas. 419, 6 O.W.N. 317. [Affirmed, 22 D.L.R. 272, 24 Can. Cr. Cas. 38, 32 O.L.R. 569.]

(§ II—19)—APPLICATION FOR — NOTICE NOT GIVEN — NOTICE LEFT AT OFFICE OF SOLICITOR — SOLICITOR HAVING APPEARED ON HEARING.

An application for a writ of certiorari on the ground that notice of the time and place for hearing the matter in review, as directed by 1903 C.S.N.B. c. 122, s. 6, was not given to the plaintiff, will not be granted when the notice was left at the office of the counsel retained on the first hearing, and he has actually appeared on the hearing in review.

The King v. Armstrong; Ex parte Case, 44 D.L.R. 429.

REGULARITY OF NOTICE.

Where a notice of motion for a certiorari is intituled in the Supreme Court of Saskatchewan, the omission to add the designation of the appropriate judicial district of that province will not invalidate the notice.

Fauchaux v. Georgett; R. v. Georgett (No. 2), 25 Can. Cr. Cas. 76, 8 S.L.R. 325, 32 W.L.R. 863, 9 W.W.R. 458.

CRIMINAL LAW — NOTICE — LENGTH OF — AFFIDAVITS FILED AND NOTICE OF MOTION SERVED ON SAME DAY—PRESUMPTION AS TO PRIORITY — APPEAL TO DISTRICT COURT JUDGE—JUDGE ERRONEOUSLY HOLDING THAT HE HAS NO JURISDICTION—RIGHT TO CERTIORARI NOT AFFECTED BY.

That the Statute, 13 Geo. II., c. 18, ss. 1 and 5, do not apply to Saskatchewan and two clear days' notice of application for certiorari is sufficient. Where affidavits in support of certiorari are filed on the same day that notice of motion is served, it will be presumed in the absence of evidence to the contrary that the affidavits were regularly filed prior to the service of the notice. The giving of a notice of appeal from a conviction or order of a justice does not take away the right to certiorari where such notice is given for the wrong court or, where such notice being given for the right court, the court erroneously holds that it is given to the wrong court and refuses to hear the appeal. The fact that the appellant has a possible remedy by mandamus to compel a District Court Judge to hear an appeal is not in itself a bar to the remedy by certiorari. [Fauchaux v. Georgett (8 S.L.R. 325) applied as to intituling.]

R. v. Deer, 12 S.L.R. 49.

PROCEDURE—NOTICE OF MOTION.

It is competent for a court authorized under Cr. Code, s. 576, to make rules of procedure inter alia as to certiorari, to sub-

stitute a practice by notice of motion for the former process by writ and order nisi.

R. v. Titchmarsh, 22 D.L.R. 272, 24 Can. Cr. Cas. 38, 32 O.L.R. 569.

To remove case for trial in a superior court.

R. v. Baugh, 26 Can. Cr. Cas. 74, 36 O.L.R. 436

(§ 11—20)—Filing amended conviction—Depositions.

Leave to file an amended conviction on the return of a certiorari motion to quash will be refused where it was essential to the offence under a provincial law that it should have taken place in an electoral district constituting a restricted locality and the description of the place of offence in the first conviction did not shew that it was within the restricted locality, unless the amendment intended to cure the defect is supported by the evidence and proceedings before the magistrate.

R. v. Bissette (Alta.), 41 D.L.R. 52, 29 Can. Cr. Cas. 97, [1917] 3 W.W.R. 501.

Amendment of conviction — Right of court to make conviction conform to Code—Cr. Code, s. 754.

Assuming that a police magistrate, who imposed a penalty in excess of what was authorized by the Criminal Code, 1906, had no power, after service upon him of a notice of motion to set aside the conviction, which called upon him to make a return of the conviction, information, etc., to amend the conviction by substituting a penalty provided by the Code, the court, to which the conviction was removed by certiorari, may amend the conviction so as to conform to the Code, under the authority given by s. 1124 thereof providing that no conviction made by any justice should be held invalid for any irregularity, etc., therein, if the court or judge before which or whom the question is raised is satisfied that an offence of the nature described in the conviction has been committed, over which such justice has jurisdiction, and giving the judge or court where so satisfied, even if the punishment imposed is in excess of that which might lawfully have been imposed, like powers in all respects to deal with the case, as are given by s. 754 of the Code providing that, in every case of appeal from a summary conviction, the court to which such appeal is made, shall, notwithstanding, among other things, that the punishment imposed may be in excess of that which might lawfully have been imposed, hear and determine the charge on which such conviction was made upon the merits and, among other things, exercise any power which the justice whose decision is appealed from, might have exercised.

R. v. Marcinko, 4 D.L.R. 687, 19 Can. Cr. Cas. 388, 3 O.W.N. 1626, 22 O.W.R. 846.

Amendment of conviction.

The word "justice" is to be construed in s. 1124 of the Criminal Code 1906 in a different manner from the words "justice of the peace" which were used in the corresponding section of the former Code (Cr. Code 1892, s. 889) by reason of the statutory definition given to the word "justice" by the interpretation clause, Cr. Code, 1906, s. 4 (18), whereby police magistrates and stipendiary magistrates are included in its meaning, and also by reason of the transposition of former s. 889 in the 1906 consolidation from the summary convictions part to the part of the 1906 Code entitled "Extraordinary Remedies," with the result that the present s. 1124 as to amendment on certiorari applies not only to "summary convictions" but to convictions on "summary trials" held under Part 16 of the Code.

R. v. Crawford, 6 D.L.R. 380, 20 Can. Cr. Cas. 49, 5 A.L.R. 204, 22 W.L.R. 107, 2 W. W.R. 952.

Power to amend summary conviction.

A summary conviction for "storing inflammable goods," following an information in like terms, cannot be supported under a statutory regulation or by-law making it an offence to store "explosive material" at a particular place; the defect is fundamental and the court cannot on certiorari amend the conviction to conform with the by-law.

R. v. Little (B.C.), 27 Can. Cr. Cas. 422.

Statutory requirements of notice of motion.

A notice of motion to quash a summary conviction under the Ontario Temperance Act, 6 Geo. V., Ont. c. 50, must specify the objections intended to be raised (Ont. Judicature Act, s. 63, subs. (2)); this includes an objection that a conviction does not specify what offence under the Ontario Temperance Act has been committed, and although the notice of motion must be served within 30 days from the conviction (7 Geo. V., Ont., c. 50, s. 33) it is competent for the court after the 30 days to give leave to amend the notice served within the time, or to serve a supplementary notice, so as to specify the objection in compliance with the Judicature Act.

R. v. Leduc, 30 Can. Cr. Cas. 246, 43 O.L.R. 290.

Power to amend — Excessive punishment.

Where evidence was irregularly given of a previous offence, and the penalty imposed by a summary conviction was in excess of that authorized for a first offence, the court reviewing the conviction on certiorari for illegal importation of liquor into prohibited territory will decline to amend the conviction by reducing the penalty, if it is not satisfied by the depositions that the accused was guilty of the offence which was then being tried, although neither the information nor the conviction purported to be for other than a first offence.

R. v. L'Hirondelle, 26 Can. Cr. Cas. 71, 34 W.L.R. 722.

AMENDMENT OF CONVICTION—PLEA GUILTY

If the information for an indecent act, under Cr. Code, s. 205, omits to charge that the act was "wilfully" committed and defendant pleads guilty before any evidence is taken, the defect will then not be curable on a motion to quash the summary conviction, but if a plea of not guilty is changed to one of guilty after the evidence has been given for the prosecution which satisfies the court hearing the certiorari that the indecent act was wilful, the defect is amendable under the curative provisions of Cr. Code, s. 1124. [R. v. Clifford, 25 Can. Cr. Cas. 5, distinguished.]

R. v. Gerald, 26 Can. Cr. Cas. 7.

OFFICIAL TITLE OF MAGISTRATE INCOMPLETELY STATED—AMENDMENT.

On certiorari the Court has power to amend a summary conviction by adding to the magistrate's official designation as a county police magistrate words to indicate that he was ex officio a city magistrate as regards an offence committed in the city, if by statute the original appointment for the county has been extended to include the city without further appointment and without any further oath of office being required.

Ex parte Richard; R. v. Steeves, 24 Can. Cr. Cas. 183, 42 N.B.R. 596.

(§ II—21)—PROCEDURE — AFFIDAVITS — SUFFICIENCY — INFORMATION AND BELIEF.

Affidavits in support of an application for a writ of certiorari cannot be accepted as evidence when the essential matters are sworn to on information and belief without the grounds therefor being stated. (Per Macdonald, C.J., Irving, and Martin, JJ.) [Re J. L. Young Mfg. Co., Young v. J. L. Young Mfg. Co., 69 L.J.Ch.D. 868, and United Buildings Corp. v. Vancouver (B. C.), 13 D.L.R. 593, at 600, specially referred to.]

R. v. License Commissioners of Point Grey, 14 D.L.R. 721, 18 B.C.R. 648, 26 W. L.R. 46, 5 W.W.R. 572.

PROCEDURE — HEARING — ADMISSIBILITY OF AFFIDAVIT OF MAGISTRATE.

On an application for a writ of certiorari to set aside a conviction for a violation of the Lord's Day Act, R.S.C. 1906, c. 153, on the ground that it had not been shewn that a fiat had been obtained under the act, an affidavit of the convicting magistrate in answer is admissible to shew that, before information was laid, he had received the fiat of the Attorney-General to the prosecution being instituted as the statute requires, and that it was in his possession during the trial.

R. v. Thompson; R. v. Hammond; R. v. Churchill, R. v. Aherns, 14 D.L.R. 175, 22 Can. Cr. Cas. 78, 7 A.L.R. 40, 25 W.L.R. 576, 5 W.W.R. 157.

AFFIDAVITS.

The court will not admit affidavits in support of a certiorari motion under Ontario law to quash a summary conviction for petty trespass upon enclosed land for the purpose of shewing that the lands were not in fact enclosed or to controvert otherwise the findings of the magistrate upon questions which it was competent for him to try. [R. v. Davey, 14 D.L.R. 727, 22 Can. Cr. Cas. 185; R. v. Strachan, 20 U.C. C.P. 182, applied.]

R. v. Chappus, 28 Can. Cr. Cas. 157, 38 O.L.R. 576. [Affirmed, 28 Can. Cr. Cas. 411, 39 O.L.R. 329.]

AFFIDAVITS ON QUESTION OF COSTS.

Affidavits will be received as to the conduct of the parties as bearing upon the question of costs in certiorari proceedings to quash a summary conviction, although the matter set up may not be relevant to the case presented for quashing the conviction.

R. v. Hackam, 30 Can. Cr. Cas. 414, 44 O.L.R. 224.

(§ II—24)—ONUS OF PROOF—WEIGHT OF EVIDENCE.

The court hearing a certiorari motion may quash a summary conviction which a magistrate has entered arbitrarily in reliance upon the shifting of the onus of proof by statute upon the defendant without giving judicial consideration to the question of the credibility to the defendant's evidence contra, but if the statutory onus is that the accused shall prove that he did not keep liquor for sale when a quantity of liquor was found in his possession the magistrate may take into consideration the circumstances under which it was found and under which it was obtained in deciding that he will not accept the defendant's denial on oath that it was kept for purpose of sale. [R. v. Covert, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 A.L.R. 349, commented upon.]

R. v. Morin, 38 D.L.R. 617, 28 Can. Cr. Cas. 414, 12 A.L.R. 101, [1917] 3 W.W.R. 693.

REVIEW OF CONVICTION UNDER MUNICIPAL BY-LAW.

On a certiorari application in respect of a summary conviction under a municipal by-law, the court may look at the depositions and proceedings before the magistrate to see if the by-law has been proved, and, if not, may quash the conviction. [R. v. Banks, 1 Can. Cr. Cas. 370, 2 Terr. L.R. 81, followed.]

City of Lethbridge v. Hanson (Alta.), 29 Can. Cr. Cas. 43.

NATURE AND EXTENT OF REVIEW—CONVICTION UNDER LIQUOR LICENSE ACT—REVIEWING EVIDENCE.

On certiorari the court will not examine the evidence in a summary proceeding for a violation of the Liquor License Act, N.B. Con. Stat. 1903, c. 22, pertaining to the very issue which the inferior court had to enquire into, notwithstanding an erroneous conclusion may have been reached, except

in so far as to ascertain whether the depositions shew any evidence warranting a conviction. [Ex parte Coulson, 1 Can. Cr. Cas. 31, 33 N.B.R. 341; Re Melina Trepanier, 12 Can. S.C.R. 111; The King v. McArthur, 14 Can. Cr. Cas. 343, referred to.] On certiorari a summary conviction for violating the Liquor License Act, N.B. Con. Stat. 1903, c. 22, will be sustained, notwithstanding the contradictory nature of the evidence, where there is testimony from which the magistrate might have found the accused guilty, since the former saw and heard the witnesses and, as a judge of the evidence, was in a position to accept such portion as he might think credible. [The King v. Conrod, 5 Can. Cr. Cas. 414, 35 N.S.R. 79, referred to.]

R. v. Allingham, Ex parte Keefe, 12 D.L.R. 9, 21 Can. Cr. Cas. 268, 41 N.B.R. 558, 12 E.L.R. 504.

NATURE AND EXTENT OF REVIEW—VIOLATION OF TEMPERANCE ACT—SALE OF LIQUOR FOR INDIVIDUAL USE OF PURCHASER.

Whether liquor sold in violation of the Canada Temperance Act was intended for the individual use of the purchaser is to be determined by the magistrate and is not open to review on certiorari. [R. v. Peck, Ex parte Beal, 40 N.B.R. 320, referred to.]

R. v. Holyoke, Ex parte McIntyre, 13 D.L.R. 225, 21 Can. Cr. Cas. 422, 42 N.B.R. 135, 13 E.L.R. 210.

NATURE AND EXTENT OF REVIEW—WEIGHT OF EVIDENCE.

Where certiorari is not taken away by statute, a Superior Court, exercising powers of supervision and revision is ordinarily confined, when dealing with the question whether there is evidence to justify a summary conviction, to the evidence for the prosecution; but where the evidence for the prosecution justifies a conviction only on the ground of natural inference or statutory legal presumption and the evidence for the defence does not contradict the facts from which the inference or presumption arises, but proves the existence of other facts which shew that the inference, otherwise rightly drawn, ought not to be drawn when the whole facts are known, the court is bound to consider also such defence evidence in determining whether there was evidence to justify the conviction.

R. v. Covert, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 A.L.R. 349, [1917] 1 W.W.R. 919.

SUMMARY CONVICTION UNDER LIQUOR LAW—WEIGHT OF EVIDENCE.

The rule in civil cases as to supervision of the findings of a jury on the ground that they are against the weight of evidence does not apply to a certiorari application for review of the findings of a magistrate in respect of an offence as to which the right of certiorari of convictions thereunder has been taken away by statute; certiorari can only be granted in such cases in the event of the magistrate acting without jurisdiction. [Solomon v. Bitton, 8 Q.B.D. 176, and Phillips v. Martin, 15 App. Cas. 193, distinguished.]

R. v. Davis; Ex parte Miranda, 19 D.L.R. 475, 23 Can. Cr. Cas. 33, 42 N.B.R. 338.

NATURE AND EXTENT OF REVIEW — CONVICTION WITH SUPPORTING EVIDENCE — WEIGHT OF EVIDENCE NOT CONSIDERED.

Where there was some evidence before the magistrate to support his findings of fact such findings will not be reviewed in certiorari proceedings.

R. v. Campbell, 8 D.L.R. 321, 20 Can. Cr. Cas. 490, 3 W.W.R. 192. [Affirmed, 13 D.L.R. 941.]

EXTENT OF REVIEW — JURISDICTION — EVIDENCE OF THE OFFENCE.

Where certiorari is taken away by statute and is consequently restricted to the matter of jurisdiction, the erroneous finding by the magistrate of one of the constituents of the offence itself as distinguished from some collateral fact upon which his jurisdiction was contingent, does not go to the magistrate's jurisdiction so as to support a certiorari. [R. v. Walsh, 29 N.S.R. 531, followed; Colonial Bank v. Willan, L.R. 5 P.C. 417, applied.]

R. v. Hoare, 24 Can. Cr. Cas. 279, 40 N.S.R. 119.

OMISSION OF PROSECUTION TO NEGATIVE EXCEPTIONS.

A summary conviction under the Lord's Day Act, R.S.C. 1906, c. 153, will not be set aside on certiorari for the omission of the prosecution to negative circumstances the existence of which would legalize the Sunday work or labour complained of as being a work of necessity or mercy or as otherwise lawful under some provincial act or law. [Cr. Code, ss. 1124, 1125, applied.]

R. v. Sam Bow, 31 Can. Crim. Cas. 269, [1919] 3 W.W.R. 315.

NOTICE OF APPEAL FROM ORDER TO QUASH CONVICTION—STATING GROUNDS — ALTA. R. 847.

A notice of appeal from an order quashing a summary conviction on certiorari must specify the grounds of appeal. (Alta. Criminal Rule 847). Failure in that respect would justify the Appellate Court in disregarding an objection that an adequate remedy was afforded the accused by an appeal and that in such event certiorari was taken away by statute. (Per Stuart, J.).

R. v. Dominion Drug Stores (No. 2), 31 Can. Cr. Cas. 86, 14 A.L.R. 384, [1919] 2 W.W.R. 413.

INTOXICATING LIQUORS — KEEPING FOR SALE —CONVICTION FOR JURISDICTION OF COURT TO REVIEW — ORDERS FOR CERTIORARI GRANTED BUT WRITS NOT ISSUED—APPLICATIONS TO QUASH CONVICTIONS DISMISSED.

The three defendants having been convicted of having unlawfully kept intoxicating liquor for sale, applications were made on their behalf to the Judge of the County

Court for district number 7 for writs of certiorari to remove the convictions into the Supreme Court in order that they might be reviewed. The judge granted the applications, and an order in each case for a writ of certiorari was made, but the writs were not actually issued. Held, that, unless brought into the court by certiorari, the court had no jurisdiction to quash or otherwise deal with the convictions, and the applications to quash must therefore be dismissed.

The King v. Rusko, 52 N.S.R. 181.

(§ II—26)—Deposit of fine.

To obtain a certiorari in respect of a summary conviction under the Quebec License Law for illegal sale of liquors without a license, the defendant must within eight days after the conviction deposit with the Clerk of the Peace the amount of the fine and costs and a further sum of $50 as security for future costs (R.S.Q. 1909, art. 1166), and, in default, his petition for certiorari will be dismissed.

Gelinas v. Jolin, 34 D.L.R. 700, 51 Que. S.C. 26, 27 Can. Cr. Cas. 392.

Security for costs.

Under Sask. Crown Practice Rules 2 and 5 leave to proceed without furnishing security may be given on the return of a certiorari motion.

R. v. Adamson, 25 Can. Cr. Cas. 440, 9 S.L.R. 91, 33 W.L.R. 566.

Quashing conviction — Recognizance.

Where the summons for certiorari gives notice that on the hearing of the motion for the writ the applicant will ask for the quashing of the conviction without the actual issue of the writ and it appears on the motion that the magistrate acted absolutely without jurisdiction, the court may quash the conviction under B.C. Crown Office Rule No. 37, and the applicant need not in such case file a recognizance such as would be necessary under r. 36, if the writ were to be issued.

R. v. Dhana Singh, 25 Can. Cr. Cas. 250, 7 W.W.R. 1101.

Recognizance.

An application for a writ of certiorari should not be dismissed under B.C. Crown Office Rule 36 on a preliminary objection that no recognizance had been filed. Semble, Crown Office Rule 36 is complied with if the recognizance on a certiorari is filed on taking out the order or writ in case the judge grants the certiorari.

The King v. Ferguson, 19 Can. Cr. Cas. 31, 16 B.C.R. 287.

(§ II—27)—Staying proceedings attacked.

When the Council of the Bar is served with a notice of certiorari in respect of a charge of unprofessional conduct against a member, it should suspend all proceedings pending the decision on the certiorari, and if it disregards the same and proceeds to decree the suspension of the advocate who had served notice of this certiorari the execution of this suspension will be restrained by prohibition.

Gosselin v. Bar of Montreal (No. 1), 2 D.L.R. 19.

(§ II—28)—Amendment of summary conviction—Unlawful practice of dentistry.

An objection that a conviction for unlawfully practising dentistry in contravention of the Dental Profession Act, R.S.S. c. 108, does not specify the particular acts which constituted the alleged practising, may be remedied on certiorari by the court directing an amendment of the conviction so as to insert a statement of the several acts shewn in the evidence to have been committed by the defendant, if the court finds that the magistrate had jurisdiction and that an offence was committed of the nature specified in the conviction. [Cr. Code, s. 1124; R. v. Coulson, 1 Can. Cr. Cas. 114, applied: R. v. Harris, 13 Can. Cr. Cas. 393, referred to.]

R. v. Schilling, 21 D.L.R. 60, 23 Can. Cr. Cas. 380, 8 S.L.R. 70, 30 W.L.R. 463, 7 W.W.R. 1112.

Summary conviction bad on its face—Filing substituted conviction.

On a motion for a writ of certiorari, where the practice is to hear the merits on the motion for the writ, and if granted to include an order quashing the conviction on the return being made, the court will not permit the filing of a substituted conviction made up by the justice after notice of the certiorari application to remedy the defect of the first formal conviction in not stating any place at which the offence was committed, where the depositions themselves did not shew where the offence was committed, and consequently did not shew territorial jurisdiction of the magistrate. [Compare R. v. Oberlander, 16 Can. Cr. Cas. 244, 15 B.C.R. 134; R. v. Pickard, 11 D.L.R. 423, 21 Can. Cr. Cas. 250.]

R. v. Aikens, 21 D.L.R. 633, 23 Can. Cr. Cas. 467, 48 N.S.R. 509.

Return of amended conviction—Depositions.

If the magistrate returns to a certiorari an amended conviction by which the substance of that first drawn is changed, the court may decline to accept the amended conviction in the absence of the depositions. [R. v. Barker, 1 East 188, referred to.]

R. v. Watchman, 20 D.L.R. 201, 30 W.L.R. 534, 7 W.W.R. 880, 23 Can. Cr. Cas. 362, 7 S.L.R. 350.

Practice as to costs — Alternative procedure of appeal available — Summary conviction under Criminal Code.

It is a ground for refusing costs to the successful defendant on his conviction being quashed on certiorari that he might instead of taking certiorari proceedings have appealed to a local court from the summary conviction and that the local court would have had even wider powers upon the ap-

peal than were available to the Superior Court in the certiorari proceedings.

R. v. Roach, 19 D.L.R. 362, 6 O.W.N. 630, 23 Can. Cr. Cas. 28.

DISCRETION IN GRANTING — STATUTORY PROCEEDINGS—CURATIVE STATUTE.

Where, by statute certain defects in proceedings under the Bastardy Act, C.S.N.B. 1903, c. 182, are declared not to prevent the trial of the accused or to avail as a defence upon the trial, the discretion of the court to grant or refuse a certiorari will be exercised by refusing to remove the information and preliminary proceedings thereon for defects of the class which, if raised before the trial tribunal, would be cured by the statute.

Ex parte Seriesky, 10 D.L.R. 613, 21 Can. Cr. Cas. 140, 41 N.B.R. 475, 12 E.L.R. 387.

NEW GROUNDS — AMENDMENT — DISCRETION.

Leave to add new grounds to an order nisi to quash in certiorari proceedings is discretionary with the court and should be refused at the hearing if the applicant has had ample time to formulate them and give notice to the opposite party and has failed to do so.

Ex parte Murchie; R. v. Gloucester, 24 Can. Cr. Cas. 228.

(§ II—29) — REPRESENTATION OF MAGISTRATE BY ATTORNEY-GENERAL'S DEPARTMENT—COSTS.

Where the Attorney-General is represented on a certiorari application brought by the person convicted in a criminal matter, it is to be presumed that the Attorney-General's department is supporting the proceedings on behalf of the magistrate or other government officer; and the magistrate or officer so represented will, in a proper case, on the setting aside of the conviction, be ordered to pay costs irrespective of any misconduct being shewn as was formerly necessary, there being jurisdiction in Alberta under Crown rule N.W.T. 39, and Cr. Code (1906), s. 576. [Thomas v. Pritchard, [1903] 1 K.B. 209, 72 L.J. K.B. 23, 20 Cox C.C. 376, applied.]

R. v. Knowles, R. v. Wilson, 13 D.L.R. 773, 22 Can. Cr. Cas. 66, 6 A.L.R. 221, 25 W.L.R. 302, 5 W.W.R. 20.

(§ II—30)—CONTROVERTING THE RETURN—SUMMARY CONVICTION — USE OF EVIDENCE IN A PRIOR CASE.

A magistrate's return in certiorari proceedings is conclusive only as to matters which are required to be included and does not prevent the controverting of the magistrate's statement therein that it had been agreed that the evidence in another case previously tried should be considered as applicable, where the record of the depositions and proceedings contained no reference to such consent or agreement. [R. v. Strachan, 20 U.C.C.P. 182, referred to.]

R. v. Davey, 14 D.L.R. 727, 5 O.W.N. 464, 22 Can. Cr. Cas. 185, 25 O.W.R. 478. [Doubted in 15 D.L.R. 612, 22 Can. Cr. Cas. 221.]

CONTROVERTING THE RETURN.

The court will not hear evidence on a certiorari application to contradict the return of the magistrate as to the course of procedure at the trial; affidavits to be receivable to disprove jurisdiction must be directed to the commencement of the inquiry and not to the facts disclosed in the progress of same. (Per Barry, J.) [Ex parte Steeves, 15 Can. Cr. Cas. 160, 39 N. B.R. 2; R. v. Bolton, 1 Q.B. 66, followed.]

Ex parte Richard; R. v. Steeves, 24 Can. Cr. Cas. 183, 42 N.B.R. 596.

(§ II—35)—RETURNING AMENDED CONVICTION—COPY.

A statute requiring the magistrate to file a "copy" of each conviction under a particular statute in a public office within a limited time will not debar the magistrate from amending the original conviction while still in his possession in a manner conformable to the actual adjudication and filing a copy of such amended conviction so as to cure an omission in the first copy filed of the time when the offence was committed as proved by the evidence, and such amended conviction may be returned to an order for certiorari granted after the filing of a copy of the first pursuant to the statutory requirement. [R. v. Learmont, 23 N.S.R. 24, distinguished; R. v. McAnn, 3 Can. Cr. Cas. 110, referred to.]

R. v. Shatford, 38 D.L.R. 366, 51 N.S.R. 322, 28 Can. Cr. Cas. 284.

RETURNING AMENDED CONVICTION — SUMMARY TRIAL PROCEDURE.

A magistrate making a conviction on a summary trial for an indictable offence may in answer to a certiorari motion attacking the same for irregularity, return an amended conviction conforming with the adjudication and setting out in a more formal manner the conviction which he had already drawn. [And see R. v. McAnn, 3 Can. Cr. Cas. 110; R. v. Whiffin, 4 Can. Cr. Cas. 141; R. v. Barre, 11 Can. Cr. Cas. 1; Ex parte Gilberson (No. 1), 16 Can. Cr. Cas. 66; Ex parte Gilberson (No. 2), 16 Can. Cr. Cas. 71; R. v. Smith, 19 Can. Cr. Cas. 253, 45 N.S.R. 517.]

R. v. Nelson, 17 D.L.R. 305, 22 Can. Cr. Cas. 301, 7 S.L.R. 92, 28 W.L.R. 102, 6 W.W.R. 706.

(§ II—36)—SUMMARY CONVICTION—COSTS —MINUTE OF CONVICTION.

A summary conviction under the Liquor License Act, C.S.N.B., 1903, c. 22, will not be quashed on the ground that the amount of the costs of the prosecution and of the costs of commitment and conveying to goal were first fixed in the formal conviction and that the "minute of conviction," which the magistrate is directed to make by s. 29, adjudged the fine "besides costs" and in default three months' imprisonment, without specifying either the amount of such costs or the costs of commitment and con-

veying to gaol in the event of the fine and costs not being paid; semble, the minute of conviction was not defective, but, if it were, the defect was cured by s. 89 of that act (similar to Cr. Code, s. 1124), so far as the conviction was concerned, where the latter was in due form. [Ex parte Van Buskirk, 13 Can. Cr. Cas. 234, 38 N.B.R. 335; Ex parte Bertin, 10 Can. Cr. Cas. 65, 36 N.B.R. 577, referred to.]

R. v. Dugas; Ex parte Paulin, 27 D.L.R. 683, 25 Can. Cr. Cas. 173, 43 N.B.R. 58.

SUMMARY CONVICTIONS—APPEAL.

A summary conviction is to be considered as "removed by certiorari" for the purposes of Code s. 1124, and its curative provisions as regards convictions otherwise irregular but founded on evidence satisfactorily disclosing an offence of the nature described in the conviction, although the conviction itself had not in fact been brought up under a writ of certiorari but on a motion to quash the conviction under a method of procedure authorized by Rules of Court passed under Code, s. 576. It is sufficient in such case that the conviction and papers pertaining to it were certified and returned to the Superior Court on notice, instead of by a return to a writ of certiorari, and that for the purposes of an appeal from an order refusing to quash, the Appellate Court has before it the conviction and papers so returned by the magistrate and certified to the Appellate Division by the proper officer of the division in which the order appealed from was made. (Per Meredith, C.J.C.P.). [R. v. Titchmarsh, 32 O.L.R. 569, applied; Ont. Practice Rule 1287, considered.]

R. v. Jackson, 29 Can. Cr. Cas. 352, 40 O.L.R. 173, affirming 12 O.W.N. 191. [See 12 O.W.N. 77, 161.]

RIGHT TO AWARD COSTS AGAINST INFORMANT, RESPONDENT, ON QUASHING A SUMMARY CONVICTION.

A Superior Court having by statute the powers formerly held by the Court of Chancery in England, as well as common law powers, has jurisdiction to award costs against the informant appearing in support of a summary conviction in certiorari proceedings resulting in the conviction being quashed. Such jurisdiction in Saskatchewan is supported also by Crown r. 40 and King's Bench Act (Sask.) s. 51. [R. v. Woodhouse, [1906] 2 K.B. 501, applied; Re Mills Estate, 34 Ch. D. 24; Reg. v. Parlby, 6 T.L.R. 36, held overruled; The Queen v. Banks, 1 Can. Cr. Cas. 370; Reg. v. Coutts, 5 Ont. R. 644; R. v. Rondeau, 9 Can. Cr. Cas. 523; R. v. Bennett, 5 Can. Cr. Cas. 456, not followed.]

R. v. Standall, 31 Can. Cr. Cas. 144, 12 S.L.R. 282.

(§ II—40)—WAIVER—NOTICE OF MOTION SERVED TOO LATE — ENLARGEMENT OF MOTION BY CONSENT.

The enlargement by consent of a motion to quash a summary conviction under the Liquor License Act (Ont.) and the demanding by the respondent of copies of affidavits in support, do not operate as a waiver by the prosecutor of a preliminary objection that the notice of motion was served too late, even if it were possible for the prosecutor to waive the statutory requirements. [R. v. Whitaker, 24 O.R. 437, distinguished; R. v. How, 11 A. & E. 159, applied.]

Re Elliott, 23 Can. Cr. Cas. 163.

CHAMPERTY AND MAINTENANCE.

I. IN GENERAL.

II. AGREEMENTS BETWEEN ATTORNEY AND CLIENT.

I. In general.

(§ I—1)—ASSIGNMENT BY SEVERAL CREDITORS OF SEPARATE CLAIMS TO ONE PARTY FOR SUIT — QUEBEC CIVIL CODE, 1582.

When several creditors assign their several claims to one of their number, without selling them to him, but transferring them for the purpose of having but one suit brought against their common debtor, so as to avoid costs and multiplicity of actions, the defence of litigious rights cannot be pleaded, art. 1582 of the Quebec Civil Code applying only in the case of an onerous contract based on speculation. [Powell v. Watters, 28 Can. S.C.R. 133, followed.]

French Gas Saving Co. v. The Desbarats Advertising Agency, 1 D.L.R. 136.

(§ I—2)—TRANSFER OF LITIGIOUS RIGHTS.

An exception to an agreement, whereby the principal plaintiff agrees to limit the responsibility of the principal defendant (who is also plaintiff in warranty) to a certain sum on condition that such principal defendant prosecuted an action in warranty against the defendant in warranty, on the ground that such agreement is a transfer of litigious rights should be raised by a peremptory exception to the action in warranty and cannot be entertained as a ground against an appeal from a judgment rendered on such action.

Stilwell-Bierce & Smith-Vale Co. v. Lyall, 3 D.L.R. 369.

SUPPORTING TEST CASE—ASSISTING IN SIMILAR INDEPENDENT ACTION.

Champerty or maintenance is not shewn by an agreement of a plaintiff in a similar action against the same defendant to pay the costs of another plaintiff's solicitor in proceeding with a test action in the name of such other plaintiff, leaving the action of the person so paying the solicitor in abeyance under an order of stay to abide the result of the contested action, even although the plaintiff in the contested action had no means to carry on the litigation alone, if the latter's cause of action was an independent one and the other

plaintiff had no share in the possible proceeds of the contested action.

Stokes v. B.C. Electric R. Co., 12 D.L.R. 379, 3 W.W.R. 957.

ACTION BY ASSIGNEE OF CLAIM — AGREEMENT TO DIVIDE — ILLEGALITY.

Colville v. Small, 22 O.L.R. 426, 17 O. W.R. 745.

II. Agreements between attorney and client.

(§ II—6)—AGREEMENTS BETWEEN SOLICITOR AND CLIENT—CONTINGENT FEE.

The courts of this country will decline on grounds of public policy to enforce an agreement made in another country between a foreign attorney and his client whereby the attorney was to receive one-half of the proceeds by compromise or suit of the client's claim against her husband for alimony; and will in lieu thereof fix and allow such reduced amount as is found to be reasonable.

Waters v. Campbell, 14 D.L.R. 448, 7 A.L.R. 298, 25 W.L.R. 838, 5 W.W.R. 410.

SOLICITOR AND CLIENT—EXTRA REMUNERATION TO SOLICITOR IN CASE OF SUCCESS.

Buckley v. Riou, 20 Que. K.B. 168, reversing 37 Que. S.C. 1.

CHARGE.

Of realty under will, see Wills III.

On land generally, see Mortgage; Land Titles.

Under judgment, see Judgment; Execution.

CHARITIES.

I. NATURE AND VALIDITY.
- A. In general.
- B. What are charities.
- C. Conditions; existence and capacity of trustees or beneficiaries.
- D. Definiteness; discretion of trustee.

II. ENFORCEMENT; CONTROL; FORFEITURE; LIABILITY.
- A. In general.
- B. Cy près doctrine.
- C. Liability for damages.

As to charitable bequests, see Wills III.

I. Nature and validity.

A. IN GENERAL.

(§ I—1) — ROMAN CATHOLIC EPISCOPAL CORPORATION—ACT CREATING—EFFECT OF ACT—POWERS OF BISHOP OF TORONTO AND KINGSTON.

The Act of 8 Vict., c. 82, by which the Roman Catholic Episcopal Corporation of the Diocese of Kingston was created, in effect created the Bishops of Kingston and Toronto corporations for the purpose of acquiring and holding land for the general use, eleemosynary, ecclesiastical, or educational, of the Church of Rome or of the religious community or any part of it within their respective dioceses, with the right, having obtained the consent provided for by s. 5, to sell, exchange, lease, or otherwise dispose of the land. The act does not vest in the corporation any spiritual jurisdiction or ecclesiastical rights, nor are such rights conferred upon the Bishops in the corporate status which the act gives them.

Basil v. Spratt, 45 D.L.R. 554, 44 O.L.R. 155.

CHARITABLE ASSOCIATIONS ACT — INCORPORATION—"ORPHANS"—"FAMILY."

Under the Charitable Associations Act (R.S.M. 1913, c. 27) a corporation may be created "for any benevolent or provident act not connected with trade or commerce," therefore where any society is incorporated under said act by letters patent which provide that it shall have all powers, rights and immunities vested in such bodies under the law, the powers of the association are not limited to those specified in s. 2 (a) of the Act, and include the power to make provision for the several classes of persons named in s. 52 of the Beneficiary Laws. The word "orphans" in s. 2 of the act means children and does not include the grandchildren of a deceased member who have been bereft of their mother. The word "family" in the by-laws of a benevolent association may include all persons who habitually reside under one roof and form one domestic circle.

Hunter v. Dow (Man.), [1917] 3 W.W.R. 132.

C. CONDITIONS; EXISTENCE AND CAPACITY OF TRUSTEES OR BENEFICIARIES.

(§ I C—22)—CAPACITY GENERALLY.

R.S.O. 1897, c. 307, s. 23, gives power to sell land held by churches in trust, when it becomes unnecessary to hold it for the religious use of the congregation, and it is deemed advantageous to sell, but without disturbance of special trusts, the aim of the statute being to give a right of alienation to a religious body holding lands by trustees capable of perpetual succession. Where a given trust deed provides a specific event when "the church, for which the trust was created shall lose its visibility and cease to exist," this cannot be said to have happened where the church congregation has merely moved to another location. Where a church, to which certain lands are conveyed in perpetual trust for its maintenance, is organized on a congregational basis, the view of the majority prevails, and no breach of a general trust occurs by the conversion of the lands pursuant to direction of the majority of the congregation; and resolutions to change the place of worship and sell the lands deeded to the trustees of the congregation are matters of congregational competence and are conclusive against dissident members of the congregation. [Newburgh Reformed Church v. Princeton Theological Seminary, 4 N.J. Eq. 77, and Pine Hill Lutheran v. St. Michael's Evangelical, 48 Pa. St. 20, followed.] A deed of land to

church trustees upon trust that the land shall be forever held and enjoyed for the use of the members of a specified local church and that rents derived from any portion of the site shall be applied towards the upkeep of the meetinghouse thereon, is a trust which forbids a change of site so long as a congregation exists.

Hengli v. Pauli, 4 D.L.R. 319, 26 O.L.R. 94, 21 O.W.R. 776.

(§ I C—24)—Trust deed of church lands—Extension and division of parish.

Where a conveyance of land was made to the rector of a certain parish, "his successor and successors in office forever," in trust to erect and maintain a church thereon, and a statute, 39 Vict. Que. 1875, c. 74, declared that the land and the new church to be erected thereon should "be vested in the rector and churchwardens of the church" and their successors in office "in trust for the uses and purposes ecclesiastical of the said parish," and after many years the old parish was made into a separate parish and called by a new name while a strip of noncontiguous territory which had been added to the old parish retained the old name, the title to the old church was not vested in the corporation of the parish retaining the old name, since the trust on which the land was conveyed had a territorial meaning and related to a defined and well understood parochial area and to the maintenance within that area of a church for the purposes ecclesiastical of the original beneficiaries, the inhabitants of the district formerly known by the old name.

Parish of St. Stephen's v. Parish of St. Edward's, 2 D.L.R. 594.

(§ I C—27)—Rights of dissident members.

Dissident members of a church organized on an independent or congregational basis, who band themselves together with others in a new organization, are an off-shoot from the old body, and, therefore, have ceased to be a part of it, and can have no right as once members of the original body to claim any part of the property vested in trustees for that original body.

Hengli v. Pauli, 4 D.L.R. 319, 26 O.L.R. 94, 3 O.W.N. 915, 21 O.W.R. 776.

Unincorporated association.

A deed of property made by ratepayers in Nova Scotia to a religious order not incorporated in Nova Scotia is a nullity and no title passes under it. The same defect would affect the title of defendant under the deed to him from the mother of the order and the mortgage to his brother who was aware of the facts. The action by the Attorney-General on the relation of one of the ratepayers to recover for the section property which rightfully belonged to it would not be affected by a resolution of the majority of the ratepayers instructing discontinuance of the proceedings for the recovery of the property. The property having been obtained by public subscription for the use of the ratepayers of the section for educational purposes was a charitable trust, for the enforcement of which the Attorney-General was properly made a party, and was property which it was the duty of the trustees to take possession of under the provisions of R.S.N.S., c. 52, s. 55, subs. (a), and as to which they were guilty of a breach of trust in abandoning the proceedings for its retention.

The Attorney-General ex rel. Morrison v. Landry, 45 N.S.R. 298.

D. Definiteness; discretion of trustee.

(§ I D—35)—Nature and validity—Definiteness—Discretion of trustees—Wills.

While art. 869 of the Civil Code (Que.), gives the right and power to a person to freely dispose of his property by will (and that to charities or charitable institutions), if the will does not indicate clearly the charitable institutions or the class of charitable institutions, the charitable bequest will be nugatory for uncertainty and vagueness, and this result follows where the testator leaves it entirely to his executors or trustees to select the charities and the class of charities to be benefited. [Grimmond v. Grimmond, 74 L.J. Ch. 35, referred to.]

Atkinson v. Cinq-Mars, 20 D.L.R. 404.

Powers of trustees—Conveyance—Purposes of trust.

Property held as a charitable trust for the use of all Protestant denominations, for social and religious purposes, cannot be conveyed by the trustees for the purpose of a church for any particular congregation or faction thereof.

Langille v. Nass, 36 D.L.R. 368, 51 N.S.R. 429.

(§ I D—38) — Definiteness — Discretion as to purpose of gift — Validity.

A bequest of property to be used by the legatees "for benevolent purposes anyway they may see fit" is void for uncertainty.

Lawrence v. Lawrence, 13 D.L.R. 737, 42 N.B.R. 260, 13 E.L.R. 519.

(§ I D—39) — Crown grant of land to use of clergymen—Discretion as to apportionment of proceeds.

On a Crown grant of land to trustees their heirs and assigns to be held to and for a glebe for the use and benefit of the ministers and congregations of the Church of England in a certain town or city, the income of the trust is to be divided in aliquot parts according to the number of the churches of that denomination existing from time to time in the city; the minister and congregation of each church may properly be treated as a single entity, and payment may be made to the rector and churchwardens, leaving it to them to apportion the distribution as between the minister and congregation. [Dumoulin v.

Langtry, 13 Can. S.C.R. 258; Re Hislop, 22 D.L.R. 710, 8 O.W.N. 53 referred to.]

Re Chatham Glebe Trust, 22 D.L.R. 798, 8 O.W.N. 169.

DISCRETION AS TO BENEFICIARIES.

Vacating the site of a place of worship by a church organized upon a congregational basis pursuant to a special trust granting the site to the church for that purpose, does not amount to a cesser of the existence of the beneficiary. [Compare Parish of St. Stephen's v. Parish of St. Edward's, 2 D.L.R. 594, a decision of the Supreme Court of Canada affirming the King's Bench of Quebec.]

Heugli v. Pauli, 4 D.L.R. 319, 26 O.L.R. 94, 21 O.W.R. 776.

CHARITABLE CORPORATION—CORPORATE SEAL—RIGHT TO SUE WITHOUT LEAVE OF ATTORNEY-GENERAL.

St. Boniface Hospital v. Forrest, 16 W.L.R. 58 (Man.).

II. Enforcement; control; forfeiture; liability.

A. IN GENERAL.

(§ II A—40)—CHARITABLE BEQUEST—DISTRIBUTION AMONG CHARITIES.

Re Gilbert, 4 O.W.N. 771, 24 O.W.R. 71.

B. CY-PRÈS DOCTRINE.

(§ II B—45) — CY-PRÈS — BEQUEST TO CHARITY NOT AT ONCE APPLICABLE, HOW CONSTRUED.

Where there is a general declaration of intention by a testator in favour of charity, the fact that the fund cannot be applied at once to a specific charity does not render the gift void.

Re Upton, 9 D.L.R. 373, 4 O.W.N. 815, 24 O.W.R. 54.

CY-PRÈS — CHARITABLE GIFT — DISPOSITION OF SURPLUS.

If there is a gift for a specific charitable purpose which has taken effect, but the purpose has subsequently failed, the surplus of the fund remaining will be applied cy-près; so when there was a fund subscribed for the relief of sufferers in a fire, the surplus remaining after payment of all claims was used, with the consent of the Attorney-General, for the purpose of erecting hospitals in the district where the fire had occurred.

Re Northern Ontario Fire Relief Fund Trusts, 11 D.L.R. 15, 4 O.W.N. 1118, 24 O.W.R. 459.

C. LIABILITY FOR DAMAGES.

(§ II C—52)—NEGLIGENCE—INJURY TO PATIENT IN HOSPITAL—LIABILITY—CARE IN SELECTION OF ATTENDANTS.

Lavere v. Smith's Falls Public Hospital, 24 D.L.R. 866, 34 O.L.R. 216.

CHARITABLE FUND — ADMINISTRATION — ACTION BY COMMITTEE OF CITIZENS.

Fernie District Fire Relief Committee v. Bruce, 17 W.L.R. 425 (B.C.).

CHATTEL MORTGAGE.

I. IN GENERAL.
II. VALIDITY; CONSIDERATION.
A. Generally.
B. Description of property.
C. Property subject to mortgage; after-acquired property.
D. Possession; power to sell.
III. FILING; RECORDING; RENEWING.
IV. EFFECT; RIGHTS OF PARTIES; PRIORITIES.
A. In general.
B. Priorities.
V. ASSIGNMENT; SATISFACTION; ABANDONMENT; WAIVER.
VI. ENFORCEMENT.

Annotations.

Equity; agreement to mortgage after-acquired property; beneficial interest: 13 D.L.R. 178.

Registrability of hiring lease or conditional sale: 32 D.L.R. 566.

I. In general.

(§ I—1)—WHAT IS—WAREHOUSE RECEIPT UNDER BANK ACT (CAN.).

A statutory receipt in the nature of a warehouse receipt given under s. 88 of the Bank Act, R.S.C. 1906, c. 29, as security to a chartered bank is not a "chattel mortgage" within a warranty condition of a fire insurance policy that the insurance shall be void if the insured property "be or become encumbered by a chattel mortgage."

Guimond v. Fidelity-Phenix Fire Ins. Co., 9 D.L.R. 463, 47 Can. S.C.R. 216, 49 C.L.J. 116, 12 E.L.R. 350.

II. Validity; consideration.

A. GENERALLY.

(§ II A—5)—VERBAL AGREEMENT—RIGHT OF SIMPLE CREDITOR TO ATTACK VALIDITY.

The validity of a chattel mortgage executed in pursuance of a verbal agreement cannot be attacked by a simple creditor under s. 8 of the Bills of Sale and Chattel Mortgage Act, R.S.M. 1913, c. 17. [Parkes v. St. George, 10 A.R. (Ont.) 496; Empire Sash, etc. v. Maranda, 21 Man. L.R. 665, followed.]

Richards & Brown v. Leonoff, 24 D.L.R. 180, 25 Man. L.R. 548, 31 W.L.R. 621, 8 W.W.R. 966.

VALIDITY—CONSIDERATION.

Where the object of a chattel mortgage made by an insolvent debtor is to withdraw all his assets from the reach of the other creditors in order to enable a surety to pay a debt of the insolvent which the surety had guaranteed, the chattel mortgage is invalid as against creditors under the Assignments and Preferences Act, 10 Edw. VII. (Ont.) c. 64, as having been made for an unlawful purpose.

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

OMITTING RATE OF INTEREST—FAILURE TO ANNEX NOTE.

A chattel mortgage given to a bank as security for the payment of a promissory note, containing recitals shewing particulars of the note and that interest was payable on the amount thereof, but the note itself not being annexed to nor registered with the instrument, and the rate of interest payable thereon not being specified, does not disclose a complete statement of the terms of defeasance or assurance, and is, therefore, inoperative under s. 19 of the Bills of Sale Act, R.S.B.C. 1911, c. 20, requiring all defeasances and conditions to be truly set out in the same instrument.

Ball & Whieldon v. Royal Bank, 26 D.L.R. 385, 52 Can. S.C.R. 254, reversing 22 D.L.R. 647, 1 B.C.R. 67.

ACTION BY JUDGMENT CREDITORS TO SET ASIDE—BILLS OF SALE AND CHATTEL MORTGAGE ACT—JUDGMENT SATISFIED—COSTS—OTHER CREDITORS.

The plaintiffs, being judgment creditors of the defendant company by virtue of a judgment recovered in a Division Court, brought this action, in the Supreme Court of Ontario, to have it declared that a certain chattel mortgage made by the defendant company to the defendant T. was void as against the plaintiffs and other creditors of the defendant company. When the action was commenced, execution had not been issued upon the plaintiffs' judgment. Before this action came down to trial, the amount of the plaintiffs' judgment had been paid to them; and, so far as they were concerned, only the costs of this action were in question. The Trial Judge determined that the chattel mortgage was void against creditors of the mortgagor, and ordered the defendants to pay the plaintiffs' costs of the action. The defendants appealed from this judgment:—Held, that the chattel mortgage was rightly found to be void under the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, c. 135—the transaction between the defendants was in fact an endorsement by the defendant T. of the defendant company's promissory note, whereas the chattel mortgage was in the form prescribed for a direct loan. Held, also, that the Trial Judge's award of costs to the plaintiffs could not be interfered with, but that the plaintiffs should have no costs of the appeal. After this action was brought, the plaintiffs' claim was not for the amount owing upon their judgment only, but for the costs of this action also. The costs did not become a debt until adjudged to the plaintiffs; but, when adjudged, an invalid mortgage should not be allowed to stand in the way of enforcing payment of them. The plaintiffs should have issued execution in the Division Court, caused the mortgaged goods to be seized under their execution, and, if a claim had been then made by the mortgagee, litigated that claim in the Division Court in interpleader proceedings. Having taken a more expensive course, they should be deprived of the costs of the appeal. Although it was not shewn by the style of cause, as it should have been, it sufficiently appeared from the statement of claim, that this action was brought on behalf of all creditors, and on amendment of the style of cause was properly allowed at the trial. The defect in the chattel mortgage was one of which advantage could be taken by creditors. If the plaintiffs had not sued on behalf of all creditors, not being execution creditors when they commenced this action, they would have had no locus standi; but, suing as they did on behalf of all creditors, their status was expressly established by s. 2 (b) of the Bills of Sale and Chattel Mortgage Act. And they had proved there were other creditors.

Barchard & Co. v. Nipissing Coca Cola Bottle Works, 42 O.L.R. 196.

UNDUE INFLUENCE—ILLITERACY.

Where mortgagees deliberately exclude a friend of an illiterate foreigner, who is with him at his request to advise him as to the effect of his acts, from the room where the foreigner is persuaded to sign a mortgage which he does not understand, the mortgage will be set aside.

Kardosy v. Massey-Harris (Sask.), 34 W.L.R. 808. [See also Vanholt v. Newton (Man.), 29 D.L.R. 425.]

(§ II A—6)—RENEWAL STATEMENT—MORTGAGEE'S SURNAME OMITTED—IDENTIFICATION.

A renewal statement of a chattel mortgage under R.S.S. c. 144 is not invalidated by the omission of the surname of the mortgagee or of the additions of the mortgagor and mortgagee if the affidavit verifying the renewal statement identifies the mortgage referred to in which those details are set forth.

Rogers Lumber Co. v. Dunlop, 20 D.L.R. 154, 7 S.L.R. 421, 30 W.L.R. 209, 7 W.W.R. 975.

(§ II A—7)—VALIDITY—CONSIDERATION—BILL OF SALE AS SECURITY—AFFIDAVIT OF BONA FIDES.

A chattel mortgage given for advances made and to secure against liability on indorsements of promissory notes is insufficient under the Bills of Sale Act, 1905, B.C., c. 8, s. 7, as against an assignment for creditors made before possession had been taken by the chattel mortgagee, where the affidavit of bona fides on the chattel mortgage stated that the same was made bona fide for the valuable consideration therein mentioned but did not state that the mortgagors were justly and truly indebted to the mortgagees in respect of the considerations recited in the mortgage. [Winter v. Gault, 13 D.L.R. 176, 18 B.C.R. 487, affirmed.]

Gault v. Winter, 19 D.L.R. 281, 49 Can. S.C.R. 541.

AFFIDAVIT OF OFFICER OF CORPORATION—FAILURE TO STATE PERSONAL KNOWLEDGE—BONA FIDES—SEIZURE WITHOUT REMOVAL.

An affidavit of bona fides of a chattel mortgage sworn by an officer of a corporation is defective if it fails to state, as required by s. 24 of the Chattel Mortgage Act (Sask.), as enacted by c. 67, s. 22, of the statutes 1913, that the deponent is aware of the circumstances connected with the mortgage and has a personal knowledge of the facts deposed to. A chattel mortgage is not rendered invalid because the affidavit of bona fides is sworn before the solicitor acting in the matter. A chattel mortgage given to secure a past indebtedness of $600 and a future advance of $100, the consideration expressed in the mortgage being "$700 in hand paid," while the actual indebtedness at the time being only $600, does not truly express the consideration as required by the statute, and will render the mortgage void as against subsequent purchasers and mortgagees in good faith. A mere seizure by a bailiff under a distress warrant on the maturity of a mortgage, without removing the goods from the mortgagor's control, does not amount to such an actual change of possession of the mortgaged goods as will cure a defective mortgage as against subsequent equities.

Averill v. Caswell & Co., 23 D.L.R. 112, 8 S.L.R. 269, 31 W.L.R. 953, 8 W.W.R. 1135.

VALIDITY—DEFECTIVE AFFIDAVIT — FAILURE TO STATE DAY OF EXECUTION—R.S.O. 1914, c. 135, s. 5.

The purpose of that part of s. 5 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, c. 135, which requires that the affidavit of the attesting witness shall state the date of the execution of the chattel mortgage is to insure the registration of a chattel mortgage within the statutory period from its actual execution and to prevent the execution of chattel mortgages with the dates left blank to be post-dated at the discretion of the mortgagee, whereby a mortgage actually too late and therefore invalid might appear to be in regular form when registered. [Parsons v. Brand, 25 Q.B.D. 110; Archibald v. Hubley, 18 Can. S.C.R. 116, referred to.]

Martin v. Shapiro, 20 D.L.R. 574, 32 O.L.R. 640.

INSOLVENT COMPANY — CASH ADVANCE — MORTGAGEE NOMINEE OF COMPANY—COLLUSION—SECURED CREDITOR—PREJUDICING OTHER CREDITORS—ASSIGNMENTS AND PREFERENCES ACT (ONT.).

A chattel mortgage given by a company when insolvent will be set aside under the Assignments and Preferences Act, Ont., notwithstanding that the consideration was a cash advance where the chattel mortgage was made to a nominee of one of the company's officers and such officer provided the money and negotiated the transaction so as to pay off a company debt for which he was surety and so relieve himself from that liability by collusion with another executive officer of the company to give the officer furnishing the money under cover of his nominee and to the secured creditor who was paid the money an unjust preference and to defeat, hinder, delay, or prejudice other creditors both knowing the company to be insolvent. [Stecher Litho Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540, affirmed on appeal; Middleton v. Pollock, 2 Ch.D. 104, referred to.]

Uffelmann v. Stecher Lithographic Co., 20 D.L.R. 619.

TRUE CONSIDERATION—BALANCE OF PURCHASE PRICE—VERBAL AGREEMENT.

The sale of a business by verbal agreement creates a valid existing debt for the purchase price which may form the bona fides of a chattel mortgage, though such agreement is formally reduced to writing subsequent to the execution of the mortgage; and a recital in the mortgage that it was given as security for the balance of such purchase price truly sets forth the consideration thereof.

Russell v. Quaker Oats Co., 25 D.L.R. 82, 8 S.L.R. 399, 32 W.L.R. 953, 9 W.W.R. 617.

"$1,500 NOW PAID"—PAST DUE AND ACCRUING DEBTS — CONSIDERATION TRULY EXPRESSED.

A chattel mortgage in which the consideration is stated to be "the sum of $1,500 now paid" truly expresses the consideration so as to satisfy s. 13 of the Chattel Mortgage Act, R.S.S. ch. 144, where the consideration money was made up of a past due note and a new advance from the mortgagor to the mortgagee. [Patterson v. Palmer, 4 S.L.R. 487; Credit Co. v. Pott, 6 Q.B.D. 295, applied.]

McCready v. International Harvester Co., 21 D.L.R. 769, 8 S.L.R. 261.

TRUE EXPRESSION OF CONSIDERATION—SUFFICIENCY OF AFFIDAVIT — CLERICAL DEFECTS—EFFECT OF POSSESSION.

The consideration in a chattel mortgage is truly expressed, notwithstanding a portion of it was not actually paid over but formed part of a debt for which the mortgage was given. The affidavit of bonâ fides made by the manager of a company need not state knowledge of the circumstances connected with the mortgage, as required by s. 22 of the Bills of Sale Ordinance (C.O. 1898, c. 43, as amended in 1915, c. 2, s. 11); nor is a clerical error as to the name of the mortgagee fatal to its validity. Besides, possession by the mortgagee, even in the form of seizure without removal, has the effect of curing any defect in the mortgage, and will prevail over a subsequent seizure of the chattels by a municipality for arrears in taxes.

Royal Trust v. Town of Castor, 37 D.L.R. 277, 13 A.L.R. 335, [1917] 3 W.W.R. 586.

As to existing and future debts—Separability.

A chattel mortgage, given as security for the payment of an existing debt and also to secure future indebtedness, though invalid as against creditors in so far as it purports to be a security for future indebtedness in noncompliance with s. 6 (1) of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, c. 135, is nevertheless laid as a security for the existing indebtedness if the requirements of s. 5 have been observed. [Campbell v. Patterson, 21 Can. S.C.R. 645, Hughes v. Little, 17 Q.B.D. 204, 18 Q.B.D. 32, distinguished.]

Hunt v. Long, 27 D.L.R. 337, 35 O.L.R. 502.

Corporation—Affidavit—Allegation of personal knowledge.

An affidavit of execution of a chattel mortgage may, in the case of corporations with head offices outside of Saskatchewan, be made by the officers specified in s. 24 of the Chattel Mortgage Act, or by any agent, without express authorization, but such officer or agent must state in the affidavit that he is aware of the circumstances connected with the mortgage and has a personal knowledge of the facts deposed to.

Hudson's Bay Co. v. Barry, 20 D.L.R. 961, 7 W.W.R. 676, 7 S.L.R. 192.

Chattel mortgage—Affidavit of bona fides—True statement of consideration—Sum added to actual indebtedness.

Graham v. Imperial Bank (Man.), 9 W.W.R. 1397.

True statement of consideration—Note for past debt.

The consideration in a chattel mortgage is truly set forth within the meaning of s. 7 of the Bills of Sale Act, R.S.B.C. 1911, c. 20, where it is stated to be for "a loan of $1,200 on a promissory note of even date," though it fails to set out the past debt for which the note is given. [Credit Co. v. Pott, 6 Q.B.D. 295, followed.]

Ball & Whieldon v. Royal Bank, 26 D.L.R. 385, 52 Can. S.C.R. 254, reversing 22 D.L.R. 647, 21 B.C.R. 267.

Bills of Sale Act—True and requisite facts of transaction not shown in mortgage.

Mortgage of chattels held invalid under the Bills of Sale Act because while the mortgage on its face appeared to be given to secure a loan, the transaction was in fact largely for security for prior indebtedness; the true consideration was not stated; there was nothing to show the mortgagees were trustees, as they in fact were: and their authority to act and receive the mortgage was not shown.

Innes & Griffith v. Cameron Valley Land Co. & Merchants Finance & Trading Co. [1919] 1 W.W.R. 751.

B. Description of property.

(§ II B—10)—General words—Pulpwood.

The words "all the pulpwood belonging to the undersigned wherever situate" are too general to be effective in an assignment to a bank as security on goods.

Battle Island Paper Co. v. Molsons Bank, 38 D.L.R. 372, 27 Que. K.B. 28.

Gray mare and natural increase of animal.

Clements v. National Manufacturing Co., 38 D.L.R. 751, 10 S.L.R. 438.

Sufficiency of description.

In a chattel mortgage of a hotel business and the effects therein, the description is sufficient for all reasonable purposes if it fully describes the premises upon which the effects are situated.

Royal Trust v. Town of Castor, 37 D.L.R. 277, 13 A.L.R. 335, [1917] 3 W.W.R. 586.

Sufficiency of description.

The Bills of Sale Act, R.S.B.C. 1911, does not require a specific description of the property comprised in the bill of sale; any description by which the goods can be identified is formally sufficient.

Ball & Whieldon v. Royal Bank, 26 D.L.R. 385, 52 Can. S.C.R. 254, reversing 22 D.L.R. 647, 21 B.C.R. 267.

General words following description of specific articles — Seizure under execution in hands of transferee from execution debtor — Validity of transfer — Chattel mortgage by transferee — Bona fides — Interpleader issue.

Dafoe v. McGuinness, 10 O.W.N. 269.

Description—Identification—Proper inquiries.

The description of cattle in a chattel mortgage need not be such that, with the chattel mortgage in hand, without other inquiry the property could be identified, but there must be such material on the face of the mortgage as would indicate how the property may be identified if proper inquiries are instituted. [McCall v. Wolfe, 13 Can. S.C.R. 130, applied; Barron and O'Brien on Bills of Sale, 2nd revised ed., 147, referred to.]

Rogers Lumber Co. v. Dunlop, 20 D.L.R. 154, 7 S.L.R. 421, 30 W.L.R. 269, 7 W.W.R. 975.

Description of mortgaged goods—Identity—Oral evidence—Facts—R.S.O. 1914, c. 135, s. 10.—Interpleader issue.

The requirements of s. 10 of the Bills of Sale & Chattel Mortgages Act, R.S.O. 1914, c. 135, are fulfilled when the mortgage on the face of it shows sufficient to identify the property mortgaged, the question of the sufficiency of a description being one of fact, may be determined upon by the aid of oral evidence.

Woollings v. Barr, 49 D.L.R. 352, 40 O.L.R. 1.

Description of chattels—Bills of Sale Act (R.S.S. 1909, c. 144), s. 14.

A description of articles comprised in a chattel mortgage cannot be considered sufficient and full when all the following four elements are absent: (1) A definite description permitting of a ready distinction of the articles from similar articles in the same locality; (2) a particular and definite statement of the locality of the goods; (3) a statement that the goods are in the possession of the mortgagor; (4) a statement that the goods are all the goods of that description in the possession of the mortgagor or in the locality mentioned. [Mason v. McDougald, 25 U.C.C.P. 435; Holt v. Carmichael, 2 O.A.R. 639; McCall v. Wolfe, 13 Can. S.C.R. 132; Hovey v. Whiting, 14 Can. S.C.R. 566; Ward v. Serrell, 3 A.L.R. 138, referred to.]

Edwards v. Boulton, 7 W.W.R. 217.

Description of property—Identification.

A chattel mortgage on 700 unidentified bushels of a crop is void because of the impossibility of identifying the particular bushels intended to be mortgaged.

Little v. Magle, 7 W.W.R. 224, 29 W.L.R. 596.

C. Property subject to mortgage; after-acquired property.

(§ II C—15)—After-acquired property—Ejusdem generis.

Where a chattel mortgage instrument assumes to cover in a shop (a) a stock of hardware, crockeryware and groceries, (b) the shop and office fixtures, scales and appurtenances, (c) all other goods that may be put in said shop in substitution for or in addition to those already there, the same and as fully to all intents and purposes as if said "added or substituted stock" were already in said shop; the "stock" and the "fixtures" are distinct "genera," and only within the latter can an "account register" properly come, hence it cannot be included in the "added or substituted stock." Dominion Register Co. v. Hall (No. 1), 8 D.L.R. 577, affirmed.]

Dominion Register Co. v. Hall (No. 2), 11 D.L.R. 366, 47 N.S.R. 57, 12 E.L.R. 494.

Interest of purchaser under conditional sale.

The interest of a purchaser under a conditional sale, whereby the title to the goods remains in the seller until the price is fully paid, may form the subject-matter of a chattel mortgage.

Sharp v. Ingles, 23 D.L.R. 636, 21 B.C.R. 584, 32 W.L.R. 150, 9 W.W.R. 1325.

No affidavit of execution — Invalid against creditors—Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, c. 135, ss. 5-7—Proviso in mortgage—Validity.

Under R.S.O. 1914, c. 135, the Bills of Sale Act, a chattel mortgage registered without an affidavit of execution is void as against the mortgagor's creditors. But a proviso in the mortgage itself that the goods will be insured with loss (if any) payable to the mortgagee is valid, and acts as an equitable assignment of the insurance moneys. [In re Isaacson, ex parte Mason, [1895] 1 Q.B. 333, specially referred to.]

Petinato v. Swift Canadian Co., 50 D.L.R. 218, 46 O.L.R. 247, reversing 17 O.W.N. 2.

Validity — Pressure — Description of goods—Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. c. 65, s. 10 — After-acquired goods — Identification—Assignment of debt—Right of assignee to recover—Reference.

Marks-Clavet-Dobie Co. v. Russell Timber Co., 7 O.W.N. 229.

(§ II C—16)—Future crop—Seed-grain mortgages in Saskatchewan.

A valid chattel mortgage can be taken in Saskatchewan for the price of seed grain sold bonâ fide for seed purposes on any crop to be grown by the mortgagor whether the same be grown from the seed sold or not.

R. v. Holderman, 19 D.L.R. 748, 23 Can. Cr. Cas. 369, 7 S.L.R. 279, 7 W.W.R. 729, 30 W.L.R. 82.

Future-acquired goods — Mortgagor's transferee.

The general inclusion in a chattel mortgage of future-acquired goods brought upon the premises by the mortgagor will not recover future-acquired goods separable from the others and brought in by the mortgagor's transferee who had purchased the business subject to the chattel mortgage.

Great West Liquor Co. v. Colquhoun, 17 D.L.R. 568.

After-acquired property—In esse or in posse—"Excepting logs on the way to the mill," construed.

Where a mortgage by a wholesale manufacturer stipulates to cover generally all present and future-acquired assets "excepting logs on the way to the mill," such exception is not to be construed as limited to logs on the way to the mill at the date of the mortgage, when the reason for the exception is in the interest of all parties (including the mortgagee himself) to facilitate those ordinary and essential financial arrangements between mortgagor and his bank which are only possible if advances can be made upon logs in transit from time to time during the general and regular course of the trade and contract.

Imperial Paper Mills v. Quebec Bank, 13 D.L.R. 702, 24 O.W.R. 930, affirming 6 D.L.R. 475, 26 O.L.R. 637.

Priorities—Mortgage on merchandise—After-acquired goods—Segregation—Onus.

Where a chattel mortgage purports to include after-acquired goods, the extent of the latter, even if not within the express terms of the Bills of Sale Act, 1905, B.C., would have to be proved by the claimant chattel mortgagee thereof as against an assignment for creditors made by the chattel mortgagor before possession had been

taken by the chattel mortgagee; the latter's interest is a merely equitable one to after-acquired goods when they come under the operation of the mortgage, and the onus is upon the chattel mortgagee to establish his title to same. [Tailby v. Official Receiver, 13 A.C. 523; Traves v. Forrest, 42 Can. S.C.R. 514, referred to; and note subsequent legislation of 1912, 2 Geo. V. (B.C.), c. 2.]

Gault v. Winter, 19 D.L.R. 281, 49 Can. S.C.R. 541, affirming 13 D.L.R. 176, 18 B.C.R. 487.

(§ II C—22)—Book debts.

A transfer of book debts is not within the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. (Ont.) c. 65, and does not require registration under that act in order to be valid against creditors if the transaction is otherwise unimpeachable. [Kitching v. Hicks, 6 Ont. R. 739; Thibaudeau v. Paul, 26 Ont. R. 385, followed; Tailby v. Official Receiver, 13 App. Cas. 523, applied.] Where a mortgage not specifically mentioning present or future book debts covers "undertakings . . . together with . . . incomes and sources of money, rights, privileges . . . held or enjoyed by [the mortgagor], now or at any time prior to the full payment of the mortgage," such language is sufficiently comprehensive to create an equitable charge on present and future book debts of the trading corporation by which the mortgage was made. Book debts are not within the Ontario Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, c. 148 (now 10 Edw. VII. c. 65), and the transfer of them does not require registration, and, therefore, the mortgagee in an unregistered mortgage covering book debts as well as other personal property which would require its registration to make it valid as against creditors of the mortgagor, is entitled to recover the amount realized from the book debts by the mortgagor's assignee for the benefit of creditors or by the liquidator appointed under the Winding-up Act, R.S.C. 1906, c. 144, even though no notice was given by the mortgagee to those owing the book debts.

National Trust Co. v. Trusts & Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279, 22 O.W.R. 933.

D. Possession; power to sell.

For wrongful exercise of power of sale, see Injunction, II-134.

(§ II D—25)—Second chattel mortgage—Seizure in default.

A second chattel mortgagee may have a right of seizure under an express stipulation in the mortgage subject to the rights of the first mortgagee, notwithstanding that the legal estate in the chattels passed to the first mortgagee and that the latter's mortgage stipulated that the mortgagor should hold them as bailee in trust exclusively for him. [Rugg v. Barnes, 56 Mass. 591, distinguished.]

Great West Liquor Co. v. Colquhoun, 17 D.L.R. 568.

Absence of defeasance clause—Possession in mortgagee.

The right of possession is an incident to the right of property in the goods, and, where a chattel mortgagee vests the right of property in the chattel mortgagee and there is no defeasance clause or other stipulation to the contrary, the chattel mortgagee becomes entitled to the possession. [Smith v. Fair, 11 A.R. (Ont.) 755, referred to.]

McDermott v. Fraser, 23 D.L.R. 439, 25 Man. L.R. 298, 8 W.W.R. 196.

Degree of care in exercising sale—Liability.

A mortgagee in possession who does not exercise care and discretion in the sale of mortgaged goods is liable in damages for the difference between the real value of the goods and their sale price.

Vanholt v. Newton, 29 D.L.R. 425, 9 W. W.R. 1407.

(§ II D—29)—Wrongful seizure — Consent — Undue influence — Illiteracy.

The assent of a mortgagor to the seizure and sale of his property is null and void for undue influence when the mortgagor is of but moderate intelligence and little education and the mortgagee intelligent and shrewd, and the assent is procured by the misrepresentations and threats of the mortgagee.

Vanholt v. Newton, 29 D.L.R. 425, 9 W. W.R. 1407.

Absence of redemise clause—Acceleration clause — Discretion of mortgagee—New goods brought on premises—Seizure of goods not covered by mortgage.

Best v. Renaud, 10 O.W.N. 248.

Effect of possession—Creditors—Subsequent purchasers.

The taking of possession under a mortgage which does not conform to the Bills of Sales Ordinance has not a curative effect as against creditors of the mortgagor or subsequent purchasers or mortgagees for value. [Heaton v. Flood, 29 O.R. 87, followed.]

Johnson v. McNeil (Alta.), [1917] 3 W. W.R. 249.

Pledging of contractor's plant and materials as security—What constitutes plant and materials for the work—Claim under bills of sale given by contractor—Necessity for registration.

Clancy v. G.T.P.R. Co., 15 B.C.R. 497.

Seizure under two chattel mortgages—Sale without proper advertising.

Neal v. Rogers, 2 O.W.N. 1482, affirming 2 O.W.N. 1167, 19 O.W.R. 132.

FAILURE TO REGISTER IN DUE TIME—EX PARTE ORDER EXTENDING TIME—COMPANIES ACT, 1910.

Morrison-Thompson Hardware Co. v. West Bank Trading Co., 19 W.L.R. 294 (B.C.), affirming 16 B.C.R. 33.

PREFERENCE—ACTION BY JUDGMENT CREDITOR TO SET ASIDE—CONSEQUENTIAL RELIEF.

Pitts v. Campbell, 9 E.L.R. 469 (N.S.).

BILL OF SALE—AGREEMENT NOT TO REGISTER.

Bentley v. Morrison, 44 N.S.R. 476.

BILL OF SALE TREATED AS CHATTEL MORTGAGE—AFFIDAVIT OF BONA FIDES NOT IN ACCORDANCE WITH BILLS OF SALE ORDINANCE—FRAUDULENT INTENT.

Patterson v. Palmer, 19 W.L.R. 422.

III. Filing; recording; renewing.

(§ III—30)—TRUST DEED SECURING DEBENTURES—FLOATING CHARGE OR SECURITY—REGISTRATION.

[Nat. Trust Co. v. Trust & Guarantee Co., 5 D.L.R. 459, and Imperial Can. Trust Co. v. Wood & Vallance, 24 D.L.R. 241, referred to.]

Capital Trust Co. v. Yellowhead Pass Coal & Coke Co.; Johnston & Boon v. Capital Trust Co., 30 D.L.R. 468, 9 A.L.R. 463, 34 W.L.R. 982.

(§ III—31)—NECESSITY OF FILING OR RECORDING.

A mortgage is a "mortgage or conveyance intended to operate as a mortgage of goods and chattels" within the meaning of ss. 2 and 23 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, c. 148 (now ss. 5 and 24 of 10 Edw. VII. c. 65), which mortgage covered the mortgagor's "undertakings then made or in course of construction, or thereafter to be constructed, together with all the property, real and personal, tolls, incomes, and sources of money, rights, privileges and franchises, owned, held, or enjoyed by it" and "all machinery of every nature and kind including all tools and implements used in connection therewith," although it stipulated that for the purpose of the mortgage security "all machinery, plant, and personal property of the mortgagor were to be considered fixtures to the realty" and that the mortgage was not to be registered as a bill of sale or chattel mortgage; and therefore, if such mortgage is not accompanied by an immediate delivery for an actual and continued change of possession of the things mortgaged, or is not registered as a chattel mortgage, as required by s. 2 of that Act, it is absolutely null and void as against creditors of the mortgagor under s. 5 of that Act (now s. 7, 10 Edw. VII. c. 65).

National Trust Co. v. Trusts & Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279, 22 O.W.R. 933.

LIQUIDATOR OF COMPANY — NECESSITY OF COMPLYING WITH STATUTORY REQUIREMENTS—STATUS OF LIQUIDATOR.

The liquidator of an incorporated company is not a creditor of, or a purchaser for valuable consideration from the company, within the meaning of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1897, c. 148 (see now 10 Edw. VII. (Ont.) c. 65). [Re Canadian Camera and Optical Co., 2 O.L.R. 677, distinguished, and dictum of Street, J., therein dissented from.]

Re Canadian Shipbuilding Co., 6 D.L.R. 174, 26 O.L.R. 564, 22 O.W.R. 585.

(§ III—32)—FILING—SUFFICIENCY—AFFIDAVIT OF ATTESTING WITNESSES—FAILURE TO STATE DATE OF EXECUTION.

Failure to state in the affidavit of the attesting witness the year of execution of a chattel mortgage given to a creditor of the mortgagor, will, under clause (a), s. 5, of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. c. 65, render the conveyance void as to the mortgagor's subsequent assignee for the benefit of his creditors. The requirement of clause (a) s. 5, of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. c. 65, as to stating the date of the execution of a chattel mortgage in the affidavit of the attesting witnesses, is imperative and must be strictly construed.

Cole v. Racine, 11 D.L.R. 322, 4 O.W.N. 1327, 24 O.W.R. 622.

(§ III—38)—RENEWAL — EXTENSION OF TIME.

An order extending the time for renewal of the mortgage, made subject to the rights of third parties, is effective as against those whose rights have not accrued at the time the order was made.

Royal Trust Co. v. Town of Castor, 37 D.L.R. 277, 13 A.L.R. 355, [1917] 3 W.W.R. 586.

RENEWAL—POSSESSION—RIGHT TO ATTACK.

Held, that the plaintiffs, not being creditors, were not in a position to assert that the chattel mortgage had ceased to be valid by reason of noncompliance as to renewal, with s. 21 of the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, c. 135; and their position was not improved by a provision in the chattel mortgage enlarging the meaning of "mortgagor" and "mortgagee" so as to include the executors, administrators, and assigns of the mortgagor and mortgagee. Held, also, that s. 23 of the act, as to taking possession, and s. 3 of the Fraudulent Conveyances Act, R.S.O. 1914, c. 105, had no application. Taking possession of the goods by placing a proposed purchaser in possession, before the plaintiffs had obtained judgment—the chattel mortgage being in default and there being no fraud—the subsequent sale is valid and the bill of sale unimpeachable by the plaintiffs.

Brown Bros. v. Modern Apartment Co., 37 O.L.R. 642.

A simple contract creditor cannot attack a chattel mortgage for a defective renewal after the goods have come into the mortgagee's possession.

Leishman v. Barker (Alta.), 10 W.W.R. 209.

CHATTEL MORTGAGE BY COMPANY—REGISTRATION OF IN COUNTY COURT INSTEAD OF WITH REGISTRAR OF JOINT-STOCK COMPANIES.

An appeal from the decision, 16 B.C.R. 33, was dismissed by the Court of Appeal.

Morrison-Thompson Hardware Co. v. Westbank Trading Co., 16 B.C.R. 314.

NONCOMPLIANCE—CREDITOR'S ACTION.

A simple contract creditor cannot make an attack for noncompliance with the Bills of Sale Act (Man.)

Empire Sash & Door Co. v. Maranda, 19 W.L.R. 78 (Man.), 21 Man. L.R. 605.

IV. Effect; rights of parties; priorities.

See Assignments for Creditors, III. B.

A. In general.

(§ IV A—40)—RIGHT TO DISTRESS UNDER LAND MORTGAGE.

Where a mortgage of land contains an attornment clause whereby the mortgagor becomes the tenant of the mortgagee at a yearly rent equivalent to the annual interest, the mortgagee has a right of distress in like manner as a landlord for interest in arrear, and this right may be exercised under the Distress Act, R.S.M. 1913, c. 55, s. 5, as against a chattel mortgagee of the goods distrained.

McDermott v. Fraser, 23 D.L.R. 430, 25 Man. L.R. 298, 8 W.W.R. 196.

RIGHT OF MORTGAGEE DISCHARGING DEBTS—CONSENT.

A mortgagee cannot recover from a mortgagor for amounts paid in discharge of debts due by the latter without his privity or consent.

Vanholt v. Newton, 29 D.L.R. 425, 9 W. W.R. 1407.

NONCOMPLIANCE WITH ACT—SEIZURE OF GOODS UNDER EXECUTION—CLAIM BY CHATTEL MORTGAGEE — INTERPLEADER ISSUE—ASSIGNEE FOR BENEFIT OF CREDITORS OF EXECUTION DEBTOR.

Pulos v. Soper, 4 O.W.N. 1559, 24 O.W.R. 962; Soper v. Pulos, 10 D.L.R. 848, 4 O.W. N. 1258; Sykes v. Soper, 14 D.L.R. 497.

EXECUTION IN DUPLICATE—FILED INSTRUMENT—ASSIGNMENT OF—MATERIAL ALTERATIONS IN DUPLICATE RETAINED BY MORTGAGE — ASSIGNMENT — REFERENCES TO FILED INSTRUMENT—REFERENCES TO ALTERED INSTRUMENT—FALSA DEMONSTRATIO—SEIZURE UNDER CHATTEL MORTGAGE—EXTENSION OF PERIOD FOR PAYMENT—BREACH OF COVENANT — ACCELERATION — INSECURITY — JUSTIFICATION—PAYMENT OF MONEY INTO COURT.

Woodbeck v. Waller, 11 O.W.N. 386. [See also 12 O.W.N. 201.]

SEIZURE AND SALE UNDER PRIOR UNREGISTERED MORTGAGE — VALIDITY OF AS AGAINST SUBSEQUENT MORTGAGEE IN GOOD FAITH—PRIOR MORTGAGEE MUST ACCOUNT TO SUBSEQUENT MORTGAGEE—RIGHT OF SUBSEQUENT MORTGAGEE TO BRING ACTION BEFORE HIS MORTGAGE BECOMES DUE—REFERENCE TO TAKE ACCOUNTS.

Stewart Sheaf Loader v. Jacobson, 30 W.L.R. 944.

INJUNCTION—TERMS.

Wallace v. Clapp, 8 O.W.N. 438.

B. Priorities.

(§ IV B—45)—REMOVAL OF MORTGAGED CHATTELS—RIGHTS OF SUBSEQUENT PURCHASERS.

The failure to reregister a mortgage in the district where mortgaged animals are removed within six months of their removal as required by the Bills of Sale Act (Man.), does not give a purchaser a better title to them as against the mortgagee where the purchase is made before the expiry of the statutory period. [Hodgins v. Johnston, 5 A.R. (Ont.) 449, applied.]

McIntyre v. Prefontaine, 23 D.L.R. 139, 25 Man. L.R. 572, 8 W.W.R. 1149, 31 W.L.R. 928.

PRIORITIES — DEFECTIVE REGISTRATION — FAILURE TO STATE DATE—R.S.O. 1914, c. 135, s. 5.

A chattel mortgage, although registered within five days from the date shewn thereon, is invalid against the mortgagor's assignee for creditors if the affidavit of execution does not state the date of execution as required by the Bills of Sale and Chattel Mortgage Act, R.S.O. 1914, c. 135, s. 5. [Cole v. Racine, 11 D.L.R. 322, 4 O.W.N. 1327, followed.]

Martin v. Shapiro, 20 D.L.R. 574, 32 O.L.R. 640.

DEFECTIVE AFFIDAVIT—EXECUTION CREDITORS.

A chattel mortgagee whose mortgage is not effectively registered because of a defective affidavit will not be protected as against execution creditors of the mortgagor by the fact that he took and held actual possession against the mortgagor for a short time after the execution of the mortgage, if he afterwards voluntarily parted with possession to the mortgagor so that the latter appeared thereafter to be the ostensible owner of the mortgaged goods. [Ex parte Jay, L.R. 9 Ch. 697, and Re Wood, 40 L.T. 104, referred to.]

Ritchie Contracting Co. v. Brown, 21 D.L.R. 86, 21 B.C.R. 89, 8 W.W.R. 84, 30 W.L.R. 723.

CREDITORS.

The expression "creditor" in s. 5 of the Chattel Mortgage Act, Man., declaring that a mortgage of goods not accompanied by immediate delivery and an actual and continued change of possession and not registered, shall be void as against "the credi-

tors of the mortgagor and as against subsequent purchasers and mortgagees in good faith," means an execution creditor or a judgment creditor, i.e., one who is in a position to assert and exercise a present right to take possession of the goods. [Barron on Chattel Mortgages, 2nd revised edition, 501, referred to.]

McDermott v. Fraser, 23 D.L.R. 430, 25 Man. L.R. 298, 8 W.W.R. 196.

HIRE AGREEMENT — REGISTRATION — PRIORITIES.

An unregistered chattel lease which provides that the lessee may acquire a similar chattel from the lessor for the total amount of the rental is not as against creditors null and void under the Bills of Sale Act (R.S. N.S. 1900, c. 142, as amended by 1908, c. 24), whether the chattel delivered at the outset is the identical subject-matter of the hiring or otherwise. [Guest v. Diack, 29 N.S.R. 504, 32 D.L.R. 561, followed.]

Chapman v. McDonald, 34 D.L.R. 124, 51 N.S.R. 70, reversing 32 D.L.R. 557.

CROPS—EXECUTION.

Section 17 of the Chattel Mortgage Act, R.S.S. 1909, c. 144, as amended by 1916 stats., c. 37, s. 22, authorizes a chattel mortgage to be given on growing crops to secure the purchase price of food and supplies; but such mortgage does not take priority over a prior execution.

De Laval Dairy Supply Co. v. Nichol, 42 D.L.R. 713, 11 S.L.R. 295.

POSSESSION UNDER DEFECTIVE MORTGAGE.

Possession taken by a mortgagee, under a defective chattel mortgage, in that it did not comply with the requirements of the Bills of Sale Ordinance (C.O. 1898, c. 43, s. 17, Alta.), saves the mortgage [illegible] as against all persons who are not at the time of the taking of the possession either execution or attaching creditors or purchasers or mortgagees for value.

Security Trust Co. v. Stewart, 39 D.L.R. 518, 12 A.L.R. 423, [1918] 1 W.W.R. 709, reversing 39 D.L.R. 801, 12 A.L.R. 420.

PRIORITIES—VALIDITY AGAINST EXECUTION CREDITOR OF MORTGAGORS—INTENT—FAMILY PARTNERSHIP—EXECUTOR DE SON TORT—STATEMENT OF CONSIDERATION—WANT OF REGISTRATION OF EARLIER MORTGAGE—INTERPLEADER.

Weddell v. Douglas, 7 O.W.N. 92, and 216, 8 O.W.N. 455.

PRIORITIES—PRIOR UNREGISTERED MORTGAGE—SUBSEQUENT MORTGAGEE IN GOOD FAITH—ACCOUNTING—RIGHT OF SUBSEQUENT MORTGAGEE.

Held, that, under the Chattel Mortgage Act, R.S.S. c. 144 and amendments, a prior bona fide mortgage, unregistered, is void as against a subsequent mortgagee in good faith;—Held, that where in a chattel mortgage there is expressed to be an absolute conveyance from mortgagor to mortgagee, then a defeasance on a certain event, then a provision that the mortgagor will forever warrant and defend the goods unto the mortgagee, then a declaration that the mortgagor does put the mortgagee in possession of the goods by delivery of some kind, the possession follows the property conveyed and the mortgagee, though no default has been made, is entitled to assume possession at any time, and, if the goods covered by his mortgage have been seized and sold by a mortgagee under a prior unregistered mortgage, he is entitled to compel the latter to account.

Stewart Sheaf Loader v. Jacobson, 29 W.L.R. 575.

V. Assignment; satisfaction; abandonment; waiver.

(§ V—50)—SET-OFF—APPROPRIATION OF PAYMENTS—RIGHTS OF ASSIGNEE.

Mitchell v. Buckner, 9 O.W.N. 133.

(§ V—51)—ASSIGNMENT BY DEPOSIT—MORTGAGEE WITH LEGAL TITLE.

The chattel mortgagee to whom the legal title has been transferred by the terms of the chattel mortgage may effectually create an equitable mortgage by deposit of the documents evidencing the title so acquired which will be given effect as against execution creditors of the mortgagor in a case in which the registration laws do not apply and in which the rights of the mortgagor are not affected. [Jones v. Twohey, 1 A.L.R. 267, Bonin v. Robertson, 2 Terr. L.R. 21, referred to.]

Dominion Bank v. Markham Co., 14 D.L.R. 508, 26 W.L.R. 101.

(§ V—52)—DISCHARGE — DEBTS COVERED — NOVATION — FAILURE TO INSURE — DISCHARGE OF SURETY.

Korczynski v. Cockshutt Plow Co., 30 D.L.R. 475, 10 A.L.R. 28, 34 W.L.R. 1196.

SEIZURE — NEGLIGENCE — ADVERTISING SALE—SUFFICIENCY OF ADVERTISEMENT—LOSS OF GOODS BY NEGLIGENCE.

McHugh (T.P.) v. Union Bank of Canada, 3 A.L.R. 177, 14 W.L.R. 642.

EXTRAJUDICIAL SEIZURES—CHATTEL MORTGAGE—SALE THROUGH BAILIFF—EXCESSIVE COSTS — INTEREST — EXCESSIVE RATE.

Union Bank of Canada v. F. McHugh, 44 Can. S.C.R. 473.

SEIZURE OF GOODS—NEGLECT OF OWNER OF GOODS TO MAKE CLAIM.

Baron v. Drewery, 4 S.L.R. 26.

EXPENSES OF SEIZURE—EXCESSIVE CHARGES—PENALTY.

Collins v. Eaton, 19 W.L.R. 608 (Alta.).

VI. Enforcement.

(§ VI—55)—POWER TO SUE—ORDER PERMITTING SALE NECESSARY—SALE WITHOUT ORDER ILLEGAL — LIABILITY OF AGENT AND BAILIFF ENFORCING WARRANT—DUTY OF PRINCIPAL TO OBTAIN ORDER.

A mortgagee has no power to sell and recover the amount due under a chattel

mortgage until an order is obtained from the judge permitting the sale (Alta. Stats. 1914, c. 4, s. 4), and a sale without such order is illegal although the warrant itself purports to give such authority. The sheriff to whom the warrant is directed acts as agent of the mortgagee and stands in no better position. The bailiff to whom he endorses the distress warrant cannot be said to exceed his authority in selling if the warrant expressly authorizes the sale. It is the duty of his principals to obtain the order, and if they have not done so they should not direct more than a seizure. Where a sale of mortgaged chattels has been illegally made in that the order of a judge has not been obtained as required by Alta. Stats. 1914, c. 4, s. 4, by the mortgagee, such mortgagee cannot set up his disregard of the law as an answer to an action at the suit of an innocent purchaser.

Lipsey v. Royal Bank, 47 D.L.R. 545, [1919] 2 W.W.R. 979.

ENFORCEMENT—NECESSARY COSTS OF REALIZING—STATUTORY TARIFF—SALE.

On a realization of mortgaged property by a chattel mortgagee under a power of sale contained in the instrument, the chattel mortgagee should be allowed to deduct from the amount realized the reasonable expenses of such realization, ex. gr., the necessary costs for care and removal of horses from quarantine and keeping them in good condition. S. 2 of c. 34 of the North-West Territories Consolidated Ordinances, 1898, merely fixes a statutory scale of costs for certain acts which ordinarily must be performed in connection with any seizure or sale, but it does not interfere with the rights of the parties to a chattel mortgage to deal with reference to other expenses of realization which are reasonable and necessary in the interests of both parties. It is the duty of a chattel mortgagee when realizing the mortgaged property by sale under the power contained in the mortgage, to act in the realization by sale as a reasonable man would act in the realization of his own property, so that the mortgagor may receive credit for the fair value of the property sold.

McHugh v. Union Bank, 10 D.L.R. 563, 108 L.T. 273, [1913] A.C. 299, 23 W.L.R. 409. [Applied in Northern Crown Bank v. Great West Lumber Co., 11 D.L.R. 395.]

EXCESSIVE SEIZURE—CONCURRENT DISTRESS FOR RENT SECURED BY CHATTEL MORTGAGE.

Where a creditor, holding two distinct securities against his debtor, i.e., by an attornment clause in the contract of sale and also by a chattel mortgage against specific goods, concurrently makes seizure under both, one of the seizures may be declared oppressive and illegal, when he knew or should have discovered (a) that his protection was ample without the double process, and (b) that serious inconvenience and loss would ensue to the debtor.

Dornian v. Crapper, 17 D.L.R. 121, 7 S.L.R. 229, 27 W.L.R. 599, 6 W.W.R. 651.

RIGHT TO DISTRESS.

Where the land mortgagee having a right to distrain for rent to the amount of the interest overdue under the terms of his mortgage, includes in his distress not only such interest but an instalment of principal money for which he had the authority of a mere personal license from the mortgagor, the distress is not thereby vitiated in toto as to a chattel mortgagee; the inclusion of the principal money is only an irregularity, and will not prevent the distress being upheld for the amount of the interest rental.

McDermott v. Fraser, 23 D.L.R. 430, 25 Man. L.R. 298, 8 W.W.R. 196.

SEIZURE AND SALE OF GOODS—PART PAYMENT BY ASSIGNMENT OF SECURITIES—ACCEPTANCE—FINDING OF FACT—EXCESSIVE SEIZURE—ASSESSMENT OF DAMAGES.

Avery & Son v. Parks, 9 O.W.N. 125.

SEIZURE AND CONVERSION OF CHATTELS UNDER — JUSTIFICATION — EVIDENCE — LIEN NOTE—FINDINGS OF TRIAL JUDGE —APPEAL.

Burlak v. Beneroff, 8 O.W.N. 140.

SALE BY MORTGAGEE—ALLEGATIONS OF IMPROVIDENCE AND MISCONDUCT OF MORTGAGEE.

O'Neill v. Edwards, 5 O.W.N. 348, 25 O.W.R. 292.

SALE UNDER POWERS—NOTICE—OFFER TO REDEEM—TENDER—EQUITABLE RELIEF.

B.C. Land & Investment Agency v. Ishitaka, 45 Can. S.C.R. 302.

SEIZURE AND SALE—SHERIFF'S PERMISSION —LIVERY COSTS.

Where a chattel-mortgagee of live stock knows at the time he makes a seizure under his mortgage that he will require to obtain the permission of the sheriff to sell the chattels, he should not remove them when the owner has feed for them, but should put a man in possession until he obtains such permission, and he will not be allowed the additional cost of removing the chattels and keeping them in a livery stable. The mortgagee was only entitled to the costs of twenty-one days' possession, although nearly three months had elapsed between seizure and sale owing to the necessity for obtaining the sheriff's permission to sell.

Marshall v. Siger, 34 W.L.R. 803.

REMOVING PLAINTIFF'S GOODS FROM HOTEL—SALE UNDER MORTGAGE—NOTICE OF SALE.

Boehmer v. Zuber, 3 O.W.N. 134, 20 O.W.R. 172.

CHEQUES.

I. IN GENERAL: NATURE OF.
II. PRESENTATION.
III. CERTIFICATION.

IV. Bona fide holders.
V. Forged paper.

See Bills and Notes; Banks.
Alteration affecting validity, see Alteration of Instruments.
Payment by cheque, see Payment.
Acquiescence, cheques signed by other party, see Estoppel.

Annotations.

Delay in presenting for payment: 40 D.L.R. 244.
"Cheque" within meaning of Bills of Exchange Act, see Bills and Notes, IV. D—104.
Bill or cheque presentment, see Bills and Notes, IV. B—91.
As legal tender, see Tender, I—12.
Liability of bank for dishonor, see Banks, IV. A—66.

I. In general; nature of.

Lost cheque — Recourse of creditor — Security — C.C. arts. 1938, 1939 — S. ref., [1909] c. 119 (Letters of exchange), arts. 156, 157.

One who receives a cheque from his debtor and loses it has the right on offering good and sufficient sureties of demanding a new cheque, and on refusal he can make him pay the amount.

Cloutier v. Brodeur, 25 Rev. Leg. 188.

II. Presentation.

(§ II—5)—Presentation—Necessity of—Time.

If the person who receives a cheque and the bank on which it is drawn are in the same place, the cheque must in the absence of special circumstances be presented for payment on the day after it is received. [Blackley v. McCabe, 16 A.R. 295; Lord v. Hunter, 6 L.N. (Que.) 310, referred to.] If the person who receives a cheque and the banks on which it is drawn are in different places, the cheque must, in the absence of special circumstances, be forwarded for presentment on the day after it is received, and the agent to whom it is forwarded must in like manner present it or forward it at the latest on the day after he receives it. The endorsement or delivery of a cheque to another does not extend the time for presentment as against prior endorsers.

Bank of B.N.A. v. Haslip; Bank of B.N.A. v. Elliott, 20 D.L.R. 922, 31 O.L.R. 442.

(§ II—12)—What will excuse failure to present.

A drawer of a cheque, who notifies the payee that he has stopped payment thereof, thereby waives presentation for payment. [Hill v. Heap, D. & R. 57, distinguished.]

Trapp & Co. v. Prescott, 5 D.L.R. 183, 17 B.C.R. 298, 21 W.L.R. 521.

Cheques on banks—Presentment and payment after death of donor—Notice of death.

McLellan v. McLellan, 23 O.L.R. 654, 19 O.W.R. 157. [Affirmed, 25 O.L.R. 214, 20 O.W.R. 673.]

IV. Bona fide holders.

(§ IV—22)—Authority to endorse—Restricted—Bona fide holders—Rights of parties.

Bank of Commerce v. Won Foo, 42 D.L.R. 768, 13 A.L.R. 546, [1918] 3 W.W.R. 212.

Transfer—Good faith.

Garand v. West, 40 Que. S.C. 323.

Acceptance—Refusal to pay—Fraud of drawer—Right of indorsee against bank.

Baker v. Merchants Bank, 19 W.L.R. 641 (Alta.).

Stolen cheque—Holder in due course.

McKenty v. Vanhorenback, 21 Man. L.R. 360, 19 W.L.R. 184.

V. Forged paper.

Forgery—Payment by bank—Cheque charged to customer's account.

Woosnam v. Merchants Bank of Canada, 17 W.L.R. 40 (Man.).

CHILDREN.

See Parent and Child; Infants.
As beneficiaries, see Wills.
For injuries to, see Negligence.
For injury to Child passenger, see Carriers.

CHOSE IN ACTION.

See Assignment.

CHOSE JUGEE.

(§ I—5)—Quebec practice.

A married woman, member of the community, authorized by her husband "to institute any action whatsoever, to plead, etc.," has no right to sue in her own name for a debt due to the community. But the husband himself may afterwards bring an action which will not be barred by the plea of chose jugée. A party whose action or proceeding has been dismissed by a judgment of the court may institute a fresh action without first paying the costs of the first. He is only required to do so when he abandons his action.

Mercure v. Bassinet, 13 Que. P.R. 379.

Annotation.

Definition; primary and secondary meaning in law: 10 D.L.R. 277.

CHURCHES.

See Religious Institutions; Charities; Benevolent Societies.
Gifts to, see Wills, III.

CITIES.

See Municipal Corporations; Towns.

CIVIL APPLICATION.

(§ I—1)—Appeal—Opposition to judgment — Personal fraud — Garnishment — Definitive judgment—C.C.P. arts. 645, 695, 1163, 1177.

In our system of procedure a civil ap-

plication is introductory to a really new and principal action. That is always one of its incidents, our Code has not copied on this point, like the modern French Law, the provisions of the ordinance of 1667. A civil application can be received by a judge ex parte without previous notice to the opposite party. Appeal, opposition judgment, and a civil application do not exist simultaneously. The condemned party has not a choice between the three methods, for they are each exclusive of the other. A civil application only exists if an appeal is impossible or useless. But when an appeal is impossible or useless, a civil application is necessary and not discretionary. All judgments not subject to appeal or for which appeal is impossible or useless, whether they are definitive or interlocutory, preparatory or examinations, no matter what court they emanate from, are subject to civil application when they are contradictory, provided that the party finds himself really in the conditions laid down by s. 1177.

Rousseau v. Pelletier, 56 Que. S.C. 486.

CIVIL APPLICATION—APPEAL—NULLITY—NOTICE OF SETTING DOWN—ACTION IN PURSUIT OF CLAIM C.C.P. ARTS. 82, 112, 296, 480, 924, 935, 948, 1159, 1177.

In the application of par. 2 of art. 1177, which prescribes the opening of a civil application "if the prescribed procedure has not been followed and the nullity resulting therefrom has not been rectified by the parties," we must distinguish between the formalities prescribed for the parties and their advocates and solicitors and those which concern the judges. In principle the violation of the first alone, cannot give use to a civil application, the latter are subject to the method of appeal. This rule, however, is subject to exception. Even in the case of a violation by the court, there takes place, in effect, a civil application in our system of procedure, and if this violation was not even apparent on the face of the brief in the action even an appeal would be of no use, since an examination would be necessary. The method of civil application only exists where there is no right of appeal. The nullity is overcome when the party who has the right to invoke it, has not taken exception to the nullity in the first instance, as required by art. 164 C.C.P. and has pleaded later on. But this nullity cannot be overcome if it is a public matter and if he who had an interest in pleading it was incapable of renouncing it. Art. 1177 which allows a civil application to quote a judgment "for which appeal or opposition is not a real remedy," is unknown in French law, because the judicial organization, different from ours, gives the Appeal Courts jurisdiction to proceed with the examination of cases which are submitted to them for the first time. In giving a notice of less than 6 days for the examination and hearing of a suit which he is opposing, the opposing party has violated the rule of art. 296 C.C.P. but when an examination is unnecessary to establish the facts stated in the information, the case of the plaintiff falls within the above mentioned exception and the judgment which she asks to be quashed by way of civil application can then be quashed by way of appeal. Art. 43 C.C.P. sanctions the principle that an appeal is a right common to all matters; unless it is especially taken away by statute. The result of the combination of arts. 948, 934, and 935, is that the action in pursuit of a claim is subjent to the formalities of ordinary rules of subpœnas and executions.

Belisle v. Peloquin, Baillargeon Express & Contant, 56 Que. S.C. 371.

CIVIL RIGHTS.

See Constitutional Law; Aliens.

Annotation.

Status of alien enemies during war: 23 D.L.R. 375.

(§ I—10)—EFFECT OF CONVICTION ON CRIMINAL'S PROPERTY.

Under s. 1033, Criminal Code 1906, providing that no conviction or judgment for any treason or indictable offence shall cause any attainder or corruption of blood or any forfeiture or escheat, a convicted offender serving his term may deal with his goods and lands as other men who are free from custody may deal with theirs.

Young v. Carter, 5 D.L.R. 655, 19 Can. Cr. Cas. 489, 26 O.L.R. 576, 22 O.W.R. 643.

EFFECT OF CRIME ON PROPERTY RIGHTS OF PARTY CHARGED.

The court will not enforce property rights directly resulting to the person asserting them from the crime of that person. [Cleaver v. Mutual Reserve Fund Life Assn., [1892] 1 Q.B. 147; and Lundy v. Lundy, 24 Can. S.C.R. 650, referred to.] The rule that a wrongdoer cannot acquire rights from his own wrong, while requiring the undoing, wherever possible, of the advantage gained, does not operate to deprive the wrongdoer of a right previously possessed by him. [Hooper v. Lane, 6 H.L.C. 443; and Ockford v. Freston, 6 H. & N. 466, referred to.]

Re Sanderson & Saville, 6 D.L.R. 319, 26 O.L.R. 616, 22 O.W.R. 672.

CIVIL SERVICE.

Personation at examination for, see Personation.

CLAIMS.

In winding-up proceedings, see Companies; Assignments for Creditors.

Against decedent's estate, see Executors and Administrators.

In expropriation matters, see Expropriation: Damages, III. L.

Against municipalities, see Municipal Corporations.

Land claims, see Public Lands.

Mining claims, see Mines and Minerals.

CLERKS.

Salaries of, as preferred claim, see Assignment for Creditors, VIII.; Companies VI. F.

CLOUD ON TITLE.

See Land Titles; Ejectment; Vendor and Purchaser.

WHAT ARE CLOUDS.

Defendant recovered judgment and issued execution against a party bearing the same name as plaintiff. This was registered against plaintiff's land. He demanded that the defendant remove same, but this was not done. In an action brought to secure the removal, the defendant admitted that the execution did not bind plaintiff's land, and was a cloud upon the title, but pleaded that he had not refused to remove the execution, and that in any event he had commanded the sheriff to register the execution against the lands of his execution debtor, and not the plaintiff's land, and was not, therefore, responsible for the sheriff's act: —Held, that the plaintiff in issuing his execution, the sheriff in delivering the certificate, and the registrar in registering the same against plaintiff's land, were only carrying out the provisions of the act governing the issue and registration of execution, and none of them were tortfeasors. (2) But the defendant, by neglecting to remove the execution and defending the action, had rendered himself liable to costs.

Martens v. O'Brien, 4 S.L.R. 292.

MISTAKE AS TO NUMBER OF LOT ON PLAN—REMOVAL OF—DECLARATION OF TITLE.

Waltz v. Kreit, 10 O.W.N. 308.

REGISTERED CONVEYANCES—ACTION FOR REMOVAL FROM REGISTER—RES JUDICATA—LACHES AND ACQUIESCENCE.

Curtis v. Robinson, 10 O.W.N. 120.

CLUBS.

See Associations; Benevolent Societies.

EXPULSION OF MEMBER FOR POLITICAL OPINIONS—FREEDOM OF SPEECH—INJUNCTION.

A resolution, adopted by a social club for the purpose of expelling one of its members, on account of words spoken by him in the exercise of his duties as a member of the legislative assembly, constitutes a violation of the parliamentary immunity of the freedom of speech, and is, in such respect, illegal and void. When club by-laws provide for the constitution of a committee before acting as a special tribunal for the expulsion of members, such tribunal alone has jurisdiction in the matter, and the method of expulsion set out in the by-laws must be strictly followed. Any concerted action by other members of the club than those of the committee regularly convened is illegal, improper and void.

Le Club de la Garnison de Quebec v. Lavergne, 27 Que. K.B. 37.

ASSOCIATION OF HOCKEY CLUBS—CENTRAL ASSOCIATION — INTERFERENCE WITH PLAYERS OF ONE CLUB—ACQUIESCENCE—LEAVING CLUB OUT OF SCHEDULE OF MATCHES—POWERS OF ASSOCIATION—EVIDENCE—INJUNCTION.

Toronto Hockey Club v. Ottawa Hockey Assn., 15 O.W.N. 145.

SOCIAL CLUB — EXPULSION OF MEMBER — POLITICAL VIEWS—PARLIAMENTARY IMMUNITY.

A purely social club the by-laws whereof expressly exclude from its objects and purposes all political and religious questions, cannot expel one of its members on account of his political opinions, especially when expressed by him in the discharge of his duties as a Member of Parliament, and covered by parliamentary immunity.

Lavergne v. Garnison Club of Quebec, 51 Que. S.C. 349.

INJURY TO PROPERTY.

Interferencce with the enjoyment of property held as a place of amusement constitutes a cause of actual damage to the owner.

Rigaud-Vaudreuil Gold Fields v. Boldue & Pacaud, 25 Que. K.B. 97.

CODICIL.

See Wills.

COLLEGES.

Exemption from taxes, see Taxes, I F—85.

COLLISION.

Between automobiles, see Automobiles.

On highways or railways, see Railways; Carriers; Street Railways; Negligence.

Between vessels, see Shipping; Admiralty.

Annotations.

Shipping: 11 D.L.R. 95.

Collisions on high seas; limitation of jurisdiction: 34 D.L.R. 8.

Law of Tugs and Towage; 49 D.L.R. 172.

(§ I—1) — MARITIME CONVENTIONS ACT (IMP.)—DEGREE OF BLAME.

Section 9 of the Maritime Conventions Act, 1911 (Imp.), 1 & 2 Geo. V. c. 57, as to the degree of blame in collision cases does not apply to Canada. [The "Bravo" 29 T.L.R. 122; The "Rosalia," [1912] P. 109, referred to.]

Pallen v. The "Iroquois" (No. 2), 11 D.L.R. 41, 18 B.C.R. 76, 23 W.L.R. 778.

ACTIONS FOR—TRIABLE BY WHICH COURTS—EXCHEQUER—ONTARIO SUPREME COURT.

An action for damages for a collision between two ships on the inland waters of the Province of Ontario may be brought either in the Exchequer Court of Canada or in the Supreme Court of Ontario. [Smart v. Wolff, 3 T.R. 323, referred to.]

Shipman v. Phinn, 19 D.L.R. 305, 50 C.L.J. 234, 31 O.L.R. 113.

SHIPPING—DAMAGES—MEASURE OF.

Rheinhardt v. The "Cape Breton," 20 D.L.R. 989, 15 Can. Ex. 102.

TUG AND TOW BOATS—RULES OF ROAD.

The rules of the road are not applied as strictly in the case of a tug and tow as where a single vessel is concerned. [The "Lord Bangor," 8 Asp. M.C. 217; C.P.R. Co. v. Bermuda, 13 Can. Ex. 389, referred to.]

Ontario Gravel Freighting Co. v. "A.L. Smith" and "Chinook," 22 D.L.R. 488, 15 Can. Ex. 111. [Affirmed, 23 D.L.R. 491, 51 Can. S.C.R. 39.]

(§ I—2)—RULES FOR AVOIDING — NEGLIGENCE—USUAL NAUTICAL MANŒUVRES —SUDDEN SURGING.

Where a vessel at a dock in a harbour is unloading grain into an elevator with which it is coupled and an approaching vessel entering the harbour proceeds to turn around near the unloading vessel thereby surging the water and unmooring the latter vessel whereby injury to the elevator results, the approaching vessel is not liable where the surging was not a natural or anticipated result, and the nautical manœuvre was reasonable and usual and under the elevator owner's instructions, it appearing that the accident resulted from the unavoidable breaking of a cable in an emergency and there being no evidence of any undue or sudden action by the approaching vessel.

Playfair v. Meaford Elevator Co.; Meaford Elevator Co. v. Montreal Transportation Co., 13 D.L.R. 763, 24 O.W.R. 946, affirming, in part, 2 D.L.R. 577, 3 O.W.N. 525.

FIXING LIABILITY — CONTRIBUTORY NEGLIGENCE—VESSEL COLLIDING WITH RAFT—RULES.

A vessel is not liable for a collision with a boom of logs being towed by a steam tug in a locality which is admittedly one that is dangerous for such purposes, and where it appears that the collision was due to the negligence of the tug (a) in shewing misleading lights (b) in having too long a tow (c) in having insufficient lights on the boom, and (d) losing control of the boom and blocking the channel, the colliding vessel being misled by the lights to such an extent that the boom of logs was not visible until it was too late to avoid the accident, and where it is shewn that the colliding vessel exercised a degree of care commensurate to the circumstances. [The "Devonian," [1901] P. 221; Harbour Commrs. of Montreal v. The "Universe," 10 Can. Ex. 352; N.Y.O. & W. R. v. Cornell Steamboat Co., 193 Fed. 380; The "Patience," 167 Fed. 855, referred to.]

Patterson Timber Co. v. SS. "British Columbia," 11 D.L.R. 92, 18 B.C.R. 86, 23 W.L.R. 778.

SHIPPING—COLLISION REGULATIONS—SPEED REDUCTION.

In an action against a vessel for damages resulting from a collision with a tug towing a scow in a fog, where it is shewn that the defendant vessel failed to comply with the provisions of art. 16, imposing a duty on a vessel in a fog to proceed at a moderate rate of speed, liability is not avoided unless it be shewn that the speed of the vessel was not more than was necessary; the fact that she was running at a speed which would make it safer for herself in determining her position is not the determining factor if such excessive speed made her more dangerous to other vessels. [The "Lord Bangor," [1896] P. 28; The "Challenge and Duc d'Aumale," [1905] P. 198 (C.A.), referred to.]

Pallen v. The "Iroquois" (No. 2), 11 D.L.R. 41, 18 B.C.R. 76.

RULE 16 OF REGULATIONS FOR AVOIDING COLLISIONS AT SEA.

At about 9 o'clock a.m. on June 15, 1917, a collision occurred at the entrance to Halifax Harbour between the ship "Deliverance" and the defendant ship "Regin" in a dense fog. The "Deliverance" was yoked up to the S.S. "Belain" and was outward bound engaged in mine sweeping in the harbour, and the "Regin" was coming in. Held, that inasmuch as the "Deliverance" admittedly heard the fog signals of the "Regin" well forward of her beam and still kept on at her speed into the fog, she violated the provisions of art. 16 of the rules of the road and was at fault. That such fault was the proximate cause of the collision and she was wholly to blame therefor.

Southern Salvage Co. v. The Ship "Regin," 49 D.L.R. 107, 19 Can. Ex. 159. [Appeal to the Supreme Court of Canada, allowed, Nov. 24, 1919, to the extent of declaring the ships equally liable for the collision.]

HARBOUR—INCOMING AND OUTGOING VESSELS —DUTY.

A vessel has no right to manœuvre her entry into the basin of a harbour while another vessel was leaving her moorings ready to come out; under such circumstances it is the duty of the former to remain below the canal entrance, in order to give way to the out-going vessel, and her failure to do so will render her liable in case of collision. [Taylor v. Burger, 8 Asp. M.C. 364, followed.]

Canada Shipping Co. v. SS. "Tunisie;" Deppe v. S.S. Cabotia, 45 D.L.R. 386, 18 Can. Ex. 348.

(§ I—3)—ADMIRALTY LAW—NARROW CHANNEL—FOG.

The "Wakena" v. Union S.S. Company of British Columbia, 49 D.L.R. 690, affirming 37 D.L.R. 579, 16 Can. Ex. 397, which reversed 35 D.L.R. 644, 24 B.C.R. 156.

EVIDENCE—WEIGHING—DISINTERESTED WITNESSES—REASONABLE POSSIBILITIES.

In case of a collision between two ships in a narrow channel the evidence of disinterested witnesses standing on the shore in such a position of advantage as to have a full and clear view of both ships and who follow the courses and manœuvres of the vessels, will be accepted in preference to

that of a passenger in the saloon of one of the ships with a limited range of sight as to the course of the two colliding ships. That where there is conflicting evidence, the court should examine into the probabilities of the matter and draw its own conclusion as to what would be the most reasonable courses. [The "Mary Stewart," 2 Wm. Rob. 244, and The "Ailsa," 2 Stuart's Adm. 38, referred to.]

Coy, McLean & Titus v. S.S. "D.J. Purdy," 50 D.L.R. 69, 19 Can. Ex. 212.

CANAL — PASSING VESSELS — LIABILITY — PROXIMATE CAUSE.

Where vessels passing one another in a canal have exchanged the proper signals, and were properly navigated, the fact that one took a starboard course to avoid collision, and in doing so struck the canal banks and was damaged, does not give her a right of action against the other; where the damage was about the bilge or bottom of the vessel it is evidence of its having been caused by an obstruction at the canal's bottom and not by its banks.

Canada Steamship Lines v. Montreal Transportation Co., 45 D.L.R. 478, 18 Can. Ex. 354.

TUG AND TOW — SNOWSTORM — INEVITABLE ACCIDENT.

In attempting to avoid a collision with a black gas buoy in a channel, which became invisible owing to a snowstorm, the master of a tug, after passing an upbound steamer, starboarded his vessel and ran his tow, composed of several barges, into shallow water, thereby bringing about a collision between them. Held, it was not an inevitable accident and could have been avoided by the exercise of ordinary caution and maritime skill; that the collision was caused by the improper starboarding of the tug; its failure to take soundings; the failure to anchor.

"Lawrence C. Giff" v. Sincennes-McNaughton Line, 45 D.L.R. 402, 18 Can. Ex. 366.

SHIPPING—RESPONSIBILITY—GROSS NEGLIGENCE—REGULATIONS—ART. 27.

The collision happened in Halifax harbour at 8.50 a.m., in broad daylight. The weather was perfect, there being no wind, and the ships could see each other several miles away. The "Imo" was keeping as far as practicable to her side of the fairway or mid-channel and blew a signal of three blasts and reversed her engines when about a mile apart, having previously signalled she would keep to starboard; she then reduced speed and did not put on engines again before collision. When "Mont Blanc" blew a two-blast signal, indicating she was coming to port and would cross bow of the "Imo," the "Imo" reversed engines and gave a three-blast signal. The "Mont Blanc" was travelling at excessive speed and, starboarding her helm, attempted to cross the bows of the "Imo." She did not reverse engines nor drop anchor. The collision happened with the waters of the "Imo," that is, on the Halifax side of mid-channel, and after collision the "Mont Blanc" ran upon the Halifax shore, where the explosion took place. Held, that the collision was wholly due to the last order of the "Mont Blanc" and to the gross negligence of her officers in attempting to cross the bows of the "Imo." That the order could not be justified as an emergency order, in view of the respective positions of the ships.

General Transatlantic Co. v. The "Imo," 47 D.L.R. 462, 19 Can. Ex. 48. [Reversed in part 59 Can. S.C.R. 644, which was affirmed 51 D.L.R. 403.]

RESPONSIBILITY — RIGHT-OF-WAY — REGULATIONS—ART. 19.

A collision occurred between the "Durley Chine," bound from Halifax to Norfolk, and the "Harlem," bound from New York to Bordeaux, at 1.19 a.m. on April 22, 1917, some 65 miles southeast of Ambrose Channel lightship, off New York harbour. It was starlight, though the night was dark, and a haze was on the horizion. Just before the collision, the course of the "Durley Chine" was S. 50° W. and that of the "Harlem," S. 52° E., or at right-angles to one another, with the "Harlem" on the starboard side of the "Durley Chine." Art. 19 of the Rules to Prevent Collision at Sea provides that when vessels are crossing so as to involve risk of collision, the vessel which has the other on her starboard side shall keep out of the way of the other. Held, that within the meaning of said rule, the "Harlem" was a crossing ship, carrying proper regulation lights, and that being so, the "Durley Chine" was obliged to keep out of her way.

The King v. The "Harlem," 47 D.L.R. 471, 19 Can. Ex. 41. [Affirmed 59 Can. S.C.R. 653]

BETWEEN SAILING VESSELS — REGULATIONS RELATING TO LIABILITY.

The regulations relating to sailing vessels require that when two sailing vessels are approaching one another so as to involve risk of collision the one which is running free shall keep out of the way of the one that is close-hauled; if both are running free with the wind on different sides the vessel which has the wind on the port side shall keep clear of the other. Where one vessel is to keep out of the way the other shall keep her course and speed. Held on the evidence that the defendant vessel had violated these rules.

Le Blanc v. The "Emilien Burke," 46 D.L.R. 59, 19 Can. Ex. 24.

TUG AND TOW—STEAMSHIP—NARROW CHANNEL—RULES OF ROAD—LIGHTS.

A steamship was coming up the St. Lawrence River in ballast, at a great speed, and approaching a tug and tow in the bend of the channel changed her course with the intention of passing them starboard to starboard, contrary to art. 25 of the Rules of the Road. Thereupon the master of the

tug ported his helm in an endeavour to avoid a collision. The steamer then tried to manœuvre herself into position and collided with two barges at the head of the tow. Held, the collision resulted from the steamer's failure, "when safe and practicable, to keep to the starboard side of the fair-way or mid-channel," as required by art. 25; even if the pilot of the steamer believed the tug and tow coming down the wrong side of the channel, good seamanship required him to stop or slow up, which he failed to do; that no blame could be imputed to the tug. The length of the tow and the absence of regulation lights on the barges cannot be said to have contributed to the collision when it occurred at the head of the tow.

S.S. "Coniston" v. Frank Walrod, 49 D.L.R. 200, 19 Can. Ex. 238, affirming 45 D.L.R. 518.

ACT OF GOD—RESPONSIBILITY—BURDEN OF PROOF—INEVITABLE ACCIDENT—DEFINITION OF — NEGLIGENCE — COSTS — RULE 132, ADMIRALTY PRACTICE.

Held, that where the action of tide and currents is so contrary to experience, that it could not be reasonably anticipated or foreseen it is to be regarded as an "Act of God," and collision due to such is an "inevitable accident." That "inevitable accident" is that which the party charged with damage could not possibly prevent by the exercise of all reasonable precautions which ordinary skill and prudence could suggest. That where "inevitable accident" is pleaded the onus is primarily on the plaintiff to shew that blame does attach to the vessel proceeded against, and a primâ facie case in this behalf must be established. That, on an action being dismissed on the ground that the damage was due to inevitable accident costs will follow the general rule, unless special circumstances exist requiring a departure therefrom. [The "Marpesia," L. R. 4 P.C. 212, referred to.]

The Tug "Jessie Mac" v. The Tug "Sea Lion," 48 D.L.R. 184, 19 Can. Ex. 78, [1919] 2 W.W.R. 411.

FIXING LIABILITY—INDEPENDENT CONTRACTORS—TOWAGE CONTRACTS.

One who contracted to tow scows using a tug-boat owned or controlled by himself, was an independent contractor, for whose negligence in permitting one of the scows to come in contact with and injure the scow of a third party the employer is not liable, the contractor not being interfered with by his employer in the performance of the contract. [Quarman v. Burnett, 6 M. & W. 499, and Jones v. Corp. of Liverpool, 14 Q.B.D. 890, referred to.]

Cotton Co. v. Coast Quarries, 11 D.L.R. 219, 24 W.L.R. 288.

FIXING LIABILITY—DEATH OF RAILWAY FIREMAN ON SNOWPLOUGH — UNQUALIFIED SIGNALMAN.

Jones v. C.P.R. Co., 13 D.L.R. 900, 30 O.L.R. 331, reversing 5 D.L.R. 332.

FIXING LIABILITY—OFFENDING VESSEL TAKING WRONG SIDE—OTHER'S DUTY TO REVERSE—LATITUDE ALLOWED.

Where two vessels are meeting in a river and one of them in violation of the rules, negligently takes the wrong side of a narrow channel from which immediate danger of collision arises, the vessel offended against is not to be held to have been negligent in giving aid to prevent a collision, merely from its miscalculation by a few seconds of the exact juncture at which her engines might effectively be reversed to avoid the danger, since the offending boat's negligence tended to surprise and confuse the other which might reasonably expect the offender promptly to reverse her own engines to escape the danger caused by herself.

C.P.R. Co. v. The "Kronprinz Olav," The "Montcalm" v. Bryde, 14 D.L.R. 46, 13 E.L.R. 178, reversing the judgment of the Canada Supreme Court (unreported), which affirmed the judgment of the D.L. Judge Admiralty reported 19 Can. Ex. 138.

NEGLIGENT NAVIGATION—FIXING LIABILITY.

In a personal action for damages for negligent collision of the boats of the plaintiff and defendant operating in Ontario inland waters brought in the Supreme Court of Ontario, if it appear that both parties were guilty of acts of negligent navigation contributing to the collision, the action is not to be dismissed, but the damages are to be apportioned in conformity with s. 918 of the Canada Shipping Act, R.S.C. 1906, c. 113.

Shipman v. Phinn, 20 D.L.R. 596, 32 O.L.R. 329.

VESSELS IN CHANNELS—FIXING LIABILITY.

A vessel which fails to keep to the starboard side of the fairway or mid-channel, when entering a harbour, in violation of art. 25, and crosses at an excessive speed to the wrong side of the channel, without excuse, is liable for collision with a tug prudently proceeding out of the harbour, at a very low speed, with a heavy scow lashed to her starboard bow; under such circumstances the latter cannot be blamed for her failure to reverse her engines to avoid the collision. [The Kaiser Wilhelm der Grosse, [1907] P. 259; Richelieu & Ont. Nav. Co. v. Cape Breton, [1907] A.C. 112, 76 L.J.P.C. 14, referred to.]

The King v. The "Dispatch;" The Border Line Transportation Co. v. McDougal, 28 D.L.R. 42, 22 B.C.R. 496, 16 Can. Ex. 319.

OPEN SEA—RULES OF NAVIGATION—NEGLIGENCE.

The rules of navigation governing the open sea apply to open water of the St. Lawrence river; it is negligent for a ship approaching another in a fog to alter her course and fail to reverse engines, in violation of rr. 16, 21, and 29, where the other

vessel has obeyed r. 23. [See also C.P.R. Co. v. S.S. "Storstad," 34 D.L.R. 1.]

C.P.R. Co. v. S.S. "Storstad," 40 D.L.R. 600, 17 Can. Ex. 169.

CANAL—RULES AND REGULATIONS.

The only exception to a rigid compliance with the regulations prescribed for the navigation of Canadian waters and canals is when it appears with perfect clearness, amounting almost to a certainty, that adhering to the rule would have caused a collision and violating the rule would have avoided it. The Rules of the Department of Railways and Canals, except where they indicate the contrary, govern vessels using the canals, and are not intended merely for the preservation and safety of the canals.

Canadian Sand & Gravel Co. v. The "Keywest," 38 D.L.R. 682, 16 Can. Ex. 294.

FOG—RULE OF ROAD—SPEED—LOOKOUT.

Where in a fog or thick weather a steamer proceeds at an excessive speed, without a sufficient lookout, and fails to keep out of the way of a schooner keeping properly within her course, she is in violation of arts. 16 and 20 of the Rules of the Road, and liable for a collision with the latter vessel.

Smith v. Mackenzie, 41 D.L.R. 393, 17 Can. Ex. 493.

FOG — DUTY AS TO SPEED — LIABILITY — COSTS.

The provisions of art. 16, requiring each vessel in case of fog or thick weather to "stop her engines and then navigate with caution," must be strictly adhered to in order to avert a collision. Mere sounding of the fog signal is not sufficient. Where both vessels are at fault "the damages shall be borne equally by the two vessels," pursuant to s. 918 of the Canada Shipping Act (R.S.C. 1906, c. 113). The old rule that each delinquent vessel shall bear her own costs is still in force.

Pallen v. The "Iroquois," 11 D.L.R. 41, 17 Can. Ex. 185, 18 B.C.R. 76.

OVERTAKING VESSEL—FOG SIGNALS—FAUTE COMMUNE—DAMAGES.

A steamer descending the St. Lawrence River in foggy weather had come to anchor for safety. Previous to anchoring the ship was being overtaken by another ship descending the river. Both ships had failed to give the proper fog signals, and as a result the steamer at anchor was run down by the other. Held, as the ships were both at fault the damages should be divided. Status of report of the Commission of Wrecks before the court commented on.

Crown Steamship Co. v. The "Lady of Gaspé;" Bouchard v. "Crown of Cordova," 17 Can. Ex. 191.

TUG AND TOW—BARGE.

Held, that upon the evidence the judgment of the court below was correct in finding a tug, having a dead tow, responsible for a collision with a barge properly moored.

The "Ethel Q" v. Beaudette, 17 Can. Ex. 505.

TUG AND TOW—BOOM OF LOGS—LIGHTS.

In an action against defendant ship for having run through and scattered a boom of logs belonging to the plaintiff while being towed by plaintiff's steam tug, the collision having occurred at night at a difficult point of a channel: Held, that the collision was occasioned by the tug's negligence (1) in showing misleading lights; (2) having too long a tow; (3) displaying insufficient lights on the boom; (4) and losing control of the boom and blocking the channel. Also, that a boom of logs is not a vessel within the meaning of the regulations.

Paterson Timber Co. v. The "British Columbia," 16 Can. Ex. 305.

FOG AND SNOW—SPEED OF VESSEL—APPORTIONMENT OF DAMAGES.

A ship is not entitled to run through fog and snow at a speed which is safe for herself but immoderate and dangerous for others. [Pallen v. Iroquois, 11 D.L.R. 41, 18 B.C.R. 76, followed.] In apportioning damages resulting from a collision between two ships, where the evidence does not establish that a clear preponderance of culpability rests upon one ship, the division of damages should be half and half. [The Peter Benoit, 13 Asp. M.C. 203, 85 L.J.P. 12, followed.]

The Beldridge v. The Empress of Japan (Exch.), [1917] 3 W.W.R. 961.

HARBOUR—PROPER LOOKOUT—COURSE AND SPEED.

The making of a landing along the waterfront of a busy harbour is a manœuvre which ought to be accompanied by full precautions, the first of which is an adequate lookout. [Observations of Martin, J., in Brice v. C.P.R., 13 B.C.R. 96, affirmed by the P.C. 15 B.C.R. 510, 13 Can. Ex. 394, upon the "proper precaution" of keeping a "general lookout" in Vancouver Narrows, applied.] A serious burden is imposed upon a vessel if she fails to "keep her course and speed" as required by art. 21 of the Sea Regulations, and she lays herself open to attack by the "give-way" vessel by departing from the directions of the article and must be prepared to justify the departure by the proper execution of nautical manœuvres, such as in dropping a pilot, or approaching a landing or drawing up to an anchorage, or to lessen the consequences of collision to save life or otherwise. [Albano v. Allan Line S.S. Co., and the Parisian, [1907] A.C. 193, 76 L.J.P.C. 33 at p. 40, followed.]

The Cleeve v. The Prince Rupert (Ex.), [1917] 3 W.W.R. 957; [1918] 1 W.W.R. 345.

TUG AND SCOW—NARROW CHANNEL.

While a channel, admittedly difficult of navigation under certain conditions, might properly be used by a ship, she is under an obligation to take all precautions to avoid collision with another ship. Where prudent seamanship precludes a tug, in charge of a laden scow, from following certain of

the regulations, she will be exonerated from blame in departing therefrom.

C. P. R. Co. v. The Tug "Bermuda," 13 Can. Ex. 389.

DAMAGE TO ELECTRIC CABLE—AGREEMENT BETWEEN PLAINTIFF AND QUEBEC HARBOUR COMMISSIONERS—VALIDITY.

Canadian Electric Co. v. The Steamship "Crown of Aragon," 13 Can. Ex. 399.

(§ I—8)—LIMITATION OF ACTION.

An action for damages for personal injury against the owners of a motor vehicle by collision with the motor vehicle, commenced three and a half years after the cause of action arose, does not fall within the two-year limitation of 10 Edw. VII. (Ont.) c. 34, s. 49 (h), upon actions for "damages given by any statute," notwithstanding the statutory provisions governing the operation of motor vehicles, and is, therefore, not barred on a plea of the Statute of Limitations. [Corporation of Peterborough v. Edwards, 31 U.C.C.P. 231; Thomson v. Lord Clanmorris, [1900] 1 Ch. 718, referred to.]

Maitland v. MacKenzie & Toronto R. Co., 6 D.L.R. 336, 4 O.W.N. 109, 23 O.W.R. 80.

COMBINATIONS.

See Monopoly; Conspiracy.

As to covenants for restraint of trade, see Contracts.

COMMERCE.

Annotations.

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School Commissioners, see Schools.

COMMISSIONS.

Of agents, brokers, see Brokers; Principal and Agent.

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Annotations.

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I. Nature; creation; franchises; governmental regulation.

A. IN GENERAL.

(§ I A—1)—CREATION—FRANCHISES—GOVERNMENT REGULATION—FEDERAL COMPANY, HOW AFFECTED BY PROVINCIAL LAW—COMPANIES ACT OF CANADA—B. C. COMPANIES ACT—B.N.A. ACT.

The provisions of B.C. Companies Act in

so far as they purport to compel a trading company incorporated under the Companies Act of Canada with powers extending throughout the whole of Canada to take out a provincial license as a condition of exercising such corporate powers in B.C., and of suing in the courts of that province, are ultra vires. [Wharton v. John Deere Plow Co., 12 D.L.R. 422, reversed; John Deere Plow Co. v. Duck, 12 D.L.R. 554, reversed; Re Companies Act, 15 D.L.R. 332, 48 Can. S.C.R. 331, considered.] The power of legislating with reference to the incorporation of companies in Canada with other than provincial objects belongs exclusively to the Parliament of Canada as a matter affecting the "peace, order and good government of Canada" under s. 91 of the B.N.A. Act.

John Deere Plow Co. v. Wharton, 18 D.L.R. 353, [1915] A.C. 330, 7 W.W.R. 635, 706, 29 W.L.R. 917.

(§ I A—2)—Federal company—How affected by provincial laws of general application—B.N.A. Act.

A company incorporated by the Dominion with powers to trade is not the less subject to provincial laws of general application enacted under s. 92 of the B.N.A. Act. [Union Colliery Co. v. Bryden, [1899] A.C. 580; Bank of Toronto v. Lambe, 12 App. Cas. 575, and Citizens v. Parsons, 7 App. Cas. 96, referred to.]

John Deere Plow Co. v. Wharton, 18 D.L.R. 353, 29 W.L.R. 917, 7 W.W.R. 635, 706, [1915] A.C. 330.

Company with share capital—Letters patent — Sale of shares—S. ref. [1909] arts. 6011, 6019, 6036.

A company with share capital becomes a corporation from the date of its letters patent, after the publication in the Quebec Official Gazette of the notices mentioned in art. 6011, of S. ref. [1909]. The obligation on a company formed by a virtue of letters patent not to commence business before 10 per cent of its capital has been subscribed and deposited, and a declaration to this effect has been filed with the provincial secretary's department, in accordance with S. ref. [1909], art. 6019, so that the deposit of a contract of sale required by art. 6036 of the said statute as amended, does not involve the nullity of the letters patent, nor of intervening contracts between the company and a third party, but constitutes, in case of default, in carrying out these formalities, an infraction of the act punished in the manner indicated in the said statutes. The sale by a shareholder to a third party of all his shares in the capital of the company does not need to be authorized by the direction of the company. A person who has bought shares of a company with the clause that if he does not make the payments as they fall due the contract will be void, has no right to demand the nullity of the sale and of the shares transferred to him on account of a defect of form in the formation of the company and in the issue of its shares.

Perusse v. Fuller, 55 Que. S.C. 254.

Territorial powers—Business outside of province.

A company incorporated by provincial letters patent has the capacity to acquire and exercise powers and rights outside the territorial boundaries of the province where it is incorporated; an Ontario mining corporation is not precluded from carrying on mining business in the Yukon Territory and receiving licenses or certificates in respect thereto from the executive officers of that territory.

Bonanza Creek Gold Mining Co. v. The King, 26 D.L.R. 273, [1916] 1 A.C. 566, 25 Que. K.B. 170, 34 W.L.R. 177, reversing 21 D.L.R. 123, 50 Can. S.C.R. 534. [Followed in Insurance Case, 26 D.L.R. 288, and Companies Case, 26 D.L.R. 293.]

B. Corporate purposes.

(§ I B—5) A prospectus ordered and prepared by an agent engaged by a company to sell its shares who has obtained from the directors of the company the information to be inserted therein, partly or wholly corrected by the president of the company, and received by the directors of the company without demur, will be held the prospectus of the company itself, especially when it is so described in its headline.

French Gas Saving Co. v. The Desbarats Advertising Agency, 1 D.L.R. 136.

(§ I B—6)—Registration—Action for penalty—R.S.Q. ss. 6091, 6095.

The obligation, imposed on the president of an incorporated company doing business in the Province of Quebec, of signing and filing a declaration to this effect in the office of the prothonotary and of the registrar within 60 days after the company began doing business, does not extend to his successor. Even if it should be held that the law extends to his successor, it would be unjust to declare him guilty in the absence of proof that he exercised his functions for more than 60 days. A person who sues to recover the penalty imposed by law for default in filing the said declaration must prove that the company has not deposited it within the said 60 days.

Malo v. Diamond Flint Glass Co., 46 Que. S.C. 481.

(§ I B—7)—Delay in organizing.

Where letters patent incorporating a company have been obtained under the Ontario Companies Act, and, though no steps have been taken towards its organization, its corporate powers have not been forfeited by delay, the company is an existing legal entity, and solicitors entering an appearance on its behalf cannot be made personally liable for the costs of the action as having appeared for a nonexisting client. [Sim-

mons v. Liberal Opinion, In re Dunn, [1911] 1 K.B. 966, distinguished.]

Campbell v. Taxicabs Veralls, 7 D.L.R. 91, 27 O.L.R. 141, 23 O.W.R. 6.

C. De facto corporation.

§ I C—10)—The renting of an office, payment of business tax, opening of a bank account, signing of a lease, and institution of suit by a company, constitute a commencement of operations and incurring of liabilities bringing the company within the purview of s. 6019 R.S.Q.

French Gas Saving Co., v. The Desbarats Advertising Agency, 1 D.L.R. 136.

D. Names.

(§ I D—15)—Corporate names—Conflict—Declaratory order.

The use of a corporate name, as chartered, cannot be restrained merely because it resembles in part the name of another corporation and its trademark; it is no ground for a declaratory order.

John Palmer Co. v. Palmer-McLellan Shoe-Pack Co., 37 D.L.R. 201, 45 N.B.R. at 34.

New corporation—Similarity of names—Injunction.

An injunction will be granted to restrain a proposed new company from applying for registration where the circumstances point to an intention on the part of the new company to do business under a name which might easily be mistaken for the name of an existing company, doing the same class of business, and thereby deceive the public. It is not necessary to wait until the company actually commences to do such business. [Hendricks v. Montagu, 17 Ch. D. 638, referred to.]

Guardian Assurance Co. v. Garrett, 40 D.L.R. 455, 25 B.C.R. 353, [1918] 2 W.W.R. 405. [Reversed, 45 D.L.R. 32, 58 Can. S.C. R. 47, [1919] 1 W.W.R. 67.]

Corporate name — Superseded — Not abandoned — Adoption of by new company—Fraud.

Strains v. Nott, 49 D.L.R. 699.

Removal of name from register — Who may apply for restoration—"Creditor."

Where the name of a company has been struck off the register a customer of such company who prior to the striking off institutes an action against the same, and seeks not merely for unliquidated damages, but for repayment of a sum certain under an agreement to that effect, is a "creditor" within the meaning of s. 24 (5) of the Companies Act, so as to be entitled to make an application for the restoration of the name of the company to the register. Held, also, that the company at the time of the striking off was not "carrying on business or in operation" owing to the fact that all its assets had then been sold.

Re Porter Art & Music Store, 9 W.W.R. 30.

(§ I D—19)—Right of majority of shareholders to use name.

The name of a company may be used in behalf of a majority of the shareholders in a proceeding to expel directors who were illegally elected.

Colonial Ass'ce. Co. v. Smith, 4 D.L.R. 814, 22 Man. L.R. 441, 21 W.L.R. 815.

E. Governmental regulation.

(§ I E—19z)—Governmental regulation.

A provision in the letters patent incorporating a loan company in Ontario, giving power to the company to sue and be sued by its corporate name only so long as it is registered under the Loan Corporations Act, R.S.O. 1897, c. 205 (see now 2 Geo. V. (Ont.) c. 34), is not justified by the Act, and is ineffectual. [Simmons v. "Liberal Opinion," Re Dunn, 27 T.L.R. 278, distinguished.]

Powell-Rees v. Anglo-Canadian Mortgage Corp., 5 D.L.R. 818, 26 O.L.R. 490, 22 O.W. R. 529.

Governmental regulation—Companies—With objects extending to the entire Dominion—Federal and provincial powers—Right to sue, whence derived.

The legislative power to regulate trade and commerce which by s. 91 of the B.N.A Act belongs to the Dominion Parliament enables the latter to prescribe to what extent the powers of trading companies which it incorporates with objects extending to the entire Dominion should be exercisable and what limitations should be placed on such powers; and ss. 5, 29, 30 and 32 of the Companies Act (Can.) and s. 30 of the Interpretation Act, 1906 (Can.), purporting to enable any federal company incorporated under the Companies Act of Canada to sue and be sued and to contract in the corporate name and establishing the place of its legal domicile and declaring the limitation of personal liability of the shareholders are within the legislative powers of the Parliament of Canada.

John Deere Plow Co. v. Wharton, 18 D.L.R. 353, 29 W.L.R. 917, 7 W.W.R. 635, 706, [1915] A.C. 330.

Investigation of oil companies.

Chapter 2 of the Statutes of Alberta, 1908, authorizing the appointment of commission for the purpose of inquiries into matters connected with the good government of the province or the conduct of the public business thereof, does not permit any investigations into the private affairs and operations of private oil corporations.

Black Diamond Oil Fields v. Carpenter, 24 D.L.R. 515, 9 A.L.R. 121, 32 W.L.R. 425, 9 W.W.R. 158.

Penalties for not making government returns—Remission.

In an action against an incorporated company and its secretary to recover $12,760 as penalties incurred under the Ontario

Companies Act, R.S.O. 1914, c. 178, s. 135, for not making returns to the government, it appeared that the plaintiff had been induced by false and fraudulent statements of a broker, acting for the company, to pay $3,000 for shares in the company. She brought an action against the broker and the president and secretary of the company to recover her $3,000; in that action the returns were demanded, and it was found that they had never been made. The plaintiff then applied to the Att'y-Gen'l. for leave to sue for the penalties; and, after some delay in order to afford the company an opportunity to make the returns, the leave was granted, and this action was begun. Two days later the returns were made. An application was then made by the defendants to the Att'y.-Gen'l. to rescind the leave to sue or to remit the penalties; this was refused. Upon application by the defendants to a judge in court, an order was made, under s. 6 of the Fines and Forfeitures Act, R.S.O. 1914, c. 99, remitting the penalties, upon the terms that the defendants should repay to the plaintiff the money received from her for the shares, with interest at 6%, and her costs as between solicitor and client of both actions and the proceedings before the Att'y-Gen'l.

Seagram v. Pneuma Tubes, 40 O.L.R. 301.

COMPANY — SUBSCRIPTION FOR SHARES INDUCED BY FALSE REPRESENTATIONS OF PRESIDENT—RETURN OF MONEY PAID—NONCOMPLIANCE WITH PROVISIONS OF ONTARIO COMPANIES ACT, R.S.O. 1914, C. 178, SS. 111-117, AS TO PROSPECTUS, CERTIFICATE, ETC.—DAMAGES.

Aikens v. Waugh & International Safe & Register Co., 16 O.W.N. 340.

INJUNCTION—INSURANCE COMPANIES—CONFUSION OF NAMES.

An insurance company cannot by writ of injunction, prohibit another company from using the name under which it was constituted by an Act of the Parliament of Canada on the ground that the former company is prejudiced by the confusion between such name and that borne by itself and under which it has done business for many years.

Travelers' Ins. Co. v. Travelers' Life Ins. Co. of Canada, 20 Que. K.B. 437.

CORPORATE NAME — ACTION AGAINST FIRM WITH SIMILAR NAME.

An incorporated company has, under the provisions of art. 7438 R.S.Q., 1909, a right of action against a partnership which, by its registered declaration, has adopted a firm name likely to produce the confusion aimed at in said article. Thus, a company incorporated under the name of Lamontagne, Limited, is entitled to cause the registration of a declaration of a firm under the name of Lamontagne & Co. to be annulled. (Cf. Laing Packing & Provision Co. v. Laing, Q.R. 25 S.C. 344.)

Lamontagne v. Girard, 39 Que. S.C. 179.

II. Consolidation; reorganization; transfer of franchises.

Effect of amalgamation on pending proceedings, see Arbitration, III—16.

(§ II—20)—TITLE TO SHARES—AMALGAMATION — CONTRACT — NOVATION — FAILURE OF CONSIDERATION—EVIDENCE.

Marshall v. Dominion Mfg., 7 O.W.N. 808, 8 O.W.N. 526.

(§ II—24)—REORGANIZATION—SALE OF UNDERTAKING — TAKING SHARES IN PROPOSED NEW COMPANY.

Where a company's power to sell its undertaking is controlled by a statute declaring that it may sell, lease or dispose of same "for such consideration as the company may see fit, including cash, shares wholly or partially paid, bonds, debentures or securities of any other company carrying on or formed for the purpose of carrying on any business capable of being conducted so as directly or indirectly to benefit this company," a sale to a speculative buyer for shares in a company not yet formed, but intended to be organized but for which new company the buyer does not become a trustee, is not within the statutory power, and the company may be restrained at the suit of a dissentient shareholder from carrying out a resolution accepting a proposition of sale on such terms.

Hill v. Starr Mfg. Co., 15 D.L.R. 146, 47 N.S.R. 387, 43 E.L.R. 420.

(§ II—27)—LIABILITY OF TRANSFEREE.

A person to whom a franchise to supply water to the citizens of a town is granted by a municipal corporation cannot have any larger or greater responsibility than the corporation would have had, had it itself exercised the powers delegated. [Brousseau v. City of Quebec, 42 Que. S.C. 91, followed.]

Quesnel v. Emard & City of Montreal, 8 D.L.R. 537.

CONSOLIDATION OR REORGANIZATION—LIABILITY OF TRANSFEREE TO EMPLOYEES.

Where a person is employed by a company for a period of years at a stipulated salary per year, and subsequently during the period of employment the company turns over its undertaking and assets as a going concern to a new company which assumes all liabilities, and the employee is told by the new company that the change would not affect him in his job, and he continues to work for the new company, an implied contract of hiring for 1 year from the date of the transfer to the new company may be inferred where the circumstances both as to the character of the service with the new company and the method

of payment indicate that it was more than a monthly hiring.

Archibald v. Hygienic Fresh Milk Co., 11 D.L.R. 416, 47 N.S.R. 150, 13 E.L.R. 92, affirming 9 D.L.R. 763.

III. Charters; articles of incorporation.

(§ III—30) — Compliance with formalities.

The formalities prescribed by arts. 7175, etc., R.S.Q. 1909, for the constitution of incorporated societies, must be strictly followed on pain of nullity.

St. Narcisse Butter & Cheese Manuf. Co. v. Demers, 50 Que. S.C. 6, 49 Que. S.C. 406.

(§ III—31) — Telephone — Powers of municipalities as to — Duration of contract as to poles and wires — Ontario Municipal Act, ss. 330, 331.

By ss. 330 and 331 of the Ontario Municipal Act (6 Edw. VII. c. 34), the power of municipalities to allow telephone companies to place and keep their wires and poles on the streets of the municipalities is limited to a period of 5 years at one time.

Town of Cobalt v. Temiskaming Telephone Co., 47 D.L.R. 301, 59 Can. S.C.R. 62, reversing 46 D.L.R. 477, 44 O.L.R. 366, and restoring 43 D.L.R. 724.

Provincial charters — Extraterritorial operations.

A company created by a provincial charter under the provisions of the Companies Act of any province of Canada is not necessarily restricted to the incorporating province as the area of the company's operations.

Re Companies Incorporation, 15 D.L.R. 332, 48 Can. S.C.R. 331, 25 W.L.R. 331, 25 W.L.R. 712.

Company with federal license — Exclusive agreement for sales territory with resident of province — When provincial company license is required — "Carrying on business," meaning of.

A contract made between a company carrying on business as implement dealers and holding a federal charter under the Companies Act, R.S.C. 1906, c. 79, and a merchant in B.C. whereby the latter was to sell their goods with an exclusive right within a part of the province and with a limitation on his selling prices, and whereby the company also retained title to the goods until paid for and the merchant agreed to take lien notes from customers to the company direct if it so requested and to hold money received in partial payments from customers as in trust for the company, does not involve the "carrying on of business" within the province by the company under s. 139 of the B.C. Companies Act, 10 Edw. VII. c. 7, and the company, although it has not obtained a provincial license under that statute, may maintain an action against the merchant upon his promissory notes payable within the province for goods shipped by the company from another province to him in pursuance of such agreement. [John Deere Plow Co. v. Agnew, 8 D.L.R. 65, reversed.]

John Deere Plow Co. v. Agnew (No. 2), 10 D.L.R. 576, 48 Can. S.C.R. 208, 24 W.L.R. 221.

When provincial company license is required — "Carrying on business," meaning of.

Contracts of an unlicensed extra provincial company, although partly made in B.C. must, in order to fall within the incapacity to sue imposed by s. 168 of the Companies Act, R.S.B.C. 1911, c. 39, be contracts made in the course of or in connection with some business which the company, in whole or in part, "carries on" in British Columbia. [John Deere Plow Co. v. Agnew, 10 D.L.R. 576, 48 Can. S.C.R. 208, applied.]

White v. Donkin, 16 D.L.R. 446, 19 B.C.R. 565, 6 W.W.R. 508, 27 W.L.R. 789.

Incorporated racing association — Dominion charter — Construction — Powers — "Operations throughout the Dominion and elsewhere" — Places for holding race meetings.

O'Neill v. London Jockey Club, 8 O.W.N. 602.

Incorporated racing association — Letters patent under Dominion Companies Act — Cr. Code, s. 235(2) — Amending Act, 2 Geo. V. c. 19—Powers — "Operations throughout Dominion and elsewhere" — Supplementary letters patent — "Use of the charter" — Establishment of race course—Forfeiture.

Hepburn v. Connaught Park Jockey Club of Ottawa, 10 O.W.N. 333.

Presumption as to legitimacy of purpose.

A charter is always presumed to authorize legitimate business, and is never intended to override the general law of the land, nor justified persons for their own gain and profit to violate law established for the general welfare of the public.

Wilson v. North American Securities, 52 Que. S.C. 522.

(§ III—32)—Amendment or repeal.

Under a statutory authority enabling a company to alter or add to its articles of association, it may provide that a shareholder shall not sell his shares except for cash and that sales should be subject to the approval of the directors of the company. [Borland v. Steel Bros. & Co., [1901] 1 Ch. 279, followed.]

Leiser v. Popham Bros., 6 D.L.R. 525, 17 B.C.R. 187.

(§ III—33) — Incorrect statement of liability.

Where a certificate of incorporation incorrectly states that the liability of the company is specially limited under § 63, the Companies Ordinance, the certificate is

erroneous to the extent of that statement only and the company has all the usual powers given by the Ordinance or incident to the company's objects.

Alberta Drilling Co. v. Dome Oil Co., 8 A.L.R. 340, 8 W.W.R. 996.

SALE OF SHARES — OPERATES AS SALE OF ENTIRE BUSINESS — DEBTS NOT IN STATEMENT, PAID BY MANAGER.

Strong v. Van Allen, 19 O.W.R. 1, 2 O. W.N. 929.

IV. Powers; liabilities and officers.

A. RIGHTS AND POWERS GENERALLY.

(§ IV A—35)—DOMINION COMPANY—LIMITATIONS IN CARRYING OUT OBJECTS.

A trading corporation of Dominion-wide scope, incorporated by Dominion legislation, is subject to the limitation that in carrying out its objects it must comply with the laws relating to property and civil rights in each of the provinces of Canada.

Re Dominion Marble Co., 35 D.L.R. 63, 23 Rev. de Jur. 578.

HOSPITAL—ELECTION OF TRUSTEES—CHARTER—BY-LAW.

The powers of a hospital board under its incorporating Act, as to the election or appointment of trustees for the management thereof, cannot be varied by a by-law; though empowered to make the necessary by-laws therefor, it cannot legislate for an increase of its membership nor fix any qualification for voters outside of the corporation, nor to sanction persons taking part in the business of the hospital who were not members of the body corporate, unless expressly or impliedly authorized by the charter.

Murphy v. Moncton Hospital, 35 D.L.R. 327. [Affirmed in 36 D.L.R. 792, 44 N.B.R. 585.]

(§ IV A—40) — RIGHTS AND POWERS GENERALLY—IMPLIED POWERS.

The objects which a company may pursue must be ascertained from its charter or memorandum of association, and the powers to be exercised in furtherance of those objects must either be expressly conferred by, or derived by reasonable implication from, the provisions of such charter or memorandum. [Amalgamated Society of Railway Servants v. Osborne, [1910] A.C. 87, applied.]

Fire Valley Orchards v. Sly, 17 D.L.R. 3, 20 B.C.R. 23, 28 W.L.R. 140, 6 W.W.R. 934.

RIGHTS AND POWERS — ENGAGING IN BUSINESS FOREIGN TO INCORPORATION.

The incidental powers conferred by ss. 14 and 25 of the Companies Act, R.S.O. 1897, c. 191, [R.S.O. 1914, c. 178], on companies in order to carry into effect the intentions and objects of incorporation and to permit them to carry on any branch of business incidental and subsidiary thereto, do not permit a company to embark in a business or undertaking foreign to the specific purposes of its incorporation, but such powers only as are necessary to carry into effect such specific purposes are thereby conferred.

Union Bank v. McKillop, 16 D.L.R. 701, 30 O.L.R. 87. [Affirmed, 24 D.L.R. 787.]

EXTRA-PROVINCIAL POWERS—MEETINGS OUTSIDE PROVINCE—CARRYING ON BUSINESS — RESOLUTIONS — VALIDITY — LIABILITY OF SHAREHOLDER — CONTRIBUTORIES—ESTOPPEL.

A company incorporated under the Companies Act, R.S.B.C. 1911, c. 39, and the Memorandum of Association, of which gives it power "to do any or all of the above things in any part of the world," has the capacity analogous to that of a natural person, to exercise extra-provincial powers [Bonanza Creek case, [1916] 1 A.C. 566, 26 D.L.R. 273, discussed.] Section 72 (3) of the Companies Act, R.S.B.C. 1911, c. 39, which declares that "every general meeting of the company shall be held within the province," applies only to annual general meetings, and does not prohibit the holding of other meetings outside the province. A shareholder held to be estopped from disputing his liability to be placed on the list of contributories of the above-named company. Quaere, whether the holding of shareholders and directors' meetings in a carrying on of business. Certain resolutions of a company held to have been regularly passed under the company's Memorandum and Articles of Association and Act of Incorporation and shares issued in pursuance of such resolutions held to have been validly issued.

Re Lands & Homes of Canada (Robertson's case) (Man.), 44 D.L.R. 325, 29 Man. L.R. 173, [1918] 3 W.W.R. 935.

AUTHORITY OF DIRECTORS — TRANSFER OF LAND—COVENANT—ULTRA VIRES.

The authority of company directors to execute an assignment of an agreement for the sale of land by the company, and the usual indemnity covenant in connection therewith, may be derived from a by-law passed subsequent to the execution of the assignment. A land trading company having the power to sell and has the implied power to enter into a covenant of that kind. [Bonanza Creek case, 26 D.L.R. 273, [1916] 1 A.C. 566, considered.]

National Land & Loan Co. v. Rat Portage Lumber Co. (Man.), 36 D.L.R. 97, [1917] 3 W.W.R. 269.

DELEGATION OF POWERS GIVEN BY CHARTER—COMPANY FOR SUPPLYING ELECTRICITY—R.S.O. 1887, c. 165—CONVEYANCE OF PROPERTY AND RIGHTS TO ELECTRIC STREET RAILWAY COMPANY — LIMITED POWERS OF LATTER COMPANY—56 VICT. C. 97, S. 9—SALE OR LEASE OF SURPLUS ELECTRICITY — MUNICIPAL CORPORATION—BY-LAWS — EFFECT OF — EXTENT OF RIGHTS AND POWERS OF STREET RAILWAY COMPANY — RIGHT TO PLACE POLES AND WIRES ON HIGHWAYS—INSUFFICIENT EVIDENCE—NEW TRIAL.

Sandwich, Windsor and Amherstburg Railway v. City of Windsor, 13 O.W.N. 336.

INCORPORATED TRADING COMPANY — POWER TO ACQUIRE AND SELL LAND—TITLE TO LAND ACQUIRED BY COMPANY—CONTRACT FOR SALE — OBJECTION BY PURCHASER—POWERS OF COMPANY UNDER LETTERS PATENT—ONTARIO COMPANIES ACT, R.S.O. 1914, c. 178, ss. 23, 24—APPLICATION UNDER VENDORS AND PURCHASERS ACT.

Re Gillies Guy, & Laidlaw, 13 O.W.N. 11. [Affirmed 13 O.W.N. 57.]

AUTHORITY OF MANAGER — SALE — RESOLUTION.

A promise of sale to a corporation cannot be accepted by its manager not authorized to do so by a resolution of the Board of Directors.

Canadian European Land Co. v. Lalanne, 49 Que. S.C. 37.

AUTHORITY OF GENERAL MANAGER.

A joint stock company which, in its announcements and circulars to the public, designates a person as its general manager although it has conferred on him only limited powers, is bound by the undertakings entered into by him in the name of the company in his capacity of manager.

Talbot v. Park Richelieu Co., 51 Que. S.C. 87.

LIABILITY FOR ACTS OF OFFICERS.

A company is liable for work ordered by its secretary-treasurer, partly by writing and partly oral, when it has knowledge of the work to be done and is in possession of it.

Lalonde (Damien) v. Galeries Parisiennes Co., 51 Que. S.C. 134.

INCORPORATION IN MANITOBA—CARRYING ON BUSINESS IN ONTARIO WITHOUT LICENSE UNDER EXTRA-PROVINCIAL CORPORATIONS ACT—ASSIGNMENT TO COMPANY OF CONTRACT OF PERSON RESIDENT IN ONTARIO TO PURCHASE LAND IN SASKATCHEWAN—PROCURING EXECUTION BY PURCHASER OF ASSIGNMENT AND ACKNOWLEDGMENT OF NOTICE—SS. 7 AND 16 OF ACT—ACTION BROUGHT BY COMPANY IN ONTARIO—CAPACITY OF COMPANY — LETTERS PATENT OF INCORPORATION PURPORTING TO CONFER CAPACITY TO EXERCISE POWERS IN ANY PART OF THE WORLD—B.N.A. ACT, S. 92—DEFENCE BASED ON MISREPRESENTATION — FAILURE TO ESTABLISH — JUDGMENT FOR SPECIFIC PERFORMANCE.

Canadian Freehold Securities Co. v. McDonald, 16 O.W.N. 139. [Reversed 17 O.W.N. 65.]

EXTRATERRITORIAL POWERS TO DO BUSINESS.

A company incorporated under the laws of the Province of Manitoba has no power to do business outside Manitoba.

Hooper Grain Co. v. Colonial Assurance Co. (Man.), [1917] 1 W.W.R. 1226.

(§ IV A—41)—IMPLIED POWERS.

A corporation has certain powers necessarily and inseparably incident to it, and among them is the power to sue or to be sued, plead or be impleaded by its corporate name. [See Conservators of the River Tone v. Ash, 10 B. & C. 349; and Blackstone's Commentaries, vol. 1, p. 475.]

Powell-Rees v. Anglo-Canadian Mortgage Corp., 5 D.L.R. 818, 26 O.L.R. 490, 22 O.W.R. 529.

(§ IV A—49)—TO SUE FOR PENALTIES.

A corporation is not a "private person" within the meaning of s. 131, subs. 6 of the Ont. Companies Act, 7 Edw. VII. c. 34 (see now 2 Geo. V. c. 31, s. 134, subs. 6), and, therefore, cannot sue for the penalties provided thereby for default in making annual returns.

Guy Major Co. v. Canadian Flaxhills, 3 D.L.R. 312, 3 O.W.N. 1058.

B. OWNING STOCK OF OTHER COMPANIES.

(§ IV B—50)—POWER TO ACQUIRE STOCK IN OTHER COMPANIES.

A power by statute or charter, purporting to authorize a company to sell its entire undertaking does not alone give a power to sell for shares in another company; there must be express words to give that power.

Hill v. Starr Manufacturing Co., 15 D.L.R. 146, 47 N.S.R. 387, 13 E.L.R. 420.

(§ IV B—51)—CONTROLLING INTEREST OR ENTIRE OWNERSHIP.

Under 63-64 Vict. (Can.) c. 98, empowering a cotton company "to construct, acquire, operate and dispose of cotton and woollen manufactories of every description," the company has the power to lease its mills to another company formed for the purpose of acquiring capital stock and a controlling influence in the cotton company and its three principal competitors.

Dominion Cotton Mills Co. v. Amyot and Brunet, 4 D.L.R. 306, [1912] A.C. 546.

(§ IV B—52)—SYNDICATE HOLDING SHARES.

An application for shares and payment of a call thereon to a syndicate is not an application to the company whose shares this syndicate may hold and there is no contractual relation between the applicants and the company until, at any event, an allotment thereof is made.

Consumers Cordage Co. v. Molson, 2 D.L.R. 451.

C. Mode of corporate action; acts of agents.

(§ IV C—55) — Registration of "mortgage or charge."

An assignment of an unascertained amount, to be credited to the assignor when collected, as security for a debt, is a "mortgage or charge," within the meaning of s. 102, c. 39, R.S.B.C. 1911, though absolute in form, and is not valid as against the liquidator of the assignor if not registered before his appointment.

Dominion Creosoting Co. v. Nickson Co., 38 D.L.R. 69, 55 Can. S.C.R. 303, affirming, 35 D.L.R. 272, 23 B.C.R. 72. [Leave to appeal to Privy Council refused.]

It is only purchasers, mortgagees or creditors in relation to the mortgagor who are entitled to the benefit of s. 102 of the Companies Act, R.S.B.C. 1911, c. 39, requiring mortgages or charges created by a company to be filed with the registrar of joint stock companies.

Dalton v. Dominion Trust Co., 25 B.C.R. 240, [1918] 3 W.W.R. 42.

Corporate action — Use of company's name as plaintiff.

Though the name of a joint-stock company cannot be used as a party plaintiff in an action unless authorized by resolution of the directors or shareholders, where such objection is interposed by the defendants as against a rival faction suing as shareholders to set aside an ultra vires transaction of the company, the court may refuse to strike out the name of the company as a party plaintiff where it is clear that the rights of the company should be protected either by having it a party plaintiff or party defendant, and where the defence has not produced any evidence to show that the personal plaintiffs do not represent the majority of the shares. [Foss v. Harbottle, 2 Hare 491; Russell v. Wakefield Water Works Co., L.R. 20 Eq. Cas. 474; Lindsay v. Imperial Steel & Wire Co., 21 O.L.R. 375; Re McGill Chair Co. (Munro's case), 5 D.L.R. 73, and Re Jones & Moore Electric Co., 18 Man. L.R. 549, referred to.]

Colonial Ass'ce Co. v. Smith, 12 D.L.R. 113, 23 Man. L.R. 243, 24 W.L.R. 105.

Execution of instruments — Signature.

Clause 76 of table "A" of the Companies Act, R.S.B.C. c. 39, requires that instruments of a company should be signed by three distinct persons, who must be present to join in the signing, and a director who has been appointed secretary cannot in such a case fill both positions.

Re Land Registry Act, 28 D.L.R. 354, 22 B.C.R. 507, 34 W.L.R. 466.

Officers—Power of director to sue for company—Action without proper authority.

One director alone has no power prima facie to act on behalf of the company (unless specially authorized by the Articles of Association or by delegation from the Board of Directors). He is only one of a body of directors in whom collectively the management is vested. A managing director is only an ordinary director entrusted with some special powers. [Hopkins v. The Newspaper Proprietary Syndicate, [1900] 2 Ch. 349, followed.] These special powers may be given him by the Articles of Association or by delegation from the board of directors, or perhaps by a course of conduct long acquiesced in by shareholders. [Ho Tung v. Man On Ins. Co., [1902] A.C. 232, applied.] Apart from such special powers, he has no power to institute legal proceedings. When a solicitor's right to issue a writ in the name of a company as plaintiff is questioned the onus is on the solicitor to shew his authority, and if he has acted without proper authority he is liable for the defendant's costs. [Porter v. Fraser, 29 T.L.R. 91, followed.]

The Standard Construction Co. v. Crabb, 7 S.L.R. 365, 7 W.W.R. 719, 30 W.L.R. 151.

Deeds — Execution of mortgage — Non-compliance with table A., art. 76—Principle in Royal British Bank v. Turquand not protecting mortgagees — Subsequent mortgages confirming.

Semble where a mortgage by a company had the seal of the company affixed in the presence of two directors (one of whom was the secretary) and of "W. P. Morgan, assistant secretary," there being no appointment proved authorizing W. P. Morgan as an assistant secretary or otherwise to sign the mortgage or authenticate the affixing of the seal, the execution was bad as not complying with art. 76 of table A of the Companies Act, and where one of the mortgagees was a solicitor who had prepared the document, instructed its mode of execution and been appointed solicitor for the company prior to its execution, knowledge of the defective execution was brought home to the mortgagees and they were not protected by the principle contained in Royal British Bank v. Turquand, 6 El. & Bl. 327. (The mortgage was held good however by reason of confirmation by subsequent mortgages.)

Innes & Griffith v. Cameron Valley Land Co. & Merchants Finance & Trading Co., [1919] 1 W.W.R. 751.

D. Contracts; ultra vires.

(§ IV D—60)—Companies Act of Canada (R.S.C. 1906, c. 79)—Real subscription for shares—Contract for unreal subscription—Ultra vires—Position of subscriber.

The Companies Act of Canada (R.S.C. 1906, c. 79) requires a real subscription and real payment for the shares of the capital stock of a company, a plan whereby there is an unreal and fanciful subscription and payment for shares, and whereby no money was ever paid nor intended to be paid to the company for the shares is ultra vires the company. The alleged subscriber can-

not retain the position of a paid-up stockholder, nor can he be put in the position of a holder of stock upon which nothing has been paid, nor can the company recover the amount, as money payable by him to them for money lent by them to him.

Henderson v. Strang, 48 D.L.R. 606, 45 O.L.R. 215, reversing 43 O.L.R. 617.

RAILWAY DIRECTORS — REBATE AGREEMENTS WITH SHIPPERS.

The directors of a provincial railway in Quebec, without being specially authorized thereto by the shareholders, have the power to enter into an agreement with a shipper to grant him rebates upon freight charges in return for valuable consideration rendered on his part, where no unjust discrimination results therefrom.

Quebec & Lake St. John R. Co. v. Kennedy, 15 D.L.R. 400, 48 Can. S.C.R. 520, 13 E.L.R. 566, affirming 14 Can. Ry. Cas. 161, 21 Que. K.B. 85.

MORTGAGE IN AID OF MINING OPERATIONS—CONSIDERATION.

The discharge of the company's indebtedness and the securing of financial aid to the company for the future may be shewn to be the real consideration for a mortgage given by the company on two of its three stockholders selling out their holdings to the third, although the expressed consideration of the mortgage was the price fixed for such holdings; such mortgage made by a mining company when it had no other means of procuring money for operating is not ultra vires even as to the excess of the expressed consideration above the indebtedness assumed and paid off or cancelled by the arrangement so made by the continuing stockholder. [Northern Electric v. Cordova Mines, 31 O.L.R. 221, reversed; Trevor v. Whitworth, 12 App. Cas. 409, and G.N.W. v. Charlebois, [1899] A.C. 114, distinguished.]

Hughes v. Northern Electric & Mfg. Co., 21 D.L.R. 358, 50 Can. S.C.R. 626.

POWERS OF CEMETERY COMPANY—DISPOSITION OF LOTS FOR NONBURIAL PURPOSES.

Land held by a company incorporated under the Cemetery Companies Act, R.S.O. 1887, c. 175, for burial purposes cannot be disposed of for any other purposes, which powers of disposition cannot be enlarged by subsequent reincorporation; and any attempted disposition by the corporation of any part of such land for purposes foreign to its original powers is an act ultra vires which may be enjoined by any shareholder.

Smith v. Humbervale Cemetery Co., 22 D.L.R. 773, 33 O.L.R. 452.

CONTRACTS—ULTRA VIRES.

Where the legislature gives a company express power, within certain limits, to do a special thing, it is to be taken prima facie to prohibit by implication any deviation from the power so given.

McGregor v. St. Croix Lumber Co., 8 D.L.R. 876, 12 E.L.R. 199.

CHARTER—RIGHTS AT COMMON LAW — FORFEITURE OF CHARTER.

The Ontario Companies Amendment Act (1916), 6 Geo. V., c. 35, s. 6, expressly declares that "every corporation or company . . . heretofore or hereafter created by or under any general or special act . . . shall, unless otherwise expressly declared in the act or instrument creating it, have and be deemed from its creation to have had, the general capacity which the common law ordinarily attaches to corporations created by charter." A corporation created by charter had at common law almost unlimited capacity to contract, to bind itself by contracts, to deal with its property and to do all such acts as a private person could do. Statements in the charter defining the objects of the incorporation do not take away that unlimited capacity, and even express restrictions in the charter do not take it away, but are simply treated as a declaration of the Crown's pleasure, in reference to the purposes beyond which the capacity of the corporation is not to be exercised, a breach of which declaration gives to the Crown a right to annul the charter. [British South Africa Co. v. DeBeers Consolidated Mines, [1910] 1 Ch. 354; Diebel v. Stratford Improvement Co., 37 O.L.R. 497; National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., 14 O.L.R. 22; Biggerstaff v. Rowatts Wharf, [1896] 2 Ch. 93; County of Gloucester Bank v. Rudry Merthyr Steam and House Coal Colliery Co., [1895] 1 Ch. 629; John Deere Plow Co. v. Wharton, 18 D.L.R. 353, referred to; Bonanza Creek Gold Mining Co. v. The King, 26 D.L.R. 273, distinguished.]

Edwards v. Blackmore, 42 D.L.R. 280, 42 O.L.R. 105.

CONTRACT OF EMPLOYMENT — IRREGULAR RESOLUTION — SALARY — SHARES — DAMAGES.

A contract for the employment of a manager, signed by the president and secretary of a company under a resolution of the Board of directors, cannot be repudiated by the latter, after it has admitted its fulfilment, on the ground that it was irregularly passed. Such contract, stipulating a salary $2,500 a year, payable $125 per month in money and $83.33 a month in shares, which he was to subscribe for, is only a contract of service at a salary of $125 a month. As a subscriber for the shares, he is not bound to make a formal demand for delivery of his paid-up shares, and if the company refuses to issue them to him, or to recognize him as a shareholder, he has the right to seek damages for the nonfulfilment of his obligation. The damages he is entitled to in such case is the value of the shares.

Schneider v. La Compagnie de Sable et de Brique des Laurentides, 54 Que. S.C. 4.

ULTRA VIRES — FORFEITURE OF CHARTER—DISTINCTION.

In the case of a company created by charter, the doctrine of ultra vires has no real application in the absence of statutory restriction added to what is written in the charter, and such company has the capacity of a natural person to acquire powers and rights; if by the terms of the charter it is prohibited from doing so, a violation of this prohibition is an act not beyond its capacity, and is, therefore, not ultra vires, although such violation may well give grounds for proceedings by way of scire facias for the forfeiture of the charter. [Ashbury Carriage Co. v. Riche, L.R. 7 H.L. 653, distinguished.]

Bonanza Creek Gold Mining Co. v. The King, 26 D.L.R. 273, [1916] 1 A.C. 566, 25 Que. K.B. 170, 34 W.L.R. 177, reversing 21 D.L.R. 123, 50 Can. S.C.R. 534. [Followed in Insurance Case, 26 D.L.R. 288, and Companies Case, 26 D.L.R. 293.]

BY-LAW RESTRICTING COMPETITION — FREEDOM OF CONTRACT.

A by-law which prescribes, that whenever a shareholder patronizes any other manufactory, in any manner whatsoever, he will be subject to a fine of 50 cents per day for each infraction, is ultra vires, and null as an attempt to abridge personal liberty.

St. Narcisse Butter & Cheese Mfg. Co. v. Demers, 50 Que. S.C. 6; 49 Que. S.C. 406.

RULES OF INTERPRETATION.

The rules of interpretation which govern agreements between individuals should be applied in the same manner to corporations, but it is not necessary to attach too much importance to the acts and doings of their employees.

Chars Urbains v. Commissaires du Havre, 24 Que. K.B. 503.

MINING LEASE — ULTRA VIRES PARTIES TO ACTION — ACQUIESCENCE — INJUNCTION.

In an action by a shareholder of the above-named company to have a certain lease made by it rescinded as ultra vires, it appeared that the lease was made to the defendant the Y. E. company by the other defendant companies and that the defendant B. joined in the lease for the purpose of personally guaranteeing certain of its provisions. The defendant, the N.L. & P. Co. owned the whole of the stock of the defendant companies, except the stock of the lessee company. By the lease, all the property of the other defendant companies was demised to the lessee company:—Held, that the plaintiff was entitled to maintain the action. [Simpson v. Westminster Palace Hotel Co., 8 H.L.C. 712.] Held, also, that the defendant lessee company and the defendant B., its president, were properly made parties defendants: [Russell v. Wakefield Waterworks Co., 44 L.J. Ch. 496.] Held, also that the other codefendant companies were proper parties. [Great Western R. Co. v. Rushout, 3 DeG. M. & G. 354, 64 E.R. 1121.] Held, also, that the defendant lessee company, incorporated under the Companies Act of the Dominion of Canada, could not under the provisions of its charter, as a purely mining company, take over the undertakings, property, and rights of the codefendant companies. Held, also, that acquiescence on the part of the plaintiff, even if proved, would not avail, as acquiescence cannot cure an illegality. Held, therefore, that the lease was illegal; and an injunction was granted, but no other relief.

Newhouse v. Northern Light, Power and Coal Co., 29 W.L.R. 249.

(§ IV D—65)—CONTRACT OF EMPLOYMENT—DELEGATION OF DIRECTORS' AUTHORITY.

A contract of service giving the employee power over "all the administration of the business of the company subject only to such direction and control as it is the duty of the directors to exercise" is not such a delegation of the authority of the directors as to be ultra vires the company.

Montreal Public Service Co. v. Champagne, 33 D.L.R. 49.

POWERS OF DEVELOPMENT COMPANY—COVENANT TO ESTABLISH RAILWAY STATION.

A covenant to establish and maintain a railway station is within the corporate powers of a development company "to do any act to increase the value of the property . . . or to enter in any arrangement capable of being conducted so as directly or indirectly to benefit the company," and within the requisite or incidental powers under s. 29 (3) of the Companies Act (Alta.), particularly where the establishment of such station may be procured from a railway company owing to an identity of management. [Union Bank v. McKillop, 16 D.L.R. 701, 30 O.L.R. 87, referred to.]

Norquay v. G.T.P. Town & Dev. Co., 25 D.L.R. 59, 9 A.L.R. 190, 32 W.L.R. 756, 9 W.W.R. 347.

POWER TO CONTRACT — EXECUTORY CONTRACT NOT GERMANE TO PURPOSE OF INCORPORATION—SEAL.

An executory contract of a trading company unless germane to the purpose of its creation, is void unless made under its corporate seal. [Garland Mfg. Co. v. Northumberland Paper and Electric Co., 31 O.R. 40, followed; National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., 14 O.L.R. 22; and South of Ireland Colliery Co. v. Waddle, L.R. 3 C.P. 463, specially referred to.]

Sun Electrical Co. v. McClung, 12 D.L.R. 758, 25 W.L.R. 43, 4 W.W.R. 1350.

ERROR IN CERTIFICATE AS AFFECTING CORPORATE POWERS.

An incorrect statement in the certificate of incorporation that the liability of the company is specially limited under s. 63 of the Companies Act. (Alta.) does not thereby affect the usual powers of the corporation incidental to the corporate objects

and a contract executed by the corporation within the scope of those powers is not on that account ultra vires.

Alberta Drilling Co. v. Dome Oil Co., 27 D.L.R. 118, 8 A.L.R. 340, 8 W.W.R. 996. [Affirmed in 28 D.L.R. 93, 52 Can. S.C.R. 561.]

MINING AND "MINERALS" — CONTRACT TO DRILL FOR OIL.

Rock oil is a "mineral," and drilling for it is a mining operation within the contemplation of ss. 63 and 63a of the Alta. Companies Act (N.W.T. Ord. 1905, c. 61, as amended by Act 1911-12, c. 4, s. 5); a mining corporation empowered by virtue of s. 63a(2) "to dig for minerals, whether belonging to the company or not," has a legal right to drill oil wells, and to carry on the work as a contractor on lands belonging to others.

Dome Oil Co. v. Alberta Drilling Co., 28 D.L.R. 93, 52 Can. S.C.R. 561, 9 W.W.R. 1238, affirming 27 D.L.R. 118, 8 A.L.R. 340.

POWER TO CONTRACT.

A company incorporated under the Manitoba Joint Stock Companies Act has no power to bargain away paid-up shares in the company for a mere covenant or agreement by the subscriber to do certain future acts as to which upon nonperformance the company's rights would lie only in damages. [Re Jones & Moore Electric Co., 18 Man. L.R. 549, 571, approved; and see Elkington's case, L.R. 2 Ch. 511.]

Re Winnipeg Hedge & Wire Fence Co., 1 D.L.R. 316, 22 Man. L.R. 83, 20 W.L.R. 337, 1 W.W.R. 853.

(§ IV D—66)—OSTENSIBLE AUTHORITY OF OFFICER.

It is not necessary for any person dealing with an officer of a corporation to ascertain the proper steps taken to clothe him with the authority, where it is apparent that he is the agent of the corporation to transact the particular business.

McKnight Construction Co. v. Vansickler, 24 D.L.R. 298, 51 Can. S.C.R. 374, affirming 19 D.L.R. 505, 31 O.L.R. 531.

CLUB — LIABILITY FOR GOODS ORDERED BY HEAD STEWARD—SEAL.

An incorporated club cannot disclaim liability for club supplies sold and delivered to it upon the verbal orders of its head steward or manager, although such orders were placed without the knowledge of the principal officers, and no agreement under seal relating thereto has been executed by the corporation.

Gowans-Kent v. Assiniboia Club, 25 D.L.R. 695, 8 S.L.R. 344, 33 W.L.R. 266, 9 W.W.R. 936.

(§ IV D—67)—AS TO NEGOTIABLE PAPER.

Upon a bank refusing to discount a company note, which was indorsed by the directors for the sole purpose of being discounted, and insisting upon holding it as collateral security for the company's indebtedness, the managing director had power to consent to so pledging such note, where the latter had, to the knowledge of the bank, been empowered by a resolution of the company to deal with such bank, and to negotiate with, deposit with, or transfer to it for the credit of the company, bills of exchange, promissory notes, and, under such circumstances, the bank was a holder in due course for value, there being no circumstances which would place it on inquiry.

Cox v. Canadian Bank of Commerce, 5 D.L.R. 372, 2 W.W.R. 835.

(§ IV D—69)—POWERS AS TO SURETYSHIP.

Unless expressly within the powers conferred upon it by the act of incorporation or those arising from necessary implication, a contract of suretyship by an incorporated company guaranteeing the payment to a bank of advances to another company is ultra vires and void.

Union Bank v. McKillop, 24 D.L.R. 787, 51 Can. S.C.R. 518, affirming 16 D.L.R. 701, which affirmed 11 D.L.R. 449.

(§ IV D—71)—PURCHASE OF "ASSETS AND LIABILITIES" OF OTHER COMPANY—PAYING ITS LIABILITIES.

Where a newly organized company under an intra vires agreement in writing purchases "the assets and undertakings" of two dissolving industrial companies, and it was the intention of such agreement that the liabilities of the dissolving companies should be assumed and paid by the purchasing company, the payment in pursuance thereof will not be declared void in a shareholder's action, if there was no fraud or want of good faith in the transaction; although the agreement did not on its face specifically stipulate for such payment. [Rose v. B.C. Refining Co., 16 B.C.R. 215 at 227; Burland v. Earle, [1902] A.C. 83 at 93, applied.]

Johnston v. Thompson, 15 D.L.R. 546, 19 B.C.R. 105, 26 W.L.R. 814.

PURCHASE OF LANDS FOR LOTTERY PURPOSES —RIGHTS OF SUBSEQUENT PURCHASERS.

The purchase of land by a real estate company for the purpose of carrying on a lottery scheme is an act ultra vires and will be vacated in favour of a purchaser claiming under a subsequent sale from the original vendor.

Prevost v. Bédard, 24 D.L.R. 153, 51 Can. S.C.R. 149, affirming 8 D.L.R. 686, 43 Que. S.C. 50. [See also 24 D.L.R. 862, 51 Can. S.C.R. 629.]

(§ IV D—73)—SUBSCRIPTION FOR SHARES —COLLATERAL AGREEMENT — REPURCHASE OF OWN STOCK — ULTRA VIRES —SUBSCRIBER DE FACTO SHAREHOLDER.

A condition subsequent or collateral agreement annexed to a subscription for shares in a company, by which under certain circumstances the subscriber is to be entitled to surrender his shares and demand a return of his money, is ultra vires the company as involving an unlawful reduction of its capital.

The nonfulfilment of the agreement by the company does not prevent the holder

of such shares from being a de facto shareholder of the company, he having retained the shares and given proxies to vote thereon.

Alberta Rolling Mills Co. v. Christie, 45 D.L.R. 545, 58 Can. S.C.R. 208, [1919] 1 W.W.R. 572, reversing 38 D.L.R. 488, 12 A.L.R. 445.

(§ IV D—74)—Power to issue bonds to raise loan — Securities — "Pledge" —Priorities.

Re B.C. Portland Cement Co., 27 D.L.R. 726, 22 B.C.R. 443, 10 W.W.R. 50, affirming 22 D.L.R. 609, 21 B.C.R. 534, 31 W.L.R. 938, 8 W.W.R. 1119.

(§ IV D—75) — "Trading company," meaning of.

For the purpose of the exception to the general rule that contracts of corporations must be made under the corporate seal, the meaning of the expression "trading company" is not confined to companies with the object of barter, and a building company is a "trading company" within the meaning of the exception.

The Brandon Construction Co. v. Saskatoon School Board, 5 D.L.R. 754, 5 S.L.R. 250, 21 W.L.R. 949, 2 W.W.R. 870. [Reversed 13 D.L.R. 379, 6 S.L.R. 273.]

(§ IV D—76) — Power to contract—Sales generally — Corporate purposes.

A trading corporation making a sale of land with the view of enabling it to purchase other lands to carry on its business is bound by its contract of sale although not under the corporate seal, as the circumstances shewed that the contract was in furtherance of the objects of the corporation. [Beer v. London & Paris Hotel Co., L.R. 20 Eq. 412, referred to.]

Vansickler v. McKnight Construction Co., 19 D.L.R. 505, 31 O.L.R. 531. [Affirmed, 24 D.L.R. 298, 51 Can. S.C.R. 374.]

Sale of assets—Debenture mortgage—Claim against trustees—Securities held by bank — Subrogation — Evidence.

Stuart v. Bank of Hamilton, 7 O.W.N. 727.

(§ IV D—77)—Transfer of entire property.

An agreement entered into by the directors of a company for the sale of the entire undertaking to another company, although ratified by a resolution passed at a meeting of shareholders, is ultra vires and cannot be enforced in the absence of the special resolution called for by the amending act, s. 5, as defined by s. 93 of the Companies Act. The procedure prescribed by the Nova Scotia Companies Act for the sale of its whole undertaking and assets must be strictly followed. Under the provisions of the Nova Scotia Companies Act, R.S.N.S. c. 128, as amended by N.S. Acts of 1912, c. 47, a company, whether incorporated before or after the passage of the latter Act, may dispose of the whole of its undertaking; such sale is not limited to sales for shares, debentures or securities of other companies carrying on a business of a similar character, but covers sales for money as well.

McGregor v. St. Croix Lumber Co., 8 D.L.R. 876, 12 E.L.R. 199.

Chattel mortgage — Incidental powers.

A chattel mortgage for money lent must be held invalid where the company in whose favour it was given had no power to lend money under its memorandum of association and where the lending could not be classed as an incidental power to the specific objects of the company's incorporation; the company may nevertheless have power to sue for the return of the money. [Ashbury Carriage Co. v. Riche, L.R. 7 H.L. 653, 44 L.J. Ex. 185; A.-G. v. Great Eastern, 5 App. Cas. 473; Osborne Case, 79 L.J. Ch. 93, [1910] A.C. 87, 79 L.J. Ch. 93; A.-G. v. Mersey, [1907] A.C. 415; Re Bagley, 80 L.J.K.B. 168; and Carter v. Columbia, 18 D.L.R. 520, referred to.]

Columbia Bitulithic Co. v. Vancouver Lumber Co., 21 D.L.R. 91, 30 W.L.R. 753, 8 W.W.R. 132, affirming 20 D.L.R. 954, 21 B.C.R. 138.

Promissory note, power to make.

Where a company takes, within the purview of its charter powers, a chattel mortgage to protect credits extended by the company, it may be within the ordinary scope of its business, when such mortgage security is threatened by a creditor of the mortgagor, to avert the danger by giving the promissory note of the company as additional security for the creditor's debt and so in effect protecting the company's own mortgage.

Vancouver Engineering Works v. Columbia, 16 D.L.R. 841, 6 W.W.R. 413.

Chattel mortgage.

A document by which the title and right to possession of chattel property of a company is transferred to a trustee for bondholders is within the purview of the Bills of Sale and Chattel Mortgage Act, 10 Edw. VII. (Ont.), c. 65, although a "floating charge" passing no property in the goods and conferring no rights of possession or interference therewith, but giving preferential rights on the winding up of a company, may be created as to present and future property of a company without coming within the terms of the Bills of Sale and Chattel Mortgage Act. [Johnston v. Wade, 17 O.L.R. 372, specially considered; Re London Pressed Hinge Co., [1905] 1 Ch. 576, specially referred to.]

National Trust Co. v. Trusts and Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279, 22 O.W.R. 933.

(§ IV D—78) — Joint stock company under letters patent — Powers of directors—Mortgage of real estate.

The directors of a company incorporated by letters patent (R.S.Q. 1909, arts. 6002 et seq.), can only mortgage the real estate

if they are authorized to do so by by-law approved by the vote of shareholders representing at least two-thirds of the subscribed capital. Consequently a mortgage agreed to by resolution only is void, and does not give a creditor the right to rank by preference on the proceeds of the mortgage of the real estate.

Cimon Shoe Mfg. Co. v. Therrien & Desmarteau, 45 Que. S.C. 336.

(§ IV D—79)—Contract to repay loan.

A guaranty by a corporation for the payment of work performed under a building contract is within the powers conferred upon it by s. 23 of the Companies Act, Ont., 1912, 2 Geo. V. c. 31.

Diebel v. Stratford Improvement Co., 33 D.L.R. 296, 38 O.L.R. 407, varying 37 O. L.R. 492.

Power to borrow—Subrogation.

An insurance company is a commercial corporation, and therefore has implied power to borrow, and to pledge and mortgage its securities to secure the sum borrowed, though for the purpose of meeting the statutory security to the government authorities to enable it to carry on the business; even if ultra vires, if moneys were used for the payment of a just debt, the lender is entitled to be subrogated to the rights of those whose debts were paid therewith.

Royal Bank v. B.C. Accident, 35 D.L.R. 650, 24 B.C.R. 197, [1917] 2 W.W.R. 898.

Loan contract — Shareholders' liability —Existing debts affected.

Where a corporation without the previous sanction of a formal resolution required by Alberta Companies Ordinance (Alta. Ordinances 1911, c. 61), s. 98, borrows money for the purposes of the corporation, and where the money so borrowed is applied to discharge existing enforceable legal debts of the corporation, the lender may recover though he knew that the authority to borrow was insufficient; since the transaction does not really add to the corporate liabilities, their amount remaining in substance unchanged, it being merely for convenience of payment a change of creditor. [Reversion Fund v. Maison Cosway, [1913] 1 K.B. 364; Blackburn Building Society v. Cunliffe Brooks & Co., 22 Ch. D. 61, 71, referred to.] The borrowing powers under the Companies Ordinance (Ordinances 1911, Alta. c. 61), s. 98, conferred on a corporation when sanctioned by a resolution thereof previously given in general meeting, are strictly construed and can be validly exercised only when previously authorized by the shareholders, and to that extent the principle of ratification has been abolished, the import of the enactment being to enable every shareholder to deliberate upon and discuss the question in advance, the theory that (when prudent and proper) he may at that stage withhold his consent, although after the unauthorized transaction has taken place, he might hesitate to condemn the directors.

Northern Crown Bank v. Great West Lumber Co., 11 D.L.R. 395, 7 A.L.R. 183, 24 W.L.R. 477, 4 W.W.R. 720.

Private company — Debt of individual shareholders — Assumption by company.

That the only real shareholders in a company had paid a part of their own debt to the plaintiff with the company's money and had obtained the issue and transfer to him of certain of the company's shares by way of security, is not an assumption of the debt, and will not operate to make the plaintiff a creditor of the company for the balance; it is, moreover, to be doubted whether a trading company can voluntarily assume an obligation incurred by an individual in the purchase of the company's own shares or become guarantor or surety in respect thereof.

Re Pengelly-Akitt, Jacques' Case, 16 D. L.R. 79, 27 W.L.R. 148.

Loan—Repayment.

Where a number of persons agree to subscribe shares to form themselves in corporation and borrow from one of them a sum of money if once incorporated, the corporate body cannot, when sued by the lender, refuse to pay on the ground that the debt has been extinguished by confusion.

Howard v. Findley, 51 Que. S.C. 375.

(§ IV D—80)—Dominion company—Bond —Ultra vires as defence.

A trust company incorporated by Dominion authority having applied for and obtained registry under the Ontario Act, and as a term of receiving its license having given a bond to the Attorney-General for Ontario for the due performance of the duties of any office to which it might be appointed, cannot, nor can its sureties, in an action on the bond—after the winding-up of the company—for balances improperly advanced, set up that the provisions of the Act under which the bond was demanded and given were ultra vires the province so far as it was sought to apply them to a Dominion company.

Att'y.-Gen'l. for Ontario v. Railway Passengers Ass'ce. Co., 43 D.L.R. 344, 43 O. L.R. 108, reversing, in part, 41 O.L.R. 234.

Ultra vires as defence.

A corporation is liable for goods acquired under an ultra vires contract; though there can be no liability on the contract itself, there is an implied obligation to make restitution or compensation.

Trades Hall Co. v. Erie Tobacco Co., 29 D.L.R. 779, 26 Man. L.R. 468, 34 W.L.R. 780, 10 W.W.R. 846.

Right of creditor to set up.

The plea of ultra vires cannot be set up by a creditor defending on behalf of the company.

Capital Trust Co. v. Yellowhead Pass Coal & Coke Co., 27 D.L.R. 25, 9 A.L.R. 463, 33 W.L.R. 873, 9 W.W.R. 1275.

(§ IV D—81) — RIGHT TO SET UP ULTRA VIRES AS DEFENCE—RIGHT OF CORPORATION—CORPORATE OBJECTS.

Where a company incorporated to carry on a general contracting business and having no specific power in its memorandum of association either to guarantee the payment of the obligations of others or to undertake primary liability therefor, without consideration gives its promissory note for the debt of another company at the request of the payee, the transaction will be held ultra vires as between the original parties where no circumstances are shewn which would make the transaction a "necessary or convenient" one as regards the corporate objects mentioned in the memorandum of association; and in like manner the company's endorsement of another note given in renewal thereof by the debtor company creates no cause of action in favour of the payee who is not a holder for value. [Ashbury v. Riche, L.R. 7 H.L. 653; Atty.-Genl. v. Great Eastern, 5 App. Cas. 473; A. R. Williams Co. v. Crawford, 16 O.L.R. 245, referred to; Ex parte Booker, 14 Ch.D. 317, distinguished.]

Carter Dewar Crowe Co. v. Columbia Bitulithic, 18 D.L.R. 520, 20 B.C.R. 37, 28 W.L.R. 758, 6 W.W.R. 1215.

(§ IV D—85)—CONTRACTS — FORMAL REQUISITES — SPECIFIC ENFORCEMENT OF LAND CONTRACT.

Where the by-laws of a trading company authorized the president and the secretary-treasurer, who had the management of the company, to make all contracts and engagements on its behalf and both concurred in an agreement of sale of the company's lands, but it was signed by the secretary-treasurer only, the contract is binding on the company and may be ordered to be specifically performed.

Vansickler v. McKnight Construction Co., 19 D.L.R. 505, 31 O.L.R. 531. [Affirmed, 24 D.L.R. 298, 51 Can. S.C.R. 374.]

CONTRACTS — FORMAL REQUISITES — STATUTORY REQUIREMENTS — CONTRACT FOR SALE BY LAND COMPANY.

As to lands for resale by a land company incorporated under the Manitoba Joint Stock Companies Act, a wholly executory agreement of sale entered into by the company's officers must have been authorized at a shareholder's meeting or have been specially authorized by a by-law passed by the Board of directors to conform with s. 68 of the Act (s. 65a added in 1911), otherwise a defence of want of mutuality must prevail as to a document purporting to be a contract under the hand and seal of the purchaser and under the seal of the land company attested by its executive officer, where no consideration had passed and the purchaser had given notice of repudiation.

Houghton Land Corp. v. Ingham, 18 D.L.R. 660, 24 Man. L.R. 497, 28 W.L.R. 826, 6 W.W.R. 1275, reversing 14 D.L.R. 773. [Affirmed 10 W.W.R. 1252.]

RIGHT OF TRADING COMPANY TO CONTRACT WITHOUT THE SEAL OF THE COMPANY.

A contract by a trading company entered into for the purpose for which the company is incorporated need not be under the common seal of the company. [Clarke et al. v. Cuckfield Union, 21 L.J.Q.B. 349; Henderson v. Royal Mail Navigation Co., 5 E. & B. 409, and South of Ireland Colliery v. Waddle, L.R. 3 C.P. 463, referred to. See also Lindley on Companies, 6th ed., vol. 1, p. 271; and Halsbury's Laws of England, vol. 8, p. 383.]

The Brandon Construction Co. v. Saskatoon School Board, 5 D.L.R. 754, 5 S.L.R. 250, 21 W.L.R. 949, 2 W.W.R. 870. [Reversed, 13 D.L.R. 379, 6 S.L.R. 273.]

CORPORATIONS AND COMPANIES — REQUISITES OF CORPORATE CONTRACT — ADOPTION OF OFFICER'S REPORT OF ASSETS.

The fact that the financial statement of a company submitted by its treasurer and adopted by its directors enumerated as one of the assets of the company, an item as follows: "Patent 820,000" is not, in the absence of a by-law or other document under the corporate seal or of assumption or user of the patent rights by the company, sufficient evidence of a contract binding the company to take over at that price from the incorporators acting as a syndicate a patent right for the transfer of which to the company negotiations had been pending between the syndicate and the company.

Re Winnipeg Hedge & Wire Fence Co., 1 D.L.R. 316, 22 Man. L.R. 83, 5 S.L.R. 250, 20 W.L.R. 337, 1 W.W.R. 853.

FORMAL REQUISITES.

Section 64 of the Manitoba Joint Stock Companies Act which dispenses with the necessity for the corporate seal upon a contract or agreement made for the company by its agent, officer or servant "in general accordance with his powers" does not apply to agreements made out of the ordinary course of the company's business, even by its vice-president in the company's name; and the person dealing with the company's officer or agent in respect of agreements of that nature is put upon inquiry to ascertain that the officer or agent has in fact been duly authorized to enter into them.

Whaley v. O'Grady, 1 D.L.R. 224, 19 W. L.R. 885, 1 W.W.R. 535, 48 C.L.J. 112. [See 4 D.L.R. 485.]

CORPORATE SEAL — INSURANCE — AUTHORITY OF OFFICERS.

An insurance company is liable on contracts not under the corporate seal entered into for the purposes for which it was incorporated, particularly where the contract is executed; the authority of a managing director to bind the company by a contract of reinsurance, authorized by the terms of

the charter, will be presumed unless the contrary is shown.

Foster v. British Colonial Fire Ins. Co. (Man.), 37 D.L.R. 404, 28 Man. L.R. 211, [1917] 3 W.W.R. 598.

(§ IV D—90)—Ratification.

After the incorporation of a company the personal liability of the signatories to a promissory note executed in the company's name by persons purporting to be the president and manager thereof and signed prior to the incorporation remains unaffected by the incorporation of the company.

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313, 2 W.W.R. 429.

Contract by financial agent for advertising—Ratification.

When an incorporated company allows a prospectus ordered and prepared by a financial agent employed by them to sell their shares to be circulated amongst the public which purports to be the prospectus of the company and permits any advertisements based thereon to be published without any disclaimer on the part of the company, it will not be allowed to deny the authority of the apparent agent, who gave the orders for the printing and advertisements, whether such apparent agent be really the duly authorized agent of the company or not.

French Gas Saving Co. v. The Desbarats Advertising Agency, 1 D.L.R. 136.

Ultra vires transaction — Ratification precluded.

An illegal or ultra vires transaction on the part of a stock company cannot be ratified, sanctioned or authorized by the shareholders, either through a majority or by the whole body acting in concert. [Trevor v. Whitworth, 12 App. Cas. 409, referred to.]

Colonial Assurance Co. v. Smith, 12 D.L.R. 113, 23 Man. L.R. 243, 24 W.L.R. 105, 4 W.W.R. 295.

A ratification by the Crown, express or implied, in orders-in-council, of a contract makes it valid, notwithstanding what may have been lacking in the powers of the corporate body. Nor can the latter set forth, as an answer, that the Crown had no power to make such orders, as in doing so, it violates the rule that forbids to plead a jus tertii.

Harbour Commissioners of Montreal v. Foundry and Machine Co., 21 Que. K.B. 241.

Authority of director and president to bind company—Implied authority—Ratification — Failure to repudiate promptly—Statute of Frauds—Name of company — "Limited" — Companies Act, R.S.O. 1914, c. 178, ss. 23, 24, 84—Breach of contract.

Schmidt v. Beatty & Sons, 10 O.W.N. 230.

E. Property rights.

(§ IV E—95) — Mortgage — Security to bank—Priorities.

Under Act 4, Geo. V., c. 51, modifying art. 6119 R.S.Q. 1909, a joint stock company may, if authorized for the purpose by its charter or letters patent, hypothecate all its property, movable or immovable, present or future, by an authenticated trust deed in favour of a third party as security for its obligations. The lien of the secured creditors is postponed to that previously obtained by a bank for advances under the provisions of ss. 86 and 88 of the Bank Act.

Lord v. Canadian Last Block Co., 51 Que. S.C. 499.

Unincorporated society — Property of society—Dissident members—Ultra vires action of majority—Breaking-up of society into factions — True line of succession—Counterclaim—Damages.

Wirta v. Vick, 6 O.W.N. 599; 7 O.W.N. 384.

Companies Act, R.S.M. 1913, c. 35, s. 119—Acquisition of land by company not licensed under act.

It is only the Crown that can take advantage of the prohibition enacted by s. 119 of the Companies Act, R.S.M. 1913, c. 35, as amended by s. 4 of c. 20 of 6 Geo. V., against the acquiring or holding of land in this province by a company not incorporated under the provisions of the statutes of the province unless under license issued to it under the Act. Such a company may, therefore, although not so licensed, acquire such an interest in land in this province that a creditor claiming under a judgment against the person from whom the land was acquired, registered after such acquisition, cannot have the conveyance declared void and the land sold to satisfy the judgment. [Mickelson v. Mickelson, 34 W.L.R. 155; Euclid Ave. Trust Co. v. Hohs, 23 O.L.R. 377, 24 O.L.R. 447; and McDiarmid v. Hughes, 16 O.R. 570, followed.]

Campbell v. Morgan (No. 3), 29 Man. L.R. 297, [1919] 1 W.W.R. 268.

(§ IV E—96)—Agreement of sale.

A company incorporated by Act of Dominion Parliament having obtained an indefeasible title to real property of a greater value, and for other purposes than authorized by the incorporating Act, may properly enter into an agreement for sale of the said property and recover arrears due under such agreement.

Hudson Bay Ins. Co. v. Creelman (B.C.), 40 D.L.R. 274, 25 B.C.R. 307, [1918] 2 W.W.R. 448, reversing, 37 D.L.R. 199. [Affirmed, 48 D.L.R. 234, [1919] 3 W.W.R. 9.]

F. Liabilities.

(§ IV F—100)—Fraudulent acts of officers—False accounts.

Fraud by the treasurer of a company

in his own interest, in making up accounts rendered to an executrix, purporting to be between the company and the deceased, is not attributable to the company.

Sutherland v. Victoria Steamship Co., 27 D.L.R. 622, 50 N.S.R. 146.

UNIVERSITY GOVERNORS — CORPORATE ENTITY DISTINCT FROM UNIVERSITY, WHEN — LIABILITY TO SUIT—APPORTIONMENT BY GOVERNOR-IN-COUNCIL, EFFECT ON LIABILITY.

Where the Board of Governors of the University of Toronto is erected by statute into a body corporate separate and distinct from the university which they serve, they may be sued in their corporate capacity as governors, apart from the university which they serve. [See University Act, 1906, 6 Edw. VII. (Ont.) c. 55, ss. 20 to 46.] The appointment under the authority of a statute by the Lieutenant-Governor-in-council of members of the Board of Governors of the University of Toronto does not constitute them Crown officers, nor does it confer on them immunity from civil actions. [See University Act, 1906, 6 Edw. VII. (Ont.) c. 55, ss. 20-46.]

Scott v. Governors of University of Toronto, 10 D.L.R. 154, 4 O.W.N. 994, 24 O. W.R. 325.

WINDING-UP — DIRECTORS — PAYMENT OF DIVIDEND OUT OF CAPITAL — LIABILITY — ONTARIO COMPANIES ACT, R.S.O. 1914, c. 178, s. 95.

Re Metropolitan Theatres, 16 O.W.N. 241.

(§ IV F—101)—LIABILITY FOR DECEIT.

A corporation may, in its corporate character, be called on to answer in an action for deceit.

Moneur v. Ideal Mfg. Co., 31 D.L.R. 465, 37 O.L.R. 361.

LIABILITIES — FOR TORT—STATUTORY EXEMPTION.

Where a power-house for an electric company operating a railway and supplying electricity to the public is constructed and operated under statutory power and no compensation is provided for damage occasioned to neighbouring residential property by noise, vibration or otherwise, no action lies for damages on the part of an adjoining owner in respect of the nuisance caused to him by the non-negligent operation of the power-house, where the enabling statute in effect conferred upon the company absolute discretion of selecting the site for the power house. [Hammersmith R. Co. v. Brand, L.R. 4 H.L. 171, 38 L.J.Q.B. 265, Metropolitan v. Hill, 6 App. Cas. 208, 50 L.J.Q.B. 353; London, Brighton & South Coast R. Co. v. Truman, 11 App. Cas. 45; Bennett v. G.T.P.R. Co., 2 O.L.R. 425, and Fletcher v. Birkenhead, [1907] 1 K.B. 205, 76 L.J.K.B. 218, considered; C.P.R. v. Parke, [1899] A.C. 535, 68 L.J.P.C. 89, distinguished.]

Leighton v. B.C. Electric R. Co., 18 D. L.R. 505, 20 B.C.R. 183, 29 W.L.R. 303, 6 W.W.R. 1472, affirming 17 D.L.R. 117.

G. OFFICERS, MEETINGS.

(§ IV G—105) — DIRECTORS — QUALIFICATIONS—SHARES HELD IN TRUST.

Section 112 of c. 37 of the Canada Railway Act, R.S.C. 1906, prevents one holding shares of a company organized under such act, merely as a trustee, without any beneficial interest in them, becoming a director of the company. [Pulbrook v. Richmond Consolidated Mining Co., 9 Ch. D. 610, considered.]

Lucas v. North Vancouver, 12 D.L.R. 802, 18 B.C.R. 239, 24 W.L.R. 966, 4 W.W. R. 1381.

INTERNAL MANAGEMENT — MEETINGS — NOTICE — VOTING — ACQUIESCENCE — ULTRA VIRES.

The conditions of a statute validating an ultra vires agreement to secure debentures subject to the confirmation of the company's acts by a specified majority of the shareholders must be actually and literally complied with to render the agreement intra vires, and the fulfilment cannot be inferred from acquiescence; a notice of meeting which does not sufficiently apprise the shareholders of the purpose of the meeting, so that each could judge for himself whether he would consent to the proposals made at the meeting, is insufficient and the resolutions of the meeting are null and void.

Pacific Coast Coal Mines v. Arbuthnot, 36 D.L.R. 564, [1917] A.C. 607, [1917] 3 W.W.R. 762, reversing 31 D.L.R. 378.

OFFICERS—STATUS OF DIRECTORS.

There is no legal incompatibility between the office of director of a company and any other office in the service of the company, for directors do not stand in the position of masters to the officers of the company, but are themselves the servants of the company. [King v. Tizzard, 9 B. & C. 418, referred to.]

Bashforth v. Provincial Steel Co., 10 D. L.R. 187, 4 O.W.N. 1019, 24 O.W.R. 334.

DISMISSAL OF OFFICERS—POWERS.

Held, the power of the defendants as a legally constituted association to remove their secretary-treasurer, whom they had elected to office, is a power which is inherent to such association, at common law, provided such removal be for cause affecting the plaintiff's fitness and capacity for office; that this power was justly exercised.

Poliquin v. Longshoremen's Union, 24 Rev. de Jur. 573, 24 Rev. Leg. 504.

DIRECTORS — MOTION TO RESTRAIN FROM ACTING AS SUCH — OWNERSHIP AND CONTROL OF SHARES—INTERIM INJUNCTION.

Tough Oakes Gold Mines v. Foster, 10 O.W.N. 209.

(§ IV G—106)—Election of directors—Sufficiency of quorum—Disqualification of members—Unpaid calls.

Doig v. Mathews, 25 D.L.R. 732, 22 B.C.R. 352, 33 W.L.R. 275, 9 W.W.R. 487.

Officers — Election — Office of assistant managing directors—Authority for creation.

An article of association authorizing the directors of a company to appoint one or more of their number to be managing director or managing directors, warrants creation of the office of assistant managing director in addition to the office of general manager.

Re Canadian Diamond Co., Broad's Case, 11 D.L.R. 251, 6 A.L.R. 42.

(§ IV G—109)—Directorate—Reduction of its membership, how effected.

A board of directors of 7 members having been determined upon by a resolution of the previous board of 3 directors and elected by the shareholders of the company in accordance therewith, the new board was validly elected and constituted so as to authorize a call on the unpaid shares of the company.

North West Battery v. Hargrave, 15 D.L.R. 193, 23 Man. L.R. 923, 26 W.L.R. 331, 5 W.W.R. 821, 1002.

Reduction of number of directors.

Clary v. Golden Rose Mining Co., 4 O.W.N. 1491, 24 O.W.R. 813.

(§ IV G—110)—Meeting of shareholders—Irregularity.

Where the secretary-treasurer of a company has called a meeting of the shareholders of the company and is seeking to take advantage of resolutions passed at that meeting although it was irregularly held, the company is entitled to take advantage of such irregularity although it could not invoke it against third parties acting in good faith.

Courchene v. Viger Park Co., 23 D.L.R. 693, 24 Que. K.B. 97.

Power of officer to indorse note.

The authority of an officer of a corporation to indorse a note for the corporation cannot be disputed after the corporation has obtained advances from a bank on the strength of such indorsement.

Bank of Commerce v. Bellamy, 25 D.L.R. 133, 8 S.L.R. 38, 33 W.L.R. 8, 9 W.W.R. 587.

Managing director—Powers of—Disposing of real estate acquired merely to protect claim of company.

Although one who is president and managing director of a company, with the powers of a general manager, has no implied power to dispose of the company's real estate, yet where he has bid in certain real estate at a sale for the purpose of protecting a claim of the company and to secure its payment and with no intention of acquiring the property for the use of the company, and in pursuance of the previous understanding with another person and to implement his intention with respect to the property when he bid it in he agrees to transfer the property, such agreement may be held to be within his implied powers and be given effect to by the court.

Armstrong v. Grenon, [1919] 3 W.W.R. 290.

Officers—"First directors"—Qualifications—Quorum—Validity of calls.

A call on shares made by a meeting of directors which included as one of the quorum a director who had vacated his office by not taking up his qualification shares, is valid by reason of clause 71, table 3 of the Companies Act. [Dawson v. African Consolidated Land and Trading Co., [1898] 1 Ch. 6, 67 L.J. Ch. 47; British Asbestos Co. v. Boyd, [1903] 2 Ch. 439, 73 L.J. Ch. 31; Channel Collieries Trust v. Dover, St. Margaret's and Martin Mill, Light Ry. Co., [1914] 1 Ch. 568, 83 L.J. Ch. 417, referred to.]

Alberta Improvement Co. v. Peverett, 7 W.W.R. 757, 7 S.L.R. 342.

(§ IV G—111)—Liability of president on agreements expressly entered into on his own behalf and that of the company — Signature of company.

Where, by an agreement which is in writing, but which it would have been competent to the parties to make without any writing, the president of an incorporated company enters into an undertaking expressly upon his own behalf and upon behalf of the company, but signs the agreement in the name of the company only, the written document will be regarded merely as a record of the agreement and not as the agreement itself, and the president will be held personally bound by his undertaking.

Wood v. Grand Valley R. Co., 16 D.L.R. 361, 30 O.L.R. 44, affirming 10 D.L.R. 726, 27 O.L.R. 556. [Affirmed, 22 D.L.R. 614, 51 Can. S.C.R. 283.]

Powers of president—Right of notary public to pass a deed as notary in which company is a party—Effect of its registration.

A notary public holding the position of president of an incorporated company is not competent to pass a deed in his capacity of notary whereto such company is a party; and the registration of such deed is ineffective if registration is made of it as if it were an authentic deed.

Bedard v. Phoenix Land Improvement Co. & Drolet, 8 D.L.R. 686.

Powers of directors — Acknowledgment of company's insolvency.

An officer of a company who is at the same time director, president and manager, cannot make the acknowledgment of insolvency specified in subs. (d) of s. 3 of the Winding-up Act, R.S.C. 1906, c. 144, in the absence of authority so to do. [Almon v. Law, 26 N.S.R. 340, and Re Brit-

ton Medical Co., 11 O.R. 478, specially referred to.]

Re Manitoba Commission Co., 2 D.L.R. 1, 22 Man. L.R. 268, 21 W.L.R. 86, 2 W.W.R. 276.

(§ IV G—114) — Powers of vice-president.

An agreement by a company engaged in the business of company flotation and of selling shares in the companies promoted through its efforts, to give the buyer of corporate stock sold by its salesman the option of returning the shares within a limited time and of receiving back the purchase price with a premium added, is not a transaction in the ordinary course of the company's business and will not be binding on the selling company although made by the authority of its vice-president, if such contracts had been forbidden by the president and were neither made nor authorized by any document or record under the corporate seal.

Whaley v. O'Grady (No. 1), 1 D.L.R. 221, 19 W.L.R. 885, 48 C.L.J. 112, 1 W.W.R. 555. [See 4 D.L.R. 485.]

(§ IV G—115)—Powers of officers—Implied authority to contract.

Whilst it is safe as a general rule, and in the absence of proof of direct authority, to ascribe an implied authority in the case of the managing director of a company, such a rule cannot be held to apply to a subordinate officer of a company, such as a logging superintendent of a lumber company. [Doctor v. People's Trust, 16 D.L.R. 192, 18 B.C.R. 382, distinguished; Wright v. Glyn, [1902] 1 K.B. 745, referred to.]

Hedican v. Crow's Nest Pass Lumber Co., 17 D.L.R. 164, 19 B.C.R. 416, 28 W.L.R. 37, 6 W.W.R. 969.

Powers of officers.

A trading company is bound by acts of its officers done in the course of negotiations for a contract for the purpose for which it is incorporated, and its common seal is not necessary. Where the managing director of an incorporated company in Saskatchewan holds himself out as having authority to do certain acts, which are not unusual for the managing director of such a company, the company will be bound by such acts. Where a school board calls for tenders for the construction of a building upon the terms that a marked cheque for a proportion of the tender should accompany the tender and be forfeited if the successful tenderer should fail to execute a contract within 3 days of receipt of notice of acceptance of his tender, and the successful tenderer, an incorporated company, refuses to sign a contract for the amount named in its tender, because of an error in its estimates, it cannot recover the amount of its deposit on the ground that it has made no contract under its seal with reference thereto, and that the authority of its managing director, who signed the tender and conducted the negotiations on its behalf, was confined to the making of the tender, and did not extend to agreeing to the condition as to the forfeiture of the deposit.

The Brandon Construction Co. v. Saskatoon School Board, 5 D.L.R. 754, 5 S.L.R. 250, 21 W.L.R. 949, 2 W.W.R. 870. [Reversed on other grounds, 13 D.L.R. 379, 6 S.L.R. 273.]

(§ IV G—116) — Powers of manager — Bookkeeping entries.

The manager of a company, who, upon a proposed transfer of assets to another company, has himself charged on the company's books with various debts of the company, will not be liable as a contributory, on its winding-up, as having been guilty of misfeasance, where such charging of debts to himself was done merely as a matter of bookkeeping and the company was not thereby prejudiced.

Re Stewart, Howe & Meek, 9 D.L.R. 484, 4 O.W.N. 506, 23 O.W.R. 852.

Powers of managing director.

The managing director of a company who has authority to manage and conduct its business, does not have implied authority to sell the entire assets of the company as a going concern, since such a sale does not relate to the carrying on of its business.

Picard v. Revelstoke Saw Mill Co., 12 D.L.R. 685, 25 W.L.R. 98, 4 W.W.R. 1278, 18 B.C.R. 416, varying 9 D.L.R. 580.

Powers of manager—Agreement by manager, ratification essential, when —Knowledge.

An agreement made by a general manager or the vice-president of a company is only tentative and will not bind the company without ratification, when the fair inference to be drawn from the evidence is that all the parties to the transaction knew that such agreement was subject to being ratified by the Board of directors of the company. [Skinner v. Crown Life Ass'ce Co., 1 O.W.N. 921, 2 O.W.N. 647; National Malleable Castings Co. v. Smith's Falls Malleable Castings Co., 14 O.L.R. 22; Russo-Chinese Bank v. Li Yan Sam, [1910] A.C. 174, referred to. See also Re Dickson and Graham, 8 D.L.R. 928.]

Dickson Co. v. Graham, 9 D.L.R. 813, 4 O.W.N. 670, 23 O.W.R. 749.

Powers of secretary-treasurer — Insurance contract.

Where a contract for insurance is not authorized by the board of directors, the promise of the secretary-treasurer to recommend to the corporation the acceptance of certain insurance proposals is not of itself sufficiently definite to create a binding contract as will render the corporation liable thereon.

Douglas v. Eastern Car Co., 25 D.L.R. 481, 49 N.S.R. 208.

Powers of managing director—Lease.

The managing director of a company incorporated in England under the Com-

panies Consolidation Act, 1908, to whom the company has given power of attorney to do all acts, execute all deeds and instruments as, in his opinion, may be necessary, convenient or expedient in relation to the property and business of the company, has authority to lease the company's salmon cannery and business as a going concern.

Scottish Canadian Canning Co. v. Dickie, 22 D.L.R. 890, 21 B.C.R. 338, 31 W.L.R. 273.

POWERS OF OFFICERS — SCOPE OF APPARENT AUTHORITY—MANAGER.

It is sufficient for persons dealing with the managing director of a company in the ordinary course of business and bonâ fide, if the articles of the company shew that he might have the powers which he purports to have, and a promissory note taken in such circumstances is prima facie enforceable. [Doctor v. People's Trust Co., 16 D.L.R. 192, applied.]

Vancouver Engineering Works v. Columbia, 16 D.L.R. 841, 6 W.W.R. 413.

POWERS OF OFFICERS—UNAUTHORIZED CONTRACT OF GENERAL MANAGER—SCOPE OF APPARENT AUTHORITY.

Doctor v. People's Trust Co., 16 D.L.R. 192, 18 B.C.R. 382, 4 W.W.R. 771. [Applied in Vancouver Engineering Works v. Columbia, 16 D.L.R. 841, distinguished in Hedican v. Crow's Nest Pass Lumber Co., 17 D.L.R. 164.]

AUTHORITY OF MANAGER — AGREEMENT TO DISCHARGE MORTGAGE—CORRESPONDENCE —CONSTRUCTION.

Sinclair v. Toronto Brick Co., 10 O.W.N. 250.

OF MANAGER—CREDITS GIVEN IN BOOKS OF COMPANY AT INSTANCE OF MANAGING DIRECTOR.

Saskatchewan Land and Homestead Co. v. Moore, 5 O.W.N. 183, 25 O.W.R. 125.

(§ IV G—117)—ADVISORY BOARD—DUTIES TO INVESTIGATE APPLICATIONS — APPLICATION AND VALUATOR'S REPORT APPARENTLY SATISFACTORY — NEGLIGENCE —LIABILITY OF COMPANY.

Members of an advisory board of a loan company whose duties are to investigate the application and valuator's report, and who act without remuneration, are not liable for negligence, causing loss to the company, in recommending a loan based in part upon the personal standing of the applicant, the application and valuator's report being apparently regular and satisfactory, the loss being caused by the fraud of the local solicitor of the company who was also on the advisory board, but of whose fraud the other members were unaware.

Prudential Trust Co. v. McQuaid, 45 D.L.R. 346, [1919] 1 W.W.R. 523.

POWERS OF DIRECTORS — REMOVAL OF MANAGING DIRECTOR.

The directors of a company are prevented by s. 72 of the Companies (Consolidated) Act of 1908 (Imp.) from removing a managing director from office.

Windsor v. Windsor, 3 D.L.R. 456, 21 W.L.R. 137, 2 W.W.R. 15.

RIGHT OF DIRECTOR TO CONTRACT WITH COMPANY—ABSENCE OF ANY ADVANTAGE BEING TAKEN.

One who contracts with an incorporated company, of which he is a director, must shew that the contract is a fair one and that he has taken no advantage of the company. It is not within the authority of the managing director of an incorporated company to compromise or release the liability of another director in respect of misrepresentations made by that director inducing a contract between him and the company.

Denman v. The Clover Bar Coal Co., 7 D.L.R. 96, 6 A.L.R. 305, 22 W.L.R. 128, 2 W.W.R. 986. [Affirmed, 15 D.L.R. 241, 26 W.L.R. 435.]

POWER OF DIRECTORS TO DEFEND AN ACTION IN NAME OF COMPANY.

The directors of a company have power to defend an action in the name of a company. [See Lindley on Companies, 6th ed., vol. 1, p. 378.]

Campbell v. Taxicabs Verrals, 7 D.L.R. 91, 27 O.L.R. 141, 23 O.W.R. 6.

PROVISIONAL DIRECTORS—SECURING STOCK SUBSCRIPTIONS—POWERS TO APPOINT AGENTS—SCOPE OF AGENCY.

Adair v. British Crown Co., 24 D.L.R. 905, 9 W.W.R. 340, 32 W.L.R. 652.

POWERS OF DIRECTORS.

The power to adopt by-laws relative to the voting of shares by proxy at elections of company directors is, by s. 15 of c. 53 of 52 Vict. (Man.), vested in the directors only, and not in the shareholders of the company. [Kelly v. Electrical Construction Co., 16 O.L.R. 232, applied.]

Colonial Assurance Co. v. Smith, 4 D.L.R. 814, 22 Man. L.R. 441, 21 W.L.R. 815, 2 W.W.R. 699.

PROVISIONAL DIRECTORS—POWERS AS TO HIRING MEDICAL EXAMINER—TERM.

Provisional directors of a joint stock company have no right to make a contract for hire of services of a medical examiner for the whole duration of the company's existence. Such a contract is void if it is not approved and ratified by the board of directors of the company properly appointed.

Lebel v. Security Life Ins. Co., 47 Que. S.C. 238.

(§ IV G—119)—POWERS OF AUDITORS.

An auditor appointed by an incorporated company in pursuance of the Companies Ordinance (Alta.), cannot enforce against the directors of the company a right of access to the company's books and records by means of an application to the court instituted by an originating summons

under Alta. r. 469 of the Judicature Ordinance.

Baldwin v. Bowden, 6 D.L.R. 520, 5 A.L.R. 16, 22 W.L.R. 26, 2 W.W.R. 844.

(§ IV G—120)—Officers—Compensation—Appointment of director as manager, when lawful.

In the absence of express statutory provisions, the general rule that a director of a company cannot take the benefit of a contract entered into between himself and the company, does not apply to a contract of employment between the company and the director, whereby the latter is engaged as manager of the company, if it appears that such engagement is more in the interest of the company than the appointment of some one outside of the directorate. [Albion Steel & Wire Co. v. Martin, 1 Ch.D. 580, referred to; Birney v. Toronto Milk Co., 5 O.L.R. 1, distinguished.]

Van Hummell v. International Guarantee Co., 10 D.L.R. 306, 23 Man. L.R. 103, 23 W.L.R. 248, 3 W.W.R. 941.

Compensation.

Directors who perform mere manual labour as servants or clerks of a company are entitled to remuneration therefor at the ordinary market price, without such payments being first authorized by a by-law adopted at a general meeting as required by s. 88 of 7 Edw. VII. c. 34 (The Ontario Companies Act), in the case of compensation of officers whose appointment must be by by-law. [Burland v. Earle, [1902] A.C. 83, followed; Re Queen City Plate Glass Co., Eastmure's Case, 1 O.W.N. 863; Re Morlock & Cline, Sarvis & Canning's Claims, 23 O.L.R. 165, and Benor v. Canadian Mail Order Co., 10 O.W.R. 1091, distinguished.]

Re Matthew Guy Carriage & Automobile Co., 4 D.L.R. 764, 26 O.L.R. 377, 22 O.W.R. 34.

Officers — Compensation — Managing directors—Salaries—Vote required—Improper payments to director, liquidator's right to recover.

Under an article of incorporation providing that the directors may pay to any managing directors such salary as they may think fit, provided that a majority of all the directors (exclusive of any managing director) vote in favour of such salary, the salary may be paid on the vote of a majority of the directors exclusive of the managing director to whom it is voted. The liquidator of a company is entitled to recover from a director, under a misfeasance summons, money paid by the director by the company as commission on shares subscribed for by him at the time he signed the memorandum of association; such payments not being authorized by the articles of association or the prospectus, and being in violation of Companies Ordinance (N.W. Terr. 1911, c. 61), s. 111. [Re Newman (George) & Co., [1895] 1 Ch. 674; Re Bodega Company, [1904] 1 Ch. 276; Re Oxford Benefit Building & Investment Society, 35 Ch. D. 502, referred to.]

Re Canadian Diamond Co., Broad's Case, 11 D.L.R. 251, 6 A.L.R. 42, 4 W.W.R. 578.

Salary — Bonus — Knowledge of resolution.

Where the articles of incorporation of a company authorize payment for services rendered to the company by directors as well as others, a bonus and salary voted to a director for services rendered, at a meeting of the company at which the shareholders were all present, by the majority of shareholders, are acts intra vires, and cannot subsequently be recovered back by the company or the majority of shareholders.

Macdonald Bros. v. Godson, 31 D.L.R. 363, [1917] 1 W.W.R. 233.

Directors—Compensation to.

Directors have no right to be paid for their services, and cannot pay themselves or each other, or make presents to themselves out of the company's assets, unless authorized so to do by the instrument which regulates the company or by the shareholders at a properly convened meeting. [Re G. Newman & Co., [1895] 1 Ch. 674, referred to.]

Roray v. Howe Sound, 22 D.L.R. 855, 21 B.C.R. 406, 31 W.L.R. 409.

Mutual aid society—Remuneration of directors—Costs.

Directors of a mutual aid society should give their services gratuitously, and they have no right to issue paid-up policies to themselves and to vote themselves an indemnity in money in payment for their past and future services. The directors, in committing such illegal acts, have acted as agents and jointly committed a délit. In the two capacities they may be jointly and severally condemned to payment of the costs.

Roy v. La Caisse des Familles, 48 Que. S.C. 43.

Company funds—Administration—Intervention of tribunals—Salary of directors—C.C., art. 361.

The courts of justice ought not to interfere in the direction of interior affairs of a society by actions, unless in case of fraud or illegality; thus they have no right to interfere in the reimbursing of the salaries of the directors which had been voted and paid, when they have acted in good faith conforming to the rules of the company and as they have been accustomed to do each year to the knowledge, and without any observation on the part of the shareholders. An action against the directors of a society to make them pay pretended salaries illegally received in virtue of a resolution adopted by them, ought not to be formed personally against them. The action ought to first of all be intended against the corporation to make them annul this resolution authorizing the payment of salaries.

Mack v. Dresser, 25 Rev. Leg. 297.

LAND COMPANY—DIRECTOR ACTING AS SALES-AGENT — REMUNERATION — COMMISSIONS—CONSTRUCTION OF AGREEMENT—ACCOUNT — REFERENCE — REPORT — APPEAL—COSTS—DISCRETION.

Home v. M. S. Boehm & Co., 9 O.W.N. 175.

(§ IV G—123)—SECRET PROFITS.

Secret profits obtained by those who are in reality trustees of a company, organized and incorporated under the Ontario Companies Act, for the purpose of acquiring and reselling land, which had been purchased by a syndicate, the members of which became shareholders of the company, are profits of the company, and those who in effect paid it are liable to refund it or cause it to be refunded.

Crawford v. Bathurst Land & Development Co., 43 D.L.R. 98, 42 O.L.R. 256, affirming, 37 O.L.R. 611. [Reversed on another point, sub nom. Fullerton v. Crawford, 50 D.L.R. 457, 59 Can. S.C.R. 315.]

DIRECTORS NOT ENTITLED TO REMUNERATION — BY-LAW AUTHORIZING PAYMENT — CONSENT OF SHAREHOLDERS NOT UNANIMOUS—INVALIDITY.

A by-law authorizing the payment out of the funds of a company of salaries to directors of the company, such directors not being entitled to remuneration from the company, is invalid without the unanimous consent of the shareholders.

Cook v. Hinds, 44 D.L.R. 586, 42 O.L.R. 273, reversing judgment of Masten, J.

ILLEGAL COMPENSATION TO PRESIDENT—VOTING ISSUE OF STOCK TO ENABLE CONTROL OF MEETING.

Directors cannot vote to their president an indemnity as salary which is not justified, either by services rendered nor by the state of the company's business, in order to permit him to acquire shares which would give him the majority and the control in a shareholders' meeting. Resolutions respecting this indemnity and the issue of shares purchased with the amount of it are void.

Giguère v. Colas, 48 Que. S.C. 198.

DIRECTORS — TRUSTEES — ACCOUNTS — SALARIES AND DISBURSEMENTS OF DIRECTORS—VALUE OF PREFERRED SHARES RECEIVED BY DIRECTORS—EVIDENCE—INTEREST—ESTOPPEL—REMUNERATION OF TRUSTEES—COSTS.

Hyatt v. Allen, 9 O.W.N. 173, 415.

(§ IV G—125)—FIDUCIARY RELATION—OFFICER PURCHASING STOCK FROM SHAREHOLDER.

Where directors of a landholding company passed a resolution appointing three of themselves as a committee to bring in a proposal for disposing of the whole of their lands and also of the corporate shares in the company, the responsibility of the members of the committee acting upon such resolution is more extensive than the ordinary duties devolving upon company directors; and, on any proposal of purchase being received by them which involved the acquisition of the land forming the entire assets of the company, the committee were under a duty to the shareholders whose rights as such, would, on completion of the sale, be limited to a reimbursement pro rata out of the purchase money, to make full disclosure to them as well as to the company, as represented by its directors and officers, of the terms of the offer.

Gadsden v. Benretto, 9 D.L.R. 719, 23 Man. L.R. 33, 23 W.L.R. 633, 3 W.W.R. 1109.

FIDUCIARY RELATION OF DIRECTORS—BREACH OF TRUST — MISUSE OF COMPANY'S PROPERTY—MATING FOXES.

Pure Canadian Silver Black Fox Co. v. Morrison, 24 D.L.R. 915.

FIDUCIARY RELATIONSHIP OF DIRECTORS — RAILWAY CONTRACT — ACCOUNTING TO MINORITY.

The majority directors of a corporation formed with an object of undertaking railway contracts, who are entrusted with the conduct of affairs of the company, cannot consistently, before dissolution, deliberately exclude, by using their influence and position, the interest of the corporation in a railway contract they procured, in favour of a company separately formed by them with a similar object, and owe a duty of accounting to the minority in respect of the profits realized from such contract. [North-Westerns Transportation Co. v. Beatty, 12 App. Cas. 589; Burland v. Earle, [1902] A.C. 83, distinguished.]

Cook v. Deeks, 27 D.L.R. 1, [1916] 1 A.C. 554, reversing 21 D.L.R. 497, 33 O.L.R. 209.

FIDUCIARY RELATION—MISFEASANCE BY DIRECTOR—ACCEPTANCE OF STOCK FOR SERVICES.

A director's acceptance of stock issued to him for services rendered prior to the incorporation of the corporation, did not constitute misfeasance in the nature of a breach of trust where the memorandum of association authorized the issue, though the company's prospectus states that "no amount has been or will be paid to any director beyond the purchase price paid to the syndicate as above mentioned;" no claim of fraud as to the rendition or value of the services being made. [Coventry & Dixon's Case, 14 Ch.D. 660, referred to.]

Re Canadian Diamond Co., Broad's Case, 11 D.L.R. 251, 6 A.L.R. 42, 4 W.W.R. 578.

MANAGING DIRECTOR—BREACHES OF TRUST —ACCOUNT — COMPENSATION — INTEREST—COMPOUND INTEREST—CREDITS—CLAIMS FOR COMMISSION—EXPENSES AND DISBURSEMENTS—MASTER'S REPORT —APPEAL.

Saskatchewan Land and Homestead Co. v. Moore, 7 O.W.N. 684, 8 O.W.N. 525, varying 16 D.L.R. 871, 6 O.W.N. 100.

FIDUCIARY RELATION OF DIRECTORS—CONTRACTING COMPANY—CONTRACT TAKEN BY MAJORITY OF DIRECTORS AS INDIVIDUALS—DUTIES AND LIABILITIES OF DIRECTORS—TRUST—RIGHTS OF MINORITY SHAREHOLDERS — EVIDENCE — CONFLICT—FINDING OF TRIAL JUDGE.

Cook v. Decks, 6 O.W.N. 590.

DIRECTORS SELLING COMPANY'S BUSINESS TO THEMSELVES — SHAREHOLDERS' MEETING TO CONFORM—WANT OF DUE NOTICE TO ALL SHAREHOLDERS—NO RIGHT IN OUTSIDER TO COMPLAIN.

Plaintiff held certain premises under lease from defendant company which lease provided that in the event of the company selling or in any way disposing of the restaurant business carried on by it in the same building it should have the right to cancel the lease to plaintiff on certain notice. The company being in financial straits, two of its directors at a directors' meeting passed a by-law sanctioning the sale of the business to themselves, the consideration being the assumption of the liabilities. Said by-law was confirmed at a shareholders' meeting, the minutes of which were signed by all the shareholders except one who was not shown to have been present at, or notified of, the meeting. The court found that the sale to the two directors was made bona fide because of the financial condition of the company and only after they had failed in inducing any other purchaser to take over the business. A notice of cancellation of the lease was then served on the plaintiff signed by the company per said two directors as its officials. Held although as against a shareholder or any person having a direct interest in the company such a sale from directors to themselves could not be permitted to stand unless it was sanctioned by the shareholders at a meeting at which all the shareholders were present or of which they all had notice, the irregularity was not such as the plaintiff could take advantage of; even if that were not the case the court should not declare the sale void under the circumstances because the approving shareholders represented the large majority of the shares and they could at once approve the sale at a regularly called meeting, which would be a work of supererogation.

Grammas v. Kensington Cafe, [1919] 3 W.W.R. 301.

(§ IV G—126)—OFFICERS—DIRECTOR RESIGNING TO TAKE CONTRACT WITH COMPANY—FIDUCIARY RELATION.

Full and complete disclosure to the shareholders of the material circumstances surrounding the bargain is essential to support, as against the company, an arrangement made by one director with the other directors whereby he obtained a contract with the company highly advantageous to himself, on resigning his directorship.

Denman v. Clover Bar Coal Co., 15 D.L.R. 241, 48 Can. S.C.R. 318, 26 W.L.R. 435, 5 W.W.R. 564, affirming on other grounds 7 D.L.R. 96.

OFFICERS—FIDUCIARY RELATION—LIQUIDATORS—RECEIVERS.

Subs. 5 of s. 7 of the Companies Winding-up Act, R.S.S. 1909, c. 78, under which all the powers of a company's directors cease (unless the company itself or its liquidator may otherwise determine) operates to cancel the fiduciary relationship previously existing between the company and its directors. A liquidator under the Companies Winding-up Act, R.S.S. 1909, c. 78, may legally sell his company's property to a director in the absence of a shewing that the fiduciary relationship between the company and its directors, which is prima facie determined by subs. 5 of s. 7 of the Act, was actually kept in force.

Holmested v. Annable, 18 D.L.R. 3, 7 S.L.R. 222, 28 W.L.R. 819, 6 W.W.R. 1497.

FIDUCIARY RELATION—OFFICER DIVERTING FUNDS TO PERSONAL USE.

Where a managing director of a joint stock company, who is also its president, takes out of the assets of the company from year to year moneys belonging to the company in addition to his salary and diverts these moneys to his personal use, charging himself on the books with the overdrafts, he becomes a trustee of such moneys, in view of the fiduciary relationship between him and the company and the question of bona fides of the transaction does not enter into the matter. [Great Eastern R. Co. v. Turner, L.R. 8 Ch. 149; Re Forest of Dean Coal Mining Co., 10 Ch. D. 450; Re Lands Allotment Co., [1894] 1 Ch. 616; Gluckstein v. Barnes, [1900] A.C. 241, referred to.]

Rogers Hardware Co. v. Rogers, 10 D.L.R. 541.

POWERS OF DIRECTORS—TAKING EXTENSION OF LEASE TO THEIR OWN USE—PROOF—MINUTES BOOK.

Although it may be admitted that the directors of a company cannot by their own act deprive the company of any advantage or do anything to its detriment and prejudice, an extension of a lease belonging to the company may be obtained by the directors personally and for their own benefit, when, at the date of the contract, the company was in liquidation, and had practically refused to accept the extension. The negative acts of a board of directors may be proved by witnesses; it is not obligatory to enter in the minutes book every proposition which the directors refuse to accept or to discuss.

Boston Shoe Co. v. Frank, 48 Que. S.C. 66.

(§ IV G—127)—DIRECTORS AND SHAREHOLDERS—FIDUCIARY RELATIONS.

Under ordinary circumstances no fiduciary relation exists between directors and shareholders of a corporation, but where directors of a corporation were approached with a view of merging or consolidating with similar interests by the merged in-

terests purchasing the assets of the corporation, and the directors of said corporation secured the consent of a majority of the shareholders thereof for the sale and transfer of the plant and property of the corporation, and where said shares were surreptitiously acquired by the directors for their own profit, a trust or fiduciary relation was established between the directors of said corporation and its shareholders. Where directors of a corporation were approached with a view of merging or consolidating with similar interests, by the merged interests purchasing the assets of the corporation, and the directors of said corporation secured the consent of a majority of the shareholders thereof for the sale and transfer of the plant and property of the corporation, and where said shares were surreptitiously acquired by the directors for their own profit, the directors are agents of the shareholders and cannot personally profit by the transaction in question. [Percival v. Wright, [1902] 2 Ch. 421, distinguished.]

Allen v. Hyatt, 17 D.L.R. 7, 26 O.W.R. 215, affirming 8 D.L.R. 79.

POWERS OF DIRECTORS—ACKNOWELDGMENT OF COMPANY'S INSOLVENCY.

The directors of a company may, without the sanction of the shareholders, make an acknowledgment of the company's insolvency for the purpose of winding up, as required by subs. (d) of s. 3 of the Winding-up Act, R.S.C. c. 144. [Hovey v. Whiting, 14 Can. S.C.R. 515, applied.]

Re Manitoba Commission Co., 2 D.L.R. 1, 22 Man. L.R. 268, 21 W.L.R. 86, 2 W.W.R. 276.

(§ IV G—130)—LIABILITY OF DIRECTORS—ILLEGAL PAYMENTS — DIVIDEND — REMUNERATION.

Directors, whether de facto or de jure, who knowingly, or without the use of ordinary prudence, sanction the payment of dividend in diminution of capital, or the illegal remuneration to directors for their services, or any ultra vires or illegal payments, are guilty of misfeasance and breach of trust, and are jointly and severally liable.

Northern Trust Co. v. Butchart (Man.), 35 D.L.R. 169, [1917] 2 W.W.R. 405.

MISFEASANCE — DIVIDENDS — WILFUL NEGLECT.

Directors who are not wilfully blind or careless but who rely upon the statement of officials, are not guilty of misfeasance for directing the payment of dividends which, in fact, decrease the capital. Sections 90 and 91 of 2 Geo. V. c. 31 (R.S.O. the Companies Act) are not confined in their application to vendor and purchaser agreements, but prohibit a director from voting upon any contract whatever in which he is interested.

Re Owen Sound Lumber Co., 33 D.L.R. 487, 38 O.L.R. 414, varying 25 D.L.R. 812.

PERSONAL LIABILITY—FRAUD—MISAPPLICATION OF FUNDS—MISFEASANCE SUMMONS.

Money obtained by a director of a company which was on the verge of insolvency, on the representations that the funds would be invested in first-class securities, but which were in reality used to discharge pressing debts against the corporation, constitutes a fraud which will render all the directors personally liable for the amounts thus obtained, and such liability may be enforced by the liquidator upon a misfeasance summons under s. 123 of the Winding-up Act, c. 144, R.S.C. 1906, for the benefit of the defrauded party.

Re Traders Trust & Kory, 26 D.L.R. 41, 33 W.L.R. 352, 9 W.W.R. 538.

OFFICERS — LIABILITIES — WINDING-UP — DETERMINATION OF DIRECTOR'S LIABILITY—PREREQUISITES.

On application by the liquidator of a company to compel a director to account, his liability respecting stock issued to him for services under Companies Ordinance (N.W.T. 1911, c. 61), s. 110, for want of the contract in writing referred to in clause (b), will not be determined; if he is so liable his name should be placed upon the list of contributories, in order not only that his liability as such may be determined in the proper manner, but also that the rights and liabilities of the contributories as amongst themselves may be decided.

Re Canadian Diamond Co., Broad's Case, 11 D.L.R. 251, 6 A.L.R. 42.

STATUTORY LIABILITY OF DIRECTORS—WAGES—ASSIGNMENT OF.

The personal liability imposed upon directors by s. 98 of the Companies Act, R.S.O. 1914, c. 178, for wages due to workmen of the company does not apply to an assignment of wage claims to a storekeeper in pursuance of an agreement with the company for periodical adjustment of such claims for supplies furnished them.

Coveney v. Glendenning, 22 D.L.R. 461, 33 O.L.R. 571.

STATUTORY LIABILITY OF DIRECTORS—TRANSFER OF STOCK TO PERSONS OF INSUFFICIENT MEANS.

In order to relieve directors of the liabilities imposed under s. 24 of the Companies' Clauses Act, R.S.C. 1886, c. 118, for allowing a transfer of unpaid stock to a person who is "not apparently of sufficient means" there must be a positive appearance of sufficient means; the directors must not approve a transfer to a person about whom they know nothing.

Re Ontario Fire Ins., 23 D.L.R. 758, 8 W.W.R. 1081, 31 W.L.R. 483, 8 W.W.R. 1081.

PERSONAL LIABILITY FOR WAGES—CONTRIBUTION—PARTIES.

The personal liability of company directors under the Ontario Companies Act, R.S.O. 1914, c. 178, s. 98, for an unpaid

judgment against the company, for wages of a company employee, is joint and several, and a plaintiff is not bound to join them all as defendants; if there is a right of contribution or indemnity it is open for the parties sued to take third party proceedings against the director not sued. The plaintiff is at liberty to discontinue as to any defendant, although the statutory limit of one year after such defendant ceased to be a director may have expired pending the action.

Reuckwald v. Murphy, 28 D.L.R. 474, 32 O.L.R. 133.

LIABILITIES.

An action against a company on a note given in part settlement of an account stated, the account being partly for wages and partly for goods supplied, is not a prior action for wages against the company under the statute 7 Edw. VII. (Ont.) c. 34, s. 94, so as to make the directors of the company personally liable for the amount of the note under that section, where the amount of the note was considered both by the maker and payee as an undivided sum and represents the balance due on the settlement after a payment made generally on the entire indebtedness without apportionment as between the wages and the other claims.

Olson v. Machin, 8 D.L.R. 188, 4 O.W.N. 287, 23 O.W.R. 531.

PROCEEDING BY LIQUIDATOR AGAINST OFFICER OR EMPLOYEE FOR MONEY ALLEGED TO HAVE BEEN MISAPPLIED.

Re Boston Shoe Co., 16 D.L.R. 856.

REMUNERATION FOR SERVICES AS MANAGERS—BY-LAW—APPROVAL BY SHAREHOLDERS—ATTEMPT TO SHEW FRAUD ON RIGHTS OF MINORITY—PAYMENT OF LARGE SUM OUT OF FUNDS OF COMPANY—COSTS OF FORMER LITIGATION—COSTS PERSONALLY PAYABLE BY DIRECTORS PAID OUT OF FUNDS OF COMPANY—RESTORATION.

Cook v. Hinds, 12 O.W.N. 404.

DISSIPATION OF ASSETS—REMUNERATION.

M., a solicitor, whose firm financed a company by which a large indebtedness accumulated, acted as the company's solicitor, for which he was paid a stipulated sum monthly. He obtained one share and became a director in the company largely for the purpose of protecting his firm's interest. The debt to the firm was secured by some of the individual directors and by an assignment of an agreement for sale made by the C.P.R. to the company of 1,100 acres of timber lands on which $2,000 was owing. Later a sale was made of the C.P.R.'s lands to E. & W. at $7 an acre, the terms being $2,000 down and the balance in payments, extending over some years; this sale was brought by M.'s efforts, for which he received a commission of $268.87. E. & W. purchased in order to sell at an advance to a certain group of persons (including themselves), and later carried out this sale. M. was not interested at the time of the sale, but later became interested in the purchasing group. The directors held all the shares in the company. On the company going into liquidation the liquidation brought action against the directors for misappropriation and dissipation of the company's assets. The case narrowed down to a claim against M. in respect to three items: (1) his remuneration as a solicitor for the company; (2) the item of $268.87 for commission; (3) the profit obtained from his interest in the purchasing group of the C.P.R. lands:—Held, on the facts, that the claims do not come within the provisions of the Winding-up Act, nor do they give rise to any statutory presumption which is not refuted by the evidence.

Roberts v. Macdonald, 23 B.C.R. 542.

WAGE CLAIM AGAINST DIRECTORS—EFFECT OF TAKING ACKNOWLEDGMENT AND SUING UPON IT—JOINDER OF CLAIMS—COMPANIES ACT, S. 35—ABANDONMENT OF PORTION OF CLAIM TO BRING WITHIN AMOUNT OF COUNTY COURT JURISDICTION—APPORTIONMENT OF ABANDONED AMOUNT.

Williams v. Graham, Welfley & Devine, 34 W.L.R. 855.

(§ IV G—131)—ENGAGING IN ULTRA VIRES BUSINESS.

When the directors of a company expressly or impliedly authorize the commencement of the operations of the company or the incurring of liabilities before ten per centum of the authorized capital of the company has been subscribed and paid in in conformity with the Quebec Companies Act, R.S.Q. 1909, art. 6019, they are personally, jointly and severally liable with the company for the payment of such liabilities.

French Gas Savings Co., v. The Desbarats Advertising Agency, 1 D.L.R. 136.

TRUST FUNDS—ULTRA VIRES—NEGLIGENCE—MISFEASANCE.

There must be loss resulting from the negligence or ultra vires acts of directors in handling trust funds before they can be charged with misfeasance in the legal sense of the word. Directors who had taken no active part in the management are not answerable for the acts of the board.

Re Dominion Trust Co., 32 D.L.R. 63, 23 B.C.R. 401, [1917] 1 W.W.R. 618, varying 26 D.L.R. 408.

LIABILITY OF DIRECTORS—ULTRA VIRES ACTS—LOANS—TRUST FUNDS.

Where, by the act of incorporation, a trust company is imperatively directed to keep company funds and trust funds separate and distinct, and in what securities trust funds should be invested, and that the affairs of the company be managed by the directors, defining what should constitute a quorum, the loss of trust funds resulting through disregard of these mandatory provisions will render such directors as were actually guilty of such disregard, or who must be held to have had knowledge of such disregard and remained quiescent,

jointly and severally liable for such loss, both on the ground of ultra vires and of negligence. [Re Brazilian Rubber Plantations, [1911] 1 Ch. 425; Cullerne v. London and Suburban General Per. Bdg. Soc., 25 Q.B.D. 485, distinguished.] Loans made by the managing director or a trust company contrary to the lending rules, and of the whole system governing loans, as established by the board of directors, are considered fraudulent if not criminal; but all the directors are not liable for any loss of the company funds by reason of such loans, where, without being negligent, they have failed to detect such fraudulent conduct. [Joint Stock Discount Co. v. Brown, L.R. 8 Eq. 381; Re Liverpool Household Stores Assn., 59 L.J.Ch. 616; Marzetti's Case, 28 W.R. 541; Re New Mashonaland Exploration Co., [1892] 3 Ch. 577; Re Oxford Benefit Building & Invest. Soc., 35 Ch. D. 502; Leeds Estate Bldg. v. Shepherd, 36 Ch.D. 787; Ottoman Co. v. Farley, 17 W.R. 761; Dovey v. Cory, [1901] A.C. 477, referred to.]

Re Dominion Trust Co., 26 D.L.R. 408, 23 B.C.R. 401. [Varied in 32 D.L.R. 63, [1917] 1 W.W.R. 618.]

ILLEGAL ACTS OF DIRECTOR—MEETING OF SHAREHOLDERS TO CONFIRM—INJUNCTION—ABSENCE OF FRAUD OR CONCEALMENT—ACTS INTRA VIRES OF COMPANY—AMENDMENT—PARTIES.

McClure v. Langley, 10 O.W.N. 32.

(§ IV G—133)—ILLEGAL DECLARATION OF DIVIDEND—PAYABLE IN STOCK.

A resolution of a board of directors declaring a dividend payable partly in money and partly in stock of the corporation is illegal under subs. 4 of art. 6036 of R.S.Q. 1909, and will be quashed; but the court will not assume jurisdiction to substitute itself for the company and declare a dividend payable completely in money.

St. Lawrence Furniture Co. v. Binet, 25 D.L.R. 316, 24 Que. K.B. 405.

WINDING-UP — DIRECTORS — MISFEASANCE—DE FACTO DIRECTORS—LIABILITY—PAYMENT OF DIVIDENDS—BONUSES.

Re Owen Sound Lumber Co., 25 D.L.R. 812, 34 O.L.R. 528.

ILLEGAL DIVIDEND—FICTITIOUS PROFITS—REIMBURSEMENT—BONDS—C.C., ARTS. 1032, 1040—R.S. [1909], ARTS. 4736, 5999.

Dividend declared and paid by a company before it is actually earned and which infringes upon and lessens its capital, the said dividend being taken from alleged eventual, fictitious, and problematical profits, is illegal. A shareholder who has received such dividend is bound to restore to the liquidator of the company which paid the dividend, the latter's bonds which he received in payment thereof, at the par value, or the price for which he sold the same. Art. 1032 to 1040, C.C. referring to the "Paulian" action are not applicable to a case where a company divides amongst its members not only the accumulated profits, but also bonds, part of its capital, without paying its debts. Therefore, an action instituted by the liquidator of the company to revendicate these bonds or the value thereof, is not a "Paulian" action which is prescribed by one year. This action may be taken not only against the directors, but also against any shareholder having, in bad faith, received any illegal dividend.

Hyde v. Scott, 28 Que. K.B. 80.

LIABILITY OF DIRECTORS—DIVIDENDS—PROSPECTUS.

When directors of a company in formation signed and published a prospectus guaranteeing the subscribers of stock a dividend of 30 per cent, secured by a deposit of 10 per cent taken from the payments of the stock, they are in fact declaring a dividend taken out of the capital obtained from the sale of the company's stock, and not earned from the profit. The declaration of dividend is illegal and null. If the company commences its operations before 10 per cent of its authorized capital has been subscribed and paid for, the directors are responsible personally for the losses of the shareholders. Election of directors and officers made before any certificate has been issued and without even the company having a stock book is of no legal effect. A prospectus which announced that the provisional directors have promoted this company for the purpose of taking up certain "contracts which they made for the purchase and delivery of," without specifying the date of the agreements and the name of the parties to them, and which contained assertions false, susceptible of deceit, is deemed fraudulent on the part of directors who issued such notice. The directors, in acting as aforesaid, are jointly and severally responsible towards a shareholder having acted in good faith, and bound to reimburse him the amount he has paid for his stock. The secretary-treasurer of the company who was not a provisional director, is not liable for the repayment of this money.

Lefebvre v. Prouty, 54 Que. S.C. 490.

(§ IV G—134)—LIABILITY OF SECRETARY-TREASURER — MISREPRESENTATION OF AUTHORITY—INSURANCE.

The secretary-treasurer of a corporation cannot be held personally liable in damages for a misrepresentation of his authority because of a refusal by the corporation to accept insurance proposals submitted to him, the acceptance of which he promised to recommend.

Douglas v. Eastern Car Co., 25 D.L.R. 481, 49 N.S.R. 208.

APPLICATION FOR SHARES—MISREPRESENTATIONS BY AGENT OF COMPANY—"STATEMENT" SHEWN TO PURCHASER—"PROSPECTUS"—ONTARIO COMPANIES ACT, R.S.O. 1914, c. 178, ss. 99, 101 (3)—ABSENCE OF ALLOTMENT AND NOTICE—RESCISSION OF APPLICATION—RETURN OF MONEY PAID.

The plaintiff signed an application for $2,000 worth of shares in the defendant company, an industrial concern, organized under the Ontario Companies Act, R.S.O. 1914, c. 178, and paid $1,000 on account. He was shewn a document called a "statement," issued by the company, which contained several untrue representations bearing on the value of the shares, such as that all the earnings would be available for the common stock, and that the superintendent of the company's factory had an interest in the company. Misrepresentations were also made to him by an agent of the company who obtained his application:—Held, that the "statement," as it was "issued for the purpose of being used to promote or aid in the subscription or purchase of" the shares of the company, was a "prospectus" within the meaning of s. 99 of the Ontario Companies Act. The misrepresentations were sufficient to justify a rescission of the agreement (if any) to take shares. If the statement was not a prospectus, no prospectus was delivered at the time the subscription was obtained, and under s. 101 (3) of the act the plaintiff was not bound by and was entitled to withdraw his subscription; and, as no notice of allotment was ever sent to him, his withdrawal could be at any time. There was not only no notice of allotment to the plaintiff, but there was no allotment. What was relied upon—a resolution of the directors—was too vague, and was not intended to apply to the plaintiff, who was never entered on the company's register as a shareholder.

McCurdy v. Oak Tire and Rubber Co., 44 O.L.R. 571.

MISCONDUCT OF DIRECTORS—SECRET PROFITS—MISREPRESENTATIONS.

This was an action for damages for the misconduct of the defendants as directors of the defendant company, for the recovery of secret profits and for damages for misrepresentation. On the facts the plaintiff's action was dismissed.

Kohler v. Stoner, 32 W.L.R. 161.

(§ IV G—136)—ON PROMISSORY NOTES.

Persons who sign a promissory note as president and manager of a nonexisting company are liable upon their implied warrant of its actual existence for the full face value of such note. [Thomson v. Feeley, 41 U.C.Q.B. 229, and Kelner v. Baxter, L.R. 2 C.P. 174, applied.]

Crime v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313, 2 W.W.R. 429.

(§ IV G—137)—DIRECTOR TRAVELING SALESMAN—REMUNERATION.

Section 92 of the Ontario Companies Act (R.S.O. 1914, c. 178), which provides that "No by-law for the payment of the president or of any director shall be valid or acted upon unless passed at a general meeting or if passed by the directors until same has been confirmed at a general meeting," does not prohibit a director from receiving reasonable remuneration for acting in another capacity, such as traveling salesman, without a by-law authorizing such payment.

Canada Bonded Att'y Legal Directory v. Leonard-Parmiter, 42 D.L.R. 342, 42 O.L.R. 141, varying 12 O.W.N. 388.

LIABILITY OF DIRECTORS—WAGES—WINDING-UP—EXECUTION.

The recourse granted by art. 6072, R.S.Q., to labourers, clerks and servants of a joint stock company against its directors, jointly and severally, to recover six months' wages, has no criminal character, but rests on a purely civil obligation created by the law and subject to the conditions imposed by it. In order to exercise such recourse against the directors, a workman, who has obtained a judgment against the company, is not bound to obtain by a proces verbal a report that the company has not sufficient assets to satisfy his judgment, if such insufficiency is otherwise shown by an immediate winding-up of the company. A delay of 9 days to execute the judgment obtained against the company does not constitute, on the part of the workman, an act of negligence which the directors may oppose him as means of contesting the action he has taken against them, unless a prejudice is shown. The order of winding-up of an incorporated company does not terminate the powers of its directors, but only suspends the exercise of such powers. The directors lose their capacity as such only at the end of the winding-up.

Dallaire v. Leclerc, 53 Que. S.C. 201, 24 Rev. de Jur. 254.

LIABILITY OF DIRECTORS—WAGES.

A company director, under s. 54 of the Companies Ordinance, N.W.T. 1901, c. 20 [N.W.T. Ord. Alta. 1911, c. 61], is practically a statutory guarantor of the wages due for services performed for the company to the extent and under the condition prescribed by the section.

Guenard v. Coe, 17 D.L.R. 47, 7 A.L.R. 245, 28 W.L.R. 250, 6 W.W.R. 922, reversing 16 D.L.R. 513.

FOR WAGES.

In an action against the directors of a company for wages, under s. 94 of the Ontario Companies Act, 7 Edw. VII., c. 34 (see now 2 Geo. V. c. 31, s. 96), owing by the company, it is sufficient if the execution against the company under the judgment first obtained against it, has been directed to the sheriff of the county where the venue is laid, or of the county where the head office of the company is situated.

[Nixon v. Brownlow, 1 H. & N. 405, and Brice v. Munro, 12 A.R. (Ont.) 453, followed.] It must also be shewn that there has been a bona fide attempt to collect the amount of the judgment from the company, and that a bona fide return has been made that there is nothing in the shape of assets of the company to satisfy it, a mere formal, colourable or illusory return is not sufficient. [Hfracombe R. Co. v. Devon and Somerset R. Co., L.R. 2 C.P. 15; Moore v. Kirkland, 5 U.C.C.P. 452; Jenkins v. Wilcock, 11 U.C.C.P. 505, followed; Grills v. Farah, 21 O.L.R. 457, distinguished.] An allowance for traveling expenses can be recovered in an action against the directors of a company under s. 94 of the Ontario Companies Act, 7 Edw. VII., c. 34 (see now 2 Geo. V., c. 31 s. 96), as a part of the wages for which the directors are personally liable on the company's default, where the employee was entitled under his contract of employment to have his traveling expenses added to the fixed salary.

Pukulski v. Jardine; Perry v. Jardine, 5 D.L.R. 242, 26 O.L.R. 323, 21 O.W.R. 983.

HIRING OF WORK—SALARY—DIRECTORS OF AN INSOLVENT COMPANY—COMMERCIAL STAMPS — ORIGIN OF THE LAW — CR. CODE, ART. 505—S. REV. [1906], c. 79—COMPANIES ACT, ART. 85.

An agent employed by a company for the sale of commercial stamps, who obtains a judgment against the latter for his salary, can, if the company is insolvent hold the directors responsible by virtue of s. 85 of the Companies Act, since this right does not come to him from his hiring contract which is illegal, being for the sale of a thing prohibited by the act. The right arises from his judgment against the company and from the act which, in this case holds the directors personally responsible.

Gariepy v. Gauthier, 55 Que. S.C. 452.

LIABILITY OF DIRECTORS FOR WAGES—"SERVANT"—"CLERK."

In s. 54 of the Alberta Companies Ordinance (C.O. 1898, c. 64), which provides that the directors of a company shall, under certain circumstances, be liable to the clerks, labourers, servants and apprentices thereof for six months' wages due for services performed for the company, the word "servant" may include a mine superintendent whose authority is much restricted, and a mine physician; the word "clerk" includes a bookkeeper who works under instructions given by the general manager, but not an auditor working under a contract under which much if not all of his work might be performed by his employees.

Re Yellowhead Pass Coal & Coke Co., 12 A.L.R. 144, [1917] 2 W.W.R. 985.

LIABILITY FOR WAGES—LACHES—ENFORCEMENT.

The remedy given by art. 6072, R.S.Q. 1909, to the workmen, clerks and servants of a joint stock company, against its directors jointly and severally, to recover six months wages, should be strictly interpreted, by considering the personal responsibility of the directors as a penalty, and an employee who wishes to make use of this remedy should first satisfy all the requirements of the law. A workman cannot exercise this remedy when, having obtained judgment against the company, he neglects to execute it upon its property before it goes into liquidation, and neglects to obtain leave of the court to execute it after it has been put into liquidation.

Pilote v. Leclerg, 52 Que. S.C. 127.

LIABILITY OF DIRECTORS—WAGES OF SERVANT—UNSATISFIED JUDGMENT FOR—ONTARIO COMPANIES ACT, R.S.O. 1914, c. 178, S. 98—COMPUTATION OF WAGES—ALLOWANCE FOR BOARD—INTEREST—COSTS—EVIDENCE—APPLICATION TO REOPEN CASE AFTER TRIAL—REFUSAL—SUGGESTED DEFENCE.

Darrah v. Wright, 7 O.W.N. 233.

(§ IV G—140)—ONTARIO COMPANIES ACT—FAILURE TO MAKE STATEMENT—PENALTIES — SECRETARY — LIABILITY OF — WILFULLY PERMITTING.

By s. 134 (6) of the Ontario Companies Act the secretary of a company is liable to penalties for default in making out and transmitting to the Provincial Secretary the summary statement prescribed by subs. 1 to 5 only when he wilfully authorizes or permits the default. The court held under the circumstances that the conduct of the secretary, who was a barrister and also a director of the company, and who was more in control than either of the other two directors, and whose office was the head office of the company, shewed that he wilfully permitted the default.

Seagram v. Pneuma Tubes, 44 D.L.R. 578, 43 O.L.R. 513.

(§ IV G—150)—LIABILITY OF OFFICER—ACTS BEYOND AUTHORITY—GIVING OPTION FOR SALE OF BUSINESS.

The managing director of a company is answerable in damages to an optionee, where, without authority, he gave an option for the sale of the assets of the company, leading the optionee to believe that he was empowered to do so.

Picard v. Revelstoke Saw Mill Co., 12 D.L.R. 685, 18 B.C.R. 416, 25 W.L.R. 98, 4 W.W.R. 1278.

(§ IV G—153)—CRIMINAL LIABILITY.

An officer of a company is criminally liable under art. 69 of the Cr. Code, providing, among other things, that everyone is a party to and guilty of an offence who does an act for the purpose of aiding any person to commit the offence, where on the strength of a false representation in a report made by him with intent to perpetrate the offence of obtaining credit by false pretences, goods were obtained on credit for the company.

Rex v. Amos Campbell, 5 D.L.R. 370, 23 Que. S.C. 400.

(§ IV G—155) — Officers' meetings — Changing number of directorate.

Where a board of directors consisting of three members were unanimous in deciding that the board should be increased to 7 members, but the resolution was not reduced to writing, a subsequent meeting of shareholders may confirm the directors' resolution although it was not in writing, by electing a directorate of 7 members. [Colonial Ass'ce Co. v. Smith, 4 D.L.R. 814, 22 Man. L.R. 441, and Kelly v. Electrical Construction Co., 16 O.L.R. 232, referred to.]

North West Battery v. Hargrave, 15 D. L.R. 193, 23 Man. L.R. 923, 26 W.L.R. 331, 5 W.W.R. 821 and 1002.

Where a bare majority of the directors of a company call a meeting of directors at a time that does not reasonably permit of the attendance of a full board, and not acting in a bona fide manner or in the interests of the company, but for the purpose of defeating shareholders in respect to resolutions to be considered at a company meeting, and for the purpose of retaining themselves in office, and altogether apart from any business investigation, the parties to whom the shares are issued will be restrained from making use of them in voting at such meeting. There is no difference between preventing a threatened issue of stock for improper purpose and the use of stock improperly issued and intended for improper control.

The Glace Bay Printing Co. v. Harrington, 45 N.S.R. 268.

Acts of directors—Internal management.

In the absence of deceit or fraud a joint stock company is bound by the act of its board of directors acting within the limits of their powers even when adopted at a meeting of the board irregularly convened. The company cannot set up a breach of its by-laws for governing its internal affairs to revoke a contract entered into between it and a third party in good faith.

Goulet v. Hydraulic Co. of Portneuf, 52 Que. S.C. 58.

Meetings—Quorum.

A director disqualified from voting upon a contract by reason of interest therein cannot be included in the number of directors necessary to constitute a quorum at the meeting at which the contract is made. One director cannot constitute a meeting.

Re D. & S. Drug Co., Donald's Claim (Alta.), 10 W.W.R. 612.

(§ IV G—156)—Meetings of officers—Outside of province of incorporation—Legality of.

Where meetings of members or directors of a company relate to the internal affairs of the company only or to transactions in the province of incorporation the mere holding of such meetings in another province is not carrying on business outside the boundaries of the province of incorporation in a manner that transcends the limitation to provincial objects imposed on the company by s. 92 of the B.N.A. Act. The receipt of applications for shares in the company and the issue of such shares to applicants may take place outside the province because such transactions do not of themselves involve extra-provincial objects. [Bonanza Creek Gold Mining Co. v. The King, 26 D.L.R. 273, [1916] 1 A.C. 566, discussed.]

Re Lands & Homes of Canada; Robertson's Case, 44 D.L.R. 325, 29 Man. L.R. 173, [1918] 3 W.W.R. 935.

(§ IV G—157)—Notice of.

The action of the board of directors of a company incorporated under the Imperial Companies Consolidation Act of 1908 in appointing a managing director is not invalid because two of the directors, who were temporarily in B.C., did not receive notice of the meeting, as the requirement as to notice will be reasonably construed so as to facilitate the efficient carrying on of the business of the company. The fact that the articles of association of a company provide for the payment of the traveling and hotel expenses of directors while attending meetings of the board, does not require that notice of meetings thereof to be held in England shall be given to directors who are temporarily in British Columbia.

Windsor v. Windsor, 3 D.L.R. 456, 21 W.L.R. 137.

Company funds—Preferred stock—Assembly—Notice—Loan.

A director of a company cannot complain on September 4, that he had not received notice of an assembly of the administrative council held April 9 preceding, at which it had been decided to borrow a sum of $7000 from a third party on the guarantee of preferred stock previously underwritten by this director, with the understanding that the company should use it to obtain capital.

Prudential Trust Co. v. Brodeur, 25 Rev. Leg. 335.

H. Promoters.

(§ IV H—161)—Promoters and incorporators—Liability for misrepresentations.

The prospectus is the basis of the subscription for company shares and the company issuing shares upon a subscription contract based upon a prospectus thereby adopts the prospectus although it was issued before the incorporation of the company; but where a person becomes one of the original incorporators there is no ratification by the company of any misrepresentation made by a promoter whereby a person was induced to become one of the incorporators and to join in the petition for the company's charter; each petitioner by signing the memorandum of incorporation becomes bound not only as between himself and the company, but as between

himself and the other persons who may become members. [Re Metal Constituents, [1902] 1 Ch. 707, followed.]

Buff Pressed Brick Co. v. Ford, 23 D.L.R. 718, 33 O.L.R. 264.

PROMOTERS—LIABILITY FOR SERVICES OF FELLOW PROMOTERS, HOW LIMITED.

In the absence of an express agreement, one of several promoters has no right of action against another for remuneration for promoting services, with respect to a projected company or corporation. [Holmes v. Higgins, 1 B. & C. 74, referred to.]

Van Hummell v. International Guarantee Co., 10 D.L.R. 306, 23 Man. L.R. 103, 23 W.L.R. 248, 3 W.W.R. 941.

AGREEMENT FOR ADVANCE TO COMPANY BY PROMOTER—PROCEEDS OF SALE OF PROMOTER'S SHARES.

A stipulation between the buyer and seller that the purchase price of shares in a company should be applied by the seller in accordance with his promotion agreement in reduction of certain liabilities against the assets of the company, with the intention that the seller should later be repaid by the company, is one which the buyer may have an interest in enforcing as affecting the value of the shares he is getting, and the court may therefore, in an action brought by the seller for the price, give effect to such stipulation by directing payment in accordance therewith of the balance for which judgment is entered in the seller's favour.

Lazier v. McCullough, 14 D.L.R. 270, 6 A.L.R. 503, 25 W.L.R. 911, varying 7 D.L.R. 851.

PROMOTERS—SALE TO TRUSTEES FOR COMPANY—LIABILITY.

An agreement for the sale of goods by a manufacturer to parties acting as trustees for a company about to be, and subsequently incorporated, creates no liability on their part to pay for the goods. Irregularities in the proceedings of incorporation of the company afford no ground for challenging its existence, after the certificate of incorporation has been made and delivered by the competent authority.

T. W. Hand Fireworks Co. v. Baikie, 43 Que. S.C. 325, affirming 39 Que. S.C. 227.

(§ IV H—162)—PROMOTERS—COMPENSATION FOR SERVICES BEFORE INCORPORATION.

A company is not liable to a promoter for services rendered or expenses incurred by him before its incorporation in promoting the company, unless after its incorporation it expressly agrees with him to make such payment, or such other facts exist from which the court can infer a new contract to reimburse him as by the acceptance of the benefit of the services. [Re National Motor Co., [1908] 2 Ch. 515, referred to.]

Van Hummell v. International Guarantee Co., 10 D.L.R. 306, 23 Man. L.R. 103, 23 W.L.R. 248, 3 W.W.R. 941.

(§ IV H—164)—SALES BY PROMOTERS TO CORPORATION.

Where shares in an incorporated company are issued to one of the promoters of the company in alleged consideration of the transfer to the company of patent rights which were already known to be of no real value to the company, the transaction may be declared a fraud upon the company and the promoter in whose name the shares remain may be held liable as a contributory upon a liquidation proceeding under the Winding-up Act, R.S.C. 1906, c. 144.

Re Winnipeg Hedge & Wire Fence Co., 1 D.L.R. 316, 22 Man. L.R. 83, 20 W.L.R. 337, 1 W.W.R. 853.

PROMOTERS—SALES BY, TO COMPANY.

Shares in a company may be declared to have been allotted illegally and the certificate in favour of a promoter may be cancelled where such shares represent an illicit profit made by him as a vendor to the company out of a transaction of pretended sale not properly disclosed to the company inasmuch as the prospectus issued with the privity of the promoter and in which the latter's personal interest should have been disclosed had contained a statement that there were no promoters' shares to lessen the public's dividends, if in fact the transaction was a mere scheme whereby three promoters divided amongst themselves the shares ostensibly allotted to one of them for releasing his claim to the property which the company was to buy from the other two, subject to the payment of the real purchase price of the property.

Fire Valley Orchards v. Sly, 17 D.L.R. 3, 20 B.C.R. 23, 28 W.L.R. 140, 6 W.W.R. 934.

PROMOTERS—SALES TO COMPANY—SECRET PROFIT.

A corporation which was one of the active promoters of a newly formed company, will not be permitted to make a secret profit from property purchased by it in the latter's behalf.

Graham Island Collieries v. Canadian Development Co. and H. R. Bellamy, 12 D.L.R. 316, 3 W.W.R. 817.

SALE OF RAILWAY TO A COMPANY BY ITS PROMOTERS—PURCHASE AUTHORIZED BY ITS INCORPORATING ACT — PROMOTERS THE ONLY SHAREHOLDERS.

Att'y-Gen'l for Canada v. Standard Trust Co. of New York, [1911] A.C. 498.

ILLEGAL DISPOSITION OF ASSETS—ACQUISITION BY SHAREHOLDER OF SHARES IN ANOTHER COMPANY—BREACH OF TRUST.

Chandler & Massey v. Irish, 23 O.L.R. 2[illegible], 20 O.W.R. 649, affirming 24 O.L.R. 513, 20 O.W.R. 75.

SALE OF PROPERTY TO COMPANY BY DIRECTOR —AGREEMENT WITH CODIRECTORS—DIVISION OF PURCHASE MONEY.

Bennett v. Havelock Electric Light Co., 20 O.W.R. 578.

MORTGAGE TO BANK—DEPOSITS IN CURRENT ACCOUNT—APPROPRIATION OF PAYMENTS—EXECUTION OF MORTGAGE—PROPER OFFICERS.

Canadian Bank of Commerce v. Smith, 17 W.L.R. 135.

DIRECTOR—REMUNERATION—ONTARIO COMPANIES ACT, 1907, s. 88.

Re Morlock and Cline; Sarvis and Canning's Claims, 23 O.L.R. 165, 18 O.W.R. 545.

BY-LAW TO CHANGE NUMBER OF DIRECTORS—ELECTION OF DIRECTORS UNDER SUCH BY-LAW.

Sherker v. Rudner, 39 Que. S.C. 44.

ESTOPPEL—IRREGULARITIES IN ISSUE OF BONDS—BONA FIDE HOLDER FOR VALUE.

Veilleux v. Atlantic & Lake Superior Railway Co. & De Frieze, 39 Que. S.C. 127.

PROMOTION EXPENSES—SHARES GIVEN IN PAYMENT — DIRECTORS — SHARES FOR ACTING AS DIRECTORS.

Rose v. British Columbia Refining Co., 16 B.C.R. 215, 18 W.L.R. 299.

CONFESSION OF JUDGMENT—COMPANY DEFENDANT.

Rondeau v. Bishop Construction Co., 12 Que. P.R. 307.

V. Capital; stock and stockholders.

A. IN GENERAL; ISSUE OF STOCK.

(§ V A—165)—DIRECTORS—PROPOSED ALLOTMENT OF UNISSUED SHARES OF AUTHORIZED CAPITAL BY DIRECTORS TO THEMSELVES—MEANS OF GAINING CONTROL OF AFFAIRS OF COMPANY—RIGHTS OF OTHER SHAREHOLDERS—RESOLUTION OF DIRECTORS—DECLARATION OF INVALIDITY—INJUNCTION.

The defendant company was incorporated in 1912 under the Ontario Companies Act, with an authorised capital stock of $150,000, divided into 1,500 shares of the par value of $100 each, but only 1,208 shares had been issued. The plaintiff, a director, was the registered holder of 458 of these, and had agreed to buy 150 shares from another shareholder; which would give him a majority of the issued shares. At a meeting of the directors held in Oct. 1918, a resolution was passed (the plaintiff voting against it) that "the balance of the shares capital of the company unissued be offered to the shareholders at par. This offer to remain open for 20 days." There were five directors, and all were present at the meeting. The president then asked each one present how many shares he would take. Two asked for 10 each, one for 100, and one for 50—these numbers bearing no fixed relation to their previous holdings. The plaintiff said he would take his proportion based upon his holding of 608 shares. This was not conceded; the plaintiff was offered 98 shares, which he refused. The directors then passed a resolution (the plaintiff voting against it) that the applications for the shares be accepted and that certificates be issued accordingly. The plaintiff, suing on behalf of himself and all shareholders other than the individual defendants, brought this action against the company, his four codirectors, and another shareholder who was to get some of the shares, to restrain them from making the allotment:—Held, that the purpose of the defendant directors in all they did was to deprive the plaintiff of the controlling position which he had acquired—they were making a one-sided allotment of shares with a view to the control of the voting power. Although the shares were not actually shares of new stock, they were practically in that position. No shares had been issued for a long time; the company had been carrying on a successful business with the capital it had; the readily saleable assets were apparently worth three or four times the par value of the issued shares, and each shareholder was justified in considering that he had an interest in these assets proportionate to his holding of the issued shares. To do something which would alter those proportions, to do it without giving to each shareholder an opportunity of protecting his interest, and to do it, not in the usual course of the company's business, but for the purpose of shifting from one body of shareholders to another the power of electing directors and so of controlling the company's policy, was beyond the powers of the directors. [Martin v. Gibson, 15 O.L.R. 623, applied and followed; Harris v. Sumner (1909), 39 N.B.R. 204, considered.] The second resolution passed at the meeting of the directors in October, 1918, was adjudged void, and the defendants were enjoined from acting thereon.

Bonisteel v. Collis Leather Co., 45 O.L.R. 195.

CAPITAL—STOCK AND STOCKHOLDERS.

A resolution of directors ratifying and confirming issues of stock will be restricted to shares issued previously to the date of the requisition calling the meeting at which the resolution approving such issue is passed, and will not be effective in confirming shares issued subsequently to the date of such requisition.

The Glace Bay Printing Co. v. Harrington, 45 N.S.R. 276.

CONTRACT—SALE OF SHARES IN MINING COMPANY—DELIVERY "WHEN STOCK SHALL BE ISSUED"—STOCK HELD BY DIRECTORS UNDER POOLING AGREEMENT—KNOWLEDGE OF PARTIES—ORAL EVIDENCE TO EXPLAIN WRITTEN AGREEMENT—AMBIGUITY—ORAL EVIDENCE OF CONDITION—ACTION BY VENDEE FOR SPECIFIC PERFORMANCE OF AGREEMENT OR DAMAGES FOR BREACH—LACHES—PROSPECTUS—ABSENCE OF —ACT RESPECTING PROSPECTUSES ISSUED BY COMPANIES, 6 EDW. VII. c. 27 (O.)—APPLICATION OF —PLEADING—AMENDMENT.

Brown v. Crawford, 16 O.W.N. 370.

PRINCIPAL AND AGENT—SALE BY AGENT OF SYNDICATE OF BLOCK OF SHARES IN MINING COMPANY—AGENT HIMSELF BECOMING PURCHASER OF PORTION OF SHARES—KNOWLEDGE OF MEMBERS OF SYNDICATE—RATIFICATION — EVIDENCE — ONUS—BONA FIDES—DISCLOSURE—DECEIT—MISREPRESENTATIONS — ELECTION — ACCOUNT—LIABILITY FOR SHARES LOST BY AGENT — TRUSTS AND TRUSTEES — JUDGMENT — DECLARATION — COSTS — COUNTERCLAIM—APPEAL.

Foster v. Oakes, 17 O.W.N. 250.

INDUSTRIAL CONCERN—TRANSFER TO, OF SECRET PROCESS—SALE OF ASSETS—ISSUE OF SHARES TO VENDOR IN PAYMENT—CONTRACT—HALF INTEREST IN SHARES—AGENT—COMMISSION.

Cowie v. Baguley, 16 O.W.N. 231.

DIRECTORS—ISSUE OF NEW SHARES—INVALIDITY—PREVIOUS AGREEMENT TO ALLOT SHARES IN CONSIDERATION OF FINANCIAL AID — AGREEMENT WITH DIRECTOR NOT BINDING ON COMPANY—CONTROL OF COMPANY—ELECTION OF DIRECTORS.

Swayze v. Grobb, 8 O.W.N. 316.

TITLE TO SHARES—CONTRACT—TRUST—PAROL EVIDENCE—COLLATERAL TRANSACTION—COSTS.

McConnell v. Murphy; Patton v. Murphy, 7 O.W.N. 812, 8 O.W.N. 409.

AGREEMENT BETWEEN PROMOTERS—GOODS SUPPLIED TO BE PAID FOR IN SHARES OF COMPANY'S STOCK—RECOGNITION BY COMPANY—REPRESENTATIONS—ISSUE OF SHARES—CLAIM AGAINST COMPANY FOR PRICE OF GOODS—ASSIGNMENT OF CHOSE IN ACTION—CONVEYANCING AND LAW OF PROPERTY ACT, R.S.O. 1914, c. 109, s. 49—ASSIGNMENT SUBJECT TO EQUITIES.

Abbott v. St. Catharines Silk Co., 12 O.W.N. 35.

SALE OF SHARES ACT—DEBENTURES—FLOATING CHARGE—CERTIFICATE.

An application for a certificate under the Sale of Shares Act, c. 15, 1916, allowing the sale of certain debentures issued by a company and secured by a floating charge upon all the assets of the company, excepting uncalled capital stock, refused on the grounds that the security of such stock was not included, and that, as the charge did not fasten on ascertained and specific property, there was nothing to prevent the company from issuing a second series of debentures secured by a legal mortgage upon specific property which would rank in priority to the floating charge, or creating by a trust deed a charge on specific property, or from creating specific mortgages which would rank in priority to the floating charge; [Re London Pressed Hinge Co., [1905] 1 Ch. 576, distinguished on the ground that the debenture therein provided against the granting of prior securities] and because the debenture itself placed no restriction upon the amount of debentures which might ultimately be issued, and the debenture holders had evidently no legal right to prevent future issues.

Re Sale of Shares Act; United Grain Growers Case (Sask.), [1918] 3 W.W.R. 92.

ONE MAN CORPORATION —SALE OF STOCK—VALIDITY—CREDITORS.

Under English law, as laid down by the Privy Council, a company composed of a single shareholder, the others only sending their names, can legally exist, and a sale made by him personally to such company of his business, in consideration of the grant of the whole capital stock, is legal, if it is not fictitious and fraudulent. The purchase of the capital stock of a company for a fixed price and the payment of the whole price to the vendor, without retaining the amount due to the creditors according to the list attached to the deed of sale, creates a presumption of simulation sufficient, under the circumstances, to throw upon the vendor the obligation of proving that, subsequently at least, other persons became shareholders of the company, and of explaining the understandings which must necessarily have taken place between the company and the vendor's creditors.

Trahan v. Painchaud, 53 Que. S.C. 445.

(§ V A—167)—CAPITAL STOCK—INCREASE—VOTING.

When the letters patent fix the capital stock at a certain amount and do not include any clause permitting the shareholders to increase such capital and such capital has been increased without the issuing of supplementary letters patent; a resolution voted on by the holders of the additional shares, even although the majority were original shareholders, is illegal and void.

Courchene v. Viger Park Co., 23 D.L.R. 693, 24 Que. K.B. 97.

(§ V A—168) — CAPITAL STOCK — BONUS SHARES.

The issue of paid up shares of stock to the promoters of a stock company, otherwise than for value, is a breach of trust on the part of the directors, and the company or its creditors are entitled to have such shares treated as not paid up, unless they are in the hands of a bona fide holder for value without notice of the facts, or perhaps unless they are in the hands of persons who though they have notice themselves, derived their title through a bona fide holder for value without notice, or unless the company is otherwise precluded from shewing that they have not been paid up. [Lindley on Companies, 6th ed., 548, specially referred to.]

Colonial Ass'ce Co. v. Smith, 12 D.L.R. 113, 23 Man. L.R. 243, 24 W.L.R. 105, 4 W.W.R. 295.

BONUS STOCK.

A company organized under the Ontario Companies Act, R.S.O. 1897, c. 191, cannot issue shares of capital stock at a discount or as a bonus. [Ooregum Gold Min-

ing Co. v. Roper, [1892] A.C. 125, and Welton v. Saffery, [1897] A.C. 299, followed.]

Re McGill Chair Co; Munro's Case, 5 D.L.R. 73, 26 O.L.R. 254, 21 O.W.R. 921.

BONUS STOCK—ILLEGAL ISSUE—EFFECT ON BOND SUBSCRIPTION.

Where a company, as a special inducement to subscribers for its debentures, offers a bonus of common stock, such inducement is an essential and important consideration of the contract; and, therefore, if such issue of stock is null and illegal, the underwriting agreement itself becomes void.

Dorchester Electric Co. v. King; Same v. Thomson; Same v. Industrial Securities Co., 24 D.L.R. 373, 48 Que. S.C. 471, 22 Rev. de Jur. 27.

(§ V A—169)—PREFERRED STOCK—ISSUE OF —BASIS FOR CERTIFICATE.

Where a company's articles of association enable it to issue new shares under the authority of a special resolution and to divide them into classes and make some preferential with the like authority, a certificate issued as for preference shares issued without any such resolution and therefore without the requisite authority by the secretary or president has not the effect of creating or allotting preference shares. [Koffyfontein Mines v. Mosely, [1911] A.C. 409; Re Pakenham Pork Packing Co., 12 O.L.R. 100, applied.]

Re Bankers Trust Co. & Barnsley, 19 D.L.R. 590, 29 W.L.R. 479, 7 W.W.R. 171.

(§ V A—170)—FRACTIONAL SHARES.

A company organized under the Ontario Companies Act, R.S.O. 1897, c. 191, is not empowered to allot half shares of stock, and a person to whom the company purported to allot two and one-half shares is liable for two shares only.

Re McGill Chair Co; Munro's Case, 5 D.L.R. 73, 26 O.L.R. 254, 21 O.W.R. 921.

B. SUBSCRIPTIONS.

(§ V B—175)—RIGHT TO REPUDIATE—LACHES.

The right to repudiate a subscription for shares on account of misrepresentation or because of nondelivery of a copy of the prospectus as required by the Ontario Companies Act (6 Edw. VII. c. 27, s. 3), must be exercised promptly and will not be accepted as a defence where there has been unreasonable delay in approving or repudiating.

Morrisburgh & Ottawa Electric R. Co. v. O'Connor, 23 D.L.R. 748, 34 O.L.R. 161.

REPUDIATION—NOTICE.

A distinct and unequivocal repudiation of a company share subscription where the subscriber is entitled to repudiate, need not be by the institution of proceedings to set aside his subscription; a notice of repudiation given to the directors may be sufficient for the purposes of a winding-up under the Companies Winding-up Ordinance, 1903, sess. 1, c. 13, if given before the winding-up proceedings had commenced. [Reese River Silver Mining Co. v. Smith, L.R. 4 H.L. 64, applied; Re Scottish Petroleum Co., 23 Ch. D. 430, dissenting from; Oakes v. Turquand, L.R. 2 H.L. 325, discussed; Re Retailer Merchants Assn., 15 D.L.R. 890, overruled.]

Re Western Canada Fire Ins. Co., 22 D.L.R. 19, 8 A.L.R. 348, 30 W.L.R. 648, 7 W.W.R. 1365.

NONALLOTMENT — MISREPRESENTATION — MATERIALITY.

An underwriting subscriber for company shares which were not to be allotted until bills of exchange given by him for the shares were fully paid, cannot plead non-allotment as a defence to an action by the liquidator of the company on the bills of exchange; neither can he plead misrepresentation in inducing the subscription where the misrepresentation did not play a material part.

Canada Food Co. v. Stanford, 28 D.L.R. 689, 50 N.S.R. 252.

SUBSCRIPTION NOTE—MISREPRESENTATION—REMEDY.

Liability on a promissory note, given for company shares, cannot be evaded on the ground that the note had been obtained on a representation which was never fulfilled; the remedy in such case, if any, is by an action or counterclaim for damages for breach of warranty.

Graver Tank Works v. Morris, 28 D.L.R. 696, 26 Man. L.R. 452, 34 W.L.R. 696.

STOCK — SUBSCRIPTION — AGENT'S UNTRUE STATEMENT—VALIDITY.

An untrue statement by an agent of a company who was employed to solicit subscriptions to its capital stock, made to one who becomes a subscriber, constitutes a fraud with respect to such person which cancels the subscription. A subscription to the capital stock of a company only binds the subscriber upon the company's acceptance of it, followed by an allotment in the manner provided by the charter or rules of the company. [Nasmith v. Manning, 5 Can. S.C.R. 417; Pellatt's Case, L.R. 2 Ch. 527, and Common v. Matthews, 8 Que. Q.B. 138, followed.]

Robertsonville v. Bilodeau, 46 Que. S.C. 5.

SUBSCRIBERS' AGREEMENT.

A memorandum to become a shareholder in a company to be formed is an agreement between each subscriber and the others, and not between the subscribers and the promoters, and still less between them and the company, which has yet no legal existence.

Bergeron v. LaCompagnie De Jonquiere, 22 Que. K.B. 341.

ALLOTMENT—LIABILITY—FRAUD.

A subscription for shares in a joint stock company constitutes an offer on the part of the subscriber to become a shareholder of the company and from the time it is accepted and the subscriber notified of its acceptance the contract is formed and the

parties are bound. The acceptance may be made by the allotment of the shares subscribed for or by other equivalent acts. If the subscriber signs the subscription book and pays for his shares in money or by a note, and such payment is accepted by the company, an allotment of the shares is not necessary to the validity of the contract. A shareholder cannot demand a certificate for his shares so long as they are not paid for in full. A subscriber for shares cannot plead to an action upon a note given in payment for his subscription, and transferred by the liquidator of the company to the plaintiff, that his subscription was obtained under false pretences and by fraudulent means, especially when he has never demanded its cancellation by the company before it was put in liquidation.

Boulet v. Hudon, 51 Que. S.C. 29.

SALE OF SHARES—UNDERTAKING TO RESELL OR REPURCHASE—FRAUD—EVIDENCE—DAMAGES—RESCISSION—POWER OF COMPANY—COSTS.

The plaintiffs, two elderly spinsters, paid to the defendants, a company incorporated under the laws of Ontario, and S., who was the president of the company, certain sums of money, upon agreements executed by the company and S. personally, in the following or similar terms: "In consideration of . . . 8500 received, . . . from Miss M.W. and Miss H.W. . . . by the (company), in full payment of 5 shares of the par value of 8500, we hereby guarantee that, at any time after one year from the date hereof, upon receiving 60 days' notice in writing that said Miss M.W. and Miss H.W. . . . wish to dispose of their holdings in our company, we will resell or repurchase said 5 shares of the par value of 8500 at par with . . . interest . . ." The plaintiffs became the holders of certificates for the stock of the company. They brought this action against the company and S. alleging fraud, misrepresentation, and other grounds for relief and claiming to recover the moneys they had paid. The writ of summons was specially endorsed; the defendant S. did not appear; and the plaintiffs entered final judgment against him for the sums paid by them and interest. As against the company, the action proceeded to trial, and it was held:—(1) That the plaintiffs could not recover damages for deceit; actual fraud had not been proved; but, if it had been, the plaintiffs, having taken final judgment against S., upon the contracts in respect of the shares, could not both affirm and repudiate them; the judgment against S. could have been only upon the claim upon the contracts; and the question whether a claim for damages for deceit, against several defendants, is merged in a final judgment upon it against one of them, did not arise. (2) That, for the like reasons, the plaintiffs could not succeed upon a claim to set aside the transactions on the ground of actual fraud. (3) That the plaintiffs' claim to set aside the transactions on the ground of misrepresentation without actual fraud failed for want of proof of misrepresentation; and the election of the plaintiffs to affirm and enforce the contracts defeated a claim to set them aside. (4) That the plaintiffs could not enforce against the company the agreements to resell or purchase; for such agreements were ultra vires of the company. [Helwig v. Siemon (1916), 10 O.W.N. 29, followed. Edwards v. Blackmore, 42 D.L.R. 280, 42 O.L.R. 105, referred to.] (5) That the plaintiffs could not recover from the company the moneys paid upon the allegation that they were moneys lent to the company. Semble, that, if the plaintiffs had not affirmed the transactions, they would have been entitled to relief upon another ground: the company, if they failed to become bound according to the terms upon which they were to get the money, could not retain it; when an essential part is omitted, there is no contract. [Morris v. Baron & Co., [1918] A.C. 1, followed.] The action as against the company was dismissed, but without costs.

Ward v. Siemon, 43 O.L.R. 113.

SHARES—SUBSCRIPTION—SUBSCRIBER ACTING AS DIRECTOR—WAIVER OF NOTICE OF MEETING—LACK OF PROSPECTUS—STATUS OF ORIGINAL SUBSCRIBER.

Fort William Commercial Chambers v. Braden, 16 D.L.R. 864, 6 O.W.N. 24. [Affirmed, 7 O.W.N. 679.]

SHARES—SUBSCRIPTION FOR—ALLOTMENT—ACCEPTANCE—ELECTION OF SUBSCRIBER AS DIRECTOR—ACTING AS SHAREHOLDER AND DIRECTOR—ACTION FOR CALLS—LIABILITY.

Fort William Commercial Chambers v. Perry, 6 O.W.N. 41.

INDUCEMENT TO BUY COMPANY SHARES—PROOF OF FRAUD—EVIDENCE—COSTS.

Smith v. Haines, 8 O.W.N. 235.

(§ V B—176)—STOCK—ALLOTMENT—PARTIAL PAYMENT.

The allotment of shares in a company is evidenced by production of the minute book of the directors' meeting moving a resolution allotting stock to the different persons whose names appear in the list set out in the minutes and a contract is completed on posting the notice of allotment. [Re Imperial Land Co., L.R. 7 Ch. 587; Household Fire Ins. Co. v. Grant, L.R. 4 Ex. D. 216, referred to.]

North West Battery v. Hargrave, 15 D.L.R. 193, 23 Man. L.R. 923, 26 W.L.R. 331.

WHEN BINDING—ALLOTMENT OF SHARES.

A promissory note given for shares in a company not yet incorporated is an offer to take shares when the company becomes incorporated; to constitute a binding contract there must be an acceptance of this offer by an allotment of the shares applied

for and a notice to the applicant of such allotment.

Morse Co-operative Supply Co. v. Coates, 38 D.L.R. 92.

CAPITAL STOCK—SUBSCRIPTION—ALLOTMENT —FORFEITED AND CANCELLED SHARES.

Where a company accepted an application for a definite number of shares not specifically identified or ear-marked, and gave due notice of the allotment thereof made at the directors' meeting, the subscriber cannot repudiate the contract because of the tender to him of shares previously allotted to another and while the company claimed had been cancelled as forfeited and contest in an action for the price the regularity of the forfeiture, if the company always had other shares available to give the applicant in their stead and was willing to do so.

Graham Island Collieries Co. v. Macleod, 16 D.L.R. 281, 6 W.W.R. 154, 27 W.L.R. 227, 6 W.W.R. 154, affirming 11 D.L.R. 838.

STOCK—SUBSCRIPTION COMPLETE AND BINDING.

As soon as a proposed purchaser of company shares signs the memorandum and the articles of association, and these are registered as required by the Companies Act, R.S.S. 1909, c. 72, he and his fellow subscribers become a body corporate, and his agreement to take shares becomes binding without further formality under s. 13 of the Act.

Albert Improvement Co. v. Peverett, 17 D.L.R. 314, 7 S.L.R. 99, 27 W.L.R. 801, 6 W.W.R. 709.

SALE OF SHARES—RELIANCE ON MISREPRESENTATIONS—PURCHASER'S PRIOR STATEMENT.

A subscriber for shares is not precluded from questioning the truth of statements contained in a company prospectus by an admission made by him before subscribing for his shares, to the effect that he was not influenced by anything contained in the prospectus, where he afterwards gave his subscription in reliance on false statements in the prospectus and oral misrepresentations by an agent of the company. [Aaron Reefs v. Twiss, [1896] A.C. 273, 280; Edgington v. Fitzmaurice, 55 L.J. Ch. 650, 653; and Peek v. Derry, 37 Ch. D. 541, 584, specially referred to.]

Pioneer Tractor Co. v. Peebles, 15 D.L.R. 275, 6 S.L.R. 339, 26 W.L.R. 503, 5 W.W.R. 989. [Affirmed, 18 D.L.R. 477, 7 S.L.R. 322. See 8 W.W.R. 632.]

ACTION FOR PRICE OF SHARES—TENDER OF SHARES—EXCEPTION.

Abitibi Power & Paper Co. v. Smart, 20 D.L.R. 977.

ALLOTMENT OF SHARES—RESOLUTION.

The allotment of shares among subscribers, by a resolution of the directors of a joint stock company, is not necessary where each of them has subscribed for a stated number of shares.

Pineau v. St. Laurent, 25 Que. K.B. 210.

WHEN SUBSCRIPTION COMPLETE AND BINDING.

A party who subscribes the memorandum that accompanies the petition for the incorporation of a company, under art. 6008 R.S.Q. 1909, becomes, by the issuing of the letters patent, a shareholder of the incorporated company for the amount of his subscription, and no further allotment of shares to him is required.

Bergeron v. La Compagnie De Jonquiere, 22 Que. K.B. 341.

WHEN SUBSCRIPTION BINDING—ALLOTMENT —ASSIGNABILITY.

The subscription for a share in a joint stock company which has not yet been accepted nor alloted does not form a complete contract, but is only an offer or a promise to buy. The subscription is not transferable and can be revoked. There is no privity of contract between the subscriber for a share and the person to whom he has transferred it before acceptance and allotment by the company.

Duclos v. Bilodeau, 47 Que. S.C. 205.

SUFFICIENCY OF ACCEPTANCE—PAYMENT.

Generally a shareholder who wishes to purchase shares in a joint stock company does not become shareholder by the offer alone that he makes of the latter; it is necessary that the company should accept this offer. But it is not necessary that the acceptance should be formal; it is sufficient that there be a manifestation of the intention to accept on the part of this company and this acceptance may be legally proved. When a subscription for privileged shares in the capital of a company has been made on the condition that the subscriber would obtain in addition a certain number of common shares it is not necessary for the company, before taking action for the amount subscribed, to make an actual offer of the latter shares and deposit the certificates in court; it is sufficient for it to declare itself ready to deliver them upon payment. Although generally the subscriber for shares is not obliged to pay for them before being requested, he can nevertheless undertake, in his contract for subscription, to pay at specified dates.

Forget v. Cement Products Co., 24 Que. K.B. 445, affirming 46 Que. S.C. 351. [Affirmed by the Privy Council, 28 D.L.R. 717.]

APPLICATION FOR SHARES—OFFER AND ACCEPTANCE—SUFFICIENCY OF ACCEPTANCE.

Where an offer to purchase shares in a company is duly made to the company and by the subsequent conduct of the parties the offeror becomes aware that the offer has been accepted by the company, then the usual requirements of a binding contract have been complied with. [Hill's case 10 O.L.R. 501; Denison v. Lesslie, 3 O.A.R. 536; Nichol's case, 29 Ch. D. 421 and 439; In re Scottish Petroleum Co., 23 Ch.D. 413; North West Battery v. Hargrave, 5 W.W.R. 1002; Higginbotham's case, 12 O.L.R. 100; Re Canadian Tin Plate Decor-

ating Co., Morton's case, 12 O.L.R. 594, referred to.]

Re Winding-up Act & Canadian etc., Tractor Co., 7 W.W.R. 562.

SUFFICIENCY OF ALLOTMENT—JOINT SUBSCRIBERS.

A. and B. applied for shares in a company in the following terms: "I hereby subscribe for and request you to allot me five shares of stock," etc., both signing the one application. The minute-book of the company shewed that the directors allotted five shares to B. only, although five shares were entered in the share ledger to A. and B. jointly, and a share certificate for five shares was issued to them jointly, but never delivered, being held by the company pending payment for the shares in full. Subsequently the company went into liquidation, and A. and B. were both placed upon the list of contributories by the registrar, whose report was affirmed by the court:—Held, on appeal, that as there was no allotment of shares to A., there was not a concluded contract as between A. and the company, and A's name must be removed from the list of contributories.

Re Federal Mortgage Corp. and Kipp, 24 B.C.R. 12.

(§ V B—177)—SUBSCRIPTIONS—RECEIPT OF COPY OF PROSPECTUS AS CONDITION PRECEDENT—ALBERTA COMPANIES ACT.

Where the company comes within the terms of s. 57a of the Alberta Companies Ordinance as enacted by c. 5 of statutes of 1909, s. 1, prescribing that a prospectus must be filed, the provisions of subs. 3 of the new s. 57a, invalidating every stock subscription and relieving the subscriber unless he shall have received a copy of the prospectus, will be construed strictly as a condition precedent to a valid subscription, and the statute cannot be defeated by the failure of the company to issue or file any prospectus whatever. [Re London Marine Ins. Assn. (Smith's case), L.R. 4 Ch. App. 611, specially referred to.]

Re Retailer Merchants Assn., 15 D.L.R. 890, 7 A.L.R. 322, 27 W.L.R. 50, 5 W.W.R. 1221.

STOCK—CONDITIONS TO SUBSCRIPTION—SEAL, EFFECT.

That an application for shares in a company is under seal does not dispense with the necessity of the company doing something to indicate its acceptance and communicating such acceptance to the applicant to make a complete contract. [Re Provincial Grocers, 10 O.L.R. 705; Nelson Coke & Gas Co. v. Pellatt, 4 O.L.R. 481, referred to.]

North West Battery v. Hargrave, 15 D.L.R. 193, 23 Man. L.R. 923, 26 W.L.R. 331, 5 W.W.R. 821 and 1002.

CONDITIONS TO SUBSCRIPTION.

The effect of s. 57a of the Companies Ordinance, C.O. 1898, c. 61, as amended 1909, c. 5, is to make voidable a subscription for a stock obtained by verbal representations to the subscriber where he has not received a copy of the prospectus, such being the effect of the words "no subscription, etc., shall be binding upon the subscriber," which do not imply that the contract shall be absolutely void and incapable of ratification.

Re Western Canada Fire Ins. Co., 22 D.L.R. 19, 8 A.L.R. 348, 30 W.L.R. 648, 7 W.W.R. 1365.

CONDITIONS TO SUBSCRIPTION.

An applicant or subscriber for shares in a joint stock company may validly stipulate that his subscription will only take effect in the event of the company finding other bona fide subscribers for a given number of shares.

Edge v. Security Life Ins. Co., 8 D.L.R. 492.

(§ V B—178)—CANCELLATION OR RELEASE.

One who accepts shares of company stock as a bonus cannot, upon discovering their illegality, have their allotment cancelled on the ground that they were issued under a mistake of fact, since, if there was any mistake, it was one of law. [Ex p. Sandys, 42 Ch. D. 98; Welton v. Saffery, [1897] A.C. 299, and Re Cornwall Furniture Co., 20 O.L.R. 520, followed; Burkinshaw v. Nicolls, 3 App. Cas. 1004, distinguished.]

Re McGill Chair Co; Munro's Case, 5 D.L.R. 73, 26 O.L.R. 254, 21 O.W.R. 921.

INFERENCE OF ALLOTMENT—PAYMENT.

An allotment of stock pursuant to an application for the same can be shewn by inference and implication as well as by express words. Subsequent payments made on account of the stock, and acceptance thereof by the company, constitute an inference that the applications had been accepted and stock allotted. [Companies Ordinance (Alta.), s. 108 (4), N.W.T. Ord. 1911, c. 61.]

Pierson v. Egbert, 29 D.L.R. 569, 34 W.L.R. 1039, 10 W.W.R. 321, affirming 28 D.L.R. 759, 34 W.L.R. 256. [Affirmed by Can. Supreme Court, [1917] 2 W.W.R. 1175.]

CAPITAL STOCK—ILLEGAL ISSUE AT DISCOUNT—CANCELLATION.

It is competent to a company, upon discovering that it has, under a mistake of law, been illegally issuing its shares at a discount, to return the subscriptions and cancel the allotment, and the issue of stock so made.

Re Matthew Guy Carriage and Automobile Co. (Thomas's Case), 1 D.L.R. 642, 3 O.W.N. 902, 21 O.W.R. 842.

REPUDIATION OF SUBSCRIPTION—LIABILITY AS CONTRIBUTORY.

An allottee of shares who has received notice of the allotments, and delays to exercise his right of repudiation until after the winding-up of the company, may be held liable as a contributory.

Barrett v. Bank of Vancouver (B.C.), 36 D.L.R. 158, 24 B.C.R. 241, [1917] 3 W.W.R. 53.

SUBSCRIPTION FOR SHARES—CONTRIBUTORY —ALLOTMENT MADE AND NOTIFIED TO SUBSCRIBER—ATTEMPT TO SHEW, AFTER WINDING-UP ORDER, THAT SUBSCRIPTION MADE UPON CONDITIONS NOT FULFILLED —ORAL VARIATION OF WRITTEN APPLICATION — MISTAKE OR MISREPRESENTATION.

Re Monarch Bank; Simon's Case, 14 O.W.N. 295. [Affirmed, 16 O.W.N. 171.]

CANCELLATION OF STOCK—ILLEGAL ISSUE—WANT OF CONSIDERATION.

Shares belonging to the original subscribers who have applied for and obtained letters patent incorporating the company, cannot be annulled by the court on the ground that they were obtained illegally and without consideration.

Giguère v. Colas, 48 Que. S.C. 198.

MISREPRESENTATION—CANCELLATION OF SUBSCRIPTION—ACTION BY LIQUIDATOR FOR DECLARATION OF INVALIDITY OF MORTGAGE MADE BY COMPANY—FRAUD PRACTISED UPON INDIVIDUAL SHAREHOLDERS —INABILITY TO MAKE RESTITUTION.

McAndrew v. Nagrella Mfg. Co.; Moncur v. Ideal Mfg. Co., 37 O.L.R. 361.

COMPANY — WINDING-UP — CONTRIBUTORY —EVIDENCE OF BOOKS AND DOCUMENTS —ENTRIES AND WRITINGS TO SHOW ONE A SHAREHOLDER CROSSED OUT AND STOCK CERTIFICATE CANCELLED — PRESUMPTION THAT PROPER STEPS FOR CANCELLATION TAKEN AND THAT SAME WERE JUSTIFIED—VALIDITY OF COMPROMISE OF CANCELLATION OF SHARES ON BONA FIDE DISPUTE AS TO THEIR HOLDING.

Application by liquidator to place a name on the list of contributories refused because from certain books and documents, being the only evidence produced, it appeared that while entries and writings had at one time been made (including stock certificate) to show the person in question to be a shareholder, there had been subsequent crossing out of certain of such entries and writings and a cancellation of shares, and a repayment of money paid for shares, and it was held that, in the absence of evidence to the contrary, the court must presume that all the steps and proceedings necessary to bring about or authorize the cancellation were taken and that reasons to justify same existed. Where there is a bona fide dispute concerning the validity of the holding, or the contract to take, shares, a company may compromise and may bona fide cancel the stock in question.

Re Alta. Loan & Investment Co.; Dr. Lafferty's Case, [1919] 1 W.W.R. 603.

SUBSCRIPTIONS — ALLOTMENT OF SHARES — INFERENCE—PAYMENT.

On an appeal by the defendants from the judgment of the Appellate Division affirming the judgment of Walsh, J., in favour of the plaintiffs in actions under s. 108 (4) Companies Ordinance, for the return of moneys paid to them on applying for shares in a company:—Held, that the judgment appealed from should be affirmed for the reasons given by the trial judge and affirmed by the Appellate Division.

Pierson v. Crystal Ice Co., [1917] 2 W.W.R. 1175, 1253, affirming 29 D.L.R. 569, 34 W.L.R. 1039; 10 W.W.R. 321, 28 D.L.R. 759, 34 W.L.R. 256.

(§ V B—180) — BANKS — SHARES — SUBSCRIPTION — PROMISSORY NOTE — DEMAND FOR PAYMENT—NOTICE OF ALLOTMENT — AGENT SOLICITING — CONDITION SUBSEQUENT.

Assuming that allotment and notice of allotment are necessary to bind a bargain to take shares of stock in a bank, for which a promissory note payable on demand has been given, the allotment having been made, a written demand for payment of the note is sufficient notice. If the agreement to take shares was made upon the condition that the subscriber should be appointed to some local office in management of the bank and that his account should be taken over by the bank, such undertaking being that of the person who solicited and made the agreement for the bank the condition was a condition subsequent and was no defence to a claim for payment for the shares.

Re Monarch Bank of Canada; Murphy's Case, 48 D.L.R. 588, 45 O.L.R. 412.

STOCK SUBSCRIPTIONS—PAYMENT BY PROMISSORY NOTE.

Where a promissory note was given for an original subscription to the stock of a company in payment for the stock, the liquidator, on the winding-up of the company, cannot place the name of the maker of the note upon the list of contributories, where the note had been transferred by the company to a bona fide holder.

Re Stewart, Howe & Meek, 9 D.L.R. 484, 4 O.W.N. 506, 23 O.W.R. 852.

MODE OF PAYMENT — STATUTORY REQUIREMENTS—WATERED STOCK.

Under the Quebec Companies Act no issue of stock not paid for in cash is legal unless a contract be filed with the provincial secretary at or before the issue thereof shewing that payment in a form other than cash had been sanctioned. Under the Quebec Companies Act stock issued direct from the treasury of a company without being paid for in cash is watered stock and therefore illegally issued and void even though it be claimed that such stock represents the increased value of the company's property.

Dorchester Electric Co. v. King; Same v. Thomson; Same v. Industrial Securities Co., 24 D.L.R. 373, 48 Que. S.C. 471, 22 Rev. de Jur. 27.

PAYMENT.

An allotment of shares of capital stock offered for public subscription is not void but voidable only, for noncompliance with the Ontario Companies Act, 7 Edw VII.

c. 34, s. 106 (now 2 Geo. V. c. 31, s. 110), as regards payment to and receipt by the company of the deposits with applications for shares to the extent of the minimum subscriptions required for organization. [Finance & Issue v. Can. Produce Corp., [1905] 1 Ch. 37, applied by Court below.]

Boeckh v. Gowganda Queen Mines, 8 D.L.R. 782, 46 Can. S.C.R. 645, affirming 24 O.L.R. 293.

ALLOTMENT OF SHARES—CONSIDERATION.

Shares in a company allotted to a promoter for profits, which in fact belonged to the company, are not "paid up" and nominees of the promoter in respect of these shares are liable as shareholders.

Re Owen Sound Lumber Co., 33 D.L.R. 487, 38 O.L.R. 414, varying 25 D.L.R. 812.

PAYMENT BY DIVIDENDS—EFFECT ON WINDING-UP.

A stipulation in a subscription for shares in a company that the amount unpaid thereon is to be paid by the application of dividends is of no avail as against the liquidator. [Re Standard Fire Ins. Co., 12 Can. S.C.R. 644, followed.]

Re Investors (Ball's case) (Man.), [1918] 3 W.W.R. 180.

(§ V B—181)—STOCK ALLOTTED TO BE PAID FOR IN TRADE.

A resolution of the board of directors authorizing the president and vice-president to complete the formalities necessary for the issue and disposal of the shares at par implies that the shares are to be paid for in cash, and does not authorize those officers to accept, without further reference to the board, an application for shares to be paid for in trade by the supply of merchandise at current prices. [Compare Re Modern House Mfg. Co., 14 D.L.R. 257, 29 O.L.R. 266, 4 O.W.N. 1567.]

Re Bishop Construction Co.; Hains v. Garth, 15 D.L.R. 911, 23 Que. K.B. 284.

SUBSCRIPTIONS — CONSIDERATION OTHER THAN CASH.

The discretion of the court as to giving leave to file, after a winding-up order has been made, a contract whereby shares were allotted other than for cash under s. 110b of the Companies Ordinance (Alta.), so as to relieve the shareholder from liability as contributories is properly exercised by refusing the leave where the same parties have filed large claims as creditors of the company for rent and salaries.

Re Crow's Nest Pass Hardware Co., 16 D.L.R. 44, 27 W.L.R. 35.

(§ V B—182)—SUBSCRIPTIONS FOR SHARES —STIPULATIONS AS TO CALLS.

A stipulation that a balance of the subscription price of shares should be payable "on call within 18 months after allotment" means that such balance shall not be payable within the 18 months except on call, but that on the expiry of that time it becomes due and payable without call.

Graham Island Collieries Co. v. Macleod, 16 D.L.R. 281, 6 W.W.R. 154, 27 W.L.R. 227.

C. TRANSFERS; LIEN.

(§ V C—185) — TRANSFER OF SHARES — PURCHASER OF ITS OWN SHARES.

A joint-stock company, incorporated in Manitoba, has no right to purchase its own shares. [Trevor v. Whitworth, 12 App. Cas. 409, referred to.]

Colonial Ass'ce. Co. v. Smith, 12 D.L.R. 113, 23 Man. L.R. 243, 24 W.L.R. 105, 4 W.W.R. 295.

STOCK AGREEMENT TO TRANSFER — EFFECT —RIGHT TO DECLARE TRUST.

Breach of plaintiff's agreement to transfer stock to defendant does not entitle defendant to have plaintiff declared a trustee respecting the stock, and defendant is entitled to damages only, based upon the value of the stock at the time it should have been delivered; it not appearing that defendant might not have bought other shares at their value at that time. Plaintiff's agreement to transfer stock to defendant in consideration of services rendered by the latter should be construed as an admission that defendant was entitled to receive an amount at least equal to the value of the stock at that time.

Bureau v. Laurencelle, 11 D.L.R. 283, 24 W.L.R. 335.

TRANSFER—VETO—ULTRA VIRES.

A company consituted under a special act incorporating Part II. of the Companies Act (c. 79, R.S.C. 1906), has no power to make a by-law restricting or empowering its directors to veto the transfer of its shares; a by-law providing that transfers shall be subject to the approval of the directors means that they are to be satisfied as to matters within their power upon which they have to exercise a judgment.

Can. National Fire Ins. v. Hutchings; Great West Permanent Loan Co. v. Hutchings, 39 D.L.R. 401, [1918] A.C. 451, [1918] 3 W.W.R. 154, affirming 33 D.L.R. 752, 27 Man. L.R. 496.

COMPANY—REFUSAL TO RECORD TRANSFER OF SHARE — AGREEMENT OF CORPORATORS TO RESTRICT TRANSFERABILITY OF SHARES—AGREEMENT BETWEEN SHAREHOLDERS AND COMPANY AND BETWEEN SHAREHOLDERS AFTER INCORPORATION—FAILURE TO PROVE SATISFACTORILY — EFFECT OF AGREEMENTS IF ESTABLISHED—CONSIDERATION—REMEDY FOR BREACH—BY-LAW OF DIRECTORS—COMPANIES ACT, 2 GEO. V. C. 31, S. 54—PURCHASER FOR VALUE WITHOUT NOTICE OF RESTRICTION—ORDER COMPELLING ENTRY OF TRANSFER AND ISSUE OF CERTIFICATE — FORM OF ORDER — S. 52 OF ACT.

Re Belleville Driving & Athletic Assn., 31 O.L.R. 79.

INSTALMENT PURCHASE OF SHARES.

The vendor of shares in an industrial

company the price of which is payable by instalments is not obliged to effect the transfer thereof so long as the purchase money has not been paid in full. Therefore, the purchaser, in an action against him for the first instalment cannot set up the want of transfer as a ground of nonsuit.

Saunders v. Harvey, 43 Que. S.C. 54.

TRANSFER OF SHARES BY ENDORSEMENT ON CERTIFICATE — FAILURE TO RECORD IN BOOKS OF COMPANY—FRAUD OF TRANSFEROR—RIGHTS OF TRANSFEREE AGAINST TRUE OWNER—LACHES—MANDAMUS.

Leadlay v. Union Stockyards Co., 8 O.W.N. 516.

(§ V C—186)—SALE OF SHARES BEFORE ISSUE—ORGANIZATION NEVER COMPLETED—DAMAGES.

Default under a contract whereby a fixed amount of common stock in a railway company was to be delivered within 6 months will entitle the purchaser to damages, although the organization of the company was never completed and the common stock was, in consequence, never issued. [Great West Ry. Co. v. Rous, L.R. 4 H.L. 650, applied.]

Johnson v. Roche, 17 D.L.R. 74, 14 E.L.R. 374.

(§ V C—187)—TRANSFER OF SHARES IN BLANK—HOLDER—COMMERCIAL ACT.

The delivery of a share certificate of an incorporated company, endorsed by the holder in blank, is not equivalent to a transfer or alienation of the certificate, and does not give rise to that presumption. The holder continues to be the owner of the shares as long as a transfer has not been made in the manner and according to the formalities provided by the charter or rules of the company. The sale of transfer of shares in an incorporated company is a commercial act, and facts which are connected therewith can be proved by witnesses.

Bonner v. Moray, 23 Que. K.B. 252.

(§ V C—188)—TRANSFER—CERTIFICATE—STATUS OF HOLDER.

Under the Ontario Companies Act (R.S.O. 1914, c. 178), the holder of a share certificate has primâ facie evidence of title to the shares mentioned in it, to compel, under s. 121 of the act, their registration or transfer in his name on the corporate books.

Lorsch & Co. v. Shamrock Consolidated Mines, 36 D.L.R. 557, 39 O.L.R. 315, reversing 11 O.W.N. 357.

TRANSFER ON BOOKS.

A transfer of shares of stock of a company is not invalidated, under s. 64 of c. 79 of R.S.C. 1906, by failure to have the transfer registered on the books of the company, as such section, for the purpose of exhibiting the rights of the parties toward each other, expressly preserves the validity of an unregistered transfer. The directors of a company cannot refuse to register a transfer of its shares of stock, under s. 67 of c. 79 of R.S.C. 1906, on the ground that the transferor was indebted to the company, where the indebtedness did not exist at the time the transfer was executed, although it was incurred before the application for registry was made.

Re Polson Iron Works, 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

REFUSAL TO REGISTER.

Application for mandamus enlarged upon undertaking of company to bring action for cancellation of certificate issued to transferor.

Re Goldfields, 2 D.L.R. 885, 3 O.W.N. 928.

SALE OF SHARES — DIRECTORS PREVENTING TRANSFER—LIABILITY OF CORPORATION.

A company owes a duty to a shareholder to permit the transfer of his shares, and where its directors wrongfully prevent the transfer, the company is liable for the natural consequences of such breach of duty which in a case where a sale of the shares is prevented is the loss of the sale.

Wolverton v. Black Diamond Oil Fields, 8 A.L.R. 283.

(§ V C—189)—AGREEMENT BY PROMOTERS AS TO DISPOSITION OF STOCK—TRUST—"FOR THE PURPOSE OF PROVIDING FUNDS."

Black v. Carson (P.C.), 36 D.L.R. 772, affirming 7 D.L.R. 484, 22 Que. K.B. 217.

TRANSFER OF COMPANY SHARE—UNDERTAKING TO RETRANSFER—SALE OR LOAN OF SHARE.

Lamoureaux v. Simpson, 2 D.L.R. 917, 3 O.W.N. 569, 21 O.W.R. 64.

SHARES HELD IN FAMILY—TRUST—REPRESENTATIONS TO BANK.

Pope v. The Royal Bank, 39 D.L.R. 757, 55 Can. S.C.R. 622, [1918] 1 W.W.R. 38, affirming 11 A.L.R. 68.

TRANSFER—TRUST.

The endorsement by a holder of shares in an incorporated company, of his certificate in favour of himself in trust for a third person, and the delivery to such third person of the certificate so endorsed, does not constitute a valid gift of the shares.

H. Corby Distillery Co. v. O'Meara, 20 Que. P.R. 101, 55 Que. S.C. 34. [Affirmed, 28 Que. K.B. 332.]

(§ V C—190)—TRANSFER OF SHARES FOR PURPOSES OF SALE.

A transfer of company shares to a person for sale to another does not amount to a sale to the transferee.

Gadsden v. Bennetto, 9 D.L.R. 719, 23 Man. L.R. 33, 23 W.L.R. 633, 3 W.W.R. 1109, reversing 5 D.L.R. 529, 21 W.L.R. 886.

(§ V C—191)—RIGHTS OF PLEDGEE.

Section 53 of the B.C. Companies Act, 1897, c. 44 [R.S.B.C. 1911, c. 39, s. 40] has no reference to a case where a transfer of shares is made, but applies only where the shares appear to have been

pledged as collateral security and where the owner's name and not the name of the pledgee remains on the books of the company as the holder of the shares; it does not enable the company to set off against a dividend a debt due by a person who was a shareholder, but whose transfer of the shares to a bank manager in trust for the bank as collateral security for a loan to such shareholder had been accepted and registered by the company and a new certificate issued in respect thereof in the name of the bank manager; the company might have declined, under its articles (art. 10, table A, Companies Act, 1897), to register any transfer of shares made by a member who was indebted to it, but having registered, it must treat the transferee as the owner of dividends thereafter payable.

Wilson v. B.C. Refining Co., 22 D.L.R. 634, 21 B.C.R. 414, 31 W.L.R. 381, 8 W.W.R. 838, reversing 20 D.L.R. 418.

(§ V C—192)—Right of transferee to have record of transfer entered in books—Prior option given by transferor.

An agreement giving an option to purchase shares of stock in case the owner should desire to sell them does not create a contract with the company issuing the stock so as to justify the refusal of the directors, upon a transfer thereof to a third person, to record the transaction on the books of the company.

Re Polson Iron Works, 4 D.L.R. 193, 3 O.W.N. 1269.

One who purchases shares of stock under an irregular sale by a pledgee will not be protected as a purchaser for value without notice, where the solicitor who acted for the former was also the solicitor for the pledgee, and had knowledge of such irregularity, as his knowledge was imputable to the purchaser.

Bartram v. Grice, 4 D.L.R. 682, 3 O.W.N. 1296, 22 O.W.R. 191.

Transfers—Agreement for sale—Conflicting evidence.

Lazier v. MacCullough, 7 D.L.R. 851, [Varied, 14 D.L.R. 270, 6 A.L.R. 503, 25 W.L.R. 911.]

(§ V C—195)—Prior right of purchase.

A transfer of shares of stock to a trustee under a marriage settlement does not constitute a sale within the meaning of an agreement giving a third person an option for their purchase should the settler desire to sell them.

Re Polson Iron Works, 4 D.L.R. 193, 3 O.W.N. 1269, 22 O.W.R. 84.

Shares — Directorate — Prior right of purchase — Formal requirements —How construed.

Where articles of association of a company required that before selling certain shares they should first be offered to the board of directors, an objection by an outside purchaser to closing the purchase for default of his vendor in submitting to the directors must fail if notice that the shares were for sale was given to the individual directors and they took no action towards exercising the privilege of buying.

Harvey v. Mitchell, 20 D.L.R. 134.

(§ V C—200)—Lien on shares for holder's debt to company — Purchaser without notice—Duty to inquire.

A by-law of a company creating a lien in its favour on shares of a stockholder in respect to his indebtedness to it, is not binding on a purchaser of shares for value without notice of such by-law; nor need the purchaser make inquiry as to its existence. The purchaser of company shares takes them subject to a lien of the company for an indebtedness due it from the seller, where the purchaser had notice of the lien before he acquired the legal title to the shares. Power to adopt a by-law creating a lien in favour of a company upon the shares of a stockholder in respect to his indebtedness to it is conferred by the Joint Stock Companies Act, R.S.M. 1902, c. 30 [Montgomery v. Mitchell, 18 Man. L.R. 37, followed.]

Box v. Bird's Hill Sand Co., 12 D.L.R. 556, 23 Man. L.R. 415, 24 W.L.R. 706, 4 W.W.R. 961.

D. Forged or fraudulent issue.

(§ V D—205) — Power to issue debentures — Fraud — Knowledge — Bona fide purchaser.

Jefferson v. Pacific Coast Co. Mines, 31 D.L.R. 557.

Share certificate—Fraudulent or illegal issue.

A plaintiff who, by his pleadings in an action against a company to declare him a shareholder, bases his claim upon an alleged agreement with the company itself as authorizing the share certificate delivered to him by the company's manager, but who fails to prove any consideration for its issue other than between himself and the manager personally, will not be permitted afterwards on appeal to set up a case inconsistent with that so advanced and to claim an estoppel against the company in respect of the issue of the certificate, where no question of estoppel was directly before the trial court, nor was the company called upon to give the additional evidence which the raising of such a question would have necessitated had the plaintiff alleged and proved that he was deceived by the issue of the certificate into believing that it represented a portion of the manager's personal holding, transferred at the latter's instance.

Monarch Life Ass'ce. Co. v. Mackenzie, 15 D.L.R. 695, reversing 45 Can. S.C.R. 232, and restoring 23 O.L.R. 342.

PROSPECTUS — MISREPRESENTATION AS TO EXISTENCE OF PATENT — PURCHASE OF SHARES — RESCISSION — FRAUDULENT MISREPRESENTATION BY AGENT AS TO BUSINESS OF COMPANY — MATERIALITY — INDUCEMENT TO PURCHASE — EVIDENCE — REPUDIATION — PROMPTNESS.

Howard v. Canadian Automatic Transportation Co. and Weaver, 6 O.W.N. 285, 404.

E. RIGHTS OF SHAREHOLDERS.

(§ V E—210) — MISAPPROPRIATION OF FUNDS ON CONSENT OF DIRECTORS — SHAREHOLDERS' RIGHTS.

The consent of two codirectors of a joint stock company to an overdraft of salary on the part of the managing director of the company will not estop the stockholders of the company from claiming interest on the overdraft on an accounting against the managing director or his representatives for the amount of the overdraft, since such consent is not binding on the company unless the circumstances attending the dealing with the company's funds have been fully brought before a general meeting of the shareholders and their sanction thereto obtained. [Great Luxembourg R. Co. v. Magnay (No. 2), 25 Beav. 586, referred to.]

Rogers Hardware Co. v. Rogers, 10 D.L.R. 541.

THE RURAL TELEPHONE ACT (SASK.)—FORMATION OF COMPANY — MEMBERSHIP—PLAINTIFF SUBSCRIBER AT TIME OF PETITION, BUT NOT TO MEMORANDUM OF ASSOCIATION — ORIGINAL ACCEPTED PLAN PROVIDING FOR TELEPHONE SERVICE TO PLAINTIFF — ALTERATION OF PLAN AFTER ORGANIZATION OF COMPANY — COSTS.

Plaintiff subscribed to the list of subscribers for stock in proposed defendant company, subsequently formed, under the Rural Telephone Act, which list was forwarded with the petition as part of the information required by s. 4, and paid for his share, the money going into the treasury of the company, but he did not subscribe to the memorandum of association of the company nor was there any register of members. Held, plaintiff was entitled to recognition as a shareholder. In the original plan sent in with the petition and accepted, provision was made for telephone service to plaintiff. After organization of the company the plan was altered and the issue of debentures authorized on the altered plan, which did not provide telephone service to plaintiff, the intention being that he should be served by another company, with whose terms however he was not satisfied. The defendant company tried to have the department revert to the plan as originally proposed and accepted but up to time of issue of writ had not secured the approval of the minister. The court, with considerable doubt, refused to interfere and dismissed this branch of plaintiff's case. The court questioned the power of the minister under the act to alter the plan on the basis of which the company was organized. Evidence as to the consent of the persons interested was not satisfactory, there being no minutes of meeting on the point.

Lindsay v. Red Jacket Rural Telephone Co., [1919] 3 W.W.R. 161.

TRANSFER OF ASSETS TO ANOTHER COMPANY.

A statute which authorizes the sale and transfer of the whole of the business rights and property of one company to another company and authorizes such purchase by the latter company does not, in the absence of clear and precise language to that effect, constitute the shareholders of the selling company shareholders in the purchasing company.

Re Winding-up Act and the Dominion Trust Co., 35 W.L.R. 171.

(§ V E—212)—MINORITY SHAREHOLDERS.

Minority shareholders of a joint stock company are obliged to follow the administrative directors of the majority shareholders in the absence of legislation to the contrary.

Black v. Carson & The Crown Reserve Mines Co., 7 D.L.R. 484. [Affirmed, 36 D.L.R. 772.]

RIGHTS OF MINORITY—ACTIONS BY—FRAUD —ULTRA VIRES.

Stockford v. McPherson (Alta.), 9 W.W.R. 1192.

(§ V E—214)—STOCK SOLD FOR ASSESSMENTS.

Where stock of a shareholder partly paid for has been improperly declared forfeited for nonpayment of calls, the shareholder is not restricted to an action for damages, but is entitled to sue for his stock and for a judgment giving him his benefits of a shareholder subject to all obligations legally imposed upon him as such. A by-law of a company, giving the board of directors the power to summarily forfeit shares and the money paid thereon upon which any call shall have remained unpaid for 6 months after it shall be due and payable, is not sufficient to forfeit shares upon which part payment had been made, unless notice of the intended forfeiture has been given to the shareholder.

Fox v. Selkirk Land & Investment Co., 8 D.L.R. 945, 22 Man. L.R. 773, 22 W.L.R. 680, 3 W.W.R. 452.

(§ V E—215)—TO REMOVE OFFICER.

Under s. 72 of the companies (Consolidated) Act of 1908 (Imp.), only the shareholders of a company have power to remove a managing director from office.

Windsor v. Windsor, 3 D.L.R. 456, 21 W.L.R. 137, 2 W.W.R. 15.

(§ V E—217)—APPROPRIATION TO SUBSCRIBERS—SALE BY BROKERAGE FIRM.

Where a company is authorized by law to appropriate in commission to subscribers 10

per cent of what it should otherwise have in its treasury as capital derived from subscriptions, and a sale at 7½ per cent discount by a brokerage firm is attacked as illegal, but there is no evidence to shew that the broker is acting for the company, the court may assume that such method has been adopted under which the broker might lawfully become entitled to the stock which he is agreeing to sell as by himself becoming the original subscriber under an appropriation of 10 per cent commission.

Borden v. Stanford, 21 D.L.R. 209, 48 N.S.R. 532.

(§ V E—220)—Action for rescission of subscription—Misrepresentation.

It is no answer to a shareholder's action against the company for rescission of the allotment to him of shares, for which he had fully paid, subscribed for upon a fraudulent misrepresentation of the company, for the latter to set up that at the time of action brought the company was in financial difficulties and that the interest of creditors had intervened, if the company has not been placed in liquidation, although an assignee had been appointed under the Sale of Goods in Bulk Act, R.S.B.C., c. 204, to carry out the sale of its entire stock in trade. [Oakes v. Turquad, L.R. 2 H.L. 325; Tennent v. City of Glasgow Bank, L.R. 4 A.C. 615, distinguished.]

Fitzherbert v. Dominion Bed Mfg. Co., 23 D.L.R. 125, 21 B.C.R. 226, 8 W.W.R. 743.

Directors—Secret profit—Action to recover—Company's name not used—Rights of shareholders—"Companies Act" R.S.O. 1914, c. 178.

Certain directors of a company having made what was decided in this action to be a secret profit and the company refusing to allow its name to be used in an action to recover the same. The capacity of a single shareholder to assert the right of the company to this money is doubtful, and the action cannot succeed. [Towers v. African Tug Co., [1904] 1 Ch. 558, referred to.]

Fullerton v. Crawford, 50 D.L.R. 457, 59 Can. S.C.R. 315, [1919] 3 W.W.R. 843, reversing 43 D.L.R. 98.

Actions by.

Where a minority of shareholders are permitted by the court to bring an action in their own name because the majority of shareholders will not permit an action to be brought in the name of the company, the plaintiffs cannot have a larger right to relief than the company itself would have had if it were plaintiff, and the objecting minority cannot complain of acts which are valid if done with the approval of the majority of the shareholders or are capable of being confirmed by the majority, and they are, therefore, confined to actions in which the acts complained of are of a fraudulent character, or beyond the powers of the company. The rule of law that to redress a wrong done to a company or to recover moneys or damages alleged to be due to the company, the action should be prima facie brought by the company itself, does not apply where the persons against whom the relief is sought, themselves hold and control the majority of the shares of the company, and will not permit an action to be brought in the name of the company and in such case the minority shareholders complaining will be permitted to bring an action in their own name. [Burland v. Earle, [1902] A.C. 83, followed.]

Dominion Cotton Mills Co. v. Amyot and Brunet, 4 D.L.R. 306, [1912] A.C. 546.

Action by stockholders against corporation.

Bennett v. Havelock Electric Light Co., 8 D.L.R. 954, 46 Can. S.C.R. 640, 23 O.W.R. 309.

Action by shareholder—Internal management—Control.

The court will not interfere with the internal management of companies, as to the control of the majority of the stock, at the instance of a shareholder who has suffered no personal wrong.

Brown v. Menzies Bay Timber Co., 34 D.L.R. 452, 24 B.C.R. 27, [1917] 2 W.W.R. 658.

Rights of shareholder—Action by—Account of undue profits made by directors personally.

Theatre Amusement Co. v. Stone, 16 D.L.R. 855, 6 W.W.R. 1438, 50 Can. S.C.R. 32.

Action by shareholders for declaration that agreement between company and another shareholder illegal—Style of cause not shewing that plaintiff suing on behalf of other shareholders — Amendment — Improvidence — Fraud — Consideration —Election of directors—Loan by company to shareholder — Ultra vires—Companies Act, R.S.C. 1906, c. 79, s. 29, subs. 2—Status of shareholder—Payment for shares—Acceptance of cheque — Evidence — Share register — Partnership not separate entity—Deposit of money —"Loan" — Relief — Injunction — Repayment to company of money lent.

The plaintiff, a shareholder in an incorporated company, sued W.S., W.S. & Son, and the company for a declaration that a certain agreement, dated August 24, 1910, and a loan of money made by the company to W.S. & Son, were illegal, and for repayment of the money to the company:—Held, that the plaintiff must be taken to be suing alone, inasmuch as she had not in the style of cause proclaimed herself as suing on her own behalf and on behalf of all other shareholders of the company; but that she should be permitted to amend so as to claim in a representative capacity. (2) That 510 shares of the stock of the company allotted to W.S. had been paid up in full, the company having legally accepted a cheque in

payment; and, even if the shares were not paid up, the plaintiff could not maintain an action for recovery of a balance due from a shareholder to the company in respect of his shares—the company would be the only proper plaintiff. [Burland v. Earle, [1902] A.C. 83; Bennett v. Havelock Electric Light Co. 25 O.L.R. 200, and Allen v. Hyatt, 17 D.L.R. 7, followed.] (3) That the plaintiff could not attack the agreement on the ground that the company was not bound by it because it was improvident; such an agreement can be attacked by a shareholder only if the agreement is fraudulent and constitutes a fraud upon him. (4) That, upon the evidence, there was consideration to the company for the agreement. (5) That a board of directors of the company was properly elected on August 24, 1910, and that there continued to be a proper board to carry on the affairs of the company from that time on. (6) That the agreement was ultra vires by reason of the fact that it was for a loan from the company to one of its shareholders of money belonging to the company, in contravention of s. 29, subs. 2, of the Canadian Companies Act, R.S.C. 1906, c. 79. The 510 shares were the property of W.S.: the share register shewed that, and it must govern, unless definitely proved to be incorrect or false, which was not the case; and, even if the shares were the property of the firm of W.S. & Son, of which W.S. was a member, the firm was not a separate entity; and, when the loan was made to W.S. & Son, it was made to W.S. and his partners. The depositing of the money with W.S. & Son constituted a lending to them upon the principle, well established in the case of banks, that a deposit of money makes the depositee not a bailee but a debtor. (7) That the plaintiff was entitled to maintain the action to prevent the company from doing something ultra vires; and, as a necessary incident the court should direct the repayment of the money lent. [Russell v. Wakefield Waterworks Co. (1875), L.R. 20 Eq. 474, 481, followed.]

Henderson v. Strang, 43 O.L.R. 617.

(§ V E — 221) — Effect of purchase of stock—Right of action.

An assignment of a share of stock in a company, made more than one month after a winding up order was entered, although not proceeded with, is inoperative as a transfer of stock to qualify the transferee to sue to set aside a sale of the assets of the company by the assignee of the company for the benefit of creditors, on the ground that one of the inspectors of the estate was interested in the purchase.

Shantz v. Clarkson, 11 D.L.R. 107, 4 O.W.N. 1303, 24 O.W.R. 596.

(§ V E—223)—Rights of shareholder—Investigation of internal management—Action against director.

Although the court has no jurisdiction to interfere with the internal management of companies acting within their powers, yet where a company is formed by special Act and provision is made thereby for provincial aid, and to extend protection to the interest of both the public and of individual shareholders, the court should interfere where serious allegations are made leading to the necessity of interpreting one of the sections of the private Act. [Stone v. Theatre Amusement Co., 6 W.W.R. 1438, applied; Foss v. Harbottle, 2 Ha. 461; Mozley v. Alston, 1 Ph. 790; and MacDougall v. Gardiner, 1 Ch. D. 13, distinguished.] Where an action is taken by the shareholders of a company against a shareholder director thereof, such defendant should be excepted from the general body of shareholders referred to in the style of cause as plaintiffs.

Wheeler v. Freame and Alberta Farmers & Co., 7 W.W.R. 191.

(§ V E—224)—Proceedings for illegal application of funds.

Held, on appeal, that the shareholders holding a majority of the stock issued, having been indorsers of the notes securing the indebtedness of the Victoria Contracting Co., and they having carried a resolution indorsing the action of paying said company's indebtedness the day before the trial of this action, it was not necessary for the plaintiff to make a formal request in meeting assembled to enable him to obtain a status to bring this action in his own name. That the plaintiff must first apply to the defendant company to proceed to recover the moneys alleged to be lost before he can bring this action in his own name. The court being equally divided, the appeal was dismissed.

Johnston v. Carlin, 20 B.C.R. 520.

(§ V E—230)—Declaration of dividend in property — Notes — Noncompliance with formalities—Meetings.

Karr v. South Side Lumber Co., 28 D.L.R. 739, 34 W.L.R. 510.

Dividends—Impaired capital.

It is ultra vires on the part of a stock company to declare a dividend, no matter how small, at a time when its capital is impaired.

Colonial Assur. Co. v. Smith, 12 D.L.R. 113, 23 Man. L.R. 243, 24 W.L.R. 105.

Dividends—Stock dividends—What are.

A stock dividend is a distribution to those already holding shares of a company by way of a dividend upon their holdings; it does not amount to a new investment, but is merely a mode of distributing accummulated profits in the shape of new stock, and which has the effect of reducing pro tanto the value of the shares already held.

Re Fulford, 14 D.L.R. 844, 29 O.L.R. 375.

Dividends—Declaration of, at general meeting.

Where the articles of association provide

that "the company in general meeting may declare dividends," and this is the only authority for the declaration of dividends, a dividend cannot be legally declared by a meeting of the directors. Although the minutes of a company meeting state that it was a meeting of the company, the court may find from an inspection of these minutes as well as from the minutes of other meetings, that the meeting in question was not a meeting of the shareholders, but a meeting of the directors only.

Re Cardiff Coal Co., 3 A.L.R. 325.

DIVIDENDS.

The declaration of a dividend by a share company is a question of administration and of jurisdiction of the board of administration, unless there was a by-law adopted by the shareholders limiting this power. Shareholders have not the right to intervene in the administration of the affairs of the company, which is, by law, entrusted to the board of administration. A resolution declaring a dividend, adopted by a board of administration, is not a by-law and does not require ratification by the shareholders to become valid. In joint stock companies a by-law differs from a resolution; a by-law being of a permanent character, governs the affairs of the company until it is repealed. A resolution, on the other hand, is transitory and has for its object only to deal with a particular case. If a dividend is declared by the board of administration, in reduction of capital or from the reserve, the resolution adopted to this end is illegal and renders the directors personally liable.

Denault v. Stewart, 54 Que. S.C. 209.

DIVIDENDS—ULTRA VIRES—LIABILITY OF DIRECTORS—SHAREHOLDERS' ACTION.

Dividend paid to shareholders, in part paid out of capital, is ultra vires of the directors and incapable of ratification by the shareholders; and in an action properly constituted the director might be ordered to repay the sum illegally paid out. Other proceedings, either under s. 15 of the Companies Act or by way of voluntary winding-up, might be taken so as to reach the same result and, even if taken, would not be a ratification of the distribution complained of.

Crawford v. Bathurst Land & Development Co., 37 O.L.R. 611.

NONDECLARATION OF DIVIDEND—INVESTIGATION UNDER STATUTE.

The fact that no dividend is declared by a profit-making company is insufficient to warrant an order for an inspection pursuant to s. 92 c. 79, R.S.C. 1906.

Re Sarnia Ranching Co., 8 W.W.R. 697.

(§ V E—231)—PROHIBITED FROM PAYING UNEARNED DIVIDEND—R.S.Q. (1909), ART. 5999—DUTY OF SHAREHOLDER RECEIVING.

R.S.Q. (1909), art. 5999, prohibits a company from declaring a dividend the payment of which impairs or lessens the capital of the company, and from declaring or paying any dividend which has not been actually earned. A shareholder who has received such illegal dividends is bound to return to the liquidator of the company, bonds of the company which he received in payment thereof or the price for which he sold such bonds.

Hyde v. Scott, 47 D.L.R. 260, 28 Que. K.B. 80.

(§ V E—233)—TAKING STOCK FOR CASH DIVIDEND.

Where shareholders entitled to be paid their dividends in cash take shares instead to the amount of the dividend, such shares are to be considered as having been allotted for cash.

Re Crow's Nest Pass Hardware Co., 16 D.L.R. 44, 27 W.L.R. 35.

F. LIABILITY OF SHAREHOLDERS—CONTRIBUTORIES.

(§ V F—235)—PURCHASE OF SHARE IN—RIGHT OF COMPANY TO QUALIFY AGREEMENT—PURCHASER ALLOWING NAME ON REGISTER AND ATTENDING MEETINGS—LIABILITY OF.

Taking a share in a limited company is an agreement to become liable to pay to the company the amount for which the share has been created and the company has no authority to alter or qualify such agreement, except in the particular way authorized by s. 45 of c. 35 R.S.M. 1913. Although the contract to purchase shares at a discount may be an illegal contract, a purchaser of such shares who allows his name to be put on the register of shareholders and attends shareholders' meetings cannot deny that he is a shareholder and is liable for the amount unpaid on such shares. [North-West Electric Co. v. Walsh, 29 Can. S.C.R. 33; Welton v. Saffery, [1897] A.C. 299; Ooregum Gold Mining of India v. Roper, [1892] A.C. 125, followed.]

Bank of Ottawa v. Jones, 46 D.L.R. 407, 29 Man. L.R. 330, [1919] 2 W.W.R. 4.

LIABILITY OF SHAREHOLDERS—RECEIVING SHARE CERTIFICATES—FAILURE TO REPUDIATE.

The receipt of share certificates following allotment, and their retention without repudiating their ownership, may establish a prima facie case of liability as a contributory.

Re Western Canadian Fire Ins. Co.: Craig's Case, 19 D.L.R. 170, 30 W.L.R. 138.

STOCK — TRANSFER — COPLAINTIFF — MIS EN CAUSE—QUE. C.P. 77, 177.

When the owner of shares in an incorporated company transfers his shares, in part to secure a debt, and when after his judicial assignment a curator sues in respect of such shares, the curator may be ordered to join in the suit the transferees of the shares, either as coplaintiffs or mis en cause, (third parties) as he prefers.

Barnard v. Savage, 23 Que. K.B. 561.

FORFEITURE OF SHARES—WINDING-UP UNDER DOMINION WINDING-UP ACT—LIABILITY, AS CONTRIBUTORY OF PERSONS WHOSE SHARES FORFEITED.

Judgment of Morrison, J. upheld, that where the power of forfeiting shares has been properly and legally exercised, the person whose shares have been forfeited has ceased to be a member or shareholder of the company, and is not liable to be put on the list of contributories, on a winding-up under the Winding-up Act, R.S.C. 1906, c. 144.

Schetky v. Bradshaw; In re The Winding-up Act, [1919] 2 W.W.R. 885, affirming 26 B.C.R. 153, [1918] 3 W.W.R. 477.

(§ V F—236)—APPLICATION FOR SHARES—MEMORANDUM OF AGREEMENT—ACCEPTANCE.

An application for shares in a company to be organized under the Quebec Companies Act and not included in the memorandum of agreement accompanying the petition for incorporation cannot be accepted two years later, so as to make the applicant, who had paid nothing upon them and had not participated in the corporate business, liable for calls where at the time of the pretended acceptance and allotment the company was insolvent and the shares valueless.

Vilandre v. Allie, 22 D.L.R. 577.

LIABILITY OF SHAREHOLDERS—EXEMPTION—ONUS.

In a winding-up proceeding, where it is shewn that a person subscribed for a certain number of shares of stock in a company subject to the Companies Clauses Act (Can.), and that his subscription had not been entirely paid-up, the onus is upon him to shew that he is discharged from the liability which usually flows from the ownership of such shares, ex. gr., where the contention is that he held the stock as a trustee or in a representative capacity only, and consequently that the trust fund only is liable for the amount unpaid under the Companies Clauses Act, 3 Edw. VII. (Can.) c. 118, s. 32.

Re Empire Accident & Surety Co.; Faill's Case; Barton's Case, 10 D.L.R. 782, 24 O.W.R. 208, 4 O.W.N. 926. [Affirmed, 11 D.L.R. 847, 4 O.W.N. 1411, 24 O.W.R. 807, on terms.]

PLAINTIFF CONTRACTING FOR ORIGINAL SHARES IN COMPANY—GIVEN SHARES ALREADY ISSUED AND HELD BY THIRD PERSON—CONTRACTUAL RELATION CONTEMPLATED NOT ESTABLISHED — ENTITLED TO RECOVER MONEYS AND TO BE REMOVED FROM LIST OF CONTRIBUTORIES.

Plaintiff applied for shares in defendant company and from the wording of such application and other documents the court found that he bargained for original shares in defendant company, which was not complied with by giving him shares already issued and held by a third party; the result being that the contractual relation contemplated was never established, and, the plaintiff having taken prompt steps on becoming aware of the facts, was entitled to recover back the moneys and securities given to the company as a result of his application, notwithstanding the liquidation of the company, and to be removed from the list of contributories. Where plaintiff recovered judgment against a company in liquidation for moneys paid as a result of his application for shares, which application the court found had been improperly complied with by giving him shares already issued and held by a third party, he was given interest on such moneys to the date of the liquidation; the company was not allowed to set off or recover sums which had been paid to plaintiff as dividends on the shares.

Brydges v. Dominion Trust Co., [1919] 3 W.W.R. 345. [See [1919] 2 W.W.R. 510.]

(§ V F—238)—WINDING-UP—PAID SHAREHOLDERS AS CONTRIBUTORIES.

A fully paid-up shareholder—not liable to contribute—may be placed on the list of contributories, so called, under the provisions of the Dominion Winding-up Act (R.S.C. 1906, c. 144, s. 34, 93), so as to share in any surplus of assets over liabilities.

Re Colonial Assur. Co., 29 D.L.R. 488, 26 Man. L.R. 324, 34 W.L.R. 489, 10 W.W.R. 555.

SHARES—AGREEMENT AS TO PAYMENT—FAILURE TO REGISTER—LEAVE OF COURT TO FILE.

Re Jasper Liquor Co., 23 D.L.R. 894, 31 W.L.R. 719, 8 W.W.R. 1078.

(§ V F—241)—ALLOTMENT—NOTICE—DE FACTO OFFICERS—ESTOPPEL.

The receipt of notice of a shareholders' meeting by a subscriber for shares is notice of acceptance of his application for shares; the allotment of the shares is valid though made by de facto directors, particularly where there is a provision in the charter validating their acts; and where after receiving the notice he attends the meetings, or gives proxy to another to represent him thereat, without taking any steps to repudiate the subscription, he will be precluded from disclaiming his liability as a shareholder. [Colonial Assur. Co. v. Smith, 4 D.L.R. 814, referred to.]

Traders Trust Co. v. Goodman, 37 D.L.R. 31, 28 Man. L.R. 156, [1917] 2 W.W.R. 1235.

LIABILITY OF SHAREHOLDERS—IN DE FACTO CORPORATIONS.

That the company regularly formed began business before it was legally entitled to do so is no answer to a claim to place a shareholder on the list of contributories.

Re Western Canadian Fire Ins. Co.; Craig's Case, 19 D.L.R. 170, 30 W.L.R. 138.

(§ V F—242)—OF TRUSTEE OR ATTORNEY.

A member of a syndicate in whose name, with the addition of the words "trustee for syndicate" share certificates are issued for

stock in a trading corporation organized by the members of the syndicate for the purpose of taking over the syndicate business, is not exempt from personal liability as a contributory in respect of unpaid shares included in his stock holding by the addition of the words "trustee for syndicate" upon the face of the certificate. [See also Hamilton's Company Law, 3rd ed., p. 161.] Section 48 of the Manitoba Joint Stock Companies Act, R.S.M. 1902, c. 30, s. 48, declaring that no person holding stock in a company incorporated thereunder as an executor, administrator, tutor, curator, guardian or trustee shall be personally subject to liability as a shareholder, but that the trust estate and funds shall be liable, does not apply to protect from personal liability a member of a trading association or syndicate who accepts as trustee for himself and associates shares of stock in a company incorporated under that statute.

Re Winnipeg Hedge and Wire Fence Co., 1 D.L.R. 316, 22 Man. L.R. 83, 20 W.L.R. 337, 1 W.W.R. 853.

(§ V F—247)—Liability of shareholder—Concurrence in company's infraction of criminal law.

In order to convict an individual shareholder of an offence committed by an incorporated company (e.g., an infraction of liquor laws in the unlawful shipment of liquor), it is necessary to shew active personal participation or at least knowledge of the guilty act on the part of the defendant. [See R. v. Hendrie, 10 Can. Cr. Cas. 198; R. v. Hays, 12 Can. Cr. Cas. 423.]

R. v. Glassey, 22 Can. Cr. Cas. 73.

(§ V F—250)—Liability of shareholders—Effect of transfer in trust—Company's right of set-off.

In respect of shares in a company subject to the B.C. Companies Act (R.S.B.C. 1897, c. 44, s. 53, R.S.B.C. 1911, c. 39, s. 40), the person pledging same to a bank as collateral security is to be considered as still holding the same and remains liable as a shareholder, although a transfer has been registered in favour of the bank manager "in trust," and where the articles of association of the company (R.S.B.C. 1897, c. 44 Table A. s. 75), enable the directors to deduct "from the dividends payable to any member all such sums of money as may be due from him to the company on account of calls or otherwise," a deduction of the pledging shareholder's debt to the company (not being for calls), may still be made from dividends on the share subsequent to and notwithstanding the assent to the transfer, and such assent is not a representation by the company that the pledging shareholder owed them nothing (except possibly as to calls on the particular shares), and no estoppel arose against it. [Page v. Austin, 10 Can. S.C.R. 132, referred to.]

Wilson v. B.C. Refining Co., 20 D.L.R. 418, 29 W.L.R. 473, 7 W.W.R. 147.

Transfer—New certificate—Effect.

A director of a company owning partly paid-up shares therein transferred some of such shares to another director, the sums paid up on all the shares being attributed to the retained shares by informal agreement between these two directors and another. A new certificate was issued with respect to the retained shares, bearing an indorsement as to agreed amount paid up thereon. Held, that the liquidator of the company was right in placing the original owner of shares upon the list of contributories, and treating the retained shares as if only the original payments had been made thereon.

Re Federal Mortgage Corp. & Stewart; Re Winding-up Act, [1917] 2 W.W.R. 282.

Consideration—Transfer.

The value of the consideration given a company in exchange for its shares cannot be enquired into while the transaction is unimpeached. [Re Wragg, [1897] 1 Ch. 796, followed.] Shareholders in a company who have not subscribed for their shares but have obtained them as fully paid up by transfer from the original allotee cannot be placed on the list of contributories in an action by the liquidator. [Re Carlings case, 1 Ch. D. 115; Re Innes & Co., [1903] 2 Ch. 254, followed.]

National Trust Co. v. Frank, [1917] 3 W.W.R. 43.

Winding-up — Contributories — Application for shares — Allotment — Notice — Acceptance — Special contract as to payment—Transfer of shares not paid for—Approval of directors—Liability to calls—Resolution of directors—Dominion Companies Act, R.S.C. 1906, c. 79, ss. 58, 59, 65, 66—"Call" made upon directors' shares only—Invalidity as "call"—Novation—Powers of company—Surrender — Compromise — Sale of claims by liquidator—End of liquidation.

In March, 1910, T. applied for shares in the company, which had been incorporated in Jan. 1910, under the Dominion Companies Act, R.S.C. 1906, c. 79. His application was addressed to directors, and read: "I hereby apply and subscribe for 100 shares . . . and agree to accept same, or any lesser amount that may be allotted to me, and agree to pay for the same as follows: 20 per cent on signing hereof and 10 per cent each succeeding month until fully paid. . . . I hereby authorize the secretary . . . to register me on the books of the company as holder of said shares." The 100 shares were allotted to T., notice of allotment was given to him, and he became a shareholder, director, and president of the company, but paid no part of the price

of the shares:—Held, that the allotment and notice amounted to an acceptance of the offer contained in the application; and, under the contract thus formed, T. did not become a subscriber for shares subject to call, but a subscriber upon the terms of the contract—the payments of 20 per cent and 10 per cent became due by virtue of the contract, and were not "calls" within the meaning of the Act, ss. 58 et seq. In August, 1910, T. desired to retire from the company, and made an arrangement with his codirectors for relief from liability in respect of his subscription. This was in consequence of a change in the policy of the company. On August 26, 1910, T. signed a memorandum of transfer to L. of "all my rights under this subscription," and L., in writing, accepted the transfer. At a meeting of the directors held on that day, T.'s resignation as a director was accepted, and a resolution passed approving and sanctioning the transfer of T.'s subscription. At the same meeting it was resolved "that a call be made upon the directors for payment of 25 per cent, of the amount of their subscriptions." The appropriate entries transferring the shares from T. to L. were made in the books of the company. The arrangements between T. and his codirectors were made honestly, in good faith, and before the company had incurred any substantial liabilities. The company afterwards went actively into business, incurred large liabilities, and soon became insolvent; a winding-up order was made in January, 1913. In the winding-up the liquidator sought to make T. a contributory in respect of the 100 shares, and the Master found T. liable, for the reason, among other reasons, that payments were in arrear under the terms of his subscription, and the shares could not, as the Master thought, be validly or effectively transferred:—Held, upon appeal from the Master's ruling, that s. 66 of the Act, which provides that "no shares shall be transferable until all previous calls thereon are fully paid in," did not apply to T.'s subscription—his liability thereon was not a liability for "call," and the shares held by him were not subject to call. [Re Peterborough Cold Storage Co., 14 O.L.R. 475, explained and distinguished.] Held, also, that the directors' resolution purporting to make a "call" had no operation on T.'s shares; indeed, the "call" had no validity as such, for it purported to be a call upon the shares held by the directors only, and the very essence of a call is that it shall bear equally upon all shares allotted; and there was nothing to prevent the directors assenting to the transfer of T.'s shares, for there was no "call" in arrear. Held, also, that there was a novation, the company accepting L. as transferee of the shares, and L. accepting T.'s position as holder of the shares. If the dealings did not amount to a novation, T.'s liability was not such as could be enforced by a call; the remedy would be by an action upon his promise to pay; he would be liable as a debtor and not as a contributory. [In re Hoylake R. Co., Ex p. Littledale L.R. 9 Ch. 257, followed; Dictum of Duff, J., in Smith v. Gow-Ganda Mines, 44 Can. S.C.R. 621, at pp. 625, 626, dissented from.] Held, also, that the transaction was not in the nature of a compromise; nor was there a surrender of the shares—though, semble, an agreement to surrender might be made by a company of Dominion incorporation. Semble, also, that, while the liquidator might sell any claim which he might have as liquidator, and the chose in action would become vested in the purchaser, he could not sell the right to use the machinery of the Winding-up Act. When he has sold the assets of the company, it is his duty to distribute the proceeds; and, when that is done, the liquidation ends. Held, therefore, that T. was not liable as a contributory; and the same considerations applied to the case of S., who had subscribed for shares on the strength of T.'s connection with the company, and, desiring to retire when T. retired, was permitted to transfer his shares.

Re Port Arthur Waggon Co., Tudhope's Case; Shelden's Case, 45 O.L.R. 260.

(§ V F—251)—Liability of transferee.

An absolute transfer of company shares is not created by an assignment of them merely as security for a loan.

Gadsden v. Bennetto, 5 D.L.R. 529, 21 W.L.R. 886, 2 W.W.R. 733. [Reversed, 9 D.L.R. 719, 23 Man. L.R. 33, 23 W.L.R. 633, 3 W.W.R. 1109.]

(§ V F—252)—Liability of transferor.

The general rule is that a shareholder who has duly transferred his shares on the books of the company, and whose transferee has been registered as a shareholder in his stead, is discharged as between himself and the company from all liability upon such transferred shares as well in respect of past as of future transactions, and he is not liable to be put on the list of shareholder contributories on the insolvency and winding up of the company except under the terms of statutory enactments making past shareholders liable. [Re Wiarton Beet Sugar Co., Freeman's Case, 12 O.L.R. 149, followed.]

Re Winnipeg Hedge & Wire Fence Co., 1 D.L.R. 316, 22 Man. L.R. 83, 20 W.L.R. 337, 1 W.W.R. 853.

(§ V F—253)—Effect of fraud on sale of shares.

A sale of company shares induced by fraud is voidable only, and not void. [Walsham v. Stainton, 1 DeG. J. & S. 678, followed.]

Gadsden v. Bennetto, 5 D.L.R. 529, 21 W.L.R. 886, 2 W.W.R. 733. [Reversed, 9 D.L.R. 719, 23 Man. L.R. 33, 23 W.L.R. 633, 3 W.W.R. 1109.

NONALLOTMENT—REPUDIATION.

Persons who apply to a company for shares upon which application no allotment is made, but to whom shares originally issued to others are transferred, are not liable as contributories if they repudiate the shares promptly upon learning the facts.

Western Union Fire Ins. Co. v. Alexander, Loggin & Holmes, 39 D.L.R. 632, 25 B.C.R. 393, [1918] 2 W.W.R. 546.

(§ V F—255)—CONTRIBUTORIES—SUBSCRIPTION—RATIFICATION—CONDUCT.

Where one has subscribed for shares in a company to be formed, was allotted the shares and elected director, and as such executed a power of attorney authorizing the signing his name to the company's prospectus, acting in the belief that the shares had been issued to him for services rendered, will be estopped, by his conduct, from denying his liability as a shareholder or contributory; the fact that the company was incorporated at less capital stock than proposed and under a different name does not warrant his rescission of the subscription.

Re Port Arthur Waggon Co.; Smyth's Case, 45 D.L.R. 207, 57 Can. S.C.R. 388.

SHAREHOLDER—RELIEF FROM LIABILITY—UNCONDITIONAL SUBSCRIBERS—CONSENT OF OTHER SUBSCRIBERS.

None of the subscribers of shares in a company can be relieved of their obligation, unless for reasons which annul a contract. It is illegal for the promotors of a company to relieve unconditional subscribers, from their subscription without the consent of the other subscribers.

Leroy v. Davis & Co., 46 D.L.R. 568, 55 Que. S.C. 497.

CONDITIONAL SUBSCRIPTION.

One who agrees to subscribe for shares of preferred capital stock and to pay the par value of the shares when the value is ascertained, upon condition that he is to be elected a director and made vice-president as long as he retains his shares of stock in the company, the shares to become his absolute property without any conditions attached, and who afterwards becomes a director and has these shares allotted to him and votes on them with the consent of the directors and shareholders, although payment is not due until the value of the shares is ascertained, is properly upon the shareholders' register and is liable for the amount unpaid upon the shares in accordance with his contract, and an application under ss. 118, 119 and 121 of the Companies Act, R.S.O. 1914, c. 178, for a mandatory order directing the removal of his name from the register of shareholders will be refused. [Re R. Time Tables Publishing Co., 42 Ch. D. 98; Re Wiarton Beet Sugar Co., Jarvis's Case, 5 O.W.R. 542, and Re Modern House Man. Co., 14 D.L.R. 257; Cameron v. Cuddy, 13 D.L.R. 757, [1914] A.C. 651; Morrisburg and Ottawa Electric R. Co. v. O'Connor, 23 D.L.R. 748, referred to.]

Re Gramm Motor Truck Co. of Can., 26 D.L.R. 557, 35 O.L.R. 224.

RELEASE—COMPROMISE—ULTRA VIRES.

A transfer by shareholders, in compromise of an action, of partly paid shares in a company, in trust for the company, under an agreement relieving the shareholders from any liability thereon, does not amount to a dealing by the company in its own shares, and the shareholders cannot be held as contributories; the agreement cannot be attacked on the ground of ultra vires by a company which has received full benefit thereunder.

Re Colonial Assur. Co.; Crossley's Case, 34 D.L.R. 341, 27 Man. L.R. 313, [1917] 1 W.W.R. 793.

LIABILITY FOR UNPAID SHARES.

Persons not duly elected directors, but who assume the office, are liable in all respects as if rightly such.

Re Owen Sound Lumber Co., 33 D.L.R. 487, 38 O.L.R. 414, varying 25 D.L.R. 812.

SET-OFF—UNPAID SHARES—DEBT OF COMPANY TO SHAREHOLDER—CALL.

A person liable as a contributory must discharge himself in that character before he can set up that he is entitled to receive something as a creditor of the company. [Re Overend, Gurney & Co., Grissell's case, L.R. 1 Ch. App. 528.] An arrangement between a company and a shareholder therein whereby the latter purports to set off a debt owing to him by the company against the amount unpaid by him on his shares where no call has been made for said amount, is not a ground for removing the shareholder's name from the list of contributories.

Re Consolidated Investments; Simons' Case (Alta.), [1918] 2 W.W.R. 581.

WINDING-UP — CONTRIBUTORY — APPLICATION BY LAND CORPORATION FOR SHARES—ACCEPTANCE BY DIRECTORS—ALLOTMENT OF SHARES TO NOMINEE OF CORPORATION — QUESTION WHETHER SHARES PAID FOR BY EFFECT OF AGREEMENT BETWEEN COMPANY AND CORPORATION—INDEPENDENT AGREEMENT — LIABILITY OF NOMINEE AS SHAREHOLDER—ESTOPPEL—COMPANIES ACT, R.S.C. 1906, C. 79, S. 41—TRUSTEE.

Re British Cattle Supply Co., McHugh's case, 16 O.W.N. 62.

CONTRIBUTORY—ALLOTMENT OF SHARES—NOTICE — PREFERRED AND COMMON — BONUS—CONDITIONAL SUBSCRIPTION.

Re Port Arthur Waggon Co., Price's Case, 9 O.W.N. 358.

SHARES — ACTION FOR AMOUNT OF CALL MADE BY DIRECTORS—VALIDITY—7 EDW. VII. c. 117 (O.)—8 GEO. V. c. 20, s. 30 (O.)—ONTARIO COMPANIES ACT, s. 15 (6), (7) — JURISDICTION OF ONTARIO COURT—DEFENDANT RESIDENT IN FOREIGN STATE—ASSIGNEE IN BANKRUPTCY — ASSESSMENT OF SHAREHOLDERS — BONA FIDES — DEFENCES TO ACTION — BY-LAW OF DIRECTORS—CONFIRMATION BY SHAREHOLDERS — SERVICE OUT OF JURISDICTION — DETERMINATION OF RIGHT IN FORMER ACTION—RES ADJUDICATA.

Superior Copper Co. v. Perry & Sutton, 17 O.W.N. 90.

UNPAID SHARES — COMPROMISE — ULTRA VIRES.

As a compromise of pending litigations, partially unpaid shares in a company were transferred to a trustee for the company, the compromise containing an agreement that the holders of the shares were to be relieved from liability thereon. The company subsequently went into liquidation. Held, that the names of the owners of the above shares should be removed from the list of contributories, the transaction not having amounted to a trafficking in its own shares by the company and that it would be inequitable to permit the company to take the full benefit of the agreement and insist at the same time that such agreement was ultra vires.

Re Winding-up Act: Re Colonial Ass'ce Co. (Man.), 35 **W.L.R. 793.**

(§ V F—258)—CALLS — AUTHORITY OF DIRECTORS — BY-LAW — QUORUM — SUBSCRIBER FOR SHARES — SIGNATURE TO STOCK AGREEMENT — LIABILITY TO COSUBSCRIBERS FOR PROPORTIONATE SHARE OF MONEYS PAID BY THEM—PARTNERSHIP — AGENCY — CONDITIONAL SUBSCRIPTION — NONFULFILMENT OF CONDITION—WAIVER—FINDINGS OF FACT OF TRIAL JUDGE.

Canadian Ohio Motor Car Co. v. Cochrane, 7 O.W.N. 698, 8 O.W.N. 242.

CALLS—SET-OFF—WIND-UP.

A creditor of a company, which has subsequently gone into liquidation, is entitled to set-off his debt against calls made in respect to his shares before the company went into liquidation, but not afterwards.

Re Ontario Fire Ins. Co., Heighington's Case (Alta.), 10 W.W.R. 911.

CALL ON SHARES — SET-OFF OF CLAIM AGAINST COMPANY—NO MEETING OF DIRECTORS AUTHORIZING CALL — VERBAL AUTHORIZATION BY DIRECTORS—IRREGULARITY OF CALL—LIABILITY AS CONTRIBUTORY.

Where a call was made for the amount remaining unpaid on shares in a company and moneys owing on his shares by D., who was secretary-treasurer and manager and a director of the company, were set off against moneys owing by the company to D., so that shares appeared as fully paid for, but the call had not been authorized at any meeting of directors, nor had any authorization of the directors been expressed in writing, although evidence was given that authorization for the call and agreement to the set-off had been verbally given by all the directors, it was held, on application by the liquidators on the winding-up of the company, that the call was not regular and therefore was of no effect and there could be no set-off; and D.'s name was placed on the list of contributors.

In re Consolidated Investments; Dunlop's Case, [1919] 3 W.W.R. 105.

WINDING-UP SHARES PAYABLE BY INSTALMENTS — RIGHT TO CALL UP WHOLE AMOUNT UNPAID — WINDING-UP ACT, R.S.C., 1906, c. 144—"DEBT"—MEANING OF IN PROVISO TO S. 58—"AT THE TIME WHEN HIS LIABILITY COMMENCES"—MEANING OF IN S. 53.

Under the Winding-up Act, R.S.C., 1906, c. 144, leave will not be granted to call up the whole amount remaining unpaid on shares where the time fixed for payment by the terms of the shareholder's application has not arrived, since in the proviso to s. 58 of the Act which reads: "provided that no call shall compel payment of a debt before the maturity thereof," the debt referred must be held to be the debt created by the contributory application for shares and the company's acceptance of it and payable as therein set out.

In re The Alliance Investment Co., McCausland's Case, [1919] 1 W.W.R. 17.

(§ V F—259)—CANCELLED SHARES—VALIDITY.

An arrangement between a company and certain of its shareholders whereunder the shares are "cancelled" and the money paid therefor is returned to the shareholders is void, even though the company be solvent at the time, unless the power to purchase its shares has been given to the company by the Act by or under which it was incorporated, and the shareholders whose shares have been so dealt with are liable to be placed on the list of contributories on the winding-up of the company. [Trevor v. Whitworth, 12 App. Cas. 409, followed.]

Re Wallbridge Grain Co. (Alta), [1918] 2 W.W.R. 886.

(§ V F — 261) — CONTRIBUTORIES — NEW COMPANY—ESTOPPEL.

Upon the organization of a new company, as where a provincial company is incorporated into a dominion company, the shareholders of the old company do not become shareholders of the new company and liable as contributories, even when receiving dividends and participating in the business of the latter, unless shares in the new company are in fact allotted to them.

Re Dominion Trusts Co. & Allen (B.C.), 37 D.L.R. 251, 24 B.C.R. 450, affirming, [1917] 1 W.W.R. 171.

(§ V F—262)—Misrepresentation — Estoppel.

Silence for an unreasonable time after notice amounts to acquiescence and laches which will estop a subscriber for shares in a company from attacking his subscription on the ground of fraud or misrepresentation.

Robert v. Montreal Trust Co., 41 D.L.R. 173, 56 Can. S.C.R. 342, affirming 36 D.L.R. 516, 52 Que. S.C. 73.

Subscription obtained by misrepresentation.

A representation by the seller of company shares that other shareholders had paid cash for their shares is a material representation.

Young v. Smith, 21 D.L.R. 97, 8 A.L.R. 256, 30 W.L.R. 642, 7 W.W.R. 1355.

Fraud as a defence—Unpaid stock.

Since a person who subscribes the memorandum accompanying a petition for the incorporation of a company, under art. 6008 R.S.Q. 1909, becomes, by the issuing of the letters patent, a shareholder of the company for the amount of his subscription, and no further allotment of shares being necessary, as a consequence, he cannot, after incorporation repudiate his quality as a shareholder and the obligations arising therefrom, on the ground that he was induced to sign the memorandum through misrepresentations made by the promoter.

Bergeron v. La Compagnie De Jonquiere, 22 Que. K.B. 341.

Shareholders' liability — Exaggeration of prospectus—Deceit—Waiver after discovery.

A shareholder is not relieved from his liability as a contributory in winding-up proceedings, on the ground that a prospectus or some other document put forward by the company contained extravagant and exaggerated language, if he was not deceived thereby, and was not induced to subscribe on the faith of such prospectus or document and if, after discovery of the fraud, the subscriber elects by his conduct to remain a shareholder instead of repudiating liability on his subscription.

Re National Husker Co., Worthington's Case, 14 D.L.R. 696, 5 O.W.N. 375, 25 O.W.R. 348, affirming 10 D.L.R. 643, 4 O.W.N. 1077, 24 O.W.R. 385.

Sale of shares—False and misleading statements — Fraud — Promissory note—Renewal—Waiver of fraud—Failure of consideration—Liability.

Vancouver Life Ins. Co. v. Richards, 48 D.L.R. 707, [1919] 3 W.W.R. 907.

Contributories — Subscription obtained by false representations.

Shareholders of a joint stock company in liquidation summoned as contributories cannot relieve themselves from their liability as such to the creditors of the company by establishing that their subscriptions for shares had been obtained by fraud or false representation, or that they were subject to conditions not performed.

St. Roch Hotel Co. v. Barbeau, 48 Que. S.C. 94.

(§ V F—263)—Conditional subscription—Liability as contributory—Right to repayment.

An allotment of shares upon a subscription which was subject to a condition that the subscriber, a physician, should be appointed chief medical referee for the company, which has not been fulfilled, nor notice of such allotment given, is illegal, and will, therefore, not render the subscriber liable as a contributory upon liquidation of the company; nor will such subscriber be entitled to a repayment out of the assets of the company of the money paid on such subscription to the promoters, but which has never reached the company. [Wood's Case, L.R. 15 Eq. 236; Mogridge's Case, 57 L.J.Ch. 932, applied.]

Re Great Northern Assce. Co., Black's Case, 25 D.L.R. 703, 25 Man. L.R. 670, 32 W.L.R. 524, 9 W.W.R. 240.

Unpaid stock—Defence that allotment irregular—Statutory requirements (B.C.).

S. 95 (1) of the Companies Act, R.S.B.C. 1911, c. 39, declaring voidable within a limited period at the instance of an applicant for shares an allotment made in contravention "of the provisions of the last preceding section," includes by such reference all of s. 94, and applies to make voidable within the limited period an allotment subsequent to the first as regards the statutory condition for 5 per cent being payable on application, to which cases s. 94 extends, although the other subsections are restricted in their application to first allotments only.

Graham Island Collieries Co. v. Macleod, 16 D.L.R. 281, 6 W.W.R. 154, 27 W.L.R. 227.

Illegality as defence—Estoppel.

The defendant had applied for $5,000 stock in a company and paid $2,500 in cash on account of his shares. Some months afterwards he was appointed a director of the company. As such he attended at several meetings of the directors and took an active part in the business of the company. Subsequently, the defendant being still a director, the plaintiff bank made a large advance to the company on a security of the balance remaining on the unpaid stock of several shareholders, including the defendant, and took an assignment of such balances. Shortly after making the advance, the bank gave the defendant notice of the assignment by letter, requesting him to verify the amount of his unpaid stock, to which the defendant repied: "I hereby verify the amount of the unpaid subscription assigned to your bank." After receiving the defendant's letter, the plaintiffs paid out for the company considerable sums far exceeding the amount claimed

from the defendant. There was nothing to show that the defendant had any shares in the company upon which to qualify as a director, other than the $5,000 above referred to. Held, that the defendant was estopped from denying that he was a shareholder who owed on unpaid stock the sum of $2,500, and from setting up irregularities or defects in connection with the organization of the company, the passing of its by-laws or the issue of the stock to him. [Montefiori v. Montefiori, 1 W. Bl. 363; Gale v. Lindo, 1 Vern. 475, and Dominion Bank v. Ewing, 35 Can. S.C.R. 165, followed.]

Union Bank v. Gourley, 37 D.L.R. 599, 27 Man. L.R. 330, [1917] 1 W.W.R. 935, affirming 31 D.L.R. 565.

INVALID SUBSCRIPTIONS—ILLEGAL DIRECTORATE.

Part VIII. of the Companies Act (R.S.O. 1914, c. 178) is for the protection of shareholders, and noncompliance therewith will entitle subscribers for shares to cancellation of their subscriptions, and the removal of their names from the list of contributories, notwithstanding any proceedings under the Dominion Winding-up Act (R.S. C. 1906, c. 144); a commercial company, incorporated under the above Companies Act, which, elects a board of directors exceeding the number required by its charter has no validly constituted directorate, and cannot make a valid allotment of any shares. [Re Otto Electrical Mfg. Co., [1906] 2 Ch. 390; Garden Gully Mining Co. v. McLister, 1 App. Cas. 39, followed.]

Re Carpenter, Hamilton's Case, 29 D.L.R. 683, 35 O.L.R. 626. [Leave to appeal refused, 10 O.W.N. 122, 287.]

ALLOTMENT OF COMMON STOCK IN PLACE OF PREFERRED—NULLITY.

There is no binding subscription contract effected as to charge a subscriber with liability as a contributory by allotting to him common shares in place of preferred stock he applied for, the subscriber at the time of the allotment not being a director and having no knowledge of the company's inability to issue such stock, and even had he ascertained from the articles and memorandum of incorporation the corporate powers to issue such stock he would have found the company empowered to issue them. [Re Bankers' Trust and Barnsley, 21 D.L.R. 623, 21 B.C.R. 130, followed; Oakes v. Turquand, 36 L.J. Ch. 949, at 964, referred to.]

Bankers Trust v. Okell, 27 D.L.R. 63, 22 B.C.R. 106, 34 W.L.R. 1, 10 W.W.R. 150.

CONTRIBUTORIES — ILLEGALITY AS DEFENCE —SUFFICIENCY OF ALLOTMENT—NAME NOT ON SHARES REGISTER—RECTIFICATION—COMPANIES ORDINANCE, N.W.T. —WINDING-UP ACT (CAN.)—SPECIFIC PERFORMANCE OF SUBSCRIPTION.

Liquidator of the Monarch Oil Co. v. Chapin (Alta.), 37 D.L.R. 772, 12 A.L.R. 459, [1917] 3 W.W.R. 662.

(§ V F—266)—ACTION FOR UNPAID STOCK —DEFENCES — DILATORY EXCEPTION — C.P. 179.

Held, the fact that the plaintiff has not tendered the shares of a company or any of them of the defendant, either before or with an action for the price thereof, is not a ground for dilatory exception, though a sum of money only has been asked.

Abitibi Pulp & Paper Co. v. Smart, 16 Que. P.R. 172.

(§ V F—267)—INEFFECTIVE SURRENDER OF SHARES.

Where the person to whom a share certificate has been issued has regularly become a shareholder of a company incorporated under the Manitoba Joint Stock Companies Act, the company cannot reacquire the title to its own shares by a transfer or surrender thereof from the shareholder apart from the remedies it is authorized to enforce for nonpayment of calls; and the shareholder surrendering the shares remains liable as a contributory in a compulsory liquidation in respect of the amount not paid up, although uncalled thereon. [Smith v. Gowganda Mines, 44 Can. S.C.R. 621, applied.]

Re Winnipeg Hedge & Wire Fence Co., 1 D.L.R. 316, 22 Man. L.R. 83, 20 W.L.R. 337, 1 W.W.R. 853.

EFFECT OF RESOLUTION RECALLING ALL STOCK CERTIFICATES ISSUED AS A BONUS —LIABILITY OF SHAREHOLDER.

One to whom company shares are illegally issued as a bonus is not relieved from liability to pay their par value by the adoption of an ultra vires resolution by the shareholders to the effect that all stock certificates regarded as a bonus be recalled into the company pursuant to which resolution there was an attempted cancellation of the shares. [Ooregum Gold Mining Co. v. Roper, [1892] A.C. 125, and Bellerby v. Rowland and Marwood's Steamship Co., [1902] 2 Ch. 14, followed.]

Re McGill Chair Co.; Munro's Case, 5 D.L.R. 73, 26 O.L.R. 254, 21 O.W.R. 921.

VOLUNTEERS AND RESERVISTS RELIEF ACT —CLAIM FOR DECLARATION THAT SURRENDER OF SHARES VOID THAT DEFENDANT BE PLACED ON LIST OF CONTRIBUTORIES AND FOR SETTING ASIDE TRANSFER OF LAND MADE IN CONNECTION WITH SUCH SURRENDER — NOT ENFORCEMENT OF PAYMENT OF DEBT, LIABILITY OR OBLIGATION OR FOR RECOVERY OF POSSESSION OF LAND.

A claim by a company in liquidation for a declaration that a certain surrender of shares by defendant, a volunteer under the Volunteers and Reservists Relief Act, was void and that such defendant should be placed upon the list of contributories as a holder of the shares and for an order that a certain transfer of lands by said company to the other defendant, wife of the first defendant (made in connection with such surrender) be set aside and the lands vested

in the company; is not prohibited by said Act, as the action is not for the enforcement of the payment of debt, liability or obligation nor one for the recovery of possession of land; (although it might result, on further proceedings, in the enforcement of the payment of a debt and in depriving a soldier's wife of possession of the land).

The Camrose Stock & Dairy Farm v. Claxton, [1919] 1 W.W.R. 984.

(§ V F—268)—Infant — Repudiation — Acceptance of dividend.

Where an infant purchases shares in a company he may repudiate the contract upon coming of age, but is bound to do so within a reasonable time, and his acceptance of a dividend after he comes of age is a definite affirmance of the contract. [Birkenhead, etc., R. Co. v. Pilcher, 5 Ex. 121; L. & N.W.R. Co. v. McMichael, 5 Ex. 114, referred to.]

Re Prudential Life Ins. Co., Re Paterson (Man.), [1918] 1 W.W.R. 105.

(§ V F—270)—Liability as contributory —Stock at discount or by way of bonus—Winding-up as discharge of persons in employ.

Re The City Cold Storage Co., 30 D.L.R. 574, [1917] 1 W.W.R. 135.

Stock paid for in services.

A covenant or agreement with the company to perform some future act still unperformed in consideration for paid-up shares in an incorporated company cannot be pleaded in set-off to a claim by the liquidator of the company against the shareholder as a contributory in a winding-up proceeding for the amount of the shares issued to and accepted by the shareholder and remaining registered in his name upon the stock register although the shares may be described as fully paid up. [Re Jones and Moore Electric Co., 18 Man. L. R. 549, 571, approved.]

Re Winnipeg Hedge & Wire Fence Co., 1 D.L.R. 316, 22 Man. L.R. 83, 20 W.L.R. 337, 1 W.W.R. 853.

(§ V F—275)—Shares in company—Procedure to enforce—Order nisi—Originating summons—R. 338.

Where an order nisi has been made for charging shares in a company an application should not be made to make the order absolute, but an originating summons should be issued to shew cause why the shares should not be sold to realize the amount due.

Mansell v. Drinkle, 7 W.W.R. 383.

Winding-up — Shareholders receiving dividends improperly paid out of assets of company—Liability to repay—Jurisdiction of referee under winding-up order to determine—Contributories — Holders of "prepaid stock"—Assets and undertaking of another loan company sold and transferred to insolvent company—Contract—Approval of Lieutenant-Governor-in-Council — Ontario Loan Corporations Act, R.S.O. 1897, c. 205—Position of shareholders in selling company who received paid-up shares in insolvent company.

Re Dominion Permanent Loan Co., 16 O.W.N. 295.

(§ V F — 276) — Stock subscriptions — Proceedings to enforce—Estoppel as shareholder.

Where it appears that the president of a company subscribed to additional shares of stock in the company for the purpose of obtaining supplementary letters patent, and the shares were allotted to him at a shareholders' meeting at which he presided and the allotment was recognized by the directors, and supplementary letters patent were issued on the strength of this subscription, and it further appears that in the annual report to the government the president was treated as a shareholder holding a certain number of shares of which the part allotted in question were unpaid, which report was verified by the oath of the president himself, the latter is properly placed upon the list of contributories in respect of his subscription, on the winding-up of the company, notwithstanding a subsequent by-law for conversion of common stock into preference stock to an amount which could not be made up without the shares in question, where the preference stock was not in fact issued.

Re Stewart, Howe & Meek, 9 D.L.R. 484, 4 O.W.N. 506, 23 O.W.R. 852.

Contributory—Agreement to take shares — Invalidity — Absence of allotment — Issue of certificates for shares — Liability confined to shares for which certificates issued.

Re Dominion Milling Co., Dennis's Case, 8 O.W.N. 496.

Proceedings to enforce by liquidator.

Where one has entered into a binding agreement for the purchase of treasury shares from a company, he is not released therefrom, nor is the company or the liquidator thereof bound, by a promise by the president of the company that, so long as he should remain president, the purchaser should not be called upon for payments.

Re Port Hope Brewing & Malting Co., Johnson's Case, 3 D.L.R. 426, 3 O.W.N. 1048.

Liability of shareholder as contributory—Contract to pay for shares in property.

A person cannot be held as a contributory in a winding-up proceeding in respect to shares in a company incorporated under the Ontario Companies Act, issued as fully paid and allotted to him in consideration of his agreement to convey land to the company, notwithstanding he fails to make the conveyance, where there was no subscrip-

tion or other contract by which any cash value was placed upon the shares; the default did not entitle the company to treat the shareholder as holding the shares subject to call. [Re Modern House Mfg. Co., Dougherty & Goudy's Case, 12 D.L.R. 217, affirmed on an equal division; Re Alkaline Reduction Syndicate, 45 W.R. 10, Re Railway Times Publishing Co., 42 Ch.D. 98, and Re Cornwall Furniture Co., 20 O.L.R. 520, specially referred to.]

Re Modern House Mfg. Co. (Dougherty & Goudy's Case), 14 D.L.R. 257, 29 O.L.R. 266.

CONTRIBUTORIES—EVIDENCE—ESTOPPEL.

Re Nagrella Mfg. Co., 8 O.W.N. 452.

G. STOCKHOLDERS' MEETINGS; VOTING.

(§ V G—283)—NOTICE—WAIVER.

A general by-law of a company requiring notice having been given will be set aside, cannot be arbitrarily revoked by the directors, at a directors' meeting, signing and approving of a waiver of notice, and the proceedings at a meeting held without such notice to be given of any special meeting

Canada Furniture Co. v. Banning (Man.), 39 D.L.R. 313, [1918] 1 W.W.R. 31.

REGULATORY—RESOLUTIONS.

Where the by-laws of a company require the meetings of shareholders to be called by the president of the company at the written request of five members; a meeting called by the secretary-treasurer without the consent and against the will of the president is illegal, and any resolution adopted at such meeting is null and void.

Courchene v. Viger Park Co., 23 D.L.R. 693, 24 Que. K.B. 97.

NOTICE OF MEETING.

It is not necessary to give special notice to each shareholder of a joint stock company of a general meeting; a public notice given 14 days previous to the meeting is sufficient.

Pineau v. St. Laurent, 25 Que. K.B. 210.

(§ V G—284)—VALIDITY OF QUORUM.

At a general meeting of the defendant company held on September 15, 1915, and at an extraordinary general meeting held later, there were present on each occasion seven members, only two of whom were qualified to vote. Under art. 51 of Table A of the Companies Act, three members personally present shall form a quorum. In an action by the plaintiff on behalf of himself and the other shareholders for a declaration that the proceedings were irregular for want of a quorum and for an injunction, held, that arts. 51 and 63 of Table A of the Companies Act must be read together and there must be three members qualified to vote to form a quorum competent to transact voting business, although three not qualified to vote may form a valid quorum to transact nonvoting business.

Doig v. Port Edward Townsite Co., 22 B.C.R. 418.

(§ V G—290)—VOTING POWER—RIGHTS OF MINORITY.

Apart from the principle of ultra vires, directors holding a majority of votes cannot make a gift to themselves of the property belonging to the corporation, and if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter amounts to a forfeiture of the interest and property of the minority of shareholders in favour of the majority, by the votes of those who are interested in securing the property for themselves; such use of the voting power is not sanctioned by the courts. [Menier v. Hooper's Telegraph Co., 9 Ch. App. 350, followed.]

Cook v. Deeks, 27 D.L.R. 1, [1916] 1 A.C. 554, reversing 21 D.L.R. 497, 33 O.L.R. 209.

(§ V G—291)—BOND ISSUE—POWERS OF MAJORITY—PRIORITIES.

Dissentient or absentee bondholders are bound by the action of the majority in declaring a second issue of bonds a priority over a first issue in order to raise money for the payment of pressing claims, and in conformity to the powers of a deed of trust authorizing the issue.

Re B.C. Portland Cement Co., 22 D.L.R. 609, 8 W.W.R. 1119, 31 W.L.R. 938. [Affirmed, 27 D.L.R. 726, 21 B.C.R. 534.]

MAJORITY VOTE.

No abuse of power by the majority of the stockholders of a company and no deprivation of the rights of the minority calling for the interference of a court are shewn where it appears that the directors and more than three-fourths of the shareholders in a cotton company, because its financial condition was going from bad to worse, and there was no reasonable prospect of any revival of prosperity, due to the ruinous competion which was going on in the cotton business, accepted an offer to purchase their shares made on behalf of a syndicate (afterwards incorporated as a company) formed for the purpose of acquiring capital stock and a controlling influence in the cotton company and its three principal competitors, a fair and liberal valuation being placed upon the assets of the cotton company, and afterwards the cotton company executed a lease to the new company, though the original agreement was that the new company should sell the goods produced by the cotton company at a fair and reasonable commission and the terms of the lease were fair and there was no evidence of any oppressive conduct or want of good faith on the part of either of the parties to the transaction.

Dominion Cotton Mills Co. v. Amyot & Brunet, 4 D.L.R. 306, [1912] A.C. 546.

(§ V G—293)—Proxies.

Where the directors of a company knowingly allow trust shares to be voted upon at a shareholders' meeting contrary to the wishes of the cestui qui trust, and it is fairly shewn that such voting is illegal, a shareholder, whose voting power is thereby designedly made useless, is entitled to an interlocutory injunction restraining the company from acting upon a resolution passed at such meeting.

Elliot v. Hatzie Prairie, 6 D.L.R. 9, 21 W.L.R. 897.

Right of member in default to vote by proxy.

A proxy may be voted at an election of company directors by a shareholder who is, by reason of nonpayment of calls, under s. 12 of c. 53 of 52 Vict. (Man.), precluded from voting his own shares. The right of a shareholder to appoint a non-member as proxy to vote at an election of company directors may be taken away by by-law. Unless the incorporating statute or a by-law of the company provides otherwise, the proxy appointed to represent a shareholder at a shareholders' general meeting at which the election of directors is to be held, need not himself be a shareholder. [Lindley on Companies, 6th ed. 429; and Ernest v. Loma, [1897] 1 Ch. 1, specially referred to.] Under s. 12 of c. 53 of 52 Vict. (Man.), company directors cannot be elected in any manner except by ballot. The fact that a shareholder who was in arrears for calls and therefore not entitled, under s. 12, c. 53, 52 Vict. (Man.), to vote at elections of directors, had been permitted to vote at previous elections, will not justify his voting at a subsequent election. A shareholder whose note given for a call is overdue cannot, under the provisions of s. 12 of c. 53 of 52 Vict. (Man.), vote at an election of company directors.

Colonial Assce. Co. v. Smith, 4 D.L.R. 814, 22 Man. L.R. 441, 21 W.L.R. 815, 2 W.W.R. 699.

(§ V G—294)—Right of shareholder to vote having interest in subject of vote.

Unless otherwise provided by the regulations of the company, a shareholder is not debarred from voting or using his voting power by the circumstance of his having a particular interest in the subject-matter of the vote. [Burland v. Earle, [1902] A.C. 83, followed.

Dominion Cotton Mills Co. v. Amyot and Brunet, 4 D.L.R. 306, [1912] A.C. 546.

(§ V G—295)—Election of directors—Ontario Companies Act, R.S.O. 1914, c. 178, ss. 5 (4), 44, 45, 50, 54, 60, 72, 73, 118, 123 — Meeting — Persons entitled to vote — Registered "shareholder" — "In his own right" —"Absolutely" — Beneficial holding.

Tough Oakes Gold Mines v. Foster, 34 D.L.R. 748, 39 O.L.R. 144.

Voting—Bonus—Salary.

It is unnecessary to consider the regularity of the proceedings of a company leading up to the granting of a bonus and fixing of a salary, provided that it is intra vires of the company and consented to by every shareholder. A shareholder is not debarred from voting or using his voting power to carry a resolution by the circumstance of his having a personal interest in the subject-matter of the vote, unless otherwise specially provided by the company's regulations.

MacDonald Bros. Engineering Works v. Gordon and Robertson Godson Co., 23 B.C.R. 166.

Contract under seal—Company to transfer shares to servant—Conditional gift or bonus.

Gee v. Eagle Knitting Co., 2 O.W.N. 619, 18 O.W.R. 438.

Transfer of paid-up shares — Refusal of directors to allow — Dominion Companies Act.

Re Good and Shantz, 23 O.L.R. 544, 2 O.W.N. 955.

Shares—Transfer by unauthorized person—Liability and duty of company to true owner.

Stuart v. Hamilton Jockey Club, 19 O.W.R. 180, 2 O.W.N. 1402 and 673.

Shares—Action to set aside subscription and allotment—Fraud.

McGaffigan v. National Jusker Co., 2 O.W.N. 600, 18 O.W.R. 370.

Issue of shares—Authority to sign certificate—Estoppel.

MacKenzie v. Monarch Life Ass'ce Co., 45 Can. S.C.R. 232.

Shares — Application for — Conditions —Agent's authority — Appointment of applicant as "mine doctor" — Right to remuneration.

Gillespie v. Clover Bar Coal Co., 16 W.L.R. 534, 3 A.L.R. 238.

Contributories—Application for shares on unusual terms — Allotment on different terms.

Re Canadian Mail Orders, 2 O.W.N. 882, 18 O.W.R. 834.

Shares of mining company — Weight of evidence in plaintiff's favour.

Beath v. Townsend, 19 O.W.R. 469, 2 O.W.N. 1273.

Shares — Rectification of register of shareholders — Reduction of number of shares—Consent.

Re J. A. French & Co., 2 O.W.N. 499.

Sale and conversion of shares—Measure of damages — Evidence as to value.

Goodall v. Clarke, 23 O.L.R. 57, 18 O.W.R. 185. [The Supreme Court of Canada quashed an appeal from this decision, 44 Can. S.C.R. 284.]

DECLARATION OF DIVIDEND — ARTICLES OF ASSOCIATION — GENERAL MEETING OF SHAREHOLDERS — RESOLUTION OF DIRECTORS.

Re Cardiff Coal Co., 18 W.L.R. 165 (Alta.).

COMPANY — "SHAREHOLDER" — WHAT CONSTITUTES.

Re Kootenay Valley Fruit Lands Co., 18 W.L.R. 145 (Man.).

SUBSCRIPTION FOR SHARES — AGREEMENT MADE AFTER INCORPORATION AND NOT WITH COMPANY — CANCELLATION.

Canadian Druggists' Syndicate v. Thompson, 24 O.L.R. 108, 19 O.W.R. 401.

SHARES — IMPROPER ISSUE OF STOCK FOR CONTROLLING MEETING OF SHAREHOLDERS—ORDER RESTRAINING HOLDERS OF STOCK IMPROPERLY ISSUED FROM VOTING.

Glace Bay Printing Co. v. Harrington, 9 E.L.R. 265 (N.S.).

SUBSCRIPTION FOR SHARES — JURISDICTION —CAUSE OF ACTION ARISING IN TWO DISTRICTS.

Richmond and Drummond Fire Ins. Co. v. MacDonald, 12 Que. P.R. 274.

SUMMARY PROCEDURE — SUBSCRIPTION FOR STOCK — COPY OF WRIT — STAMPS.

An action for the price of shares in a joint stock company can be taken by summary procedure.

Laurentian Granite Co. v. McLaughlin, 12 Que. P.R. 414.

SALE OF BANK STOCK — ALLOTMENT TO SHAREHOLDERS — SHARES REFUSED OR RELINQUISHED—SALE TO PUBLIC.

Sovereign Bank v. McIntyre, 44 Can. S.C.R. 157.

JOINT STOCK COMPANY — ALLOTMENT OF SHARES — SURRENDER BY ALLOTTEE — UNPAID CALL — TRANSFER — WAIVER.

Smith v. Gowganda Mines, 44 Can. S.C.R. 621.

SHARES — DEALINGS IN — OWNERSHIP — DISPUTED QUESTIONS OF FACT — FINDINGS OF TRIAL JUDGE — COUNTERCLAIM —ACCOUNT—COSTS.

Foster v. Oakes, 12 O.W.N. 76.

OWNERSHIP AND CONTROL OF SHARES—POWERS OF VOTING ON SHARES—INTERIM INJUNCTION.

Foster v. Oakes, 10 O.W.N. 210.

VI. Dissolution; forfeiture; insolvency; winding-up.

A. IN GENERAL.

(§ VI A—305) — RIGHT TO APPLY FOR WINDING-UP — SHAREHOLDER — PARTNERSHIP.

A fully paid-up shareholder is entitled to apply for a winding-up order as a contributory; and where it appears just and equitable, a corporation formed out of a partnership may be dissolved as if it were in substance a partnership. A share held by the solicitor of a partner in trust for his client cannot be used to deprive the partner of his equal voice in the corporation.

Re Winding-up Ordinance & Timbers, 35 D.L.R. 431, 11 A.L.R. 432, [1917] 2 W.W.R. 965.

WINDING-UP — PRIOR DEBENTURE RECEIVERSHIP.

When opposed by a large proportion of company creditors a winding-up order will be refused, where, if granted, the chances of the creditors obtaining payment would be diminished; or where, by reason of the property of the company being held by a receiver for its debenture holders, there would be nothing on which the order could operate.

Re Ocean Falls Co., 13 D.L.R. 265, 4 W.W.R. 680.

QUALIFICATIONS OF LIQUIDATOR — DISINTERESTED PARTY.

It is advisable that the liquidator for the winding-up of a company under the Winding-up Act, R.S.C. 1906, c. 144, s. 124, be a disinterested party having no claims against and no share in the company. [Re Central Bank of Canada, 15 O.R. 309, followed.]

Re Men's Wear, 22 D.L.R. 530.

WINDING-UP ACT, 1907 MAN., C. 51, S. 1—APPOINTMENT OF SOLICITOR TO REPRESENT THE INTERESTS OF SHAREHOLDERS —COSTS INCURRED PRIOR TO PRESENTING OF PETITION FOR WINDING-UP—POWER OF COURT TO GRANT—RULES OF COURT —DISTINCTION BETWEEN COSTS TAXED TO COUNSEL AND SOLICITOR FOR THE LIQUIDATOR AND COSTS TAXED TO COUNSEL AND SOLICITOR FOR SHAREHOLDERS.

Re Prudential Life Ins. Co., 47 D.L.R. 706, [1919] 3 W.W.R. 69.

DOMINION WINDING-UP ACT — JURISDICTION OF PROVINCIAL COURTS.

The British Columbia Court having made the winding-up order is a Dominion Court ad hoc, and that, generally speaking, a Provincial Court should not act unless at the request of the Dominion Court, but, if requested, it should in every way assist such Dominion Court. That the only grounds justifying a Provincial Court acting in the first instance would be matters of urgency, and that the facts in the present case do not disclose such grounds.

Mowat v. Dom. Trust Co., 8 S.L.R. 404.

PROCEEDINGS PENDING IN FOREIGN COURT — DOING BUSINESS ELSEWHERE — STAY OF PROCEEDINGS.

The court has jurisdiction to make a winding-up order under the Winding-up Act, R.S.C. 1906, c. 144, against, and to proceed with the winding-up of, a company incorporated in Manitoba having its head office here and empowered, amongst other things, to carry on the business of a land company, if it has assets in Canada, although it never carried on any of its business in Manitoba and dealt chiefly in lands in the Province of Saskatchewan, and although bankruptcy proceedings are pending in the United States where all of its

operations were carried on, under which proceedings the winding-up of the company could be completed subject to the want of power in the trustee in bankruptcy to deal with the lands of the company in Saskatchewan. [North Australian Territory Co. v. Goldsborough, 61 T.L.R. 716, and Re Tobique Gypsum Co., 6 O.L.R. 515, followed.] There is a discretion under s. 19 of the Act, to stay proceedings under a winding-up order and, if the procedure of the foreign bankruptcy court is as efficient for the purpose of securing an equal distribution of the company's assets as our procedure under the Winding-up Act, the winding-up under the order should only be proceeded with as far as may be necessary to make the lands in Saskatchewan available for the Canadian creditors pari passu with the creditors in the United States.

Re Stewart & Matthews, 26 Man. L.R. 277, 34 W.L.R. 47.

PETITION BY SHAREHOLDERS FOR WINDING-UP ORDER—OPPOSITION BY COMPANY—QUESTION WHETHER COMPANY INSOLVENT — INQUIRY BY ACCOUNTANT — WINDING-UP ACT, R.S.C. 1906, c. 144, s. 15—ADJOURNMENT OF HEARING OF PETITION.

Re Imperial Steel & Wire Co., 17 O.W.N. 11.

DISCRETIONARY POWERS AS TO WINDING-UP —BEST INTERESTS OF CREDITORS.

Upon application to have a joint stock company wound up, the court grants the order only if it believes it just and equitable for all the interests concerned. The discretionary powers of the court in such a matter are very wide. The winding-up of a company being made especially and above all in the interest of the creditors, the judge should as a rule, when considering the advisability of the winding-up, conform to their views and exercise his discretion in their favour if their interests come in conflict with those of the shareholders.

Fortin v. Dorchester Electric Co., 48 Que. S.C. 258.

STAY OF PROCEEDINGS—MEETING—NOTICE.

The notice calling a meeting of the shareholders of a joint stock company, convoked for the purpose of placing the company in liquidation, should contain the information that this proposition will be submitted to the meeting. Where the legality of such meeting, the resolution passed in favour of liquidation, and the regularity of share certificates belonging to the greater number of shareholders who voted in favour of the liquidation, have been contested by direct action, the court should await the decision of that litigation before ordering that the company should be placed in liquidation; the court of appeal, in such case, will suspend the liquidation.

Belanger v. Union Abitibi Mining Co., 25 Que. K.B. 376.

PRIORITY OF PETITIONERS TO CONDUCT PROCEEDINGS.

In the absence of collusion or other circumstances which would make it more desirable that the conduct of the proceedings should be given to the second petitioner for a winding-up order, the person who files his petition first should have the conduct of the proceedings, even where he is absent on active service.

Re Simpson & Hunter, 34 W.L.R. 850.

TECHNICAL INSOLVENCY — BREWING COMPANY.

An order winding-up a brewing company refused and the hearing of the petition enlarged, notwithstanding the fact that the petitioner showed the company's technical insolvency by proving that it had permitted a writ of execution under which its goods were levied upon to remain unsatisfied for fifteen days after seizure, there being no suggestion of any unpaid capital and no evidence of the assets of the company other than its plant and stock in trade.

Re Edmonton Brewing & Malting Co. (Alta.), [1918] 2 W.W.R. 350.

NONCOMMERCIAL COMPANY.

The Winding-up Act does not apply to a company which is not incorporated for a commercial purpose.

Durocher v. Le Club Champetre Canadien, 19 Que. P.R. 178.

STRIKING OFF ROLL — SHAREHOLDER SOLE CREDITOR—ASSETS ACQUIRED BY SHAREHOLDER—ACCOUNTING.

Where a company has been struck off the roll by the registrar of companies, the mere fact that some time before the machinery of the registrar's office was set in motion a shareholder wrote him asking that the company be struck off, and stating that the writer held all the stock of the company and there were no liabilities that he knew of except to himself, does not support the contention that the dissolution of the company was brought about fraudulently by such shareholder. The decision in Embree v. Millar, 11 A.L.R. 127, does not apply to a case where before the dissolution of a company its assets were acquired by a shareholder who claims them as his own.

Secord v. Keith (Alta.), [1918] 3 W.W.R. 764.

ACTION AGAINST DIRECTORS FOR MISFEASANCE — APPEAL — SERVICE EX JURIS — AMOUNT INVOLVED—FUTURE RIGHTS.

An appeal from an order refusing to set aside an order for service ex juris in a misfeasance suit brought against directors of a company in liquidation under the Winding-up Act, R.S.C., c. 144, held not to involve an amount exceeding $500. [Cushing Sulphite-Fibre Co. v. Cushing, 37 Can. S.C.R. 173, followed.] An order granting leave to serve a summons ex juris is not a matter affecting "future rights" within the meaning of s. 101, of the Winding-up Act,

R.S.C. 1906, c. 144, but is a mere matter of practice and procedure.

Brown v. Cadwell (B.C.), 25 B.C.R. 405, [1918] 2 W.W.R. 229.

WINDING-UP — PETITION OF CREDITORS — INSUFFICIENT SERVICE.

Ashdown Hardware Co. v. Residential Bldg. Co., 7 W.W.R. 690.

(§ VI A—306)—DISSOLUTION AND FORFEITURE — RECEIVERSHIP.

In the absence of a liquidation the persona of a corporation remains legally intact notwithstanding the appointment by the court of receivers and managers of the company's business made in a bondholders' action to enforce their security.

Parsons v. Sovereign Bank of Canada, 9 D.L.R. 476, [1913] A.C. 160.

(§ VI A—311)—SALE — REDEMPTION — WINDING-UP — PURCHASE OF ASSETS FROM LIQUIDATOR — ALLEGED MISREPRESENTATION — APPEAL FROM MASTER.

Re Hamilton Mfg. Co., Hall's Case, 4 O.W.N. 421, 23 O.W.R. 473.

SALE OF MINING CLAIMS—APPROVAL OF OFFERS BY REFEREE — STATUS OF OPPONENT — SUBPOENAS FOR EXAMINATION OF ASSIGNEE OF MINING CLAIM CHARGES—MOTION TO SET ASIDE — LEAVE TO APPEAL — PARTIES — ADDITION OF CESTUIS QUE TRUST — REFUSAL OF LEAVE.

Re Crown Chartered Mining Co. of Porcupine Lake; Chambers v. Crown C.M. Co., 10 O.W.N. 7, 15.

WINDING-UP — CLAIM ON ASSETS — ASSIGNMENTS.

Re Standard Cobalt Mines, 5 O.W.N. 351.

SALE OF ASSETS — AUTHORIZATION — FRAUD—UNPAID VENDOR.

An authorization by a judge to sell the assets of an insolvent company, on certain conditions, may be annulled for fraud and misrepresentations, if it was not disclosed to the judge that the liquidator had been previously authorized to give, and had given, to the same purchaser, an option on the sale of certain goods forming part of the assets, on other conditions, to protect the interest of an unpaid vendor of the goods. A liquidator duly authorized to give such option, on conditions which guaranteed the unpaid vendor of the goods the payment of the claim, cannot then rescind the contract, if the unpaid vendor has declared his intention of availing himself of it.

Bemier Glass Co. v. Metal Products Co., 24 Rev. Leg. 336.

(§ VI A—313)—NOTICE OF PRESENTATION OF PETITION.

The notice of an "application for a winding-up order" under ss. 13 and 14 of the Winding-up Act (R.S.C. 1906, c. 144), has reference to the hearing of the application and not to the filing or "presentation of the petition" within the meaning of s. 5.

Re Halifax Power Co. (N.S.), 36 D.L.R. 393.

POWERS OF REFEREE — CONTRIBUTORIES — REVIEW.

A judge sitting in appeal from the findings of an official referee under the Winding-Up Act (R.S.C. 1906, c. 144), respecting the liability of a contributory, has no jurisdiction to review the winding-up order made by a judge of co-ordinate jurisdiction; unless it is discharged on appeal, under s. 104 of the act, it is binding on the creditors and contributories of the company and is authority for the referee to proceed, and except for error in the referee's report the judge on appeal will not interfere. [Re Clarke and Union Fire Ins. Co., 14 O.R. 618, 16 A.R. (Ont.) 161, 17 Can. S.C.R. 265, followed. Morrisburgh & Ottawa El. R. Co. v. O'Connor, 23 D.L.R. 788; Re Faulkner, 25 D.L.R. 780, referred to.]

Re Farmer's Bank of Canada; Lindsay's Case, 28 D.L.R. 328, 35 O.L.R. 470.

WINDING-UP ACT, R.S.C. 1906, c. 144, s. 110 — PRACTICE — CONTRIBUTORIES — REFERENCE TO MASTER.

Re Winding-up Act & Alberta Loan & Inv. Co., 32 D.L.R. 795, 11 A.L.R. 30, [1917] 1 W.W.R. 744.

WINDING-UP GENERALLY—PROCEDURE.

The winding up of a company when ordered under the Winding-up Act, R.S.C. 1906, c. 144, takes effect retroactively as of the date of service of the notice of motion so that the winding up of the business of the company is to be deemed to commence at that time. [Fuches v. Hamilton Tribune Co., 10 P.R. (Ont.) 409, followed.]

Bank of Hamilton v. Kramer-Irwin Co., 1 D.L.R. 475, 3 O.W.N. 603.

VOLUNTARY WINDING-UP — ALBERTA — POWERS AND RIGHTS OF LIQUIDATOR — DISTRIBUTION OF ASSETS.

The liquidator of a company which is being voluntarily wound up under the Companies Winding-up Ordinance, N.W.T. 1903, c. 111, s. 22, may be granted a stay of proceedings in an action against the company and a garnishee summons issued before judgment may be discharged so that the money attached thereby can be paid to the liquidator for distribution pari passu among all creditors, where by statute other creditors might come in and share in the garnishee proceedings; but the attaching creditor may be given his costs as a preferential claim.

Chown Hardware Co. v. Delicatessen Ltd., 15 D.L.R. 502, 7 A.L.R. 320, 26 W.L.R. 689, 5 W.W.R. 1125.

WINDING-UP ORDER — APPOINTMENT OF LIQUIDATOR.

A winding-up order under the Winding-up Act, R.S.C. 1906, c. 144, may include the appointment of a provisional liquidator, but a permanent liquidator can be appointed only after notice to the creditors, contributories and shareholders in conformity with s. 27 of the Act. [Re Installations, 14 D.L.R. 679, considered.]

Great West Supply Co. v. Installations, 5 D.L.R. 896, 5 W.W.R. 1048, 26 W.L.R. 682.

WINDING-UP — INCORPORATION UNDER PROVINCIAL LAW — VOLUNTARY — COMPULSORY — AFFIDAVIT — BRINGING UNDER DOMINION WINDING-UP ACT.

The provisions of s. 11 of the Dominion Winding-up Act, R.S.C. 1906, c. 144, as to when the winding-up of a company may be brought within the act, are not restricted in their operation to companies organized under the Dominion Companies Act, but apply as well to provincial building societies having a capital stock and organized under provincial laws, if in liquidation or in process of being wound-up under a resolution adopted by its shareholders; and a winding-up order may be made in a proper case on petition of a shareholder asking that the society be brought under the provisions of the Winding-up Act (Can.). [Re Union Fire Ins. Co., 14 O.R. 618, 16 A.R. (Ont.) 161, 17 Can. S.C.R. 265, applied; Re Cramp Steel Co., 16 O.L.R. 230, distinguished and criticized.] A building loan and investment company, organized under a Manitoba Act, and which is in process of being voluntarily wound up under a provincial law pursuant to a resolution adopted by its shareholders at a special meeting, may under s. 11 (b) of the Dominion Winding-up Act, R.S.C. 1906, c. 144, be ordered to be wound up under the provisions of the latter act on the petition of any shareholder. [Re Union Fire Ins. Co., 14 O.R. 618, 16 A.R. (Ont.), 161, 17 Can. S.C.R. 265, applied; Re Cramp Steel Co., 16 O.L.R. 230, distinguished and criticized.] Whether a winding-up order will be made under the Dominion Winding-up Act, R.S.C. 1906, c. 144, on the petition of any of the shareholders of a provincial company which is in process of winding-up under a provincial law rests in the discretion of the court, and will not be made ex debito justitia merely because the petitioners bring themselves within the terms of the Dominion Act. In Manitoba where a petition for a winding-up order cannot be based on an affidavit of information and belief only, a verification in general terms of the several paragraphs of a supporting affidavit, by a statement that the deponent has read over certain numbered paragraphs of the petition and that they are true, ought not to be encouraged, although constituting evidence which may be given effect to in the absence of conflicting material. [Re Manitoba Commission Co., 2 D.L.R. 1, 22 Man. L.R. 268, followed; Gilbert v. Endean, L.R. 9 Ch.D. 259, applied. See also Re Kootenay Brewing Co., 6 B.C.R. 131; Hamilton's Company Law, 3rd ed., 442 and 533 g.] An order for the winding-up of a provincial company at the instance of a shareholder may be made under the Dominion Winding-up Act, R.S.C. 1906, c. 144, s. 11 (e), as to a company to which the latter Act applies, notwithstanding the pendency of a voluntary winding-up proceeding under a provincial Act, where ample reason is shewn for fearing that the interests of the company at large, and of the shareholders in particular, are likely to be insufficiently protected in the voluntary proceeding and the court is, in consequence of opinion that it is just and equitable to make the winding-up order.

Re The Colonial Investment Co. of Winnipeg, 14 D.L.R. 563, 23 Man. L.R. 871, 25 W.L.R. 843, 5 W.W.R. 461.

WINDING-UP — INCORPORATION UNDER PROVINCIAL LAW — BRINGING UNDER DOMINION WINDING-UP ACT.

The provisions of s. 11 of the Dominion Winding-up Act, R.S.C. 1906, c. 144, as to when the winding-up of a company may be brought within the Act, are not restricted in their operation to companies organized under the Dominion Companies Act, but apply as well to provincial building societies having a capital stock and organized under provincial laws, if in liquidation or in process of being wound up under a resolution adopted by its shareholders; and a winding-up order may be made in a proper case on petition of a shareholder asking that the society be brought under the provisions of the Winding-up Act. A building loan and investment company, organized under a Manitoba Act, and which is in process of being voluntarily wound up under a provincial law, pursuant to a resolution adopted by its shareholders at a special meeting, may, under s. 11(b) of the Dominion Winding-up Act, R.S.C. 1906, c. 144, be ordered to be wound up under the provisions of the latter Act on the petition of any shareholder. [Re Union Fire Ins. Co., 14 O.R. 618, 16 A.R. (Ont.) 161, 17 Can. S.C.R. 265, applied; Re Cramp Steel Co., 16 O.L.R. 230, distinguished and criticized.]

Re Colonial Investment Co. of Winnipeg, 15 D.L.R. 634, 23 Man. L.R. 871, 26 W.L.R. 361, 5 W.W.R. 882, affirming 14 D.L.R. 563. [Considered in Re Colonial Investment Co. of Winnipeg, 15 D.L.R. 650.]

WINDING-UP — SETTLING CONTRIBUTORIES — IRREGULARITY IN STOCK SUBSCRIPTION.

Apart from possible questions of estoppel by conduct, the nonreceipt of a copy of any prospectus under the Companies Ordinance, Alta. statutes 1909, c. 5, may be raised as a defence as against an alleged allotment of shares on settling the list of contributories in winding-up proceedings.

Re Retailer Merchants Assn., 15 D.L.R. 890, 7 A.L.R. 322, 27 W.L.R. 50, 5 W.W.R. 1221.

WINDING-UP PROCEDURE.

Under s. 15 of the Winding-up Act, R.S.C., c. 144, providing that if a company opposes the application for a winding-up order on the ground that it is not insolvent, the court may make an order for an accountant to inquire into the affairs of

the company, the power so conferred can be exercised only where the petitioners have made such a primâ facie case of insolvency against the company as would justify a winding-up order, and upon their failure so to do, no order for an audit by an accountant will be made. A petition for a winding-up order cannot be supported by statements verified by an affidavit on information and belief only. [Gilbert v. Endean, L.R. 9 Ch. D. 259, applied.] Petitioners for the winding up of a company under the Dominion Winding-up Act on the ground of its insolvency must not only allege, but strictly prove, the existence of one or more of the circumstances set out in s. 3 of the Winding-up Act, R.S.C. 1906, c. 144, which would justify an order for winding-up.

Re Manitoba Commission Co., 2 D.L.R. 1, 22 Man. L.R. 268, 21 W.L.R. 86, 2 W.W. R. 276.

WINDING-UP IN YUKON TERRITORY—RULES GOVERNING PROCEDURE.

An application for an order to proceed with the winding-up of a company in the Yukon Territory is properly made pursuant to the rules of procedure made by the judges of the Supreme Court of the North-West Territories at a time antecedent to the separation of the Yukon Territory from the North-West Territories, since no rules have been made modifying or replacing these rules.

Re The Stewart River Gold Dredging Co., 7 D.L.R. 736, 22 W.L.R. 315.

APPLICATION FOR WINDING-UP — COMPELLING PRODUCTION OF BOOKS AND DOCUMENTS IN SUPPORT.

The petitioners for a winding-up order are not entitled to a preliminary order that certain of the company's officers should produce on their examination, not yet entered upon as compulsory witnesses in support of the petition, the books of the company and the auditor's reports, as the extent to which the petitioner may be entitled to use such books and documents cannot be decided until the course of the cross-examination is known. [Re Emma Silver Mining Co., L.R. 10 Ch. 194, referred to.]

Re Baynes Carriage Co. (No. 2), 8 D. L.R. 309, 27 O.L.R. 244.

WINDING-UP — "TRADING COMPANY" — OBJECTS OF INCORPORATION.

For the purposes of bringing a company within the scope of the Winding-up Act (Can.) as being a "trading company," any of the objects of incorporation stated in the letters patent creating the company may be looked at. [Re Lake Winnipeg L. & T. Co., 7 Man. L.R. 255, followed; Re Anchor Investment Co., 7 D.L.R. 915, referred to.]

Re Canadian General Service Corp. (No. 1), 16 D.L.R. 15, 24 Man. L.R. 140, 5 W.W. R. 1389, 27 W.L.R. 102.

WINDING-UP — AMENDING PETITION.

The court has ample discretionary powers under ss. 128 and 129 of the Winding-up Act, R.S.C. 1906, c. 144, to allow amendments to the petition and will exercise them in favour of the petitioner where the right and justice of the case seem to call for such amendments to place petitioner's case properly before the court. [Re Rapid City Farmers Elevator Co., 9 Man. L.R. 574; Re Abbott Mitchell Iron & Steel Co. 2 O.L.R. 143; Re Redpath Motor Vehicle Co., 4 O.W.R. 515, referred to.]

Re Canadian General Service Corp. (No. 2), 16 D.L.R. 17, 24 Man. L.R. 143, 27 W.L. R. 105, 5 W.W.R. 1291.

WINDING-UP—ASSETS TRANSFERRED TO NEW COMPANY — PETITION — STATUS OF PETITIONER.

Macpherson v. Boyce, 49 D.L.R. 698, affirming 43 D.L.R. 538, which affirmed 25 B.C.R. 214.

WINDING-UP ORDER—WAIVER OF NOTICE.

The requirements of s. 13 of the Winding-up Act, R.S.C. c. 144, as to giving four days' notice of an application for a winding-up order may be dispensed with by the consent of the company.

Great West Supply Co. v. Installations, 5 D.L.R. 896, 5 W.W.R. 1048, 26 W.L.R. 682.

WINDING-UP — LEAVE TO SUE COMPANY IN LIQUIDATION—JURISDICTION.

Plante v. Dalmas Pulp Co., 20 D.L.R. 983, 46 Que. S.C. 166.

TRADING COMPANY — WINDING-UP — INSOLVENCY.

Re Anchor Investment Co., 7 D.L.R. 915, 1 W.W.R. 527.

ORDER FOR WINDING-UP MADE IN ANOTHER PROVINCE — APPLICATION FOR LEAVE TO PROCEED WITH ACTION BROUGHT IN ONTARIO AGAINST COMPANY BEFORE ORDER —DOMINION WINDING-UP ACT, S. 125.

Brewster v. Canada Iron Corp., 7 O.W.N. 128.

PETITION FOR WINDING-UP — INSPECTION OF AFFAIRS AND MANAGEMENT — INSPECTOR'S REPORT — MEETING OF SHAREHOLDERS TO CONSIDER — COMPANIES ACT, R.S.O. 1914, c. 178, S. 126.

Re Hamilton Ideal Mfg. Co., 7 O.W.N. 254.

WINDING-UP — PETITION FOR — DISCRETION —REFUSAL—ASSIGNMENT IN TRUST FOR CREDITORS.

Re M. A. Holladay Co., 7 O.W.N. 321.

WINDING-UP — PETITION UNDER DOMINION ACT, BY CREDITOR UNWILLING TO ACCEPT COMPROMISE OF CLAIM—RIGHT OF PETITIONING CREDITOR — DISCRETION OF COURT.

Re Tudhope Motor Co., 5 O.W.N. 865.

PETITION FOR ORDER UNDER DOMINION WINDING-UP ACT AFTER LIQUIDATION BEGUN BUT NOT COMPLETED UNDER ONTARIO COMPANIES ACT — INTEREST OF UNSECURED CREDITORS — INVESTIGATION OF STOCK SUBSCRIPTIONS—COSTS.

Re Hough Lithographing Co., 8 O.W.N. 377.

PETITION FOR BY CREDITOR — WINDING-UP ACT, R.S.C. 1906, c. 144—NO OPPOSITION BY OTHER CREDITORS—REFUSAL OF COMPANY'S REQUEST FOR DELAY—DISCRETION.

Re Heyes Brothers, 8 O.W.N. 390.

PETITION FOR ORDER — MATERIAL IN SUPPORT—DOMINION WINDING-UP ACT.

Re Ontario Spring Bed & Mattress Co., 12 O.W.N. 307.

COMPULSORY ORDER UNDER DOMINION ACT—DISCRETION AS TO CLAIMS OF CREDITORS.

Re Elmira Interior Woodworking Co., 10 O.W.N. 6.

CONDUCT OF PROCEEDINGS — SEVERAL PETITIONS—CREDITOR OR SHAREHOLDER.

Re Canadian Fibre Wood & Mfg. Co., 4 O.W.N. 1183, 24 O.W.R. 635.

WINDING-UP—EXCEPTION—QUE. C.P. 174.

When a judge has, on the petition of the liquidator and of the inspectors after discussion with the creditors, granted the issue of an exception to the form, such exception will not be discussed in the course of the procedure, but will be dismissed, and its facts will be discussed at the hearing.

Laurier v. Modern Garage Co., 16 Que. P.R. 102.

APPLICATION TO WIND UP—PROOF OF INSOLVENCY—R.S.C., c. 144, s. 12.

A creditor must have an unquestioned and liquidated debt of at least $200, in order to ask for the winding-up of a company. One who claims a salary payable in shares of the company ought to bring an action against it for the shares or to pay a fixed sum. He can then ask for the winding-up of the company. A company which has sold paid up shares to the amount of $40,000 upon an authorized capital of $50,000, which has a line of credit of $10,000, in the bank upon its directors' guarantee, and which has never discounted more than half of this opening of credit, is not insolvent by reason of the fact that it contests the suit of one claiming to be a creditor.

Schneider v. Laurentide Brick & Sand Co., 15 Que. P.R. 271.

An order for winding-up a company, being susceptible of appeal or opposition, cannot be set aside for irregularities by requête civile. A winding-up order made by a Superior Court Judge cannot be set aside by another judge of the same court, but may be by the Court of King's Bench. On a motion to set aside a winding-up order the applicant cannot, by tierce opposition, attach the legality of proceedings prior to its issue. Four days' notice to the company of the application for a winding-up order is not required when the company is a party to the application. A winding-up order may be granted in vacation. The Winding-up Act, R.S.C. (1906), c. 144, applies to the voluntary, as well as compulsory, liquidation of an insolvent company.

Pontbriand Co. v. Cosky, 14 Que. P.R. 19.

Proceedings for setting aside an order for winding up a company should be by petition, which need not be previously authorized by the court.

Siche Light Co. v. Fortin, 13 Que. P.R. 235.

The voluntary winding up of an industrial company, though under a judicial order, raises no presumption of insolvency that deprives it of the benefit of term for the discharge of its obligations.

McKinestry v. Irwin, 21 Que. K.B. 139.

WINDING-UP ORDER — PROCEDURE — CREDITORS—LIQUIDATOR.

An order for winding-up a company under the provisions of R.S.C., 1906, c. 144, suspends the rights of the creditors. All the property of every kind passes into the possession and under the control of the liquidator, who alone can dispose of it in the manner prescribed by the Act. Hence, an opposition by the liquidator to set aside a pending seizure by a creditor cannot be dismissed as being frivolous. An adjournment for a fortnight of the hearing of an application to dismiss an opposition to the sale by the sheriff of immovables seized and pending the action of the liquidators who must wind-up the affairs of the company without delay followed by a second adjournment for a fortnight and a third for four days, does not justify the dismissal of the opposition as frivolous and vexatious when, in the interval, a resolution of the inspectors to the effect that liquidation within the time is impossible has been filed.

Organ v. Gamache, 22 Que. K.B. 389.

WINDING-UP — POWERS OF LIQUIDATOR.

The liquidator of an insolvent company being an officer of court, the court will invest him with the powers necessary to enable him to put the purchaser of a lease of the company in possession of the property of which he has become the tenant.

In re Dominion Medical Institute, Dorval v. Smith, 15 Que. P.R. 102.

CONTESTATION BY A SHAREHOLDER AS CONTRIBUTORY — TAXATION OF COSTS.

When the claim against a contributory contestant is separate and distinct from the claims and demands against the other shareholders of the company insolvent, the fact that all the names of the contributories are mentioned in the same petition, and it is demanded by the same conclusion, that they be declared contributories for the amounts remaining unpaid, does not change the nature of the individual character of the claims against each other. So, according to the tariff, on contestation of an application to have a party held to contribute, the same fees are granted as in ordinary actions. If a special enquete is made with respect to said contestation, a

special fee will be granted. The words "the same fees as in ordinary actions for a like amount" in s. 7, art. 76 of the tariff of advocates' fees in cases of the Superior Court, refer only to actions taken in the Superior Court, and claims for less than $100 would entitle the liquidator to an attorney's fee of a fourth class action in the Superior Court.

Champlain Real Estate Co. v. Racine, 15 Que. P.R. 87.

LIQUIDATOR APPOINTED IN ANOTHER PROVINCE.

A verbal application that a liquidator to an insolvent Ontario company be forced to take up the "instance" will not be entertained as such liquidator is an officer of the High Court of Ontario and not of the Quebec courts.

Arnold v. The Canadian Motors Co., 15 Que. P.R. 13.

STAY OF PROCEEDINGS.

The provision of the Winding-up Act (R.S.C. 1906, c. 144, s. 19), which permits the court to stay the winding-up proceedings, either altogether or for a stated time, should be strictly interpreted. An order for this purpose should only be granted by the unanimous consent of the creditors, unless those opposing it have their claims satisfied and their rights safeguarded. In case of conflict among them as to the expediency of staying the proceedings the court will only grant the stay if the creditors who demand it pay those who oppose it or guarantee payment of their claims.

Saint-Foye Company v. Matte, 52 Que. S. C. 217.

PROVINCIAL COMPANY — OBJECT — COMMERCE AND AMUSEMENT — LIQUIDATION—S. REV. 1906, c. 144.

The Winding-up Act (S. rev. 1906, c. 144) only applies to provincial companies instituted for commercial purposes, and not to those whose object it is to encourage the art and practice of athletic games and sports. Even if the latter have a clause in their charter authorizing them to sell drinks, candy, etc., to the public which frequents their establishment, they are not by that subject to this Act, if in fact they did not exercise their powers. A creditor who, at a meeting of the shareholders of a company called to place the company in liquidation, by virtue of the Federal Act, does not oppose this petition for the reason that this Act does not apply to a company which is not commercial, is not for this reason deprived of the right to raise this objection by an intervention.

Langevin v. The Stadium Co., 55 Que. S.C. 165, 19 Que. P.R. 245.

SERVICE OF NOTICE—WAIVER—APPEARANCE.

The service of notice of an application for the winding-up of a company may be dispensed with under proper circumstances, e.g., instructions given to and appearance by counsel.

Re Winding-up Act; Re Consumers' Coal Co. (Alta.), [1917] 2 W.W.R. 143.

DELEGATION OF POWER TO MASTER.

The powers conferred upon the Supreme Court by the Winding-up Act may be delegated to the Master, whether according to the usual practice and procedure of the court such officer is in the habit of exercising similar jurisdictions or not.

Re Winding-up Act; Re Alberta Loan & Invest. Co., [1917] 1 W.W.R. 744.

B. GROUNDS OF FORFEITURE.

(§ VI B—315) — INSOLVENCY — IMPAIRMENT OF STOCK — PETITION OF SHAREHOLDER.

The court will not entertain a petition for the winding-up of a company not made for a bonâ fide purpose, in the interest of the company, but merely with an object of bringing pressure on the company to repay the petitioner money he paid on shares; under s. 12 of the Winding-up Act (R.S.C. 1906, c. 144), a shareholder has no locus standi to such petition on the ground of insolvency; his petition on the ground of an impairment of the capital stock must be accompanied by evidence thereof apart from his affidavit to the petition.

Re Company, 34 D.L.R. 396, 27 Man. L.R. 540, [1917] 2 W.W.R. 555.

MINING COMPANY — WINDING-UP — DIRECTORS — MISFEASANCE — PURCHASE OF MINING PROPERTY FROM DIRECTOR — PAYMENT BY ALLOTMENT OF SHARES — PROSPECTUS — ABSENCE OF CONCEALMENT AND FRAUD — OVER-ISSUE OF SHARES—SALE AT DISCOUNT—NO LOSS SUSTAINED — BREACH OF DUTY — TRUSTEE CLAUSES OF LIMITATIONS ACT, R.S.O. 1914, c. 75—APPLICATION OF.

Re Norwalk Mining Co., 9 O.W.N. 41.

(§ VI B—317) — ANNUAL STATEMENT — LAND CORPORATIONS.

The only power conferred by the Companies Act, R. S. M. c. 35, upon the Lieutenant-Governor in Council to cancel a company's charter is to be found in ss. 77 and 78, which provide for cancellation upon the application of the company, and the charter of no company except that of a land company can be cancelled under s. 77; therefore an order-in-council purporting to revoke the charter of a company, which is not a land company, on the ground that it had failed to comply with s. 80, which requires a company to make out annually a summary of its own affairs, is a nullity.

Re Stanley Mineral Springs Co. (Man.), 10 W.W.R. 1368.

(§ VI B—323) — NONUSER OF CORPORATE POWERS—DISPOSITION OF ASSETS.

It is the duty of the court, in the proper exercise of its discretion, to make an order for the winding-up of a company, under the Winding-up Act, R.S.C. 1906, c. 144, s.

11, where it appears that most of its assets had been disposed of and that no active business was being carried on or that it was being operated at a loss, and the principal person opposing the petition to its being wound up was its president, who was receiving a salary payable out of its assets.

Re Hamilton Ideal Mfg. Co., 23 D.L.R. 640, 34 O.L.R. 66.

(§ VI B—324)—Abuse of powers—Scire facias.

Every member of a corporation prejudiced on account of an abuse of the corporate powers is entitled to invoke the nullity of its existence as a corporation, or to have a declaration thereof by recourse at common law without being obliged to adopt the special procedure of scire facias.

St. Narcisse Butter & Cheese Mfg. Co. v. Demers, 50 Que. S.C. 6, 49 Que. S.C. 406.

(§ VI B—327)—Winding-up — Petition by person alleging himself to be a creditor — Service of demand for payment remaining unsatisfied — Sole foundation for allegation of insolvency — Reasonable doubt whether claim could be established—Refusal to retain petition — Dismissal with costs — Winding-up Act, R.S.C. 1906, c. 144, ss. 5, 14.

Re Meaford Mfg. Co., 17 O.W.N. 153.

C. Effect on property rights.

(VI C—330)—Specific performance — Rescission.

The discretion of the court under s. 22 of the Winding-up Act, Can., is properly exercised by granting leave to sue a company in liquidation for specific performance of an agreement for exchange of lands or in default that the agreement be declared cancelled, so that plaintiff may recover his own lands of which the company in liquidation has been allowed to take possession.

Re Transcontinental Townsite Co., 21 D.L.R. 291, 25 Man. L.R. 193, 8 W.W.R. 93, 30 W.L.R. 833.

Validity of instruments — Summary jurisdiction.

The court has no jurisdiction, either under s. 109 of the Winding-up Act (c. 144, R.S.C.), or r. 46, of the B.C. Winding-up Rules, to determine, upon a summary application in chambers, the validity of instruments, held by outside parties who are not connected with the company. [Cardiff Coal, etc., Co. v. Norton, 2 Ch. App. 405, distinguished; Re Imperial Bank, 1 Ch. App. 339, referred to; Re Ilkley Hotel Co., [1893] 1 Q.B. 248, applied.]

Re Maritime Trust Co. & Burns & Co., 26 D.L.R. 92, 22 B.C.R. 177, 32 W.L.R. 442, 9 W.W.R. 167.

Bona vacantia — Constitutional law.

The right of bona vacantia, in regard to the assets of a defunct English corporation, carrying on business in British Columbia, is vested in the Dominion and does not pass to the province as "revenues" or "royalties" under ss. 102 and 109 of the B.N.A. Act.

The King v. Rithet, 40 D.L.R. 670, 17 Can. Ex. 109.

Goods in possession of sheriff under execution — Purchaser — Right of liquidator.

At the time when an order was made, under the Winding-up Act, R.S.C. 1906, c. 144, for the winding-up of a company, certain goods, which were admittedly at one time the property of the company, were in the custody of the sheriff, in the building occupied by the company, and in which its business had been carried on, under a writ of fi. fa. against the goods and lands of the company. The goods were claimed by the appellants, two men who asserted that they had bought the goods from the company:—Held, that the winding-up order superseded the execution, and that the liquidator should have the custody of the goods, pending an inquiry into the validity of the appellants' claims, and without impairing those claims. [Sections 33, 84, and 133 of the Act, referred to.]

Re Ideal Foundry & Hardware Co., 42 O.L.R. 411.

Mortgage — Registration — Right of liquidator to oppose—Estoppel.

An application under s. 4 of the Companies Amendment Act, c. 10, 1916, for an order permitting the registration under c. 39, R.S.B.C. 1911, of a mortgage with the registrar of joint stock companies allowed. [Keyes v. Hanington, 13 D.L.R. 139, distinguished.] A liquidator of a company which is being wound up under order of the court cannot, by his own actions, prevent the setting-up of a claim to such registration of a mortgage, but the priority given the liquidator by s. 92 of the Winding-up Act, R.S.C. 1906, c. 144, is not affected thereby. Generally speaking, the principle of estoppel is not applicable to anything of moment which a liquidator may have said or done, without authority of the court, in carrying out the liquidation. [Re Ontario Bank; Massey and Lee's Case, 8 D.L.R. 243, 27 O.L.R. 192, referred to.]

Re Peoples' Trust Co., 25 B.C.R. 138, [1918] 1 W.W.R. 242.

Sale of lands of company—Satisfaction of mortgage — Claim of guarantors to balance of proceeds of sale — Agreement — Acquiesence — Costs of liquidation proceedings — Rights of liquidator.

Re Woodstock Concrete Machinery Co., 14 O.W.N. 323.

Bona vacantia.

Shareholders of a defunct corporation have a right to bring in their own name a representative action to recover assets belonging to a company which has been dissolved and struck off the register; these assets do not vest in the Crown as bona

vacantia. [American doctrine, 10 Cyc. 1320, adopted.]

Embree v. Miller, 33 D.L.R. 331, 11 A.L.R. 127, [1917] 1 W.W.R. 1200.

WINDING-UP—EFFECT ON PROPERTY RIGHTS.

A payment out of a company's funds either to avoid, or in consequence of, a seizure under execution after a winding-up order has been made must be deemed to be illegal and subject to reclamation by the liquidator. [Shaver v. Cotton, 23 A.R. (Ont.) 426; Keating v. Graham, 26 O.R. 361, followed.]

Richards v. Producers Rock & Gravel Co., 17 D.L.R. 588, 20 B.C.R. 109, 27 W.L.R. 890. [Affirmed, 20 B.C.R. 109 at 113.]

WINDING-UP—SALE OF MORTGAGED VESSEL BY LIQUIDATOR—PROCEEDS—RIGHTS OF MORTGAGEE AND SEAMEN ENTITLED TO LIEN ON BOAT.

Where, under an order of court, a liquidator with the consent of the mortgagees sold a mortgaged vessel free from encumbrances, the mortgagee, and the seamen entitled to a maritime lien on the vessel for wages, have the same respective rights against the fund realized from the sale as they had against the vessel, and the subsequent loss of the latter does not deprive the holders of the maritime lien of their priority over the mortgage as regards such fund.

Re Fort George Lumber Co.; Traders Bank v. Lockwood, 16 D.L.R. 175, 48 Can. S.C.R. 593, 26 W.L.R. 884, 5 W.W.R. 982, affirming 12 D.L.R. 807, 25 W.L.R. 92.

FORFEITURE OF CHARTER—GROUNDS—NON-PAYMENT OF REGISTRATION FEE — EFFECT ON PROPERTY RIGHTS.

Where a company consisting of defendant and others interested was formed for the purpose of taking over and disposing of options and the certificate of registration of the company was revoked for nonpayment of the annual registration fee:—Held, that the defendant would not be permitted to take advantage of such revocation for the purpose of disposing of the properties in his own name. Nothing but a direct proceeding by the attorney-general against the company, or winding-up proceedings, could put an end to its existence, and, even then, there would be rights not destroyed to which defendant would be subject. Two out of four provisional directors of a company constitute a quorum where one forfeits his shares and the other declines to attend, having acquired interests adverse to the company which he was promoting.

The International Mining Syndicate v. Stewart, 48 N.S.R. 172.

COMPANY IN LIQUIDATION—DIRECTORS OBTAINING IN THEIR OWN NAME—EFFECT ON PROPERTY RIGHTS — LEASE — GOOD FAITH—C.C. 1233.

Defendants leased from mis-en-cause a certain store on St. Catherine St., from 1904 until 1914 and subsequently transferred and assigned all their rights in lease to Boston Shoe Co., of which they were directors. After assignment, to wit, in 1908, defendants obtained in their own names, the other directors of the company having refused to take up the same, new lease, or, as it was called, an extension of lease until 1917. After issue of winding-up order the curator sued for a declaration that the extension was taken by defendants as trustees for the company. Held, that in reality this extension is simply a new lease entered into between the defendants and the mis-en-cause; that in the absence of any evidence that the defendants acted secretly and fraudulently as regards the company, they are entitled to the benefits of their extension.

Boston Shoe Co. v. Frank & Bremner, 21 Rev. de Jur. 120.

SECURITIES—DIRECTORS' GUARANTY.

A bank, to which the directors of a company have given a personal guarantee, cannot be forced to value its security in the winding-up of the company, and the position is not changed by the fact that the directors are mortgagees of the real estate of such company by way of indemnity, as the bank is not entitled to the benefit of such mortgage. A principal creditor is not entitled to the benefit of county bonds or collateral security given by the principal debtor to the surety. [Re Walker, [1892] 1 Ch. 621, applied.]

Re Hardstone Brick Co., Molsons Bank Claim, [1917] 1 W.W.R. 541.

MORTGAGE — LEAVE TO REGISTER — LIQUIDATOR'S COSTS.

Registration of mortgage with the registrar of joint stock companies under the Companies Amendment Act, 1916, c. 10, s. 4, allowed without being subject to liquidator's costs.

In re The Winding-up Act, & Companies Act, & Dominion Trust Co. and Alvo von Alvensleben, [1919] 3 W.W.R. 209.

APPEAL — ADJOURNMENT — LIQUIDATOR — JURISDICTION.

Application for an order directing a liquidator to consent to the adjournment of appeals pending before the judicial committee dismissed. Quære, whether once a liquidator has been authorized to take legal proceeding the conduct thereof is not governed by the rules of court procedure with which it is beyond the province of the winding-up judge to interfere. In interfering with the conduct of the liquidator the court, even if it has jurisdiction, would be assuming as a general rule, a responsibility which it could not discharge adequately.

Dominion Trust Co. v. New York Life Ins. Co., [1918] 1 W.W.R. 614, 25 B.C.R. 271.

(§ VI C—332)—WINDING-UP OF TRUST COMPANY—RIGHTS OF CESTUI QUE TRUST—RECOVERY OF SECURITIES.

The right of a trust company, to retain as its remuneration part of the profits realized from investments, creates a trust

coupled with an interest, which, upon the winding-up of the corporation passes to the liquidator as an asset for the general benefit of creditors, and the court will not compel the liquidator, before the final wind-up, to surrender such securities to the cestui que trust, nor appoint a special trustee to carry it into effect.

Re Dominion Trust & Harper, 24 D.L.R. 670, 22 B.C.R. 337, 32 W.L.R. 832, 9 W.W.R. 503.

ACTIONS AGAINST LIQUIDATOR — TRUST — LEAVE OF COURT.

A company in process of winding-up, under order of a court in one province, and a liquidator appointed by such court, cannot be proceeded against in the courts of another province to have the liquidator declared a trustee of moneys deposited with the company for investment, and for the appointment of a new trustee to preserve the trust, unless with the leave of the court where the winding-up proceedings are pending. [The Winding-up Act, R.S.C. 1906, c. 144, ss. 22, 23, applied.]

Stewart v. Lepage, 29 D.L.R. 607, 53 Can. S.C.R. 337, reversing 24 D.L.R. 554.

POWERS OF LIQUIDATOR—CONTESTATION OF VALIDITY OF MORTGAGE — WINDING-UP ACT, R.S.C. 1906, c. 144.

A liquidator appointed under the Winding-up Act, R.S.C. 1906, c. 144, being from the beginning prima facie lawfully in possession of the property of the company sought to be wound up as an officer of the court, and being charged with the duty of applying the proceeds in payment of the company's creditors in due course of administration, is entitled in right of the creditors represented by him as liquidator to contest the validity of a mortgage of personal property made by the company to a trustee for bondholders without any transfer of possession having been made to such trustee and without registration under the Bills of Sale and Chattel Mortgage Act, and as liquidator to set up the invalidity of such mortgage as against the creditors in general of the mortgagor company on the ground of noncompliance with the provisions of the Bills of Sale and Chattel Mortgage Act.

National Trust Co. v. Trusts & Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279, 22 O.W.R. 933.

RIGHT OF LIQUIDATOR—FRAUDULENT SALE OF SHARES—RECOVERY OF MONEY PAID BY COMPANY.

Where one who has been employed by another to sell shares in a company belonging to that other, sells them by fraud, but procures payment of the purchase price to be made to the company, and not to the vendor of the shares, the vendor cannot recover the money from the company, since to do so would be to obtain an advantage from his agent's wrongful act, but the money is, nevertheless, not the money of the company, and, therefore, the liquidator of the company cannot recover from the vendor any part of such money which has been paid over to him by the company.

Re Gloy Adhesives, 7 D.L.R. 454, 4 O.W.N. 350, 24 O.W.R. 348.

POWERS OF LIQUIDATOR.

As money paid into a bank designated in a mortgage to receive payment thereof for the mortgagee does not become that of the mortgagee, a limited company, when accompanied by the condition that the money should not be paid out to the mortgagee except upon the delivery of either an assignment of the mortgage to a designated person, or a discharge, assented to by every stockholder of the company, a liquidator of the company could not take possession thereof as effects of the company and execute a discharge of the mortgage under s. 33 of the Winding-up Act (Can.), notwithstanding that the condition requiring the assent of every stockholder appeared to have been imposed because of uncertainty as to the persons entitled to exercise the corporate powers of the company before the liquidator was appointed by the court.

Re Kootenay Valley Fruit Lands Co., (James Cooper's Case), 3 D.L.R. 428, 22 Man. L.R. 300, 21 W.L.R. 309, 2 W.W.R. 479.

LIQUIDATORS—REMOVAL FROM OFFICE.

That liquidators of a company in voluntary liquidation had practically delegated their powers as such to a trust company and gave themselves no concern as to efforts to sell the assets, is a ground for the removal of the liquidators from office.

Re Hatzie Prairie Co., 15 D.L.R. 772, 26 W.L.R. 950.

LEAVE TO BRING ACTION IN NAME OF LIQUIDATORS — INDEMNITY — COSTS — PROPOSED SALE OF ASSETS—ADJOURNMENT OF CONSIDERATION—ORDER OF MASTER—APPEAL.

Re Bailey Cobalt Mines, 8 O.W.N. 433.

NON-SUIT—RESUMPTION OF ACTION IN ORDER TO ASK FOR NON-SUIT—GARNISHMENT—LIQUIDATION — CURATOR — C.C.P. ART. 266, 279, 8 GEO. V. 1917, C. 7.

The power given by the curator of a corporation in liquidation to realize upon the assets of the corporation implies the right to appear in court to put an end to actions, the issue of which could affect the assets of the corporation. The curator or the liquidator of a corporation in liquidation can in one and the same procedure ask for a resumption of an action in order to obtain a nonsuit of an action commenced against the corporation in liquidation. A garnishment after judgment is not an action, but a mode of execution; it is not susceptible to nonsuit.

Rhodes v. Syndics, Des Chemins a Barrieres De La Rive Sud, and Begin and Demers, 55 Que. S. C. 228.

LIQUIDATOR—SEQUESTRATOR—AUTHORITY TO COMMENCE ACTION.

A liquidator of a company, who has also

been appointed its sequestrator, cannot, in this latter capacity, enter an action, particularly where the leave of the court has not been obtained.

Lum v. DePencier, 16 Que. P.R. 369.

Winding-up Act—Appointment of liquidator—Interested party—R.S.C. c. 144, s. 124.

Held, it is advisable that the liquidator appointed for the winding-up of a company in liquidation be a disinterested party, having no claims against and no share in the company. [See Dignard v. Hon-Angers, 11 Que. P.R. 289, Lafontaine, J.]

Re Men's Wear, 16 Que. P.R. 164.

Unregistered assignment by way of mortgage—"Debts"—"Book debts."

An unregistered mortgage made by way of assignment is void as against a liquidator. It is impossible for the parties to a transaction by way of mortgage or charge to alter the effect of s. 102 (1) of the Companies Act by adopting a form which does not accord with the real transaction between them. [Saunderson & Co. v. Clark, 29 T.L.R. followed.] The term "debts" in the above section should not be confined to such debts as are presently due. The expression "book debts" is generally used with reference to purely mercantile transactions, but is an apt term to describe an obligation accruing due to a mortgage company.

Re Metropolitan Mortgage & Sav. Co., 7 W.W.R. 1204.

(§ VI C—333)—Company in liquidation — Liquidator — Procedure — Authority — Execution — Guardian of office — Salary — C.C.P. art. 651, 669—S. ref. [1906], c. 144, art. 34.

The liquidator of a company in liquidation can bring the procedure before a court of justice or defend there, without the permission of this court, following art. 34 of the law of liquidation. (1) This disposition ought to apply itself with still more force to a provisory liquidator. A trustee of goods seized has no right to claim a salary beginning from the day when the effects have been placed on the market to the demand of the distrainer.

Duhamel v. Adamakos, 25 Rev. Leg. 269.

D. Effect on causes of action.

(§ VI D—335)—Claims against liquidators—Summary or plenary proceedings.

Claims against liquidators may be enforced by a summary proceeding, and a plenary action taken against a liquidator for the wrongful taking possession of goods while in transit after the winding-up of the corporation will either be stayed or dismissed.

Carson v. Montreal Trust Co., 23 D.L.R. 690, 49 N.S.R. 50.

Fraud on shareholders—Redress—Liquidator.

The right of action for fraud practised upon individual shareholders, to induce them to take shares, must be asserted by them individually, not by the liquidator of the corporation.

Moneur v. Ideal Mfg. Co., 31 D.L.R. 465, 37 O.L.R. 361.

Winding-up — Misfeasance — Discovery of books and documents.

Re Toronto Rowing Club, 31 D.L.R. 686, 37 O.L.R. 23.

Actions by liquidator—Examination for discovery by contributories.

S. 117 of the Winding-up Act, R.S.C. 1906, c. 144, confers a special power, of inquisitorial character, intended to be used by the liquidator acting under a winding-up order, for his own guidance in the conduct of the liquidation. But, in certain circumstances, there may be some right of discovery open to a person charged in the winding-up as a contributory. In this case it was directed, upon an appeal, that an Official Referee, before whom the reference under an order for the winding-up of a bank was pending, should consider the application of five persons whose names were placed by the liquidator upon the list of contributories, for leave to examine for discovery the former general manager of the bank, in the view that the applicants might have a claim to invoke the aid of s. 117. [Whitworth's Case, 19 Ch. D. 118, 120, and Re Penysflog Mining Co., 30 L.T.R. 861, applied.]

Re Sovereign Bank of Can. Newman's Case, 34 O.L.R. 577.

Action by liquidator to recover chattels—Evidence—Sale—Costs.

McCammon v. Westport Mnfg. Co., 9 O.W.N. 6.

Judgment on calls—Costs of proceedings.

Upon a company in liquidation obtaining an order under the Winding-Up Act for the payment of a call of a certain sum of money by the defendant, the company may sue for judgment on the call if a final order for judgment has not been obtained under the Act; but where a more expensive mode of procedure is adopted in obtaining judgment the court will order the party taking such course to pay the difference cost as compared with the less expensive and equally effective method.

Maritime Trust Co. v. Alcock, 22 B.C.R. 399.

Restraining actions—To preserve assets.

The sections of the Winding-up Act as to restraining actions or not allowing them to proceed, are intended not for the purpose of harassing or impeding or injuring third parties who are not members of the company, but for the purpose of preserving the limited assets of the company in the best way for distribution among all creditors who have claims upon it.

Plummer v. Sullivan Machinery Co., 24 B.C.R. 104, [1917] 2 W.W.R. 229.

EXECUTION—LEAVE OF COURT.

The writ of execution obtained against a joint stock company after it has been put in liquidation without the previous authority of the court is void and of no effect.

Pilote v. Leclerc, 52 Que. S.C. 127.

JUDGMENT AGAINST ESTATE—LEAVE TO ENFORCE.

One who has obtained judgment against the estate in the winding-up of a company has a right to immediate payment, but he must obtain from the court an order to this effect, and not summon the liquidator under art. 590 C.C.P.

Metro Pictures v. McNeil, 20 Que. P.R. 133.

ACTION—LEAVE OF COURT.

In an action brought by leave against a company in liquidation under the Winding-up Act, held, that the plaintiff was entitled to a final order for foreclosure of property mortgaged by the defendant company by way of a trust deed securing a debenture issue.

Michigan Trust Co. v. Canadian Puget Sound Lumber Co. (B.C.), 25 B.C.R. 569, [1918] 3 W.W.R. 273.

ACTION—LIQUIDATOR AS PARTY—LIABILITY FOR COSTS.

An action brought in the Supreme Court of Ontario against an incorporated company, to set aside as fraudulent and preferential a chattel mortgage made to the company, was at issue when an order was made by a Quebec Court for the winding-up of the company under the Dominion Winding-up Act, R.S.C. 1906, c. 144, and a liquidator was appointed. By orders made by the Quebec Court, the liquidator was allowed to intervene and continue the defence of the action, and the plaintiff was allowed to continue the action against the company in liquidation:—Held, that the liquidator of the defendant company was not a necessary or proper party to the action; and an order made by a Master upon the application of the plaintiff, adding the liquidator as a defendant, was set aside. When a company is in process of being wound up, the liquidator, if unsuccessful in litigation which he is carrying on, will pay the costs out of the assets of the company, and these costs have priority over the liquidator's costs of the winding-up. The estate of the company is in truth the party defendant, and is saddled with the burden of the costs awarded. [Re Pacific Coast Syndicate, Limited, [1913] 2 Ch. 26; Re Wenborn & Co., [1905] 1 Ch. 413, followed.] When it is deemed proper that the right of the company should be determined in the pending litigation rather than in the liquidation, the liquidator may sue or defend either in his own name or in the name of the company; if he elects to proceed in his own name, he makes himself personally liable for costs; but no such liability should be imposed upon him, for he is an officer of the court, and is only discharging his official duty.

Cole v. British-Canadian Fur & Trading Co., 42 O.L.R. 587.

DOMINION COMPANY IN COURSE OF WINDING-UP IN QUEBEC COURT—MECHANIC'S LIEN REGISTERED AGAINST LAND OF COMPANY IN ONTARIO—LEAVE TO COMMENCE ACTION TO ENFORCE—MECHANICS AND WAGE-EARNERS LIEN ACT, R.S.O. 1914, c. 140—WINDING-UP ACT, R.S.C. 1906, c. 144, s. 22—APPLICATION FOR LEAVE—JURISDICTION—FORUM.

Re Hobbs & Kenabeek Consolidated Silver Mines, 14 O.W.N. 358.

FORECLOSURE PROCEEDINGS—LEAVE TO CONTINUE—COSTS.

Where a mortgagee commenced sale proceedings and served a preliminary notice of exercising power of sale and proceeded further after an order for the winding-up of the mortgagor company was granted, and subsequently applied for, and obtained an order from the Master authorizing the continuation of the proceedings upon terms including the payment of costs, it was held that it was not necessary to put the mortgagees to commence fresh proceedings as such leave should be given, but only upon the payment of the costs of the liquidator in the proceedings which the mortgagees had taken without authority.

Re Winnipeg & Western Develop. Co., 33 W.L.R. 749, 9 W.W.R. 1360.

(§ VI D—336)—BY CORPORATION.

A liquidator of a company in winding-up proceedings must obtain leave from the court or referee exercising the powers of the court under the Winding-up Act, R.S.C. 1906, c. 144, before instituting proceedings to set aside a consent judgment obtained against the company between the service of notice of motion for winding up and the pronouncement of the order on the ground that the winding-up order took effect as from the date of service of the notice and that the solicitors who had given the consent had, therefore, no authority to bind the company.

Bank of Hamilton v. Kramer-Irwin Co., 1 D.L.R. 475, 3 O.W.N. 603, 20 O.W.R. 999.

APPLICATION BY LIQUIDATOR TO SET ASIDE WRIT—LEAVE OF COURT.

S. 22 of the Winding-up Act (Sask.), which prohibits any action or proceedings against the company after the winding-up order unless with the leave of the court, does not apply to an application to set aside a concurrent writ and service. [Mersey Steel & Iron Co. v. Naylor, 9 Q.B.D. 648, 9 App. Cas. 434, applied.]

Frid Lewis Co. v. Holmes, 8 S.L.R. 185, 31 W.L.R. 918, 8 W.W.R. 1195.

(§ VI D—337)—AGAINST CORPORATION—WINDING-UP—SALE BY MORTGAGEE—LEAVE TO PROCEED WITH SALE AFTER WINDING-UP ORDER—TERMS—COSTS.

Re Dominion Milling Co., 3 D.L.R. 897, 3 O.W.N. 1618, 22 O.W.R. 836.

WINDING-UP ORDER—EFFECT ON LIEN CLAIM OF A NONCREDITOR.

Good v. Nepisiquit Lumber Co., 11 D.L.R. 850, 12 E.L.R. 89.

EFFECT OF WINDING-UP ORDER—EXECUTION AND INTERPLEADER.

Where during the pendency of interpleader proceedings between execution creditors of the company and claimants of the goods seized, the company consents to a winding-up order which is made without notice to execution creditors, the latter may, on a motion to stay proceedings under the winding-up order, be given leave to proceed with the interpleader issue upon which the winding-up order had operated as a stay, and to apply again for the further disposal of the rights of the parties after the trial of the issue.

Re Installations, 14 D.L.R. 679, 26 W.L.R. 254, 5 W.W.R. 709.

WINDING-UP—EFFECT ON CAUSES OF ACTION —LEVY OF EXECUTION IN ANOTHER PROVINCE.

As a winding-up order when made in one province, under s. 23 of R.S.C. 1906, c. 144, is effective throughout the Dominion, an execution and distress put in force against the assets of a company in another province after the making of such order, although done without notice thereof, is void; and the sheriff cannot recover fees, charges or poundage in respect thereto.

Re Producers Rock & Gravel Co., 14 D.L.R. 289, 18 B.C.R. 375, 25 W.L.R. 709.

LEAVE TO PROCEED WITH DISMISSED ACTION —LIMITATIONS—INSURANCE.

A County Court Judge has no power to reinstate an action upon an insurance policy which stood dismissed for 'noncompliance with an order for security at the time a winding-up order was in force against the insurance company; nor should a King's Bench Judge grant leave under s. 22 of the Winding-up Act (R.S.C. 1906, c. 144), to proceed with such action, particularly where the claim, meantime, has become barred by limitations under a condition in the policy.

Goldrich v. Colonial Ass'ce Co., 28 D.L.R. 542, 26 Man. L.R. 463, 34 W.L.R. 758, 10 W.W.R. 915.

EFFECT ON CAUSES OF ACTION.

If a saisie-revendication is issued in the district of Montreal against a company with headquarters in the district of Saguenay and pending the proceedings, the company is put in liquidation the court will, on application therefor, order that the proceedings be continued in the district of Montreal where all the witnesses reside, where considerable expense has already been incurred, where the liquidator lives and where the proceedings in liquidation will mainly be carried on. The plaintiff should make the liquidator a party to the action and serve on him all the proceedings already taken within the delays provided for ordinary service.

Re East Canada Power & Pulp Co., 14 Que. P.R. 350.

WINDING-UP PENDING ACTION—SUBSEQUENT PROCEEDINGS BY LIQUIDATOR.

A joint stock company, which is placed in liquidation while an action against it is pending, cannot afterwards take any proceedings nor demand the dismissal of the action except through the liquidator authorized by the judge.

Royal Paper Box Co. v. Canada Cement Construction Co., 48 Que. S.C. 287.

JUDGMENT—WINDING-UP ACT (CAN.) SS. 22 AND 112 AND COMPANIES ORDINANCE (ALTA.) S. 54—WAGE-EARNERS' ACTION AGAINST COMPANY—EFFECT OF WINDING-UP ORDER—MASTER'S ORDER IN THE LIQUIDATION — "JUDGMENT" — REQUISITES FOR SUBSEQUENT ACTION AGAINST DIRECTORS.

A judgment against the company is only prima facie evidence against the directors in an action against the latter under s. 54 of the Companies Ordinance. Semble an order made by the Master in the liquidation against the company is a judgment (under s. 112 of the Winding-up Act). Semble if the suit that was commenced would fulfil the condition of s. 54 of the Companies Ordinance that the wage-earners must have sued the company within one year after their debts became due, the execution under which the sheriff must make his return under said section not in said action but may be an execution issued under a Master's order against the company.

Risler v. Alberta Newspapers, [1919] 1 W.W.R. 740.

(§ VI D—338)—RETURN OF WRIT OF EXECUTION.

Section 22 of the Winding-up Act, R.S.C., c. 144, providing that "after the winding-up order is made, no suit, action or other proceeding shall be proceeded with or commenced against the company," does not prevent a sheriff from making a return of nulla bona to a writ of execution issued prior to the winding-up order.

Pukulski v. Jardine; Perryman v. Jardine, 5 D.L.R. 242, 26 O.L.R. 323, 21 O.W.R. 983.

(§ VI D—339)—DOMINION WINDING-UP ACT—WINDING-UP ORDER—EXECUTION —VOID IF PUT IN FORCE WITHOUT LEAVE OF COURT.

Section 23 of the Dominion Winding-up Act (R.S.C. 1906, c. 144) does not make every attachment, sequestration, distress or execution against the assets of a company void after the making of a winding-up order but only that every process "put in force" thereafter is void if leave to put it in force has not been obtained under s. 22 of the Act.

Risler v. Alberta Newspapers, 46 D.L.R. 536, 14 A.L.R. 460, [1919] 2 W.W.R. 326.

Action begun prior to liquidation.

Permission to carry on a proceeding begun by a company may be granted the liquidator thereof under order XVII. on an ex parte application, without the month's notice required by r. 973 of the B.C. Court Rules, 1906.

Goldstein & Creehan v. Vancouver Timber & Trading Co., 4 D.L.R. 172, 17 B.C.R. 356, 21 W.L.R. 561, 2 W.W.R. 722.

E. Procedure; power of liquidator.

(§ VI E—340)—Summary procedure under Winding-up Act—Action.

The summary procedure provided by s. 123 of the Winding-up Act (R.S.C. 1906, c. 144), with respect to misfeasance or breach of trust by directors, is in addition to, not in substitution for, other rights of action.

Northern Trust Co. v. Butchart (Man.), 35 D.L.R. 169, [1917] 2 W.W.R. 405.

Winding-up—Form of affidavit verifying petition—Manitoba rules.

A petition in Manitoba for a winding-up order under the Winding-up Act, R.S.C. c. 144, may be verified by an affidavit referring to the allegations of the petition in conformity with the English practice which is expressly sanctioned by the Manitoba Winding-up Rules. [Re Colonial Investment Co. of Winnipeg, 14 D.L.R. 563, discussed.]

Re Canada Provident & Investment Corp., 14 D.L.R. 782, 24 Man. L.R. 582, 26 W.L.R. 326, 5 W.W.R. 816.

Dissolution and winding-up—Procedure—Books of company—Evidence of.

As between the contributories of a company in liquidation under the Winding-up Act, R.S.C. 1906, c. 144, its books are prima facie evidence by s. 144, but that section does not make them evidence in favour of the liquidator against an alleged contributory where the issue is substantially between a creditor of the company and persons proceeded against as shareholders.

Re International Electric Co., McL[illegible]an's Case, 20 D.L.R. 451, 31 O.L.R. 348.

A deponent who makes an affidavit in connection with proceedings under the Manitoba Winding-up Act is subject to cross-examination thereon and may be compelled to attend and submit to such cross-examination and also to examination for the purpose of his depositions being used on the hearing of a petition for a winding-up order and to produce upon such examination all books and documents in his possession as an officer of the company. The effect of subs. (b) of s. 43 of the Act is that the practice in force under the Act, in matters with respect to which no provision is made either in the Act or in the rules made under it, and in so far as such practice is not inconsistent with either, is the Chancery practice as it existed in England on 15th July, 1870, so that a subpœna and appointment should be issued in accordance with that practice. The King's Bench Act and rules do not apply to such proceedings.

Re Manitoba Commission Co., 21 Man. L.R. 795, 19 W.L.R. 893.

Winding-up—Order under dominion winding-up Act—Offer to purchase assets—Terms of offer—Payment by allotment of shares in new purchasing company to be created—Power of Master to accept offer—Power of court—Winding-up Act, s. 34 (h)—Ontario Companies Act, s. 184 (1), (2)—Rights of minority shareholders—References to Master in ordinary—Illness of Master—Jurisdiction of assistant Master in ordinary pro tem.—Judicature Act, ss. 76 (7), (8), 77—Rules 759, 760.

Re Bailey Cobalt Mines, 17 O.W.N. 221. [Leave to appeal granted 17 O.W.N. 228.]

Mode of enforcing judgment of another province.

The correct practice in order to enforce an order or judgment of the court of another province made under the Winding-up Act, and produced to the registrar pursuant to s. 126, is to enter such order as a judgment of this court under the rules made under the Act by this court in Trinity Term, 1888, without any formal motion to that effect.

Re Winding-up Act & Sovereign Bank, 43 N.B.R. 519.

Judicial sale—Avoidance—Summary petition.

The avoidance of a judicial sale of movables made under the Winding-up Act, without fraud being alleged, cannot be pronounced upon summary petition.

Re Royal Agricultural School & Duclos, 20 Que. P.R. 226.

Removal of liquidator — Salary — Disbursements — Insurance policy — Set-off.

A liquidator appointed for an insolvent company cannot, if he has been dismissed for fraud during the winding-up, claim salary for his uncompleted administration. No fee is due to a liquidator for receiving or swearing the claims of creditors. He has no right to engage and pay a special guardian without being authorized by the inspectors and a judge. Upon his dismissal, he should obtain the cancellation of insurance policies he took out upon the assets, and the repayment of the unexpired premium. If he neglects to do so, he cannot claim this amount from the estate, nor is he entitled to costs of a guarantee policy he was required to furnish for the proper discharge of his duties. A set-off takes place between the legitimate disbursements of a dismissed liquidator and amounts withdrawn by him of which he has not rendered an account.

Re Le Club Athletique Canadien & Finlayson, 20 Que. P.R. 119.

WINDING-UP — LIQUIDATOR — DISBURSEMENTS—PREMIUMS PAID TO GUARANTEE COMPANY FOR FIDELITY BOND.

Re Owen Sound Lumber Co., 14 O.W.N. 309.

PROCEDURE—PROOF OF INSOLVENCY.

The allegation in a petition for an order to wind-up a company that the latter is insolvent and unable to pay its debts as they become due does not compel the petitioners to establish such incapacity to pay by the mode indicated in s. 4 of the Winding-up Act, that is, by serving a demand for payment on the company at least sixty days before the presentation of the petition. The said s. 4 is not exclusive and the petitioner may prove the incapacity as he would any other fact.

Re Calumet Metals Co., 14 Que. P.R. 264.

(§ VI E—341) — STAY OF PROCEEDINGS — RESOLUTION—VALIDITY.

Where a petition has been made to the court to wind up a company, in pursuance of a resolution passed at a special meeting, and where actions are pending seeking the annulment of the resolution, as being fraudulent and illegal, the court will hold the petition in suspense until the other actions have been decided by the proper courts.

Belanger v. Union Abitibi Mining Co., 32 D.L.R. 709, 25 Que. K.B. 376.

LIQUIDATOR — APPOINTMENT — QUALIFICATION.

If at a meeting of the creditors, shareholders and contributories of a company, a liquidator has been regularly appointed, his appointment will not be revoked on the sole ground that he is an employee of one of the inspectors. At the time of the meeting of the creditors to appoint a liquidator the court should accept any claim supported by an oath and by confirming documents without entering into the validity of the claims filed.

Rigaud Granite Co. v. Wylie, 18 Que. P.R. 266.

(§ VI E—342)—WINDING-UP — PROCEDURE —SINGLE CREDITOR—RIGHT TO PROCEED BY.

An application for a winding-up order should not be granted when sought for the sole purpose of enforcing a single creditor's claim in a case where such claim could be as well enforced by a writ of execution.

Re International Electric Co., McMahan's Case, 20 D.L.R. 451, 31 O.L.R. 348.

WINDING-UP—PREFERRED CREDITOR'S APPLICATION.

The holder of fully paid preference shares is a "shareholder" within s. 12 of the Winding-up Act, R.S.C. 1906, c. 144, and as such has a status to apply for an order winding-up the company.

Re Canada Provident & Investment Corp., 14 D.L.R. 782, 24 Man. L.R. 582, 26 W.L.R. 326, 5 W.W.R. 816.

(§ VI E—343)—PROCEDURE—TAXATION OF COSTS.

The Superior Court has exclusive jurisdiction in the Province of Quebec, in proceedings under the Winding-up Act.

Champlain Real Estate Co. v. Dame Marie Malvina Racine, 15 Que. P.R. 87.

(§ VI E—344)—CLAIMS—POWER OF COURT.

The court has no jurisdiction to interfere with the statutory duties of a liquidator under s. 73 of the Winding-up Act, R.S.C., 1906, c. 144 (which requires him to give notice to all creditors to prove their claims), by making an order staying all proceedings taken by him until the final adjudication of certain selected claims, even if the intention of the order is merely to minimize costs and expedite proceedings. The liquidator is not an officer of the court in the same full sense as a registrar, etc. Certain things he may do with the approval of the court, others he is authorized to do without the control of the court.

Re Dominion Trust; Critchley's Case, 27 D.L.R. 580, 23 B.C.R. 42, 34 W.L.R. 461, 10 W.W.R. 655.

POWERS OF LIQUIDATOR — AUTHORITY TO CARRY ON BUSINESS—RIGHT OF RETAINER.

[Re Ont. Bank; Massey & Lee's Case, 8 D.L.R. 243, referred to.]

Williams v. Dom. Trust, 31 D.L.R. 786, 23 B.C.R. 461, [1917] 1 W.W.R. 664.

STATUTORY LIABILITY OF DIRECTORS.

The burden of proof that transfers of unpaid stock were made without due information and inquiry as to the financial responsibility of the transferee is upon the liquidator where the insolvent company was by its special act of incorporation made subject to the statutory provision that the directors should be jointly and severally liable for allowing the registration of a transfer of unpaid stock to a person not apparently of sufficient means, and the liquidator seeks to enforce that statutory liability.

Re Ontario Fire Ins., 23 D.L.R. 758, 8 W.W.R. 1081, 31 W.L.R. 483.

EXAMINATION OF DIRECTORS.

Upon an application by a corporation for a winding-up order under the provisions of the Winding-up Act, R.S.C. 1906, c. 144, the directors of the corporation are compellable witnesses for examination under s. 135 of the act supplemented by Con. Rules (Ont.) 489, 491, 492. Upon an application to examine certain directors of a corporation, the provisions of s. 135 of the Winding-up Act, R.S.C. 1906, c. 144, control, and as read with s. 2 (e) and s. 134, render applicable, in the Province of Ontario, the procedure, including rules and regulations and methods of practice, current in the High Court of Justice (Ont.), adapted as nearly as may be as laid down in the Con. Rules (Ont.), it

appearing that no other rules have yet been made under s. 134 of R.S.C., c. 144. [Re Belding Lumber Co., 23 O.L.R. 255, specially referred to.]

Re Baynes Carriage Co., 7 D.L.R. 257, 4 O.W.N. 30, 27 O.L.R. 244, 23 O.W.R. 10.

DEBENTURE-HOLDERS—APPOINTMENT OF LIQUIDATOR AS RECEIVER — CONFLICT OF INTERESTS—APPOINTMENT OF NEW RECEIVER ON BEHALF OF DEBENTURE-HOLDERS.

Re Civil Service Co-operative Supply Assn., 10 O.W.N. 143.

LIABILITY OF LIQUIDATOR FOR REPAYMENT OF SUM PAID BY PERSON PROPOSING TO PURCHASE PORTION OF ASSETS—LEASEHOLD PROPERTY — PAYMENT MADE TO LANDLORD TO AVOID FORFEITURE—RES JUDICATA.

Re Northern Quarries, 10 O.W.N. 262.

DISMISSAL OF PETITION TO WIND-UP—LEAVE TO APPEAL — REFUSAL — WINDING-UP ACT, R.S.C. 1906, c. 144, s. 101 (a), (b).

Re Elliott & Son, 9 O.W.N. 51.

ENFORCING LIABILITIES OF CONTRIBUTORIES.

A liquidator of a company who, in a petition entitled "Petition to settle the list of contributories," concludes by asking that certain persons named be summoned to shew cause why they should not be declared contributories, cannot enter upon the merits of the litigation; and the court cannot upon these conclusions declare the shareholders contributories nor order them to shew cause at some other date.

Frank v. Boston Shoe Co., 24 Que. K.B. 267.

FEES OF LIQUIDATOR.

As certified accountant, a liquidator has no right to claim the fees under the tariff of the association of diplomated accountants of which he is one. If his services entitled him to a percentage upon the receipts, it is necessary, at least in respect to the gross receipts, to deduct the amount affected by the lien of a bank on the assets. The amount of the remuneration should be fixed according to the services rendered, the time spent, the labour necessary and the responsibility incurred by the duties of the liquidation.

Waldron Drouin & Co. v. Savage, 17 Que. P.R. 358.

INSCRIPTION IN REVIEW—AUTHORIZATION—DELAY.

Where the liquidator of an incorporated company made a petition for an authorization to inscribe a judgment in review, and seeing that the delay was about to expire, filed the inscription before his demand was granted, the Court of Review will not reject the inscription, but will ratify the procedure.

Boston Shoe v. Frank, 48 Que. S.C. 65.

CREDITOR'S RIGHT TO EXAMINE BOOKS.

An application by a creditor for permission to examine the books of a company under liquidation will not be granted unless special reasons therefor are shewn.

Colonial Engineering Co. v. Dominion Light, Heat & Power Co., 13 Que. P.R. 436.

WINDING-UP—THE WINDING-UP ACT, R.S.C., 1906, c. 144, s. 35 — CHANGE OF LIQUIDATOR'S SOLICITOR — APPROVAL BY COURT.

The fact that a solicitor selected by a liquidator to assist him in the winding-up of a company under the Winding-up Act (Can.) has been acting up to the time of his selection for claimants in the winding-up is not sufficient ground for the court to withhold approval of such solicitor under s. 35 of said act; but before such approval the solicitor must elect to relinquish acting for such claimants. It is not necessary for a liquidator in assigning reasons for a change of solicitors to go further than to allege that the change will be in the best interest of the winding-up.

In re The Winding-up Act: In re Bank of Vancouver, [1919] 3 W.W.R. 986.

F. INSOLVENCY — RIGHT AND PREFERENCES OF CREDITORS.

(§ VI F—345)—BANK — SECURITIES — RELEASE OF SURETY.

If a creditor bank elect to take securities at a valuation in payment of a debt of an insolvent corporation, in process of voluntary liquidation, the bank is bound even though there is no statutory provision for such valuation, and a surety for the debtor is released to the extent of that valuation.

Bank of Commerce v. Martin, 40 D.L.R. 155, 24 B.C.R. 381, [1918] 1 W.W.R. 395.

RIGHT OF PETITIONER — SECURED AND UNSECURED CREDITORS.

While a creditor of a company who is unable to secure payment of his debt is, as between himself and the company, entitled ex debito justitiæ to a winding-up order: [Re South East Corp., 23 D.L.R. 724, 8 A.L.R. 460]; yet, as between the petitioner and the other creditors there is no such ex debito right: [Re Crigglestone Coal Co., [1906] 2 Ch. 327, at 331.] A winding-up order refused on the ground that unsecured creditors, other than the petitioner (in this case two-thirds in value of the unsecured creditors) were opposed to the petition.

Re Edmonton Brewing & Malting Co., 43 D.L.R. 748, 14 Alta. L.R. 365, [1918] 3 W.W.R. 988.

WAGES—SOLICITOR'S LIEN.

A liquidator must recognize the status of an insolvent company as it exists at the time its affairs come into his hands. [Re Clinton Thresher Co., 15 O.W.R. 318; Re Fashion Shop Co., 21 D.L.R. 478, 33 O.L.R. 253, followed.] Where a company which has made an assignment under the Assignments Act, c. 6, 1907, is ordered to be wound up under the Winding-up Act, R.S.C., c. 144, the priority given by s. 28 of

the Assignments Act to claims for wages over the claims of other creditors is not divested or lost, because of the winding-up proceedings, although the wages in question did not accrue during the three months next previous to the date of the winding-up order. A solicitor cannot acquire as against a liquidator a lien upon the share register and minute book of a company. [Re Capital Fire Ass'ce Assn., 24 Ch. D. 408, followed.]

Re Pioneer Tractor Co. (Alta.), [1918] 1 W.W.R. 329.

DISTRIBUTION—LIABILITY OF LIQUIDATOR.

A liquidator of an incorporated company, who in good faith has distributed and paid to the creditors of the company all the moneys that he has received as liquidator, under an order of the court, cannot be sued personally for the recovery of any of these sums of money.

Eastern Canada Fisheries v. McIntosh, 27 Que. K.B. 122.

OPPOSITION BY CREDITORS TO WIND UP — FUTILITY OF PROCEEDINGS.

The onus is on those opposing a creditor's application for a winding-up order, where the statutory presumption of the company's insolvency arises, to prove that there is no reasonable possibility of any benefit accruing to the applicant and other unsecured creditors from the winding-up. [Re Crigglestone Coal Co., [1906] 2 Ch. 327, referred to.]

Re South East Corp., 23 D.L.R. 724, 8 A.L.R. 460, 8 W.W.R. 297, 31 W.L.R. 145.

CLAIMS—JUDGMENT—COSTS.

Dominion Bed Co. v. Fitzherbert, 36 D.L.R. 600, 24 B.C.R. 38, [1917] 2 W.W.R. 727.

SURETY AS CREDITOR—COMPROMISE.

The fact that a creditor who filed an affidavit of claim with the liquidator of the company accepted the proceeds of certain securities in compromise of his claim, and agreed not to rank for the remainder, will not prevent sureties for the debt against whom the creditor expressly reserved his rights, from ranking in respect of the balance of the creditor's claim when compelled to pay the creditor.

Brown v. Coughlin; Re Stratford Fuel, etc. Co., 28 D.L.R. 437, 50 Can. S.C.R. 100, affirming 13 D.L.R. 64, 28 O.L.R. 481.

ACTION BY LIQUIDATOR TO RECOVER MACHINERY SEIZED UNDER EXECUTION — TITLE OF COMPANY TO CHATTELS — SALE — MORTGAGE — EVIDENCE — MINUTES OF COMPANY.

McCammon v. Westport Mfg. & Plating Co., 26 D.L.R. 748, 9 O.W.N. 397, reversing 9 O.W.N. 6.

COMPROMISE BY SURETY WITH LIQUIDATOR—RIGHT OF SURETY TO RANK AS CREDITOR.

By a contract of suretyship C. and others guaranteed payment to a bank of advances to a company by discount of negotiable securities and otherwise, the contract providing that it was to be a continuing guarantee to cover any number of transactions, the bank being authorized to deal or compound with any parties to said negotiable securities and the doctrines of law and equity in favour of a surety not to apply to its dealings. The company became insolvent, and its liquidator brought action against the bank to set aside some of its securities, which action was compromised, the bank receiving a certain amount, reserving its rights against the sureties and agreeing not to rank on the insolvent estate. The sureties were obliged to pay the bank and sought to rank for the amount. Held, affirming the judgment of the Appellate Division, that they were not debarred by the compromise of said action from so ranking.

Brown v. Coughlin, 28 D.L.R. 437, 50 Can. S.C.R. 100. [Sub nom. Re Stratford Fuel Co., 13 D.L.R. 64, 28 O.L.R. 481, reversing 8 D.L.R. 146, affirmed.]

INSOLVENCY OF TRUST COMPANY INCORPORATED BY DOMINION STATUTE—WINDING-UP ORDER — COMPANY LICENSED TO DO BUSINESS IN ONTARIO UNDER LOAN AND TRUST CORPORATIONS ACT—SECURITY-BOND MADE TO PROVINCIAL MINISTER FOR BENEFIT OF CREDITORS OF COMPANY IN ONTARIO—COMPANY INDEBTED TO ESTATE IN ITS HANDS AS EXECUTOR —ACTION ON BOND—POWER OF PROVINCIAL LEGISLATURE TO REQUIRE DOMINION COMPANY TO OBTAIN LICENSE TO DO BUSINESS IN PROVINCE — QUESTION NOT OPEN IN ACTION ON BOND—ELECTION OF COMPANY TO GIVE BOND—LIABILITY OF SURETY — VALIDITY OF BOND—PROOF OF DEFAULT BY COMPANY OR LIQUIDATOR.

Attorney-General for Ontario v. R. Passengers Ass'ce Co., 41 O.L.R. 234.

FILING CLAIM AFTER DIVIDEND DECLARED.

Where upon the winding-up of a company under the Winding-up Act an unsecured creditor does not file his claim with the liquidator until after a dividend has been declared and paid to the other creditors, he is entitled to participate with the other unsecured creditors, pari passu, in the undistributed assets, but is not entitled to the dividend already paid.

Re Peoples Loan & Deposit Co.; Davidson's case, 25 B.C.R. 109.

INSOLVENCY—SUFFICIENCY OF ALLEGATIONS —SHERIFF'S NULLA BONA.

On a petition by a creditor for winding-up under the Dominion Winding-up Act, R.S.C. 1906, c. 144, on the ground of insolvency of the company:—Held, that it is necessary that the alleged insolvency be established strictly in the manner required by the Act, and it is not sufficient to merely shew that there are unpaid judgments against the company, or that executions against the company have been returned by the sheriff nulla bona, or that

officers of the company have admitted its insolvency, nor is it evidence of insolvency under the Act to shew that the company is unable to pay its debts as they become due without also shewing that a demand in writing has been made under s. 4 of the Act. An objection for noncompliance with the Act as to proof of insolvency is more than a mere preliminary objection, and counsel is not prevented from taking such objection by reason of the fact of a previous adjournment being had of the motion on the understanding that no preliminary objections be taken.

Re Great West Brick & Coal Co., 9 S L.R. 240.

RECEIVERSHIP—ADVANCES MADE BY BANK UPON SECURITY OF TIMBER—PAYMENT OF CROWN DUES BY BANK—CLAIM FOR REPAYMENT OUT OF ASSETS OF BANK IN PRIORITY TO CLAIM OF MORTGAGEE — OBLIGATION OF COMPANY NOT BINDING ON MORTGAGEE—PREFERENTIAL LIEN OF CROWN — VALIDITY AGAINST SECURED CREDITORS — SUBROGATION — SALVAGE — COURT IN CONTROL OF FUND—EQUITABLE ADMINISTRATION.

Re Imperial Paper Mills of Canada, Diehl v. Carritt, 7 O.W.N. 639.

It was held that s. 8 of c. 143, Cons. St. N.B. 1903, must be read as subject to the provisions of s. 2 of the Act, and in order to obtain the benefit of the provisions of s. 8 the vendor of a chattel, under a contract that the sale shall not pass the title until the chattel is paid for, must file a copy of such contract with the registrar of deeds of the county in which the conditional purchaser resided at the time of the sale within fifteen days from the delivery of possession of the chattel mentioned in the contract. (2) In a mortgage given by the N.L. Company, to secure a certain bond issue, the trustee under the mortgage deed was a foreign corporation not having a license to do business within the Province of New Brunswick, as required by Cons. St. N.B. 1903, c. 18, and, therefore, under the provisions of the Provincial Act, 5 Edw. VII., c. 28, was unable to take or hold property in New Brunswick. After the bonds were issued and the mortgage executed the N.L. Company went into liquidation, and a liquidator was appointed under the provisions of the Winding-up Act, R.S.C. 1906, c. 144. Held, that while the mortgage deed was not effectual to convey to the foreign corporation the property it was intended, or purported to convey, yet, inasmuch as it was clear upon the fact of the bonds that the bondholders acquired the bonds under an agreement that they were to be secured by a mortgage upon the property of the N.L. Company, the bondholders, who were not responsible for the failure of the company to appoint a competent trustee, were entitled in equity as against the company and its liquidator, to a first charge, as security for the payment of such bonds, upon all the property of the company specified as intended to be so charged in the bonds themselves and in the ineffectual mortgage deed. (3) While insolvency of a company is one ground upon which the Winding-up Act provides that the company may be wound up, this does not make the Winding-up Act an "act relating to insolvency" within the meaning of the New Brunswick Bills of Sale Act; nor does it make the liquidator an assignee for the general benefit of creditors. (4) A liquidator is in no sense a subsequent purchaser for value, but represents the company and acquires no rights as liquidator which the company itself did not possess, save those which are given to him by the Winding-up Act.

Harrison v. Nepisiquit Lumber Co., 11 E.L.R. 314.

WINDING-UP—CLAIM ON ASSETS—ASSIGNMENTS.

Re Standard Cobalt Mines, 5 O.W.N. 144, 25 O.W.R. 103.

CLUB SUBSCRIPTION — OFFER TO RETURN — ACCEPTANCE — CONTRACT — CONSIDERATION — CREDITOR'S CLAIM — PREFERRED CLAIM — MONEYS DEPOSITED IN BANK—TRUST—EARMARKING.

Re Civil Service Club; Furniss Withy & Co.'s Claim, 13 O.W.N. 138.

CLAIM OF LIQUIDATORS AGAINST PERSON INDEBTED TO COMPANY—JUDGMENT RECOVERED BY DEBTOR AGAINST COMPANY — ASSIGNMENT OF, AFTER WINDING-UP ORDER ACTED ON—SET-OFF—EQUITIES—REFERENCE TO MASTER — POSTPONEMENT OF TAKING EVIDENCE ON FACTS UNTIL AFTER DETERMINATION OF QUESTIONS OF LAW.

Bailey Cobalt Mines v. Benson, 13 O. W.N. 102. [See 43 O.L.R. 1.]

DISALLOWANCE OF CLAIMS BY REFEREE—AFFIRMANCE BY JUDGE—APPLICATION FOR LEAVE TO APPEAL REFUSED—WINDING-UP ACT, R.S.C. 1906, c. 144, s. 101.

Re Ontario Bank, 12 O.W.N. 245, 333. [See 38 O.L.R. 242.]

CLAIM UPON ASSETS—LEASE OF MACHINERY —CONTRACT — PAYMENTS FOR REPAIRS AND DETERIORATIONS—ORDER OF JUDGE ON APPEAL FROM MASTER'S RULINGS—LEAVE TO APPEAL TO DIVISIONAL COURT —WINDING-UP ACT, R.S.C. 1906, c. 144, s. 101.

Re Durnford Elk Shoes, 11 O.W.N. 59, 105.

CLAIM OF TRUSTEE-ASSIGNEE TO PAYMENT FOR SERVICES BEFORE WINDING-UP ORDER.

Re Auto Top & Body Co., 10 O.W.N. 76, 129.

SECURED CLAIM — DISCLOSURE OF SECURITIES.

A creditor who files a claim in the winding-up of a company is not obliged under the Winding-up Act (R.S.C. 1906, c. 144),

to designate the nature, amount and value of the immovables received as security, unless the immovables belonged to the company at the time it was put in liquidation. The contract contained in the contre-lettre sent by a third party to the creditor in favour of the debtor was neither a sale pure and simple nor a mortgage, but a sale with the right of redemption which has conveyed to the purchasers a right in rem in the lots sold.]

Bourbeau Co. v. Stewart, Macdonald Export Co., 26 Que. K.B. 315.

COSTS OF LIQUIDATION—RENT.

In the winding-up of companies under the Winding-up Act (R.S.C., c. 144, s. 92), the expenses and costs properly incurred in the winding up, which includes the remuneration of the liquidators, are payable out of the assets of the company in priority to all other claims, and include the claim of the lessor; the rank and privilege of the lessor are governed by the provisions of the said Winding-up Act, and not by those of the Civil Code, when they are in opposition to the costs of liquidation. A voluntary liquidation commences from the date of the resolution ordering it, even when the liquidator is only named later on. A lessor is not a creditor holding security on the estate of the company which he can place a value on, and which he can retain or assign to the estate under ss. 76, 77, R.S.C. c. 144.

Re Colonial Toy & Show Case and Richards & Organ v. Maurice, 53 Que. S.C. 420.

(§ VI F—346)—ACTS OF INSOLVENCY.

A winding-up order is authorized under the Dominion Winding-up Act, R.S.C. 1906, c. 144 (s. 11), on proof of an execution remaining unsatisfied against the company for fifteen days after its goods were levied upon, although there may not have been a default of sixty days following the demand for payment, under s. 4 of the Act; the latter section does not affect clause (h) of s. 3 as to insolvency presumed from executions remaining unsatisfied.

Re Installations, 14 D.L.R. 679, 26 W.L.R. 254, 5 W.W.R. 709.

WINDING-UP — TRANSFERRING ITS MAIN ASSETS—TAKING SHARES IN PAYMENT.

Where a company which is largely indebted and whose stock has been issued as fully paid has ceased active operations for lack of funds and is proceeding against the will of dissentient shareholders and creditors to make over its assets in exchange for the shares of another company, the court may, at the instance of a creditor, properly make a winding-up order under the Winding-up Act, R.S.C. 1906, c. 144, because of the company being about to dispose of its property with intent to defraud or delay creditors (s. 3 (e)) or because of its making a sale of such assets without the consent of its creditors and without satisfying their claims while it was unable to meet its liabilities in full. [See also 15 D.L.R. 461, for earlier decision.]

Calumet Metals v. Eldredge, 17 D.L.R. 276, 23 Que. K.B. 521.

DISPOSITION OF PROPERTY GENERALLY—VOLUNTARY LIQUIDATION—OFFICIAL LIQUIDATOR.

[Re Colonial Investment Co., 14 D.L.R. 563, and 15 D.L.R. 634, considered.]

Re Colonial Investment Co. of Winnipeg, 15 D.L.R. 650, 27 W.L.R. 134.

COMPROMISE AGREEMENT BETWEEN CREDITORS OF A COMPANY IN LIQUIDATION IS LEGAL AND VALID WHEN IT DOES NOT ILLEGALLY AFFECT RIGHTS OF CREDITORS OF COMPANY.

Plaintiffs were entitled to withdraw their intervention which was taken in their own name, in consideration of the amount which was paid. The settlement of the intervention in question did not affect the rights of other creditors. Judgment reversed and defendant condemned to pay the sum claimed with interest and costs.

Ehrenback v. Wener, 25 Rev. de Jur. 203.

VOLUNTARY TRANSFER OF ASSETS—FRAUD ON CREDITORS—ONUS.

Where property is transferred from one company to another, the person who planned the transfer for the transferor company, being the guiding spirit of the transferee company, and the effect of such transfer being to hinder and delay the creditors of the transferor company, the onus of shewing that the transfer was not made with the intent to hinder and delay creditors of the transferor company, falls upon the transferee company. [Re Hirth, [1899] 1 Q.B. 612; Re Slobodinsky, [1903] 2 K.B. 517; Barthels v. Winnipeg Cigar Co., 2 A.L.R. 21; Mackay v. Douglas, L.R. 14 Eq. 106; Ex parte Russell, 19 Ch. D. 588, referred to.]

Walter v. Leduc, 8 W.W.R. 360.

(§ VI F—347)—ASSIGNMENT FOR BENEFIT OF CREDITORS.

Where a company made an assignment for the benefit of its creditors and afterwards a liquidator was appointed under the Winding-up Act, R.S.C. 1906, c. 144, the property then in possession of the assignee for the benefit of the creditors was property to which the company "appears to be entitled," within the meaning of s. 33 of such act requiring the liquidator upon his appointment to "take into his custody or under his control all the property, effects and choses in action to which the company is or appears to be entitled."

National Trust Co. v. Trusts & Guarantee Co., 5 D.L.R. 459, 26 O.L.R. 279, 22 O.W.R. 933.

ASSIGNMENT FOR CREDITORS — RIGHT TO WIND-UP ORDER — OPPOSITION BY MAJORITY.

A creditor who consents to the winding-

up of a provincial company under a Provincial Assignment Act cannot afterwards invoke the Dominion statute to wind up the company under the Winding-up Act, R.S.C. 1906, c. 144; nor will the court make such order ex debito justitiæ, even where insolvency is established, for the purpose of prosecuting claims which would not prove of material benefit and could be as effectively done by the official assignee under the provincial statute, particularly where such order is opposed by a majority of the creditors. [Re Strathy Wire Fence Co., 8 O.L.R. 186, applied.]

Re Olympia Co. 25 D.L.R. 620, 26 Man. L.R. 73, 33 W.L.R. 331, 9 W.W.R. 875.

EXHIBITING STATEMENT SHEWING INSOLVENCY.

That a company's president threw open the books of the company to an accountant employed by a creditor, and the accountant embodied the result of his examination thereof in a report to the creditors shewing that the company was insolvent, does not bring the company within subs. (c) of s. 3 of the Winding-up Act, R.S.C. 1906, c. 144, as exhibiting a statement shewing its inability to meet its liabilities. Where an affidavit offered in support of a petition for winding up a company stated that the deponent, an auditor designated by certain creditors, had examined the company's books and records and, in connection therewith, had obtained from time to time information as to the affairs of the company from its president, and that though the deponent was unable from the limited time at his disposal to make a complete audit or arrive at a balance, he made a sufficient examination and secured sufficient information from the president to arrive at the conclusion that the company was insolvent, such statement is but an expression of the auditor's professional opinion and is not an acknowledgment by the company of its insolvency within subs. (d) s. 3 of the Winding-up Act, R.S.C. 1906, c. 144. The acknowledgment of insolvency required by subs. (d) of s. 3 of the Winding-up Act, R.S.C. 1906, c. 144, must be some formal act of the directors or of the shareholders or of some officer expressly or impliedly authorized to make such an acknowledgment on the company's behalf. [Re Qu'Appelle Valley Farming Co., 5 Man. L.R. 160, specially referred to; and see Parker and Clark's Company Law, 351.] An offer to the company's creditors by the president of a company carrying on a grain commission business, to pay a specified sum in full of all liability upon condition that he be reinstated as a member of the grain exchange, cannot be construed as an acknowledgment of the company's inability to pay its creditors in full.

Re Manitoba Commission Co., 2 D.L.R. 1, 22 Man. L.R. 268, 21 W.L.R. 86, 2 W.W.R. 276.

PETITION BY UNSECURED CREDITORS UNDER WINDING-UP ACT, R.S.C. 1906, c. 144—PREVIOUS ASSIGNMENT BY COMPANY FOR BENEFIT OF CREDITORS—SALE OF ASSETS ORDERED BY COUNTY COURT JUDGE—CHARGE OF COLLUSION—DISCRETION.

Re International Trap Rock Co., 8 O.W.N. 461.

ASSIGNMENT FOR BENEFIT OF CREDITORS—TRANSFER OF ASSETS OF COMPANY TO NEW COMPANY—RESOLUTION OF CREDITORS—DISSENTIENT CREDITOR—INJUNCTION—DELAY IN MOVING.

Kreamer v. Clarkson, 8 O.W.N. 545.

(§ VI F—348)—JUDGMENT BY CREDITOR—FILED AGAINST LANDS—WINDING-UP OF COMPANY—SALE OF LANDS BY LIQUIDATOR—EFFECT OF JUDGMENT—WINDING-UP ACT—R.S.C. 1906, c. 144, s. 84.

No lien shall be created on the property of a company by filing of a judgment against the same, if before such judgment has been satisfied, winding-up proceedings have been commenced. [Re Heyden, 29 U.C.Q.B. 262; Re Toronto Wood & Shingle Co., 30 C.L.T. 353, referred to.]

In re McDonald Co., 50 D.L.R. 417.

(§ VI F—350)—CONTESTATION OF CLAIMS—SECURED CLAIMS.

Section 85 of the Winding-up Act, R.S.C. 1906, c. 144, which enables a creditor to contest claims filed in the proceedings, only applies to those claims which are made in the winding-up proceedings, and since a secured creditor is not bound to enter such proceedings for the purpose of enforcing his security, a general creditor has therefore no standing to attack such security, the enforcement of which is sought by an independent foreclosure action.

Capital Trust Co. v. Yellowhead Pass Coal & Coke Co., 27 D.L.R. 25, 9 A.L.R. 463, 33 W.L.R. 873, 9 W.W.R. 1275.

PREFERENCES—WAGES—DOMINION WINDING-UP ACT, S. 70—COMMERCIAL TRAVELLER—COMMISSION.

Re Hartwick Fur Co.; Murphy's Claim, 17 D.L.R. 853, 6 O.W.N. 363.

CLAIM OF MUNICIPAL CORPORATION FOR BUSINESS TAX—WHEN PREFERRED—DISTRESS.

Re Faulkner, City of Ottawa's Claim, 25 D.L.R. 780, 34 O.L.R. 536.

CLAIM OF MORTGAGEE FOR BONDHOLDERS—APPLICATION FOR LEAVE TO PROCEED TO ENFORCE, NOTWITHSTANDING WINDING-UP ORDER—WINDING-UP ACT, R.S.C. 1906, c. 144, s. 22—DISCRETION—DELAY TO ENABLE LIQUIDATOR TO SELL ASSETS—COSTS.

Re Martin International Trap Rock Co., 8 O.W.N. 599.

SALE OF MACHINERY TO COMPANY BEFORE WINDING-UP—PROPERTY NOT TO PASS TILL PAYMENT—CLAIM OF UNPAID CREDITORS TO POSSESSION AND OWNERSHIP OF MACHINERY—ORDER OF JUDGE ON APPEAL FROM RULING OF MASTER—REFUSAL OF LEAVE FOR FURTHER APPEAL.

Re Motor Street Cleaning Co., 8 O.W.N. 233.

RECEIVER—SALE OF ASSETS—CLAIM BY ELECTRIC LIGHT COMPANY IN PRIORITY TO DEBENTURES—TRIAL OF ISSUE—FINDING OF FACT.

Diehl v. Carritt, 9 O.W.N. 109.

WINDING-UP—CLAIMS OF CREDITORS—PREFERENCE — CONTRACT — CONSTRUCTION —ASSIGNMENT TO BANK—DETERMINATION OF ISSUES BY LITIGATION OUTSIDE OF WINDING-UP PROCEEDINGS.

Re Canadian Mineral Rubber Co., 6 O. W.N. 637.

PREFERENCE—REPAYMENT OF ADVANCES.

The reimbursement by a joint stock company, on the eve of being put in liquidation, of advances which have been made to it and which have benefited its creditors, does not constitute a preferential payment of which the liquidators can subsequently demand the annulment in the name of the creditors.

Larue v. Dohan, 48 Que. S.C. 374.

CROWN AS PREFERRED CREDITOR—LICENSE MONEY.

Moneys received for game licenses by two game guardians were by them deposited with a company of which they were directors and either paid out as petty cash or deposited in a bank. Held, that for such moneys the Crown had a preferential claim in the winding-up of the company.

Re Simpson & Hunter; Re Alberta Government Claim, [1917] 1 W.W.R. 402.

(§ VI F—354)—RIGHTS AND PREFERENCES OF CREDITORS—PREFERRED SHAREHOLDERS.

Where there is no acquiescence, delay, or conduct on the part of the alleged contributory to estop him from alleging that at the time when he made his application for preference shares and thenceforth until the liquidation proceedings the company was not in a position to give him preference shares, he is entitled to set up in answer to the liquidator's claim to place him on the list of contributories that he never got what he applied for by reason of irregularities in the issue to him, as preferred shares, of certain shares which were in fact common shares by reason of their having been legally made into preferred, when in fact all of the legally constituted preferred shares had already been issued to others. [Re Pakenham Pork Packing Co., 12 O.L.R. 100, applied.]

Re Bankers' Trust & Barnsley, 21 D.L.R. 623, 21 B.C.R. 130, 30 W.L.R. 738, 8 W.W. R. 38, affirming 19 D.L.R. 590.

(§ VI F—357)—PREFERENCES—RENT—DISTRESS.

In a voluntary winding up under the Winding-up Ordinance (Alta)., there is no right, under ss. 7 (2), 18 (7), to distress, or to any preferential claim, for rent accrued before the winding-up resolution; the proper course, where a preferential claim exists, is by a summary application for a direction to the liquidator to allow such claim out of the proceeds. A subsequent proceeding under the Dominion Act will not vitiate the proceedings under the provincial statute. [Re Oak Pitts Colliery Co., 21 Ch.D. 322; Re Jasper Liquor Co., 23 D.L.R. 41, 25 D.L.R. 84, 9 A.L.R. 199, applied.]

Re City Transfer Co.; Ex parte Potter, 34 D.L.R. 457, 11 A.L.R. 83, [1917] 2 W.W.R. 128.

PREFERRED CLAIMS—WAGES OF "CLERKS"—MANAGER.

The reference to "clerks or other persons" in s. 70 of the Winding-up Act (R.S.C. 1906, c. 144), which prefers their claims for three months' wages, applies to persons in the same kind of employment as clerks, and does not include the manager of the company. [See also Hives v. Imperial Can. Trust Co. (Sask.), 29 D.L.R. 271.]

Re Shirleys, 29 D.L.R. 273, 9 S.L.R. 258, 34 W.L.R. 805, 10 W.W.R. 919.

"SALARY OF CLERK OR OTHER PERSON"—COMMISSIONS.

A sales agent employed on a commission basis is not a "clerk or other person" entitled, in respect of commissions, to rank as a preferred creditor for arrears of "salary or wages" within the meaning of s. 70 of the Winding-up Act, R.S.C. 1906, c. 144, [Miquelon v. Vilandre Co. (Que.), 16 D.L.R. 316, followed; Re Western Coal Co. (Alta.), 12 D.L.R. 401, distinguished. Re Hartwick Fur Co., 17 D.L.R. 853, considered. See also Hives v. Imperial Can. Trust Co. (Sask.), 29 D.L.R. 271; Re Shirley (Sask.), 29 D.L.R. 273.]

Re Parkin Elevator Co., Dunsmoor's Claim, 31 D.L.R. 123, 37 O.L.R. 277.

RENT AS PREFERRED CLAIM—INVALID LEASE —POSSESSION.

By taking possession under a lease entered into in pursuance of an invalid resolution, a corporation accepts the tenancy upon the terms set forth in the resolution, and the lessor, upon liquidation of the corporation, is entitled to rank as a preferred creditor for the arrears of rent distrained for.

Re D. & S. Drug Co., 31 D.L.R. 643, 10 A.L.R. 266, [1917] 1 W.W.R. 374.

PREFERENTIAL LIEN OF LANDLORD.

On an order being made for the winding-up of the company under the Winding-up Act, R.S.C. 1906, c. 144, after an assignment for creditors made by the company under the Assignments and Preferences Act, R.S.O. 1914, c. 134, the liquidator takes the assets subject to the preferential lien of the landlord under s. 38 of the Landlord

and Tenant Act, R.S.O. 1914, c. 155, for rent in arrear whether distrained for or not, upon goods available for distress limited, however, to the rent for the period of one year prior to the assignment and the three months following. [Re Clinton Thresher Co., 1 O.W.N. 445, applied; Fuches v. Hamilton Tribune Co., 10 P.R. (Ont.) 409, distinguished.]

Re Jasper Liquor Co., 23 D.L.R. 41, 32 W.L.R. 213, 9 W.W.R. 6, affirmed 25 D.L.R. 84, 9 A.L.R. 199, 32 W.L.R. 727, 9 W.W.R. 364.

PREFERRED CLAIMS—RENT.

A landlord has no preferred claim for past due rent distrained for where the distress lien is not in effect at the date of the commencement of the winding-up proceedings.

Re Jasper Liquor Co., 23 D.L.R. 41, 32 W.L.R. 213, 9 W.W.R. 6. [Affirmed 25 D. L.R. 84, 9 A.L.R. 199, 32 W.L.R. 727, 9 W. W.R. 364.]

WINDING-UP — PREFERENCES — SALARY — MANAGING DIRECTOR—SALESMAN.

The managing director of a company who also acted as a salesman, is not entitled to a preference under s. 10 of c. 111 of N.W.T. Ordinances (Alta. 1911), in a winding-up proceeding, where it is impossible to determine what portion of his salary, which was entire, was for his services as salesman. [Re Newspaper Proprietary Syndicate, [1900] 2 Ch. 349, specially referred to.] A salesman for a company is entitled to a preference under s. 10 of c. 111 of the N.W.T. Ordinances Alta. 1911, in a winding-up proceeding under that ordinance, notwithstanding he also acted as secretary of the company, where the greater portion of his services were performed in the former capacity.

Re S. E. Walker Co., 12 D.L.R. 769, 6 A.L.R. 238, 25 W.L.R. 164, 4 W.W.R. 1288.

WINDING-UP — PREFERENCES — WAGES — SALESMEN.

A salesman employed under a yearly hiring by a company is entitled, in a winding-up proceeding, to be collocated as an ordinary creditor to the amount of his unearned salary. A salesman is entitled to a preference as for wages under s. 70 of the Winding-up Act as well as under art. 2006 of the Civil Code, in respect of a bonus earned in addition to his salary for the period of three months prior to the winding-up order.

Allner v. Lighter, 13 D.L.R. 219.

WINDING-UP—PREFERRED CREDITORS—WAGE-EARNERS.

One employed without a definite term of hiring, to haul coal with his own wagon and team, at a fixed sum per ton, who works under the direction and control of his employer, is working for wages so as to make him a preferred creditor under the Companies Winding-up Ordinance of the Northwest Territories, Alta., 1911, c. 111, s. 10.

Re Western Coal Co., 12 D.L.R. 401, 7 A.L.R. 29, 25 W.L.R. 26, 4 W.W.R. 1238.

PREFERRED CLAIMS—RENT DISTRAINED FOR.

Distress for rent due, levied previous to the commencement of winding-up proceedings, is not a judicial proceeding, and there is nothing in the Winding-up Act (R.S.C. 1906, c. 144, ss. 22, 23, 84, amended by 7 & 8 Edw. VII., c. 75, s. 1) which prevents the landlord from realizing on the same. [Fuches v. Hamilton Tribune Co., 10 P.R. (Ont.) 409, distinguished. See also Re Jasper (Alta.), 25 D.L.R. 84, affirming 23 D.L.R. 41; National Trust Co. v. Leeson (Alta.), 26 D.L.R. 422; Cristall v. Loney (Alta.), 27 D.L.R. 717.]

Re Shirleys, 29 D.L.R. 273, 9 S.L.R. 258, 34 W.L.R. 805, 10 W.W.R. 919.

DISTRESS FOR RENT—LEAVE OF COURT.

Under subs. 7 of s. 18 of the Companies' Winding-up Ordinance, 1903 (Alta.), a distress for rent, after the commencement of the winding-up proceedings, cannot be had without leave of the court. [Re Jasper Liquor Co., 23 D.L.R. 41, affirmed.]

Re Jasper Liquor and Winding-up Act, 25 D.L.R. 84, 9 A.L.R. 199, 32 W.L.R. 727, 9 W.W.R. 364.

WINDING-UP — EMPLOYEES' PRIORITY FOR WAGES—AUDITOR.

Miquelon v. Vilandre Co., 16 D.L.R. 316, 15 Que. P.R. 266.

ACCOUNTANT'S LIEN ON BOOKS.

A company incorporated under the Companies Act, R.S.M. 1913, c. 35, must keep in its office the stock ledger, transfer register and minute book referred to in the Act, but not its other books of account such as its general ledger, cash book, journal, etc., so that, if the directors allow these latter books to be taken out of its office by an accountant so that he may work at them, the accountant will have a valid lien upon them for his services. [Re Capital, etc., Ass'ce Corp., 24 Ch. D. 408, followed; Re Alpha Mortgage & Invest. Co., 22 B.C.R. 513, distinguished.]

Re Residential Bldg. Co., 26 Man. L.R. 638.

CLAIMS OF PROVINCE—WAGES—WORKMEN'S COMPENSATION.

On the winding-up of a company, debts due by it to a province take priority to all unsecured claims. [Commissioners of Taxation for N.S. Wales v. Palmer, [1907] A.C. 179, followed.] Moreover, the claim of the province is not subject, under s. 70 of the Winding-up Act, to the claims of clerks and other employees of the company in respect to wages due them for the three months prior to the winding-up order. And, since in B.C. the Workmen's Compensation Board is simply an adjunct or administrative body, of the provincial government, claims by it in respect of the "accident fund" are claims by the province and are, therefore, entitled to preference. [Fox v. Government of Newfoundland, [1898] A.C. 667, distinguished.]

In re Smith Lumber Co. (B.C.), 25 B.C. R. 126.

LIQUIDATOR OF COMPANY MADE GARNISHEE—PERSONAL LIABILITY FOR WAGES OF PERSONS EMPLOYED BY LIQUIDATOR IN CARRYING ON BUSINESS OF COMPANY AFTER WINDING-UP ORDER—LEAVE TO PROCEED AGAINST LIQUIDATOR—NECESSITY FOR—QUESTION OF LAW FOR JUDGE IN DIVISION COURT—MOTION FOR PROHIBITION.

Scott v. Silver, 8 O.W.N. 552.

MONEYS PAYABLE TO COMPANY IN RESPECT OF CONTRACT—ASSIGNMENT TO BANK—CLAIMS OF WAGE-EARNERS AND MATERIALMEN — PRIORITY — CONSTRUCTION OF CONTRACT.

Re Canadian Mineral Rubber Co., 10 O.W.N. 456, 11 O.W.N. 135.

VOLUNTARY WINDING-UP—ONTARIO COMPANIES ACT, R.S.O. 1914, CH. 178—CLAIM OF SALES-MANAGER FOR SALARY AND COMMISSIONS — ALLOWANCE OF SUM BASED UPON PRESENT VALUE OF SALARY FOR UNEXPIRED TERM AFTER WINDING-UP ORDER—DISALLOWANCE OF CLAIM FOR UNEARNED COMMISSIONS — AGREEMENT WITH COMPANY—EXECUTED CONTRACT—ABSENCE OF SEAL AND BY-LAW—SECTION 92 OF ACT—RIGHT TO RANK ON ASSETS—CLAIM FOR PREFERENCE DISALLOWED.

Hawkins v. Allied Truck Co., 16 O.W.N. 381.

RENT — WAGES — "CLERK" — MANAGER — BARTENDER.

The claim of the lessor is privileged before that of clerks, on the proceeds of the sale of movable effects found on the premises. The lessor's privilege does not extend to an indemnity paid by the government. The privilege given to clerks under s. 70 of the Winding-up Act (R.S.C. 1906, c. 144) extends to all assets, but when it comes into competition with other privileged claims it is governed by 1994, etc., of the Civil Code. [Exchange Bank v. The Queen, 11 App. Cas. 157; Mitchell, Canadian Company law, p. 1543-4.] A manager is not a "clerk or other person" within the sense of s. 70 of the Winding-up Act. [Girard v. Gariépy, 17 Que. P.R. 406; Re Ritchie-Hearn Co., 6 O.W.R. 374.] A bartender is a clerk within the meaning of s. 70.

White Star Hotel Co. & Turgeon, 17 Que. P.R. 299.

The manager of a stock company is not a "clerk" in the sense of art. 2006, C.C. Que. and s. 70 of the Winding-up Act, R.S.C. 1906, c. 144, and has no privileged claim for arrears of his salary.

Girard v. Gariépy, 49 Que. S.C. 284; 17 Que. P.R. 396.

LIEN FOR RENT.

The lien of a lessor, in case of liquidation of the property abandoned by an insolvent merchant less than 4 months before the end of the current year, comprises 12 months of rent due, the rent to accrue during the current year and that of the year following.

Brodeur Company v. Merrill, 26 Que. K.B. 461.

TRUSTEE FOR BOND HOLDERS—RENT.

The trustee for the bond holders of a company has the right, in view of the company being put into liquidation, to cause himself to be put in possession of its assets without prejudice to the rights of privileged creditors of the company, such as its landlord.

Canadian Brass & Bedsteads Co. v. Duclos, 18 Que. P.R. 206.

WAGES—BANK ACT.

Under s. 70 of the Winding-up Act (R.S.C. 1906, c. 144) the claims of employees of a company are privileged to the extent of three months' arrears of salary which have accrued during the three months previous to the date of the winding-up order. Under s. 88 (7) of the Bank Act, the salaries of employees are privileged to the extent of three months, without any limitation to any specified three months, if the bank takes possession of such security as is mentioned in the section. Held, that if a liquidator takes a transfer from a bank of security held by it under s. 88, the wages in respect to which the employees would be entitled to priority would be such as had accrued to them during the three months next previous to the date of the winding-up order, but if the liquidator does not take over the security held by the bank, the bank must, if it realizes its security, do so under the Bank Act, and, therefore, must treat the wages of the employees to the extent of three months, independently of the date when they accrued, as a prior charge to its own claim.

Re Alberta Ornamental Iron Co., & Imperial Bank, [1917] 1 W.W.R. 126.

(§ VI F—359)—WINDING-UP—LIQUIDATOR CONTINUING BUSINESS — COMPLETING CONSTRUCTION CONTRACT—PRIORITIES.

Where the liquidators of a construction company have been authorized by the court in winding-up proceedings to complete a construction contract for the benefit of the estate, and in the work of completion adopt the prior contract between the company and a subcontractor for part of the work, the subcontractor's contract price is to be divided so as to collocate him for a dividend (where the claim is not privileged) as upon an ordinary claim in respect of the work done prior to the liquidation, but the subsequent work will be ordered to be paid for in full.

Re Bishop Construction Co., Hains v. Garth, 15 D.L.R. 911, 23 Que. K.B. 284.

PREFERENCES—LOAN TO LIQUIDATOR—ORDER OF COURT—PRIORITY OVER COSTS OF WINDING-UP.

A claim for money lent the liquidator of a company under an order of a court declaring that the loan should be a first charge on all the assets of the company,

subject only to existing liens, charges or encumbrances, is entitled to priority over the costs and charges of the winding-up proceeding, including liquidator's and solicitor's fees; and such rule is not affected by s. 92 of the Winding-up Act, R.S.C. 1906, c. 144, providing that the costs, charges and expenses properly incurred in a winding-up proceeding, including remuneration of the liquidator, shall be payable from the assets in priority to all other claims; since such section applies only to confer priority over claims against the company in existence at the time of going into liquidation.

Keyes v. Hanington, Liquidators of Miramichi Pulp & Paper Co., 13 D.L.R. 139, 42 N.B.R. 190, 13 E.L.R. 327.

BANK—WINDING-UP—FOUR DAYS' NOTICE—APPLICATION OF RULES OF PRACTICE.

Re Farmers Bank of Canada, 22 O.L.R. 556, 17 O.W.R. 964.

RAILWAY — INSOLVENCY — SALE — PRIOR ENQUIRY INTO CLAIMS OF CREDITORS — PLEDGE OF BONDS—TRUSTEE FOR BONDHOLDERS.

Royal Trust Co. v. The Baie des Chaleurs R. Co., 13 Can. Ex. 1.

ACTION BY COMPANY IN LIQUIDATION — BREACH OF CONTRACT FOR SALE OF GOODS—INDEPENDENT MONTHLY DELIVERIES UNDER CONTRACT.

Hamilton M. Co. v. Hamilton Steel & Iron Co., 23 O.L.R. 270, 18 O.W.R. 739.

APPOINTMENT OF INSPECTOR—OBJECTS—MISMANAGEMENT.

Re Town Topics Co., 20 Man. L.R. 574, 17 W.L.R. 646.

"CLERKS OR OTHER PERSONS"—COMMERCIAL TRAVELLER—PREFERRED CLAIMS FOR WAGES AND EXPENSES.

Re Morlock & Cline; Sarvis & Canning's Claims, 23 O.L.R. 165, 18 O.W.R. 545.

PETITION — IRREGULARITY — AFFIDAVIT NOT FILED BEFORE SERVICE—ORDER MADE UPON SUBSEQUENT REGULAR PETITION—APPLICATION FOR LEAVE TO APPEAL.

Re Belding Lumber Co., 23 O.L.R. 255, 2 O.W.N. 739, 755, 18 O.W.R. 668.

STAYING PROCEEDINGS IN ACTION BY LIQUIDATOR AGAINST CONTRIBUTORY.

Re London Fence (No. 1), 21 Man. L.R. 91, 17 W.L.R. 387. [Leave to appeal refused, 17 W.L.R. 650.]

SALE OF ASSETS BY LIQUIDATORS—CLAIM BY MORTGAGEES TO PROCEEDS OR FOR CONVERSION.

Re Raven Lake Portland Cement Co.; National Trust Co. v. Trusts & Guarantee Co., 24 O.L.R. 286, 19 O.W.R. 631.

PURCHASER BY MANAGER OF BANK OF BANK'S SHARES WITH BANK'S MONEY—BREACH OF TRUST—LIABILITY OF SUBSEQUENT PURCHASER.

Re Ontario Bank; Barwick's Case, 24 O.L.R. 301, 19 O.W.R. 686.

CONTRIBUTORY — ACTION FOR CALLS — DISMISSAL—CONSENT JUDGMENT.

Re Ontario Sugar Co.; McKinnon's Case, 24 O.L.R. 332, 19 O.W.R. 764. [Leave to appeal refused, 44 Can. S.C.R. 659.]

RAILWAY—INSOLVENCY—STATUS OF CREDITOR AS MORTGAGEE OF BONDS AND TRUSTEE.

Royal Trust Co. v. Atlantic & Lake Superior R. Co., 13 Can. Ex. 38.

RAILWAY COMPANY—TRUST DEED—REGISTRATION — TRUSTEE'S SALARY — PRESCRIPTION—SALARY OF DIRECTOR—PRIVILEGE OF BONDHOLDER.

Royal Trust Co. v. Atlantic & Lake Superior R. Co., 13 Can. Ex. 42.

WINDING-UP—POSITION OF LIQUIDATOR—SALE OF GOODS—BREACH OF CONTRACT—CONVERSION—DAMAGES.

Judgment of MacMahon, J., 14 O.W.R. 1163, 1 O.W.N. 262, reversed.

Dominion Linen Mfg. Co. v. Langley, 2 O.W.N. 1255, 19 O.W.R. 648

WINDING-UP — CONTRIBUTORIES — SUBSCRIPTION AND ALLOTMENT—POWER OF ATTORNEY—POWER EXERCISED AFTER SOME MONTHS' DELAY—RATIFICATION—ESTOPPEL—COSTS TO LIQUIDATOR.

Re Ontario Accident Ins. Co., 3 O.W.N. 140, 20 O.W.R. 164.

WINDING-UP—AFFIDAVIT NOT FILED BEFORE SERVICE.

Re Belding Lumber Co., 2 O.W.N. 739, 755, 18 O.W.R. 668.

WINDING-UP ACT (ONTARIO)—RIGHT OF APPEAL FROM HIGH COURT JUDGE.

Where a winding-up order is under the Ontario Act, there is no appeal from the decision of a Judge of the High Court.

Re Canadian Mail Order Co. (Meakin's Case), 19 O.W.R. 111, 2 O.W.N. 1055.

WINDING-UP—ASSETS COVERED BY DEBENTURES—RIGHTS OF UNSECURED CREDITOR—RIGHT TO WINDING-UP ORDER.

Re Alexander Dunbar & Sons Co., 9 E.L.R. 217 (N.B.).

INSOLVENCY—LEAVE TO SUE.

Clarkson v. Linden, 2 O.W.N. 379, 17 O.W.R. 689, affirmed by Divisional Court, 2 O.W.N. 564, 18 O.W.R. 92.

CONTESTATION OF CLAIM BY LIQUIDATOR—STAY OF PROCEEDINGS—DISCRETION OF OFFICIAL REFEREE.

Re Standard Cobalt Mines, 2 O.W.N. 725, 18 O.W.R. 555.

WINDING-UP—SALE OF PROPERTY AND ASSETS—ACTION FOR UNPAID PURCHASE MONEY.

Scott v. Sieman; Murphy v. Traders Bank, 2 O.W.N. 697, 18 O.W.R. 538.

WINDING-UP ORDER—PETITION BY COMPANY—SOLICITOR ACTING FOR BOTH COMPANY AND LIQUIDATOR.

Re International Electric Co., 2 O.W.N. 665, 18 O.W.R. 476.

ILLEGAL DEALINGS WITH ASSETS—SHARES ACQUIRED IN NEW COMPANY BY SHAREHOLDER OF THE OLD COMPANY NOW IN LIQUIDATION—PAID FOR BY ASSETS OF OLD COMPANY.

Chandler & Massey v. Irish, 3 O.W.N. 383, 20 O.W.R. 649.

INSOLVENT COMPANY — PENDING ACTION — OBLIGATION OF LIQUIDATOR.

The liquidator of an insolvent company cannot be compelled to continue an action in the place and stead of the latter which is still in existence, nor jointly with the company. The liquidator is not obliged and cannot be compelled to continue the action in his own name.

Feeteau v. Ideal Confectionery Co., 12 Que. P.R. 360.

APPEAL TO PRIVY COUNCIL.

1. No appeal lies to His Majesty in His Privy Council from a judgment rendered by the Court of King's Bench of Quebec, in which the amount in controversy does not exceed $5,000. (2) The amount of the costs cannot be taken into account to decide if the case is appealable to the Privy Council. (3) Under the Winding-up Act (1906), no appeal to the Privy Council is authorized.

Lapierre v. Banque de St. Jean, 12 Que. P.R. 152.

INSCRIPTION IN REVIEW.

There is no appeal to the Court of Review from any order or decision of the Superior Court or of a single judge thereof in any proceedings under the Winding-up Act (R.S.C., c. 144), but only to the Court of King's Bench.

La Banque de St. Jean v. Bienvenu, 12 Que. P.R. 353.

ACTION BY LIQUIDATOR OF INSOLVENT COMPANY—IN WHOSE NAME IT LIES.

Hyde v. Thibaudeau, 20 Que. K.B. 200.

FRAUDULENT PROCEEDINGS—ACTION AGAINST TWO DEFENDANTS—NULLITY AS TO ONE.

Butler v. Rattray & Sons, 39 Que. S.C. 245.

QUALIFICATION OF CREDITOR—DEBT IN LITIGATION—ABUSE OF CORPORATE POWERS.

Canadian Arts Assn. v. Prévost, 20 Que. K.B. 227.

MUTUAL INSURANCE COMPANIES—VOLUNTARY LIQUIDATION—POWER OF THE SECRETARY-TREASURER — ASSESSMENTS ON DEPOSIT NOTES.

Clement v. Rhéaume, 40 Que. S.C. 299.

WINDING-UP — CONTRIBUTORIES — CONTESTATION OF CLAIMS—INTERVENTION OF SHAREHOLDER TO STAY PROSECUTION—STATUS.

Re London Fence, 17 W.L.R. 387 (Man.).

WINDING-UP—ORDER MADE BY ONTARIO COURT—RELEASE OF CHATTELS OF COMPANY SEIZED UNDER EXECUTION IN YUKON TERRITORY—JURISDICTION.

Re Dome Lode Development Co., 17 W.L.R. 610.

VII. Foreign corporations; extra-provincial corporations.

B. DOING BUSINESS WITHIN PROVINCE.

(§ VII B—370)—EXTRATERRITORIAL POWERS TO DOING BUSINESS—INSURANCE.

A company incorporated for the purpose of carrying on the businesss of insurance has general power to do business and effect policies outside of the province of incorporation; a recital in the preamble of the act of incorporation as to the purpose of carrying on the business "within the province" is no limitation upon its general powers. [Bonanza Creek Case, 26 D.L.R. 273, [1916] 1 A.C. 566, followed. See Montreal-Canada Fire Ins. Co. v. National Trust Co., 35 D.L.R. 445.]

Kittles v. Colonial Ass'ce Co., 35 D.L.R. 588, 28 Man. L.R. 47, [1917] 2 W.W.R. 878.

EXTRA-PROVINCIAL COMPANIES—LICENSE.

A mandamus will not be granted to compel the registrar of joint stock companies to register under the Foreign Companies Ordinance, Alta. Ord., 1911, c. 65, a company having only a provincial incorporation in another province, though it had as one of its expressed objects of incorporation that of carrying on business throughout the entire Dominion, as the duty to register is not so clear that the court should exercise its discretion to grant a mandamus to compel him to do so, the object of incorporation so indicated being one for which a Dominion and not a provincial charter should have been obtained.

International Home Purchasing Contract Co. v. Registrar of Joint Stock Companies, 9 D.L.R. 297, 5 A.L.R. 374, 23 W.L.R. 279, 3 W.W.R. 806.

DOMINION COMPANY.

An insurance company incorporated under a Dominion statute has the inherent power, unless forbidden by its charter, to carry on business and to issue policies to persons and on property outside of Canada.

Montreal-Canada Fire Ins. Co. v. National Trust Co. (Que.), 35 D.L.R. 445. [See also Kittles v. Col. Ass'ce Co., 35 D.L.R. 588.]

DOMINION INCORPORATION — PROVINCIAL LICENSE—COMPANY DOING BUSINESS AS CARRIERS IN CITY—BOARD OF POLICE COMMISSIONERS—POWERS OF—BY-LAW—IMPOSITION OF LICENSE FEE—MUNICIPAL ACT, S. 354, 422—MOTION TO QUASH BY-LAW—DISCRETION—COSTS.

Re Major Hill Taxicab Co. & Ottawa, 7 O.W.N. 747, 8 O.W.N. 446.

INCORPORATION OF INSURANCE COMPANY UNDER ONTARIO LAWS—LICENSE FROM DOMINION—AUTHORITY TO DO BUSINESS THROUGHOUT CANADA—VALIDITY OF CONTRACTS OF INSURANCE MADE OUTSIDE OF ONTARIO IN RESPECT OF PROPERTY OUTSIDE OF ONTARIO.

Re Anglo-American Fire Ins. Co. (No. 2), 16 O.W.N. 150.

(§ VII B—371)—Doing business within Province.

The defence that an extra-provincial corporation is not licensed under C.S. 1903, c. 18, is not a matter to be pleaded, but a ground for a stay of proceedings. [The Empire Cream Separator Co. v. The Maritime Dairy Co., 38 N.B.R. 309, followed.] The plaintiff, an extra-provincial corporation, sued defendant on a contract, made in New York, by which plaintiff was to ship goods at Toronto to defendant in Sussex, N.B., by freight, defendant to pay freight. The plaintiff shipped the goods by express and prepaid the charges which were afterwards paid by the defendant. Held, this was not carrying on business within New Brunswick as the title to the goods passed in Toronto.

Culbert v. The McCall Co., 40 N.B.R. 385.

(§ VII B—373)—Acts of unlicensed foreign company—Actions.

The effect of s. 122 of the Companies Act, R.S.M. 1913, c. 35, upon extra-provincial companies carrying on business in the province without a license, in addition to the penalty provided therein, is merely to suspend the remedy of the company to maintain actions upon contracts, until the license is obtained and the fees paid. It does not render void contracts made or acts done by such unlicensed corporations in the course of their business, nor does it disable them from bringing actions of tort. [Consolidated Investments v. Caswell, 21 D.L.R. 525; Randall v. British & American Shoe Co., [1902] 2 Ch. 354, followed; North-Western Construction Co. v. Young, 13 B.C.R. 297, distinguished.]

Mickelson v. Mickelson, 28 D.L.R. 307, 34 W.L.R. 155, 10 W.W.R. 261. [See also 23 D.L.R. 451; 16 Can. Ex. 275.]

Contracts of unlicensed companies—Validity.

A contract made in British Columbia with a company incorporated under the Companies Act (Canada), but not licensed or registered as required by R.S.B.C. 1911, c. 39, is unenforceable in the courts of British Columbia if made in respect of business carried on in the province by such company without provincial license or registration and consequently in contravention of the provincial law.

John Deere Plow Co. v. Duck, 12 D.L.R. 554, 24 W.L.R. 844. [See 18 D.L.R. 353, [1915] A.C. 330, 29 W.L.R. 917, 7 W.W.R. 635, 706.]

Failure to register—Validity of contract.

Under the Companies Act, R.S.M. c. 35, ss. 118 and 122, contracts entered into by unregistered foreign corporations are not void, but the right of action is suspended until the company registers. Bessemer Gas v. Mills, 8 O.L.R. 647; Semi-Ready v. Tew, 19 O.L.R. 227, applied.]

Consolidated Investments v. Caswell, 21 D.L.R. 525, 25 Man. L.R. 213, 8 W.W.R. 43.

Noncompliance with statutory requirements—Effect on validity of contract.

A contract entered into by a foreign corporation in violation of the Extra-Provincial Companies Act, 1913 (P.E.I.), prohibiting, under penalties, foreign corporations from carrying on business unless a sworn statement, required by the statute, is transmitted to the provincial authorities, is illegal and unenforceable by the corporation.

Willett Martin Co. v. Full, 24 D.L.R. 672.

Validity of contracts of unlicensed company.

Failure of foreign insurance company to obtain license to do business in Canada.

Pacific Coast Ins. Co. v. Hicks, 13 E.L.R. 194.

(§ VII B—374)—Acts of general agent.

A foreign company doing business in Canada is bound by the action of its general agent appointed for a province, although the insurance policy contains a clause that "the company is not liable for loss . . . if any subsequent insurance is effected in any other company unless and until the company assents thereto" where such agent, after a fire has occurred, learns of subsequent insurance having been effected, and does not repudiate on account of the condition in the policy, but continues to treat the claim as good and appoints an adjuster with authority to make a settlement with the assured, his action constitutes an assent on behalf of the company.

National Benefit Life & Property Ass'ce. Co. v. McCoy, 42 D.L.R. 21, 57 Can. S.C.R. 29, [1918] 2 W.W.R. 591.

C. Actions by or against.

(§ VII C —375) — Not licensed in province.

Under s. 168 of the Companies Act (R.S.B.C. 1911, c. 39) as re-enacted by the Companies Act Amendment Act, 1917 (7 & 8 Geo. V., c. 10), allowing a company, if it is licensed, to "maintain anew" an action which has been decided against it, on the ground that any transaction of the company was invalid because it was an extra-provincial company and was not licensed; the company is not obliged to bring an action de novo but is entitled to have the action reinstated at the stage at which it was when the judgment based on the statute was given.

Komnick System Sandstone Brick Mach. Co. v. B.C. Pressed Brick Co., 41 D.L.R. 423, 56 Can. S.C.R. 539, [1918] 2 W.W.R. 564, reversing 8 D.L.R. 859, 17 B.C.R. 454.

Action by foreign company—Registration—Repeal of statute.

The repeal of the Foreign Companies Act (R.S.S. (1909), c. 73) pending an action by a foreign company unregistered thereunder, but subsequently registered under the new Act (The Companies Act, 1915, c. 14), removes the disability to sue under which

the plaintiff company would otherwise have been.

Wiley & Co. v. Cheesman, 34 D.L.R. 357, 10 S.L.R. 78, [1917] 2 W.W.R. 98.

FOREIGN ACTION TO RESTRAIN FROM APPLYING FOR PROVINCIAL LICENSE—AMENDMENT OF INSURANCE ACT—DOMINION LICENSE NECESSARY—ACTION PREMATURE.

An action brought to restrain a foreign insurance company from applying for registration under a Provincial Act was dismissed. Between the date of the trial judgment and the hearing of the appeal the Dominion Insurance Act was amended (7 & 8 Geo. V., c. 29) and ss. 4 and 11 provided that a foreign insurance company could not carry on its business in Canada unless and until it had obtained a license from the Minister of Finance for the Dominion of Canada. The court held that the Court of Appeal for the province should have taken judicial notice of the Dominion amendment, and that as the company could not transact any business by the issuing of a provincial license the proceedings by way of injunction were premature. [Boulevard Heights v. Veilleux, 26 D.L.R. 333, 52 Can. S.C.R. 185, distinguished.]

Matthew v. Guardian Ass'ce Co., 45 D.L.R. 32, 58 Can. S.C.R. 47, [1919], W.W.R. 67, reversing 40 D.L.R. 455, sub-nom. Guardian Ass'ce Co. v. Garrett.

TRIAL—AMENDMENT MADE AT SITTINGS FOR TRIAL—QUESTION OF LAW RAISED—POSTPONEMENT OF TRIAL.

Riverdale Land & Improvement Co. v. Chappus, 16 O.W.N. 356.

FOREIGN CORPORATION—SHARES—ACTION BY SHAREHOLDER TO SET ASIDE TRANSFER OF SHARES TO ANOTHER—PURCHASE—FAILURE TO DISCLOSE OPTION—CONSIDERATION—FRAUD—FINDINGS OF FACT OF TRIAL JUDGE—REVERSAL ON APPEAL—DISSOLUTION OF CORPORATION BY DECREE OF FOREIGN COURT—ASSETS OF CORPORATION AND TRUSTEES THEREOF IN ONTARIO—RIGHT OF SHAREHOLDER TO HAVE ASSETS ADMINISTERED IN ONTARIO.

McCormack v. Carman, 17 O.W.N. 241.

UNREGISTERED FOREIGN COMPANY—INCAPACITY UNDER FOREIGN COMPANIES ORDINANCE TO MAINTAIN ACTION—WHETHER GROUND FOR SETTING ASIDE DEFAULT JUDGMENT.

The incapacity of an unregistered foreign company to maintain an action under s. 10 of the Foreign Companies Ordinance must be raised by defence and cannot be a ground for setting aside a default judgment obtained by it.

Western Canada Ranching Co. v. Begg & Wyndham, [1919] 2 W.W.R. 861.

(§ VII C—376)—FOREIGN CORPORATION—ACTION AGAINST CANADIAN STOCKHOLDER—BOUND BY LAWS OF FOREIGN STATE.

An action is instituted by the receiver of a foreign corporation to recover the sum of $5,000 being the value of 50 preference shares of the said corporation held by an estate of which the defendant company is the executor. The court decided that the proper law of contract was that of the state where the foreign corporation had its head office, and such being the case that the purchaser of shares in the said corporation was bound by the laws of the said state, and so must meet the liabilities on the said shares according to the laws of the said state.

Allen v. Standard Trust Co., 49 D.L.R. 399, [1919] 3 W.W.R. 974.

FOREIGN COMPANY—RIGHT TO SUE.

Section 3 of the Saskatchewan Foreign Companies Act, forbidding a foreign company having gain for its object from carrying on any part of its business in the province unless it is duly registered, cannot be relied upon to defeat an action on notes given by the defendant to the plaintiff company for the price of certain goods sold by the latter to the former on the ground that the company's statement of claim, while alleging that it was an incorporated company carrying on business in another province, failed to allege that it was registered under the above Act, where it was shewn that the goods had originally been sold to another, from whom the defendant purchased them with the consent of the company who took the notes for the price in substitution for those given by the first purchaser, and no evidence was offered as to the place of the original contract of sale and there was no allegation that the plaintiff was such a company as to require registration under the Foreign Companies Act. [Bank of Montreal v. Bethune, 4 U.C.Q.B. (O.S.) 341, disapproved; C.P.R. Co. v. Western Union T. Co., 17 Can. S.C.R. 151, applied.]

Ontario Wind Engine & Pump Co. v. Eldred, 2 D.L.R. 270, 5 S.L.R. 194, 20 W.L.R. 697, 2 W.W.R. 60.

NONREGISTRATION — CARRYING ON BUSINESS—WHAT IS.

The mere setting up and starting the working of machinery sold by an extra-provincial company does not constitute a carrying on of business in another province within the meaning of the Foreign Companies Act, R.S. Sask. 1909, c. 73, depriving foreign companies of the right of action in the event of their noncompliance with the requirements as to registration.

Linde Canadian Refrigerator Co. v. Sask. Creamery Co., 24 D.L.R. 703, 51 Can. S.C.R. 400, 8 W.W.R. 1246, reversing 7 S.L.R. 245.

FOREIGN CORPORATIONS—UNREGISTERED EXTRA-PROVINCIAL COMPANIES — ACTIONS BY—REGISTRATION PENDENTE LITE.

That an action was begun by an extra-provincial company before being registered in accordance with s. 10 of the Ordinance of 1903, c. 14, 1st sess. (Alta.), declaring that no such company "while unregistered" shall be capable of "maintaining" any ac-

tion in any court of the province, will not prevent the action being prosecuted to final judgment if the plaintiff was registered in compliance with the act pendente lite, since it is only the "maintaining" and not the bringing or commencement of an action that is prohibited by the Act. [Blais v. Banker's Trust Corp., 14 D.L.R. 277; Smith v. Western Canada Flour Mills Co., 3 A.L.R. 348; Moon v. Durden, 2 Ex. 22, 29; and Re Jones, L.R. 9 Eq. 63, specially referred to.]

Slater Shoe Co. v. Burdette, 14 D.L.R. 519, 6 A.L.R. 457, 26 W.L.R. 109, 5 W.W.R. 583.

FOREIGN COMPANIES — RIGHT TO SUE — FRAUDULENT CONVEYANCE OF LAND IN DOMESTIC LAW DISTRICT.

Where the action is not in respect of any contract made in whole or in part in Saskatchewan, a foreign company may maintain an action on behalf of itself and all other creditors to set aside as fraudulent certain conveyances made by the debtor of real estate situate in Saskatchewan, though the plaintiff company is not registered under the Foreign Companies Act, R.S.S. 1909, c. 73, so as to confer upon it the right to do business in that province.

Minot Grocery Co. v. Durick, 10 D.L.R. 126, 6 S.L.R. 44, 23 W.L.R. 270, 3 W.W.R. 904.

ACTIONS BY.

A foreign company by registration in Alberta, although clothed with all the rights, powers and privileges of companies incorporated under the Companies Ordinance, is not thereby absolved from giving security for costs as a nonresident in an action brought by it, since there is nothing in such ordinance exempting companies so incorporated from giving security for costs.

Frost & Wood Co. v. Howes, 4 D.L.R. 527, 5 A.L.R. 47, 21 W.L.R. 335, 2 W.W.R. 321.

ACTION BY FOREIGN LAND COMPANY—SPECIFIC PERFORMANCE.

A foreign corporation not licensed to hold lands within Manitoba under R.S.M. 1913, Pt. IV., cannot maintain an action in that province for specific performance of an agreement to exchange lands in the foreign jurisdiction for lands in Manitoba; the action may be dismissed on a summary application under Manitoba Rule 639. [Empire Cream Separator Co. v. Maritime Dairy Co., 38 N.B.R. 309, followed; Euclid Avenue Trust Co. v. Hohs, 24 O.L.R. 447, distinguished.]

North Wyoming v. Butler, 23 D.L.R. 274, 25 Man. L.R. 288, 8 W.W.R. 340.

FOREIGN COMPANY'S RIGHT TO SUE—SALE DISTINCT FROM AGENCY.

Where a company's contract purporting to appoint a special agent for sale in Alberta of a line of goods is really only a contract for sale of the goods to him with a restriction that he should not carry an opposition line of goods, and delivery is stipulated to be made f.o.b. in another province, in which the company's head office is situate, the vendor company is not debarred by the Foreign Companies Ordinance (Alta.) from suing for the price, although not licensed in Alberta as an extra-provincial or foreign corporation, merely by reason of such buyer being called the company's agent. [Standard Fashion v. McLeod, 17 D.L.R. 403, followed.]

Butterick Publishing Co. v. White & Walker, 18 D.L.R. 636, 7 S.L.R. 245, 28 W.L.R. 941, 6 W.W.R. 1394.

FOREIGN COMPANY'S RIGHT TO SUE.

An unregistered foreign company is not deemed to be carrying on business in Alberta within s. 3 of the Foreign Companies Act, N.W.T. 1903, 1st Session, c. 14, as amended by statutes of 1903, 2nd Sess., c. 19, merely because it enters into an agreement with a person in Alberta purporting to appoint the latter as its "agent," if in fact the agreement is made by the company outside of the province for the sale of its goods f.o.b. at a point outside of the province to the so-called agent with certain privileges of return or exchange, and no power is thereby conferred to act on the company's behalf. [Semi-Ready v. Hawthorne, 2 A.L.R. 201, distinguished.]

Standard Fashion Co. v. McLeod, 17 D.L.R. 403, 7 A.L.R. 145, 6 W.W.R. 939. [Followed in Butterick Publishing Co. v. White, 18 D.L.R. 636.]

ACTION BROUGHT BY EXTRA-PROVINCIAL COMPANY—STAY OF PROCEEDINGS—LICENSE OBTAINED PENDING ACTION—LEAVE TO PROCEED — TERMS — COSTS — EXTRA-PROVINCIAL CORPORATIONS ACT, R.S.O. 1914, c. 179, ss. 4, 16.

New York & Pennsylvania Co. v. Holgevae, 9 O.W.N. 123.

(§ VII C—377) — EXTRA-PROVINCIAL COMPANIES—ACTIONS AGAINST—EFFECT OF WINDING-UP ORDER MADE BY COURT OF DOMICILE.

An action begun against an extra-provincial company after the making of a winding-up order by a court of its domicile will not be entertained without leave of such court, since the action is governed by s. 22 of R.S.C. 1906, c. 144, prohibiting the commencement of or proceeding with suits against a company after the making of a winding-up order except with the leave of the court and subject to such terms as the court making the order may impose. [Re Tobique Gypsum Co., 6 O.L.R. 515; and Brand v. Green, 13 Man. L.R. 101, specially referred to.]

Blais v. Bankers' Trust Corp., 14 D.L.R. 277, 6 A.L.R. 444, 25 W.L.R. 65, 5 W.W.R. 243.

ACTIONS AGAINST.

Where no evidence is given as to the place at which a contract for the sale of goods by an unregistered foreign company was made, the fact that the goods were afterwards purchased from the

original buyer within Saskatchewan, and that his contract with the company selling the machines was, with its consent, assumed by the new purchaser, who gave his own notes for the price in place of the original buyer's notes, shews no violation of Saskatchewan Foreign Companies Act, s. 3, imposing a fine upon foreign companies doing business for gain within the province if they fail to register.

Ontario Wind Engine & Pump Co. v. Eldred, 2 D.L.R. 270, 5 S.L.R. 194, 20 W.L.R. 697, 2 W.W.R. 460.

EXTRA-PROVINCIAL COMPANIES — ACTIONS AGAINST—AFTER WINDING-UP ORDER BY COURT OF DOMICILE—STAYING PROCEEDINGS.

An action commenced against an extra-provincial company after the making of a winding-up order by a court of its domicile is irregular, and, under s. 22 of R.S.C. 1906, c. 144, prohibiting the commencement of, or proceeding with, an action against such company after the making of such order without the leave and direction of the court making it, the action will be stayed until leave to proceed can be obtained. A garnishee summons issued after in another province than that of the debtor company's domicile will be set aside if it appears that the proceedings in which the garnishee summons was issued had been begun in contravention of the Winding-up Act after the date of the winding-up order against the company made in the province in which it had its head office and without leave of the court in that jurisdiction. An action begun against an extra-provincial company after the making of a winding-up order by a court of the province in which it has its domicile will not be entertained without leave of such court, as the Winding-up Act, R.S.C. 1906, c. 144, s. 22, prohibits the commencement of or proceeding with suits against a company after the making of a winding-up order except with the leave of the court and subject to such terms as the court making the order may impose. [Blais v. Bankers' Trusts Corp., 14 D.L.R. 277, 6 A.L.R. 444, followed.]

Lavell v. Canadian Mineral Rubber Co., 14 D.L.R. 521, 26 W.L.R. 111, 5 W.W.R. 584.

FOREIGN COMPANY—ACTION AGAINST—PLACE OF BUSINESS—SERVICE ON FOREIGN COMPANY—SECRETARY TEMPORARILY WITHIN JURISDICTION.

Appeal from a decision of the Master in Chambers. The plaintiff resident within the jurisdiction, issued a writ against non-residents. The defendants were L. G. Harrison, H. F. Schultz and the Stewart-Harrison Land Co. The plaintiff held the writ and subsequently the individual defendants came temporarily into the jurisdiction, whereupon the plaintiff served the defendant Schultz in his capacity as secretary-treasurer of the defendant company. The defendants moved to set aside the service on all the defendants. Newlands, J., held that where a foreign company has no place of business in the province, the service of the writs of summons upon the secretary, who is temporarily in the province on his own business but not on that of the corporation, is not a compliance with subs. 3 of r. 18; and as the court in this case had jurisdiction over the subject-matter of the action, service on the other two defendants, although they were only temporarily in the province, was a sufficient compliance with subs. 1 of r. 18. The service on the company was therefore set aside with costs in the cause to the successful party.

Baird v. Harrison, 5 W.W.R. 1364.

D. WINDING-UP; INSOLVENCY OF FOREIGN CORPORATION.

(§ VII D—380)—SUBSTANTIAL INTEREST OF PETITIONER—ONLY CREDITOR.

Where it is not made to appear that a petitioner for a winding up order, under R.S.C. (1906), c. 144, has a substantial interest in the winding-up, and where he is the only creditor desiring an order to wind-up, the order ought not to be made. [Re Okell v. Morris, 9 B.C.R. 153, applied.]

Marsden v. Minnekahda Land Co., 40 D.L.R. 76, 25 B.C.R. 372, [1918] 2 W.W.R. 471.

DISTRIBUTION.

The Winding-up Act, R.S.C. 1906, c. 144, applies to all companies carrying on business in Canada, and includes a foreign corporation which is being liquidated in the country of its origin; and the assets in the hands of the Canadian liquidator are to be distributed pro rata amongst all creditors of the company ranking pari passu, without preference to the claims of creditors residing in Canada.

Re Breakwater Co., 22 D.L.R. 294, 33 O.L.R. 65.

WINDING-UP—COMPANY OF FOREIGN DOMICILE—DEBTS INCURRED IN CANADA.

Proceedings under the Winding-up Act, R.S.C. 1906, c. 144, for winding-up of an insolvent company are applicable to a foreign company as an effective recourse upon property in Canada or to enforce satisfaction of obligations created in Canada, and it is not necessary that similar insolvency proceedings should have been instituted in the foreign jurisdiction where the company's head office is situated.

Calumet Metals v. Eldredge, 17 D.L.R. 276, 23 Que. K.B. 521. [See also 15 D.L.R. 461.]

WINDING UP FOREIGN CORPORATION.

A foreign corporation doing business in the Yukon Territory under a license of the Dominion Government, is subject to the provisions of the Dominion Winding-up Act, R.S.C. 1906, c. 144, in so far as its assets situate within the Dominion of Canada are concerned.

Re The Stewart River Gold Dredging Co., 7 D.L.R. 736, 22 W.L.R. 315.

WINDING-UP—ORDER UNDER DOMINION STATUTE—CONSENT OF CREDITOR OF SHAREHOLDER—SECTION 12 OF WINDING-UP ACT.

Re National Automobile Woodworking Co., 17 D.L.R. 833, 7 O.W.N. 22.

PROMISSORY NOTES—INDORSEMENT TO BANK BY DE FACTO OFFICERS OF FOREIGN COMPANY—ABSENCE OF LICENSE TO DO BUSINESS IN ONTARIO—LICENSE OBTAINED BEFORE ACTION.

Canadian Bank of Commerce v. Rogers, 23 O.L.R. 109, 18 O.W.R. 401.

VALIDITY OF MORTGAGE—FOREIGN BANKING CORPORATION—AUTHORITY TO TAKE SECURITY—LICENSE TO DO BUSINESS IN ONTARIO.

Euclid Avenue Trusts Co. v. Hohs, 23 O.L.R. 377, 18 O.W.R. 787.

FOREIGN CORPORATION—WANT OF LICENSE—SPECIAL PLEA.

Le Porte Martin Co. v. Le Blanc, 9 E.L.R. 216 (N.B.).

FOREIGN CORPORATION — SALE OF GOODS — FAILURE TO OBTAIN LICENSE.

Cuthbert v. McCall Co., 10 E.L.R. 98 (N.B.).

LEX FORI—ENFORCING JUDGMENT IN PERSONAM—"FOREIGN JUDGMENT."

Gifford v. Calkin, 9 E.L.R. 498 (N.S.).

CONTRACT—FOREIGN COMPANY—AGENT IN PROVINCE—AUTHORITY.

Guerin v. State Life Ins. Co., 39 Que. S.C. 184.

PROTECTION OF TRADE MARK.

The failure of a foreign company of the class described as "extra-provincial corporations," in the act 4 Edw. VII. c. 34 (Que.) to obtain the license to do business therein provided for, is no bar to an action by it for damages, for an account and for an injunction to restrain, in a case of violation of its trade-mark.

Standard Ideal Co. v. Standard Sanitary Mfg. Co., 20 Que. K.B. 109. [Reversed, by Privy Council, [1911] A.C. 78, 27 T.L.R. 63.]

POWER OF ATTORNEY — EXTRA-PROVINCIAL CORPORATION.

An Ontario company which is authorized by its letters patent to hold its meetings outside of that province, is not thereby relieved from the obligation of furnishing security and filing a power of attorney when plaintiff in a suit taken in the Province of Quebec.

Standard Gold Mines v. Robinson, 13 Que. P.R. 52.

FOREIGN COMPANY—COMPANIES ACT, 1910.

Before the 1st July, 1910, the plaintiffs, a foreign unregistered company, sold goods to the defendant, in British Columbia, and obtained promissory notes for the price thereof, which notes became due before the 1st July, 1910:—Following North-Western Construction Co. v. Young, 13 B.C.R. 297, 7 W.L.R. 397. The plaintiffs had no right of action upon the notes or for the price of the goods before the new Companies Act of 1910; and, although they had become registered in British Columbia since the 1st July, 1910, when that act came into force, they did not, by virtue of s. 166 or otherwise, become entitled to sue.

Calgary Brewing Co. v. Jarvis, 18 W.L.R. 474 (B.C.)

FOREIGN COMPANY—CONTRACTS—VALIDITY—REGISTRATION AFTER ACTION.

Smith v. Western Canada Flour Mills Co., 17 W.L.R. 531, 3 A.L.R. 348.

VIII. Crimes and offences by corporation.

Criminal liability for fraudulently inducing people to become shareholders, see Indictment, II E-25.

(§ VIII—390)—SALE OF SHARES WITHOUT LICENSE OF UTILITY BOARD.

Section 4 of the Sale of Shares Act (Alta. stats. 1916, c. 8) making it unlawful in Alberta to sell or offer to sell any shares, stocks, bonds . . . of any corporation or company . . . without first obtaining from the Board of Public Utility Commissioners, a certificate . . . and a license . . . applies to agreements to sell as well as completed sales in companies not yet incorporated, and to foreign as well as to domestic companies. A certificate purporting to be given under the authority of a federal order-in-council dated December 22, 1917, giving approval for the issue and sale is no defence as it only removes the prohibition of the order but gives no authority beyond the right to disregard such order-in-council.

R. v. Malcolm & Olson, 42 D.L.R. 90, 13 A.L.R. 511, [1918] 2 W.W.R. 1081.

COMPENSATION.

See Payment; Expropriation; Damages; Crown.

Workmen's compensation, see Master and Servant, V.

LIQUIDATED AND EXIGIBLE DEBT.

A debt which the debtor acknowledges and promises to pay is a liquidated and exigible debt. The creditor can directly oppose it, by a defence in compensation, to a demand based on a note payable to order.

Cauchon v. Forget, 25 Que. K.B. 479.

SET-OFF AND COUNTERCLAIM—WAGES—DAMAGES.

Only legal compensation, namely that which exists in full right between two debts equally liquidated and exigible, can be directly set up by way of defence. It is by means of a reconventional demand that the defendant can set up a counterclaim which would not be liquidated and exigible by the same title as the principle demand. In the second case when the court adjudicates upon the two demands at the same time it can give judgment for judicial compensation between them. The exceptions mentioned by law to legal compensations are no obstacle to judicial compensation. Thus the court deciding at one

time upon a principal demand for wages and a reconventional demand for damages may declare that there is compensation between them.

Gignére v. Cauchon, 50 Que. S.C. 477.

JUDGMENT—INSCRIPTION IN REVIEW—RETROACTIVE EFFECT.

Compensation operates by force of law even although the contestation of the debt opposed in compensation renders it necessary to proceed with the trial. Because it is a matter of principle that the final judgment which is declaratory of a pre-existing right has retroactive effect to the date of the action. Inscription in review of the judgment offered in compensation has merely the effect of suspending the contestation of the offer of compensation and, if the judgment is confirmed, the final judgment has a retroactive effect to the date of the demand in compensation.

Security Realties v. Gallat, 50 Que. S.C. 224.

COMPOSITION WITH CREDITORS.

See Assignment for Creditors.

Upon winding-up of company, see Companies, VI.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction, I–7.

Consideration for, see Contracts, I C–16.

(§ I—1)—WHAT IS PROPER SUBJECT OF.

An agreement between an employer and a workman in settlement of a claim of the latter for damages caused by the neglect of the former, is in the nature of a transaction (art. 1918 et seq. C.C.), and though, by its terms, the employer promises to pay, and does pay for a while, by monthly instalments, "a sum equivalent to what the workman would earn during the time he is disabled as the result of the injuries," it is not governed by the rules applicable to contracts for hire of the work, and does not give the workman, in case of breach by the employer, a right to claim a lump sum as damages; he is only entitled to the amount, "equivalent to what he would have earned," that remains unpaid at the time his action is brought.

McKinstry v. Irwin, 21 Que. K.B. 139.

(§ I—4)—VALIDITY — DURESS — STIFLING PROSECUTION.

A settlement or release obtained under threat of criminal prosecution, or for the purpose of stifling a criminal prosecution, is of no effect.

Bruce v. Western Canada Flour Mills Co. (Man.), 36 D.L.R. 410, [1917] 3 W.W.R. 365.

VALIDITY—WHEN BINDING.

Where it appears that an agreement was intended to settle all matters then in dispute between the parties, no subsequnt claim should be allowed in respect of a matter arising prior to the date of the agreement, of which the party claiming had knowledge at that date.

Cooney v. Jickling, 6 D.L.R. 145, 22 W.L.R. 53.

VALIDITY—WHEN BINDING.

An agreement that "the damages shall be settled by experts to be named by the parties" containing neither the names of the arbitrators nor the object of the arbitration nor fixing a date for making the award, is not a compromise but merely an agreement for a compromise and is no bar to the remedy by action to recover the damages.

Desmeules v. Quebec & Saguenay R. Co., 43 Que. S.C. 150.

SETTLEMENT OF ACTION—DISPUTE AS TO WHETHER ITEMS OF ACCOUNT INCLUDED—REFERENCE TO TAKE ACCOUNTS—REPORT—APPEAL—EVIDENCE—ABSENCE OF MISTAKE OR FRAUD—COSTS.

Badenach v. Inglis, 11 O.W.N. 391; 12 O.W.N. 171.

SETTLEMENT OF ACTION—NOTE—LIS PENDENS.

In an action to recover money a settlement by acceptance of a note on condition formulated in writing that it was received by the plaintiff without prejudice to his rights and not as a novation, does not extinguish the original right of action. A plea of lis pendens to an action on the note will be maintained with costs.

Taillefer v. Robert, 18 Que. P.R. 145.

(§ I—8)—RESERVATIONS UPON.

Where in an action to revendicate the plaintiff has reserved his recourse for hire or use of his property and this action is settled by means of a lump sum in full of "capital, interest and costs," such settlement is a settlement of the action as taken only, and the word "interest" cannot be construed as embracing the claim for use and hire expressly excluded from such suit.

O'Brien v. Maloney, 1 D.L.R. 760.

CONFIRMATION BY COURT ORDER IN PENDING ACTION.

Smyth v. Harris (No. 3), 6 D.L.R. 885, 4 O.W.N. 223, 23 O.W.R. 241.

(§ I—9)—AS AFFECTING PLAINTIFF'S COSTS.

A settlement or transaction between the parties entered into without the knowledge and consent of their attorneys cannot affect the rights which the attorneys for plaintiff have for their costs, and they will be entitled to have judgment entered for such costs against the defendant, notwithstanding such settlement.

Seale v. Bowers, 1 D.L.R. 632.

(§ I—10)—SETTLEMENT OF ACTION—AGREEMENT FOR—ENFORCEMENT—JUDGMENT—COSTS.

Michener v. Sinclair, 6 O.W.N. 502.

CONDEMNATION PROCEEDINGS.

See Expropriation; Damages, III L.

CONDITIONAL SALE.

See Sale.

CONDITIONS.

See Contract; Sales; Deeds; Vendor and Purchaser; Landlord and Tenant.

As to limitation of carrier's liability, see Carriers; Shipping.

CONFESSION.

See Evidence.

Judgment by, see Judgment.

CONFLICT OF LAWS.

I. As to rights.
A. In general.
B. As to contracts; insurance.
C. Status; marriage; domestic relations; legitimation.
D. Corporate matters.
E. Torts and crimes generally.
F. Insolvency; assignments for creditors.
G. Rights in property generally.
H. Transfers of property generally.
I. Chattel mortgages; conditional sales.
J. Descent and distribution; wills.
II. Remedies.

Annotations.

Validity of foreign divorce; domicile: 33 D.L.R. 146, 156; validity of common law marriage, 3 D.L.R. 247.

As to power of legislature to confer jurisdiction on Provincial Courts to declare the nullity of void and voidable marriages, see 30 D.L.R. 14.

I. As to rights.

A. In general.

Taxation, partnership lands, situs, domicil, see Taxes, V C—193.

Situs of shares for taxation purposes, see Taxes, V C—190.

Civil rights of aliens, see Aliens.

(§ I A—4)—As to rights—Statutory cause of action generally.

A foreign attorney's statutory lien under the foreign law upon any money or property recovered for the client is ineffective as against land in the domestic jurisdiction. [See also Huntington v. Attrill, [1893] A.C. 150, and in appendix to 20 A.R. (Ont.) 731.]

Waters v. Campbell, 14 D.L.R. 448, 25 W.L.R. 838, 5 W.W.R. 410. [See also 17 D.L.R. 79, 7 A.L.R. 298.]

Settlement of action on building contract—Validity.

An agreement between an owner and a contractor for the construction of a building by which they settle their differences as follows: The owner to pay the price claimed and the contractor undertaking to do certain work as settled by the architects of the two parties, each party paying his own costs, is of the nature of a settlement with a compromising clause. Such settlement is void because it does not contain the essential conditions of a compromise.

Rousseau v. Raymond, 47 Que. S.C. 451.

B. As to contracts; insurance.

(§ I B—10)—Contracts—Attorney and client — Contingent fees — Extortionate terms.

An agreement made in a foreign country between a foreign attorney and his client for remuneration for the attorney's services in respect of an estate or fund in Ontario upon a contingent basis and a percentage of the fund will not be enforced in Ontario against the client if the agreement is extortionate and unconscionable and would be subject to attack in the foreign country upon the same equitable ground. [Strange v. Brennan, 2 Coop. temp. Cott. 1, disapproved; Ram Coomar v. Chunder Canto, 2 App. Cas. 186, approved; Cox v. Delmas, 99 Cal. 104; Cooley v. Miller, 156 Cal. 510, referred to.]

MacMahon v. Taugher, 20 D.L.R. 521, 32 O.L.R. 494.

Place of contract.

One who makes a purchase from an agent at his own residence contracts there and cannot be regarded as having made the contract at the place where the principal ratifies it, such ratification constituting only a condition suspensive or resolutory, according to the circumstances, the performance of which relates to the place where, and the time when the contract was made.

Trudel v. Assad, 14 Que. P.R. 202.

Contract of employment — Ship — Lex loci.

Where the contract of hire by a workman for the loading of a steamer is made in Ontario, and an accident occurred to the labourer in Quebec, while at his work on the wharf, it is the law of the Province of Quebec which applies, and not the law of the Province of Ontario.

Lennon v. Montreal Transportation Co., 53 Que. S.C. 239.

(§ I B—11)—Contract in foreign country — Enforcement in domestic forum—Quantum.

In fixing a foreign solicitor's fees as between him and his client for foreign legal services in an action on a so-called promissory note given by the client in payment thereof, the court will (in the absence of champerty) measure the reasonableness of the amount claimed on the basis of the rate or standard of payment at the place and in the courts where the services were performed as distinct from the standard for local services.

Waters v. Campbell, 17 D.L.R. 79, 7 A.L.R. 298, 28 W.L.R. 227, 6 W.W.R. 957, reversing in part 14 D.L.R. 448.

(§ I B—19)—Liability of indorser—Lex loci.

The liability of the indorser of a promissory note is governed by the laws of the place where the note was drawn up and made payable.

Hochberger v. Rittenberg, 36 D.L.R. 450, 54 Can. S.C.R. 480, affirming 31 D.L.R. 678.

(§ I B—26)—Usurious contract—Money Lenders Act.

The right of parties respecting a usurious contract made in England are to be determined under the provisions of the Money Lenders Act of England applicable to such transaction.

Stuart & Stuart v. Boswell, 26 D.L.R. 711, 50 N.S.R. 16.

(§ I B—41)—Carrier's limitation of liability.

The responsibility for a delict is to be determined according to the law of the place where the delict occurs, but the rule is that if there is a contract limiting the responsibility, such contract is to be construed in accordance with the law of the place where it was made. If that law is not proved, it is to be taken as being the same as the law of the province of Quebec.

C. P. R. Co. v. Parent, 24 Que. K.B. 193.

C. Status; marriage; domestic relations; legitimation.

(§ I C—65)—Alimony.

The payment of alimony is a personal obligation and the law governing the demand for it is that of the actual domicile of the consorts at the time of the demand, although the law of the domicile at the time of the marriage governs the effect of such marriage.

Hamilton v. Church, 24 D.L.R. 266, 24 Que. K.B. 26, varying 20 D.L.R. 639.

Foreign divorce—Remarriage abroad.

Where a British subject domiciled in this country enters into a contract of marriage during a temporary visit to a foreign country, the question of the validity of marriage, as to essentials, not as to form, depends upon the laws of this country.

Miller v. Allison (B.C.), 33 D.L.R. 144, 24 B.C.R. 123, [1917] 2 W.W.R. 231.

Foreign divorce—Domicile—Jurisdiction of Foreign Court—Fraud—Estoppel.

The defendant, being sued for alimony, set up that the plaintiff was not his wife. The real crux of the case was the domicile of the plaintiff and her former husband at the time of the filing of the bill for divorce. Upon the evidence, the former husband changed his domicile to the State of Illinois in 1892; and, until after the divorce proceedings were completed, there was no change of domicile from Illinois. The Illinois Court had jurisdiction to grant a divorce, as the defendant in the cause in that court was domiciled within its jurisdiction; and this court was not concerned (in the absence of fraud) to inquire whether the foreign court made a mistake. An agreement or understanding between the former husband, his wife, and the defendant in this action, that a divorce should be obtained in order that the wife might marry the defendant and the husband marry some one else, was not proved; and, if it were, it did not prove fraud upon the court. The defendant was not estopped, by having in a sense procured the divorce, from saying that the divorce was invalid. Quære, whether a wife can ever acquire a domicile different from that of her husband. In this case there was nothing to give the plaintiff a different domicile from that of her husband. Per Meredith, C.J.C.P. (dissenting) —The domicile of both husband and wife was in law and in fact in Ontario when the decree of divorce was obtained in Illinois; and, even if that decree were valid in Illinois, it was invalid in Ontario; and accordingly the plaintiff could not be the lawful wife of the defendant according to the law of England or the law of Ontario. Matrimonial differences should be referred to the courts of the country in which the parties are domiciled (Wilson v. Wilson, L.R. 2 P. & D. 435); the reason is, that the views of the community in which the parties concerned are permanently settled are the views which ought to prevail in divorce cases; and there was no power in the Illinois Court to dissolve a marriage solemnized in Ontario between British subjects. It was for the Ontario Court to find whether there was jurisdiction in the Illinois Court; that court did not consider the question of jurisdiction, being misled by false testimony in regard to domicile or residence in an undefended case; and its jurisdiction was now successfully impeached by the defendant.

C. v. C., 39 O.L.R. 571, affirming 33 D.L.R. 151, 38 O.L.R. 481.

(§ I C—66)—Marital rights.

The law of the province where a marriage takes place governs, as to the form of the marriage, but the domicile of the husband governs as to the marital rights and obligations of the parties.

Reid v. Pinault, 39 D.L.R. 152, 53 Que. S.C. 156, 24 Rev. de Jur. 59.

Marriage.

The law of the country where a marriage is celebrated determines the validity of the ceremony; the personal capacity of the parties to the ceremony depends on the law of their domicile.

Johnston v. Hazen, 43 N.B.R. 154.

(§ I C—67)—Marital relations—Domicile.

A woman married without a marriage contract in the Province of Ontario, where the marriage without a matrimonial agreement establishes separations as to property, cannot be regarded as separated as to property in the absence of proof of the place where the husband lived before his marriage, where he had his principal place of business at the time of the marriage, and what his intentions were then as to the place where he would fix his domicile after his marriage. The isolated fact of the celebration of the marriage in a place does not prove that the consorts were domiciled there.

Bolté v. Brière, 49 Que. S.C. 229.

(§ I C—71)—Suit by foreign guardian.

A foreign guardian has the capacity to sue here with respect to damages for personal injuries to the ward; the validity of the supplementary appointment here is therefore immaterial.

Montreal Tramways Co. v. McAllister, 34 D.L.R. 565, 26 Que. K.B. 174. [Affirmed by Privy Council 51 D.L.R. 429.

D. Corporate matters.

See Companies.

(§ I D—75)—Execution — Winding-up — Situs.

A company's interests in Saskatchewan lands could be seized and realized upon by creditors recovering judgment there, notwithstanding the bankruptcy proceedings in a foreign country: Macdonald v. Georgian Bay Lumber Co., 2 Can. S.C.R. 364; since real estate or immovable property is exclusively subject to the laws of the government within whose territory it is situated, and therefore a winding-up order would in such a case be properly made here for the purpose of securing the Canadian assets.

Re Stewart & Matthews, 26 Man. L.R. 277, 34 W.L.R. 47.

E. Torts and crimes generally.

(§ I E—101)—Trade interference, unfair competition—Trade-mark.

Civil law responsibility for wrongful interference with a plaintiff's trade is to be determined by Quebec law and not by English law, except in so far as it depends upon statutory construction.

Lambert Pharmacal Co. v. Palmer & Son, 2 D.L.R. 358, 21 Que. K.B. 451.

(§ I E—105)—Actions ex delicto—Place of accident.

A legal obligation ex delicto, where the res gestæ giving rise to the obligation have occurred outside the territorial jurisdiction of a province, may be enforced in the courts of that province, if a like obligation would have arisen had the accident occurred within that jurisdiction; and a right of action by common law, accruing in Ontario, where the accident occurred, is enforceable in the Province of Manitoba where a similar right of action would have arisen. [Phillips v. Eyre, L.R. 6 Q.B. 1, applied.]

Lewis v. G.T.P.R. Co., 26 D.L.R. 687, 52 Can. S.C.R. 227, 20 Can. Ry. Cas. 318, 9 W.W.R. 1541.

(§ I E—106)—Employers' liability—Injuries sustained in another province—Action by employee at place of hiring—Lex loci.

Where an action is commenced in Manitoba by a servant against his employer respecting an alleged wrong which took place in Saskatchewan in the course of his employment extending to that province, he must prove that a wrong has been committed which is actionable according to the law of Manitoba and also that the act was wrongful in Saskatchewan. [Tomalin v. Pearson, [1909] 2 K.B. 61, and Schwartz v. Indian Rubber Co., [1912] 2 K.B. 299, referred to.]

Simonson v. C.N.R. Co., 17 D.L.R. 516, 24 Man. L.R. 267, 28 W.L.R. 310, 6 W.W.R. 898, affirming 15 D.L.R. 24.

Torts — Personal injury occurring abroad—When actionable in Ontario.

To give the Courts of Ontario jurisdiction to entertain an action for a tort committed abroad, the act must be such as is not justifiable in the place where it was committed. A person entering the employ of another does not thereby contract that the laws of his domiciliary province shall in all respects govern in relation to an action for an injury received by the employee while working in another province. [Dupont v. Quebec Steamship Co., 11 Que. S.C. 188; The M. Moxham, 1 P.D. 107, and Tomalin v. Pearson, [1909] 2 K.B. 61, referred to.]

Story v. Stratford Mill Bldg. Co., 18 D.L.R. 309, 30 O.L.R. 271, affirming 11 D.L.R. 49, 4 O.W.N. 1212.

F. Insolvency.

(§ I F—120) — Bankruptcy Act — Lex domicilii.

The real and personal property, situated in Canada, of a person domiciled in England, when adjudicated a bankrupt under the English Bankruptcy Act, as well as the property acquired by him after the adjudication and prior to his discharge, but not property acquired after the loss of his English domicile, vests in the English trustee in bankruptcy. (Critical review of authorities.)

Re Eades Estate (Man.), 33 D.L.R. 335, [1917] 2 W.W.R. 65.

Bankruptcy — Foreign discharge — Promissory note—Right to sue.

A discharge in bankruptcy by a court of a foreign state from liability on a promissory note made by the bankrupt while domiciled in such foreign state and payable therein, is a good defence to an action here upon the note. Where a promissory note made, and payable, in Canada while the maker was domiciled here is a renewal of a note from which the maker had been discharged by the courts of a foreign state wherein the original note was made, the maker may be sued in Canada upon the renewal note if it be the law of such foreign state that the moral obligation to pay the original note constitutes a good consideration for a new promise to pay.

International Harvester Co. v. Zarbok (Sask.), 11 S.L.R. 354.

G. Rights in property generally.

(§ I G—125)—Rights in property generally—Lex situs — Lands — Fraudulent conveyance.

An action by creditors to set aside as fraudulent certain conveyances by debtors of land situate within a province is governed by the laws of the province where

the land is situated and all creditors, no matter where they reside, are entitled to the benefit of that law; except where otherwise expressly prescribed by statute.

Minot Grocery Co. v. Durick, 10 D.L.R. 126, 6 S.L.R. 44, 23 W.L.R. 270, 5 W.W. R. 904.

GUARDIANSHIP—LOCUS OF PROPERTY.

The courts in this province will recognize the authority of a foreign guardian, under the foreign law with respect to trust funds situated within this province.

Kelly v. O'Brian, 31 D.L.R. 770, 37 O.L.R. 526.

B. TRANSFER OF PROPERTY GENERALLY.

(§ I B—137)—DECREE OF FOREIGN COURT.

Upon confirming a sale of lands by an executor a Michigan Court of Chancery cannot make its decree effective as a conveyance of land situated in Ontario without a conveyance signed by the executor as directed by the decree. [Norris v. Chambres, 29 Beav. 246, 3 DeG. F. & J. 583; Re Hawthorne, Graham v. Massey, 23 Ch. D. 743; and Companhia de Mocambique v. British South Africa Co., [1892] 2 Q.B. 358, referred to.]

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

J. DESCENT AND DISTRIBUTION—WILLS.

Foreign executors, see Executors and Administrators.

(§ I J—147)—FOREIGN WILL—EFFECT OF MARRIAGE—REVOCATION—LAW GOVERNING.

A will made in a foreign jurisdiction in which the testator was domiciled, and which under the foreign law was not revoked by the subsequent marriage of the testator, is valid as to lands in Alberta subsequently acquired if made in the form required by Alberta law, notwithstanding the subsequent marriage in the foreign jurisdiction in which he was domiciled; and, semble, the result would be the same even had he owned the real estate in Alberta at the date of the marriage. [Re Martin, [1900] P. 211, referred to.] The principle as to whether a will is revoked by a second marriage is governed by the law of the matrimonial domicile and not by the law of the place where the property affected by the will is situated.

Davies v. Davies, 24 D.L.R. 737, 8 W.W.R. 803, 31 W.L.R. 396.

LAND AND PERSONALTY—DOMICILE AND SITUS—RIGHTS OF WIDOW.

Personal property being governed by the law of the domicile it followed that the personal property in Saskatchewan disposed of by the will is not subject to the law of Saskatchewan and could not be taken into consideration on the present application. That notwithstanding the provision of s. 21 of the Devolution of Estates Act providing that land in Saskatchewan shall descend to the personal representative of the deceased owner and be distributed as if it were personal estate, land still remains land until it is sold and the proceeds are available for distribution, and being land it is subject to and must be dealt with according to the lex situs, and that in consequence the widow had the right to ask for the statutory relief as against the real property situate in Saskatchewan.

Re Ostrander Estate, 8 S.L.R. 132, 30 W.L.R. 890.

VALIDITY OF WILL—LAND—SITUS—RELIGIOUS USES.

The validity of a will of immovables is determined by the laws of the place where the property is situate, and this rule is not affected by the Devolution of Estates Act. [Re Ostrander Estate, 8 W.W.R. 367, followed.] Quære, whether the fact that it is not land but the proceeds of land which is to be distributed under a will affects the validity of, or the right of the court where the land is situate to pass upon the validity of, a bequest thereof.

Re Millar Estate; Re Trustee Act & Rules of Court (Sask.), [1918] 1 W.W.R. 87.

II. Remedies.

(§ II—150)—REMEDIES—ENFORCEMENT OF CONTRACT.

The interpretation of a contract and the rights of the parties are to be determined in accordance with the "proper law of the contract," i.e., the law by which the parties intended, or may be presumed to have intended, the contract to be governed, so that a contract of guaranty made in Minnesota and to be performed there is prima facie subject to the Minnesota statutes. [Lloyd v. Guibert, L.R. 1 Q.B. 115, 123, referred to.]

Scandinavian American National Bank of Minneapolis v. Kneeland, 16 D.L.R. 565, 24 Man. L.R. 168, 27 W.L.R. 346, 6 W.W. R. 222, reversing 12 D.L.R. 202.

PROVINCIAL MORATORY LAWS — ACTIONS IN ENGLAND—INJUNCTION.

Quære, whether a resident of British Columbia could be penalized for bringing an action in the English Courts in direct opposition to the terms of the B.C. War Relief Acts, or an injunction could be obtained in that province to restrain him from so violating the prohibitions of the statute.

Merchants Bank v. Eliot (Eng.), [1918] 1 W.W.R. 698.

VERBAL EVIDENCE—ADMISSIBILITY—LOAN—LEX FORI.

The admissibility of verbal evidence to prove a loan, cash advances and recovery of the value of articles appropriated, is governed by the lex fori; and according to our law a loan of $500 cannot be established by testimonial evidence.

Abbott v. Arnton, 24 Rev. Leg. 236.

(§ II—151)—ATTACHMENT AND GARNISHMENT.

The question as to whether foreign courts

might not accord Ontario Courts any extra-territorial recognition is a question of policy affecting those who make the law and cannot be considered by the courts who are called upon to administer the law as they find it. [The King v. Lovitt, [1912] A.C. 212, distinguished; Western National Bank of New York v. Perez, Triana & Co., [1891] 1 Q.B. 304; Tytler v. C.P.R., 29 O.R. 654, specially referred to.

McMulkin v. Traders Bank of Canada, 6 D.L.R. 184, 26 O.L.R. 1, 21 O.W.R. 640.

(§ II—152)—Divorce and alimony—Public policy.

A permanent alimony judgment embodied in a foreign divorce decree is not of a penal nature, and is enforceable in the courts of Ontario for arrears of payments thereunder: the fact that because of remarriage of the husband its enforcement would result in contributing to the support of a divorced wife while a wife was living does not contravene the morals upheld by English law.

Wood v. Wood, 31 D.L.R. 765, 37 O.L.R. 428.

(§ II—154)—Personal actions — Statute of limitations—Lex fori.

In matters of limitations of personal actions the lex fori prevails, except where the debt has been absolutely extinguished by the Statute of Limitations of the locus contractus. [Rutledge v. U.S. Savings & Loan Co., 37 Can. S.C.R. 546, applied.]

Quaker Oats Co. v. Denis, 24 D.L.R. 226, 9 A.L.R. 62, 31 W.L.R. 579, 8 W.W.R. 877, affirming 19 D.L.R. 327, 8 A.L.R. 31.

(§ II—159) — Remedies — Injury sustained in Quebec—Action in Ontario—Measure of damages—Lex fori.

Where the courts of Ontario have jurisdiction to entertain an action for tort committed abroad (the wrong being actionable under Ontario law and not justifiable in the foreign law district) the domestic courts act according to their own rules in the damages to be awarded.

Story v. Stratford Mill Bldg. Co., 18 D.L.R. 309, 30 O.L.R. 271.

CONSERVATORY ATTACHMENT.

See Attachment; Garnishment; Execution; Levy and Seizure.

CONSIDERATION.

See Contracts; Bills and Notes; Deeds; Fraudulent Conveyances; Assignment for Creditors; Bills of Sale; Chattel Mortgage.

Annotation.

Failure of consideration—Recovery in whole or in part by party guilty of breach, 8 D.L.R. 157.

CONSOLIDATION.

Of actions, see Action.

CONSPIRACY.

I. In general.
II. To cheat, rob or steal.
III. To injure the business of another.
IV. Of labourers; strikes.

Trial, evidence, depositions, Cr. Code, s. 999, see Evidence, IV G—420.

I. In general.

(§ I—1)—Several defendants—Assessment of damages against each separately—Direction to jury—Acquiescence in—Verdict of jury—Evidence to support.

McLean v. Wokes, 7 O.W.N. 490.

Proof of damage.

No action lies for conspiracy unless it can be shewn that legal damage has been sustained.

Armishaw v. Sacht, 24 B.C.R. 53, affirming 30 D.L.R. 228, 34 W.L.R. 1180.

What must be shewn in action for.

In an action for damages for conspiracy it is necessary for the plaintiff to prove a design common to the defendant and to others to damage the plaintiff without just cause or excuse; such a conclusion may be established by inference from proven facts, but the facts must be such that any other inference cannot fairly be drawn from them. [Sweeney v. Coote, [1907] A.C. 221, followed.] The facts proven in the present case held not to be such as to admit of no other inference.

Humphrey v. Wilson (B.C.), 25 B.C.R. 110, [1917] 3 W.W.R. 529.

(§ I—3)—To withhold certificate or diploma.

A wilful and fraudulent conspiracy on the part of the examiners and the College of Dental Surgeons to undermark the examination papers of an applicant so as to prevent his admission to the college, is not established by the fact that the secretary of the college, after the commencement of the plaintiff's action and making discovery therein of his own examination papers and the books of the college, while making a change in his office, destroyed, without the knowledge of his codefendants, before the time fixed by said college therefor, and before he had knowledge that their discovery would be required, among a quantity of other papers, the examination papers of the other candidates who were examined with the plaintiff.

Richards v. Verrinder, 2 D.L.R. 318, 20 W.L.R. 779, 2 W.W.R. 102.

II. To cheat, rob or steal.

(§ II—5)—To defraud public—Evidence.

On a charge under Criminal Code s. 444 of conspiracy to defraud the public, if there is no direct proof of the existence of the unlawful agreement between the defendants and the acts proved are not such as to show from their very nature that they are parts of a common scheme, the jury must separately consider the case of each

defendant and determine from his conduct whether there is evidence of the conspiracy alleged; it is only after the conspiracy has been proved that the acts of the one become evidence against the other.

R. v. McCutcheon, 28 D.L.R. 378, 25 Can. Cr. Cas. 310.

To defraud—Agreement of real estate agent warranting refund or sale at advance—"Protective guarantee"—Contract—Good faith of broker.

R. v. Sinclair, 32 D.L.R. 796, 28 Can. Cr. Cas. 350, 36 O.L.R. 510.

Fraudulent use of street car transfer—Conspiracy to defraud company—Cr. Code, s. 444.

R. v. Bythell, 24 Can. Cr. Cas. 276.

To defraud—Sufficiency of evidence—Identity.

The defendants were tried by a County Court Judge without a jury upon a charge of conspiring to defraud the complainant. At the trial the complainant, in the witness box, would not swear positively that the defendant H., then present in court as a prisoner in the dock, was the man or one of the men who had defrauded him, although he had identified the same man at the preliminary hearing in the police court. The complainant said: "To the best of my knowledge he was the man. There is another man here to-day, and I am undecided which it is." The County Court Judge thought the evidence of identity sufficient, and convicted the two defendants: Held, that the conviction could not be disturbed, there being some evidence to sustain it, that, if there had been a jury the case could not have been withdrawn from them.

R. v. Harvey & Taylor, 42 O.L.R. 187.

Conspiracy to set fire to building with intend to defraud—Evidence—Statements of coconspirator — Admissibility.

R. v. Wilson, 4 A.L.R. 35, 21 Can. Cr. Cas. 105, 19 W.L.R. 657.

III. To injure the business of another.

A. In general.

(§ III A—10)—To injure one in employment—Overt act.

A person cannot conspire with others to induce himself to reduce the salary of an employee, and thereby injure the reputation of such employee. A conspiracy to be actionable must be followed by an overt act in furtherance thereof.

Patterson v. C.P.R., 38 D.L.R. 183, 12 A.L.R. 474, [1918] 1 W.W.R. 40. [See 33 D.L.R. 136, 10 A.L.R. 408.]

(§ III A—11)—Action on the case—Libel and slander—Meeting of villagers to injure reputation of married women—Proof of special damage.

The plaintiff, a married woman whose husband was overseas, drove to another village with a married man; upon their return in the evening the defendants, residents of the village in which they lived, met them near the village, fired off guns, rang bells and shouted. The plaintiff claimed that they did these acts for the purpose of bringing her into disrepute and injuring her reputation for chastity. Harris, C.J., held that the acts of the defendants amounted to libel and were actionable without proof of special damage. Ritchie, E.J., and Russell, J., held that the case was technically not an action for slander or libel but an action on the case for conspiracy. All the elements of conspiracy were present, and the defendants had committed a tort for which they, or any of them, could be sued, and punitive damages might be imposed by the jury, the amount being within wide limits a matter for their discretion. Chisholm, J. (dissenting), held that the action was one of trespass on the case, but in the absence of special damage, the demonstration of the defendants was not actionable.

Varner v. Morton, 46 D.L.R. 597.

Action against police officers—Pleading—Statement of claim—Public authorities Protection Act, R.S.O. 1914, c. 89, s. 12—Search warrant—Conviction for breach of Ontario Temperance Act—Allegation of damage—Trespass—Malicious prosecution—Actionable damage—Leave to amend.

Goldberg v. Cruikshank, 17 O.W.N. 164.

B. Boycott.

(§ III B—15)—Trade union—"Scabs"—Strike—Liability—Parties.

Held, affirming the judgment of Simmons, J., 41 D.L.R. 719, by an equal division of court, that the members of an unincorporated association constituting the local of a trade union are individually liable for the damage and loss of wages resulting to non-union workers, whom they refused to take in as members and coerced their dismissal from employment under threat of strike. (Status of the association as party defendant discussed; Industrial Disputes Investigation Act, 1907, and Trade Union Act, R.S.C. 1906, c. 125, considered.)

Williams & Rees v. Local Union No. 1562 of the United Mine Workers of America, 45 D.L.R. 150, 14 A.L.R. 251, [1919] 1 W.W.R. 217, affirming 41 D.L.R. 719.

To injure one in his employment—Pleading.

A reasonable cause of action is disclosed by a statement of claim which charges an employer with wrongful dismissal of the plaintiff, and the other defendants with conspiracy to procure such dismissal.

Patterson v. C.P.R., 33 D.L.R. 136, 10 A.L.R. 408, [1917] 1 W.W.R. 1154. [See also 34 D.L.R. 726.]

(§ III B—16)—Church boycott—Injury to business.

Where officers of a church enter into a combination to expel a member of their congregation from the church for insufficient reasons, the effect of which is a boycott and

deprivation of his business, they are liable to him in damages for his resultant business losses. [Temperton v. Russell, [1893] 1 Q.B. 715; Quinn v. Leathem, [1901] A.C. 495, followed.]

Heinrichs v. Wiens, 31 D.L.R. 94, [1917] 1 W.W.R. 306. [See 23 D.L.R. 664.]

CONSPIRACY IN RESTRAINT OF TRADE AND COMMERCE—ASSOCIATIONS OF JOBBERS AND RETAILERS.

The King v. McMichael, 18 Can. Cr. Cas. 185 (Ont.).

IV. Of labourers; strikes.

CONSPIRACY — TRADE UNION — PAINTING CONTRACTOR'S AGREEMENT TO EMPLOY ONLY UNION MEN.

The refusal of a trade union to admit an applicant for membership and the subsequent notification of such refusal to the applicant's employer, as a consequence of which he was discharged from his employment will not support a charge of conspiracy to prevent the applicant from working at his trade, particularly where there is no evidence to shew any agreement between the defendants to reject the applicant for the purpose of depriving the applicant of employment.

The King v. Dey, 17 Can. Cr. Cas. 403, 6 O.W.R. 470.

AIDING CONTINUANCE OF MINERS' STRIKE—AGENT OF TRADE UNION SUPPLYING FOOD AND CLOTHING TO STRIKERS—EMPLOYEE NOT DISMISSED.

The King v. Neilson, 17 Can. Cr. Cas. 298 (N.S.).

TRADES UNIONS—STRIKES—COMBINED ACTION—CONSPIRACY TO INJURE EMPLOYERS—PICKETTING AND BESETTING.

Vulcan Iron Works v. Winnipeg Lodge, 21 Man. L.R. 473.

CONSTABLES.

Arrest by, see Arrest.

CONSTITUTIONAL LAW.

I. IN GENERAL; GOVERNMENTAL MATTERS.
- A. Adoption; amendment; construction.
- B. Ex post facto and retrospective laws.
- C. Vested rights.
- D. Delegation of powers.
- E. Separation of powers.
- F. Local self-government.
- G. Functions and powers of Dominion and province.
- H. Abandonment of power.

II. RIGHTS OF PERSONS AND PROPERTY.
- A. Equal protection and privileges; abridgment immunities and privileges.
- B. Guaranty of right to life, liberty and property.
- C. Police power.
- D. Freedom of speech, press and worship.
- E. Natural rights; implied guaranties.
- F. Guaranties of justice.
- G. Impairing obligations of contracts.

Provincial powers as to taxes, see Taxes.

As to public domain, see Public Lands; Escheat.

As to legislative power regarding schools, see Schools.

As to validity of statutes, see Statutes I C.

Annotations.

Property and civil rights; nonresidents in province: 9 D.L.R. 346.

Power of legislature to confer authority on Masters: 24 D.L.R. 22.

Denominational school privileges; constitutional guaranties: 24 D.L.R. 492.

Powers of Dominion and provinces to incorporate companies: 26 D.L.R. 294.

Property clauses of the B.N.A. Act; "Public Harbours": 26 D.L.R. 69.

Provincial and Dominion rights to escheated lands: 26 D.L.R. 137.

Power of legislature to confer jurisdiction on Provincial Courts to declare the nullity of void or voidable marriages: 30 D.L.R. 14.

Constitutional powers, as to creation of courts and to appointments thereon: 37 D.L.R. 183.

Fisheries; tidal waters; the 3 mile limit: 35 D.L.R. 28.

The "Crown": 40 D.L.R. 366.

I. In general; governmental matters.

A. ADOPTION; AMENDMENT; CONSTRUCTION.

(§ I A—2)—ADOPTION.

The Forfeiture Act, 33 and 34 Vict. c. 23 (Imp.), is not in force in Canada. [Dumphy v. Kehoe, 21 Rev. Leg. 119, Jetté, J., pp. 126, 127, followed.]

Young v. Carter, 5 D.L.R. 655, 19 Can. Cr. Cas. 489, 26 O.L.R. 576, 22 O.W.R. 643.

INTERFERING WITH PROPERTY.

Where an appointment was obtained for the examination of defendant as to her estate and effects, and it appeared thereon that the plaintiff's share of an estate had never been received by defendant, and that she did not obtain it and pay it over to plaintiff as she had an outlawed set-off in excess of the amount of said share, and would not assist the plaintiff by bringing the fund into Canada; a motion to commit the defendant, or, in the alternative, to re-examine, for not disclosing her property, or for having concealed or made away with the same, should be dismissed. [McKinnon v. Crowe, 17 P.R. (Ont.) 291, distinguished.]

Fee v. Tisdale, 8 D.L.R. 524, 4 O.W.N. 373, 23 O.W.R. 489.

(§ I A—20)—FEDERAL AND PROVINCIAL RIGHTS—"CIVIL RIGHTS IN THE PROVINCE"—CONSTRUCTION OF B.N.A. ACT.

The expression "civil rights in the province" as used in the confirming of provincial powers in s. 92 of the B.N.A. Act is to be construed as excluding cases ex-

pressly dealt with elsewhere in ss. 91 and 92.

John Deere Plow Co. v. Wharton, 18 D.L.R. 353, [1915] A.C. 330, 7 W.W.R. 635, 706, 29 W.L.R. 917.

(§ I A—25)—Application of Federal Constitution to provinces — British Columbia.

In construing the operation of s. 108 of the B.N.A. Act as to vesting in the Dominion the property in public harbours within the province of British Columbia the year 1871, when that province entered confederation, is the determining period. [Pickles v. The King, 7 D.L.R. 698; Att'y-Gen'l for British Columbia v. C.P.R. Co., [1906] A.C. 204; Att'y-Gen'l for Dominion of Canada v. Att'y-Gen'l for Ontario, Quebec & Nova Scotia, [1898] A.C. 700, specially referred to.]

Att'y-Gen'l for Canada v. Ritchie Contracting & Supply Co. & Att'y-Gen'l for B.C., 17 D.L.R. 778, 20 B.C.R. 333, 28 W.L.R. 59, 6 W.W.R. 640.

Powers of Dominion parliament—Immigration.

The Parliament of Canada is paramount in its legislation in respect to all matters not coming within the classes of subjects by the B.N.A. Act assigned exclusively to the legislatures of the provinces, and acting under the power conferred by s. 91 of the said Act in the making of laws for the peace, order and good government of Canada, is paramount in legislating in respect to all matters coming within said section, and its legislation is to prevail although it may be that the Dominion Parliament may trench upon matters assigned to the provincial legislatures.

In re Immigration Act & Munshi Singh, 6 W.W.R. 1347, 29 W.L.R. 45.

(§ I A—30)—Construction—Application of Federal Constitution to provinces—Self-executing provisions—B.N.A. Act.

The B.N.A. Act being founded upon a political agreement, the judicial interpretation of sections thereof stating the distribution of legislative power between the provinces and the Dominion should be limited to concrete questions which are in actual controversy from time to time without entering upon a general interpretation of the act, the form of which shews that it was intended to leave the interpretation of seemingly conflicting provisions to practice and judicial decision. [Citizens v. Parsons, 7 App. Cas. 109, and Att'y-Gen'l v. Colonial Sugar Refining Co., [1914] A.C. 254, applied.]

John Deere Plow Co. v. Wharton, 18 D.L.R. 353, [1915] A.C. 330, 29 W.L.R. 917, 7 W.W.R. 635, 706.

(§ I A—39)—As to criminal matters.

If the enactment of the Provincial Parliament of Quebec, of 1 Geo. V. c. 35, regulating the sale of cocaine, morphine or their compounds, and providing a punishment for violations thereof, is not void because it is criminal legislation exclusively within the province of the Dominion Parliament, it was rendered ineffectual by the subsequent enactment by the latter body of 1 and 2 Geo. V. c. 17, prohibiting the use or sale of such drugs, since the Provincial Act was in contravention to and incompatible with the Dominion Act. [Reg. v. Wason, 17 A.R. (Ont.) 221; Fielding v. Thomas, [1896] A.C. 600; The Manitoba Liquor Act Case, [1902] A.C. 73; Local Prohibition Case, [1896] A.C. 348; and subs. 27 of s. 91 of the B.N.A. Act, 1867, specially referred to.]

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

B. Ex post facto and retrospective laws.

(§ I B—40)—Ex post facto and retrospective laws.

While the courts will closely scrutinize by-laws of Municipal Councils which limit freedom of trade, the court's jurisdiction should not be exercised to quash a by-law unless the municipal council has clearly exceeded its powers.

Re Simpson & Village of Caledonia, 1 D.L.R. 15, 3 O.W.N. 503, 20 O.W.R. 874.

D. Delegation of powers.

(§ I D—80)—Delegation of powers to province—Sunday laws.

Section 5 of the Lord's Day Act, R.S.C. 1906, c. 153, had the effect of delegating to the Province of British Columbia the power to pass, as it did in enacting the R.S.B.C. 1911, the prohibition of Sunday sales contained in R.S.B.C. 1911, c. 219 (the Sunday Observance Act of B.C.).

R. v. Laity, 13 D.L.R. 532, 21 Can. Cr. Cas. 417, 18 B.C.R. 443, 25 W.L.R. 363, 5 W.W.R. 75.

(§ I D—82)—Prerogative of Lieutenant-Governor—Incorporation of companies.

The distribution of powers under the B.N.A Act, between the Dominion and provinces, extends not only to legislative but executive authority; hence, the effect of ss. 12, 64 and 65 of the act is, that, subject to certain express provisions in that act and to the supreme authority of the Sovereign, the exercise of the prerogative is delegated to the Governor-General and through his instrumentality to the Lieutenant-Governors, and the powers to grant letters patent for the incorporation of companies, which the Governor-General or Lieutenant-Governor possessed before the Union or Confederation, must be taken to have passed to the Lieutenant-Governor of the province, the continuity of which is made by implication to depend on the appropriate legislature not interfering. [Liquidator of Maritime Bank v. Receiver-Gen'l, N.B., [1892] A.C. 437, applied.]

Bonanza Creek Gold Mining Co. v. The King, 26 D.L.R. 273, [1916] 1 A.C. 566, 114 L.T. 765, 25 Que. K.B. 170, 34 W.L.R. 177, reversing 21 D.L.R. 123, 50 Can. S.C.

R. 534. [Followed in Insurance Case, 26 D.L.R. 288, and Companies Case, 26 D.L.R. 293.]

WAR MEASURES ACT—MILITARY SERVICE ACT.

The Parliament of Canada had power, under the ambit of authority conferred upon it by the B.N.A. Act, to delegate to the Governor-in-council power to make from time to time such orders and regulations as he may by reason of the existence of real or apprehended war, invasion or insurrection, deem necessary or advisable as provided by the War Measures Act, 1914. These delegated powers are declared not to be limited or affected by s. 13 (5) of the Military Service Act, 1917, and are wide enough to include the orders-in-council of April 20, 1918, cancelling the exemptions granted under the Military Service Act. [Re Lewis, 41 D.L.R. 1, referred to.]

Re Gray; Re Habeas Corpus, 42 D.L.R. 1, 57 Can. S.C.R. 150, 13 A.L.R. 423, [1918] 3 W.W.R. 111.

DELEGATED AUTHORITY—OPEN TO REVIEW BY COURTS — INVALID IF NOT WITHIN POWERS CONFERRED—ORDERS-IN-COUNCIL —HABEAS CORPUS.

Orders and regulations made by virtue of a delegated authority from a legislature are open to review by the courts and are invalid if they do not come within the powers conferred by the legislative enactment, or are inconsistent with the direct enactments of the legislature which conferred the delegated power. Order-in-council passed April 20, 1918, cancelling exemptions granted under the Military Service Act, 1917, held to be ultra vires. [Review of legislation.]

Re Lewis; Re Habeas Corpus, 41 D.L.R. 1, 13 A.L.R. 423, [1918] 2 W.W.R. 687.

HABEAS CORPUS — SUSPENSION OF — WAR MEASURES ACT—MILITARY SERVICE ACT —ALIENS.

1. Section 5 of the order-in-council of April 30, 1918, purporting to suspend the right of habeas corpus ad subjiciendum "Canada Official Gazette," May 18, 1918, t. 51, n. 46, p. 4027, is ultra vires of the powers of the executive because it is authorized neither by the War Measures Act of 1914 (5 Geo. V., c. 2), nor by the Military Service Act of 1917 (7-8 Geo. V., c. 19), nor by any express and formal law of the federal parliament. 2. In ordering that those who claim not to fall under the provisions of the Military Service Act of 1917 (whether on account of age, status, or nationality) should carry with them, at all times, their birth or marriage certificate, as the case may be, or a certificate, if aliens, signed by the consul or vice-consul of the country of which they are subjects—the said order-in-council of April 30, 1918, is ultra vires of the powers which s. 6 of the said War Measures Act gives and confers upon the executive. 3. The only penalty which the federal parliament has permitted the executive to prescribe for infraction of the provisions of the order-in-council of April 30, 1918, is a fine or imprisonment, or both, by s. 10 of the War Measures Act of 1914, but not the suspension of the remedy of habeas corpus ad subjiciendum, accorded by s. 1120 of the Cr. Code to all persons incarcerated in criminal matters. 4. The issue of the writ of habeas corpus ad subjiciendum cannot be refused; the writ is of right, and is accorded ex debito justitiæ. 5. In all matters concerning the liberty of the subject, the acts of the Crown, its Ministers, the members of the Privy Council, or the executive are subject to revision and control by the court and its judges, by way of habeas corpus ad subjiciendum. (16 Chas. I., c. 10.) The military tribunals and officers are also subject to this revision. 6. By sub-par. (c) s. 1 of the said order-in-council of April 30, 1918, with s. 2 thereof, the presumption, prima facie, of the liability of an alien for military service, when he has not in his possession the necessary consular certificate, establishing his nationality, can be rebutted and destroyed by contrary proof.

Perlman v. Piché & Att'y-Gen'l of Canada, intervenant; Re Habeas Corpus, 41 D.L.R. 147, 54 Que. S.C. 170, 24 Rev. de Jur. 438.] [See 24 Rev. de Jur. 578.]

THE B.N.A. ACT S. 92 (15)—RIGHT OF PROVINCIAL LEGISLATURE TO IMPOSE FINE AND IMPRISONMENT.

Notwithstanding the wording of subs. 15 of s. 92 of the B.N.A. Act empowering a provincial legislature to impose punishment "by fine, penalty or imprisonment" for enforcing its laws it has power to impose a penalty by fine coupled with imprisonment.

In re Kennedy. [1919] 3 W.W.R. 777.

STATUTES—THE WAR MEASURE ACT 1914—EXTENT AND VALIDITY OF AUTHORIZATION — ORDER-IN-COUNCIL P.C. 1725 PASSED JUNE 25, 1917—POWERS OF DIRECTOR OF COAL OPERATIONS—WHETHER POWER TO CREATE RIGHT IN MINERS TO RECOVER WAGES AT RATES DECLARED—DELEGATION OF POWERS—CONSTRUCTION —SUBDELEGATION.

It was not ultra vires of the Dominion parliament to pass the War Measures Act, 1914, even assuming that Act to authorize the Governor-in-Council to take charge of the operation of coal mines or to make all regulations which could conceivably be advisable (as to which the Governor-in-Council would be the sole judge) for the purpose of securing their continuous and satisfactory operations. Section 6 of that Act is wide enough for such authorization, including the power to create a right of action in the ordinary civil courts as upon a debt for wages at a rate which may have been fixed. The order-in-council P.C. 1725 passed on June 25, 1917, by virtue of the War Measures Act, 1914, did not delegate any power to the director of coal operations to create

a right in miners to recover in a civil action wages at the rates declared by the director. (Quære whether the Governor-in Council could delegate such a power.) The authorized orders of the director only amounted to command for payment at the stated increase under the penalty provided for disobedience thereto. In a matter of so grave a nature as the delegation of a law-making power by a body to whom the law-making power has already been delegated, the court should at least, even assuming the power of subdelegation to exist, not act on any vague implication arising out of the language used, but should take the words as they are used in the plain ordinary sense and give them simply the meaning that they will thus bear and no more. A subsequent order in council extended the territorial jurisdiction of the director. It was held that the orders made by him prior to such extension did not thereafter become effective within the added territory without renewed promulgation therein.

Starr v. Banner Coal Co; Chick v. Alberta Coal Mining Co., [1919] 3 W.W.R. 259.

(§ I D—85)—Criminal law and procedure.

It was competent to the Parliament of Canada under s. 91 (27) of the B.N.A. Act, 1867, Imp., in legislating as to criminal law and procedure to declare that what might previously have constituted a criminal offence should no longer do so, although a procedure in form criminal was kept alive.

Toronto R. Co. v. The King, 38 D.L.R. 557, [1917] A.C. 630, 29 Can. Cr. Cas. 29, reversing 25 D.L.R. 586, 23 Can. Ry. Cas. 183.

(§ I D—88)—Appointment of judges—Masters—Powers of province.

The office of the Master is essentially that of an officer, and while his duties are largely judicial in their character they do not constitute him a judge within the meaning of s. 96 of the B.N.A. Act, so as to require his appointment by the Governor-General.

Polson Iron Works v. Munns, 24 D.L.R. 18, 9 W.W.R. 231, 32 W.L.R. 534.

(§ I D—90)—Initiative and referendum—Ultra vires.

An act to confer upon the electors of a province the right to initiate legislation which should come into force if certain votes in its favour were given would be an abdication of the powers conferred upon the legislature by the B.N.A. Act, 1867, and an interference with the powers of the Lieutenant-Governor, and, therefore, the Initiative and Referendum Act, Man. Stat. 1916, c. 59, is ultra vires.

Re The Initiative & Referendum Act, 48 D.L.R. 18, [1919] A.C. 935, [1919] 3 W.W.R. 1, affirming 32 D.L.R. 148.

(§ I D—95)—Winding-up Act — Delegation of court's power to referee.

The Dominion Parliament, having power to legislate as to insolvency and the winding-up of insolvent companies, has power to determine upon the machinery by which they shall be wound up; s. 110 of the Winding-up Act (R.S.C. 1906, c. 144), which empowers the court, after a winding-up order is made, to refer and delegate to any officer of the court any of the powers conferred upon the court by the Act, is no encroachment upon the constitutional appointive powers as to the judiciary (B.N.A. Act, s. 96) and is not ultra vires. [See also Polson Iron Works v. Munns, 24 D.L.R. 18 (annotated); Colonial Invest. & Loan Co. v. Grady, 24 D.L.R. 176, 8 A.L.R. 496.]

Re Farmers Bank; Lindsay's Case, 28 D.L.R. 328, 35 O.L.R. 470.

(§ I D—100)—Temperance Act—Municipality.

The Temperance Act of Quebec (R.S.Q., arts. 1316 to 1328) is of a private and local nature; it has effect only in the localities which adopt it; it has not in view the regulation of the trade generally, but only the particular interest of the municipalities. It is, therefore, constitutional. The Quebec Legislature has the right, without abdicating any of its prerogatives, or any of its rights, to confer upon municipalities the power to prohibit, within their own limits, the trade in intoxicating liquors. So the proceedings taken by a city clerk, at the request of the required number of municipal electors, to convene a public meeting for the purpose of adopting a by-law prohibiting the sale of intoxicating liquors in the municipality, are legal. Municipal institutions in this province relieve the legislature; it can organize them as it wishes, and distribute powers as it thinks desirable. It does not violate any principle by leaving the initiative of the adoption or abrogation of any by-law whatsoever conjointly to the council and to the municipal electors. The fact that a municipality already had in its charter power to prohibit within its limits the sale of intoxicating liquors, does not withdraw it from the application of the Temperance Act of Quebec, which is a law complete in itself and independent of any municipal charter. The unconstitutionality of an act cannot be pleaded unless 8 days' previous notice has been given to the Att'y-Gen'l. Municipal electors have a right without proving special interest to intervene in an action brought to have declared illegal proceedings having in view the adoption of the Temperance Act of Quebec.

Valois v. City of Sorel, 53 Que. S.C. 45.

The Anti Treating Act—Intoxicating liquors — Constitutionality of the act—S. ref., [1909] arts. 1033-7, Geo. V. [1916], c. 17—B.N.A. Act, 30-31 Vict. [1867], c. 3 (Imp.).

The act known as the "Anti Treating Act" is constitutional and intra vires of the Quebec Legislature; it is of a local and provincial nature; it falls under art. 92, sub-

art. 8, 15 and 16 of the B.N.A. Act and not under art. 92 sub-art. 27 of that act.

The Senate v. Judge Choquet of the Sessions of the Peace, Boisseau, & Sir Lomer Gouin, 56 Que. S.C. 387.

DELEGATION OF POWERS—TO BOARDS AND COMMISSIONERS — INDUSTRIAL DISPUTES INVESTIGATION ACT—BOARDS OF CONCILIATION.

The Acts 6-7 Edw. VII. c. 20 and 10-11 Edw. VII. c. 29, being "an act to aid in the prevention and settlement of strikes and lockouts in mines and industries," and a further act to amend it, are within the legislative powers of the Parliament of Canada and are constitutional.

Montreal St. R. Co. v. Board of Conciliation & Investigation, 44 Que. S.C. 350.

MUNICIPAL CORPORATIONS—BY-LAW REGULATING LICENSES—PROVISION AS TO GAMES IN BILLIARD AND POOL ROOM—WHETHER INTRA VIRES OF COUNCIL.

A provision in a by-law of the city of Vancouver "respecting the issue and regulating of licenses" that no keeper of a billiard and pool room should permit any person to play in his licensed premises for a wager other than the price of the game, was held intra vires of the council.

In re Vancouver Incorporation Act; Jones v. Vancouver, [1919] 3 W.W.R. 313.

(§ I D—101)—DELEGATION OF POWER TO MUNICIPALITY—REGULATION OF CLOSING HOURS OF SHOPS.

The legislature has the right to give power to a municipality to pass a by-law regulating the closing hours of certain shops within the municipality. [Montreal v. Beauvais, 42 Can. S.C.R. 211, and Re Robertson & Tp. of North Easthope, 16 A.R. 214, referred to.]

Re McCoubrey & Toronto, **9** D.L.R. 84, 4 O.W.N. 573, 23 O.W.R. 653.

(§ I D—110)—OF JUDICIAL POWER.

Section 60 of the Supreme Court Act, R.S.C. 1906, c. 139, which empowers the Governor-in-Council to refer to the Supreme Court of Canada for their opinion questions either of law or of fact, is within the legislative jurisdiction of the Parliament of Canada. [Re References by the Governor-in-Council, 43 Can. S.C.R. 536, affirmed on appeal.]

Att'y-Gen'l for the Provinces v. Att'ys-Gen'l for Canada, 3 D.L.R. 509, [1912] A.C. 571.

(§ I D—117)—APPOINTMENT OF MAGISTRATES.

The power of the Provincial Legislature, under the B.N.A. Act, to legislate on the subject of administration of justice, including the constitution, maintenance and organization of courts, and with respect to the appointment of provincial officers, extends to the appointment of stipendiary magistrates, although the power to appoint judges of Superior, District and County Courts is reserved to the Governor-General of Canada.

The King v. Sweeney, 1 D.L.R. 476, 19 Can. Cr. Cas. 222, 45 N.S.R. 494.

DELEGATION OF JUDICIAL POWER—APPOINTMENT OF MAGISTRATES—PROVINCIAL AUTHORITY.

It is within the legislative power of the Legislature of Nova Scotia to pass a statute empowering the Lieutenant-Governor-in-Council to appoint stipendiary magistrates for incorporated towns and municipalities throughout the Province of Nova Scotia.

The King v. Basker, 1 D.L.R. 295, 19 Can. Cr. Cas. 158, 10 E.L.R. 320.

E. SEPARATION OF POWERS.

(§ I E—120)—SEPARATION OF POWERS—EXTRA-TERRITORIAL UNDERTAKINGS — GOVERNING PRINCIPLE CONFERRING, NOT ACTUAL EXERCISE, OF POWERS.

Upon a question of provincial as distinct from federal jurisdiction over a railway with a federal charter conferring powers to operate beyond the limits of a province the governing principle is the conferring of such powers and not whether they were actually exercised. [Toronto Corp. v. Bell Telephone Co. of Canada, [1905] A.C. 52, referred to.] Where powers are conferred by the Parliament of Canada for an undertaking extending beyond as well as within the limits of a province and falling within the exclusive jurisdiction of the Dominion Parliament, a declaration thereby that such undertaking is a work for the general advantage of Canada is unnecessary to bring it within the ambit of that exclusive jurisdiction and is therefore "unmeaning" and the legislature of such province has no jurisdiction to impose conditions precedent to the exercise of such powers. [Kerley v. London & Lake Erie Railway & Transportation Co., 6 D.L.R. 189, reversed; Toronto Corp. v. Bell Telephone Co., [1905] A.C. 52, followed.]

Kerley v. London & Lake Erie R. & Transportation Co., 13 D.L.R. 365, 15 Can. Ry. Cas. 337, 28 O.L.R. 606.

SEPARATION OF POWERS—FEDERAL—PROVINCIAL — SUNDAY OBSERVANCE — BRITISH COLUMBIA.

The restriction introduced by the consolidated Sunday Observance Act of B.C. in 1888, limiting the application of certain Imperial Acts, (including 29 Charles II. c. 7) as to Sunday observance to the old colony of British Columbia, was beyond the competency of the legislature of British Columbia as an infringement upon the exclusive jurisdiction of the Parliament of Canada, prior to the delegation of certain powers by Parliament to the provincial legislatures under the Lord's Day Act (Can.), 6 Edw. VII. c. 27, R.S.C. 1906, c. 153, s. 5. [See also special case Re Provincial Legislative Jurisdiction on Sunday Observance, 35 Can. S.C.R. 581.] The declaration of the British Columbia legislature limiting to the mainland the operation of certain Sunday observance Imperial Acts (cited in the con-

solidation of R.S.B.C. 1911, c. 219) does not prevent the application to Vancouver Island of the new general prohibition embraced in s. 5 of the Dominion Lord's Day, R.S.C. 1906, c. 153.

R. v. Laity, 13 D.L.R. 532, 21 Can. Cr. Cas. 417, 18 B.C.R. 443, 25 W.L.R. 363, 5 W.W.R. 75.

(§ I E—126)—Commissions—Prerogative powers of Lieutenant-Governor—Encroachment on judicial powers—Prohibition Act—Public Inquiries Act—Administration of justice.

The appointment of a commission by the Lieutenant-Governor-in-Council to inquire whether intoxicating liquor had been unlawfully imported into British Columbia since the passing of an order of the Governor-General prohibiting such importation and also whether sales of intoxicating liquor had been made in the province contrary to the provisions of the B.C. Prohibition Act, is within the powers enumerated in the Public Inquiries Act, R.S.B.C. 1911, c. 110, which empowers the Lieutenant-Governor-in-Council to appoint a commissioner to inquire into matters connected with the administration of justice in the province. The Public Inquiries Act, R.S.B.C. 1911, c. 110, which empowers the Lieutenant-Governor-in-Council to appoint a commissioner to inquire into matters connected with the good government of the province, the conduct of public business and the administration of justice is within the provincial legislative powers, under s. 92 of the B.N.A. Act.

Re Public Inquiries Act, 48 D.L.R. 237, [1919] 3 W.W.R. 115. Reversing 44 D.L.R. 623, 30 Can. Cr. Cas. 309, [1919] 1 W.W.R. 372.

Encroachment on judiciary—Provincial powers to appoint enquiry commissions.

The Inquiries Act (Man.), which purports to give an Investigation Commission the same power to enforce the attendance of witnesses as is vested in a court of law in civil cases, which necessarily comprises the power to commit, is within the provincial legislative powers under s. 92 of the B.N.A. Act. [Att'y-Gen'l v. Col. Sugar Refining Co., [1914] A.C. 237, distinguished.]

Kelly & Sons v. Mathers, 23 D.L.R. 225, 25 Man. L.R. 580, 31 W.L.R. 931, 8 W.W.R. 1298.

(§ I E—130)—As to judiciary—Appointive powers—Justices of peace.

The Small Debts Recovery Act (Alta.), which confers a limited civil jurisdiction on Justices of the Peace, is within the legislative powers of a province, under s. 92 (14) of the B.N.A. Act, as to its administration of justice, and is no encroachment upon the Dominion appointive powers as to the judiciary under s. 96 of the B.N.A. Act.

Re Small Debts Recovery Act (Alta.), 37 D.L.R. 170, [1917] 3 W.W.R. 698, 12 A.L.R. 32. [See also Polson Iron Works v. Munns (Alta.), 24 D.L.R. 18; Colonial Investment v. Grady, 24 D.L.R. 176, 8 A.L.R. 496; Kelly v. Mathers, 23 D.L.R. 225, 25 Man. L.R. 580; Re Farmer's Bank, 28 D.L.R. 328, 35 O.L.R. 470.]

F. Local self-government.

(§ I F—135)—Municipal corporation—Regulation of Sunday — Criminal law.

The provisions of the charter of the City of Quebec (29 Vict., c. 57, art. 27), which authorize the town to pass by-laws "For good order, peace, security and the local government of the city," are intra vires of the legislative power of the provinces and especially of the former Province of Lower Canada. Such by-laws and the legislation authorizing them do not constitute an encroachment upon the legislative powers of Parliament in criminal matters and in respect to Sunday observance.

Drapeau v. Recorder's Court of Quebec, 52 Que. S.C. 505. [See Rodrigue v. Parish of St. Prosper, 37 D.L.R. 321, 26 Que. K.B. 396, reversing 51 Que. S.C. 109.]

G. Functions and powers of Crown.

(§ I G—140)—Intoxicating liquors—Soliciting orders — Transactions within province.

The Manitoba Legislature had legislative authority to pass the Manitoba statute of 1917, 7 Geo. V., c. 50, in so far as it prohibits residents of Manitoba taking orders in Manitoba on behalf of liquor dealers outside of the province for the supply of intoxicating liquors for beverage purposes to persons within the province. [Att'y-Gen'l of Manitoba v. Manitoba License Holders Assn., [1902] A.C. 73, specially referred to.]

R. v. Shaw, 29 Can. Cr. Cas. 130, 28 Man. L.R. 325.

Deprivation of property without compensation.

There is no doubt that a province, by clear and distinct legislation dealing with civil rights, may deprive a person of his property therein without compensation. [Re McDowell & Town of Palmerston, 22 O.R. 563, and Liquidators of Maritime Bank v. Receiver-Gen'l of N.B., [1892] A.C. 437, cited.] Such an intention should not, however, be imputed to the legislature unless expressed in unequivocal terms. [Com. of Public Works v. Logan, [1903] A.C. 355, at p. 363, followed.]

Nelson v. Pacific Great Eastern R. Co., 25 B.C.R. 259, [1918] 1 W.W.R. 597.

Power of territory to pass ordinance restricting contracts on Sunday—N.W.T. Con. Ord. 1898, c. 91, s. 3.

C.O. (N.W.T.) 1898, c. 91, s. 3, which declares void all sales and purchases as well as contracts and agreements for the sale or purchase of real or personal property when made on the Lord's Day, was intra vires of the Legislature of the North-West

Territory, and its adoption in Alberta is intra vires of the Legislature of Alberta.

Fallis v. Dalthaser, 4 D.L.R. 705, 4 A.L.R. 361, 21 W.L.R. 171, 2 W.W.R. 132.

CONSTITUTIONAL LAW — EXTRA-PROVINCIAL CORPORATIONS — STATUS WITHIN ANOTHER PROVINCE—RIGHT OF ACTION—LICENSE — EXTRA-PROVINCIAL CORPORATIONS ACT, R.S.O. 1914, c. 179.

A Provincial Legislature is not precluded by item 11, s. 92 of the B.N.A. Act from creating companies with a capacity to accept extra provincial powers and rights. Such capacity need not be expressly conferred. On obtaining a license under R.S.O. 1914, c. 179, a Saskatchewan company may do business in Ontario, and may institute and maintain an action in that province, even though the required license be not granted until after the commencement of the action. [Bonanza Creek Gold Mining Co. v. The King, 26 D.L.R. 273, [1916] 1 A.C. 566, followed.]

Honsberger v. The Weyburn Townsite Co., 50 D.L.R. 147, 59 Can. S.C.R. 281, [1919] 3 W.W.R. 783, affirming 45 O.L.R. 176, which reversed 43 O.L.R. 451.

DIRECT TAXATION WITHIN PROVINCE—SUCCESSION DUTY.

The imposition of a succession duty upon the interest of a deceased person in partnership property within the province, where he was domiciled, is direct taxation within the province and consequently within the powers of a provincial legislature.

Boyd v. Att'y-Gen'l for B.C., 36 D.L.R. 266, 54 Can. S.C.R. 532, [1917] 2 W.W.R. 242, affirming 28 D.L.R. 193, 23 B.C.R. 77. [See also Cotton v. The King, 15 D.L.R. 283, [1914] A.C. 176.]

DOMINION OR PROVINCIAL DOMAIN—INDIAN LANDS.

Crown lands not surveyed and appropriated to the use of Indians prior to July 1, 1867, are not "lands reserved for the Indians" within the meaning of s. 91 (24) of the B.N.A. Act, 1867, and consequently are not under Dominion control: the presumption is that they become vested in the Crown in the right of the province. On the principle omnia praesumuntur rite esse acta the order-in-council of 1853 respecting the constitution of the "reserve" being carried out, the surrender thereof by the Indians to the Crown with a trust resulting in their favour has made it subject to Dominion control under s. 91. [St. Catharines Milling & Lumber Co. v. Reg., 14 App. Cas. 46, distinguished.]

Att'y-Gen'l for Can. v. Giroux, 30 D.L.R. 123, 53 Can. S.C.R. 172, affirming 24 Que. K.B. 433.

PUBLIC HARBOURS—WHAT ARE.

English Bay, lying outside the entrance to the harbour of Vancouver, B.C., is not a "public harbour," within the meaning of that term used in the third schedule of the B.N.A. Act, 1867, and, therefore, not "the property of Canada" under s. 108, so as to entitle the Dominion Government to restrain parties from removing gravel from a bank running out from the coast into the bay, necessary for the protection of ships anchoring therein, as a harbour of refuge from storms. [Fisheries Case, [1898] A.C. 700, considered.]

Att'y-Gen'l for Can. v. Ritchie Contracting & Supply Co. and Att'y-Gen'l for B.C., 26 D.L.R. 51, 52 Can. S.C.R. 78, 9 W.W.R. 694, affirming 17 D.L.R. 778, 20 B.C.R. 333, 28 W.L.R. 59, 6 W.W.R. 640. [Affirmed, 48 D.L.R. 147, [1919] A.C. 999.]

INCORPORATION OF COMPANIES—"PROVINCIAL OBJECTIONS."

The limitations of the legislative powers of a province expressed in s. 92 of the B.N.A. Act, 1867, and in particular the limitation of the power of legislation to such as relates to the "incorporation of companies with provincial objects" (subs. 11 of s. 92), confine the character of the actual powers and rights which the provincial government can bestow either by legislation or through the executive, to powers and rights exercisable within the province. Section 92 (11) is wide enough to enable the legislature of the province to keep alive the power of the executive to incorporate by charter in a fashion which confers a general capacity analogous to that of a natural person, with an ambit of vitality wider than that of the geographical limits of the province, except that rights outside of the province would have to be derived from authorities outside of the province.

Bonanza Creek Gold Mining Co. v. The King, 26 D.L.R. 273, [1916] 1 A.C. 566, 25 Que. K.B. 170, 34 W.L.R. 177, reversing 21 D.L.R. 123, 50 Can. S.C.R. 534.

PROVINCIAL REGULATION OF FORECLOSURE PRACTICE—POWERS OF MASTER.

A Provincial statute which confers upon a Master the extraordinary powers of a judge, in respect of actions for the enforcement of mortgages or agreements for the sale of land, is in conflict with the appointive power of s. 96 of the B.N.A. Act, which provides the appointment of judges by the Governor-General-in-Council, and is therefore ultra vires.

Colonial Investment & Loan Co. v. Grady, 24 D.L.R. 176, 8 A.L.R. 496, 8 W.W.R. 995, 31 W.L.R. 575.

FISHERIES — TIDAL WATERS — PROPRIETARY RIGHTS—THREE MILE LIMIT.

The Province of Quebec has the power to grant exclusive fishing rights in tidal waters within its territorial limits, and has the proprietary rights in such fisheries, to a distance of 3 marine miles beyond low water mark, by virtue of s. 92 (5) (13) of the B.N.A. Act, 1867, as to "public lands belonging to the province" and "property and civil rights in the province." [Re British Columbia Fisheries, 15 D.L.R. 308, [1914]

A.C. 153, distinguished; Re Fisheries Case, [1898] A.C. 700, referred to.]

Re Quebec Fisheries, 35 D.L.R. 1, 26 Que. K.B. 289.

FUNCTIONS AND POWERS OF CROWN.

Under the Confederation Act of 1867, it is within the power of the Dominion Parliament to declare any act a crime which it may consider necessary to so characterize.

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

FUNCTIONS AND POWERS OF PROVINCE—ACT ALTERING CONDITIONS OF LOAN—NON-RESIDENT BONDHOLDERS—SITUS OF REMEDY ON FAILURE OF CONSIDERATION.

Where the purchase price of bonds was remitted by the lenders in London to a branch of a Canadian bank in New York, to be applied in carrying out the proposed construction of a railway upon a guarantee of the bonds by the Provincial Government of Alberta, and in pursuance thereof the bank through its head office in Montreal authorized the opening of a credit for the amount in a branch of the same bank in Alberta subject to be drawn upon only upon the terms of the scheme which the province had approved by statute and order-in-council, the province cannot, by declaring a forfeiture of the concession and enacting a statute purporting to alter the conditions of the scheme previously approved, acquire jurisdiction to legislate over the civil right which arose in favour of the bondholders in London to claim from the bank in Montreal, outside of the jurisdiction of the Alberta legislature, a return of the money which they had advanced for a purpose which had ceased to exist. [The King v. Lovitt, [1912] A.C. 212, distinguished.] As the effect of the Alberta statute, 1910, c. 9, the Alberta and Great Waterways Railway Bonds Act, if validly enacted would have been to preclude the bank, through which the money of the bondholders was being advanced under the terms of a government concession, from fulfilling its legal obligation accruing and remaining enforceable at a place outside of the Province of Alberta, the statute is ultra vires.

Royal Bank of Canada v. The King, 9 D.L.R. 337, 108 L.T. 129, [1913] A.C. 283, 49 C.L.J. 331, 23 W.L.R. 315, 3 W.W.R. 994.

MARRIAGE AND DIVORCE LAWS.

Under s. 91 (26) of the B.N.A. Act, marriage and divorce are within the exclusive legislative powers of the Dominion Parliament, with the exception of the solemnization of marriage in the province, which is by s. 92 (12) under the exclusive powers of the Legislatures of the province; therefore, s. 36 of the Marriage Act, R.S.O. 1914, c. 148, empowering the Supreme Court of Ontario to adjudge the invalidity of marriages entered into between persons of prohibited age without the required consent is beyond the powers of the provincial legislature.

Peppiatt v. Peppiatt, 34 O.L.R. 121, 8 O.W.N. 447.

The Act known as the Anti-Treating Act S. ref. [1909] art. 1033a, is constitutional and intra vires of the powers of the legislature of Quebec contained in pars. 8, 15, and 16, of s. 92 of the B. N. A. Act.

Godbout v. Justice Choquet, 56 Que. S.C. 62.

FISHERY LAWS OF QUEBEC—B.N.A. ACT, S 92 (5), (16)—CRIMINAL LAW.

The fishery laws of Quebec are constitutional because they deal only with the administration of the public lands belonging to the province and touch only upon matters of a purely local nature such as are mentioned in subss. 5 and 16 of s. 92 B.N.A. Act, 1867. When the Legislature of Quebec passes Acts within the powers conferred upon it by the B.N.A. Act, it may provide fine or imprisonment for violation of said Acts without infringing upon the provisions of the B.N.A. Act which gives to the Federal Parliament exclusive power to legislate in criminal matters. The Indians who inhabit the province are British subjects and as such subject to its laws. The Hudson Bay Co., having sold and conveyed to the Government of Canada all the rights and privileges that it possessed under its charter with the exception of that of carrying on the business of trading in furs, is subject to the laws of this province by virtue of arts. 6 and 17 C.C.

Dion v. Hudson Bay Co., 51 Que. S.C. 413.

(§ I G—141)—CREATION OF CORPORATIONS—EXTRATERRITORIAL CORPORATE OBJECTS OR FUNCTIONS.

The B.N.A. Act gives the provinces the right to incorporate companies with provincial objects only, and the exercise of such objects is necessarily limited to the geographical boundaries of the province granting the privilege.

International Home Purchasing Contract Co. v. Registrar of Joint Stock Companies, 9 D.L.R. 297, 5 A.L.R. 374, 23 W.L.R. 279, 3 W.W.R. 806.

POWERS OF ONTARIO RAILWAY AND MUNICIPAL BOARD—STREET RAILWAY—FENDERS, GUARDS, AND APPLIANCES.

R. v. Toronto R. Co., 23 O.L.R. 186, 18 O.W.R. 104.

B.N.A. ACT, SS. 91, 92, 101—"SUPREME COURT ACT" SS. 3, 60—REFERENCES BY GOV.-GEN.-IN-COUNCIL.

In re References by the Governor-General-in-Council, 43 Can. S.C.R. 536.

EXTRADITION—BANKRUPTCY LAW—DEFRAUDING CREDITORS—OFFENCES MADE CRIMINAL BY LAWS OF BOTH COUNTRIES—NON-EXISTENCE OF ANY GENERAL BANKRUPTCY ACT IN CANADA.

The King v. Stone (No. 2), 17 Can. Cr. Cas. 377 (Que.).

INDIAN LANDS—EXTINGUISHMENT OF INDIAN TITLE—PAYMENT BY DOMINION—LIABILITY OF ONTARIO.

The Dominion of Canada v. The Province of Ontario, [1910] A.C. 637, 26 T.L.R. 681.

CONFLICT BETWEEN LEGISLATION BY PARLIAMENT AND PROVINCIAL LAWS.

The legislation of the Parliament of Canada on matters exclusively within its legislative powers is of paramount authority and is not subject to restrictions and formalities imposed by the law relating to property and civil rights in the provinces.

Veilleux v. Atlantic & Lake Superior R. Co. & De Frieze, 39 Que. S.C. 127.

II. Rights of persons and property.

A. EQUAL PROTECTION AND PRIVILEGES—ABRIDGEMENT OF IMMUNITIES AND PRIVILEGES.

(§ II A—154)—DENOMINATIONAL SCHOOLS—PROVINCIAL COMMISSION—ABRIDGEMENT OF CONSTITUTIONAL PRIVILEGE.

C. 45 of the Statutes of Ontario, 5 Geo. V., providing for the suspension of the powers of a denominational school board and for conferring such powers upon a commission, is within the legislative powers of the province and does not prejudicially affect any right or privilege with respect to denominational schools guaranteed by s. 93 of the B.N.A. Act, 1867.

Ottawa Separate School Trustees v. Ottawa; Ottawa Separate School Trustees v. Quebec Bank, 24 D.L.R. 497, 34 O.L.R. 624.

SEPARATE SCHOOLS—DE FACTO COMMISSION—VALIDATING STATUTE.

The Ontario statute, 7 Geo. V., c. 60, validating the expenditures and obligations of commissioners in reference to the management of the Roman Catholic Separate Schools of Ottawa, incurred under the Act of 5 Geo. V., c. 45, which was later held ultra vires, does not "prejudicially affect any rights or privileges with respect to denominational schools," within the meaning of s. 93 of the B.N.A. Act, and is intra vires; the acts of commissioners, in the circumstances, must be regarded as those of a de facto body, with the right to be recouped of the moneys they had expended in the management of the schools.

Ottawa Separate School Trustees v. Quebec Bank, 45 D.L.R. 218, 43 O.L.R. 637, reversing 41 O.L.R. 594. [Affirmed in 50 D.L.R. 189.]

DENOMINATIONAL SCHOOLS — APPOINTMENT OF COMMISSION.

The Act of 7 Geo. V., c. 59, respecting the appointment of a commission for the Ottawa Separate Schools, is within the legislative authority of the Legislature of the Province of Ontario. [Ottawa Separate School Trustees v. Ottawa Corporation, 32 D.L.R. 10, [1917] A.C. 76, and the Act of 5 Geo. V., c. 45, distinguished.]

Re Ottawa Separate Schools, 40 D.L.R. 465, 41 O.L.R. 259. [See 43 O.L.R. 637.]

SEPARATE SCHOOLS — ABRIDGMENT OF CONSTITUTIONAL RIGHT—INTERFERING WITH USE OF FRENCH LANGUAGE.

Regulation No. 17 (of 1912 and 1913) of the Department of Education for Ontario providing inter alia the manner of conducting schools in districts where the scholars or a majority of them were French-speaking Canadians and making it compulsory that teachers in such schools should understand the English language does not infringe any constitutional right which the supporters of such schools have under the B.N.A. Act. [Mackell v. Ottawa Separate School Trustees, 18 D.L.R. 456, referred to.]

Mackell v. Ottawa Separate School Trustees, 24 D.L.R. 475, 34 O.L.R. 335.

DENOMINATIONAL SCHOOLS—REGULATION—ULTRA VIRES.

The status of the Board of Trustees of the Roman Catholic Separate Schools of the city of Ottawa depends on the provisions contained in the Separate Schools Act, 1863 (U.C.), and is protected by subs. (1) of s. 93 of the B.N.A. Act. That status cannot be prejudicially affected without an Act of the Imperial legislature, and therefore s. (3) of 5 Geo. V., c. 45 (1915) (Ont.), authorizing the Minister of Education to suspend or withdraw all the rights and powers of the board is ultra vires the Legislature of Ontario.

Ottawa Separate Schools Trustees v. Ottawa & Quebec Bank, 32 D.L.R. 10, [1917] A.C. 76, 115 L.T. 797, reversing 30 D.L.R. 770, 36 O.L.R. 485. [See also 40 D.L.R. 465, 41 O.L.R. 259.]

ACT RESPECTING THE ROMAN CATHOLIC SEPARATE SCHOOLS OF THE CITY OF OTTAWA, 7 GEO. V. C. 60 (O.)—ULTRA VIRES—DECISIONS ON PREVIOUS ACT, 5 GEO. V. C. 45—MONEYS RECEIVED BY COMMISSIONERS APPOINTED UNDER THAT ACT—MONEYS PAID BY BANK TO COMMISSIONERS—RECOVERY BY BOARD OF TRUSTEES—EXCEPTION AS TO MONEYS PROPERLY PAID FOR SALARIES AND CONTROL AND MANAGEMENT.

Ottawa Separate School Trustees v. Quebec Bank, 41 O.L.R. 594. [See 35 D.L.R. 134, 39 O.L.R. 118.]

SCHOOLS—DENOMINATIONAL PRIVILEGES.

The jurisdiction of the Provincial Legislature over education is absolute unless it invades certain rights and privileges reserved by s. 93 of the B.N.A. Act; and even if s. 17 of the Saskatchewan Act (4 and 5, Edw. VII., c. 42, Can.) is ultra vires of the Parliament of Canada, the Provincial Legislature would still have power to enact s. 39 of the School Act, which does not prejudicially affect any right or privilege with respect to separate schools under cc. 29 and 30 of the N.W.T. Ordinances, existing at the date of the passing of the Saskatchewan Act, and so does not conflict with s. 93 of the B.N.A. Act. [Ottawa Separate School Trustees v. Mackell, 32 D.L.R. 1; Winnipeg

v. Barrett, [1892] A.C. 445, referred to. See 32 D.L.R. 10.]

McCarthy v. City of Regina & the Regina Board of P.S. Trustees (Bartz Case), 32 D.L.R. 741, 10 S.L.R. 14, [1917] 1 W.W.R. 1105. [Affirmed, 43 D.L.R. 112, [1918] A.C. 911, [1918] 3 W.W.R. 302.]

(§ II A—160)—Marriage laws.

Upon the true construction of the B.N.A. Act conferring upon the Parliament of Canada the exclusive legislative authority over "Marriage and Divorce," and upon the Legislature of each province the exclusive power of making laws in relation to the "Solemnization of Marriage in the Province," the Parliament of Canada has no power to amend the Marriage Act, R.S.C. 1906, c. 105, by adding thereto either the whole or any of the provisions of a section, providing that every ceremony or form of marriage theretofore or thereafter performed by any person authorized to perform any ceremony of marriage by the laws of the place where it is performed, and duly performed according to such laws, shall everywhere within Canada be deemed to be a valid marriage, notwithstanding any differences in the religious faith of the persons so married and without regard to the religion of the person performing the ceremony; and that the rights and duties as married people of the respective persons married as aforesaid and of the children of such marriage shall be absolute and complete, and that no law or canonical decree or custom of or in any Province of Canada shall have any force or effect to invalidate or qualify any such marriage or any of the rights of the said persons or their children in any manner whatsoever. The powers conferred by subs. 26, s. 91, of the B.N.A. Act upon the Parliament of the Dominion of Canada to make laws in respect to "Marriage and Divorce" are limited by the provisions of subs. 12 of s. 92 of the said act, which confers exclusive jurisdiction upon the Legislatures of each province to make laws relating to "the solemnization of marriage in the province."

Re The Marriage Law of Canada, 7 D.L.R. 629, [1912] A.C. 880, 11 E.L.R. 255, affirming 6 D.L.R. 588, 46 Can. S.C.R. 132.

(§ II A—178)—Regulation of business generally.

These provisions of the B.C. Companies Act, 10 Edw. VII. (B.C.) c. 7, which impose conditions upon companies incorporated under the Companies Act, R.S.C. 1906, c. 79, in order to do business within the Province of British Columbia are not ultra vires. [Waterous Engine Co. v. Okanagan Lumber Co., 14 B.C.R. 238, followed.]

John Deere Plow Co. v. Agnew, 8 D.L.R. 65, 17 B.C.R. 543, 2 W.W.R. 1013. [Reversed, 10 D.L.R. 576, 48 Can. S.C.R. 208, 24 W.L.R. 221.]

Regulation of business — Companies with Dominion charter — Provincial — Restrictions on right to do business—Validity.

The B.C. Companies Act R.S.B.C. 1911, c. 39, requiring companies organized for gain to be licensed or registered in the province, and providing that no person shall act as agent for or carry on business in behalf of an unlicensed or unregistered company, and that no suit or proceeding shall be maintained in the courts of the province on any contract made therein in whole or in part in the course of or in connection with its business, is not ultra vires; and such requirement of registration and license is valid even as to companies incorporated under federal law by the issue of Letters Patent under the Companies Act of Canada, R.S.C. 1906, c. 79.

John Deere Plow Co. v. Duck, 12 D.L.R. 554, 24 W.L.R. 844.

(§ II A—194)—Regulation of foreign companies—"Doing business" — Dominion company.

The provisions of the Companies Act 1915 (Sask.), requiring all companies to register and take out an annual license, do not affect the status or powers of companies, are intra vires of the legislature, and are applicable to companies incorporated under Dominion legislation. [John Deere Plow Co. v. Wharton, 18 D.L.R. 353, [1915] A.C. 330; The Companies Case, 15 D.L.R. 332, 48 Can. S.C.R. 331; 26 D.L.R. 293, [1916] 1 A.C. 598, considered.]

Harmer v. Macdonald Co., 33 D.L.R. 363, 10 S.L.R. 231, [1917] 2 W.W.R. 435, affirming 30 D.L.R. 640, [1917] 1 W.W.R. 153.

Regulation of extra-provincial corporations — Intra vires — Dominion company — License — Penalties — Right of company to hold land — Mortmain and Charitable Uses Act.

Currie v. Harris Lithographing Co.; Att'y-Gen'l for Ontario v. Harris Lithographing Co., 41 D.L.R. 227, 41 O.L.R. 475, reversing 40 O.L.R. 290.

Statute — Companies Act 6 Geo. V. (1915, Sask.) — Regulation — Dominion companies — Provincial license.

The provisions of ss. 23 and 25 of the Companies Act (1915, 6 Geo. V., Sask.) requiring all companies to register and take out an annual license before carrying on business in the province, are intra vires the legislature, and are applicable to companies incorporated by the Dominion Parliament to do business throughout Canada. [John Deere Plow Co. v. Wharton, 18 D.L.R. 353, [1915] A.C. 330, distinguished.]

The Great West Saddlery Co. v. The King; The John Deere Plow Co. v. The King; The A. MacDonald Co. v. Harmer, 48 D.L.R. 386, 59 Can. S.C.R. 19, [1919] 2 W.W.R. 561, affirming 33 D.L.R. 363, 10 S.L.R. 231.

INSURANCE—LICENSE TO DO BUSINESS.

It is within Dominion legislative powers, under s. 91 of the B.N.A. Act, as to the regulation of commerce and aliens, to prohibit foreign insurance companies from carrying on business without a federal license, even within the limits of a single province; to such extent s. 4 of the Dominion Insurance Act, 1910, is intra vires. [Re Insurance Act, 26 D.L.R. 288, [1916] 1 A.C. 588, explained and followed.]

Farmers Mutual Hail Ins. Assn. v. Whittaker (Alta.), 37 D.L.R. 705, 12 A.L.R. 309, [1917] 3 W.W.R. 750.

DOMINION COMPANIES — MANITOBA COMPANIES ACT (R.S.M. 1913, c. 35)—LICENSE TO DO BUSINESS IN PROVINCE.

A province has power under s. 92 of the B.N.A. Act to compel, under penalty, extra provincial corporations, including Dominion companies, to take out a license as a condition of doing business in the Province. Part IV. of the Manitoba Companies Act, R.S.M. 1913, c. 35, is intra vires the legislature. [John Deere Plow Co. v. Wharton, 18 D.L.R. 353, [1915] A.C. 330, distinguished. See also Mickelson v. Mickelson, 28 D.L.R. 307; The Companies Case, 26 D.L.R. 293, [1916] 1 A.C. 598; The Insurance Case, 26 D.L.R. 288, [1916] 1 A.C. 588; Bonanza Creek Case, 26 D.L.R. 273, [1916] 1 A.C. 566.]

The Great West Saddlery Co. v. Davidson, 48 D.L.R. 404, 59 Can. S.C.R. 45, [1919] 2 W.W.R. 577, affirming 35 D.L.R. 526.

DOMINION POWERS—REGULATION OF TRADE AND COMMERCE—FOREIGN COMPANIES.

The Dominion Parliament, in virtue of the power to regulate trade and commerce under s. 91 (2) of the B.N.A. Act, has jurisdiction to require a foreign company to take out a license from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province.

Att'y-Gen'l for Canada v. Att'y-Gen'l of Alta. & B.C. (Ins'ce. Case), 26 D.L.R. 288, [1916] 1 A.C. 588, 114 L.T. 772, 25 Que. K.B. 187, 34 W.L.R. 192, 10 W.W.R. 405, affirming 15 D.L.R. 251, 48 Can. S.C.R. 260, 25 W.L.R. 781, 5 W.W.R. 488.

FOREIGN CORPORATIONS.

A foreign boom company is not entitled to construct or maintain its works or any portion thereof within Canada, and the construction by a boom company, whose amended articles of incorporation by the State of Minnesota purported to confer upon it powers for "the improvement of the Rainy River from its mouth at the Lake of the Woods to the falls of the said river at International Falls . . . and to drive, tow, boom, assort, hold, distribute and otherwise handle logs . . . in said river and to collect tolls and charges for such services," etc., of a sheer boom and part of its main boom wholly on the Canadian side of the boundary line between Canada and the United States, by means of which logs of a Canadian log owner were diverted into the possession and control of the foreign boom company, is illegal.

Rainy Lake River Boom Corp. v. Rainy River Lumber Co., 6 D.L.R. 401, 27 O.L.R. 131, 22 O.W.R. 952.

EXTRA-PROVINCIAL COMPANIES OF DOMINION INCORPORATION — REGULATION BY PROVINCE.

A provincial Act which deprives, upon a noncompliance with the registration requirements, an extra-provincial company, incorporated under a Dominion statute, of its right to maintain actions in the courts of the other province is ultra vires of the provincial legislature, and inoperative. [John Deere Plow Co. v. Wharton, 18 D.L.R. 353, [1915] A.C. 330, applied.]

Linde Canadian Refrigerator Co. v. Sask. Creamery Co., 24 D.L.R. 703, 51 Can. S.C.R. 400, 8 W.W.R. 1246, reversing 7 S.L.R. 245.

PROVINCIAL REGULATION OF EXTRA-PROVINCIAL CORPORATIONS.

The Extra-provincial Companies Act, 1913 (P.E.I.), intended for the regulation of foreign or extra-provincial corporations is within the powers of a province comprised under the head of "Civil rights in the Province" in the B.N.A. Act, 1867.

Willett Martin Co. v. Full, 24 D.L.R. 672.

(§ II A—195) — CORPORATIONS AND COMPANIES — FEDERAL CHARTER — PROVINCIAL LICENSE.

A company created by a Dominion charter under the provisions of the Companies Act (Canada) may be required by the laws of any province to take out a license in that province as an extra-provincial corporation, and to pay the incidental license fee, before carrying on business within the province.

Re Companies Incorporation, 15 D.L.R. 332, 48 Can. S.C.R. 331, 25 W.L.R. 712, 5 W.W.R. 299 and 421.

AS TO BANKS—SHARE REGISTRY OFFICES.

The Dominion Parliament, for the purpose of carrying into effect its powers as to banks and banking under s. 91 (15) of the B.N.A. Act, has the power to require banks, in the interest of shareholders, to maintain share registry offices where their shares may be conveniently transferred, though it in effect operates as a change of the situs of the shares from one province to another; it is no encroachment upon the constitutional powers of the provinces as to "property and civil rights in the province." The Dominion Bank Act, s. 43, as amended in 1913, held intra vires.

Provincial Treasurer v. Smith (N.S.), 35 D.L.R. 458. [Affirmed 47 D.L.R. 108, 58 Can. S.C.R. 570.]

AS TO CORPORATIONS, ASSOCIATIONS AND CARRIERS.

Upon the true construction of ss. 91 and 92 of the B.N.A. Act, 1867, a provincial railway is not subject to the jurisdiction

of the Federal Railway Commission in respect of its through traffic with a Federal railway.

Montreal v. Montreal Street R. Co., 1 D.L.R. 681, 10 E.L.R. 281, affirming on appeal 43 Can. S.C.R. 197, 11 Can. Ry. Cas. 203.

CORPORATIONS AND COMPANIES — "PROVINCIAL OBJECTS" — TERRITORIAL POWERS — REGULATION AND LICENSING — POWERS OF DOMINION AND PROVINCES.

[Bonanza Case, 26 D.L.R. 273; Re Insurance Act, 26 D.L.R. 288; John Deere Plow Co. v. Wharton, 18 D.L.R. 353, [1915] A.C. 330, followed.]

Att'y-Gen'l of Ontario v. Atty-Gen'l for Canada (Companies Case), 26 D.L.R. 293, [1916] 1 A.C. 598, 114 L.T. 774, 34 W.L.R. 197, 10 W.W.R. 410, affirming 15 D.L.R. 332, 48 Can. S.C.R. 331, 25 W.L.R. 712, 5 W.W.R. 299 and 421. [See also Dome Oil v. Alberta Drilling Co., 28 D.L.R. 93.]

DOMINION POWERS AS TO CORPORATIONS — PROPERTY AND CIVIL RIGHTS IN THE PROVINCE.

The power conferred upon a Dominion trading corporation by s. 69 of the Dominion Companies Act (R.S.C. 1906, c. 79) to hypothecate, mortgage, or pledge its real and personal property, in so far as it is in conflict with the law of the Province of Quebec, is ultra vires the Dominion Parliament, as an encroachment upon "property and civil rights in the province" under s. 92 of the B.N.A. Act.

Re Dominion Marble Co. (Que.), 35 D.L.R. 63, 23 Rev. de Jur. 578.

KEEPING INTOXICATING LIQUOR FOR EXPORT.

The Saskatchewan Act to prevent the keeping of liquor for export to other provinces or to foreign countries is ultra vires as an interference with trade and commerce and not within the jurisdiction of a Provincial Legislature. [Att'y-Gen'l of Ontario v. Att'y-Gen'l of Canada, [1896] A.C. 348, and Att'y-Gen'l of Manitoba v. Manitoba License Holders, [1902] A.C. 73, applied.]

Hudson Bay Co. v. Heffernan, 39 D.L.R. 124, 29 Can. Cr. Cas. 38, 10 S.L.R. 322, [1917] 3 W.W.R. 167.

INTOXICATING LIQUOR FOR EXPORT.

Gold Seal Company v. Att'y-Gen'l (Sask.), 29 Can. Cr. Cas. 244.

BANKS — POWER OF PROVINCE TO INCORPORATE.

A provincial legislature has power to incorporate a company with the object of carrying on that branch of banking which consists of accepting money on deposit, paying interest thereon and allowing the customer to issue cheques against such deposit.

Re Dominion Trust Co., U.S. Fidelity's Case; Reid's Case; Ramsay's Case (B.C.), [1918] 3 W.W.R. 1023.

(§ II A—197) — INSURANCE COMPANIES —INSURANCE ACT (CAN.), 1910.

Ss. 4 and 70 of the Insurance Act (Can.), 1910, 9 & 10 Edw. VII. c. 32, prohibiting under penalty any person or corporation from engaging in insurance business unless it be done by or on behalf of a company of underwriters holding a license from the Minister, deprive private individuals of their liberty to carry on the business of insurance and is an interference with the civil rights of individuals and corporations, as well as an encroachment upon the legislative powers of provinces to confer such rights upon corporations beyond the provincial limits, and, therefore, ultra vires of the Dominion Parliament. [Bonanza Case, 26 D.L.R. 273, followed.]

Att'y-Gen'l for Canada v. Att'y-Gen'l of Alta. & B.C. (Insurance Case), 26 D.L.R. 288, [1916] 1 A.C. 588, 25 Que. K.B. 187, 34 W.L.R. 192, 10 W.W.R. 405, affirming 15 D.L.R. 251, 48 Can. S.C.R. 260, 25 W.L.R. 781, 5 W.W.R. 488.

(§ II A—200)—PROVINCIAL REGULATION OF DOMINION RAILWAY COMPANIES — EXTENDING RIGHTS OF OCCUPANCY.

S. 7 of c. 15, Alta. Stats. 1912, amending the Alberta Railway Act, 1907, by the addition of a subsection purporting to make s. 82 of the latter Act apply to Dominion railways so as to make the latter subject to a right of occupancy along with a provincial railway on terms to be approved by the Lieutenant-Governor in Council, is ultra vires of the Legislature of Alberta: it would be none the less ultra vires if the amendment had not been limited as it was by a clause thereof to cases where the taking of the Dominion railway company's land did not "unreasonably interfere with the construction and operation" of its own railway. [C.P.R. Co. v. Notre Dame de Bonsecours, [1899] A.C. 367, and Madden v. Nelson & F.S.R. Co., [1899] A.C. 626, applied.]

Att'y-Gen'l for Alta. v. Att'y-Gen'l of Canada, 22 D.L.R. 501, 19 Can. Ry. Cas. 153, [1915] A.C. 363, 112 L.T. 177.

DOMINION POWERS — RAILWAYS — "GENERAL ADVANTAGE OF CANADA."

The Parliament of Canada has power by subsequent enactment to properly and effectually modify or repeal a declaration under s. 92 (10) B.N.A. Act, 1867, whereupon a railway previously declared "to be for the general advantage of Canada or for two or more of the provinces," becomes again subject to the jurisdiction of the province in which it is situate.

Hamilton, Grimsby & Beamsville R. Co. v. Att'y-Gen'l for Ontario, 29 D.L.R. 521, [1916] 2 A.C. 583, affirming 25 D.L.R. 613, 34 O.L.R. 599, 20 Can. Ry. Cas. 123.

RAILWAY COMPANIES — SEPARATION OF GRADES — COST OF — IMPOSING PART ON STREET RAILWAY COMPANY — CANADA RAILWAY ACT.

The provisions of ss. 8 (a), 59, 237 and

238 of the Railway Act, R.S.C. 1906, c. 37, as amended by 8 & 9 Edw. VII. c. 32, permitting the Board of Railway Commissioners to impose on a street railway company a portion of the cost of separating the grade of a street at a railway crossing, is not ultra vires. (Per Idington, Anglin and Davies, JJ.) [Toronto v. C.P.R. Co., [1908] A.C. 54; C.P.R. Co. v. Notre Dame de Bonsecours, [1899] A.C. 367; Toronto v. G.T.R. Co., 37 Can. S.C.R. 232; County of Carleton v. Ottawa, 41 Can. S.C.R. 552; and Re C.P.R. Co. & York, 25 A.R. (Ont.) 65, followed.]

B.C. Electric R. Co. v. V. V. & E. R., 13 D.L.R. 308, 48 Can. S.C.R. 98, 15 Can. Ry Cas. 237, 4 W.W.R. 649.

RAILWAY COMPANIES — SMOKE REGULATION —MUNICIPAL BY-LAWS OR COMMISSION CONTROL.

The provisions of order number 5678 of the Railway Commission, Can., for the regulation of the discharge of smoke from locomotives supersede, as to railway engines operated by a railway subject to federal legislative control, the provisions of a smoke by-law passed by a municipality under provincial authority. [C.P.R. v. Notre Dame de Bonsecours, [1899] A.C. 367, distinguished.]

R. v. C.P.R. Co., 23 Can. Cr. Cas. 487.

DOMINION POWERS OVER LANDS OF PROVINCIAL RAILWAY—EMINENT DOMAIN.

The Dominion Parliament has power, ancillary to its main legislative power regarding railways, to authorize the taking of lands of a provincial railway by a Dominion railway company, to the extent necessary to give effect to the purpose of the Dominion incorporation.

Lachine, Jacques Cartier & Maisonneuve R. Co. v. Montreal Tramways, 18 Can. Ry. Cas. 133.

(§ II A—207) — PROVINCIAL CORPORATION TAX— INSURANCE PREMIUMS — DIRECT TAXATION.

The Corporations Tax Act, R.S.O. 1914, c. 27, as amended by 4 Geo. V. c. 11, in so far as it imposes a tax upon the gross premiums received by any insurance company in respect of business transacted in Ontario, including every premium which by the terms of the contract is payable in Ontario, or which is in fact paid in Ontario, or is payable in respect to a risk undertaken in Ontario, or in respect of a person or property resident or situate in Ontario at the time of payment (clauses (a) and (e) of s. 4 (3), as enacted by 4 Geo. V. c. 11, s. 2), is within the powers of the Ontario Legislature, and comes within the words of subs. 2 of s. 92 of the B.N.A. Act, 1867, "Direct Taxation within the Province." [Bank of Toronto v. Lambe, 12 App. Cas. 575, explained and applied.]

Treasurer of Ontario v. Canada Life Ass'ce Co., 22 D.L.R. 428, 33 O.L.R. 433.

(§ II A—208) — PROVINCIAL LEGISLATION —INTERFERENCE WITH DOMINION RAILWAYS.

It is not competent to the Legislature of the Province of Alberta to enact legislation authorizing the construction and operation of railways in such a manner as to interfere with the physical structure or operation of railways subject to the jurisdiction of the federal Parliament.

Re Alberta Railway Act, 12 D.L.R. 150, 48 Can. S.C.R. 9, 15 Can. Ry. Cas. 213, 24 W.L.R. 630, 4 W.W.R. 608.

CARRIERS — "GENERAL ADVANTAGE OF CANADA" — CONSTRUCTION OF STATUTES —EXCLUSIVE JURISDICTION.

Section 6a of the Railway Act of Canada 1903 as amended by c. 32 of 1904, s. 2 (re-enacted substantially in R.S.C. 1906, c. 37, s. 9), subjecting certain railways to provincial legislation and confirming and ratifying such legislation (s. 193 of Ontario Railway Act, 1906), is construed as covering the peculiar status of those railways (and only those railways) declared by the Dominion Parliament to be "works for the general advantage of Canada" and solely by such Federal declaration withdrawn from the provincial jurisdiction to which otherwise they, as provincial undertakings, would have been subject. Where a railway and transportation company is incorporated under an Act of Parliament of Canada: (a) conferring power to operate beyond as well as within a certain province, and (b) declaring its undertaking to be a work for the general advantage of Canada, its undertaking falls within the exclusive legislative authority of the Parliament of Canada conferred by subs. 29 of s. 91 of the B.N.A. Act. [Toronto Corp. v. Bell Telephone Co., [1905] A.C. 52, followed.]

Kerley v. London & Lake Erie R. & Transportation Co., 13 D.L.R. 365, 28 O.L.R. 606, 15 Can. Ry. Cas. 377, reversing 6 D.L.R. 189.

FOR GENERAL ADVANTAGE OF CANADA.

When a railway company constituted by a provincial Act is, after completion, declared by Parliament to be a work for the general advantage of Canada, it becomes subject to Federal jurisdiction; but if, by a Federal Act, the company is authorized to purchase and operate another provincial railway which is not declared to be a work for the general advantage of Canada, it remains subject, as to the latter, to provincial jurisdiction. Therefore, the Public Utilities Commission is competent to arbitrate on disagreements provided for by arts. 740 et seq. R.S.Q. 1909, which may arise respecting the last mentioned railway between the company and individuals.

Quebec R. Light, Heat & Power Co. v. Langlais, 21 Que. K.B. 167.

(§ II A—210)—DIRECT AND INDIRECT TAXATION.

The "direct taxation" which, under s.

92 of the B.N.A. Act, a province may impose for raising a revenue for provincial purposes, is a tax which is demanded from the very persons who it is intended should pay it and upon whom the burden of the tax at the time fixed for payment is placed as the ultimate incidence of the taxing scheme; conversely, if the tax is demanded from one person in the expectation and intention of the taxing scheme that he shall indemnify himself at the expense of another the taxation is "indirect." [Att'y-Gen'l (Que.) v. Reed, 10 App. Cas. 141, applied.]

Cotton v. The King; The King v. Cotton, 15 D.L.R. 283, 13 E.L.R. 371, 26 W.L.R. 207, 5 W.W.R. 662.

DIRECT AND INDIRECT TAXATION — SUCCESSION DUTY.

As a condition for local probate in respect of property situated within a province, payment of a succession duty may be required under provincial legislation, for example R.S.B.C. 1911, c. 217. [The King v. Lovitt, [1912] A.C. 212, and Cotton v. The King, 15 D.L.R. 283, [1914] A.C. 176, considered.]

Re Doe, 16 D.L.R. 740, 19 B.C.R. 536, 27 W.L.R. 803, 6 W.W.R. 510.

(§ II A—211) — SUCCESSION DUTIES — PROPERTY IN ANOTHER PROVINCE.

Where a party dying, domiciled in Manitoba, has by a verbal agreement contracted to erect elevators in another province, but is to retain possession and control over them until they are fully paid for, the debt thus created constitutes "property" within Manitoba and is subject to succession duty under the Succession Duties Act, R.S.M. 4 and 5 Edw. VII, c. 45, s. 4. [Re Muir Estate, 18 D.L.R. 144, 24 Man. L.R. 310, affirmed.]

Standard Trusts Co. v. Treas. of Manitoba, 23 D.L.R. 811, 51 Can. S.C.R. 428, 9 W.W.R. 1226, affirming 18 D.L.R. 144, 24 Man. L.R. 310.

SUCCESSION TAX — PARTICULAR LEGATEE REQUIRED TO PAY INDIRECT TAX — LAW.

The provision of art. 1380, R.S.Q. 1909 (repealed by 4 Geo. V. c. 9) which requires a particular legatee to pay the entire succession duties before being able to demand payment of his legacy imposes an indirect tax, and is, accordingly, unconstitutional and void.

Carrier v. Roy, 46 Que. S.C. 122.

SUCCESSION TAX — "TAXES, DIRECT AND INDIRECT" — LIMITATION OF PROVINCIAL POWERS — SUCCESSION DUTY ORDINANCE, 1903, SESS. 2, C. 5 (ALTA.).

The Succession Duty Ordinance, 1903, 2nd Sess. c. 5 (Alta.), is ultra vires of the provincial legislature even as to property within Alberta of persons domiciled there at time of death, as it purports to make the executor or administrator primarily liable for the succession duty and not the property devolving or the beneficiaries who take the same, and in consequence the ordinance imposes "indirect taxation," which is beyond the powers of the province. [Cotton v. Rex, 15 D.L.R. 283, applied.]

Re Cust, 18 D.L.R. 647, 8 A.L.R. 39, 29 W.L.R. 716, 7 W.W.R. 387.

TAXES, DIRECT AND INDIRECT — PROVINCIAL LAW-MAKING POWERS—SUCCESSION TAX.

A succession tax directly laid on property within the province by provincial law is not an indirect tax under the B.N.A. Act although payment thereof must be made or security given therefor concurrently with taking out letters probate to the decedent's estate. [The King v. Lovitt, [1912] A.C. 212; Cotton v. The King, 15 D.L.R. 283, [1914] A.C. 176, referred to.]

Re Doe, 16 D.L.R. 740, 19 B.C.R. 536, 27 W.L.R. 803, 6 W.W.R. 510.

TAXES, DIRECT AND INDIRECT — LIMITATION OF PROVINCIAL POWERS — SUCCESSION DUTY ACT, 1906 (QUE.).

An impost of taxation by way of succession duty on the devolution of an estate is for an "indirect tax" and therefore beyond the powers of a provincial legislature if the scheme of succession duty statute is to make one person pay duties which he is not intended to bear but to obtain from other persons; and as the Succession Duties Act, 1906 (Que.) is of this character, inasmuch as the notary or administrator making the property declaration for the estate might be held personally liable to the provincial collector of inland revenue for the tax, although not sharing in the benefits of the succession, it is ultra vires of the province where, as in Quebec Province, no local service such as the granting of letters probate is rendered by the government therefor or is required by law.

Cotton v. The King; The King v. Cotton, 15 D.L.R. 283, 13 E.L.R. 371, 26 W.L.R. 207, 5 W.W.R. 662.

(§ II A—212)—TAXING POWER — CROWN LANDS—PURCHASERS.

The fact that the Crown has a reversionary interest in land does not thereby render it, as far as the interest of a purchaser is concerned, exempt from taxation under s. 250 (Alta. Stats. 1911-12, c. 3), or s. 125 of the B.N.A. Act, 1867.

Southern Alta. Land Co. v. Rur. Mun. of McLean, 29 D.L.R. 403, 53 Can. S.C.R. 151, 10 W.W.R. 879, affirming 23 D.L.R. 88, 22 D.L.R. 102, 31 W.L.R. 725, 8 W.W.R. 1066.

CROWN LANDS—GRAZING LEASE.

Though under s. 125 of the B.N.A. Act, 1867, the provinces have no constitutional power to tax Crown lands, that restriction does not prevent them from imposing a tax upon the interest of a tenant of such lands under grazing leases from the Dominion Government.

Smith v. Rur. Mun. of Vermilion Hills, 30 D.L.R. 83, [1916] 2 A.C. 569, [1917] 1 W.W.R. 108, affirming 20 D.L.R. 114, 49 Can. S.C.R. 563. [See also South-

ern Alta. Land Co. v. McLean, 29 D.L.R. 403.]

(§ II A—233) — CANCELLING LIQUOR LICENSES—TEMPERANCE.

A provincial statute cancelling all existing liquor licenses, in furtherance of its temperance laws, is not unconstitutional (obiter dictum).

Re Carrie Bradbury, 30 D.L.R. 756, 27 Can. Cr. Cas. 68, 50 N.S.R. 298.

(§ II A—234) — DENTISTRY — REQUIREMENTS AS TO PRACTICE — DISCRIMINATION.

That a by-law passed by the Dental Council under the provisions of the Dental Practice Act, R.S.S. 1909, c. 108, respecting examination for admission to the Dental College, exempted from examination dentists already practising in Saskatchewan, is not an unjust discrimination which would invalidate the by-law. [Kruse v. Johnson, [1898] 2 Q.B. 91, specially referred to.]

Hodgson v. Cowan, 15 D.L.R. 236, 6 S. L.R. 377, 26 W.L.R. 407, 5 W.W.R. 907.

(§ II A—245)—SUNDAY LAWS — DOMINION LORD'S DAY ACT — PROVINCIAL POWER.

The Lord's Day Act, R.S.C. 1906, c. 153, by the proviso in s. 5, enables a province to reduce the scope or mitigate the severity of the general prohibition in respect of the topics mentioned therein, but does not clothe the province with power, either itself to deal generally with the matter of Sunday observance, or to confer such powers on municipalities so as to enlarge the scope of the Dominion Act; and a conviction under a municipal by-law so framed under the municipal Act, R.S.B.C. 1911, c. 170, cannot be sustained.

R. v. Waldon, 18 D.L.R. 109, 22 Can. Cr. Cas. 405, 19 B.C.R. 539, 28 W.L.R. 46, 6 W.W.R. 850, affirming 14 D.L.R. 893, 22 Can. Cr. Cas. 122.

NEW BRUNSWICK LORD'S DAY ACT—CRIMINAL LEGISLATION — JURISDICTION OF DOMINION PARLIAMENT.

A conviction made against a restaurant keeper under the Act respecting the observance of the Lord's Day, C.S.N.B. 1903, c. 107, for selling meals on Sunday, will be set aside on the ground that such Act was ultra vires of the provincial legislature. [Att'y-Gen'l v. Hamilton St. R. Co., [1903] A.C. 524, 7 Can. Cr. Cas. 326, applied.]

The King v. Marsh, Ex parte Washington, 21 Can. Cr. Cas. 413, 41 N.B.R. 419.

SUNDAY LAWS — FEDERAL — PROVINCIAL — VALIDATION OF PROVINCIAL LAWS, HOW LIMITED.

The provisions of s. 16 of the Lord's Day Act, R.S.C. 1906, c. 153, against interference with any provincial law then "in force" is to be construed to cover only such provincial laws as were then 'validly in force" and not to validate any ultra vires legislation, notwithstanding the provisions of s. 5 and subs. (g) of s. 2 of that Act. Up to the enactment of the Lord's Day Act R.S.C. 1906, c. 153, the Sunday observance laws of B.C. stood as they had existed at Confederation in 1867 by virtue of the exclusive jurisdiction of the Parliament of Canada.

R. v. Laity, 13 D.L.R. 532, 21 Can. Cr. Cas. 417, 18 B.C.R. 443, 25 W.L.R. 363, 5 W.W.R. 75.

(§ II A—248)—SUNDAY LAWS—THEATRES —PROVINCIAL AND FEDERAL STATUTES.

That part of the Quebec statute 7 Edw. VII. c. 42, as amended by statute 9 Edw. VII. (Que.) c. 51, which prohibits theatrical performances on Sunday is ultra vires as criminal law legislation within the exclusive jurisdiction of the Federal Parliament, and it is not permissive legislation of the class which under s. 16 of the Dominion Lord's Day Act, R.S.C. 1906, c. 153, might be excepted from the operation of the Federal statute by an Act of a provincial legislature. [Ouimet v. Bazin, 3 D. L.R. 593, 20 Can. Cr. Cas. 458, 46 Can. S.C.R. 502, applied.]

Audette v. Daniel, 13 D.L.R. 240, 21 Can. Cr. Cas. 403, 14 Que. P.R. 432.

MUNICIPAL BY-LAW PROHIBITING DISORDERLY HOUSES—ULTRA VIRES.

A by-law of a city prohibiting the maintenance of disorderly houses within its limits and imposing a punishment therefor, enacted under power conferred by the provincial legislature of Alberta is ultra vires and void, since the object of the by-law was to create offences and provide punishments in the interest of public morals, a subject exclusively within the power of the Federal Parliament under s. 91 of the B.N.A. Act. [R. v. Wason, 17 A.R. (Ont.) 221; R. v. Shaw, 7 Man. L.R. 518, and R. v. Keefe, 1 Terr. L.R. 280, referred to.]

Upton v. Brown, 21 Can. Cr. Cas. 190, 3 W.W.R. 626.

SUNDAY LAWS—MUNICIPAL BY-LAW.

The special powers conferred upon the City of Montreal in 1860, by the legislature of the Province of Canada, 23 Vict., c. 72, to pass by-laws "for the better observance of the Sabbath," not having been repealed by Dominion legislation since Confederation, and having been continued in the Montreal Charter, art. 300, pars. 75 and 76, the by-law of that city prohibiting a tradesman from selling goods on Sunday is not ultra vires, such by-law being a mere continuation of the by-law passed by the city in 1865, prior to the B.N.A. Act; and a grocer who kept his store open on Sunday and sold a pound of sugar is properly convicted under that by-law. [Re Sunday Legislation, 35 Can. S.C.R. 581, and Ouimet v. Bazin, 20 Can. Cr. Cas. 458, 3 D.L.R. 593, 46 Can. S.C.R. 502, referred to.]

Bischinski v. Montreal, 28 D.L.R. 381, 25 Can. Cr. Cas. 254, 47 Que. S.C. 176.

SUNDAY LAWS—THEATRES.

The statute, 7 Edw. VII. c. 42, as amended by c. 51, 9 Edw. VII., (Que.), which,

among other things, prohibits, under penalty, the giving on Sunday of theatrical performances for gain, is prohibitive and not permissive, and cannot be upheld under s. 16 of the Dominion Lord's Day Act, R.S.C. 1906, c. 153, which permits provincial legislatures to except from its operation any Act which provincial legislation, existing at the time the Federal Act came into force or which might be subsequently enacted, "permitted" to be done. The Act, 7 Edw. VII. (Que.) c. 42, as amended by the statute 9 Edw. VII. (Que.) c. 51, which, among other things, prohibits, under penalty, the giving of theatrical performances on Sunday for gain, except in case of necessity or urgency, is void, because it is criminal legislation which, under s. 91, subs. 27, of the B.N.A. Act, is exclusively within the power of the Dominion Parliament to enact. [Att'y-Gen'l v. Hamilton St. R. Co., [1903] A.C. 524, followed; Russell v. The Queen, 7 App. Cas. 829; Re Sunday Legislation, 35 Can. S.C.R. 581; Pringle v. Napanee, 43 U.C.R. 285; Cowan v. Milburn, L.R. 2 Ex. 230, and Vidal v. Girard's Executors, 43 How. U.S. 198, referred to.]

Ouimet v. Bazin, 3 D.L.R. 593, 22 Can. Cr. Cas. 458, 46 Can. S.C.R. 502.

(§ II A—275) — PROCEDURE IN CRIMINAL MATTERS.

A provincial legislature has exclusive legislative authority to regulate matters of procedure and evidence in prosecutions under the provincial statutes even where the offence may be termd a "provincial crime" because punishable by fine or imprisonment. The exclusive control given by the B.N.A. Act (s. 91) to the Federal Parliament in respect of "procedure in criminal matters" does not include procedure with reference to the so-called "provincial crimes." [Re McNutt, 10 D.L.R. 834, 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, considered.]

R. v. Covert, 34 D.L.R. 662, 28 Can. Cr. Cas. 25, 10 A.L.R. 349, [1917] 1 W.W.R. 919.

LIQUOR LAWS—PROVINCE AND DOMINION.

A summary conviction purporting to be made under s. 78 of the Liquor License Act, R.S.O. 1914, c. 215, for attempting to tamper with a witness in a prosecution under that act, will not be quashed on the ground that the Ontario Legislature had not authority to deal with the subject-matter, as the Federal Parliament has enacted similar legislation, applicable to prosecutions under provincial liquor laws in the Canada Temperance Act, R.S.C. 1906, c. 152, s. 150, and the magistrate had jurisdiction under the conjoint legislation. R. v. Lawrence, 43 U.C.Q.B. 164, referred to.]

R. v. Armstrong, 31 D.L.R. 82, 26 Can. Cr. Cas. 151, 36 O.L.R. 2.

(§ II A—283) — RESCUING CATTLE FROM POUNDKEEPER.

To rescue cattle from the custody of a poundkeeper while he is taking the cattle to the pound is a criminal offence in Manitoba by virtue of the Imperial Statute, 6-7 Vict., c. 30, there in force (Criminal Code of Canada, 1906, s. 12), and the provisions of that statute supersede the provisions of any municipal by-law purporting to impose penalties for the like offence.

R. v. Laughton, 6 D.L.R. 47, 20 Can. Cr. Cas. 30, 22 Man. L.R. 520, 22 W.L.R. 199.

B. GUARANTY OF RIGHT TO LIFE, LIBERTY AND PROPERTY.

(§ II B—298)—INSOLVENCY—VOLUNTARY LIQUIDATION OF PROVINCIAL COMPANY —ACT OF BANKRUPTCY.

Since the Dominion Parliament has power under s. 91 (21) of the B.N.A. Act, to declare what constitutes insolvency, it may enact that a company, if in process of voluntary liquidation, pursuant to a resolution adopted by its shareholders, may be brought under the provisions of the Dominion Winding-up Act, R.S.C. 1906, c. 144, on the petition of any shareholder, although not actually insolvent, since such voluntary proceeding is to be regarded as a species of insolvency. [Att'y-Gen'l of Ont. v. Att'y-Gen'l of Canada, [1894] A.C. 189; Att'y-Gen'l of Ont. v. Att'y-Gen'l of Canada, [1896] A.C. 348; L'Union St. Jacques v. Belisle, L.R. 6 P.C. 31, and Cushing v. Dupuy, 5 App. Cas. 409, specially referred to.]

Re Colonial Investment Co. of Winnipeg (No. 2), 15 D.L.R. 634, 23 Man. L.R. 871, 5 W.W.R. 822, 26 W.L.R. 361. [Considered in Re Colonial Investment Co. of Winnipeg, 15 D.L.R. 650.]

(§ II B—325)—REGULATION OF BUSINESS, RESTRICTIONS ON RIGHT OF CONTRACT.

No person can legally be deprived of his property without being given an opportunity of being heard and obtaining compensation, and such hearing must be before the proper tribunal, a municipal officer having no jurisdiction in such a case to decree confiscation or destruction.

Montreal v. John Layton & Co., 1 D.L.R. 160.

REGULATION OF BUSINESS — EMPLOYMENT OF WHITE FEMALES IN PLACES OF BUSINESS OF CHINESE OR OTHER ORIENTALS —PROVINCIAL LAW PROHIBITING WITH PENALTIES.

Chapter 17, 2 Geo. V., 1912 (Sask.), prohibiting the employment of white women in any restaurant, laundry, or other place of business or amusement which is kept, owned or managed by a Chinaman, Japanese, or other Oriental person, is not ultra vires, although it imposes fine and imprisonment for its infraction. [Union Colliery Co. v. Bryden, [1899] A.C. 580; Cunningham v. Tomey Homma, [1903] A.C. 151, and Re McNutt, 10 D.L.R. 834, 21 Can. Cr. Cas. 157, 47 Can. S.C.R. 259, referred to.]

Quong Wing v. The King, 18 D.L.R. 121, 49 Can. S.C.R. 440, 23 Can. Cr. Cas. 113,

6 W.W.R. 270, affirming 12 D.L.R. 656, 21 Can. Cr. Cas. 326, 49 C.L.J. 593.

(§ II B—359)—Sale of intoxicating liquor—Provisions of War Measures Act—B.C. Prohibition Act—Operation of.

Paragraphs 5 and 11 of the regulations made and approved March 11, 1918, under the provisions of the War Measures Act, 1914, do not operate to abrogate, annul or supersede the provisions of s. 28 of the B.C. Prohibition Act, but are meant to apply only to sales which the province has no jurisdiction to prohibit.

Re Prohibition Act & Regulations under the War Measures Act, 1914, 44 D.L.R. 584, 30 Can. Cr. Cas. 332, 26 B.C.R. 137.

Regulation of sales of intoxicating liquors.

The Ontario Legislature was acting within its powers in passing s. 13 of Act 2, Geo. V. (Ont.) c. 55, providing that in a municipality in which a by-law, under s. 141 of the Liquor License Act, R.S.O. 1897, c. 245, prohibiting the sale by retail of liquor is in force, a person found upon a street or in any public place in an intoxicated condition owing to the drinking of liquor shall be guilty of an offence against the Liquor License Act aforesaid, and, upon any prosecution for such offence, he shall be compelled to state the name of the person from whom and the place in which he obtained such liquor, and in case of his refusal to do so, he shall be imprisoned for a period not exceeding 3 months, or until he discloses such information. [Hodge v. The Queen, 9 App. Cas. 117, followed.]

R. v. Riddell, 4 D.L.R. 662, 19 Can. Cr. Cas. 400, 3 O.W.N. 1628, 22 O.W.R. 847.

(§ II B—364)—Gold and Silver Marking Act, 7 and 8 Edw. VII. c. 30—Contract — Guaranty — Prevention of fraud.

R. v. Lee, 23 O.L.R. 490, 17 O.W.R. 550.

Offence of being found drunk.

It is competent for a provincial legislature to declare it an offence against its liquor laws for a person to be found in an intoxicated condition in a public place; s. 141 of the Liquor License Act, R.S.O. 1914, c. 215, as amended by 4 Geo. V. (Ont.), c. 3 and 5 Geo. V., c. 39, is, therefore, intra vires, and it is not overridden in counties in which Part II. of the Canada Temperance Act has been proclaimed by anything contained in the latter Act. [Att'y-Gen'l for Ont. v. Atty-Gen'l for Canada, [1896] A.C. 348, applied.]

R. v. Scott, 28 Can. Cr. Cas. 346, 37 O.L.R. 453. [Appeal quashed in 11 O.W.N. 132.]

(§ II B—369)—Animal Contagious Diseases Act — "Property and civil rights."

The Animal Contagious Diseases Act, R.S.C. 1906, c. 75, does not give a right of action to a buyer of animals who suffers damage from a sale which is illegal under that Act. [Ward v. Hobbs, 10 App. Cas. 13, followed.] In interpreting this statute there must be taken into consideration, in addition to the rules applicable to penal statutes generally, the fact that it is a Dominion statute relating to agriculture, and to hold that it gives a right of action for damages would be to hold that parliament intended to legislate not only for public order and safety, but also over "property and civil rights," thereby invading the provincial jurisdiction. Where the field is one wherein there is concurrent jurisdiction such intention should not be found in the absence of express enactment or necessary intent.

O'Mealey v. Swartz (Sask.), 11 S.L.R. 376, [1918] 3 W.W.R. 98.

(§ II B—398)—Against insurance companies.

Where the cause of action arose in the province in which an insurance company was organized and has its head office and principal place of business, suit is not authorized in a different province by the fact that the company has been registered and has a registered office therein, under R.S.B.C. 1911, c. 53, s. 67, which permits a defendant to be sued at the place where he "dwells or carries on business."

Pearlman v. Great West Life Ass'ce Co., 4 D.L.R. 154, 21 W.L.R. 557, 2 W.W.R. 563.

(§ II B—430)—Evidence Act—Assignments and Preferences Act—Examination of assignor — Questions tending to criminate — Criminal law.

Upon the examination, under s. 38 of the Assignments and Preferences Act, R.S.O. 1914, c. 134, of a person, who has made an assignment for the benefit of creditors under the Act, he has no right to refuse to answer questions put to him, on the ground that his answers would tend to criminate him—the privilege to refuse to answer which formerly existed has been abrogated by legislative enactment, now contained in s. 7 of the Ontario Evidence Act, R.S.O. 1914, c. 76, and recognized by the Canada Evidence Act, R.S.C. 1906, c. 145, s. 5 (2). The contention that this privilege was part of the criminal law, and could not therefore be abrogated or restricted except by legislation of the Parliament of Canada, and that the provincial legislation which assumes to take it away is ultra vires, is not well-founded. [Chambers v. Jaffray, 12 O.L.R. 377, approved.] The privilege is a civil right, and may be taken away by a provincial legislature as to matters with respect to which it has authority to legislate, as it has to the matters dealt with by the Assignments and Preferences Act. The question whether sufficient protection has been afforded by the provisions of the Dominion and Ontario Acts to the witness who has been compelled to answer is not for the court, but for Parliament and the

legislature, to determine. Semble, if the privilege were part of the criminal law, it had been abrogated by s. 5 (1) of the Canada Evidence Act, as applied by s. 2 of that Act. The B.N.A. Act, s. 91 (27) and s. 92 (13) and (14), considered.

Re Ginsberg, 38 D.L.R. 261, 40 O.L.R. 136, reversing 27 Can. Cr. Cas. 447, 11 O. W.N. 345.

C. Police power.

(§ II C—440)—Laws for peace, order and good government — Dominion powers.

The general authority to make laws for the peace, order and good government of Canada, which the initial part of s. 91 of the B.N.A. Act confers, does not, unless the subject-matter of legislation falls within some of the enumerated heads which follow, enable the Dominion Parliament to trench on the subject-matters entrusted to the provincial legislatures by the enumeration in s. 92 of the Act. [Russell v. The Queen, 7 App. Cas. 829, followed; Hodge v. The Queen, 9 App. Cas. 117; John Deere Plow Co. v. Wharton, 18 D.L.R. 353, [1915] A.C. 330, referred to.]

Att'y-Gen'l for Canada v. Att'y-Gen'l of Alta. & B.C. (Ins. Case), 26 D.L.R. 288, [1916] 1 A.C. 588, 25 Que. K.B. 187, 34 W. L.R. 192, 10 W.W.R. 405, affirming 15 D.L. R. 251, 48 Can. S.C.R. 260. [Followed in Companies Case, 26 D.L.R. 293.]

(§ II C—500)—Regulation of manufacture and sale.

It is within the legislative powers of the Dominion Parliament to enact as a part of legislation intended to protect the public against fraud that it shall be a criminal offence for a dealer in watch cases or other plated ware to apply a mark to plated goods purporting to guarantee that the plating would last for a specific time or to advertise to that effect; and the prohibited offence may be made a crime and punished as such, regardless of the question of intent to deceive the public and regardless of the fairness or truth of the warranty. (2) Subs. (b) of s. 16 of the Gold & Silver Marking Act, 7 and 8 Edw. VII. (Can.), c. 30, is intra vires.

The King v. Lee, 18 Can. Cr. Cas. 480.

(§ II C—502) — Health regulations — Trade and commerce—Restrictions.

If the aim of a municipal by-law be to provide for the public health as authorized by provincial legislation, the mere fact that it incidentally affects the mode in which persons engaged in trade and commerce shall supply containers or a wrapping for certain classes of goods does not make the subject-matter one of "trade and commerce" exclusively under Federal jurisdiction under the B.N.A. Act.

Re Shelly, 10 D.L.R. 666, 24 W.L.R. 285, 4 W.W.R. 741.

Municipal by-law—Charter—Constitutionality—Notice to Attorney-General.

When in a suit before the Recorder's Court of the City of Montreal, the unconstitutionality of a municipal by-law and of a law of the Quebec Legislature purporting to authorize the city to adopt this by-law is raised the recorder must not give judgment on the merits unless the notice required by art. 114 of the Code of Procedure (Que.) had been given to the Att'y-Gen'l of the province; and if the recorder gives a final judgment on the question without requiring that notice his judgment can be set aside on a writ of certiorari.

Montreal v. Turgeon, 29 D.L.R. 777, 49 Que. S.C. 34, 26 Can. Cr. Cas. 67.

(§ II C—503)—Regulation of sale of intoxicating liquor.

Section 3 of the Dominion Police Act, R.S.C. 1906, c. 92, authorizing the appointment of commissioners of police by the Governor-in-Council and conferring upon them the authority of justices of the peace in matters arising under Dominion laws, is within the legislative powers of the Dominion Parliament. The Dominion Parliament has power to make it a crime to be in possession of liquor for the purpose of giving it or selling it to another person within a defined distance of any public work under construction, and Cr. Code, s. 143, is, therefore, not beyond the legislative power of the Canadian Parliament.

Geller v. Loughlin, 18 Can. Cr. Cas. 461, 24 O.L.R. 18, 19 O.W.R. 318.

(§ II C—505)—Vagrancy offence—Provincial law.

The Superior Court of the Province of Quebec has jurisdiction to entertain a certiorari application in respect of a summary conviction under a Quebec statute, and will grant the preliminary writ of certiorari to bring up the proceedings where the magistrate's jurisdiction is attacked, if the conviction appears to be one under a provincial statute made in the exercise of police powers although for a like offence as is designated vagrancy by Cr. Code, s. 238 (f) —causing public disturbance by being drunk; the provincial jurisdiction in such matters is concurrent with that of the Dominion Parliament unless there is a conflict between the two enactments. [Ex parte Ashley, 8 Can. Cr. Cas. 328; Leonard v. Pelletier, 9 Can. Cr. Cas. 19, 24 Que. S.C. 331, and R. v. Mercier; Mercier v. Plamondon, 6 Can. Cr. Cas. 44, 20 Que. S.C. 288, referred to.]

Ex parte Pelchat, 26 Can. Cr. Cas. 75, 49 Que. S.C. 195.

G. Impairing obligations of contracts.

(§ II G—525)—Impairing obligations of contracts.

A provincial statute is not ultra vires merely because it may operate as a confiscation of private rights the benefit where-

of is thereby applied for the purpose of the public revenue of the province. [Florence Mining Co. v. Cobalt Lake Mining Co., 102 L.T. 375 (P.C.), and 18 O.L.R. 275, specially referred to.]

The King v. The Royal Bank, 2 D.L.R. 762, 4 A.L.R. 249, 20 W.L.R. 929, 1 W.W.R. 1159.

GOLD AND SILVER MARKING ACT—ULTRA VIRES—CONTRACT—GUARANTY—PREVENTION OF FRAUD.

R. v. Lee, 23 O.L.R. 490, 18 O.W.R. 845.

SUNDAY OBSERVANCE—EXCEPTION OF SUNDAY SALES BY CERTAIN RETAILERS, AS SPECIFIED IN MONTREAL BY-LAW—VALIDITY OF BY-LAW.

Kokoliades v. Kennedy, 40 Que. S.C. 306, 30 Que. P.R. 20.

CONSTRUCTION.

Of contracts, see Contracts, II.
Of lease, see Landlord and Tenant.
Of deeds, see Deeds, II.
Of guaranty, see Guaranty; Bonds; Principal and Surety.
Of insurance contract, see Insurance, III.
Of railway franchises, see Railways, II; Street Railways.
Of statutes, see Statutes, II.
Of wills, see Wills, III.

CONTEMPT.

I. WHAT CONSTITUTES.
A. In general.
B. Charge against judge; publication as to pending case or judicial decision.
C. Disobedience.
II. PROCEDURE.

Annotation.

Contempt of Court: 51 D.L.R. 46.

I. What constitutes.

A. IN GENERAL.

(§ I A—1)—BREACH OF COUNSEL'S UNDERTAKING ON CLIENT'S BEHALF—CLIENT'S LIABILITY.

An undertaking given by counsel on behalf of his client, and with the knowledge of the client may be enforced against the client by process of contempt, and in the case of a company by sequestration. [D. v. A. & Co., [1900] 1 Ch. 484, and Milburn v. Newton Colliery (1898), 52 Sol. J. 317, referred to.]

St. Clair v. Stair, 9 D.L.R. 377, 4 O.W.N. 808, 24 O.W.R. 45.

SEIZURE BY GARNISHMENT AFTER JUDGMENT—MARRIED WOMAN—REFUSAL TO ANSWER—CONTEMPT OF COURT—QUE. C.P. 686, 834.

A married woman ordered, as garnishee, to answer certain additional questions, cannot refuse to do so on the pretext that she cannot testify against her husband, or that the rejection of her evidence would then be asked for until the final judgment is rendered, the judgment ordering her to answer is res judicata. If she persists in refusing to answer, she may be imprisoned for contempt of court.

Cole v. Birchenough, 15 Que. P.R. 345.

(§ I A—4)—FILING REPEATED MOTIONS—OPPOSITION.

The fact that after an opposition was dismissed as frivolous another based upon the same ground was filed by the opposant and also dismissed, is not sufficient in itself to constitute a contempt of court by the latter when his attorneys declare that these oppositions were dismissed in their absence and by inadvertence on their part.

Chabot v. Lauzier, 51 Que. S.C. 197.

B. CHARGE AGAINST JUDGE—PUBLICATION AS TO PENDING CASE OF JUDICIAL DECISION.

(§ I B—5)—NEWSPAPER COMMENT.

To support a charge of contempt of court against a newspaper editor for published comment about a pending case, the comment must be such as to manifest that the object is to taint the source of justice and to obtain a result of legal proceedings different from that which would follow in the ordinary course.

Meriden Britannia Co. v. Walters, 25 D.L.R. 167, 24 Can. Cr. Cas. 364, 34 O.L.R. 518.

(§ I B—7)—NEWSPAPER CHARGING MISCONDUCT OF CROWN PROSECUTOR.

For a newspaper to falsely publish pending the prosecution of a criminal charge that the Crown prosecutor had proceeded with the preliminary enquiry without the authority of the Attorney-General and that he was engaged in prosecution and seeking notoriety in the matter, is contempt of court punishable summarily on a moton to the Superior Court of criminal jurisdiction by committal or fine, as tending to impair the administration of justice; the article could not be considered as one directed to a criticism of the Attorney-General's department as a branch of the public service so as to be exempt on that score. [Meriden Britannia Co. v. Walters; Re Lewis, 25 D.L.R. 167, referred to.]

R. v. McInroy; Re Whiteside, 26 D.L.R. 615, 25 Can. Cr. Cas. 49, 9 A.L.R. 232, 32 W.L.R. 764, 9 W.W.R. 846.

BEFORE JUSTICES—JURISDICTION.

A justice of the peace not being police magistrate, district magistrate or magistrate (Cr. Code, s. 607), has no power to commit for contempt for insulting statements made to him by the person being tried under the summary convictions clauses. [Young v. Saylor, 23 O.R. 513, 20 A.R. (Ont.) 645, followed.]

Re Reiben, 30 Can. Cr. Cas. 271, 12 S.L.R. 91, [1919] 1 W.W.R. 648.

C. DISOBEDIENCE.

(§ I C—10)—MOTION TO COMMIT—REFUSAL TO ANSWER QUESTIONS ON EXAMINATION—COMPANY—DIRECTOR.

Powell-Rees v. Anglo-Canadian Mortgage Corp., 8 D.L.R. 944, 4 O.W.N. 499.

FAILURE OF SHERIFF TO EXECUTE WRIT OF REPLEVIN—DEFENCES.

The neglect or refusal of a sheriff to execute a writ of replevin after he had been furnished the statutory indemnity renders him subject to attachment for contempt of court; and it is no defence that at the time the writ was issued the animal therein mentioned was dead or that it was feræ naturæ and consequently not recoverable.

Stewart v. Horne, 24 D.L.R. 602.

HABEAS CORPUS—DISOBEDIENCE OF WRIT BY MILITARY OFFICER — ATTACHMENT — SHERIFF—POSSE COMITATUS.

The refusal of a military officer to obey an order of a judge of the Supreme Court commanding him to appear in court with a draftee in his custody who has applied by way of habeas corpus for his discharge, is not legally justified by the orders of a superior officer not to do so, or by an invalid order-in-council directing military officers to disregard such orders by the court. If the command of the writ of habeas corpus is disobeyed the usual remedy by attachment may be resorted to; and in addition the court may, by appropriate writ, order the sheriff to take the body of the draftee and produce him in court, and in either case if the sheriff meets with resistance his duty is to take with him all able-bodied men in his district and go in person to execute the writ. [Statute of Westminster (2nd) 1285, c. 39, ss. 22-24.]

Re Norton, 13 A.L.R. 457, [1918] 2 W.W.R. 865.

DISOBEDIENCE.

Plaintiff served notice of motion to attach for failure to comply with an order of the court, such notice being returnable before the court at a sittings thereof appointed for trials. On the motion being made, the Chief Justice refused to hear it, but granted a summons returnable in Chambers at Regina for the purpose of the motion. This summons having come on to be heard:—Held, that such applications should not be made to the court at regular sittings appointed for trials. (2) That no procedure for motion to attach being provided in the rules of court, the English practice prevails, and that practice requires notice of motion to be given; the summons was, therefore, irregular, and, as in such proceedings the practice should be strictly observed, the order should be refused.

Vickerman v. Mackenzie, 4 S.L.R. 302.

CONTEMPT OF COURT—WITNESS—REFUSAL TO ANSWER — IMPRISONMENT — C.C.P. ARTS. 330, 834.

A witness is not the judge of the relevancy or irrelevancy of a question and cannot refuse to answer because he believes the question has nothing to do with the case. And if he persists in his refusal, although ordered to answer by the judge, he may be condemned for contempt of court to be imprisoned for a year, or until he should be willing to give his evidence. While there is an appeal to this court from a judgment of the Superior Court ordering coercive imprisonment for contempt of any process or order of court, the subject of such appeal should be limited to an inquiry as to whether or not the forms and rules of law and procedure have been complied with.

Eliasoph v. The Towle Maple Products Co. & The Canada Maple & Exchange, 25 Rev. Leg. 178.

(§ I C—11)—REFUSAL TO ANSWER ON EXAMINATION—SERVICE OF FORMAL ORDER.

An application for an order to commit the defendant for contempt in refusing to answer certain questions on examination in aid of an execution will be denied when based only on the service of a copy of the judge's memorandum of the order he had made directing the defendant to answer where the memorandum did not clearly indicate what questions were directly to be answered; a formal order should first have been taken out in which at least the subject in respect of which the defendant must submit to further examination should be clearly indicated.

Watt v. Knox, 15 D.L.R. 900, 27 W.L.R. 234, 5 W.W.R. 1331.

(§ I C—13)—OF ORDER TO PAY—IMPRISONMENT FOR DEBT ACT.

A debtor cannot be committed for contempt for disobedience of an order directing him to pay the amount of a judgment by instalments, where the circumstances referred to in ss. 15 and 19 of the Arrest and Imprisonment for Debt Act, R.S.B.C. c. 12, do not exist.

Royal Bank of Canada v. McLennan (B.C.), [1917] 3 W.W.R. 953. [Affirmed, 41 D.L.R. 27, 25 B.C.R. 183.]

JUDGMENT RESTRAINING SCHOOL BOARD FROM PAYING SALARIES TO UNQUALIFIED TEACHERS — DISOBEDIENCE BY CHAIRMAN—MOTION TO COMMIT—OBJECTIONS TO MOTION—PRACTICE—MOTION MADE IN ACTION IN WHICH JUDGMENT OBTAINED—RIGHT TO PROCEED AGAINST OFFICER OF CORPORATION—JUDGMENT NOT SERVED ON OFFICER—KNOWLEDGE OF JUDGMENT—EVIDENCE.

Mackell v. Ottawa Separate School Trustees, 12 O.W.N. 265. [See 18 D.L.R. 456, 32 D.L.R. 1, 32 O.L.R. 245, 40 O.L.R. 272, [1917] A.C. 62.]

OF CONSENT JUDGMENT—JURISDICTION OF RAILWAY AND MUNICIPAL BOARD—MANAGER OF COMPANY—FAILURE TO SHEW DUTIES AND POWERS OF.

A judgment pronounced upon the consent of the parties is nevertheless a judgment of the court; and any disobedience of its directions is punishable in the same way as if it had not been based on consent. If it be shewn that the disobedience of a judgment of the court by a corporation is the act of its manager, an order for his committal may properly be made; by r. 553, a judg-

ment against a corporation wilfully disobeyed may be enforced by attachment against the directors or other officers of the corporation; and a manager or other officer who had the power or whose duty it was to do an act which the corporation was ordered to do would come within the rule. But in this case, where it was sought to commit the general manager of the defendant company because the company had neglected or refused to comply with the judgment referred to, an order for his committal was set aside, because there was nothing before the court to shew what his duties or powers were, or that the furnishing of the statement was a duty which, as manager, he had to perform.

Toronto v. Toronto R. Co., 39 O.L.R. 310.

SALE OF PROPERTY BY JUDGMENT DEBTOR TO DEFEAT EXECUTION.

The sale sous seing privé by a debtor of his property before its seizure, but after judgment has been obtained against him, does not subject him to a rule nisi with arrest for contempt of court on the ground that it had prevented the seizure and sale of his property in execution of the judgment.

Latimer v. Gaudet, 48 Que. S.C. 270.

(§ I C—14)—OF INJUNCTION—DISOBEDIENCE OF INJUNCTION—PUNISHMENT LIMITED TO PAYMENT OF PART OF COSTS OF MOTION.

Dean v. Wright, 1 D.L.R. 918.

DISOBEDIENCE OF INJUNCTION FORBIDDING RECEIPT OF MONEY.

A person forbidden by a restraining order from receiving any money out of a railway subsidy fund pending an action for the determination of rights thereunder is bound by the order so long as it remains undischarged, and his acceptance of money in breach of such order constitutes a contempt, although the payments were made by the Crown. [Irvine v. Hervey, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.]

Eastern Trust Co. v. MacKenzie, Mann & Co., 22 D.L.R. 410, [1915] A.C. 750, 113 L.T. 346, 31 W.L.R. 248, reversing decision of Supreme Court of Canada.

INJUNCTION—APPEAL—STAY.

The judgment pronounced at the trial of this action directed the immediate delivery by the defendant to the plaintiffs of possession of the lands in question, and restrained the defendant from trespassing upon or in any way interfering with the plaintiffs' possession. The Trial Judge directed that the defendant should be allowed to occupy the house and barns on the lands "for 15 days, or until appeal, if any, may be had." An appeal having been lodged, and the defendant continuing to occupy the house and barns, the plaintiffs moved for his committal for contempt of court:—Held, that, an appeal having been lodged, the situation was governed by the rules; and the effect of r. 496, coupled with r. 498, was to stay all further proceedings in the action other than the issue of the judgment and the taxation of costs. The effect of the injunction not being stayed (r. 496), but the plaintiffs not being in a position, by reason of the stay of other proceedings, to enforce their judgment for immediate possession, and not being in actual possession —that the defendant was not guilty of a breach of the injunction. The plaintiffs' proper course would be to apply under r. 496 to a judge of a Divisional Court to remove the stay.

Bland v. Brown, 37 O.L.R. 534.

DISOBEDIENCE OF INJUNCTION—NUISANCE—OPERATION OF WORKS—PUNISHMENT—FINES—COMPANY—AGENTS.

Taylor v. Mullen Coal Co., 10 O.W.N. 149. [See also 21 D.L.R. 841, 7 O.W.N. 764, 8 O.W.N. 445.]

CONTEMPT OF COURT—DISOBEDIENCE OF JUDGMENT—SUPPLY OF NATURAL GAS—RIGHT TO CUT OFF—CONTRACT—ORDERS OF COMMISSIONER OF NATURAL GAS—NATURAL GAS ACT, 1918, 8 GEO. V. C. 12, 1919, 9 GEO. V. C. 13—MOTION TO COMMIT—OBEDIENCE TO JUDGMENT SINCE LAUNCHING OF MOTION—COSTS—LEAVE TO APPLY.

Dominion Sugar Co. v. Northern Pipe Line Co., 17 O.W.N. 95.

INJUNCTION — STYLE — SECURITY — SERVICE OF ORDER.

In the issuing of an interlocutory injunction, a failure to comply with the formalities required by law, such as not having previously furnished security for costs and failing to serve upon the defendant an order signed by the judge, but instead only a copy of the petition bearing an indorsement that a temporary injunction had been granted, signed merely with the judge's initials and intituled "temporary injunction," may give occasion for the contestation of the injunction, but will not justify a refusal to obey it. In doing that which is enjoined not to do there is a contempt of court. It is not necessary that an injunction should have been served upon the person restrained in order that he should be obliged to obey it. From the time that he has knowledge that it has been issued he renders himself guilty of contempt of court by doing any act which he is forbidden to perform by the order issued.

Martin v. Tourangeau, 25 Que. K. B. 358, 17 Que. P.R. 327.

FAILURE TO OBEY ORDER—DEFENCE—ILLITERACY.

A defendant against whom a capias has been maintained, and who is condemned to jail and imprisoned for having neglected to comply with an order of the court enjoining him to give himself up to the sheriff, can recover his liberty if he shews that he can neither read nor write, and that he had no knowledge of the order except the plaintiff's right under art. 926 C.C.P.

Myers v. Théort, 54 Que. S.C. 358.

BREACH OF INTERIM INJUNCTION—IGNORANCE.

Carey v. Kansas, 4 O.W.N. 1581.

BREACH OF INJUNCTION—MOTION TO COMMIT — ENFORCEMENT OF OBEDIENCE — STAY OF ORDER FOR COMMITMENT TO PERMIT OF OBEDIENCE BEING RENDERED——TERMS — UNDERTAKING — APOLOGY —COSTS.

Watson v. Jackson, 8 O.W.N. 410.

DISOBEDIENCE OF INJUNCTION — CONSENT JUDGMENT — LOCUS PAENI TENTIAE — UNDERTAKING TO DISCONTINUE MANUFACTURE OF GOODS IN FORM SIMILAR TO THOSE OF PLAINTIFFS—COSTS.

Real Cake Cone Co. v. Robinson, 8 O.W.N. 568.

CONTEMPT OF COURT—DISOBEDIENCE OF INJUNCTION ORDER—INTENTIONAL BREACH —BENEFIT OF DOUBT—ORDER FOR PAYMENT OF COSTS.

Downey v. Burney, 6 O.W.N. 196.

LABOUR UNION—MINE WORKERS—CONTEMPT —DISOBEDIENCE OF ORDER OF COURT RESTRAINING INTERFERENCE WITH BUSINESS—ATTACHMENT.

Cumberland R. & Coal Co. v. McDougall, 9 E.L.R. 289 (N.S.).

II. Procedure.

(§ II — 15) — PROCEDURE — "BENEFIT OF DOUBT," TO DEFENDANT, WHEN.

On an application to commit a defendant for contempt of court for disobeying a judgment restraining him from proceeding with the erection of a building on the ground that it is in contravention of certain building restrictions, any doubt as to the time, construction and meaning of the restrictions should be resolved in favour of the defendant.

Holden v. Pyan, 10 D.L.R. 90, 4 O.W.N. 668, 23 O.W.R. 961. [See also 5 O.W.N. 890.]

WRIT OF ATTACHMENT—NOTICE OF MOTION FOR ORDER TO COMMIT—PERSONAL SERVICE.

The defendant was found to be in contempt for not producing and delivering to the plaintiff the possession of a certain infant, as required by a judgment of the court. The notice of motion was for an order to commit the defendant, and was served upon her personally with a copy of the judgment; but she did not appear upon the return. An order was made, not for committal, but for the issue of a writ of attachment, that being deemed the more appropriate remedy. Rules 545, 546, and 547, considered. Review of the English authorities:—Held, that there was power to order the issue of a writ or attachment, although the notice of motion was for an order to commit. [Piper v. Piper, (1876) W.N. 202, followed.]

Link v. Thompson, 40 O.L.R. 222. [See also 11 O.W.N. 282, 390.]

COMMITTAL OF DEFENDANT—PURGING CONTEMPT — UNDERTAKING — DISCHARGE FROM CUSTODY.

Latchford v. Chartrand, 15 O.W.N. 168.

(§ II—16)—PROCEDURE—IN WHOSE NAME PROSECUTED.

Commitment for disobedience of an injunction restraining the defendant in his disposal of certain property is to be based on a wilful disregard of the order itself, and is a question between the offender and the court, limited so strictly to the actual order that no agreement between counsel for the parties can be read into it to support a commitment not within the strict terms of the order.

J. B. Snowball Co. v. Sullivan, 14 D.L.R. 528, 42 N.B.R. 318, 13 E.L.R. 349.

(§ II—19)—PROCEDURE — AFFIDAVITS — SERVICE ON RESPONDENT.

In launching a motion for an attachment for contempt against the publisher of alleged prejudicial comments on a criminal case pending before a magistrate, copies of the affidavits in support must be served on the respondent with the notice of the motion for a writ of attachment.

R. v. Cook; Re Dennis & McCurdy, 15 D.L.R. 501, 14 E.L.R. 123.

(§ II—22)—OPPORTUNITY TO DEFEND SPECIFIC CHARGE.

A conviction for the criminal offense of contempt of court can be made only where the specific charge against the accused has been distinctly stated and he has been given an opportunity of answering it. [Chang Hang v. Piggott, [1909] A.C. 312, applied; Re Pollard, L.R. 2 P.C. 106, referred to.]

R. v. Evans; Re Fisher, 24 Can. Cr. Cas. 125, 21 B.C.R. 322, 8 W.W.R. 444.

(§ II—23)—PROCEDURE—ONUS ON PROSECUTION—BREACH OF COURT ORDER.

Upon an application to commit the defendant for contempt of court based on an alleged breach of an injunction order, the onus is on the applicant to prove such breach beyond all reasonable doubt.

J. B. Snowball Co. v. Sullivan, 14 D. L.R. 528, 42 N.B.R. 318, 13 E.L.R. 349.

DISOBEDIENCE OF INJUNCTION ORDER—MOTION TO COMMIT—ADJOURNMENT FOR PERSONAL SERVICE OF ORDER.

Toronto Developments v. Kennedy, 5 O. W.N. 470.

III. Power as to.

A. OF NOTARY PUBLIC OR OTHER OFFICER.

(§ III A—25)—DISCOVERY—EXAMINATION OF PERSON AS ASSIGNOR OF CHOSE IN ACTION SUED FOR—REFUSAL TO TESTIFY —JURISDICTION OF MASTER IN CHAMBERS.

Krehm v. Bastedo, 4 O.W.N. 1307, 24 O. W.R. 616.

B. OF COURT.

(§ III B—35)—INTERFERENCE WITH FAIR TRIAL.

The disciplinary power of the court to

punish for contempt the publisher of a newspaper making improper comment on a pending case is to be sparingly and carefully exercised, and it must be shewn that it was probable that the publication would substantially interfere with a fair trial. [Re Finance Union, 11 T.L.R. 167; Skipworth's Case, L.R. 9 Q.B. 219, approved.]

Meriden Britannia Co. v. Walters, 25 D.L.R. 167, 24 Can. Cr. Cas. 364, 34 O.L.R. 518.

CONTEMPT OF COURT — PUBLICATION — INFLUENCING LITIGATION — PERSON CHARGED MUST BE NAMED—CR. CODE, S. 322.

Contempt of court being a criminal offence, the person charged must be specifically named in the application to commit, and an application to amend by adding the name of such person will be refused.

Granger v. Brydon-Jack, 25 B.C.R. 526.

IV. Judgment; punishment.

(§ IV—40)—MANDAMUS — DISOBEDIENCE — SCHOOL TRUSTEES — TOWNSHIP COUNCILLORS — COSTS — SOLICITOR AND CLIENT.

The end to be attained by a motion to commit for contempt of court persons who refuse to obey an order, is obedience, and not vindictive punishment. In contempt cases, solicitor and client costs may be awarded. Where tardy obedience was yielded to orders, made upon the application of ratepayers, directing the trustees of a continuation school to discharge their duty by opening and carrying on the school, and directing the township council to fill vacancies in the board of school trustees, no order was made upon motions to commit the trustees and the members of the council except that the applicants' costs of the motions should be paid out of the corporate funds of the school board and township corporation respectively, and that those costs should be taxed as between solicitor and client. Semble, where a mandamus is granted and treated with contempt, the extreme remedy found in r. 552 is open and appropriate.

Re West Nissouri Continuation School, 38 O.L.R. 478.

SEVERAL OFFENDERS — COSTS — DIFFERENT PENALTIES.

Bernier v. Quebec & Levis Ferry Co., 39 Que. S.C. 193.

DISOBEDIENCE OF INJUNCTION.

Broom v. Goodwin, 17 O.W.R. 629, 2 O. W.N. 321, affirmed by Divisional Court, 2 O.W.N. 566, 18 O.W.R. 92.

MOTION TO COMMIT—FORUM—PRACTICE—RIGHTS OF NEWSPAPERS — UNFAIR COMMENT PREJUDICING FAIR TRIAL—JURY — "TRIAL BY NEWSPAPER" — PUNISHMENT FOR CONTEMPT.

Hatfield v. Healy, 18 W.L.R. 512, 3 A.L.R. 327.

DISOBEDIENCE OF MANDATORY ORDER — ATTACHMENT OF COUNTY COUNCILLORS — SERVICE OF ORDER ON COUNCILLORS.

Re Bolton & County of Wentworth, 23 O.L.R. 390, 18 O.W.R. 795.

RETURN OF ELECTION MADE BY RETURNING OFFICER — INJUNCTION — BREACH OF, BY AGENT OF DEFENDANT.

Davis v. Barlow, 20 Man. L.R. 158. [See 21 Man. L.R. 265.]

V. Purging for contempt.

(§ V—50)—PURGING CONTEMPT—INJUNCTION.

Where the defendant moves to dissolve an injunction restraining him "until further order from interfering with the plaintiff in his use and occupancy of" certain premises, and where upon this motion coming up for hearing it appears that a prior motion to commit the defendant for breach of the injunction had been instituted, the motion to commit will, under the Alberta practice, take precedence over that to dissolve, and, it appearing that the defendant had been guilty of contempt by disobeying the injunction, such contempt must be purged before the application to dissolve will be heard.

Hart v. Brown, 9 D.L.R. 560, 23 W.L.R. 295.

CESSATION OF ACT NOT PURGING—IRREGULARITIES.

A contempt by disobedience of the court's injunction is not purged by mere cessation from the act giving rise to it; a technical irregularity in the motion to commit by reason of noncompliance with r. 298 (Ont.), may be condoned by the court. [Re. 183, 184, applied; Petty v. Daniel, 34 Ch. D. 172; Rendell v. Grundy, [1895] 1 Q.B. 16, followed; McDonald v. Lancaster School Trustees, 24 D.L.R. 868, 34 O.L.R. 346, affirming 31 O.L.R. 360, referred to.]

McDonald v. Lancaster Separate School Trustees, 29 D.L.R. 731, 35 O.L.R. 614.

CONTEST.

Of elections, see Elections, IV.
Of will, see Wills, I.

CONTINUANCE AND ADJOURNMENT.

I. IN GENERAL.
II. GROUNDS FOR.
III. AFFIDAVITS FOR.

I. IN GENERAL.

(§ I—1)—INHERENT JURISDICTION "TO ENTER CONTINUANCES" FROM COURT TO COURT, NUNC PRO TUNC.

Where an Appellate Court is permanent and continuing, it has inherent power to adjourn from one sitting to another and in a proper case "to enter continuances" from court to court, nunc pro tunc, by virtue of which a pending appeal may, where a hearing day has been allowed to pass, be revived and brought to a hearing. [R. v. Justices of Oxfordshire, 1 M. & S. 446; R. v.

Justices of Westmoreland, 37 L.J.M.C. 115, applied.]

R. v. Gregg, 13 D.L.R. 770, 22 Can. Cr. Cas. 51, 6 A.L.R. 234, 25 W.L.R. 183, 4 W.W.R. 1345.

DISCRETION OF MAGISTRATE.

Unless it appears that the refusal of a magistrate to grant an adjournment of the hearing results in the accused being prevented from making his "full answer and defense" (Cr. Code, s. 715), the magistrate's bona fide exercise of discretion cannot be reviewed. [R. v. Irwing, 14 Can. Cr. Cas. 489, referred to.]

R. v. Tally, 21 D.L.R. 651, 23 Can. Cr. Cas. 449, 8 A.L.R. 453, 7 W.W.R. 1178, 39 W.L.R. 396.

IN GENERAL—TERMS—LEAVE TO SELL LAND PENDENTE LITE.

Topper v. Birney, 4 O.W.N. 879, 24 O.W.R. 246.

TRIAL—POSTPONEMENT.

Langworthy v. McVicar, 6 O.W.N. 376.

TAXATION OF COSTS—DISMISSAL OF WINDING-UP PETITION — WITNESS FEES — DURATION OF INQUEST—POSTPONEMENT —TARIFF—QUE. C.P. 554.

When the roll is too heavy (during the vacation) for the presiding judge to hear the case, such an adjournment does not constitute a postponement, according to the terms of the lawyers' tariff. Item 45 applies only when a postponement takes place with the consent of the parties when the court is ready to hear the case, or when the case is postponed at the request of one of the parties, when the other party was ready.

Beaudin v. Union Abitibi Co., 16 Que. P.R. 228.

(§ I—2)—FOR CROSS-EXAMINATION—WHEN REFUSAL JUSTIFIED.

The court hearing a prohibition motion has a discretion to refuse an adjournment for the purpose of cross-examination upon an affidavit, where the adjournment would be against justice.

Re Buchanan, 15 D.L.R. 232, 23 Man. L.R. 943, 26 W.L.R. 447.

LIMITATIONS OF, CRIMINAL.

The delay of 8 clear days which must not be exceeded between two remands upon a preliminary enquiry does not apply to the case of an accused who is held on bail. The Cr. Code, s. 679, in stating that the accused cannot be detained in prison more than 8 clear days between two adjournments ipso facto permits an adjournment until the ninth day, as the statute expressly provides that the day following the remand is to be counted as the first day.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

(§ I—3)—DATE OF ADJOURNMENT.

The court may extend the time for renewing a motion if it has lapsed through a misunderstanding as to the date to which the previous motion was enlarged, particularly where the enlargement was not recorded. Where there are no fixed days for holding Chambers, and an enlargement is made of a summons upon an application to vary the clerk's report, and for other purposes, until after vacation, without a date being fixed for hearing the application, it need not be taken up on the first day after vacation when Chambers may be held, but may be heard at any time upon giving the opposite party 2 clear days' notice.

Lavallee v. C.N.R. Co., 4 D.L.R. 375, 4 A.L.R. 188, 21 W.L.R. 180, 1 W.W.R. 715.

(§ I—4)—CRIMINAL LAW—SUMMARY TRIAL BY MAGISTRATE—ADJOURNMENT SINE DIE FOR DELIBERATION.

Where the magistrate who had heard the evidence on a summary trial had adjourned to a fixed date for judgment but, being unable to then attend, another magistrate took his place and further adjourned the case sine die, the conviction recorded by the first magistrate at a later date when the accused was again brought before him is invalid, as any adjournment must be to a day certain. [See R. v. Morse, 22 N.S.R. 298; R. v. Quinn, 2 Can. Cr. Cas. 153; Plante v. Cliche, 17 Can. Cr. Cas. 43, 38 Que. S.C. 542; Cairns v. Choquet, 3 Que. P.R. 25; R. v. Smith, 16 Can. Cr. Cas. 432; Donahue v. Recorder's Court, 18 Can. Cr. Cas. 182; Ex parte Giberson (No. 3), 18 Can. Cr. Cas. 355; Dick v. The King, 19 Can. Cr. Cas. 44.]

R. v. Wilson, 19 D.L.R. 797, 23 Can. Cr. Cas. 256, 1 W.W.R. 160.

ADJOURNMENT FOR JUDGMENT IN SUMMARY PROCEEDINGS.

A summary conviction by two justices following a reservation of judgment to a fixed date is not invalid because then delivered by one of them in the unavoidable absence of the other, where both had met on a prior day and had then concurred in written reasons for judgment and signed the formal conviction. [Ex parte McCorquindale, R. v. Haines (1908), 15 Can. Cr. Cas. 187, 39 N.B.R. 49, discussed.]

R. v. Armstrong, 31 D.L.R. 82, 26 Can. Cr. Cas. 151, 36 O.L.R. 2.

SUMMARY PROCEEDINGS—RESERVING JUDGMENT WITHOUT FIXING DATE.

In the absence of prejudice to the accused, a summary conviction by a justice is valid, although there had been an adjournment without any date fixed for rendering judgment, if the magistrate beforehand has given notice to the solicitor for the accused. [R. v. Quinn, 2 Can. Cr. Cas. 153, distinguished.]

Bedard v. The King, 30 D.L.R. 326, 26 Can. Cr. Cas. 99, 22 Rev. Leg. 302.

SUMMARY CONVICTION — ADJOURNMENT WITHOUT DAY.

It is a ground for certiorari that a judgment of a summary conviction was pronounced in the absence of the accused at a date later than that at which the evidence was concluded but without formal anounce-

ment to the parties of the time when judgment would be delivered.

Ex parte Pelchat, 26 Can. Cr. Cas. 75, 49 Que. S.C. 195.

CANCELLING POSTPONEMENT.

The judge at the Assizes may, after postponing till the next Assizes the trial of a person accused of murder on account of the absence of a witness, order the trial to be proceeded with at the same Assizes if the witness is produced.

R. v. Reed, 21 Man. L.R. 785.

If on the hearing of a summary conviction matter, counsel for the complainant and for the accused agree that judgment may be reserved without fixing a date for same, other than that the decision shall be given within one week, and shall be notified to the respective solicitors, and the magistrate acquiesces in and conforms to such arrangement, he does not thereby lose jurisdiction and a conviction made within the week should not be set aside.

R. v. McKenzie, 17 Can. Cr. Cas. 372, 44 N.S.R. 474.

PRELIMINARY ENQUIRY ADJOURNED MORE THAN EIGHT DAYS—CONSENT OF ACCUSED—IRREGULARITY—EFFECT ON RECOGNIZANCE.

Re Burns' Bail, 17 Can. Cr. Cas. 292.

STATUTE LIMITING PERIOD FOR ADJOURNMENT OF "HEARING."

Plante v. Cliche, 17 Can. Cr. Cas. 43, 38 Que. S.C. 535.

POSTPONEMENT OF PROCEEDINGS—ALLEGED SETTLEMENT—MOTION TO HAVE QUESTION TRIED BEFORE FURTHER PROCEEDINGS ARE TAKEN IN CASE.

Northern Crown Bank v. Matzo, 3 O.W.N. 373, 20 O.W.R. 614.

II. Grounds for.

(§ II—5)—TO PRODUCE EXPERT TESTIMONY AS TO FUNCTION OF DYNAMITE—CAUSE OF EXPLOSION.

It is a proper exercise of discretion in refusing to adjourn a trial for the purpose of enabling a defendant, who had been unaware of the turning point in a case as to the cause of an explosion, to obtain expert testimony as to the action of dynamite, where the evidence at the trial shews that the injuries were caused by contact with an unexploded hole, in contravention of statutory regulations, and not with loose powder in the muck.

Doyle v. Foley-O'Brien, 22 D.L.R. 872, 34 O.L.R. 42. [Affirmed by Can. Sup. Ct.; see 9 O.W.N. 494.

GROUNDS—TERMS—POWERS OF MASTER IN CHAMBERS.

Armstrong v. Armstrong, 10 D.L.R. 856, 4 O.W.N. 1340, 24 O.W.R. 633.

MOTION TO POSTPONE TRIAL.

Laycock v. Speers, 11 D.L.R. 836, 24 W.L.R. 812, 4 W.W.R. 1118.

GROUNDS FOR—FOREIGN COMMISSION.

Grocock v. Edgar Allen & Co., 4 O.W.N. 1406, 24 O.W.R. 702.

GROUNDS FOR—ATTENDANCE IN PARLIAMENT.

The plaintiff who is a member of the House of Commons has not, for that reason alone, a right to have the trial of his action stayed during a session even if he is to give evidence himself but the court will order a stay if he advances sufficient reasons for wishing to absent himself.

Forget v. Simmeler, 14 Que. P.R. 335.

(§ II—6)—ABSENCE OF COUNSEL.

The magistrate has a discretion to grant an adjournment of the hearing in order that the defendant may obtain counsel, but where the accused failed to ask for counsel or for an adjournment until after the evidence for the prosecutor was closed, the magistrate's refusal to adjourn will not invalidate the conviction.

The King v. Pfister, 19 Can. Cr. Cas. 92, 3 O.W.N. 440.

(§ II—7)—CRIMINAL TRIAL—AFFIDAVITS.

An application by the accused to postpone a criminal trial because of the absence of his witnesses is to be made after plea pleaded, and although in an ordinary case an affidavit in common form is sufficient, yet where from the nature of the case, or from the affidavit on the opposite side, the court has reason to suspect that the application is not made bona fide for the purpose of obtaining material evidence but merely for delay, the court will require to be satisfied specially by affidavit (a), that the persons are material witnesses; (b) that there has been no neglect in omitting to apply to them and endeavouring to procure their attendance, and (c) that there is reasonable expectation of counsel being able to procure their attendance at the future date if a postponement be granted. [R. v. D'Eon, 1 W. Bl. 510, 3 Burr. 1513, 96 Eng. R. 295, applied.]

R. v. Mulvihill, 18 D.L.R. 189, 22 Can. Cr. Cas. 354, 19 B.C.R. 197, 26 W.L.R. 955, 9 W.W.R. 1229. [Affirmed in 18 D.L.R. 217.]

(§ II—8)—CRIMINAL TRIAL—PREJUDICE OF JURY BY PRESS COMMENTS.

The postponement of a criminal trial should be ordered on motion of the accused, where the court is satisfied upon the affidavits filed on the motion that the minds of the jurymen in attendance have been affected to the prejudice of the accused by the publication of press notices stating that the accused had confessed the crime. [R. v. Davies, [1906] 1 K.B. 32, approved.]

R. v. Willis, 9 D.L.R. 646, 23 Man. L.R. 77, 49 C.L.J. 309, 23 W.L.R. 702, 4 W.W.R. 761.

TRIAL—POSTPONEMENT—GROUNDS.

Wilkinson v. Mail Printing Co.; Wilkinson v. Hamilton Spectator Co., 2 O.W.N. 644, 18 O.W.R. 277.

POSTPONEMENT—GROUNDS—ILLNESS OF NECESSARY AND MATERIAL WITNESS.

Smith v. Lennox, 2 O.W.N. 831, 870, 18 O.W.R. 385.

III. Affidavits for.

(§ III—10)—Third-party procedure—Affidavit of merits.

The filing of an affidavit of merits is a condition precedent to the postponement of the hearing of a defendant's application for an order for directions under O. XVI., r. 52, at the instance of a third party, in order to cross-examine a plaintiff on his affidavits.

Paterson v. Hodges, 20 B.C. R. 598.

Absence of witness—Failure to shew nature of expected testimony.

Cinnamon v. Woodmen of the World, 4 O.W.N. 1042, 24 O.W.R. 379.

CONTRACTORS.

See Contracts; Mechanics' Liens.

Annotation.

Sub-contractors—Status of, under Mechanics' Lien Acts: 9 D.L.R. 105.

CONTRACTS.

I. Nature; form and requisites.
- A. In general.
- B. Implied agreement.
- C. Consideration.
- D. Meeting of minds; definiteness; offer and acceptance.
- E. Formal requisites; Statute of Frauds.
- F. Incorporating extrinsic document.
- G. Merger.

II. Construction.
- A. In general.
- B. Entirety.
- C. Time.
- D. Particular words, phrases and cases.

III. Validity and effect.
- A. In general.
- B. Illegal by express provision.
- C. Public policy.
- D. Gambling and wager contracts.
- E. In restraint of trade.
- F. Ratification; validating; holding out as agent.
- G. Remedies; proceeds of unlawful contract.

IV. Performance; breach.
- A. In general.
- B. Excuse for failure of performance.
- C. Incomplete performance; sufficiency of performance.
- D. Condition; certificate of performance.
- E. Breach and its effect.
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V. Change or extinguishment.
- A. In general.
- B. Termination.
- C. Rescission; cancellation.

VI. Actions; liabilities.
- A. In general.
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VII. Public contracts.
- A. In general.
- B. Advertisements and bids; letting.

VIII. Wrongful interference with.

Of corporations generally, see Companies; Municipal Corporations; Associations.

Mistake as affecting, see Mistake.

Relief from penalties or forfeitures, see Forfeiture.

Assignment of, see Assignment.

Limitation of liabilities, see Carriers, II.

Measure of damages for breach, see Damages.

Admissibility of parol evidence as to, see Evidence, VI.

Of guaranty, see Guaranty; Bonds; Principal and Surety.

Power of married woman to contract, see Husband and Wife.

By incompetent persons, see Insane Persons; Infants.

Injunction to protect contract rights, see Injunction, I C.

Of insurance, see Insurance.

As to when Statute of Limitations begins to run, see Limitations of Actions.

As to Mortgages, see Mortgage.

For partnership, see Partnership.

By agent, see Principal and Agent; Brokers.

Registration requirements, see Registry Laws; Bills of Sale; Chattel Mortgage; Land Titles; Deeds; Mortgage.

Of sale of goods, see Sale.

Specific performance of, see Specific Performance.

For purchase of land, see Vendor and Purchaser; Land Titles.

Effect of war, contracts with alien enemies, see Aliens.

As affected by moratorium, see Moratorium.

Premature action arising from, see Action.

Annotations.

Construction; "Half" of a lot; division of irregular lot: 2 D.L.R. 143.

Directors contracting with Corporation; manner of: 7 D.L.R. 111.

Distinction between penalties and liquidated damages: 45 D.L.R. 24.

How affected by moratorium: 22 D.L.R. 865.

Effect of war on contracts with alien enemies: 23 D.L.R. 375.

Building contracts; architects' duty to employer: 14 D.L.R. 402.

Extras in building contracts: 14 D.L.R. 740.

Failure of consideration; recovery of consideration by party in default: 8 D.L.R. 157.

Failure of contractor to complete work on building contract: 1 D.L.R. 9.

Illegality as affecting remedies; relief: 11 D.L.R. 195.

Money had and received; consideration; failure of; loan under abortive scheme: 9 D.L.R. 346.

Oral contract: Statute of Frauds; signature; effect of admission in pleading: 2 D.L.R. 636.

Part performance; acts of possession and the Statute of Frauds: 2 D.L.R. 45.

Part performance excluding the Statute of Frauds: 17 D.L.R. 534.

Restrictions in agreement for sale as to user of land: 7 D.L.R. 614

Statute of Frauds; signature of a party when followed by words shewing him to be an agent: 2 D.L.R. 99.

Stipulation as to engineer's decision; disqualification: 16 D.L.R. 441.

Time; when time of essence of contract; equitable relief from forfeiture: 2 D.L.R. 464.

Rescission for misrepresentation; waiver: 21 D.L.R. 329.

Rescission of contract for fraud and damages for deceit: 32 D.L.R. 216.

Commission of brokers; Real estate agents; sufficiency of service: 4 D.L.R. 531.

Payment of purchase money; vendors inability to give title: 14 D.L.R. 351.

Rescission for want of title in vendor: 3 D.L.R. 795.

Vague and uncertain: specific performance of: 31 D.L.R. 48.

I. Nature; form and requisites.

A. In general.

Validity, want of corporate seal, see Companies, IV D—85.

Municipal contracts, seal, see Municipal Corporations, II D—140.

Of ecclesiastical corporation, seal, see Religious Institutions, VII—50.

(§ I A—2)—Parties.

The mere fact that the owner of land who had sold it at an inadequate price was an old man nearly 80 years of age, does not make the contract of sale unenforceable where no suggestion of any other incapacity appears on the record.

Baxter v. Rollo, 5 D.L.R. 764, 18 B.C.R. 769, 21 W.L.R. 892, 2 W.W.R. 786.

Sealed Instruments—Agency—Purchase of land.

A contract under seal is only binding upon those who sign it, and an agreement under seal for the purchase of land, which is executed by one of two purchasers, cannot, even on the principle of agency, bind the other who was not a party to it. [Re International Contract Co., 6 Ch. App. 525, followed.]

Smith v. Yorkshire Guarantee Co., 27 D.L.R. 412, 22 B.C.R. 1, 34 W.L.R. 410, 10 W.W.R. 475.

B. Implied agreement.

(§ I B—5)—Implied contract or term of contract.

Where the language of the contract and the circumstances under which it was entered into lead to the inference that a stipulation not expressed in the writing must have formed a part of the bargain, the court may consider such unexpressed stipulation as an implied term of the contract.

Contractors' Supply Co. v. Hyde, 2 D.L.R. 161, 3 O.W.N. 723.

Implied agreement.

Where a real estate agent knowing of a possible buyer of property not listed with him interviews the owner and submits an offer upon a form of "offer and acceptance" and the acceptance form contains in addition to the formal acceptance of the offer an agreement with the agents to pay them the usual commission, then if the owner asks the agent to submit offers and does not repudiate any liability to pay commission, a contract will be implied to employ the agent and to pay him the usual commission if he effects a sale, although the owner does not at any time sign such formal agreement to pay commission.

Singer v. Russell, 1 D.L.R. 646, 25 O.L.R. 444, 21 O.W.R. 24.

Money paid—Implied request—Charge on land created by purchaser in possession—Subsequent rescission of sale—Payment of charge by vendor—Charge improperly registered—Right of vendor to recover from purchaser C. S. of 1908. (Sask.)—Seed grain lien—Right of registrar to register lien against land of which party creating lien not registered owner or owner under agreement for sale as shewn by caveat registered.

Otis v. Weedmark, 4 S.L.R. 531.

Sale of land—Purchase—Price payable by instalments—Land to be conveyed on completion of payments—No express covenant to purchase money—Implication of such covenant.

Where a purchaser agrees to purchase land at a named price payable by instalments and providing for the conveyance of the land on completion of the payment, though there is no express covenant by the purchaser to pay the purchase-money, such a covenant may be implied.

Hiebert & Doern v. Griesbrecht, [1919] 2 W.W.R. 24.

(§ I B—6)—To pay for services.

Where a railway company which was unable at the time to definitely award a contract, by telegram guaranteed to the plaintiff that in the event of a contract for the construction of a portion of its road not being awarded him, the cost, as well as ten per cent advance on all contractor's supplies placed by him on the ground, upon it becoming apparent that such contract would not be awarded him, a new contract does not arise from a subsequent promise of the company to assume the liability imposed by such telegram; such promise was, however, an admission that the alternative provision for paying such cost and percentage had come into effect.

Alfred and Wickham v. G.T.P.R. Co., 5 D.L.R. 154 and 471, 20 W.L.R. 111, 1 W.W.R. 622.

Implied agreement to pay for services.

When three cosureties on a contractor's

bond enter into an agreement in writing, appointing one of their number to represent all and authorizing their appointee to do all things necessary for the carrying on of the work, a contract will be implied to pay the active surety a reasonable remuneration for his services.

Cadwell v. Campeau, 3 D.L.R. 555, 3 O.W.N. 616, 21 O.W.R. 263.

TO PAY FOR SERVICES—PROMISE OF LEGACY.

Where a person often served as the testator's guide for fishing and hunting, without an agreement as to wages, but by the testator's promise that he would provide for him in his will, which he did not do, a universal legatee must pay the value of the services of such persons for the period of time not prescribed.

Leplante v. Archambault, 24 Rev. Leg. 458.

(§ I B—8)—BETWEEN RELATIVES.

Where there has been no agreement for payment of any definite amount as remuneration for personal services in looking after an aged person, the fact that a fixed monthly allowance had been for a long time paid and accepted, will not bar a claim for a larger allowance for a later period, during which the services were more onerous by reason of the illness of the aged person during which the usual allowance was not paid.

Smith v. Hopper, 3 D.L.R. 339, 3 O.W.N. 1039, 21 O.W.R. 891.

SERVICES RENDERED BY NIECE—PRESUMPTION.

The defendant had at her request brought her aunt to her (the defendant's) house; the aunt, who was suffering from an incurable disease, continued to live with and be cared for by the defendant for nearly a year, when the aunt and the defendant both went to reside with defendant's sister, where the defendant looked after the aunt until her death. The court held, under the circumstances of the case, that large sums of money paid by the aunt to the defendant were intended to enable the defendant to defray the costs of maintenance, nursing, medical supplies and other necessaries of the aunt, and that, in accounting, the defendant was entitled to a reasonable sum for her services in addition to the money disbursed on the aunt's account. The evidence was sufficient to rebut the presumption of gratuitous service on account of the relationship.

Mercantile Trust Co. of Canada v. Campbell, 43 D.L.R. 388, 43 O.L.R. 57, reversing 13 O.W.N. 144.

SERVICES RENDERED TO SISTER—ACTION AGAINST ADMINISTRATOR — QUANTUM MERUIT.

Ridley v. Bly, 9 O.W.N. 352.

AGREEMENT TO REMUNERATE DAUGHTER FOR SERVICES—ACTION AGAINST EXECUTORS—CORPORATION—REMUNERATION COMMENSURATE WITH SERVICES—LIMITATIONS ACT, R.S.O. 1914, C. 75, S. 49(g).

Mather v. Fidlin, 10 O.W.N. 229.

(§ I B—9)—IMPLIED AGREEMENTS—PURCHASE PRICE PAYABLE WHEN OTHER GOODS SOLD.

Under an agreement that payment for goods is to be made when certain other goods then in the possession of the buyer were sold by him, there is an implied agreement that such goods are to be sold within a reasonable time, and in the absence of very special circumstances the keeping of such goods for 6 years after the contract was made is not selling them within a reasonable time.

Winterburn v. Boon, 10 D.L.R. 621, 6 S.L.R. 177, 23 W.L.R. 556, 3 W.W.R. 1068.

TIME IN WHICH CONTRACTS ARE TO BE PERFORMED.

Where a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do the act within a reasonable time under the circumstances; and, if some unforseen cause over which he has no control prevents him from performing what he has undertaken within that time, he is responsible for the damage. [Ford v. Cotesworth, L.R. 4 Q.B. 127, followed.]

Webber v. Copeman, 7 D.L.R. 58, 5 S.L.R. 262, 21 W.L.R. 961, 2 W.W.R. 882.

C. CONSIDERATION.

(§ I C—10)—CONSIDERATION FOR OPTION—EFFECT OF REDATING ON TIME LIMIT.

Where an option is given for a consideration for a limited time from its date and is later amended, and redated as of the date of the amendment without further payment, the amended option as to the time for which no consideration was paid is a new agreement without consideration, and is revocable at any time before acceptance.

Archdekin v. McDonald, 1 D.L.R. 664, 20 W.L.R. 595, 1 W.W.R. 1014.

PROMISE BY THIRD PARTY—RIGHT OF ACTION.

A promise or undertaking by a third party to a debtor to pay his debt does not give the creditor any right of action against the promissor.

Canadian Moline Plow Co. v. Trea, 39 D.L.R. 581, 13 A.L.R. 354, [1918] 1 W.W.R. 645.

(§ I C—12)—FOR OPTION.

Where the plaintiff relies on an extension of an existing option to purchase land, or the making of a new option, it is necessary for the plaintiff to prove that he gave consideration for the same.

Adamson v. Vachon, 8 D.L.R. 240, 5 S.L.R. 400, 22 W.L.R. 494, 3 W.W.R. 227.

OPTION TO PURCHASE LAND.

When a right to purchase is part of a demise of lands, there is consideration; when the option is exercised before revocation mutual obligations are created.

Bennett v. Stodgell, 28 D.L.R. 639, 36 O.L.R. 45.

CONSIDERATION—OPTION GIVEN TENANT TO PURCHASE DEMISED LANDS—REVOCATION.

An option given in a lease to a tenant to purchase the demised premises at any time during the term, is based on a sufficient consideration, i.e., the creation of the tenancy, and is not revocable at the will of the lessor, although not under seal.

Mathewson v. Burns, 18 D.L.R. 287, 30 O.L.R. 186, reversing on other grounds, 12 D.L.R. 236, 4 O.W.N. 1477. [Reversed by Canada Supreme Court, 18 D.L.R. 399.]

(§ I C—14)—ILLEGAL CONSIDERATION—RECOVERY BACK.

Where the consideration upon which an agreement to give money or property or a security is illegal, e.g., the stifling of a criminal prosecution, the money or property cannot be recovered back or the security set aside at the instance of the person who has agreed to give it, on the ground of the illegality of the transaction, if it is no longer executory but has been carried into execution. [Wood v. Adams, 10 O.L.R. 631; Jones v. Merionetshire Permanent Bldg. Society, [1892] 1 Ch. 173, referred to.]

Fairweather v. McCullough, 43 D.L.R. 525, 43 O.L.R. 299, affirming 14 O.W.N. 175.

MONEY GIVEN TO WOMAN FOR IMMORAL PURPOSE—ACTION BY DONOR TO RECOVER MONEY—CLAIM ARISING EX TURPI CAUSA—IN PARI DELICTO MELIOR EST CONDITIO POSSIDENTIS.

Charezin v. Tucker, 16 O.W.N. 151.

(§ I C—15)—FAILURE OF CONSIDERATION—SHARES—COMPANY NOT FORMED.

There is an important distinction between the interest which a shareholder has in a lease owned by the company and the interest a partner has in a lease owned by the partnership; and an agreement, whereby one agrees to assign his share of commissions earned in the negotiation of oil leases in consideration of shares to be issued to him out of a company to be formed in taking over those leases, does not, in the absence of positive evidence that he shall become a joint owner or partner of the leases, effectuate the creation of such an interest therein as debarring him from retaining his commissions upon a failure of consideration resulting from the nonflotation of the company.

Adams v. Acheson, 26 D.L.R. 633.

CONSIDERATION — NECESSITY, LACK OF — WRITING SILENT AS TO — EFFECT — ONUS.

The plaintiff suing upon a written agreement which discloses on its face no consideration whatever for the obligation sought to be enforced must allege and establish the consideration.

Rainboth v. O'Brien, 20 D.L.R. 654.

CONSIDERATION—FAILURE.

Neostyle Envelope Co. v. Barber-Ellis, 16 D.L.R. 871, 6 O.W.N. 43, reversing 12 D.L.R. 385, 4 O.W.N. 1585.

(§ I C—16)—SETTLEMENT OF ACTION.

The settlement of an action is a sufficient consideration for a promise to pay a sum in addition to the amount agreed upon by the settlement.

MacEwan v. Toronto General Trusts Co., 35 D.L.R. 435, 28 Can. Cr. Cas. 387, 54 Can. S.C.R. 381, reversing 29 D.L.R. 711, 36 O. L.R. 244.

(§ I C—17)—FOR LICENSE TO USE PATENT.

A licensee of a patent of invention is not permitted during the term of such license to shew a failure of consideration therefor by reason of the alleged invalidity of the patent where there was no warranty of the patent and no fraud.

The Imperial Supply Co. v. The G.T. R. Co., 1 D.L.R. 243, 13 Can. Ex. 507, 10 E.L.R. 414.

(§ I C—20)—CONSIDERATION—SUFFICIENCY—PAST SERVICES RENDERED WITHOUT PREVIOUS REQUEST.

A promise to compensate a person for past services rendered as an act of mere friendliness, and without a previous request, will not support a subsequent promise to pay therefor, nor entitle the promisee to sue for a quantum meruit.

Grant v. Von Alvensleben, 13 D.L.R. 381, 18 B.C.R. 334, 25 W.L.R. 108, 4 W.W.R. 1303.

CONSIDERATION FOR COVENANT IN RESTRAINT OF TRADE—REASONABLENESS—INJUNCTION.

Berliner Gramophone Co. v. Scythes, 31 D.L.R. 789, 9 S.L.R. 365.

The employment forms a sufficient consideration for a covenant by an employee in restraint of his trade.

George Weston v. Baird, 31 D.L.R. 739, 37 O.L.R. 514.

(§ I C—25)—INADEQUACY AS GROUND FOR REFUSING SPECIFIC PERFORMANCE.

Specific performance will not be refused on the sole ground of inadequacy of consideration unless the disparity in price is so great as to shock the conscience and constitute in itself a badge of fraud.

Baxter v. Rollo, 5 D.L.R. 764, 18 B.C.R. 369, 21 W.L.R. 892, 2 W.W.R. 786.

(§ I C—26)—TO WILL PROPERTY.

A binding contract arises from the performance, by a woman, of household work, for a man in consideration of his promise to make her a testamentary gift of all of his property. [See also McGugan v. Smith, 21 Can. S.C.R. 263, and Kinsey v. National Trust Co., 15 Man. L.R. 32.]

Legeas v. Trusts and Guarantee Co., 5 D.L.R. 389, 4 A.L.R. 190, 20 W.L.R. 172, 1 W.W.R. 802.

PROJECT TO KEEP BOARDERS—RELINQUISHMENT OF—VALID CONSIDERATION—LIFE ANNUITY.

The relinquishment by a niece of the testator of a project of keeping boarders, in order to support herself and her mother, held to have been a valid consideration for an agreement by the testator to provide her with a life annuity. A compromise of a disputed claim which is honestly made con-

stitutes valuable consideration, even if the claim ultimately turns out to be unfounded.

Francis v. Allan, 44 D.L.R. 501, 57 Can. S.C.R. 373, reversing 43 O.L.R. 479.

MAINTENANCE OF AGED—MONEYS IN JOINT ACCOUNT—PERSONAL REPRESENTATIVES.

Where a letter addressed to a bank in which deceased had his moneys deposited, directing the bank to open an account in the names of the deceased, his wife, and daughter, and authorizing the bank to pay all moneys to the credit of such account to any one of the three and the survivor or survivors and signed by all three, is shown to be in pursuance of an agreement whereby the daughter and her husband were to take care of deceased and his wife during their lives, in return for which he was to give them all his property, and where the agreement is being carried out and the widow of the deceased is living with the daughter and is strenously opposing the action, which is in the circumstances not improvident, an action against the mother and daughter for a declaration, that the money in the bank belongs to the personal representatives, will be dismissed. [Empey v. Fick, 13 O.L.R. 178, 15 O.L.R. 19, followed.]

Burkett v. Ott, 41 D.L.R. 676, 41 O.L.R. 578. [Reversed, 45 D.L.R. 757, 57 Can. S.C.R. 608.]

(§ I C—28)—ELECTRIC RAILWAY—AGREEMENT TO BUILD THROUGH YARD OF TANNING COMPANY — CONSIDERATION — RIGHT TO MAINTAIN RAILWAY CONSTRUCTED WITHOUT OBJECTION—VALIDITY OF AGREEMENT—AUTHORITY OF MANAGING DIRECTOR OF COMPANY—EVIDENCE — CORROBORATION — EVIDENCE ACT, R.S.O. 1914, c. 76, s. 12.

Toronto Suburban R. Co. v. Beardmore, 12 O.W.N. 214, 251.

(§ I C—29)—COMPANY—TRANSFER OF SHARES—SPECIFIC PERFORMANCE.

Franklin v. Reardon, 39 D.L.R. 176, affirming 35 D.L.R. 380, 51 N.S.R. 161.

SUBSCRIPTION FOR CHARITABLE PURPOSE.

A subscription whereby a certain sum of money is promised towards the erection and equipment of a building for the Y.M.C.A. in reliance of which liabilities are incurred and other subscriptions obtained, forms a sufficient consideration for a contract and is enforceable even before the completion of the building. [Sargent v. Nicholson, 25 D.L.R. 638, followed.]

Y.M.C.A. v. Rankin, 27 D.L.R. 417, 22 B.C.R. 588, 34 W.L.R. 304, 10 W.W.R. 482.

SUFFICIENCY OF CONSIDERATION—SUBSCRIPTION FOR CHARITABLE PURPOSE.

Y.M.C.A. v. Wood, 27 D.L.R. 420, 22 B.C.R. 588, 34 W.L.R. 686, 10 W.W.R. 486.

SUBSCRIPTIONS FOR CHARITABLE PURPOSE.

A written promise to contribute a certain sum of money towards the erections of a building for the Y.M.C.A. in reliance of which advances have been made and liabilities incurred, forms a valid and binding contract which cannot thereafter be revoked by the promissor, and is enforceable against him on behalf of the association. [Re Hudson, 54 L.J. Ch. 811, distinguished; Williams v. Hales, 8 N.Z.L.R. 100; Hammond v. Small, 16 U.C.Q.B. 371; Thomas v. Grace, 15 U.C.C.P. 462; Anderson v. Kilborn, 22 Gr. 385; Berkeley Church v. Stevens, 37 U.C.Q.B. 9, applied.]

Sargent v. Nicholson, 25 D.L.R. 638, 26 Man. L.R. 53, 9 W.W.R. 883, 33 W.L.R. 250.

UNDERWRITING PREFERENCE SHARES OF COMPANY — CONSIDERATION — COMMISSION PAID IN PART IN ORDINARY SHARES—UNDERTAKING OF PROMOTERS TO BUY SHARES FROM UNDERWRITER AT REDUCED PRICE—ALTERNATIVE PROVISION AS TO SALE OF SHARES IN EVENT OF UNDERWRITER "RETAINING" THEM—ELECTION —EVIDENCE — RECEIPT — REASONABLE TIME FOR MAKING REQUEST TO BUY — RELEASE.

Rountree v. Wood, 16 O.W.N. 77, reversing 15 O.W.N. 264.

CONSIDERATION—NATURAL AND MORAL OBLIGATION — PAROL EVIDENCE — GIFT — CHEQUE—QUE. C.C. 762, 776, 777, AND 984—R.S.C., c. 119, ss. 158, 165.

Natural obligation and simple moral obligation are sufficient to render a gift a binding contract. Engagements thus contracted, with the object of fulfilling a natural or moral obligation, are valid without the fulfilment of the special formalities required by law for gifts. A father who promises to pay the price of a lot which his son wishes to purchase, and also to pay the cost of constructing a house which the said son wishes to build thereon, engages himself sufficiently to produce a civil obligation, and the contract resulting therefrom is binding. Such an obligation may be proved by witnesses. The act of a father who, two days previous to his death, gives to his son two cheques, which are presented at the bank and which the bank refuses to pay because of insufficiency of funds, does not constitute a manual gift.

Legris v. Chene, 23 Que. K.B. 571.

(§ I C—33)—PERFORMANCE OF EXISTING OBLIGATION.

Where one enters into an agreement to purchase certain shares of stock for cash, and subsequently substitutes for such agreement a new agreement to deliver certain bonds in exchange for the shares, and to sell the bonds within a certain time for the face value thereof, the agreement to sell the bonds is not without consideration as being merely collateral to the main transaction, but is part thereof, and can be enforced.

Martin v. Munns, 3 D.L.R. 435, 3 O.W.N. 1055.

(§ I C—37)—FORBEARANCE TO SET ASIDE SALE.

A forbearance from proceeding to set aside a judicial sale of land is sufficient con-

sideration to sustain a promise by the highest bidder to pay the difference between what the land will bring at a future sale and what he paid for it.

Leslie v. Stevenson, 24 D.L.R. 544, 34 O.L.R. 473, varying 23 D.L.R. 776, 34 O.L.R. 93.

FORBEARANCE TO SUE.

Where a landlord in misconception of his legal rights bona fide believing that a lease had been terminated, forbears bringing an action to enforce this claim against a tenant who is in possession claiming to have exercised an option to renew contained in the original lease, for a further term of five years, by an unsigned notice in writing, such forbearance is sufficient consideration to support the compromise effected whereby two years of the alleged renewed term was surrendered. [Callisher v. Bischoffsheim, L.R. 5 Q.B. 449, followed. See also Cook v. Wright, 1 B. & S. 559, and Brandon Electric Light Co. v. Brandon, 1 D.L.R. 793.]

Greenwood v. Bancroft, 2 D.L.R. 417, 20 W.L.R. 816, 2 W.W.R. 162.

TRANSACTION—REASON OR CONSIDERATION — LITIGATION — PRIVILEGES — MISTAKE OF LAW—C.C. ARTS. 1918, 1921.

The reasonable fear of being sued is a sufficient cause or consideration for a transaction. In order to decide if there is a case for litigation between the parties it is necessary to place oneself in the position of the parties interested. In a transaction concessions can only be made by one of the parties. A mistake of law cannot be invoked in a transaction.

Ranger v. Garièpy, 55 Que. S.C. 46.

D. MEETING OF MINDS; DEFINITENESS; OFFER AND ACCEPTANCE.

(§ I D—45)—MISTAKE—REFORMATION—NECESSARY PROOF.

To justify reformation on the ground of mistake, proof must be clear and convincing and upon testimony that is unexceptionable both with regard to the agreement actually made by the parties and the mutuality of the mistake from which the different agreement was inserted in the document sought to be reformed. [Irnham v. Child, 1 Bro. C.C. 92; Green v. Stone, 54 N.J.Eq. 399, approved.]

Provincial Fox v. Tennant, 21 D.L.R. 236, 48 N.S.R. 555, reversing 18 D.L.R. 389.

DRUNKENNESS — VOID OR VOIDABLE — REPUDIATION.

The contract of a drunken person with one who knows of the drunken condition is not void but voidable, and repudiation to be effective must be within a reasonable time.

Bawlf Grain Co. v. Ross, 37 D.L.R. 620, 55 Can. S.C.R. 232, reversing 11 A.L.R. 26.

FORMATION—WRITTEN OFFER TO CARRY GOODS AT NAMED PRICE—ORAL ACCEPTANCE—EVIDENCE—CREDIBILITY OF WITNESSES—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Austin & Nicholson v. Canada Steamship Lines, 15 O.W.N. 371.

FORMATION—EVIDENCE—ABSENCE OF CONSENSUS.

Sheriff v. Aitcheson, 4 O.W.N. 1269, 24 O.W.R. 614.

CONSENT.

When there is a reasonable doubt as to the consent by one of the parties to a contract, it is the duty of the court to decide against such consent and refuse enforcement of the contract.

Beland v. Quebec Southern R. Co., 24 Rev. Leg. 58.

FORMATION — CORRESPONDENCE — SALE OF GOODS — DELIVERY AND ACCEPTANCE — PAYMENT FOR CERTAIN DELIVERIES — EVIDENCE—AGENCY FOR ANOTHER COMPANY—ACTION FOR PRICE OF GOODS—APPEAL — PARTIES — LEAVE TO ADD PRINCIPAL COMPANY AS DEFENDANTS—NEW TRIAL.

York Sand & Gravel v. William Cowlin & Son, 14 O.W.N. 89. [Reversed in 14 O.W.N. 189.]

REALTY CONTRACT — CONSENT OBTAINED THROUGH FALSE REPRESENTATIONS.

An agreement between a real estate agent and a husband and wife, both illiterate, by which they transferred to him their property value at over $1,000 in consideration of nine promissory notes of $100 each, one payable each year, but which notes he had fraudulently represented to them as immediately negotiable at all banks, is fraudulent and void.

Demers v. Gobier, 23 Que. K.B. 239.

SALE — JURISDICTION — CORRESPONDENCE —C.C. ART. 1472—C.C.P. ART. 94.

Where the parties correspond with each other in order to make a contract and each letter contains new conditions there is no concurrence of minds and therefore no perfect contract. In this case the delivery of merchandise, the sale having been made in the district of Roberval and the payment in the district of St. Francois, the whole cause of action did not arise in the same district. The tribunal which has jurisdiction is the one at the home district of the defendant, where the action has been brought against him.

Gagnon v. Labrecque, 25 Rev. Leg. 376.

CONSENSUS—INSPECTION OF TIMBER—TIME OF SHIPMENT—SALE OF TIMBER—FORMATION OF CONTRACT—DELAY IN DELIVERY OF TIMBER—INSPECTION—EVIDENCE—FINDINGS OF TRIAL JUDGE—APPEAL.

Canada Pine Lumber Co. v. McCall, 7 O.W.N. 296.

(§ I D—46)—MISTAKE OR FRAUD.

Where a contract for the sale of certain machinery was neither read over nor ex-

plained to the purchasers other than the part that dealt with the description of the machinery, and a provision that the damages for a breach thereof should be a certain per cent of the price of the machinery was not read over to them or in any way brought to their notice, and the vendor's agent knew that one of the purchasers could neither read nor write and that the other could not read the proposed contract so as to understand it, both being foreigners with little if any education, there was no agreement on their part to the per cent fixed as damages for breach or to any other part of the contract than the order for the machinery.

Sawyer-Massey Co. v. Fedo Szlachetka, 4 D.L.R. 442, 3 S.L.R. 224, 21 W.L.R. 580, 2 W.W.R. 751.

MISTAKE—EFFECT ON CONTRACT—INACCURACY OF WRITING—SUBMISSION TO CORRECT ERROR.

A memorandum in writing otherwise sufficient under the Statute of Frauds is not vitiated by reason of the insertion of an incorrect admission of payment of the cash portion of the price, if the party in whose favour the admission is made admits the error and submits to the correction of same. [Gillatley v. White, 18 Gr. (Ont.) 1; Martin v. Pycroft, 2 DeG. M. & G. 785, applied; McLaughlin v. Mayhew, 6 O.L.R. 174, and Vanderwoort v. Hall, 18 Man. L.R. 682, specially referred to.]

Knight v. Cushing, 1 D.L.R. 331, 4 A.L.R. 123, 20 W.L.R. 28.

SALE OF GOODS—INNOCENT MISREPRESENTATION — DELIVERY — DELAY — BREACH OF WARRANTY.

Canada Law Book Co. v. Yule (Sask.), 41 D.L.R. 746, [1918] 2 W.W.R. 983, reversing [1918] 2 W.W.R. 250.

FALSE REPRESENTATIONS—SALE OF LAND—WRITTEN CONTRACT—C.C. ARTS. 1233, 1234.

When the consent of a party to a written contract has been obtained by means of untrue representations, by fraud and deceit, such untrue representations may always be proved by witnesses. In this case the evidence of false representations was insufficient to permit the court to annul the contract.

Lupien v. La Compagnie Immobilliére of Three Rivers, 28 Que. K.B. 24.

(§ I D—47)—JOINT OBLIGATION—INCOMPLETE EXECUTION.

Where a promise is intended to be made by several persons jointly, if any of such persons fail to execute the agreement, there is no contract and no liability is incurred by those who have executed the agreement. [See Mills v. Marriott, 3 D.L.R. 266.]

United Nickel Copper Co. v. Dominion Nickel Copper Co., 11 D.L.R. 88, 24 O.W.R. 462, 4 O.W.N. 1132. [Affirmed, 14 D.L.R. 919, 5 O.W.N. 301.]

(§ I D—50)—LACK OF MUTUALITY—MATERIAL ALTERATION—PLACE OF PAYMENT.

In a land contract the place of payment of the purchase money is a material term, and where, on its execution by the intending purchaser, he alters, without the consent of the vendor, the formal contract of sale already executed and forwarded by the vendor, by changing the place of the payment of the purchase money, or inserting a stipulation that payments shall be "at par" at the city where the purchaser lives (the vendor being in another jurisdiction and executing the document therein), such amounts to a material alteration, and the contracts may be avoided by the vendor.

Pearson v. O'Brien (No. 2), 11 D.L.R. 175, 22 W.L.R. 703, 4 W.W.R. 342, affirming 4 D.L.R. 413.

MUTUALITY—DEALING IN OPTIONS ON STOCK EXCHANGE—PRIVITY OF CLEARING ASSOCIATION.

In the purchase and sale of options by a customer on a stock exchange which uses a clearing house to clear such transactions, privity of contract between the clearing house and the customer is sufficiently established when the association, under the usages of the exchange, assumes the position of buyer to each seller and that of seller to each buyer in respect thereof with the result that all such transactions become merged in the process of clearing.

Richardson v. Beamish, 13 D.L.R. 400, 23 Man. L.R. 306, 21 Can. Cr. Cas. 487, 24 W.L.R. 514, 4 W.W.R. 815. [Reversed, 16 D.L.R. 855, 49 Can. S.C.R. 395, 23 Can. Cr. Cas. 394, 6 W.W.R. 1258.]

(§ I D—51)—MEETING OF MINDS—VARIANCE—EVIDENCE TO SHEW.

Relief from a contract will not be granted on the ground that the written agreement did not contain the terms of the bargain as made unless the variance is shewn by clear and satisfactory proof.

Keddy v. Daurey (No. 2), 12 D.L.R. 621, 47 N.B.R. 229, reversing 7 D.L.R. 118.

DIFFERENCE IN CONTRACTS—INTERLINEATION IN ONE COPY—SALE OF SHARES—CORROBORATION.

Where the question in an action by the owner of certain mining stock for the specific performance of an agreement which he alleged to be for the sale of the shares was whether the instrument was an option or a contract for sale, and it appeared at the trial that the agreement was made in duplicate in the handwriting of the plaintiff and that his duplicate contained a statement following his agreement to sell that the purchaser agreed to take the stock, which statement was absent from the defendant's duplicate, and the evidence as to what occurred at the execution of the agreement consisted of conflicting statements of the parties and of the testimony of one witness who corroborated one party as much as the other, so that there was no preponderance in the plaintiff's favour, the fact that the

instrument contained the further provision that the stock was to be transferred three months after the date of the instrument "without interest" while hardly applicable to the case of a mere option, was not sufficient to establish the plaintiff's claim that it was a contract for sale.

Clark v. Wigle, 4 D.L.R. 335, 3 O.W.N. 1583.

SALE OF GOODS—CORRESPONDENCE—FAILURE TO SHEW CONSENSUS AD IDEM.

Hay v. Green, 11 O.W.N. 97.

(I D—52)—OMISSION OF TERMS OF MORTGAGE FROM CONTRACT—INCOMPLETE CONTRACT.

The omission from a written contract for the sale of lands of the time when the principal is to mature under a mortgage to be given by the purchaser as security for payment of a portion of the purchase price, the contract specifying only the amount and the rate of interest, is of such a material portion of the agreement as to render it incomplete in a particular that could not be supplied by implication, and enforcement of the contract will be refused where no case is made out for a reformation of the document.

Reynolds v. Foster (No. 2), 9 D.L.R. 836, 4 O.W.N. 694, affirming 3 D.L.R. 506, 3 O.W.N. 983.

MUTUALITY—CONTRACT FOR SALE OF LAND.

Where the defendant, who had contracted to sell land to a purchaser, agreed with him to convey it directly to the plaintiff, to whom the defendant's vendee had resold it, upon the remainder of the purchase money due being paid him, there is sufficient mutuality between the plaintiff and the defendant to permit the specific performance of the agreement to convey to the plaintiff.

Dixon v. Dunmore, 12 D.L.R. 549, 49 C.L.J. 551, 4 O.W.N. 1501.

MEETING OF MINDS—MUTUALITY—CONTRACT FOR SALE OF LAND—FAILURE TO MAKE INITIAL PAYMENT—EFFECT.

The purchaser cannot take advantage of his own default to make a cash payment as provided on the execution and delivery of a contract for the sale of land to claim that there was no concluded agreement. [Cushing v. Knight, 6 D.L.R. 820, 36 Can. S.C.R. 555; and Newberry v. Langan, 8 D.L.R. 845, 47 Can. S.C.R. 114, distinguished.]

Houghton Land Corp. v. Ingham, 14 D.L.R. 773, 24 Man. L.R. 497, 25 W.L.R. 962, 5 W.W.R. 544.

MUTUALITY IN CONTRACT FOR SALE OF REAL PROPERTY.

An unilateral agreement is not created by the fact that but one party to the contract signed it, as it may become binding by the acts of the parties thereunder.

Mills v. Marriott, 3 D.L.R. 266, 17 B.C.R. 171, 20 W.L.R. 917, 2 W.W.R. 150.

MUTUALITY IN CONTRACT FOR SALE OF LAND—ALTERATION IN TERMS—SPECIFIC PERFORMANCE.

Graydon v. Gorrie, 10 D.L.R. 826, 4 O.W.N. 704, 24 O.W.R. 23.

SALE OF REAL PROPERTY.

The defendant offered to sell his land to the plaintiff by letter in the following terms: "With reference to lot 5, block 19, Edmonton, I will take $1,000 for it, half cash and the balance in 6 months with interest 5 per cent, or I will give you 10 per cent discount for cash." The plaintiff wired defendant accepting at $900:—Held, per Harvey, J., the construction given to the words of the offer was not a reasonable one and could not be supported. Held, per Harvey and Stuart, JJ., that the term "or I will give you 10 per cent discount for cash" was void for uncertainty as it was not stated upon what sum the discount would be allowed. Also, that the rule of construction that an interpretation is to be applied which would be most disadvantageous to the author, does not apply except to formal documents and in any event there was here no ambiguity but a meaningless phrase. Held, per Beck, J., the clause was ambiguous, and as the plaintiff had accepted the offer in a sense different from that intended by the defendant, there was no consensus ad idem. Judgment of Sifton, C.J., trial judge, in favour of the defendant, affirmed.

Watson v. Jamieson, 3 A.L.R. 230.

SALE OF REAL PROPERTY.

A writing in the following terms:—"I agree to purchase from B. through the intervention of D. . . . his land, etc., . . . at the price of . . ." creates the obligation to purchase from the intermediary D. and establishes a privity of contract between the latter and the promisor. Therefore, the nonperformance of this obligation gives a right of action to D. to recover from the promisor the damages which he has suffered. In a contract by which a party agrees with an intermediary to do something the profit which the latter would have made determines the amount of his damages in case of nonperformance. When a defendant, sued for nonperformance of a contractual obligation repudiates such obligation as nonexistent the court cannot dismiss the action on the ground of nonfulfillment of conditions or nonobservance of formalities which the defendant has not invoked.

Damphouse v. Leblond, 44 Que. S.C. 20.

AGREEMENT TO GRUB AND BREAK LAND—DEFINITENESS — TELEGRAM BY WIFE WITHOUT HUSBAND'S KNOWLEDGE—TELEGRAM TO HUSBAND IN REPLY WHICH HE NEVER SAW—NO CONTRACT BETWEEN PARTIES.

Dunn v. McIntosh, 46 D.L.R. 678.

CONTRACT OF EMPLOYMENT—PROMISE TO PAY FOR SERVICES OF CLERK OF WORKS.

Denison v. E. W. Gillett Co., 4 O.W.N. 833, 24 O.W.R. 105.

LETTING OUT WORK—PRICE—NULLITY—MISTAKE—EXECUTIVE OF CONTRACT—ADDITIONAL PRICE—C.C. ARTS. 992, 1601, 1690.

When in a contract for work, the price is not mentioned, an essential element is lacking and no contract is formed, but if a real price has been stipulated whether it be too great or too little, the contract exists, and the courts have no right to inquire if it is equitable. So if the contractor of a building following his plans and estimates is mistaken in his calculations in determining the price of his work, this mistake is no reason for cancelling the contract, and he cannot take advantage of it to avoid the contract or to increase the price agreed upon. An action for cancellation of a building contract or any other contract cannot be commenced after the work is finished; if the agreement has been on either part, as the parties can no longer be placed in the position in which they were before having contracted, the contract cannot be cancelled. There does not exist, in our law, any action to supplement, modify, or increase, the price.

La Campagnie de Construction et de Bois de Ste Agathe v. Lambert, 56 Que. S.C. 239.

(§ I D—54)—ACCEPTANCE—DEFINITENESS—DELAY FOR CONSENT OF THIRD PARTY.

Harkness v. Pleasance, 12 D.L.R. 842.

(§ I D—55)—DEFINITENESS—NEGOTIATIONS—CONCLUDED CONTRACT.

Sawyer v. Millett, 48 D.L.R. 714.

DEFINITENESS.

Uncertainty in a contract can be cured by a later agreement or transaction by the parties; e.g., any uncertainty in a contract to continue financing a company as the obligor has done in the past.

Saret v. Archibald, 11 D.L.R. 570, 47 N.S.R. 25, 12 E.L.R. 486.

SALE OF GOODS—AGREEMENT TO "STAND ITS SHARE OF LOSS"—AMBIGUITY—UNENFORCEABLE.

In an action for the balance due for goods sold and delivered to a firm of wholesale liquor dealers, the court held that an alleged agreement that if prohibition hit the country the plaintiff would "stand its share of the loss" was so ambiguous and uncertain as to be unenforceable.

Lethbridge Brewing & Malting Co. v. Webster, 49 D.L.R. 250, 12 S.L.R. 431, [1919] 3 W.W.R. 702.

NATURE AND REQUISITES—DEFINITENESS.

Where an employer arranges with a restaurant keeper to supply an indefinite number of midnight meals from time to time to his employees producing the employer's meal tickets, redeemable by the latter at a fixed rate per meal, there is no implied stipulation that the employer shall send all or any of his employees to get their meals exclusively at that restaurant; and an action for damages does not lie against the employer at the instance of the restaurant keeper for issuing tickets good as well at other restaurants as at that of the plaintiff for their employees' meals. [The Queen v. Demers, [1900] A.C. 103, applied.]

Bouton v. C.P. R. Co., 10 D.L.R. 463, 43 Que. S.C. 495.

MEETING OF MINDS—DEFINITENESS.

In order to constitute an agreement between two parties there must be a consensus ad idem, a meeting of the two minds upon ascertained terms. [Brogden v. Metropolitan R. Co., 2 App. Cas. 666; Pearson v. O'Brien, 10 D.L.R. 175, referred to.]

Bank of Nova Scotia v. McDougall & Secord, 11 D.L.R. 546, 6 A.L.R. 21, 23 W.L.R. 753, 4 W.W.R. 365.

DEFINITENESS.

An agreement is too indefinite and incomplete to call for a specific performance thereof, by which the plaintiff was to sell to the defendants his interest in a mining claim upon the basis of a specified amount for the whole claim, less a sum not to exceed a certain amount for charges against the first mentioned sum, the price to be in certain instalments at fixed rates, shares to be delivered as paid for or secured, and there was nothing to shew what interest the plaintiff had in the claim or how many shares he was entitled to, so that the price was not ascertainable without further negotiations between the parties. [House v. Brown, 14 O.L.R. 500, followed.]

Thompson v. McPherson, 3 D.L.R. 269, 3 O.W.N. 791, 21 O.W.R. 646.

DEFINITENESS—TIME FOR PAYMENT.

In cases of sale a contract or agreement is complete and susceptible of being executed when the parties have agreed as to the object sold and the amount of the price; absence of a stipulated term for payment of the balance of purchase price is no bar to the enforcement of such contract.

Poirier v. Archambault, 1 D.L.R. 358.

SALE OF MINING CLAIMS—DEFINITENESS—PAYMENT OF PURCHASE PRICE—POSSESSION.

An agreement concerning mining claims is a contract of sale and purchase and not a mere option to purchase, which provided not for a small down payment, but for a cash payment of $20,000 and the payment of the balance of the purchase price, $15,000, in two cash instalments within one year and that the vendors were to sell and the purchaser was to purchase all the right, title and interest of the vendors in the mining claims, it also appearing that the purchaser went into possession and continued therein until after all the purchase money was paid, when he received from the vendors written documents trans-

ferring to him all their right, title and interest in the claim.

Dubé v. Mann, 4 D.L.R. 164, 3 O.W.N. 1580, 22 O.W.R. 751.

DEFINITENESS—ASSIGNMENT OF $2,500 OUT OF $6,500 FIRE INSURANCE.

An oral promise by the debtor in consideration of an extension to assign to his creditor out of $6,500 fire insurance then in force a portion thereof "to the extent of $2,500" as security for a $2,200 debt is unenforceable for uncertainty, where there is no ascertainment of any particular policy of several aggregating the total insurance as the one to be subject to such lien or charge. [Godwin v. Murchison National Bank, 17 L.R.A.(N.S.) 935, applied; Tailby v. Official Receiver, 13 App. Cas. 523, distinguished.]

Trusts and Guarantee Co. v. Whitla Co., 16 D.L.R. 185, 7 A.L.R. 330, 27 W.L.R. 589, 6 W.W.R. 42.

DEFINITENESS—COMPROMISE OF SUIT.

Gnam v. McNeil, 16 D.L.R. 880, 6 O.W.N. 315.

UNCERTAINTY — LETTERS — SPECIFIC PERFORMANCE.

The defendant by letter gave the plaintiff a 15-day option on 7 timber licenses on a basis of 50 cents a thousand stumpage net, adding that if the plaintiff approved of the timber, he (the plaintiff) should have the timber surveyed and pay all back licenses and all future payments and that an agreement of sale will be entered into if he takes his option up. In answer by letter the plaintiff stated that he had inspected the timber comprised in the 7 timber licenses upon which he held a 15 days' option and agreed to purchase same on lines of said option. Held, that the two letters do not constitute an enforceable agreement, it being void for uncertainty.

McMillan v. Cameron, 24 B.C.R. 509, [1918] 1 W.W.R. 836, affirming a decision of Murphy, J.

The promise on the part of the buyer to resell to seller, "if he should decide to alienate," constitutes a "preferential agreement" and not a nullity as a purely facultative, since the condition is subordinate not to the will of the obligor, but to a fact depending whether or not this fact will be followed up or not.

Herbert v. Corp. en Village de Saint-Michel, 18 Rev. de Jur. 228.

(§ I D—60)—OFFER AND ACCEPTANCE—REAL PROPERTY — OPTIONS — WHEN TURNED INTO CONTRACT OF SALE.

An option for the sale of land is turned into a contract of purchase, where the buyer is permitted to go into possession and the seller gives him further time and accepts money on account of deferred payments.

Allan v. Riopel, 14 D.L.R. 811, 7 A.L.R. 65, 26 W.L.R. 248, 5 W.W.R. 712.

OFFER AND ACCEPTANCE.

A telegram instructing an agent to buy grain at a certain price, which has been communicated to a third person, who thereupon intimated to the sender that he will deliver at the price named, is not an offer constituting the basis of a contract; nor does such an alleged acceptance amount to a counter-offer, capable of acceptance by the recipient.

Acme Grain Co. v. Wenaus, 36 D.L.R. 347, 10 S.L.R. 305, [1917] 3 W.W.R. 157.

OFFER AND ACCEPTANCE—REASONABLE TIME — COUNTER-OFFER — ACCEPTANCE BY TELEGRAM—SALE OF BANK SHARES.

Manning v. Carrique, 25 D.L.R. 840, 34 O.L.R. 453.

LETTER QUOTING PRICES FOR SUPPLY OF COAL —ABSENCE OF ACCEPTANCE—FRAUD—RESCISSION.

The defendants, dealers in coal, wrote a letter to the plaintiff, a retailer of coal, quoting prices for delivery of coal to him at their yards, during a named period. No quantity was agreed to be supplied; and on the part of the plaintiff there was no undertaking or agreement to purchase from the defendants any coal whatever. After about 40 tons of coal had been supplied to the plaintiff, it transpired that he had attempted to bribe a servant of the defendants to issue false weight-tickets to him, and thus defraud the defendants for his benefit:—Held, that there was no contract between the plaintiff and defendants. [Harty v. Gooderham, 31 U.C.R. 18, and Johnston v. Rogers, 30 O.R. 150, followed.] Even if there was a contract, the defendants had the right to rescind it on account of the plaintiff's fraud. [Panama and South Pacific Telegraph Co. v. India Rubber Gutta Percha and Telegraph Works Co., L.R. 10 Ch. 515, followed.]

Greenberg v. Lake Simcoe Ice Supply Co., 39 O.L.R. 32.

CORRESPONDENCE—SALE OF GOODS—OFFER—ACCEPTANCE—TERMS AND CONDITIONS —SHIPMENT OF PART OF GOODS—IMPOSSIBILITY OF SHIPPING REMAINDER—CAR-SHORTAGE—REPUDIATION BY VENDOR OF LIABILITY TO MAKE FURTHER DELIVERIES —REASONABLE TIME—DAMAGES—MEASURE OF—DIFFERENCE BETWEEN CONTRACT-PRICE AND MARKET-PRICE AT TIME OF BREACH AND AT PLACE OF DELIVERY—FAILURE TO PROVE DAMAGES—NOMINAL DAMAGES—COSTS.

Brenner v. Consumers Metal Co., 41 D.L.R. 339, 41 O.L.R. 534.

SALE OF WHEAT—OFFER AND ACCEPTANCE.

Badger v. Torosoff (Sask.), 39 D.L.R. 606, [1918] 1 W.W.R. 496.

PLACE OF CONTRACT—ACCEPTANCE—AGENT —RATIFICATION.

A contract of hire of services negotiated with an agent of the employer, subject to ratification by the latter, is completed at the place where it is ratified.

Swan v. Roy, 19 Que. P.R. 298.

PLACE OF CONTRACT—CORRESPONDENCE.

If correspondence takes place between the

parties, who make a series of propositions and counter-propositions, the contract is completed at the point where the last modification is made.

Laforte v. Martel, 19 Que. P.R. 249.

AGREEMENT FOR SUPPLY OF MANUFACTURED GOODS — FORMATION OF CONTRACT — WRITTEN MEMORANDUM — EVIDENCE OF SURROUNDING CIRCUMSTANCES — ADMISSIBILITY — AUTHORITY OF AGENT OF COMPANY — APPARENT MANDATE — NECESSITY FOR NEW MACHINERY TO MANUFACTURE GOODS ORDERED—EFFECT ON QUESTION OF AUTHORITY — APPROBATION OF CONTRACT — RATIFICATION — SUBSEQUENT REPUDIATION — NECESSITY FOR SPECIFICATIONS BY BUYERS — CUSTOM OF TRADE — FURNISHING OF CREDIT — TERM OF CONTRACT — NOTICE OF INTENTION TO CANCEL — DAMAGES — INCREASED PRICES OF GOODS — INCREASE IN FREIGHT RATES — EXPENSES OF SPECIAL JOURNEY—REMOTENESS.

Rownson Drew & Clydesdale v. Imperial Steel & Iron Co., 14 O.W.N. 298.

ACCEPTANCE OF OFFER CONSTITUTE CONTRACT.

Plaintiffs offer to sell and defendant's acceptance of same constitute a contract of sale from plaintiff to defendant. Resolutions by defendants' Central Board to cancel sale did not set aside the contract of sale.

Reed v. Catholic School Commission of Montreal, 25 Rev. de Jur. 509.

OFFER AND ACCEPTANCE—PUBLIC WORK—APPROVAL OF GOVERNOR-IN-COUNCIL.

Where a sum of money was claimed for extras under a contract, a letter by the representative of the debtor to the claimant asking whether he would be willing to accept an amount less than that claimed, and to which letter the claimant replied: "I am willing to accept your offer," is not an accepted and binding contract, but merely a statement that the claimant is willing to accept such sum. Where a sum of money was claimed to be due by the Crown for extras under a contract made with the Public Works Department, a letter from the chief architect of that department to the claimant saying: "I am directed to offer you the sum of $4,327 as full and final settlement of all claims you may have against this department . . . subject to approval of council," does not bind the Crown if the governor-in-council refuses to ratify the alleged offer of the chief architect.

Ashwith v. The King, 18 Can. Ex. 206.

LAND OPTIONS—REVOCATION AND ACCEPTANCE.

An agreement for sale or option which contains no time limit, and is made for no consideration, may be revoked by the owner within a reasonable delay. The acceptance of such agreement by a real estate agent after receipt of a letter from the owner dated the preceding day revoking the agreement is not sufficient. To be valid the acceptance should be notified to the vendor before his revocation.

Langevin v. Duval, 47 Que. S.C. 511.

BY TELEPHONE.

A contract made by telephone, as those by correspondence or telegrams, is concluded and made perfect at the place where the proposition made is accepted and agreed to.

Paquet v. Balcer, 44 Que. S.C. 36.

SALE OF GOODS—LETTER—QUOTATION—ACCEPTANCE—SIGNATURES OF PARTIES—EVIDENCE—FINDING OF TRIAL JUDGE.

Victoria Electrical Co. v. Monarch Electrical Co., 13 O.W.N. 141.

CORRESPONDENCE — OFFER — ACCEPTANCE —PARTIES NOT AD IDEM—DIFFERENCE AS TO SUBJECT OF CONTRACT—PURCHASE AND SALE OF LUMBER—ACTION FOR DAMAGES FOR REFUSAL TO ACCEPT.

Elliot v. Keenan Bros., 13 O.W.N. 193.

SALE OF TIMBER—AGREEMENT IN WRITING—PRICES OF DIFFERENT KINDS OF TIMBER —"MILL-RUN" — MEANING OF — TERMS USED IN DOCUMENT NOT UNDERSTOOD BY VENDOR—FRAUD NOT SHEWN—CASE NOT MADE FOR REFORMATION—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Douglas v. Bury, 15 O.W.N. 283. [Affirming 14 O.W.N. 241.]

SUPPLY OF MANUFACTURED GOODS—FORMATION OF CONTRACT—EVIDENCE—AUTHORITY OF AGENT—RATIFICATION—DAMAGES—FINDINGS OF TRIAL JUDGE—APPEAL.

Rownson Drew & Clydesdale v. Imperial Steel & Wire Co., 15 O.W.N. 453.

FORMATION — CORRESPONDENCE — CONSENSUS AS TO QUANTITY OF GOODS—EVIDENCE—ONUS—COUNTERCLAIM—COSTS.

Canadian Malleable Iron Co. v. Louden Machinery Co., 6 O.W.N. 722, 26 O.W.R. 772.

OFFER AND ACCEPTANCE—QUALIFIED ACCEPTANCE.

Contract for sale of land held not established because the alleged acceptance of the offer of sale was not an absolute and unqualified assent to the terms of the offer.

Coulter v. Timlick, [1919] 2 W.W.R. 736.

(§ I D—61)—NECESSITY OF ACCEPTANCE.

One who has made an offer cannot dispense with an acceptance thereof, so as to create a contractual relationship without such acceptance.

Beer v. Lea, 7 D.L.R. 434, 29 O.L.R. 355, 23 O.W.R. 826. [Affirmed, 14 D.L.R. 236, 29 O.L.R. 255.

ACCEPTANCE OF OPTION TO PURCHASE LANDS —"ACCEPTANCE OF OPTION"—"EXERCISE OF OPTIONS."

The phrases "acceptance of option" and "exercise of option" as used in a written agreement giving an option to purchase land, mean one and the same thing,

that is, the time when an election is made to buy upon the terms specified.

Lawrence v. Pringle, 3 D.L.R. 634, 17 B.C.R. 250, 21 W.L.R. 546, 2 W.W.R. 575.

OPTION—ACCEPTANCE.

The relation of vendor and purchaser is not established by a mere option given for value; there must be an unqualified acceptance of the option to found an action for specific performance upon it.

Roots v. Carey, 17 D.L.R. 172, 49 Can. S.C.R. 211, 6 W.W.R. 27, reversing 11 D.L.R. 208, 5 A.L.R. 125, 23 W.L.R. 890. [Leave to appeal to Privy Council refused.]

(§ I D—62)—COMPANY—GENERAL MANAGER AUTHORIZED TO MAKE SPECIAL EMPLOYMENT CONTRACT—MANAGER EXCEEDING POWERS—LIABILITY OF COMPANY.

Acceptance of an offer to purchase binds a company, though ignorant of the employment, to pay to agents whom its general manager is authorized to employ to procure the very offer accepted, but not in like ignorance to pay commission on a contract of employment which the general manager has neither the actual authority to enter into nor to bind the company by estoppel.

Roray v. Nimpkish Lake Logging Co., 47 D.L.R. 395, [1919] 2 W.W.R. 105.

CORRESPONDENCE—STATUTE OF FRAUDS.

A contract of purchase and sale of real estate may be proved by the exchange of letters and where an offer made by letter is accepted by letter, the agreement is completed, and such a contract is sufficient to satisfy the requirements of the Statute of Frauds.

Mansfield v. Toronto General Trusts Corp., 1 D.L.R. 503, 22 Man. L.R. 49, 20 W.L.R. 344.

OFFER TO PURCHASE LAND—SUFFICIENCY OF ACCEPTANCE.

Where a written offer to purchase land purported to be made pursuant to conditions imposed by the owner and set out in the offer, to the effect that no application would be considered by the owner unless accompanied by a cash payment of a certain amount, and the prospective purchaser forwarded with it a lesser sum than was called for by the terms of the offer the fact that the owner replied, acknowledging receipt of the offer and stating that a sight draft would be made for the balance of the first payment does not constitute an acceptance of the offer where such balance represented by the draft was not in fact paid.

Richardson v. Ramsay, 2 D.L.R. 686, 20 W.L.R. 566, 5 S.L.R. 110, 1 W.W.R. 1070.

SUFFICIENCY OF ACCEPTANCE—STIPULATION THAT CONTRACT NOT SUBJECT TO COUNTERMAND.

Where it was stipulated in a written offer to purchase a piano, that the order was not subject to countermand or rescission, and the vendee requested that the piano should be held for him until such time as his rooms should be ready to receive it, the offer is sufficiently accepted so as to create a binding contract which was not subject to countermand, where, after the piano had been held about two months, the vendor acted upon the offer by requesting the vendee to name a time for delivery, whereupon the vendee did not repudiate but asked the vendor to hold the piano a little longer. [Ellis v. Abell, 10 A.R. (Ont.) 226, and Ruess v. Picksley, L.R. 1 Ex. 342, specially referred to.]

Heintzman & Co. v. Rundle, 4 D.L.R. 688, 5 S.L.R. 121, 20 W.L.R. 202.

OFFER AND ACCEPTANCE — ACCEPTANCE CHANGING PLACE OF PAYMENT.

The place of payment is a material term of a contract, and where the alleged acceptance changes the places of payment, it is merely a new offer and not an acceptance which concludes a contract. Where a person holding an option to purchase land forwards a remittance of the deposit money required on acceptance with a letter enclosing for signature by the vendor formal agreements of sale already signed by the sender who wrote that the documents were "in accordance with" the option, the vendor may properly treat the letter as a proposal to accept the offer only in the sense of the formal documents and to pay the money on the like terms; consequently the vendor is not bound if there is a material variance and a further definite acceptance in conformity with the option is not made within the option period.

Pearson v. O'Brien (No. 2), 11 D.L.R. 175, 22 W.L.R. 703, 4 W.W.R. 342, affirming 4 D.L.R. 413, 22 Man. L.R. 175. [Referred to in Carey v. Roots (No. 2), 11 D.L.R. 208; Bank of Nova Scotia v. McDougall, 11 D.L.R. 546.]

OPTION TO PURCHASE CONTAINED IN A LEASE—OFFER WITHOUT CONSIDERATION.

A clause in a lease not under seal giving to the lessee the option to purchase the demised premises at a stated price, is not necessarily an integral part of the lease and where it is not founded upon any consideration, specific performance of the option will be refused. [Davis v. Shaw, 21 O.L.R. 474, and Maltezos v. Brouse, 19 O.W.R. 6, applied; Hall v. Center, 40 Cal. 65, referred to.]

Miller v. Allen, 7 D.L.R. 438, 4 O.W.N. 346.

TIME, AS ESSENCE OF.

Where one party interested with another a piece of land makes an offer by mail to sell his interest and requests an answer by return mail, an attempt to accept the offer 8 days after its receipt by the offeree is too late, where in the meantime the interest was sold to another.

Kelley v. Holley, 8 D.L.R. 176, 22 Man. L.R. 601, 22 W.L.R. 587, 3 W.W.R. 412.

OPTION TO PURCHASE LAND—TIME AS ESSENCE OF FAILURE TO MAKE PAYMENT OR "EXERCISING THE OPTION."

Where, in an option to purchase land, time was declared to be of the essence of the agreement which stipulated that 25 per cent of the purchase money should be paid at the time of "exercising the option," the failure to make such payment when an election was made to buy upon the terms stated in the option will permit the owner of the property to treat the agreement as broken and ended.

Lawrence v. Pringle, 3 D.L.R. 634, 17 B.C.R. 250, 21 W.L.R. 546, 2 W.W.R. 575.

SUFFICIENCY.

The mere acceptance of a proposal to materially modify the terms of an existing contract, will not have that effect when the proposal was made subject to the express condition that it should not have legal effect on such contract until its terms were reduced into a new written agreement. [Chinnock v. Marchioness of Ely, 4 De G. J. & D. 638, and Rossiter v. Miller, 3 App. Cas. 1124, followed.]

Wallace Bell Co. v. City of Moose Jaw (No. 2), 4 D.L.R. 438, 5 S.L.R. 155, 21 W.L.R. 871, 2 W.W.R. 752.

MEETING OF MINDS—SUFFICIENCY OF ACCEPTANCE.

The owner of land who signs and forwards to the proposed purchaser an agreement of sale thereof is entitled to withdraw his offer before the latter accepts; and such right is not barred by the purchaser signing and retaining the agreement where he did not disclose the fact of signature to the vendor, but, on the contrary, held out to him that he would not accept unless certain restrictions contained in the contract form were removed.

Manson v. Pollock, 16 D.L.R. 618, 24 Man. L.R. 67, 27 W.L.R. 370, 6 W.W.R. 205, reversing on other grounds 12 D.L.R. 82.

THREATS—VITIATION.

Forcing a contractor to sign a letter consenting to a certain interpretation being given to a contract, on the threat that if it is not signed all further payments to him will be stopped, which would cause the financial ruin of the contractor, is sufficient to vitiate the consent thus given.

Vinet v. Canadian Light & Power Co., 42 D.L.R. 709, 54 Que. S.C. 134.

COMMERCIAL TRAVELER—POWER TO ACCEPT ORDER.

In the absence of express authority a commercial traveler has no authority to accept an order on the merchant's behalf; he merely takes the order and submits it to his principal for acceptance or refusal.

Lamontagne v. C. Parsons & Son, 42 D.L.R. 365, 54 Que. S.C. 297.

NATURE AND REQUISITES—SUFFICIENCY OF ACCEPTANCE—ADDING A TERM TO THE OFFER.

Where a written contract is expressed in such general or ambiguous terms as to admit of different constructions, it is open to either party to allege, consistently with the terms, that he accepted the contract with a different construction to that charged by the other party and to claim that there is no real agreement between them, though the written contract must be applied if possible so where the offer was made by letter for the sale of machinery "in place," the latter phrase being intended by the seller to indicate that delivery must be taken by the buyer of the machinery where it stood; and this interpretation was consistent with the preliminary negotiations, and the proposed buyer replied by letter purporting to accept, but adding that "in place" was considered to mean on board a railway car and that advice would be sent as to the destination to which it should be shipped, the seller properly treats the added words as an attempt to impose upon him the duty of loading on the car, and may decline to consider the alleged acceptance as any acceptance in fact.

Godson v. McLeod, 10 D.L.R. 519, 24 O.W.R. 565, 4 O.W.N. 1205.

OFFER AND ACCEPTANCE—TIME FOR PAYMENT OF DEPOSIT.

Time is of the essence of the contract as regards the cash payment or deposit on a sale of lands, and if the vendor under a contract requiring the cash payment to be made "forthwith" gives time to the purchaser until a future day specified, when payment is to be made at a business office of a firm authorized to receive it for the vendor, time remains of the essence of the agreement as to the deferred date and the vendor may withdraw if the purchaser fails to attend and pay the money within reasonable business hours at the time and place appointed. [Cushing v. Knight, 6 D.L.R. 820, 46 Can. S.C.R. 555, referred to.]

Ritchie v. Gibbs, 12 D.L.R. 323, 6 A.L.R. 181, 24 W.L.R. 660, 4 W.W.R. 985.

OFFER—ACCEPTANCE OF OPTION—SUGGESTION OF ALTERNATIVE PLAN OF COMPLETION.

Where a vendee, holding an option for the purchase of land, which option merely recites that the vendor agrees to give to the vendee an option for the purchase of his land at a certain price, payments to be made at certain specified times, replies within a reasonable time by letter that he is prepared to carry out the terms of the option, but in the same letter suggests that the vendor instead of executing an agreement for the sale of the land, make a transfer of the land and take a mortgage back for the unpaid balance, such a suggestion does not impose a condition or qualify the acceptance, but the letter constitutes an unconditional acceptance, the vendor being at liberty to accept or reject the suggestion. [Pearson v. O'Brien (No. 2), 11 D.L.R. 175, referred to.] In a contract of option for the sale of land which does not specify a time for acceptance, but which provides

that the first of three annual payments should be made on a specified date about two months after the date of the option, such annual payment is not a condition precedent for the acceptance of the option in the absence of circumstances connected with the giving of the option which would justify the conclusion that the vendee could not have until the time of the first payment to decide whether he would accept. [Mills v. Haywood, 6 Ch. D. 196; Dart's Vendors and Purchasers, 7th ed., 272, referred to.]

Carey v. Roots (No. 2), 11 D.L.R. 208, 5 A.L.R. 125, 23 W.L.R. 890, 4 W.W.R. 354, affirming 5 D.L.R. 670. [Reversed on another point 17 D.L.R. 172, 49 Can. S.C.R. 211, 6 W.W.R. 27.]

PAYMENT OF PURCHASE PRICE AS ACCEPTANCE—"REASONABLE TIME," ILLUSTRATED.

Under an alleged agreement of sale of lands stipulating for the payment of the purchaser price at a fixed hour, and a cheque tendered therefor is dishonoured, what is a "reasonable time," within which to substitute a cash payment for such dishonoured cheque, may be very short, the test being the object for which the time is given. [Webb v. Hughes, L.R. 10 Eq. 281, applied.]

Bennett v. Newcombe, 11 D.L.R. 87, 24 W.L.R. 59.

JURISDICTION—SALE BY TRAVELER SUBJECT TO ACCEPTANCE—QUE. C.P. 94.

A sale of goods made by a commercial traveler, submitted for acceptance by its employer, is only completed by such acceptance, and the contract is actually made at such place.

Jackson v. Tremblay, 15 Que. P.R. 424.

AGREEMENT OF SALE—INTERPRETATION OF THE BILL—PROPERTY—RESPONSIBILITY—DAMAGES—C.C. ART. 1053.

In the following writing "We, the undersigned, sell and give the above mentioned hydrant with all the rights and powers therein attached to C. F. for the sum of $1,000 on the following conditions: the purchaser shall have 6 months to accept and conclude the purchase, etc.," not a sale but only a promise of sale is expressed and the purchaser having made default of accepting in the stipulated time it becomes void. If in these circumstances, the purchaser on the expiration of the time, acts as owner of these hydrants causing thereby a wrong to the promiser, he will be responsible.

Henderson v. Fortin, 25 Rev. Leg. 384.

LAND OPTIONS—SUFFICIENCY OF ACCEPTANCE.

Although an offer to purchase an immoveable is not accepted in writing, the fact that the vendor attends at a notary's office to execute the deed of sale of the property constitutes a sufficient acceptance; but such acceptance will be considered insufficient if the draft of the deed of sale contains conditions different from those in the agreement of sale, and the purchaser may then withdraw his offer.

Rivet v. Anctil, 47 Que. S.C. 240.

SALE — CORRESPONDENCE — ACCEPTANCE OF OFFER — BREACH—FAILURE TO DELIVER GOODS—RISE IN MARKET-PRICE—TIME OF BREACH—ABANDONMENT OF CONTRACT.

Powers & Son v. Hatfield & Scott, 10 O.W.N. 198, 11 O.W.N. 109.

SUFFICIENCY OF ACCEPTANCE—OFFER AND ACCEPTANCE.

Sanford v. Cameron, 13 E.L.R. 208.

(§ I D—63)—WITHDRAWAL OF OFFER.

A statement by the giver of an option to purchase, which is not under seal, and for which there is no consideration, that the option has expired and that he will have nothing further to do with the holder of it, constitutes a sufficient withdrawal of the offer contained in the option.

Beer v. Lea, 7 D.L.R. 434, 29 O.L.R. 255, 23 O.W.R. 826. [Affirmed, 14 D.L.R. 236, 29 O.L.R. 255.]

VARIATION OF OFFER—REFERENCE TO LATER QUOTATION AS "PRACTICALLY A CONFIRMATION OF FORMER PRICE."

Where the owner telegraphed to a real estate agent who was not only seeking to procure a purchaser for him, but who was also acting as agent of a proposed purchaser for the purpose of completing the deal, that he would "accept $2,400, $400 cash, purchaser paying costs, commission," and then wrote him referring to his previously quoted price as $15 per acre (which in fact amounted to less than $2,400), saying that his telegram is "practically a confirmation of" the price previously quoted of $15 per acre, the word "practically" in such case means no more than "very nearly" and the letter does not constitute a renewed offer to take $15 per acre.

Meivre v. Steine, 2 D.L.R. 106, 21 W.L.R. 687, 5 S.L.R. 335.

OFFER TO ACCEPT CERTAIN PERSON AS ENDORSER—WITHDRAWAL BEFORE ACTUAL SIGNING OF NOTE.

The vendor of goods sold at auction who agreed to accept a designated person as accommodation signor to the note to be given for the purchase money, may retract such consent and refuse to accept such signer at any time before the note was actually signed, where the conditions of sale provided that for goods not paid for in cash, the vendor should receive the note of the purchaser and of an accommodation maker satisfactory to the vendor, particularly where an enquiry by the latter as to the financial standing of the proposed surety disclosed misrepresentatons of the buyer with reference thereto.

Bell v. Schultz, 4 D.L.R. 400, 5 S.L.R. 273, 21 W.L.R. 408, 2 W.W.R. 491.

WITHDRAWAL OF OFFER BEFORE ACCEPTANCE.

An offer to purchase property for a speci-

fied sum without terms or conditions can be withdrawn at any time before its acceptance has been signified to the one who made it.

Bernard v. Kirsch, 51 Que. S.C. 135.

WITHDRAWAL OF OFFER.

A writing in the words, "I buy from B, acting for M, 4 houses, etc., for the price of, etc.," signed and delivered to B, is a mere offer to buy, and only becomes an effective sale, by M's acceptance made known to the buyer. If, therefore, such offer is withdrawn by the latter before such acceptance, no action for specific performance (making and signing of a deed, etc.) will lie against him.

Martin v. Joly, 44 Que. S.C. 134.

SALE OF GOODS — CORRESPONDENCE — EVIDENCE—STATUTE OF FRAUDS.

Crawford v. McMillan, 11 O.W.N. 308.

(§ I D—64)—PLACE OF ACCEPTANCE.

Contracts by letter correspondence are only completed where there is absolute agreement between the parties as to the object, price and conditions of the contract, and the place where the contract is completed is the place where the letter of actual acceptance is posted irrespective of whatever offers and negotiations may have preceded it. [See also Magann v. Auger, 31 Can. S.C.R. 186.]

Butler v. Mechanical Equipment Co., 7 D.L.R. 77, 22 Que. K.B. 199.

PLACE OF CONTRACT—MODIFICATION BY TELEPHONE.

A contract prepared at Montreal, and forwarded to the defendant at St. Jean and there altered by a telephonic conversation between the parties, is perfected at the time when the parties agreed by telephone, and consequently at St. Jean.

Lamalice v. Audette, 17 Que. P.R. 456.

E. FORMAL REQUISITES; STATUTE OF FRAUDS.

(§ I E—65)—SALE OF LAND—ALTA. STATUTES—AGENT TO SELL—NECESSITY OF CONTRACT IN WRITING.

Chapter 27, s 1, 1906, Alta. provides that no action shall be brought whereby to charge any person either by commission or otherwise for services rendered in connection with the sale of any land, etc., unless the contract upon which recovery is sought in such action or some note or memorandum thereof is in writing signed by the party sought to be charged or by his agent thereunto lawfully authorized in writing. Held, that the correspondence relied on by the plaintiff did not constitute such an agreement as entitled him to recover under the above act.

Nunnelley v. Blatt, 47 D.L.R. 254, 14 A.L.R. 534, [1919] 2 W.W.R. 699, reversing [1919] 2 W.W.R. 604.

FORMAL REQUISITES—STATUTE OF FRAUDS.

The effect of ss. 4 and 17 of the Statute of Frauds is the same; they do not render contracts within them void, still less illegal, but they render the kind of evidence required indispensable when it is sought to enforce the contract. [Maddison v. Alderson, 8 App. Cas. 467, referred to.]

Maloughney v. Crowe, 6 D.L.R. 471, 26 O.L.R. 579, 22 O.W.R. 635.

SALE OF GOODS—RECEIPT AND ACCEPTANCE.

The receipt of a shipment of goods from the carrier taken into the buyer's warehouse where they were examined and rejected, constitutes an actual receipt and acceptance sufficient to take the transaction out of the Statute of Frauds. [Page v. Morgan, 15 Q.B.D. 228; Taylor v. Smith, [1893] 2 Q.B. 65, followed.]

Thames Canning Co. v. Eckhardt, 23 D.L.R. 805, 34 O.L.R. 72.

SALE OF GOODS—DELIVERY—ACCEPTANCE.

To satisfy the terms of art. 1235 C.C., which provides that in all commercial matters no action can be maintained against a person without an agreement in writing signed by him for sale of the effects unless the purchaser has accepted or received a part of them, it is not required that the purchaser should accept delivery; it is sufficient if delivery is made.

Martin v. Galibert, 47 Que. S.C. 181.

RAILWAY—CARRIAGE OF GOODS—CARS CONTAINING GOODS PLACED ON PRIVATE SIDING OF CONSIGNEE—RULES OF RAILWAY COMPANY—FINDING THAT DELIVERY MADE—ACTION BY VENDOR AGAINST RAILWAY COMPANY AND CONSIGNEE FOR PRICE OF GOODS—DENIAL OF CONSIGNEE THAT GOODS RECEIVED—FINDING OF RECEIPT AND ACCEPTANCE—STATUTE OF FRAUDS—COSTS.

Underhill Coal Co. v. G.T.R. Co. & Puddy Bros., 16 O.W.N. 354.

(§ I E—67)—SALE OF PERSONAL PROPERTY.

The validity of a contract for the sale of goods is not affected by the omission therefrom of the date of their delivery.

Schrader, Mitchell & Weir v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

SALES UPWARDS 850 AT STOCK EXCHANGE—PAROL EVIDENCE—BROKERS TRANSACTIONS.

The mandate of a broker in stock exchange transactions may be proved by parol evidence; but the sale and purchase of grain under that mandate is considered as goods, and if the sale exceeds the amount of $50, it must be established by a writing in accordance with art. 1235 C.C., unless admitted by the party charged. In making purchases and sales of goods for clients, brokers act as agents, and the transactions are not contracts for the sale of goods, which are required to be proved by writing, but are such commercial matters as may be proved, under the C.C. (Que.), by parol evidence.

Carruthers v. Schmidt, 32 D.L.R. 616, 54 Can. S.C.R. 131, reversing 24 D.L.R. 729.

SALE OF FLOUR—ORAL AGREEMENT—CONFIRMATION—EVIDENCE — OFFER — LETTERS—TELEGRAMS—FINDINGS OF TRIAL JUDGE—APPEAL—STATUTE OF FRAUDS—DAMAGES FOR BREACH—EXCESSIVE ASSESSMENT BY TRIAL JUDGE—REFERENCE FOR FRESH ASSESSMENT.

Ogilvie Flour Mills Co. v. Morrow Cereal Co., 39 D.L.R. 463, 41 O.L.R. 58.

MANUFACTURE AND SALE OF GOODS—FORMATION OF CONTRACT—WRITTEN ORDER BUT NO WRITTEN ACCEPTANCE—DELIVERY OF PART OF GOODS—APPROPRIATION TO ORDER — STATUTE OF FRAUDS — TERM OF CONTRACT—DELIVERY "AT ONCE"—REASONABLE TIME — REPUDIATION — RIGHT TO RESCIND—DAMAGES—MEASURE OF.

The plaintiff alleged a contract for the manufacture by the defendants for and the sale and delivery to the plaintiff of 100 chucks, the delivery to be made "at once," and a breach of the contract. At the time when the contract was said to have been made, the defendants had on hand 12 partly manufactured chucks, but had not on hand the material or the appliances for making any more. In December, 1916, a written order was sent by the plaintiff to the defendants for 100 chucks of varying sizes at stated prices. The words "shipment is wanted at once" were in the order. There was no written acceptance:—Held, that the delivery by the defendants of 9 chucks, stated by the defendants to be delivered on the order referred to, was an acceptance sufficient to satisfy the provisions of the Statute of Frauds. [Martin v. Haubner, 26 Can. S.C.R. 142, followed.] "At once" meant "within a reasonable time." [The Queen v. Rogers, 3 Q.B.D. 28, 33, approved.] And held, that the plaintiff was entitled to recover the amount claimed, $1,488.

Petrie v. Rae, 46 O.L.R. 19.

SALE OF GOODS—REFUSAL TO ACCEPT—PARTIES NOT AD IDEM—WRITTEN ORDER—QUANTITY NOT SPECIFIED—STATUTE OF FRAUDS — UNTENABLE DEFENCES — COSTS.

Mining Industry Co. v. Godson Contracting Co., 9 O.W.N. 51.

EXISTING LIABILITY ON THE PART OF COMMERCIAL COMPANY TO PAY COMMISSIONS TO TRAVELING SALESMAN—ORAL PROMISE BY THIRD PERSON INTERESTED IN COMPANY TO PAY—PROMISE TO ANSWER FOR THE DEBT OF ANOTHER—STATUTE OF FRAUDS — COMPANY SUED WITH THIRD PERSON IN ONE ACTION—JUDGMENT RECOVERED AGAINST COMPANY.

Southgate v. Dodshon Overall Co., 12 O.W.N. 119.

ORAL PROMISE TO REPAY MONEY PAID FOR SHARES IN COMPANY ON HAPPENING OF UNCERTAIN EVENT — ENFORCEMENT — STATUTE OF FRAUDS—CONSIDERATION—INTEREST.

Crawford v. Odette, 12 O.W.N. 113.

(§ I E—70)—DEBTS OF OTHERS, GUARANTY—MONEY PAID FOR DEFENDANT'S USE.

Bingham v. Millican, 10 D.L.R. 809, 4 O.W.N. 739, 23 O.W.R. 950.

PROMISE TO PAY DEBT OF ANOTHER.

The oral promise of a wife to pay for goods purchased by her husband, in order to avoid the seller's threat to stop the goods in transitu, is an undertaking to answer the debt of another within the Statute of Frauds, and unenforceable because not in writing. [Brown v. Coleman Develop. Co., 26 D.L.R. 438, 31 D.L.R. 101, referred to.] Jeffrey v. Alyea, 30 D.L.R. 341, 36 O.L.R. 391.

COLLATERAL CONTRACTS—DEBTS OF OTHERS—STATUTE OF FRAUDS—TRUE TEST.

Upon a promise to answer for the debt of another being original not collateral under s. 4 of the Statute of Frauds, the true test is that whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another and although the performance of it may incidentally have the effect of extinguishing that liability.

Conrad v. Kaplan, 18 D.L.R. 37, 24 Man. L.R. 368, 28 W.L.R. 464, 6 W.W.R. 1061.

PROMISE TO REPAY ADVANCES TO CORPORATION.

An oral promise by an officer of a company to repay money advanced to the company is an original undertaking and not a promise to answer the debt of another within the meaning of the Statute of Frauds as affecting its enforcement. [Lakeman v. Mountstephen, L.R. 7 H.L. 17, followed: Guild v. Conrad, [1894] 2 Q.B. 885; Thomas v. Cook, 8 B. & C. 728; Wildes v. Dudlow, L.R. 19 Eq. 198, referred to.]

Brown v. Coleman Development Co., Gillies v. Brown, 26 D.L.R. 438, 35 O.L.R. 219, reversing 24 D.L.R. 869, 34 O.L.R. 210. [Affirmed in Gillies v. Brown, 31 D.L.R. 101, 53 Can. S.C.R. 557.]

FORMAL REQUISITES—STATUTE OF FRAUDS—COLLATERAL CONTRACTS — DEBTS OF OTHERS—DUAL LIABILITY.

Dual liability is the prime test as to whether a verbal agreement is collateral and within s. 4 of the Statute of Frauds as a promise to answer for the debt of another; and where the defendant gives a contract to construct a building to a third party who subcontracts the roof to the plaintiff; and where (before anything is done under the subcontract) the contractor dies and the subcontractor, looking upon the death as putting an end to the subcontract, makes a verbal agreement with the defendant to do for him the identical roof work on the identical terms covered by the original subcontract under which the defendant promises "to pay for it," such ver-

bal agreement, since it imports no dual liability is not within the statute, although the original contract was not in any way formally rescinded. [Guild v. Conrad, [1894] 2 Q.B. 885, applied; Bond v. Treahey, 57 L.C.Q.B. 360, disapproved.]

Imperial Roofing Co. v. Dick, 10 D.L.R. 181, 5 A.L.R. 470, 23 W.L.R. 821, 4 W.W.R. 100.

COLLATERAL CONTRACTS—DEBTS OF OTHERS —STATUTE OF FRAUDS—TRUE TEST.

Upon a promise to answer for the debt of another being original not collateral under s. 4 of the Statute of Frauds, the true test is that whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another and although the performance of it may incidentally have the effect of extinguishing that liability.

Conrad v. Kaplan, 18 D.L.R. 37, 24 Man. L.R. 368, 28 W.L.R. 464, 6 W.W.R. 1061.

STATUTE OF FRAUDS—DEBT OF ANOTHER.

An agreement by the head of a syndicate to pay an amount in connection with the settlement of an action against the firm is not a promise to answer for the debt of another within the Statute of Frauds, and need not be in writing.

MacEwan v. Toronto General Trusts Co., 35 D.L.R. 435, 28 Can. Cr. Cas. 387, 54 Can. S.C.R. 381, reversing 29 D.L.R. 711, 36 O.L.R. 244, 10 O.W.N. 222.

GOODS SUPPLIED TO COMPANY — PERSONAL LIABILITY OF PRESIDENT—UNDERTAKING TO PAY—SUBSTITUTED CONTRACT—EVIDENCE—STATUTE OF FRAUDS—GUARANTEE—PLEADING.

Ralph & Clark v. Goldman, 7 O.W.N. 739.

(§ I E—71)—STATUTE OF FRAUDS—GUARANTY NOTE.

A promissory note given as security for the debt of another is not within s. 4 of the Statute of Frauds.

Standard Bank of Canada v. Alberta Engineering Co., 33 D.L.R. 542, 11 A.L.R. 96, [1917] 1 W.W.R. 1177, varying 27 D.L.R. 707.

GUARANTY BY COMPANY DIRECTORS—STATUTE OF FRAUDS—PROMISSORY NOTE—CONSIDERATION—BILLS OF EXCHANGE ACT—EXCESSIVE CHARGE OF INTEREST BY BANK—BANK ACT. [Union Bank v. McHugh, 10 D.L.R. 562, referred to.]

Standard Bank v. Faber, 27 D.L.R. 707, 33 W.L.R. 393, 9 W.W.R. 982. [Varied in [1917] 1 W.W.R. 1177.]

(§ I E—75)—STATUTE OF FRAUDS—CONTRACT NOT TO BE PERFORMED WITHIN YEAR—SUFFICIENCY OF MEMORANDUM.

A memorandum of an agreement not to be performed within the year, sufficient to satisfy the Statute of Frauds, is shewn, notwithstanding that one of the parties made alterations in the terms of the agreement after execution by the other party, where the latter subsequently assented thereto, although he did not re-execute the agreement.

Canadian Lake Transportation Co. v. Browne, 14 D.L.R. 744, 5 O.W.N. 376, 25 O.W.R. 365.

LEASE—FORMAL REQUISITES—STATUTE OF FRAUDS.

Where a parol agreement provides for a rental for a year certain, with a right of renewal from year to year for 2 years or more, and possession is taken thereunder, the agreement is not void under the Land Titles Act (Alta.), nor under the Statute of Frauds. [Hand v. Hall, 2 Ex. D. 355, applied.]

Roman Catholic Episcopal Corp. de St. Albert v. R. J. Sheppard & Co., 9 D.L.R. 619, 6 A.L.R. 128, 23 W.L.R. 282, 3 W.W.R. 814.

PERFORMANCE WITHIN A YEAR—AGREEMENT FOR FUTURE PROFITS.

Although a sale of land may not be made for many years, still a parol agreement for the payment by the promisor of the profits realized thereon upon such event happening and based on a forbearance by the promisee from legal proceedings is not within the Statute of Frauds. [Mills v. New Zealand Alford Estate, 34 W.R. 669, 32 Ch. D. 266, followed.]

Leslie v. Stevenson, 23 D.L.R. 776, 34 O.L.R. 93. [Varied in 24 D.L.R. 544, 34 O.L.R. 473.]

PERFORMANCE WITHIN YEAR—EMPLOYMENT.

A contract to serve for 1 year, the service to commence on the next day after that on which the contract is made, is not a contract which is not to be performed within a year, within the meaning of s. 4 of the Statute of Frauds, and is enforceable though not in writing.

Beller v. Klotz, 31 D.L.R. 647, 9 S.L.R. 419, [1917] 1 W.W.R. 585.

PERFORMANCE WITHIN YEAR—AGREEMENT TO STAY MORTGAGE PROCEEDINGS.

A contract, the performance of which within a year by one of the parties was contemplated by them when making the contract, is not within the Statute of Frauds. [Reeves v. Jennings, 79 L.J.K.B. 1137]; but where a second mortgage, who at the request of a third mortgagee, agrees to stay proceedings upon his mortgage for a term of 2 years, an agreement that the principal shall be paid at the expiration of 2 years is one which is not to be performed within 1 year, although the second mortgagee was willing to take his principal money at any time, and is within the Statute of Frauds, and must be in writing signed by the defendant.

Hadfield v. Radger, 33 W.L.R. 713, 9 W.W.R. 1189.

VENDOR AND PURCHASER—AGREEMENT FOR SALE OF LAND—ORAL AGREEMENT—POSSESSION TAKES BY VENDEE—PAYMENT OF TAXES—STATUTE OF FRAUDS—PART PERFORMANCE — AGREEMENT ENFORCED AGAINST GRANTEE OF VENDOR WITH ACTUAL NOTICE—TRESPASS — INJUNCTION.

Cook v. Barsley, 6 O.W.N. 608.

STATUTE OF FRAUDS—AGREEMENT NOT TO BE PERFORMED WITHIN THE YEAR—AGREEMENT EXECUTED.

An agreement incapable of being performed within the year and not reduced to writing does not become invalid under the Statute of Frauds by reason of an absence of a memorandum in writing of the terms thereof if the agreement is completely executed at the time of action brought.

Thacker v. Sweatman, 7 W.W.R. 262.

(§ I E—76)—CONTRACT NOT TO BE PERFORMED WITHIN YEAR — PAROL AGREEMENT FOR SUPPORT FOR LIFE.

A parol promise, in consideration of a conveyance of land, to support another for life is not within the Statute of Frauds as an agreement not to be performed within a year, since, by its terms, it might terminate within the year. [Slater v. Smith, 10 U.C.Q.B. 630; McGregor v. McGregor, 21 Q.B.D. 424, referred to.]

Spencer v. Spencer, 11 D.L.R. 801, 23 Man. L.R. 461, 24 W.L.R. 120, 4 W.W.R. 785.

(§ I E—78)—STATUTE OF FRAUDS—PAROL PARTNERSHIP FOR MORE THAN A YEAR.

A parol partnership agreement for more than one year is not enforceable under the Statute of Frauds unless there has been part performance taking it out of the statute. [Caddick v. Skidmore, 2 De G. & J. 52, 44 E.R. 907; Downs v. Collins, 6 Hare 418, 67 E.R. 1228; Johannson v. Gudmundson, 19 Man. L.R. 83 at 96, referred to; see Baxter v. West, 1 Drew & Sm. 173; and Crowley v. O'Sullivan, [1900] 2 Ir. R. 478.]

Hoffman v. Cohen, 17 D.L.R. 528, 27 W.L.R. 127.

(§ I E—80)—STATUTE OF FRAUDS—CONTRACTS AS TO REALTY.

A parol agreement made by the purchaser of land to sell to another a half interest in his purchase, but upon which the prospective subpurchaser does not make any payment, is barred from enforcement by the Statute of Frauds unless there has been part performance.

Morris v. Whiting, 15 D.L.R. 254, 24 Man. L.R. 56, 26 W.L.R. 494, 5 W.W.R. 936.

STATUTE OF FRAUDS—CONTRACT PERTAINING TO REALTY—AGREEMENT TO SUPPORT FOR LIFE IN CONSIDERATION OF CONVEYANCE OF LAND.

A parol agreement, in consideration of a conveyance of land to the promisor, for the support of another for life, is not within the Statute of Frauds as a contract relating to land. [Smith v. Ernst, 3 D.L.R. 736, 22 Man. L.R. 363; Morgan v. Griffith, L.R. 6 Ex. 70, referred to.]

Spencer v. Spencer, 11 D.L.R. 801, 23 Man. L.R. 461, 24 W.L.R. 420.

CONTRACTS AS TO REALTY.

A letter written to the plaintiff by the defendant stating that "I will sell my hotel . . . for the sum of $4,000, covering lots 1 and 2, blocks 4, and lot 19, block 4, in Blairmore. I will pay you 5 per cent commission on purchase price," and signed by the defendant, is sufficient, under c. 27 of the Alberta Statute of Frauds of 1906, to constitute a contract to pay commission in the event of the plaintiff finding a purchaser for the property.

George v. Howard, 4 D.L.R. 257, 5 A.L.R. 391, 2 W.W.R. 443.

STATUTE OF FRAUDS (S. 4)—VERBAL AGREEMENT FOR SALE OF LANDS—VALIDITY AS TO SUBSTANCE—STATUTE A BAR ONLY TO ENFORCEMENT.

In an action for the sale of lands under a certificate of judgment, for a sum of money, registered in the Land Titles Office (Man.), where the judgment debtor, prior to the registration, had entered into a verbal agreement to sell the lands in question to a purchaser for a fixed and adequate consideration contemporaneously paid, such an agreement is valid at common law, and, although it is well-settled law that under s. 4 of the Statute of Frauds it cannot be enforced against an unwilling or dishonest vendor, yet it is equally well-settled law that the statute does not affect the validity of the agreement, but only the remedy upon it, the signature so required is not of the substance of the contract, but is matter of procedure only, making a particular kind of proof necessary to enable a party to bring an action upon it; hence the verbal agreement is as effective (except as to enforcement) as a written contract. [Leroux v. Brown, 12 C.B. 801; Jones v. Victoria, 2 Q.B.D. 314, 323; Re Hoyle, [1893] 1 Ch. 84; Laythoarp v. Bryant, 2 Bing N.C. 735, referred to; see also Fry on Specific Performance, 5th ed., 254.]

Fenson v. Shore, 6 D.L.R. 376, 22 W.L.R. 202, 2 W.W.R. 1082. [Affirmed, 7 D.L.R. 812, 22 Man. L.R. 595.]

SALE OF CROWN LICENSE TO CUT TIMBER—STATUTE OF FRAUDS.

Rights granted under a Crown license to cut timber, pursuant to R.S.O. 1897, c. 32 (which include the right to take and keep exclusive possession and to sue for trespass) are an "interest in lands" within the meaning of the Statute of Frauds. [Hoeffler v. Irwin, 8 O.L.R. 740, followed; see also Leake on Contracts, 6th ed., 165.]

Thomson v. Playfair (No. 1), 2 D.L.R. 37, 25 O.L.R. 365, 21 O.W.R. 867.

MARRIAGE CONTRACT—COMMUNITY PROPERTY — SUBSTITUTION — TESTAMENTARY DISPOSITION TO DEFEAT THE SUBSTITUTION, EFFECT OF.

Where a marriage contract provides that

the community property of the proposed husband and wife shall, during the marriage, be used for their joint benefit, and that, upon the death of either, the usufruct goes to the survivor, and that, after, the survivor's death, the property shall go in moieties to the two families of the proposed husband and wife; it is beyond the power of either of the parties, after the marriage, to make any change in the marriage agreement contained in the contract.

Houde v. Marchand, 8 D.L.R. 431.

PAROL AGREEMENT TO FURNISH PART OF PURCHASE PRICE—DEMAND—NOTICE OF REPUDIATION OF CONTRACT.

Where the plantiff, who had agreed, in consideration of a half interest in property the defendant purposed to purchase, to provide a large sum for the initial cash payment, instead of doing which he claimed to have found a purchaser for the property, but upon terms the defendant refused to accept, and also attempted to obtain an option on the property to the exclusion of the defendant, the latter is relieved from making a demand upon the plaintiff to furnish the money necessary for such payment, or of giving him notice of the repudiation of such agreement.

Stewart v. Saunders, 4 D.L.R. 312, 21 W.L.R. 499. [Affirmed. 7 D.L.R. 812.]

FORMAL REQUISITES — REALTY — REAL ESTATE AGENT'S COMMISSION — ALBERTA STATUTE, 1906.

Upon a claim for a real estate agency commission an oral agreement to pay a fixed sum of money into a bank pending the adjustment of the claim in dispute is not admissible to establish a previous oral agreement to pay commission, in the face of the provision of Alberta Statute of 1906, c. 27, s. 1, precluding any action by way of commission for services rendered in connection with a realty sale unless evidenced by writing.

Sanders v. Anderson, 18 D.L.R. 349, 7 A.L.R. 400, 29 W.L.R. 682, 7 W.W.R. 288.

INTEREST IN LAND—AGREEMENT FOR FUTURE PROFITS.

A parol agreement to pay the difference between what land will bring at a future sale and what was paid for it does not relate to an interest in land and is not within the Statute of Frauds. [Stuart v. Mott, 23 Can. S.C.R. 153, 384, followed.]

Leslie v. Stevenson, 24 D.L.R. 544, 34 O.L.R. 473, varying 23 D.L.R. 776, 34 O.L.R. 93.

TRUSTS—PURCHASE OF LANDS BY AGENT.

The trust arising out of a conveyance of land in the name of one occupying the fiduciary position of manager, which was purchased with the funds of the employer, is not within s. 5 of the Statute of Frauds, R.S.N.S. 1900, c. 141, as to require a writing, in view of the provision that the statute shall not extend to any trust in land arising or resulting by implication or construction of law.

Miller v. Halifax Power Co., 24 D.L.R. 29, 48 N.S.R. 370.

PROMISE OF DECEASED MORTGAGEE (AUNT OF MORTGAGOR) TO CANCEL MORTGAGE IN CONSIDERATION OF SERVICES AND GOODS SUPPLIED—STATUTE OF FRAUDS — ACTION AGAINST ADMINISTRATOR WITH WILL ANNEXED — EVIDENCE — LEGACY GIVEN TO MORTGAGOR — FINDINGS OF TRIAL JUDGE — APPEAL — COSTS — PAYMENT FOR GOODS SUPPLIED.

Menzies v. Bartlet, 15 O.W.N. 115, varying 15 O.W.N. 8.

AGREEMENT FOR SALE OF LAND—PURCHASER TO CHOOSE PARTICULAR LOT—PRICE NOT MENTIONED IN WRITING—ORAL AND UNENFORCEABLE CONTRACT — STATUTE OF FRAUDS — VENDOR WILLING TO CONVEY LOT CHOSEN—SALE-DEPOSIT—ACTION TO RECOVER—FINDING OF FACT OF TRIAL JUDGE—APPEAL.

Harrison v. Wrights, 15 O.W.N. 442.

STATUTE OF FRAUDS—AGREEMENT TO RAISE MONEY FOR ANOTHER UPON SECURITY OF MORTGAGES.

An agreement to raise for the plaintiff a certain sum to be secured upon mortgages by the plaintiff of certain property is an agreement to create an interest in land and within the Statute of Frauds.

Gray v. Dalgety & Co., [1919] 2 W.W.R. 953.

(§ I E—83)—CONTRACTS AS TO REALTY—ORAL PARTNERSHIP — MONEY HAD AND RECEIVED.

Where an agreement of partnership by parol, under which it is intended that the partnership shall deal with land, is the basis of an action for money had and received, the Statute of Frauds (even if it could otherwise avail) is in such event inapplicable.

Leslie v. Hill, 11 D.L.R. 506, 28 O.L.R. 48, affirming 25 O.L.R. 144.

CONTRACTS AS TO REALTY — PARTNERSHIP, WHAT CONSTITUTES — VERBAL AGREEMENT—STATUTE OF FRAUDS.

Bindon v. Gorman, 12 D.L.R. 240, 24 O.W.R. 769, reversing on the facts 10 D.L.R. 431.

(§ I E—84)—RIGHT-OF-WAY — COMPANY — AUTHORITY — ACQUIESCENCE — REPUDIATION.

An oral agreement for valuable consideration entered into by the president of a commercial company, who had at the time ostensible authority to bind the company, and which has been acted upon and acquiesced in for a number of years will not be set aside.

Acton Tanning Co. v. Toronto Suburban R. Co., 40 D.L.R. 421, 56 Can. S.C.R. 196, 22 Can. Ry. Cas. 279.

(§ I E—87)—LEASES—COLLATERAL AGREEMENTS.

A collateral promise at the time of the

execution of a lease of land to heat the leased premises is not within the Statute of Frauds.

Brymer v. Thompson, 23 D.L.R. 840, 34 O.L.R. 194. [Affirmed in 25 D.L.R. 831, 34 O.L.R. 543.]

(§ I E—89)—Oral agreement to convey land — Ascertainment of terms by reference to document signed by parties—Statute of Frauds—Part performance—Conduct of parties—Enforcement of agreement by son after death of father.

Wilson v. Cameron, 5 O.W.N. 234, 25 O.W.R. 216.

Agreement between father and son that farm shall be son's at death of father — Failure to establish — Evidence — Corroboration — Statute of Frauds—Possession—Ejectment—Mesne profits.

Wingrove v. Wingrove, 8 O.W.N. 21, 471.

Conveyance of land by husband to wife —Oral agreement that ownership to remain in husband — Statute of Frauds.

Anning v. Anning, 10 O.W.N. 415.

Oral agreement to account for proceeds of land when sold — Statute of Frauds—Limitations Act.

Moffatt v. Beardmore, 11 O.W.N. 195.

(§ I E—90)—To complete title.

Where the grantee of lands subject to an instalment contract of sale made by his grantor under which a Torrens title was to be given, orally agrees with the purchaser to furnish a Torrens title if the balance of the purchase money is paid directly to him instead of to the original vendor, such agreement is not a contract for the sale of lands or of an interest therein within the meaning of the Statute of Frauds, but for the performance of an act with reference to his own lands and title, and it may be specifically enforced at the instance of the purchaser. [Angell v. Duke, L.R. 10 Q.B. 174; Jeakes v. White, 6 Ex. 873, and Boston v. Boston, [1904] 1 K.B. 124, followed.]

Smith v. Ernst (No. 3), 3 D.L.R. 736, 22 Man. L.R. 363, 21 W.L.R. 483, 2 W.W.R. 498.

(§ I E—95) — Sufficiency of writing — Letters.

A contract for the sale of land contained in correspondence is sufficiently evidenced so as to satisfy the requirements of the Statute of Frauds, where the vendor in reply to the purchaser's letter submitting offer, purported to accept the offer but stated that the terms were to be "cash or its equivalent," and in reply to this the purchaser wrote, "I take this to mean, terms cash, unless we can agree on other terms mutually satisfactory, and this is, of course, all right so far as I am concerned, if we cannot agree I will pay cash:" the agreement was completed by the last-mentioned letter as the payment was to be cash if the equivalent could not be arranged.

Meighen v. Couch, 9 D.L.R. 829, 23 Man. L.R. 117, 23 W.L.R. 523, 4 W.W.R. 64.

Sufficiency of writing — Statute of Frauds — Land sale by agent as such.

When the sufficiency of the memorandum, on a sale of land, is in question under the Statute of Frauds, such memorandum may meet the requirements, if, when read with the purchase cheques (a) the parties can be identified, (b) the property is described, (c) the price and terms are stated; and this although the actual owner is not named in the memorandum of the contract which was signed by the agent in his own name, where the form of the contract shewed on its face that it was made on behalf of the "owner." [Rogers v. Hewer (No. 2), 8 D.L.R. 288, specially referred to.]

Powell v. Hewer, 11 D.L.R. 347, 6 A.L.R. 61, 4 W.W.R. 626.

Sufficiency of writing.

Where a contract is made by correspondence between the parties, even though the final letters of both parties are under seal, any letter in the series of correspondence may be read in evidence for the purpose of explaining any ambiguity or doubt which might exist in the contract. [See Phipson on Evidence, 5th ed., 580.]

Brandon Gas & Power Co. v. Brandon Creamery Co., 8 D.L.R. 191, 22 Man. L.R. 655, 22 W.L.R. 476, 3 W.W.R. 283.

Statute of Frauds—Terms not included.

A writing shewn by parol not to include the entire contract and which does not purport to contain all the terms of agreement is insufficient as a memorandum under the Statute of Frauds to establish a sale of lands.

Rogers v. Hewer (No. 2), 8 D.L.R. 288, 5 A.L.R. 227, 22 W.L.R. 807, 3 W.W.R. 477, reversing in the result 1 D.L.R. 747.

Statute of Frauds—Sale of land—Unequivocal act of possession.

An act of possession by an alleged vendee of land under a parol contract, in order to satisfy the Statute of Frauds, must be an unequivocal act. [See Thomson v. Playfair, 6 D.L.R. 263, reversing 2 D.L.R. 37, and see annotation, 2 D.L.R. 43 on possessory acts under the Statute of Frauds.] Proof of the existence of a written memorandum of an agreement for the sale of land without proving what were the terms of payment is insufficient to satisfy the Statute of Frauds. Proof of the mere letting into possession of an alleged vendee of land is not sufficient to satisfy the Statute of Frauds. The fact that the alleged vendee of land under a parol contract of sale entered the land and cut the natural hay thereon and put out the stray cattle and repaired the fences so as to keep the cattle out, does not constitute such an unequivo-

ral act as would take the case out of the Statute of Frauds where those acts were explained by the alleged vendor on some other theory than that of a contract of sale. In order for possession of land to take a case out of the Statute of Frauds, the act of possession must be incapable of explanation on any other theory than that of the existence of a contract of the nature alleged by the plaintiff, and where the alleged act of possession involved no permanent interest in the land, and was, from its nature, capable of explanation in the manner sworn to by the defendant, the plaintiff cannot succeed even where such plausible explanation is disbelieved by the trial judge. [Maddison v. Alderson, 8 App. Cas. 467; Ungley v. Ungley, 5 Ch. D. 887, and Bodwell v. McNiven, 5 O.L.R. 332, specially considered.]

Evans v. Norris, 8 D.L.R. 652, 5 A.L.R. 320, 22 W.L.R. 818, 3 W.W.R. 532.

INCOMPLETENESS OF WRITING—ADMISSIBILITY OF PAROL EVIDENCE.

Although a writing appears on its face to constitute a complete contract in itself, it may by oral or other evidence be shewn to constitute only a part of the real contract; the terms of the instrument may be inconsistent with the real agreement which may be proved by oral or other evidence, but the giving of the instrument in that form may be consistent with the true agreement. [Eaton v. Crooks, 3 A.L.R. 1, applied.]

Brocklebank v. Barter, 22 D.L.R. 209, 8 A.L.R. 262, 30 W.L.R. 159.

SUFFICIENCY OF WRITING.

A memorandum in the following terms: "Witness that I have this day sold and agree to deliver to the Smith Grain Company at Port Arthur, Ont., 3,000 bushels wheat on or before Oct. 31, 1914, at an agreed price of 83 cents per bushel basis, 1 Northern, delivered free on board cars at Port Arthur. Government weights and grades to govern. Shipper also pays freight and dockage. I hereby acknowledge receipt of $100 on above contract," signed by the owner of the wheat, and witnessed by the agent of the purchaser, is a complete memorandum of the contract of sale and not merely an offer to sell. No further assent by the purchaser is required. Parol evidence is not admissible to vary the terms which appear on the face of the contract.

Smith v. Spencer, 42 D.L.R. 269, 11 S.L.R. 328, [1918] 2 W.W.R. 1073.

SALE OF LAND — MEMORANDUM SIGNED BY PURCHASER — DESCRIPTION — SUFFICIENCY—SPECIFIC PERFORMANCE.

The defendant signed a document reading: "A. E. Sparks sell and J. Clement buys the 50 acres of land across the road from him for the sum of $4,000.00 cash:" —Held, that the description was sufficient to identify the parcel of land sold, and that the contract was enforceable against the Statute of Frauds. (2) That a defence to an action for specific performance brought by the vendor, that the alleged contract was not a real contract at all, the defendant merely signing the document to help the plaintiff to make a sale to another at a good price, was not sustained by the evidence. Semble, that the defence that the transaction was not a real one, that is, not that the contract which the plaintiff alleged was unlawful, but that it never was made, was one upon which the defendant might rely. Such maxims as, "No one alleging his own baseness is to be heard," or "A right of action cannot arise out of fraud," were not applicable. Specific performance of the contract decreed.

Sparks v. Clement, 41 O.L.R. 344, reversing 40 O.L.R. 487.

OPTION TO PURCHASE LAND—PURCHASER RESIDING AT A DISTANCE—SUFFICIENCY OF ACCEPTANCE BY LETTER.

An option to purchase land given to a person living at a distance from the owner may be effectually accepted by letter. [Bruner v. Moore, [1904] 1 Ch. 305, referred to.]

Carey v. Roots, 5 D.L.R. 670, 21 W.L.R. 795, 2 W.W.R. 678. [Affirmed, 11 D.L.R. 209, 5 A.L.R. 125.]

SUFFICIENCY OF MEMORANDUM — CORRESPONDENCE—PAROL EVIDENCE.

The written memorandum required by the Statute of Frauds, R.S.O. 1914, c. 102, is sufficiently met if from correspondence between the parties the terms of the sale are ascertainable. Parol evidence is admissible to explain the terms of a telegram in order to connect it with other writings as a sufficient memorandum in writing under the Statute of Frauds.

Doran v. McKinnon, 31 D.L.R. 307, 53 Can. S.C.R. 609, affirming 26 D.L.R. 488, 35 O.L.R. 349, which affirmed 25 D.L.R. 787, 34 O.L.R. 403.

SALE OF LAND—STATUTE OF FRAUDS—INSUFFICIENCY OF MEMORANDUM — RECEIPT.

Lesiuk v. Schneider (Alta.), 36 D.L.R. 598, [1917] 2 W.W.R. 747.

AGREEMENT FOR EXCHANGE OF PROPERTIES—STATUTE OF FRAUDS—ACTUAL BARGAIN NOT EVIDENCED BY WRITING — FRAUD AND MISREPRESENTATION—SECRET COMMISSION — ACTION FOR SPECIFIC PERFORMANCE — UNFOUNDED CHARGES — COSTS.

Boyer v. Bright, 11 O.W.N. 351.

(§ I E—97)—FORMAL REQUISITES—STATUTE OF FRAUDS—SEVERAL PAPERS — SALE OF LAND.

An objection that a contract for the sale of real estate is defective under the Statute of Frauds, in that it does not disclose the name of the owner of the land, is ineffective if the vendor can be ascertained from some other document which is sufficiently connected with the contract in

question. [Rogers v. Hewer (No. 2), 8 D.L.R. 288; Conley v. Paterson, 2 D.L.R. 94, referred to.]

Fysh v. Armstrong, 9 D.L.R. 575, 22 W.L.R. 966, 3 W.W.R. 747.

STATUTE OF FRAUDS—SEVERAL PAPERS.

Canada Law Book Co. v. Butterworth (No. 2), 12 D.L.R. 143, 23 Man. L.R. 352, reversing 9 D.L.R. 321. [Affirmed by Privy Council, 16 D.L.R. 61.]

STATUTE OF FRAUDS—SEVERAL WRITINGS.

A party seeking to make out a memorandum to satisfy the requirements of the Statute of Frauds, cannot select some of the writings and say that they sufficiently evidence a contract, regardless of the fact that there were other important conditions of the intended contract which were not embraced in the writings and were still unsettled. [Hussey v. Horne-Payne, 4 App. Cas. 311; Bristol Co. v. Maggs, 44 Ch. D. 616; Stow v. Currie, 21 O.L.R. 486; Queen's College v. Jayne, 10 O.L.R. 319, and Bohan v. Galbraith, 15 O.L.R. 37, specially referred to.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 22 Man. L.R. 175, 20 W.L.R. 510, 1 W.W.R. 1026. [Affirmed, 11 D.L.R. 175, 22 W.L.R. 703.]

SEVERAL WRITINGS.

Where an owner answers a real estate agent's inquiry as to price and terms and intimation of the possibility of prospective sale on given terms, by instructions to take a deposit and prepare agreements for signature, the contract is closed by taking the deposit and giving a receipt shewing a sale on the terms of the instructions.

Lloy v. Wells, 3 D.L.R. 315, 21 W.L.R. 50, 2 W.W.R. 219.

SALE OF LAND — SEVERAL DOCUMENTS — STATUTE OF FRAUDS.

Where the defendant orally agreed with the agent of the plaintiff to sell the plaintiff certain land and thereafter enclosed the conveyance thereof and other documents to be executed in compliance with the oral contract in a letter signed by him and addressed to the plaintiff stating that he therewith handed him a transfer of the land, describing it, to be delivered to the plaintiff upon the payment of the purchase price, the letter and the documents enclosed therein, together with a sight draft made by the defendant on the plaintiff for the amount of the purchase price, constitute a contract of sale in writing under s. 4 of the Statute of Frauds.

Brown v. Street, 3 D.L.R. 291, 21 W.L.R. 46.

STATUTE OF FRAUDS—CHEQUE AND RECEIPT —SUFFICIENCY OF WRITINGS — SUBSEQUENT FORMAL AGREEMENT WITH ADDITIONAL TERMS CONTEMPLATED.

Where an alleged agreement for the sale of land is contained in a cheque and receipt, and it appears in an action for specific performance thereof that a more formal agreement was to be prepared, providing for payment of taxes, cancellation on default, transfer of the property, and other important matters not mentioned in the cheque and receipt, the cheque and receipt do not constitute a sufficient memorandum in writing of the agreement to satisfy the Statute of Frauds. [Green v. Stevenson, 9 O.L.R. 671, followed; Harris v. Darroch, 1 S.L.R. 116, distinguished.]

Strickland v. Ross, 5 D.L.R. 706, 5 S. L.R. 347, 21 W.L.R. 945, 2 W.W.R. 887.

SUFFICIENCY OF WRITING — REFERENCE TO FUTURE FORMAL CONTRACT.

A receipt given a purchaser of land for his first payment, which stated all the terms of the contract of sale and was sufficiently executed to satisfy the Statute of Frauds, is a binding agreement of itself, and the fact that it contained a provision making a specified sum payable "on the execution of the necessary agreement of sale," does not make it merely a contract for a contract. [Von Halzfeldt Wildenburg v. Alexander, [1912] 1 Ch. 284, specially referred to.]

Conley v. Paterson, 2 D.L.R. 94, 22 Man. L.R. 127, 20 W.L.R. 722, 2 W.W.R. 34.

STATUTE OF FRAUDS—SUFFICIENCY OF WRITING—SEVERAL PAPER.

Where a receipt for a payment on account of the purchase price of an interest in lands, containing sufficient particulars to satisfy the Statute of Frauds, is signed by the vendor, and a copy of it, headed "copy of receipt," is signed by the agent of the purchaser and handed to the vendor, the two documents may be read together, and constitute as against the purchaser a sufficient memorandum in writing to satisfy the Statute of Frauds.

Thomson v. Playfair (No. 2), 6 D.L.R. 263, 26 O.L.R. 624, 22 O.W.R. 866.

REQUISITES—STATUTE OF FRAUDS—SUFFICIENCY—SEVERAL WRITINGS.

Where the defendant, who had, while dealing with a real estate agent, mentioned property belonging to his wife, without giving him instructions to sell it, upon receiving an offer by telegraph for such property, which, however, was in fact made to another real estate agent, not associated with the first real estate agent, in any manner, but who had negotiated a sale with the plaintiff, and had given him a receipt for a cash payment stating that it was received to apply on the offer to purchase the property, which it described, refused such offer, and later, the second real estate agent sent a telegram in the name of the first real estate agent making another offer, which the defendant wired the first agent to accept, stating that the title was in his wife, whereupon the second agent accepted from the plaintiff a further payment by cheque, payable to the Realty Exchange, which did not shew for what it was given, and which was indorsed by the second agent in his own name under

instructions from the first agent, such receipt and telegrams did not amount to a written contract sufficient to satisfy the requirements of the Statute of Frauds, since the defendant's telegram to the first agent was an instruction to him to accept the offer of the plaintiff, which he did not do, and the acceptance by the second agent was insufficient because the defendant had not given him authority to accept it for him, and the indorsement of the cheque by the second agent under the first agent's instructions, if sufficient to constitute an acceptance, was not binding upon the defendant, since the first agent could not delegate to the second agent the authority the defendant had given him.

Boland v. Philip, 5 D.L.R. 81, 3 O.W.N. 1562, 22 O.W.R. 849. [Affirmed, 6 D.L.R. 863.]

SALE OF LAND—SPECIFIC PERFORMANCE—CONTRACT BY CORRESPONDENCE.

Storie v. Hancock, 4 O.W.N. 459.

(§ I E—98)—DESCRIPTION UNCERTAINTY—TERMS OF CONTRACT ELECTION.

Uncertainty of description of the subject matter in the sale of land may be aided by a right of election vested by the terms of the contract in the purchaser whereby the latter is given the power of rendering certain that which before was undetermined, and so make the sale enforceable by a decree for specific performance. [Duckmanton v. Duckmanton, 5 H. & N. 219; Hobson v. Blackburn, 1 Myl. & K. 571; Rumble v. Heygate, 18 W.R. 749; Jenkins v. Green, 27 Bev. 437, referred to.]

Fredericton & Grand Lake Coal & R. Co. v. Harding, 20 D.L.R. 803, 42 N.B.R. 363.

DESCRIPTION OF LAND.

Where a receipt for the initial payment upon land sold failed to shew with certainty how many lots were sold, its insufficiency in this regard under the Statute of Frauds, if any, was covered by the fact the cheque given by the purchaser for such payment plainly shewed that the sale was of a specified number of lots.

Rogers v. Hewer, 1 D.L.R. 747, 5 A.L.R. 227, 19 W.L.R. 868, 1 W.W.R. 481. [Reversed 8 D.L.R. 288, 5 A.L.R. 227, 22 W.L.R. 867, 3 W.W.R. 477.]

(§ I E—99)—CONTRADICTORY TERMS OF PAYMENT.

Where the terms of payment stated in a memorandum of the sale of land are contradictory, the contract is within the Statute of Frauds.

Frith v. Alliance Investment Co., 5 D.L.R. 491, 4 A.L.R. 238, 20 W.L.R. 551, 1 W.W.R. 967. [Affirmed, 10 D.L.R. 765, 6 A.L.R. 197.]

(§ I E—100)—EXECUTION.

Where the real estate agent obtained on the owner's behalf a deposit on the purchase of land and gave a receipt therefor specifying as the terms of the sale that a portion of the price (including the deposit) should be "cash" and balance in instalments, and a formal agreement to the like effect was afterwards signed and delivered by both the vendor and purchaser, the latter agreement is evidence in writing of the contract under the Statute of Frauds although the cash payment, the receipt whereof it purported to acknowledge, was not actually paid, if the agreement was not delivered conditionally upon such payment being made. [Re Hoyle, Hoyle v. Hoyle, [1893] 1 Ch. 98, specially referred to.]

Knight v. Cushing, 1 D.L.R. 331, 4 A.L.R. 123, 20 W.L.R. 28.

(§ I E—101)—FORMAL REQUISITES—STATUTE OF FRAUDS—SUFFICIENCY OF WRITING—ACCEPTANCE AS PER PAROL VARIATION OF OFFER.

A contract was not sufficiently shown against the vendor so as to satisfy the Statute of Frauds where the written acceptance of the written offer was alleged to have been modified by a parol arrangement varying material terms of the original offer as to the terms of payment.

Beer v. Lea, 14 D.L.R. 236, 29 O.L.R. 255, affirming 7 D.L.R. 434, 4 O.W.N. 342.

(§ I E—103)—STATUTE OF FRAUDS—SIGNATURE BY ONE OF TWO ADMINISTRATORS.

An offer to sell land belonging to the estate of a deceased person is not a sufficient memorandum under the Statute of Frauds where the offer is signed by only one of two of the personal representatives of the deceased. [Gibb v. McMahon, 37 Can. S.C. R. 362, applied.]

McInnis Farms v. McKenzie, 12 D.L.R. 100, 23 Man. L.R. 120, 23 W.L.R. 863, 4 W.W.R. 205.

SIGNATURE.

Where a writing relied upon as an acknowledgement or waiver is a printed form with intervening blanks between the various clauses thereof, a signature placed in one of such blanks is not equivalent to a signature placed at the end of the document, and cannot be considered as an authentication of a clause which follows the signature so placed.

Eisler v. Canadian Fairbanks Co., 8 D.L.R. 390, 22 W.L.R. 888, 3 W.W.R. 753.

(§ I E—105)—FORMAL REQUISITES—STATUTE OF FRAUDS — CONTRACTS AS TO REALTY—DESCRIPTION OF PROPERTY — RECEIPT.

An incomplete description in a receipt for an initial payment on a sale of land, which described the property by lot and block number, and as being 25 feet on a designated street, may be read with correspondence and documents with which it is connected, so as to shew in what municipality the lot was and to what registered plan the lot and block numbers applied. [Heath v. Sandford, 17 Man. L.R. 101, at 102; Owen v. Thomas, 3 My. & K. 353;

and McMurray v. Spicer, L.R. 5 Eq. 526, referred to.]

Selkirk Land & Investment Co. v. Robinson, 13 D.L.R. 936, 23 Man. L.R. 774, 25 W.L.R. 392.

STATUTE OF FRAUDS—INDEFINITE TERMS OF WRITING.

The Statute of Frauds is not satisfied where the written instrument or correspondence constituting the memorandum required by the statute, though otherwise satisfactory, fails to fix definitely the amounts of the deferred payments on a sale of land or the times when such payments are to be made.

McInnis Farms v. McKenzie, 12 D.L.R. 100, 23 Man. L.R. 120, 23 W.L.R. 863, 4 W.W.R. 205.

MEMORANDUM.

To satisfy the requirements of the Statute of Frauds as to the formalities of a written contract for the sale of lands, it is essential that the manner and time of payment, as well as the amount to be paid, should be set out with such particularity and certainty as would enable the court to ascertain and define whether or not payment was to be made in cash, and if not in cash, then on what dates and in what amounts the payments are to be made. [See also Fenske v. Farbacher, 2 D.L.R. 634.] An agreement in writing for the sale of lands in which the price is shewn, but the terms of payment are not inserted, is insufficient to satisfy the Statute of Frauds. [Reynolds v. Foster, 3 D.L.R. 506, 3 O.W.N. 983, applied.]

Clement v. McFarland, 8 D.L.R. 226, 23 O.W.R. 613.

SALE OF GOODS ACT — MEMORANDUM — WHETHER "SIGNED BY PARTY TO BE CHARGED"—PRINTED FORM.

Where the jury, although questioned on the point, fails to find whether a memorandum put forward to satisfy the Sales of Goods Act was "signed by the party to be charged," the court has power to make the finding. [Sewell v. B.C. Towing Co., 9 Can. S.C.R. 527 at 552, applied.] A printed form of contract containing the names of the defendant companies stamped at the end thereof, and between which the agent of both defendants, for handing the form to a bonding company as evidence of the contract, had written the word "and," held to be "signed by the party to be charged" [Schneider v. Norris, 2 M. & S. 286, followed], and to be a sufficient memorandum to satisfy the Sales of Goods Act, although it made no reference to an agreement by the plaintiffs to give a bond for the due performance of the contract.

Gibb v. Canadian Northern Construction Co. (B.C.), [1918] 1 W.W.R. 575. [Reversed in 43 D.L.R. 276, [1918] 3 W.W.R. 396.]

SALE OF GOODS — STATUTE OF FRAUDS — STATEMENT OF PRICE — REFERENCE TO PRICE LIST — INCORPORATION OF DOCUMENT BY REFERENCE — BREACH OF CONTRACT—DAMAGES.

Bimel-Ashcroft Mfg. Co. v. Chaplin Wheel Co., 15 O.W.N. 52.

(§ I E—106)—STATUTE OF FRAUDS—SUFFICIENCY OF MEMORANDUM — DESCRIPTION OF PARTIES—CONTRACT IN AGENT'S NAME.

An agreement relating to land made in the name of an agent sufficiently satisfies the Statute of Frauds, since parol evidence is admissible to disclose the principal.

Pulford v. Loyal Order of Moose (No. 2), 14 D.L.R. 577, 23 Man. L.R. 641, 25 W.L.R. 868, 5 W.W.R. 452.

STATUTE OF FRAUDS — SUFFICIENCY OF MEMORANDUM — NAME OF PURCHASER NOT INDICATED IN DEPOSIT RECEIPT.

Woodhouse v. Foxwell, 11 D.L.R. 860.

SUFFICIENCY OF MEMORANDUM — LAND OPTION.

A written option to purchase land at a named price, signed by the vendors, though their names do not appear in the body of the writing and no time is fixed for the exercise of the option, is a sufficient memorandum under the Statute of Frauds, and enforceable if accepted.

Bennett v. Stodgell, 28 D.L.R. 639, 36 O.L.R. 45.

DESCRIPTION OF PARTIES—DEFINITENESS.

The description of a contracting party as the "client of, etc.," without specifying the name and with no independent writings to establish the identity, is defective for want of definiteness under the Statute of Frauds, and the contract operates only as an offer on the party to be charged.

Newberry v. Brown, 23 D.L.R. 627, 21 B.C.R. 556, 32 W.L.R. 118, 8 W.W.R. 1283, affirming 20 D.L.R. 896.

GUARANTY—SUFFICIENCY OF MEMORANDUM —PARTIES.

The defendant wrote the following memorandum on a leaf of a ledger in the plaintiff's office: "I hereby guarantee the account of W.G. Fletcher successor to Fletcher and Jackson covering past and future purchases to the value of $750. (Signed) Emma Fletcher." There was no writing on the ledger to shew to whom it belonged. In an action by the guarantee: Held, that as the name of the plaintiff did not in any way appear upon the document there was no sufficient agreement or memorandum or note of an agreement within s. 4 of the Statute of Frauds and the plaintiff cannot recover. [Williams v. Lake, 29 L.J., Q.B. 1, followed.] Where there is nothing in the document to indicate that the account which was guaranteed was the account of the plaintiff, parol evidence cannot be given to prove that it was the plaintiff's account.

Macdonald & Co. v. Fletcher, 22 B.C.R. 298.

SALE OF LAND—STATUTE OF FRAUDS—DESCRIPTION OF PARTIES—SEPARATE WRITINGS.

The particulars required to make a complete memorandum for the purposes of the Statute of Frauds need not all be contained in one document. The signed writing may incorporate others by reference, but taken together they must identify the parties and subject-matter. [Clergue v. Preston, 8 O.L.R. 84, distinguished.]

Bailey v. Dawson, 1 D.L.R. 487, 25 O.L.R. 387, 20 O.W.R. 908.

STATUTE OF FRAUDS—DESCRIPTION OF PARTIES.

A contract for the sale of land which is signed by persons "as agents for the owner" sufficiently satisfies the requirements of the Statute of Frauds in that regard. [Rossiter v. Miller, 3 App. Cas. 1124, applied.]

Conley v. Paterson, 2 D.L.R. 94, 22 Man. L.R. 127, 20 W.L.R. 722, 2 W.W.R. 34.

STATUTE OF FRAUDS — DEFINITENESS — "CLIENT OF P. N. ANDERSON"—INSUFFICIENCY OF.

Where the only document available in proof of the alleged agreement of sale and signed by the party to be charged gave no further particulars from which it could be ascertained who was the other party to the contract than the words "client of P. N. Anderson," there is not a sufficient agreement to satisfy the Statute of Frauds, [Ratham v. Caldwell, 16 B.C.R. 201, followed; Andrews v. Calori, 38 Can. S.C.R. 588, distinguished.]

Newberry v. Brown, 20 D.L.R. 896, 20 B.C.R. 483, 7 W.W.R. 802.

(§ I E—108)—SUFFICIENCY OF WRITING—SIGNATURE "PER" ONE OF SEVERAL JOINT OWNERS—STATUTE OF FRAUDS.

A receipt for the deposit on a sale of land expressed to be "subject to owners' approval" and containing a statement of the price and terms of sale will not satisfy the Statute of Frauds where it is signed "per" one of several joint owners and was repudiated by the co-owners, who declined the deposit and had it returned to the proposed purchaser.

Tremblay v. Dussault (No.2), 10 D.L.R. 500, 25 Man. L.R. 128, 23 W.L.R. 969, 4 W.W.R. 235, affirming 8 D.L.R. 348.

SIGNATURE.

A concluded bargain is made for the sale of land when the owner signs a receipt that he had received a certain sum of money on account of the purchase thereof.

Baxter v. Rollo, 5 D.L.R. 764, 18 B.C.R. 769, 21 W.L.R. 892, 2 W.W.R. 786.

INTEREST IN LAND—UNDERTAKING TO CONVEY—WRITTEN MEMORANDUM—PROOF OF SIGNATURE—HANDWRITING EXPERTS — STATUTE OF FRAUDS — TRUSTEE — FRAUDULENT BREACH OF TRUST—TAX SALE.

O'Brien v. Moore, 8 O.W.N. 378.

(§ I E—110)—EFFECT OF FRAUD—REAL ESTATE BROKER'S LISTING CONTRACT — WRITING—PAROL EVIDENCE.

Where brokers with whom defendant had listed for sale to a fixed date a particular property held by him under option, on obtaining a renewal of the listing, got defendant to sign a listing agreement in which, without his knowledge, they had added to the reference made to the particular property the words "and properties belonging to myself," the latter addition may be shewn by parol to have been fraudulently obtained and will not be binding when promptly repudiated on discovery of the fraud; a reference to the listing as then "expiring" is evidence that only the property covered by the expiring contract was to be included in the renewal.

Gillespie v. Bending, 19 D.L.R. 187.

SETTLEMENT OF ACTION—INTERVENTION OF STRANGER — PROMISE TO PAY COSTS — WITHDRAWAL OF ACTION—PERFORMANCE OF PROMISE—FAILURE TO PROVE PROMISE TO PAY DAMAGES—STATUTE OF FRAUDS.

Gnam v. McNeil, 6 O.W.N. 223.

(§ I E—111)—PART PERFORMANCE—STATUTE OF FRAUDS.

Canada Law Book Co. v. Butterworth (No. 2), 12 D.L.R. 143, 23 Man. L.R. 352, 24 W.L.R. 124, 4 W.W.R. 237, reversing 9 D. L.R. 321. [Affirmed by Privy Council 16 D.L.R. 61.]

MISREPRESENTATION—LAPSE OF TIME—INABILITY TO RESTORE.

Misrepresentation as to the revenue derived from a theatre is not sufficient ground for setting aside a sale thereof, where the purchaser has had an opportunity to estimate the amount and has not complained of the small revenue received for several months after taking possession. Especially where such purchaser is in such a position that he cannot restore the business to the vendor if successful in the action.

Rodden v. Sauriol, 42 D.L.R. 220, 24 Rev. Leg. 421.

(§ I E—115)—STATUTE OF FRAUDS—ACTS OF PART PERFORMANCE.

Acts of part performance in order to be effective to take a contract for the sale of land out of the operation of the Statute of Frauds, must be done by the person asserting the contract with the knowledge of the person sought to be charged that the acts are being done and are so done on the faith of the contract; and such acts must be consistent with the contract alleged, and performed on the faith thereof. [Fry on Specific Performance, 5th ed., s. 588, specially referred to, and Maddison v. Alderson, 8 App. Cas. 467, referred to.]

McInnis Farms v. McKenzie, 12 D.L.R. 100, 23 Man. L.R. 120, 23 W.L.R. 863, 4 W. W.R. 205.

FRAUD AND MISREPRESENTATION—REALTY CONTRACT—AGENT'S DECEIT.

Kenner v. Proctor, 5 O.W.N. 552, 25 O.W.R. 439.

PART PERFORMANCE—EQUITABLE ASSIGNMENT.

The plaintiff held a mortgage secured by a property occupied by a garage, of which the defendant was owner. They both employed the same agents, who collected the rent, paid the interest on the mortgage and the balance to the owner. Upon certain principal coming due the mortgagee wrote the agents, stating he was willing to forego the payment for 6 months, but the mortgagor must sign an agreement guaranteeing that a sufficient sum be reserved from the garage rent to pay the interest without lapse until such time as the whole loan be retunded. Upon this letter being shewn the mortgagor he wrote the agents instructing them to act as his sole agent, collect the rents, and pay the mortgage interest regularly until the loan be retunded in full. This arrangement was carried out for a year, when the mortgagor wrote the agents instructing them to cease collecting the rents. The mortgagee then sued the tenant for the rents, claiming there was an equitable assignment thereof and that the revocation was nugatory. On an interpleader issue it was held by the Trial Judge that the mortgagor's authority was revocable as there was no sufficient evidence of the agreement to satisy the Statute of Frauds, and the letter from the mortgagor relied on did not constitute an equitable assignment, as it shewed no consideration on its face. Held, on appeal, that irrespective of the question of equitable assignment, the extending of the time for payment of principal, the benefit of which was accepted by the mortgagor upon his agreeing that the mortgage should be paid out of the rents, was a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and the appeal should be allowed.

Wardroper v. Stewart-Moore, 25 B.C.R. 69.

STATUTE OF FRAUDS—PART PERFORMANCE——AGREEMENT TO CONVEY LAND—EVIDENCE — CORROBORATION — EXECUTORS AND ADMINISTRATORS.

The owner of a farm agreed by a formal document to convey the farm to his son, in consideration of the payment by the son of a rental to his father and mother during their lives and the life of the survivor and the performance of certain services. The son, for nearly a year, lived on the farm and carried out the terms of the agreement. He, then, owing to domestic difficulties, went away. The father then farmed the land for some months; but, after that, saw the son and persuaded him to return, upon, as stated by the son, the same terms as those previously agreed upon. The son then again continued to carry out, until the death about 10 months later of both father and mother, obligations which were the same as those specified in the original agreement:—Held, that the evidence of the son as to the second agreement was amply corroborated, and that the possession of the farm by the son, the payment of the stipulated rent, the making of repairs, and the removal of large stones from the land, were acts of part performance sufficient to take the case out of the Statute of Frauds.

Wilson v. Cameron, 30 O.L.R. 486, 5 O.W.N. 234, 787, affirming a judgment of Middleton, J.

STATUTE OF FRAUDS—CONTRACTS AS TO LAND—PART PERFORMANCE—VENDOR AND PURCHASER—AGREEMET FOR SALE OF LAND—PAYMENT OF TAXES—TRESPASS—INJUNCTION—APPEAL—DAMAGES.

Cook v. Barsley, 7 O.W.N. 161.

(§ I E—121)—ORAL AGREEMENT—STATUTE OF FRAUDS—POSSESSION AND IMPROVEMENT.

The purchaser under an oral agreement for sale cannot set up his own contract of resale made with a third party as a part performance of the original agreement excluding the operation of the Statute of Frauds for the purpose of the purchaser's action for specific performance, if the contract of resale was made without the knowledge or acquiescence of the original vendor. [See also Fry on Specific Performance, 5th ed., p. 311.] No taking of possession sufficient to satisfy the requirements of the Statute of Frauds, occurs where one in possession of a piano under a storage arrangement, orally agrees to exchange certain land for the piano, and merely continues in possession of the piano without any overt act or writing to indicate a change in the character of the continued possession. [Maddison v. Alderson, 8 App. Cas. 467, specially referred to.]

Adolph v. Good, 1 D.L.R. 750, 5 S.L.R. 106, 20 W.L.R. 401, 1 W.W.R. 936.

INCOMPLETE AGREEMENT OF SALES—PURCHASER GOING INTO POSSESSION OF LAND—PAYMENT OF MUNICIPAL TAXES.

No taking of possession sufficient to operate as a part performance so as to take the case out of the Statute of Frauds, occurs where the intended purchaser, under an incomplete and unfinished contract, without the privity or consent of the owner goes into possession of the land being negotiated for and also pays part of the municipal taxes levied against the same. [Fry on Specific Performance, 5th ed., par. 587, specially referred to.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 22 Man. L.R. 175, 20 W.L.R. 510, 1 W.W.R. 1026, affirming 18 W.L.R. 563. [Affirmed, 11 D.L.R. 175.]

PART PERFORMANCE—POSSESSORY ACTS.

Where there has been part payment on a contract to purchase timber limits not sufficiently evidenced by a writing under the Statute of Frauds, the subsequent entry upon the lands by the purchaser's agents or employees and their examination of the timber, may constitute a taking of possession and a part performance of the contract sufficient to take the case out of the operation of the Statute of Frauds, if the vendor

as a licensee under the Crown Timber Act, R.S.O. 1897, c. 32, s. 3, had the exclusive right of possession and the acts of the purchaser were not referable to or justifiable from any circumstances other than the contract in question.

Thomson v. Playfair (No. 1), 2 D.L.R. 57, 25 O.L.R. 365, 21 O.W.R. 867.

STATUTE OF FRAUDS—PAROL AGREEMENT TO SELL LAND—PART PERFORMANCE—POSSESSION AND IMPROVEMENT.

A parol agreement to sell land is taken out of the Statute of Frauds where the vendee, with the knowledge of and without objection from the vendor, went into possession and built a house on the land.

Romanisky v. Wolanchuk, 13 D.L.R. 432, 23 Man. L.R. 615, 25 W.L.R. 166, 4 W.W.R. 1362.

INCORPORATING EXTRINSIC DOCUMENT.

The terms of a written contract with a municipal corporation, under its seal, cannot be varied so as to result in a binding agreement, by a written acceptance of a proposition to enter into a new and modified contract, contained in a letter written by a city solicitor, under directions from the city council, where such letter expressly stated that the offer therein contained was merely a tentative suggestion which was not to have any legal effect on the existing contract until reduced into a new written agreement. [Bonnewell v. Jenkins, 47 L.J. Ch. 758; Rossiter v. Miller, 3 App. Cas. 1124; Stow v. Currie, 21 O.L.R. 486, and Chinnock v. Marchioness of Ely, 4 DeG. J. & S. 638, at p. 645, applied.]

Wallace Bell Co. v. Moose Jaw (No. 2), 4 D.L.R. 438, 5 S.L.R. 155, 21 W.L.R. 871, 2 W.W.R. 752, affirming 3 D.L.R. 273, 21 W.L.R. 36.

VAGUE OR AMBIGUOUS TERMS — CONSTRUCTION.

In the interpretation of a vague or ambiguous term used in a contract, a letter having reference to the same subject-matter written by another person on the plaintiff's instructions in which the same term is used, may be considered as the language of the plaintiff for the purpose of assigning to such term a meaning consistent with that in the letter but adverse to the meaning which the plaintiff seeks to place upon it in the contract.

Davis v. Lowry, 3 D.L.R. 157, 20 W.L.R. 839, 2 W.W.R. 169.

REQUISITES—SALE OF LAND—EFFECT OF TAKING POSSESSION.

A contract to purchase is not established as against a railway company entitled to take lands by eminent domain proceedings, by the fact of the company having taken possession of same after notice from the owner naming his price and stating that if they took possession he would construe their action as an acceptance of his terms.

Haney v. Winnipeg & Northern R. Co., 1 D.L.R. 387, 14 Can. Ry. Cas. 39, 20 W.L.R. 540, 1 W.W.R. 1046.

WRITTEN ORDER SIGNED AND SEALED BY VENDEE—NONREVOCABILITY—PAROL ACCEPTANCE BY VENDOR—DELAY IN SHIPPING.

Gaar Scott Co. v. Ottoson, 19 W.L.R. 472, 21 Man. L.R. 462.

SUFFICIENCY OF DESCRIPTION—STATUTE OF FRAUDS.

Carsley v. Stewart, 18 W.L.R. 420 (Man.).

PAROL EVIDENCE—CONDITION—FRAUD.

Long v. Smith, 23 O.L.R. 121, 18 O.W.R. 88.

CONTRACT—PURCHASE OF LAND—ASSIGNMENT.

Grant v. Carr, 18 W.L.R. 415 (Man.).

AGREEMENT TO PAY SUM IF LAND NOT SOLD—STATUTE OF FRAUDS, S. 4.

Crippen v. Hitchner, 18 W.L.R. 259 (B.C.).

COMPANY—MISTAKE AS TO IDENTITY—OTHER COMPANY WITH SIMILAR NAME.

Alberta Central Land Corp. v. Ford, 17 W.L.R. 241.

STATUTE OF FRAUDS—DESCRIPTION OF LAND, SUFFICIENCY OF.

Caisley v. Stewart, 21 Man. L.R. 341, 18 W.L.R. 420.

LETTERS CONSTITUTING CONTRACT—INSUFFICIENCY—TERMS NOT SET FORTH—FORMAL CONTRACT CONTEMPLATED.

Ross v. Eastern Sask. Land Co., 17 W.L.R. 280 (Sask.).

PROMISSORY NOTE GIVEN FOR PART OF PURCHASE MONEY—ISSUE AS TO WHETHER TAKEN IN PAYMENT—DEFAULT—CANCELLATION OF CONTRACT.

Midgeley v. Bacon, 16 W.L.R. 496 (Sask.).

CONTRACT FOR SALE OF LAND—PROOF—PAYMENT OF DEPOSIT—RECEIPT BY AGENT—OWNER'S APPROVAL — MEMORANDUM IN WRITING—STATUTE OF FRAUDS.

Kirkland v. Smith, 16 W.L.R. 530 (B.C.).

CONTRACT FOR SALE OF LAND—CORRESPONDENCE—NO CONCLUDED AGREEMENT.

Frewen v. Hays, 16 W.L.R. 253 (B.C.).

VERBAL AUTHORITY TO AGENT — AGENT'S AUTHORITY TO SUBMIT OFFERS—STATUTE OF FRAUDS.

Doyle v. Martin, 3 A.L.R. 184, 14 W.L.R. 666.

CORRESPONDENCE—STATUTE OF FRAUDS.

Latimer v. Park, 2 O.W.N. 354, 19 O.W.R. 776.

CONTRACT FOR SALE OF LAND—STATUTE OF FRAUDS—OPTION BY VENDOR—PURCHASER NOT NAMED—CIRCUMSTANCES SUPPLYING OMISSION—ACCEPTANCE BY PAROL.

Evans v. Bonneau, 17 W.L.R. 243 (Alta.).

SIGNED AND SEALED CONTRACT—DELIVERY —EVIDENCE.

Dillabaugh v. McLeod, 16 W.L.R. 149 (Sask.).

BREACH OF AGREEMENT TO LEASE—NOTICE—ABSENCE OF CONSIDERATION.

Maltezos v. Brouse, 19 O.W.R. 6, 2 O.W.N. 990.

AGREEMENT TO GIVE FARM AT DEATH—CONSIDERATION—STATUTE OF FRAUDS.

Coulter v. Elvin, 2 O.W.N. 678, 18 O.W.R. 99.

BROKER—REAL ESTATE AGENT—AUTHORITY TO SIGN CONTRACT.

Standard Realty Co. v. Nicholson, 24 O.L.R. 46, 19 O.W.R. 373.

SALE TO AGENT — NONDISCLOSURE OF MATERIAL FACTS—RESCISSION.

Newstead v. Rowe, 17 W.L.R. 171 (Sask.), affirming 3 S.L.R. 176, 14 W.L.R. 509.

AGREEMENT TO ANSWER THE DEBT OR DEFAULT OF ANOTHER—STATUTE OF FRAUDS, S. 5.

Isle of Coves Hunt Club v. Williscroft, 2 O.W.N. 558, 18 O.W.R. 344.

INTEREST IN OIL LEASES—ORAL AGREEMENT—INTEREST IN LAND—STATUTE OF FRAUDS.

Leslie v. Hill, 25 O.L.R. 144, 20 O.W.R. 490.

CONTRACT FOR SALE OF LAND—AUTHORITY OF AGENT OF VENDOR TO MAKE—RECEIPT SIGNED BY AGENT IN HIS OWN NAME—MEMORANDUM IN WRITING—NAME OF PRINCIPAL NOT DISCLOSED.

Maybury v. O'Brien, 25 O.L.R. 229 20 O.W.R. 683.

II. Construction.

A. IN GENERAL.

(§ II A—125)—AGREEMENT TO BUY LAND—TERMS ON WHICH LAND TO BE RECONVEYED—TENDER OF INTEREST IN LAND INSTEAD OF SYNDICATE — NONCOMPLIANCE WITH TERMS.

The defendants organised a syndicate for the purpose of acquiring land in Alberta. The plaintiff subscribed for one share. An agreement was entered into, by which if the land purchased was not sold within a certain time, and the plaintiff wished to dispose of his share in the syndicate defendants would take over the plaintiff's interest at the actual cash amount invested by him with interest on execution by plaintiff of a good and sufficient transfer of his share containing covenants that said share had not been in any way incumbered. The court allowed the appeal and dismissed the action on the ground that, under the terms of the agreement, it was necessary for plaintiff to tender a conveyance of his interest in the syndicate; this he had not done but had only tendered a conveyance of his interest in the land held by the syndicate.

Treen v. Silliker, 44 D.L.R. 515, 52 N.S.R. 464.

CONSTRUCTION — AMBIGUITY — PRESUMPTION.

Upon the construction of contracts, doubts are solved in favour of him who has contracted the obligation and against the person claiming its benefit, especially where the latter drew the contract.

Ha Ha Bay R. Co. v. Larouche, 10 D.L.R. 388, 22 Que. K.B. 92.

CONSTRUCTION OF — COMMERCIAL CONTRACT—QUE. C.C. 1069.

A contract between a lumber company and a trader, owner of land, for the cutting down of a certain quantity of wood each year for a number of years (coupe de bois) on the trader's land for the purpose of gradually clearing the land, is a commercial contract, and where a delay is fixed for the accomplishment of an obligation, the party under such obligation is in default by the lapse of time alone.

Brosseau v. Benard, 9 D.L.R. 172, 43 Que. S.C. 165.

CONSTRUCTION — CONDITION THAT CONTRACTEE MAY PAY FOR LABOUR AND SUPPLIES.

A condition in a construction contract that the contractee may pay for "labour and supplies" furnished the contractor, does not give the former power to decide what claims fall within such stipulation, since that is a question for decision by the court.

Irvine v. Hervey, 13 D.L.R. 868, 47 N. S.R. 310, 13 E.L.R. 297.

CONSTRUCTION — TELEGRAM FOLLOWING QUOTATION INCOMPLETE — RIGHT TO REJECT.

A contract is not made out by a telegram from the buyer following a quotation for a cargo of all chestnut coal, that he "must have 75 tons grate coal for foundry, balance nut, cargo not over 200 tons, price for nut satisfactory;" the buyer must be taken to have desired a quotation for the foundry coal then first mentioned, and was justified in refusing the entire shipment consigned to him without further order.

Phillips v. Hatt, 20 D.L.R. 186.

BREED OF FOXES.

It is not to be inferred that a written contract which recites that the vendor company is the "owner of a certain breed of foxes commonly known as blue foxes," and which provides for the sale of two pairs of blue foxes on specified terms, that the sale is one of foxes bred by the plaintiff company and not of foxes which it has purchased.

Provincial Fox v. Tennant, 21 D.L.R. 236, 48 N.S.R. 555, reversing 18 D.L.R. 389.

SUBSEQUENT ACTS OR CONDUCT.

Where the language of a contract is unambiguous its interpretation cannot be affected by subsequent acts or conduct.

Union Natural Gas Co. v. Chatham Gas Co., 34 D.L.R. 484, 38 O.L.R. 488. [See also 38 D.L.R. 753, 40 O.L.R. 148.]

ONUS AS TO CORRECT INTERPRETATION.

Where an agreement is capable of being taken in several meanings, the onus is upon the party seeking to shew that his interpretation is the correct one, to establish

it with reasonable clearness. [Falck v. Williams, [1900] A.C. 176, applied.]

Adams v. Acheson, 26 D.L.R. 633.

CONSTRUCTION OF — RENUNCIATION OF RIGHTS CONSTRUED STRICTLY WHEN.

An agreement alleged to import the renunciation of a right is interpreted strictly; and where a land owner permits his land to be taken for the construction of a railway, and reserves his right of action for possible damages, resulting from the obstruction or closing of a roadway leading from his farm to the St. Lawrence River, he is not estopped therefrom by a stipulation in the agreement of sale to the effect that the price of the land sold on the same day to the company "shall include all damages caused by the running of the railway over the land sold."

Desmeules v. Quebec & Saguenay Ry. Co., 15 Can. Ry. Cas. 94, 43 Que. S.C. 150.

AMBIGUOUS WORDS CONSTRUED AGAINST PARTY USING THEM.

It is a principle recognized on the interpretation of contracts that when the writing is drawn by a party, the doubts and ambiguities found in it are interpreted against him.

Canestrari v. Lecavalier, 47 Que. S.C. 296.

MARRIAGE CONTRACT IN QUEBEC.

The clause in a marriage contract by which "the future husband donates to the future wife the sum of $4,000 half of which on his death, should go to the children born of the marriage and, if there were no children, the whole should return to the husband" with an hypothecary guarantee in favour of the future wife, constitutes, not a contractual institution of heirship nor a donation in contemplation of death, but a present donation of property, namely, of the income from the sum donated, to the future wife for her life, the property in it to be determined only at her death.

Martel v. Vignault, 44 Que. S.C. 68.

SALE — INTERPRETATION — CUTTING OF WOOD—C.C. ART. 1013, 1016, 1019.

The following clause stipulated as consideration for the sale of a wood lot, namely, "and also for the price of the work of cutting from now till 4 years from the date of these presents (for the profit of said vendors) the wood which is found on the part of the said land sold" should be interpreted in this sense that the purchaser binds himself to cut, during the four years immediately following the signing of the contract, the wood necessary for fuel for the vendor in each year. The rest of the wood should belong to the purchaser, the owner of the land. The above clause being doubtful, the common intention of the parties should be determined by interpretation. But the vendor has himself interjected the contract by only demanding from the purchaser in each year a limited quantity of wood namely, that which he needed for fuel.

Jodoin v. Parent, 55 Que. S.C. 322.

MANUFACTURING LUMBER — QUANTITY AND PRICE—EXTRA PAYMENT OR BONUS.

Orton v. Highland Lumber Co., 5 O.W.N. 438.

RENTAL OF DREDGING PLANT — CLAIM FOR BALANCE — OVERPAYMENT — COUNTERCLAIM — SET-OFF — COSTS.

Brown v. Dennon, 16 O.W.N. 165.

FAMILY ARRANGEMENT — EXECUTED AGREEMENT—CONVEYANCE IN BREACH OF, SET ASIDE — REPAYMENT OF AMOUNT OF INCUMBRANCE DISCHARGED BY GRANTEE —LIEN FOR—DISMISSAL OF ACTION FOR RECOVERY OF LAND.

McRae v. McIntyre, 17 O.W.N. 167.

SHARING OF PROFITS ON PURCHASE AND RESALE OF LAND—INTEREST ON MONEYS PAID BY PARTY IN BUYING AND HOLDING THE LAND TO BE TAKEN INTO ACCOUNT AS PART OF COST.

In estimating the profits on the purchase and resale of certain land for the purpose of dividing the profits, interest on the money paid out by one of the parties in buying the land and for taxes, etc., during the period of holding it, forms part of the cost and should be taken into account.

Moore v. Donogh, [1919] 2 W.W.R. 680.

(§ II A—127)—CONSTRUING AS A WHOLE.

Under an absolute covenant in a contract for the sale of mining claims that the purchaser should pay a royalty at a specified rate for each long ton of ore removed from the claims, the amount to be removed from the claims in each year to be not less than a specified amount of long tons and that the said royalty at such rate should be paid on such number of tons annually at least, whether that amount should be actually removed or not, the fact that no merchantable ore was found in the claims will not relieve the purchaser from the royalty. [Palmer v. Wallbridge, 15 Can. S.C.R. 650, applied; Leake on Contracts, 6th ed., 490, specially referred to.]

Dubé v. Mann, 4 D.L.R. 164, 3 O.W.N. 1580, 22 O.W.R. 75.

AGREEMENT TO SELL ALL GAS WHICH OTHER PARTY REQUIRES—INFERENCE.

Where the agreement between the parties is that the one shall supply all the gas which the other may use for power purposes, though there is no express agreement that the other would take all the gas which it needed, yet the court will infer an agreement on the part of the latter to do so. [The Queen v. MacLean, 8 Can. S.C.R. 210, referred to.] An offer by a gas company that it would supply gas at a certain reduced rate for a certain period of years to a manufacturing company for power purposes, and would extend its system and install apparatus so as to be able to make such supply, when accepted by the manufacturing company, is an agreement that

the gas company would manufacture and supply to the manufacturing company all the gas which it would use for power purposes in its factory during that period at that reduced rate, and that the manufacturing company would take all the gas which it would use for that purpose during that period. [The Queen v. MacLean, 8 Can. S.C.R. 210; Kenney v. The Queen, 1 Can. Ex. 68, referred to.]

Brandon Gas & Power Co. v. Brandon Creamery Co., 8 D.L.R. 191, 22 Man. L.R. 655, 22 W.L.R. 476, 3 W.W.R. 283.

CONSTRUCTION AS A WHOLE—CIVIL CODE, QUEBEC, ART. 1641.

In an action for rescission under art. 1641 C.C. (Que.), the contract must be looked at as a whole, and the relative importance of the result of any single breach thereof must be considered in determining whether the party injured is entitled to rescind.

Consumers' Cordage Co. v. Bannerman, 2 D.L.R. 419.

SIGNATURE OF TWO ONLY OF THE THREE PARTIES—CONSTRUCTION.

An agreement of three persons relating to property and dealing with matters in which all three were interested, to be binding on any one of them must be executed by all, and where such a contract is signed by two only, the third refusing to sign, and one of the two signers proceeds to do what is required of him by the contract, he cannot recover from the other signer for any damages suffered by reason of the latter's failure to perform his part.

Black v. Townsend, 2 D.L.R. 826, 3 O.W.N. 541, 20 O.W.R. 974.

SALE OF GOODS—AGENT FOR SALE OR PURCHASER—"TIME OF SALE."

Traders Bank of Canada v. Bingham, 1 D.L.R. 911, 3 O.W.N. 772.

PRINTED FORM — PARTIAL FILLING IN OF BLANKS.

Kelly v. Locklin, 8 D.L.R. 1039, 17 B.C. R. 331, 3 W.W.R. 15.

(§ II A—128)—AMBIGUOUS — CONSTRUCTION BY CONDUCT OF PARTIES — ACCEPTATION OF BY COURT.

A contract being ambiguous in its terms and a construction having been placed upon it by the conduct and language of the parties, that construction will be accepted by the court as the true one.

Adolph Lumber Co. v. Meadow Creek Lumber Co., 45 D.L.R. 579, 58 Can. S.C.R. 306, [1919] 1 W.W.R. 823, reversing 25 B.C.R. 298.

CONSTRUCTION—INTENTION OF PARTIES.

Though the offeree proposes a modification of the terms of the offeror and requests an acceptance or refusal by cable, and a cable message is sent by the offeror accepting the modification of the terms, but adding the word "writing" to such acceptance in the message, the informal contract between the parties will be spelled out by reference not only to the previous correspondence between the parties, but also to a subsequent letter purporting to state its terms where nothing was done by the offeree in the interim and where he, through inadvertence, failed to repudiate the interpretation placed by the offeror on a material term of the contract contained in such subsequent letter.

Canada Law Book Co. v. Butterworth, 12 D.L.R. 143, 23 Man. L.R. 352 24 W.L.R. 124, 4 W.W.R. 237, reversing 9 D.L.R. 321. [Affirmed, 16 D.L.R. 61, 5 W.W.R. 1217.]

CONSTRUCTION—REFERENCE TO PRIOR OFFER.

Where the proposed agent's counter-proposition for the sales agency of a work to be published in volumes issued at intervals, stipulates for the agency a fixed period "from the date of publication" the latter term is properly construed as referring to the publication of the first volume, where the negotiations were based upon a prior offer of the principal in which he had proposed an agency for a similar period expressly stated to be from publication of the first volume.

Canada Law Book Co. v. Butterworth, 16 D.L.R. 61, 5 W.W.R. 1217, 26 W.L.R. 937, affirming 12 D.L.R. 143, 23 Man. L.R. 352.

CONSTRUCTION — AGENCY — COUNTER-PROPOSITION — EXCLUSION OF RENEWAL CLAUSE.

Where in reply to a proposition for a contract of agency the proposed agent purports to set out a full statement of the terms to which he will agree but does not mention the offer of a renewal term which was contained in the original proposition made to him nor does his counter-proposition purport to be a mere modification of the terms of the original proposition, the renewal clause in the latter will not form a part of the contract although the acceptance by the principal refers to the counter-proposition as the agent's "modification" of his terms, if the acceptance further restates the terms as to the duration of the contract to the exclusion of the renewal clause.

Canada Law Book Co. v. Butterworth, 16 D.L.R. 61, 5 W.W.R. 1217, 26 W.L.R. 937, affirming 12 D.L.R. 143, 23 Man. L.R. 352.

CONSTRUCTION — INTENTION OF PARTIES—QUE. C.C. 1068.

Where large trees are to be cut down and conveyed to the mill, it must be done in the autumn and winter, so as to allow of the logs being hauled out of the woods before the snow disappears, and failure so to do also puts the party who agreed to do the work in default without any formal notice being necessary.

Brosseau v. Benard, 9 D.L.R. 172, 43 Que. S.C. 165.

INTENTION OF PARTIES—CONSTRUCTION.

The acts and conduct of the parties cannot be invoked to affect the interpretation

of plain and unambiguous language used in their written contract. [Baynham v. Guy's Hospital, 3 Ves. 294; Iggulden v. May, 9 Ves. 325, followed.]

Wilson v. Kerner, 3 D.L.R. 11, 3 O.W.N. 769, 21 O.W.R. 477.

AMBIGUITY—INTENTION.

Where a contract is devoid of any ambiguity, its plain provisions must not be defeated merely because the parties have acted upon a mistaken interpretation of its provisions; but where there is an ambiguity the acts of the parties done under it are admissible in evidence as a clue to their intention. [Lewis v. Nicholson, 18 Q.B. 503; North Eastern R. Co. v. Hastings, [1900] A.C. 260, referred to.]

Toronto General Trusts v. Gordon, Mackay & Co., 21 D.L.R. 394, 33 O.L.R. 183. [Reversed in 22 D.L.R. 904, 34 O.L.R. 101.]

INTENTION AS TO LEX LOCI.

The intention of parties to a contract which has been executed in a form usual in the Province of Ontario is that it should be interpreted according to the law of that province.

Canadian General Electric Co. v. Canadian Rubber Co., 27 D.L.R. 294, 52 Can. S.C.R. 349, affirming 47 Que. S.C. 24.

INTENTION—CIRCUMSTANCES AND COURSE OF DEALINGS.

Where the language used in an agreement is capable of more than one meaning the circumstances surrounding the contract and the course of dealing between the parties may be looked at to see in what sense the parties were using the words.

Burritt v. Stone, 38 D.L.R. 240, 10 S.L.R. 381, [1917] 3 W.W.R. 978.

EMPHYTEUTIC LEASE—INTENTION.

In construing an agreement respecting the unexpired term of an emphyteutic lease, the intention of the parties must be sought, and however ambiguous and involved the language may be, if the intention can be ascertained with reasonable certainty, effect must be given to it.

Quebec v. Lampson, 40 D.L.R. 522, 56 Can. S.C.R. 288, reversing 49 Que. S.C. 307.

INTENTION OF PARTIES—CONSTRUCTION GIVEN BY THEM.

It is necessary, in interpreting a contract, to endeavour to ascertain the common intention of the parties rather than to be satisfied with the literal meaning of the expressions used. Thus when in a contract to furnish beer to a customer at a price fixed and for a term of years the brewer covenants that "if he should join a trust" formed for the purpose of procuring a monopoly of the business he would incur a penalty, the condition is formed and the penalty incurred by the sale of his brewery and good will to the trust though he does not join nor acquire any interest in it. The common intention of the parties by the penal clause was to oblige the brewer not, by his act, to allow the brewery to pass into the hands of the trust whether he joined it or not. The fixed penalty provided for is only the valuation agreed upon for the damages caused by nonobservance of the main obligation. The court may reduce the amount in case of partial performance or if the circumstances exclude the right to demand the whole, e.g., in allowing a penalty to indemnify a hotelkeeper for loss in his business, it is necessary to consider the limited time for his license to run.

Robitaille v. Proteau, 41 Que. S.C. 214.

INTENTION.

The nature of an agreement should be determined by the intention of the contracting parties as well as by its main objects, taking into account the relations of the parties. It is necessary to follow the terms of the contract which has been actually effected, although in the agreement stipulations are found of the nature of some other contract.

Gallagher v. Confer, 48 Que. S.C. 303.

CONFLICTING CLAUSES — INTENTION OF PARTIES.

Where in an agreement a clause is susceptible of two interpretations, the one pertaining to the contract and compatible with the mutual intention of the parties, and the other unusual and tending to avoid the undertaking entered into, it is the first which should be adopted.

Browning v. The Masson Co., 24 Que. K.B. 389. [Reversed in 27 D.L.R. 360, 52 Can. S.C.R. 379.]

(§ II A—129)—UPHOLDING CONTRACT TO PREVENT FORFEITURE.

When a contract of option for the purchase of mining locations provides (a) that the owner giving the option shall deposit all the titles in escrow in the hands of a third party within the delay for declaring the option, under a fixed penalty; (b) that the intending purchaser may take immediate possession of the property; (c) that in the event of the option being made the owner will execute the necessary instruments to put the purchaser in full possession and ownership of the property; (d) that the price agreed upon will be paid by instalments at stated dates; the first of these covenants is sufficiently executed by depositing the documents of title exhibited at the time of the contract and on which it was made, though not perfect and complete. The penalty is not incurred till the purchaser, by payment of the entire price, has put the owner in default of vesting him with the ownership of the property.

Marshall v. Leckie, 41 Que. S.C. 206.

(§ II A—131)—PRINTED AND TYPEWRITTEN PROVISIONS.

The rule of interpretation that that which is in handwriting must be preferred to that which is in printing, does not apply where the contract is typewritten.

Howard v. Calkins, 50 Que. S.C. 147.

CONTRADICTORY CLAUSES — PRINTED AND WRITTEN.

If in a contract there is a clause printed and a clause written which contradicts it, the latter should prevail. [See remarks of Demers, J., in the case of Rosconi v. Péladeau, 48 Que. S.C. 356.] Thus, when a mandate for sale of a property contains a printed clause providing that it shall remain in force as long as it is not revoked by a written notice this clause will be ineffective if at the foot of the writing the principal has himself written that the contract will expire at a fixed date.

Rodier v. Meehan, 48 Que. S.C. 397.

(§ II A—132)—PLACE OF PAYMENT.

Where a contract for sale of lands made by offer and acceptance is silent as to the place of payment of the purchase money, the presumption is that the price is payable at the place where the party made the offer and was domiciled. [Fessard v. Mugnier, 34 L.J.C.P. 126, and Robey v. Snaefell, 20 Q.B.D. 152, followed.]

Pearson v. O'Brien; O'Brien v. Pearson, 4 D.L.R. 413, 22 Man. L.R. 175, 20 W.L.R. 510, 1 W.W.R. 1026. [Affirmed, 11 D.L.R. 175.]

PLACE OF CONTRACT — TRADE USAGE — REASONABLENESS.

By agreement in writing the plaintiff, a corporation having its head office in Toronto, agreed to sell certain goods on certain terms to the defendants, a firm of commission merchants in Winnipeg. The contract was drawn and executed by the plaintiff in Toronto, and was afterwards executed by the defendants in Winnipeg. The goods would necessarily be shipped from Ontario and payment therefor made to the plaintiff in Toronto. Held, that it was an Ontario contract and no usage adopted by the trade in Winnipeg would be admissible to explain, vary or contradict any of its terms, and there was no evidence to affect the plaintiff with any knowledge of or assent to the usage in question; that the usage alleged by the defendants was unreasonable. [Perry v. Barnett, 15 Q.B.D. 388, applied.] The construction of contracts containing words, the natural meaning of which has been changed by local usage, discussed. [McCowan v. Baine [1891] A.C. 408, and Myers v. Sarl, 3 E. & E. 306, considered.]

Sanitary Packing Co. v. Nicholson & Bain, 33 W.L.R. 594.

(§ II A—133)—INCONSISTENT PROVISIONS.

In an action by the plaintiff for a stipulated sum as liquidated damages under the defendant's written agreement to carry out and complete an option with a third party for the purchase of a certain interest in a mine, where the recital provides that in case the option is not carried out and completed the defendant will "on or before" June 1 pay the sum so fixed, and where a later clause stipulates that in case of the defendant's failure to carry out the option and complete the purchase he shall "within one month after such default, on or before June 1st," pay the stipulated sum, the specific provisions of the later clause prevail, and the liability will arise at the expiry of one month after the default, although such construction of the contract may mature the obligation prior to June 1.

Kennedy v. Harris, 7 D.L.R. 291, 4 O.W.N. 183, 23 O.W.R. 179.

On September 7, 1907, a written agreement was entered into between the plaintiff D. D. and the defendants C. McM. and L. McM., for the sale of certain lands, the title to which was vested in the defendants, for the sum of $200. At the time there was a verbal understanding between the parties to the agreement and S. D., the mother of the plaintiff, that the agreement was only to be used to raise money to pay the creditors of the plaintiff and S. D., and was not to be used for any other purpose until the assent of R. C. D., the father of the plaintiff, had been obtained. The agreement was never used for the purpose of paying the creditors and the assent of R. C. D. to it was never obtained. Held, that the agreement was valid, although the assent of the plaintiff's father was never obtained, and that the verbal agreement not to use was only a collateral agreement, and did not affect the validity of the agreement itself. Held also, that the defendants are liable to account to the plaintiff for the moneys received by them on the sale of the property, subject to the trust that such moneys be held for the benefit of the creditors of the plaintiff and his mother.

Donald v. McManus, 4 N.B. Eq. 390.

B. ENTIRETY.

(§ II B—135) — ENTIRETY — COMPLETE PERFORMANCE FOR KNOWN PURPOSE — ENTIRE AND INDIVISIBLE, WHEN.

An agreement to clear stones from and to steam plough a certain number of acres of land before a specified date is an entire and indivisible contract, where the surrounding circumstances shew that the parties were anxious to get the land in shape for cropping by the time set in the agreement; and hence no recovery can be had for work done under the contract where plaintiff has not performed the entire contract. [King v. Low, 3 O.L.R. 234, applied.]

Moir v. O'Brien, 9 D.L.R. 578, 6 S.L.R. 11, 22 W.L.R. 953, 3 W.W.R. 745.

SEVERABILITY.

Where tenders of the same contractor for two independent construction works for a municipality are accepted by separate resolutions of the council of the municipal corporation, the subsequent execution under the corporate seal, of one indenture of agreement embodying the two contracts formed by the separate resolutions, which were not under seal, whereby the tenders were accepted will not destroy the sepa-

rate identity of each contract embodied in the one indenture if there was no consensus of intention of the parties that both should constitute one entire contract.

Municipal Construction Co. v. City of Regina, 2 D.L.R. 690, 20 W.L.R. 405, 5 S.L.R. 78, 1 W.W.R. 958.

Where, in an agreement between the parties, the first clause contained a declaration of title, and subsequent clauses gave a right of mining with a power of cancellation under certain contingencies:—Held, that the agreement was severable, and that the exercise of such power related to the operative clauses only and did not affect the clause containing the declaration of title.

Dunsmuir v. Last Chance Mining Company, 16 B.C.R. 499.

ENTIRETY—LIABILITY FOR PARTIAL PERFORMANCE.

Where one agrees to cut and deliver at a given point all the hay upon a piece of land owned by another for a stated price per ton, the agreement is an entire agreement, but the owner must nevertheless pay for each ton as it is delivered. [Johnston v. Keenan, 3 Terr. L.R. 239; Taylor v. Kinsey, 4 Terr. L.R. 178, followed.]

Webber v. Copeman, 7 D.L.R. 58, 5 S. L.R. 262, 21 W.L.R. 961, 2 W.W.R. 882.

SALE — TREES — GROWTH — NULLITY — C.C. ARTS. 1013, 1065.

When the seller of a vacant lot agrees "to remove all the trees from both of the avenues," that is, the avenues on which the lot was fronting, he is not only obliged to cut the trees, but he must also remove the stumps thereof.

Matley v. Kingsley, 25 Rev. Leg. 8.

C. TIME.

(§ II C—140)—TIME — CONTRACT OF HIRING — MONTHLY PAYMENTS AND NOTICE.

Where a contract of hiring provides that the salary is to be payable at a certain rate per month and that either party has the right to terminate the hiring by giving a month's notice, the hiring is to all intents and purposes a monthly one, although other terms of the contract refer to the hiring as being upon a yearly basis.

Braden v. Reid & Co., 9 D.L.R. 668.

REALTY SALE — INCOMPLETENESS OF AGREEMENT — TIME AND MODE OF PAYMENT.

There is not a completed agreement where essential things are not provided for expressly or tacitly or otherwise; so in an agreement for the sale of land, which provided for payment of a comparatively small proportion in cash, the only stipulation as to the time for payment of the remainder was as follows: "Balance to be arranged by mortgage bearing 6 per cent interest," there was an omission of an essential part of the agreement, inasmuch as neither of the parties was to be at liberty to fix the terms and mode of payment of the mortgage. [Reynolds v. Foster, 9 D.L.R. 836, 4 O.W.N. 694, approved.]

Stevens v. Moritz, 14 D.L.R. 699, 5 O.W.N. 421, 25 O.W.R. 453.

TIME.

Where a contract to sell goods stipulated for delivery "on or about the 28th April," the variance from the exact date "28th April" must be only slight if at all, where the seller at the time of the contract knew the purpose of the purchase and that the buyer needed and expected prompt delivery not later than the day specified, and this, especially where between the date of execution of the agreement and the date for delivery, the buyer further gave special written notice that failure to deliver promptly would involve him in a loss of $40 per day. [Cross v. Elgin, 2 B. & Ad. 106, applied.]

Leonard & Son v. Kremer, 7 D.L.R. 244, 4 A.L.R. 152, 20 W.L.R. 147, 1 W.W.R. 642. [Affirmed, 11 D.L.R. 491, 48 Can. S.C.R. 518, 4 W.W.R. 332.]

CONSTRUCTION — OPTION — DEFAULT IN KEEPING ALIVE THE OPTION — DATE, HOW DETERMINED.

Where a written mining contract prescribes a fixed liability if one of the contracting parties "fails in carrying out" a certain option with a third party, such is in effect an agreement to keep the option alive; and the date of the default may be fixed by reference to the date of the cancellation of the option by the third party.

Kenne[illegible] v. Harris, 7 D.L.R. 291, 4 O.W.N. 183, [illegible] O.W.R. 179.

CONSTRUCTION—RIGHT TO REDEEM WITHIN FIXED PERIOD—NOTICE OF INTENTION—ACQUIESCENCE OF BUYER.

Where the vendor of a property who has reserved in his favour a right of redemption of such property, exercisable within a certain stipulated delay, informs the buyer within such delay of his intention to exercise such privilege, and does as a matter of fact come to exercise such right on the day following the expiry of the delay and the buyer requests him to call later, the buyer will be held to have acquiesced in the exercise of such right of redemption.

Malo v. Roy, 3 D.L.R. 431, 18 Rev. de Jur. 462.

TIME OF CONTINUANCE.

The words "whilst the mother is self-dependent" contained in a stipulation to pay for a grandchild's maintenance are not to be restricted to the lifetime of the testator, but are equally applicable to the period after his death as to that before, during which the child's mother continues to be self-dependent. A stipulation in a contract to pay maintenance made for valuable consideration whereby the promisor agrees to pay the maintenance money quarterly in advance "so long as I can," will not enable the promisor to terminate the

contract at his own will and pleasure; the words "so long as I can" are to be considered as having reference to his financial ability, and such ability being proved the promisee is entitled to recover.

Chisholm v. Chisholm, 2 D.L.R. 57, 46 N.S.R. 27.

TIME OF THE ESSENCE—EFFECT OF EXTENSION.

Where it is a condition of a contract for the sale of land that time is to be considered as of the essence of the agreement, a mere extension of time is a waiver of such condition only to the extent of substituting the extended time for the original time and the condition remains effective so as to make time of the essence of the agreement as to the substituted date. [Barclay v. Messenger, 43 L.J. Ch. 449, followed.]

Hicks v. Laidlaw, 2 D.L.R. 460, 22 Man. L.R. 96, 20 W.L.R. 479, 1 W.W.R. 1008.

TIME—SERVICES OF CONSULTING ENGINEER REPORTING ON MINING PROPERTY—PER DIEM RATE.

Allen v. Crepeau, 20 D.L.R. 985.

SHARES—COMPANY NOT FORMED.

An agreement to give cash and shares in a company to be afterwards formed, in payment for mining areas, is not broken by a failure to deliver the shares if the formation of the company does not take place: it was an implied condition of the contract that the shares should come into existence. [Wood v. Grand Valley R. Co., 22 D.L.R. 614, referred to.]

Roche v. Johnson, 29 D.L.R. 329, 53 Can. S.C.R. 18, reversing 24 D.L.R. 305, 49 N. S.R. 12.

TIME FOR PERFORMANCE—COMMERCIAL CONTRACT.

A contract between the owner of a stone-quarry and a building contractor, for the hewing and delivery of stone, is of a commercial nature, and the debtor is put in default by the mere lapse of time fixed for performance.

Wighton v. Hitch, 44 Que. S.C. 128.

SALES AGENCY — BREACH BY PRINCIPAL — DAMAGES — PERIOD OF CONTRACT INDEFINITE — CONSTRUCTION — REASONABLE TIME—LOSS OF PROFITS.

The plaintiff a resident of Vancouver and the defendant, an English manufacturing company, entered into an arrangement by correspondence whereby the plaintiff was to be the sole agent of the defendant for the sale of its goods in the 4 western Canadian Provinces. A letter from the defendant setting out proposed terms of agreement after stating the percentage allowed on sales was followed by the words "this offer to be firm for one year." The letter then continued with advice as to development of sales and wound up with the words, "we are willing to give you the agency as long as you like on a small minimum turnover." There was nothing elsewhere in the correspondence fixing any definite time during which the contract was to continue. The plaintiff accepted the offer and devoted his time and attention in developing the agency and incurred considerable expenditure in advertising. The defendant company repudiated the contract about 4 months later. In an action for damages it was held by the Trial Judge that it was not the intention of the parties to limit the contract to one year and as no time was stated a reasonable time should be allowed for the performance of the contract which he fixed at 2 years, allowing the plaintiff the profits he reasonably would have made during that period. Held, on appeal, and that the trial judge had reached a right conclusion and the appeal should be dismissed; that the plaintiff's damages should be reduced to the sum allowed for 1 year.

Macdonald & Co. v. Casein, 26 B.C.R. 204.

CONSTRUCTION — TIME — ESSENCE OF.

The clause in the original agreement making time of the essence of the contract was followed by a clause giving the vendor the right to treat the contract as cancelled if any of the stipulations as to time, title, etc., were not observed by the purchaser:—Held, that the right to treat the contract as cancelled was merely ancillary to the substantial right. The rights annexed by law to a contract in favour of one party thereto are not limited by an express right in excess of those annexed by law in favour of the other. At the common law, time was always strictly of the essence of the contract; and, when time is by express provision made of the essence of the contract, the rights of the parties are still as at common law. If the vendor is not ready and willing to perform his part of the contract at the time specified, the purchaser may at once bring his action; and it is no answer that the vendor is afterwards able and willing to implement his agreement.

Winnifrith v. Finkleman, 32 O.L.R. 318.

LOAN—DATE OF PAYMENT.

When the date for the payment of a loan is not fixed by agreement, the court at the demand either of the lender, or the borrower will determine the term according to circumstances.

Howard v. Findlay, 51 Que. S.C. 375.

TIME — SALE OF LAND — NEGOTIATIONS AFTER LAPSE.

An offer of purchase of an immovable duly accepted by the owner, with a proviso that "a good deed of sale shall be executed within 15 days," is binding after the expiry of that delay, when the parties continue to carry on negotiations respecting the transaction, shewing that they did not consider the condition an absolute one, or that they have renounced it.

Dawes v. Ward, 43 Que. S.C. 456.

SALE OF LAND — TIME — TITLE — REGISTRATION.

A promise of sale which stipulates that

on default of making a payment on June 2, and of signing the deed of sale June 3, the deed should be void, becomes cancelled and annulled on the expiration of the delay, without formal demand. Even if, on such date, the vendor's title should not be perfect; that the property offered be encumbered with hypothecs and servitudes; such defects do not prevent the promise of sale from becoming void, the owner not being compelled to remove these charges, if the purchaser does not fulfil the conditions to which he has agreed. A promise of sale of real property, binding only on one party, is not a deed of transfer of the property, and does not, by itself, encumber such property with any real right; it only gives his beneficiary a right of preference over the other purchasers, and only creates a personal obligation, whose carrying out can be demanded, and it is only when it is accepted that the vendor can be compelled to carry it out; it cannot then be registered.

Gobier v. Morrisset, 53 Que. S.C. 505.

BUILDING — ACTION FOR BALANCE OF PRICE — EXTRAS — WORK DONE UNDER CONTRACT — COUNTERCLAIM — PENALTIES FOR DELAY — RECOVERY FOR ACTUAL LOSS AND DAMAGE ONLY — REFERENCE — COSTS.

Norman McLeod v. Orillia Water Light & Power Commission, 17 O.W.N. 124.

VENDOR AND PURCHASER — AGREEMENT FOR SALE OF LAND—TIME MADE OF ESSENCE —FAILURE OF PURCHASER TO CLOSE TRANSACTION ON DAY NAMED — REGISTRATION OF PLAN — DISMISSAL OF ACTION FOR SPECIFIC PERFORMANCE.

Lawson v. Hunt, 6 O.W.N. 89, 26 O.W.R. 58.

AGREEMENT FOR SALE OF LAND — TIME MADE OF ESSENCE — FAILURE OF PURCHASER TO MAKE PAYMENT — FAULT OF SOLICITOR — TERMINATION OF AGREEMENT BY NOTICE FROM VENDOR.

Marotta v. Reynolds, 5 O.W.N. 907, 25 O.W.R. 833.

MOVING OF HOUSE — DATE OF COMPLETION — REASONABLE TIME — DELAY — DAMAGES.

The defendant on October 12 agreed to move a house for the plaintiff, and to finish the moving on October 21, "or as soon thereafter as possible":—Held, that the words quoted meant within a reasonable time after October 21; and, in the circumstances, that a few days thereafter would have been a reasonable time; and a delay till December 29 was unreasonable:—Held, therefore, that there had been a breach of contract by the defendant, for which the plaintiff was entitled to recover damages, measured by the value of the use of the house during the time for which the plaintiff was deprived thereof by the defendant's delay, assessed at $15, for which sum judgment was given, with costs on the District Court scale.

Archambault v. Day, 27 W.L.R. 15.

SALE OF LAND — PROMISSORY NOTE — NOTE GIVEN FOR OPTION TO PURCHASE LAND —OPTION NOT TO BE EXERCISABLE UNTIL PAYMENT OF NOTE — NOTE NOT PAID WITHIN TIME LIMIT — OPTION PERIOD EXPIRED—MAKER OF NOTE LIABLE THEREON.

Layng v. Pede, [1919] 1 W.W.R. 714.

D. PARTICULAR WORDS, PHRASES AND CASES.

(§ II D—145)—CONSTRUCTION — PARTICULAR WORDS—"ALL MATERIALS EXCEPTING ROCK."

Under a contract to "do the excavating of all materials excepting rock" under a building, the court held that the word "rock" should be considered as having its usual meaning of large stones or boulders, and that the contractor was under the circumstances entitled to charge extra for removing these.

Mills v. Continental Bag & Paper Co., 45 D.L.R. 389, 44 O.L.R. 71.

PURCHASE OF LAND — JOINT OWNERSHIP —ASSIGNMENT OF INTEREST BY ONE PARTY — TERMS OF PAYMENT — "NET PROCEEDS" — INTERPRETATION — EXCUSE FOR NONPERFORMANCE — ACTION.

A party to an agreement who covenants to pay a certain sum and interest from the "net proceeds" of the sale of land, cannot set up the excuse that "net proceeds" mean "net profits" and that as there were no "net profits" he is absolved from payment. [Canadian Port Huron Co. v. Fairchild, 3 S.L.R. 228, distinguished.]

Montgomery v. Scott, 50 D.L.R. 394, 30 Man. L.R. 90, [1920] 1 W.W.R. 140.

SYNDICATE AGREEMENT TO PURCHASE LAND — PARTICULAR CLAUSE — CONSTRUCTION OF.

A syndicate agreement contained the following clause:—The said Stephen Benson shall notify the other parties hereto of all sums required to meet the obligations of the syndicate, and in the event of any of the parties hereto failing to pay his share within 30 days after having been notified thereof, the interest of the party so failing, as aforesaid, in the land so purchased, shall, at the expiration of the 30 days forthwith cease, and the property so purchased shall thereupon become vested in the remaining members of the syndicate freed and discharged from any claim or interest in the same of the party so failing as aforesaid. The court held that this clause did not exclude all other remedies, and that the plaintiff had a perfect right to look to the defendants for their respective shares of the amount disbursed by him for taxes.

Benson v. McKone, 45 D.L.R. 83, 29 Man. L.R. 283, [1919] 1 W.W.R. 349.

PARTICULAR PHRASES — IMPORT OF "FULLY EQUIPPED" — AUTOMOBILE SALE — TIRES.

An agreement in writing for the sale and purchase of an automobile "fully equipped"

was held on the evidence not to include other than plain tires.

Halifax Automobile Co. v. Redden, 15 D.L.R. 34, 48 N.S.R. 20, 13 E.L.R. 436.

BREACH — ARBITRATION CLAUSE — CONSTRUCTION OF.

In a contract to dig an oil well, it was provided: "That if at any time during the prosecution of the said work, or after the completion thereof, any dispute, difference or question shall arise between the parties hereto, or any of their representatives, touching the said work, or the construction, meaning, or effect of these presents, or anything herein contained, or the rights or liabilities of the parties or their representatives, under these presents or otherwise in relation to the premises, then every such dispute, difference or question shall be referred to . . . arbitration." The court held that the words "if at any time during the prosecution of the said work or after the completion thereof" referred to time and not to the condition of the work, and applied even although the work was not being carried on through the fault of one of the parties. Held, also, that it was the intention of the parties to refer all disputes or differences arising between them as well as the question whether such disputes were within the arbitration clause.

Stokes-Stephens Oil Co. v. McNaught, 44 D.L.R. 682, 57 Can. S.C.R. 549, [1918] 2 W.W.R. 122, affirming 34 D.L.R. 375, 12 A.L.R. 501.

PARTICULAR WORDS — REALTY SALE — GUARANTEED PROFITS ON "THE PURCHASE."

On a sale by the vendor real estate company where the first deferred payment and interest did not become due for 6 months, a guarantee given to the purchaser by a large shareholder in the vendor company, as an inducement for the purchase, that such shareholder would, within 6 months, effect for the purchaser a resale to realize a profit of 25 % "on the purchase" is not necessarily a guarantee of 25 % on the entire price, but may, having regard to the customary method of speculative real estate dealings in the locality, be construed to guarantee only that profit on the actual expenditure which the purchaser would require to make, up to the end of the 6 months' period fixed for the prospective resale.

Boivin v. Lessard, 14 D.L.R. 808, 7 A.L.R. 97 26 W.L.R. 312, 5 W.W.R. 794.

CONSTRUCTION — PARTICULAR WORDS — "TO DO THE SQUARE THING" — COMPENSATION — QUESTION FOR JURY.

Where the defendant employed the plaintiff to perform certain services for him, promising as compensation therefor "to do the square thing," this is a promise to pay what is an adequate and reasonable price for the services rendered, in other words a quantum meruit. [Croasdaile v. Hall, 3 B.C.R. 384, distinguished; Bryant v. Flight, 5 M. & W. 114, applied.] Where the plaintiff agreed to perform, and did perform, certain services for the defendant, relying upon his promise "to do the square thing" as compensation for such services, the question as to what compensation under the circumstances a promise "to do the square thing" imports, should be submitted to the jury. [Croasdaile v. Hall, 3 B.C.R. 384, distinguished.]

Macdonald v. Helgerson, 11 D.L.R. 131, 24 W.L.R. 57, 4 W.W.R. 513.

PARTICULAR WORDS OR PHRASES — AGREEMENT BETWEEN PHYSICIANS — "PERCENTAGE OF TOTAL NET RECEIPTS," CONSTRUED.

Where, in an agreement between two physicians, one is employed by the other for a fixed sum for each of 2 years, for the first year at a percentage of the net proceeds of business for that year and for the next at an increased percentage on the same basis, the percentage on the business for the year is not necessarily based upon the amount of money actually received during any of the years in question, but payments made subsequently for services rendered during such year, whether paid for during each of such years or at a subsequent period, are to be taken into consideration.

Mader v. Harrison; Harrison v. Mader, 9 D.L.R. 385, 47 N.S.R. 1, 13 E.L.R. 101.

CONSTRUCTION — PARTICULAR PHRASES — INTERPRETATION BY REFERENCE TO PRIOR CONTRACTS.

Where a restaurant keeper in a local option town buys table water from the defendant under his warranty that the commodity was "nonintoxicating hop ale" and not inhibited by the Liquor License Act (Ont.), and where subsequent orders were given for "hop ale" simply, this phrase will be construed as "nonintoxicating hop ale" so as to be included in the original warranty.

Stephenson v. Sanitaris, 16 D.L.R. 695, 30 O.L.R. 60.

REMUNERATION — BUSINESS — "DEFINITE SHAPE"—MEANING OF.

Where under a contract of hiring it is a term of the contract that the remuneration shall be based on the business which shall have assumed "definite shape" during the term of the contract, a tender for a contract, accompanied by a letter and a marked cheque, where the tender was afterwards accepted, is sufficient proof that the necessary stage of definiteness has been reached.

Whyte v. McTaggart, 22 D.L.R. 8, 31 W.L.R. 654.

WORDS AND PHRASES—"AND"—"SO."

Where the literal meaning of a contract leads to no inconsistency, absurdity or injustice, and the text is unambiguous and grammatically correct, the word "and" cannot be read as "so."

Ritchie v. Webster, 35 D.L.R. 373, [1917] 2 W.W.R. 1124.

"OR"—"AND."

In an assignment of "all moneys due or accruing due," the word "or" will be read as "and."

Ledingham v. Merchants Bank of Canada, 35 D.L.R. 191, 24 B.C.R. 207, reversing 10 W.W.R. 1360, [1917] 2 W.W.R. 1016.

AGENT—COMMISSION—PARTICULAR WORDS.

An agent whose commissions on sales are to be paid "on orders received through you" is not entitled to commission where from the evidence the only inference is that it was the act of the company's manager alone that secured the order, or where orders were received otherwise than through the agent's efforts.

Band v. Sturgeon Consolidated Collieries, 41 D.L.R. 165, 13 A.L.R. 530, [1918] 2 W.W.R. 912.

PURCHASE OF GOODS—PAYMENT OF FREIGHT—INTERPRETATION OF CONTRACT—EVIDENCE.

Braun v. Peters (Sask.), 43 D.L.R. 754.

SALE OR LOAN—RIGHT TO REDEEM—INTEREST.

One who exercises the right of redemption, is only bound to reimburse his purchasers' capital without interest, and the costs of sale. It is nevertheless possible for the parties to agree that the return of the price of sale shall also include the payment of interst. But, in such case, no interest is due before the redemption has been determined on and the capital reimbursed. If such a contract is made, a stipulation for payment of interest, as well as a clause that the capital can only be returned to the purchaser in 3 years, are elements which contribute to making the agreement deemed to be a loan and not a sale with right of redemption. If such a contract was not a loan, but a sale with right of redemption, the clause declaring that the purchaser must pay interest upon the capital before the expiry of 3 years is void, as imposing a conditional obligation which cannot be performed. One of the surest rules of interpretation of agreements, besides those indicated in arts. 1013, 1018, 1019, C.C. (Que.), is to adopt the meaning that the parties themselves have given to their contract in their carrying it out.

Marcil v. Bureau, 53 Que. S.C. 496.

CONSTRUCTION OF CONTRACTS — HIRING OF AN ARCHITECT TO DRAW PLANS OF A BUILDING AND OVERSEE THE WORK—FEE TO BE A PERCENTAGE ON THE COST—ESTIMATED AND ACTUAL COST — PRESCRIPTION — SHORT PRESCRIPTIONS — DATE FROM WHICH PRESCRIPTIONS OF A CLAIM FOR PROFESSIONAL SERVICES RUNS.

When one about to build hires an architect to draw plans, etc., and oversee the work, for a fixed percentage on the cost, such percentage is due on the actual cost and not on the estimated cost at the time of the agreement. The prescription of a claim for professional services by an architect begins to run from the date at which he can bring suit to recover the amount, after the completion or abandonment of the work. Hence, if an interruption of the services, or a stoppage of the work, occurs through litigation or from other causes, prescription only runs from the time when the work is definitely abandoned.

School Commissioners of Shawinigan Falls and Lafond, 23 Que. K.B. 193.

WORK — COMMERCIAL OR NOT — CONTRACT —PENALTY FOR DELAY—QUE. C.C. 1014, 1067, 1069, 1138, 1233, 2188, 2267.

A contract made by a contractor who supplies the material is always commercial; such a contract is a commercial one as respects the owner only if the construction is made for the purposes of his trade. When in a commercial contract there is a clause imposing a penalty "for each day after which the work remains unfinished," there is a putting in default, by the terms of the contract, from the day on which the work should have been completed.

Boivin v. Paquet, 46 Que. S.C. 461.

CONSTRUCTION OF CONTRACTS — GRANT OF EXCLUSIVE PRIVILEGE — PREFERENCE FOR RENEWAL THEREOF — POWERS OF TOWN CORPORATIONS—GRANT OF RIGHT TO SUPPLY A COMMODITY FOR EVERY PURPOSE FOR WHICH IT MAY BE USED — MUNICIPAL BY-LAWS SUBJECT TO APPROVAL OF ELECTORS—MEANING OF THE WORDS "THE MAJORITY OF ELECTORS."

A contract in conformity with a by-law, by which a town corporation gives a party, for a period of 10 years, the exclusive privilege to supply electricity in the town for lighting, heating, motive power, electrolysis, metal-working, locomotion, and generally for all the purposes for which electricity may be used, with a preference, at the end of that period, of renewal of the contract, over any competitor, for a further period of 10 years, at the rates offered by such competitor, is a contract for a period, not of 20 years, but of ten only, at the expiration of which it ceases and is determined. Such a grant is ultra vires of a town municipality, and the contract is therefore null and void. A special enactment that gives a town the power to purchase "any system of electric light, etc., and for that purpose to make a by-law to be submitted for approval to the majority in member and in value of the electors who are proprietors," means the majority of such electors notwithstanding a general enactment that has governed the town for more than 10 years and that provides in express words, for the approval of by-laws of a like nature by "a majority in number and value of proprietors who are electors and who have voted."

Ricard & Town of Grand 'Mere, 23 Que. K.B. 97.

PARTICULAR WORDS, PHRASES AND CASES.

Claim by unsecured creditor of a liti-

gant against attorney "ad litem" of the latter for reimbursement, in pursuance of agreement, of advances for costs, upon attorney having recovered his costs from adverse party. It was held (confirming adjudication made by the Superior Court), that the right of action, against the defendant, was not vested in the plaintiffs.

Gagnon v. Bedard, 18 Rev. de Jur. 134.

INTERPRETATION — FORCE MAJEURE — C.C., ART. 1013.

The following clause in a contract made by an electric company to supply, during five years, the energy necessary for the operation of a plant, to wit:

"23. If any time during the continuance of the contract the operation of the works of the works of either party is suspended owing to war, rebellion, civil disturbances, serious epidemics, fire or other causes of a like nature beyond the control of either party, the party whose operations are so suspended shall not be liable to the other party, until the cause of such suspension has been removed, but there shall be a corresponding abatement of rent, provided that both parties take all reasonable precautions and adopt all reasonable measures for the prevention of fire and the extinguishing of same, and the party whose operations are so interfered with shall use all reasonable diligence to remove the cause of such suspension," must be construed as contemplating temporary suspension only, and not a total destruction by force majeure. The contract does not provide against this latter occurrence. Therefore, the company receiving the electric power not being obliged to rebuild its factory and the contract having become ineffective, the electric company has no claim for profit, losses nor disbursements for the balance of the contract.

Curtis Harvey v. Vaudreuil Electric Co., 28 Que. K.B. 473.

In an agreement for the sale of shares in a lumber company, were the following covenants: "(2) It is understood and agreed and the parties of the first part hereby guarantee that the assets of the said company with their approximate values consist of the lands and tenements and goods and chattels set forth in the schedule hereunto annexed. (6) The said parties of the first part further guarantee that the balance of the assets of the said company over and above the logs, stock in store, piles, boom sticks and boom chains are truly and correctly set forth in the said schedule, and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered the value of said deficiency shall be estimated by three arbitrators, one to be chosen by each of the parties of the first part and second part and a third by the two arbitrators so named as aforesaid and the amount of the award of the said arbitrators shall in manner hereinbefore mentioned be deducted from the said purchase money still owing and unpaid under this agreement." Assuming the clauses to be independent, the defendant, not having counterclaimed under clause 2, he should not be allowed to amend on the appeal, as to do so would be simply allowing him to set up a cross-action. It was intended by clause 6 that any deficiency should be decided by arbitration. Defendant should have been permitted to establish the deficiency, if any, in court, and then gone to arbitration to determine the value of such deficiency.

Cuddy & Boyd v. Cameron, 16 B.C.R. 451, 19 W.L.R. 282.

(§ II D — 150) — SALE OF GOODS — CONDITIONS — TIME FOR DELIVERY — BREACH — REPUDIATION — RIGHT TO RESCIND.

A contract for the sale of goods contained the following conditions: "Default in payment of any delivery will entitle seller to cancel contract. If after entering into contract the purchaser fails to execute any of his obligations thereunder, the sellers have the right to terminate the contract without prejudice to any claim for damages they may make. "Seller gives the buyer the privilege of cancelling any one month's delivery, if such delivery is delayed more than 30 days beyond the expiration of the month in question, provided buyer notifies seller within 10 days after the expiration of the said 30 days' delay of their desire to cancel." Held, that it was evident from these conditions that time was not of the essence of the contract and that no obligation was thrown upon the purchaser to demand or insist upon delivery, a demand on the part of the vender that the purchaser should take delivery under the terms of the contract was a condition precedent to a claim on his part that the failure of the purchaser to take delivery had discharged him from his obligations under the contract.

Steel Company of Canada v. Dominion Radiator Co., 48 D.L.R. 350, [1919] 3 W. W.R. 41, affirming 44 D.L.R. 72, 43 O. L.R. 356.

SUBJECT-MATTER NOT IN ESSE — HAIL INSURANCE — "NOT TO EXCEED."

In an action for damages for breach of a contract whereunder the defendant agreed to secure hail insurance notes "not to exceed" $50,000 in amount which were not then in existence, but to be obtained by a firm of insurance brokers in the course of the season's business, which was just then commencing, and to hand them over to the plaintiff for collection on certain terms of remuneration in consideration of the plaintiff giving up his agency for a certain hail insurance company, the defendant proved that the notes never came into existence and contended that, therefore, he should not be liable for nonperformance of his contract:—Held, in view of the conduct of the parties and the peculiar circumstances

in which the agreement was made, that the existence, or coming into existence, of $50,000 of such notes, could not be said to be the foundation of what was to be done and that, therefore, Taylor v. Caldwell, 3 B. & S. 826, was not applicable. Where, from the nature of a written contract, it appears that the parties knew when it was made that it could not be fulfilled unless some particular thing specified therein continued to exist, the contract is not to be construed as positive, but as subject to an implied condition that the parties shall be excused if such existence ceases; and if that principle holds good where the thing has never existed, the situation of the parties, all the surrounding circumstances and the reason of the thing, must be considered in construing the contract.

Carr v. Berg, 38 D.L.R. 176, 24 B.C.R. 422, [1917] 3 W.W.R. 1037. [Affirmed, 49 D.L.R. 693, [1918] 2 W.W.R. 368.]

RIGHT TO ERECT HOARDING—FIXTURE—LICENSE—CANCELLATION OF—RIGHTS OF LICENSEE.

An agreement entered into by the owner of land giving a company the right to erect a bill posting board or hoarding on the land on certain terms, and subject to certain conditions as to removal, creates nothing more than a license to go on the owner's land for the purpose of erecting such hoarding. A licensee who erects a hoarding for bill posting and advertising purposes, on certain land under a revocable license is entitled to notice of revocation and a reasonable time afterwards in which to remove his goods.

Credit Foncier v. Lindsay Walker Co., 18 D.L.R. 143, 12 S.L.R. 335, [1919] 2 W.W.R. 925, affirming judgment of Taylor, J.

SALE OF LOGS — "EXPENSE OF DRIVING LOGS," INCLUDES WHAT.

Sale of all logs that shall be cut by a jobber who has contracted to cut a specific quantity. Reference to jobber's contract in the sale. Clause that purchaser may take possession of the logs and charge expenses. Fees paid to solicitor. Rights of owner of a dam on a floatable river against those who use it. A clause in the sale, that the purchaser, in a certain case, may take possession of the logs and drive them and charge the seller with the expense, does not include fees paid to a solicitor.

Bank of Ottawa v. East Templeton Lumbering Co. & Gilmour & Hughson, 44 Que. S.C. 295.

INTERPRETATION OF CONTRACTS — BANKER AND CUSTOMER—EFFECT, UPON INTERPRETATION OF EXISTING CONTRACT, OF MODE OF CARRYING OUT PREVIOUS IDENTICALLY WORDED CONTRACTS FOR SAME OBJECT VOLUNTARILY ADOPTED BY THE DEFENDANT.

La Caisse D'Economie de Notre Dame v. Cité de Québec, 20 Rev. de Jur. 477.

NEWSPAPER ADVERTISING — CONDITIONS — PENALTY OR DAMAGES.

A stipulation in a contract for newspaper advertising, that the advertiser should pay 5½ cents per agate line, provided that payments should be made regularly every month for the space used, and that in default of such payments, the price should be 15 cents per agate line is not a penal clause, nor a claim for damages, but a conditional obligation. The words "extra space used on this contract within time limit will be charged according to terms of published tariff, unless otherwise provided for" mean that additional space should be subject to the same prices and upon the same conditions as those of the main contract.

La Presse Publishing Co. v. Scroggie, 25 Que. K.B. 163.

SALE OF SET OF LAW REPORTS AT FIXED PRICE PER VOLUME — "150 VOLUMES MORE OR LESS"—ESTIMATE—LIABILITY OF VENDEE TO PAY FOR VOLUMES IN EXCESS OF 150.

By a contract in writing between the plaintiffs and defendants, the plaintiffs agreed to give the defendants the sole Canadian market for the "English Reports Reprint," to be published by British publishers, the defendants agreeing to take a certain number of copies "of each volume of the set (150 volumes more or less) at a price of 10s. 6d. per volume." By the plaintiffs' agreement with the publishers, the plaintiffs became agents for the reprint, "to be printed according to the prospectus hereto annexed," and they agreed to take a certain number of "copies of each volume of the reprint as issued" at named prices. The prospectus annexed described the reprint as "a complete reissue of all the decisions . . . in one uniform set of 150 volumes." The volumes were issued from time to time, and when 150 volumes had been issued it was apparent that, to cover the ground, there must be 40 additional volumes or more. The defendants took the position that, having paid for the first 150 volumes at the stipulated price per volume, they were entitled to the additional volumes free of cost:—Held, that, in the circumstances of the case, the liability must be determined entirely upon the terms of the contract itself; the words in brackets, "150 volumes more or less," did not control and dominate the contract; "150 volumes" was a mere estimate; and the defendants were liable to pay for the additional volumes as issued.

Boston Law Book Co. v. Canada Law Book Co., 44 O.L.R. 529.

SUPPLY OF COAL BY BROKERS TO RETAILERS —PRICES MENTIONED IN CONTRACT — SUBSEQUENT VARIATION — EVIDENCE — ONUS — CONSIDERATION — AC-

COUNT — CREDITS — ESTOPPEL — COUNTERCLAIM — FINDINGS OF TRIAL JUDGE—REVERSAL ON APPEAL.

Kilbuck Coal Co. v. Turner & Robinson, 7 O.W.N. 673.

AGREEMENT OR LEASE — WATER POWER — BREACH OF COVENANTS—FORFEITURE—POSSESSION — COUNTERCLAIM — RENT —FORMER ACTION — DAMAGES — REFERENCE — AMENDMENT — COSTS.

Morrisburg (Village) v. Sharkey, 7 O.W.N. 728.

"TO INDEMNIFY"—WORK OF ART — REASONABLENESS.

The words "to indemnify" in a contract for personal services, in the case of non-execution thereof, should be construed merely as providing for indemnity which may be reasonable in respect of the work done, and do not include the whole artistic or commercial value of such work.

Hébert v. Bourque, 50 Que. S.C. 85.

AGREEMENT TO PROCURE LOAN OF MONEY AT CURRENT RATE — BREACH — EVIDENCE —ONUS—COMMISSION—DUTY OF AGENT —APPEAL—REDUCTION OF AMOUNT OF JUDGMENT—COSTS.

Zoller v. Tanner & Gates, 11 O.W.N. 380.

RAILWAY WORK — CONSTRUCTION AND EFFECT OF AGREEMENT — STATED CASE — COSTS.

Re O'Brien & Co. & Nepigon Construction Co., 12 O.W.N. 361.

AGREEMENT TO PAY MONEY AND DELIVER BONDS—ACTION TO ENFORCE—FAILURE TO DELIVER BONDS — MONEY DAMAGES BASED ON PAR VALUE OF BONDS—FORM OF JUDGMENT—CLAIM OVER FOR INDEMNITY OR CONTRIBUTION — THIRD PARTIES.

Powell v. Weaver, 11 O.W.N. 338.

ADVANCES TO OWNER OF MINING CLAIMS—AGREEMENT TO ALLOT SHARES IN MINING PROPERTY WHEN COMPANY INCORPORATED — FAILURE TO INCORPORATE —INTEREST IN PROPERTY—DECLARATION — PARTIES — TRUSTEE — CREATION OF TRUST.

Howe v. Irish, 11 O.W.N. 359, varying 10 O.W.N. 455.

JOINT DEALING OF UNCLE AND NEPHEW IN MINING LANDS AND COMPANY-SHARES—MONEYS PAID BY UNCLE — CHARGE ON SHARES OF NEPHEW — CONVERSION OF PART — PERSONAL JUDGMENT AGAINST ESTATE OF NEPHEW (DECEASED)—LIEN ON SHARES REMAINING—COSTS.

Konkle v. Konkle, 11 O.W.N. 242.

MAINTENANCE OF BROTHER UPON HOMESTEAD—BREACH—DAMAGES—COSTS.

Thompson v. Thompson, 13 O.W.N. 386.

MANUFACTURE AND SUPPLY OF PATENTED ARTICLES — COMMERCIAL FAILURE — NEW CONTRACT — PROMISSORY NOTE — BREACHES OF CONTRACT—WAIVER—RETURN OF MONEY PAID—RE-ASSIGNMENT OF PATENT.

Acme Stamping & Tool Works v. McMillan, 11 O.W.N. 300.

AGREEMENT TO SUPPLY BY-PRODUCT OF MANUFACTURE — PROMISE — GIFT — WAIVER.

Kitchen v. Malcolm, 11 O.W.N. 336, affirmed in 13 O.W.N. 88.

ASSUMPTION OR ADOPTION — HOLDING OUT —AGENCY—BREACH—DAMAGES.

Cloisonné & Art Glass v. Orpen, 13 O.W.N. 147, affirmed at p. 304.

COMMERCIAL DEBT—MISE EN DEMEURE.

When a party to a contract is a merchant the obligation that he assumes in respect to his business is of the nature of a commercial debt and does not call for any mise en demeure.

Union Trust Co. v. Chicoutimi Pulp & Wood Co., 47 Que. S.C. 524.

PARTICULAR WORDS, PHRASES AND CASES—CONSTRUCTION—"SITE OF THE WORK" —REFORMATION.

Wallberg v. Jeuckes Machine Co., 4 O.W.N. 555, 23 O.W.R. 891.

(§ 11 D—152)—SURETYSHIP — PRINCIPAL AND SURETY—BOND—"TO PAY ALL DAMAGES"—COSTS.

U. S. Fidelity & Guarantee Co. v. Deisler, 49 D.L.R. 688, [1917] 3 W.W.R. 1051, affirming 36 D.L.R. 29, 24 B.C.R. 278.

AS TO LIABILITY FOR NEGLIGENCE—INDEMNITY.

An agreement by an electric company to indemnify a municipal corporation against all damages which the city may have to pay "by reason of any act, default or omission of the company or otherwise howsoever," does not include damages which the city must pay as a consequence of its own negligence.

Toronto v. Lambert, 33 D.L.R. 476, 54 Can. S.C.R. 200, affirming 29 D.L.R. 56, 36 O.L.R. 269.

WORKMAN—INJURY TO—RECOVERY OF DAMAGES—INDEMNITY CLAUSE.

The appellant having failed in its supply of what it had contracted for, one of the men was sent to get it from the respondent's warehouse. He met with an accident in doing so for which he had recourse against the respondent and rightfully recovered damages. The court held that the respondent was entitled to be indemnified by the appellant under a clause in an agreement between the parties as follows: "That the S.S. Co. shall hold the Stevedoring Co. entirely harmless from any and all liability for personal injury to any of the Stevedoring Co.'s employees while performing labour embraced within this agreement." The workman at the time he was injured was

performing labour embraced in the agreement.

G.T.P. Coast S. S. Co. v. Victoria-Vancouver Stevedoring Co., 43 D.L.R. 231, 57 Can. S.C.R. 124, [1918] 3 W.W.R. 450, affirming 38 D.L.R. 468, 25 B.C.R. 6.

(§ II D—156)—Agreement to lend money—Mortgage of land—Building loan—Terms of arrangement—Money not to be advanced until building commenced and progress made.

Sherwood v. Sheehy, 15 O.W.N. 67.

Foreclosure sale—Threatening to set aside—Agreement to pay profit at resale.

An agreement by a bidder at a foreclosure sale to pay a lienholder threatening to set aside the sale the excess of the cost of the property realized at a resale purports an intention that the lienholder should receive only to the extent of the balance remaining due on his claim and not the whole surplus realized upon the resale.

Leslie v. Stevenson, 24 D.L.R. 544, 34 O.L.R. 473, varying 23 D.L.R. 776, 34 O.L.R. 93.

(§ II D—157)—Supply of gas "in the city"—Extension of city limits.

A contract by the producers to supply all the gas required, to a company empowered to distribute and sell to consumers "in the city" does not extend to territory annexed to the city after the contract was made. [Calgary v. Can. Western Natural Gas Co., 40 D.L.R. 201, 56 Can. S.C.R. 117, distinguished.]

Union Natural Gas Co. v. Chatham Gas Co., 40 D.L.R. 485, 56 Can. S.C.R. 253, reversing 38 D.L.R. 753, 40 O.L.R. 148, which reversed 34 D.L.R. 484.

Supply of gas—Covenant—Exceptions—Breach—Injunction—Damages—Appeal—Variation of judgment—Costs.

Dom. Natural Gas Co. v. National Gas Co., 14 O.W.N. 16.

As to natural gas—Appropriations—Extent of supply—Interest in land.

A clause in the contract for the supply of natural gas, which concedes the right to supply others with gas after the company shall be supplied "to the full extent of its requirements at all times and which may be required for supply, marketing, or sale," does not create a duty of storing up of all assets, or the preservation of a reserve of untapped gas, in order to be able at some indefinite future time to meet any possible demand which may be made, but merely obligates to deliver only what is actually required and demanded from time to time. [Dolan v. Baker, 10 O.L.R. 259, applied.] A provision for the delivery of the gas at sufficient pressure and with regularity indicates a duty of so handling the gas when won and controlled as to enable its delivery in a usable condition, and until so done it is not appropriated under the contract. An agreement to bore for gas and deliver it into pipe lines does not differ from a contract to deliver timber when cut, and is not an agreement for the sale of or concerning an interest in land. [Smith v. Surman, 9 B. & C. 561; Marshall v. Green, 1 C.P.D. 35; Erie County Natural Gas Co. v. Carroll, [1911] A.C. 105, 116, referred to.]

Tilbury Town Gas Co. v. Maple City Oil & Gas Co., 27 D.L.R. 199, 35 O.L.R. 186. [Affirmed, 32 D.L.R. 771, 35 O.L.R. 186.]

To supply gas—Rates—Minimum charge.

A gas company, bound under the terms of a municipal franchise to supply gas at a specified rate, subject to its general rules and regulations not inconsistent therewith, cannot validly obligate the consumers to pay for a minimum quantity whether the gas be used or not as a condition precedent to their being supplied.

Re City of Hamilton and United Gas and Fuel Co. of Hamilton, 37 D.L.R. 246, 39 O.L.R. 542.

To furnish gas.

Where a contract was entered into between a natural gas company and certain holders of stock in another company in the same business absorbed by the contracting company whereby it was agreed on the part of the company as a further consideration for the purchase of such stock, that the holders thereof should be entitled to receive from the company gas free for use in their private dwellings in the district in which the company was carrying on its operations, the effect of such contract is that the company was bound to supply the other parties to the contract gas free for use in their private dwellings so long as they lived in such district and gas was obtainable therein sufficient for that purpose.

Sundy v. Dom. Natural Gas Co., (No. 2) 6 D.L.R. 863, 4 O.W.N. 167, 23 O.W.R. 228, affirming 4 D.L.R. 663, 23 O.W.R. 228.

Supply of gas—Covenant—Exceptions—Breach—Injunction—Damages.

Dom. Natural Gas Co. and United Gas & Fuel Co. of Hamilton v. National Gas Co., 13 O.W.N. 254.

Supply of electric current—Rates of payment—Counterclaim—Interest—Costs.

Empire Flour Mills v. City of St. Thomas, 13 O.W.N. 432.

(§ II D—162)—Transfer of company-shares—Sale or pledge—Evidence—Finding of fact of trial judge—Liability of pledgee to account for price of shares sold.

Williamson v. Playfair, 6 O.W.N. 174 and 462.

(§ II D—163)—With carrier.

Where seed grain is delivered by rail and the bill of lading is endorsed "for seed purposes free from noxious weeds," if it be shewn that the seller made this endorsement as a representation to the railway company which refuses to carry seed grain containing noxious weeds, the words

will not necessarily, upon a legal construction of the contract of sale, be read into it.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 4 A.L.R. 366, 21 W.L.R. 433, 2 W.W.R. 404.

(§ II D—164)—Assumption of debts—Construction — Purchase of assets of company—Assumption of liabilities — Liabilities assumed "without corresponding value" — Surrounding circumstances and object—Transfer of shares — Rectification of contract—Damages—Loss of dividends —Counterclaim.

Grice v. Bartram, 3 D.L.R. 868, 3 O.W.N. 1312, 22 O.W.R. 382.

Assumption of debts—Third party.

A stipulation for the benefit of a third party as a condition of a contract, cannot be revoked if the third party signifies his willingness to profit by it. In a contract with a third party, in which a creditor undertakes to pay the debts of his debtor, the latter cannot avail himself of this undertaking and set it up as a bar to an action by the creditor to recover the amount of his debt.

Poulin v. St. Victor Lumber Co., 49 Que. S.C. 208.

The defendants agreed to purchase from the plaintiff, for $10,000, five-sixths of the plaintiff's shares in an incorporated publishing company; and the plaintiff agreed to "pay all the liabilities" of the company, out of the "first payment of $5,000 paid to him," the plaintiff. The defendants, instead of paying the first instalment of $5,000 direct to the plaintiff, and trusting to him to fulfill his covenant to pay the liabilities of the company therewith, ascertained the names of the creditors and the amounts of their claims, and, with the plaintiff's consent, paid these sums, and charged the amounts thus paid against the first instalment payable to the plaintiff. Before the sale agreement the company had undertaken to do some printing for the government at the price of $404; and this amount had been paid to the plaintiff before the sale agreement, but the work had not been done. After the agreement, the company sublet the contract for the printing and got it done for $200, which the company paid. In adjusting the accounts between themselves and the plaintiff, the defendants retained, out of the first payment of $5,000, the sum of $404, contending that it constituted a "liability," within the meaning of the sale agreement. The plaintiff assented to being charged with $200, the amount which the printing actually cost, but not with the balance, $204, for which he sued. It was held that the plaintiff was entitled to recover the $204. Judgment of Lees, Dist. Ct.J., affirmed.

Koerman v. Parlee, 20 W.L.R. 17.

(§ II D—165)—Transfer of property—Lands—Executory contract for sale —Agent's commission payable from purchase price.

An executory contract for the sale of lands made by the owner thereof, comes within the meaning of an agreement between the owner and an agent whereby the agent was to receive as commission a certain percentage of the gross selling price of all lands "sold" during the continuance of the agreement, such commission accruing whether the sale be made by the agent or the owner, and being payable out of the first instalment of the purchase price. [R. v. C.P.R. Co., [1911] A.C. 328, applied.]

Kennerley v. Hextall, 9 D.L.R. 609, 5 A.L.R. 192, 23 W.L.R. 205, 3 W.W.R. 699.

Transfer of property—Lands—Sale.

A transfer of lands by the owner thereof to a corporation for substantially all of which transfer the owner receives stock of the corporation is a sale and not merely a change in the manner in which the title should be held by the owner, especially where it appears that the owner (a) received some cash (b) values the shares at par or better and (c) fixed the consideration.

Kennerley v. Hextall, 18 D.L.R. 375, 7 A.L.R. 469. [See also 9 D.L.R. 609, as to premature action.]

Sale of brickyard—Default in payment —Repossession by vendor—Conversion of bricks—Right to possession of plant replacing plant sold—Company purchaser — Winding-up order—Rights of liquidator—Set-off —Mortgage debentures—Costs.

Wade v. Crane, 8 O.W.N. 478, 35 O.L.R. 402.

(§ II D — 170) — Construction — Real property—Agreement for sale of "building"—What covered by.

An option in a rental agreement in respect of a store described by its street number which states that the tenant shall have the option "of buying the building," where practically all of the demised premises was covered by the store building which was affixed to the land so as to become a part of the freehold, has the effect of an option for the sale of the land and building and not of the building only. [Hughes v. Parker, 8 M. & W. 244, followed.]

Hunter v. Farrell, 14 D.L.R. 556, 42 N.B.R. 323, 13 E.L.R. 354.

Sale of land—Breach—Penalty or liquidated damages—Construction.

The question whether a sum mentioned in an agreement to be paid for a breach is to be treated as a penalty or as liquidated and ascertained damages is a question of law to be decided by the court upon a consideration of the whole instrument.

Reimer v. Rosen, 45 D.L.R. 1, 29 Man. L. R. 241, [1919] 1 W.W.R. 429.

SALE OF LAND—PAYMENT IN GRAIN BY INSTALMENTS — ACCELERATION CLAUSE — REPUGNANT TO AGREEMENT—EFFECT.

If the acceleration clause in an agreement for the sale of land is repugnant to the other clauses, it cannot be given effect to. [Sherrin v. Wiggins, 27 Man. L.R. 572, referred to.]

Wellington v. Selig, 50 D.L.R. 253, [1920] 1 W.W.R. 224.

AS TO TRANSFER OF REAL PROPERTY.

Where a vendor and vendee stipulated in an agreement for the sale of property, that the vendee might, before a certain cash payment was due, obtain a designated credit thereon by conveying certain other property to the vendor, the former is not entitled to such credit where he did not, nor could not, convey the land until after such maturity date. [Vanderlip v. Peterson, 16 Man. L.R. 341, Paterson v. Houghton, 19 Man. L.R. 168, referred to.]

Bergman v. Cook, 5 D.L.R. 233, 21 W.L.R. 833, 2 W.W.R. 738.

CONSTRUCTION — PURCHASE PRICE — UNACQUIRED TITLE—RIGHT TO CONVEYANCE—PURCHASE OF SEVERAL LOTS OF LAND.

Where an entire contract for the sale of several lots of land mentions the prices of all the lots except one, and provides that the price of that one, which the vendor has not yet acquired, shall be its cost price to him, the purchaser is not entitled to insist upon a conveyance of one of the other lots at its cost price, merely because it also had not been acquired by the vendor at the date of the agreement.

McManus v. Edmonton Public School Board, 6 D.L.R. 370, 5 A.L.R. 415, 22 W.L.R. 120, 2 W.W.R. 1054.

SALE OF LAND—OPTION—PRIVITY.

In a deed of sale of certain lands and property previously held under option, there being doubt in the minds of some of the interested parties as to whether all the rights under the option had lapsed, a clause inserted as between the Crown and its vendors whereby the former would not hold their vendors responsible for any trouble which might arise from said option does not establish any privity of contract as between the Crown and third parties.

Lefebvre v. The King, 38 D.L.R. 674, 16 Can. Ex. 241. [Affirmed, 49 D.L.R. 689.]

SALE OF LAND—COLLATERAL AGREEMENT.

In the case of an agreement for the sale of land with an independent collateral agreement for the resale of the lots, it is not necessary for the collateral agreement to appear in the agreement for sale. The collateral agreement, being an agreement to sell land, not for the sale of land, is not within the Statute of Frauds.

Canadian General Securities Co. v. George, 43 D.L.R. 20, 42 O.L.R. 560; 14 O.W.N. 71 reversing 13 O.W.N. 355. [Reversed 59 Can. S.C.R. 641.]

LAND OPTION—ACCEPTANCE—OMISSION OF TIME OF PAYMENT.

The acceptance of an offer for the sale of land at a fixed price, even though coupled with a request for particulars of title, constitutes a complete contract of sale and does not render such request a condition subject to which the offer is accepted; nor will an inadvertent omission of the time at which a second instalment of the purchase price is to become payable, affect the right to specific performance of the contract.

Lareau v. Poirier, 25 D.L.R. 266, 51 Can. S.C.R. 637, affirming Poirier v. Archambault, 23 Que. K.B. 495.

SALE OF SAW MILL—INTEREST IN LAND.

A sale of a saw-mill and machinery, even if it indicates that it is to be removed from the land, constitutes a contract for the sale of an interest in land. [Lavery v. Pursell, 39 Ch. D. 508, followed.]

McPherson v. U.S. Fidelity & Guaranty Co., 24 D.L.R. 77, 33 O.L.R. 524.

ACCEPTANCE — MODIFICATION OF ORIGINAL TERMS—COMPLETION.

A contract is not complete until the proposition put forward by the proposer is accepted by the other party in a simple and direct affirmative. Conditions which vary the terms or provisions of such contract must be agreed to by the party making the proposal otherwise there is no contract enforceable at law. [Cole v. Sumner, 30 Can. S.C.R. 379, applied.]

Gauthier v. Letchford, 49 D.L.R. 369.

SALE OF LUMBER—DESTRUCTION BY FIRE—CHEQUE FOR PRICE—PAYMENT STOPPED—ACTION — INSURANCE — COUNTERCLAIM — NEGLIGENCE — WAREHOUSE RECEIPT — BANK ACT — GRATUITOUS BAILEE — REASONABLE CARE — CAUSE OF FIRE — ENGINE.

Held, that the Act to preserve the Forests from Destruction by Fire, R.S.O. 1897, c. 267, had no application to a mill-yard and an engine running upon rails therein. And held, upon the evidence, that the plaintiffs and their codefendants by counterclaim had shewn that there was no such want of reasonable care on their part of the lumber in question as a prudent man would exercise with regard to his own property, and had negatived the charge of negligence made against them in the counterclaim.

Ferguson v. Eyer, 43 O.L.R. 190.

TIMBER—SALE—LIEN.

By a contract dated December 16, 1915, between a lumber company and D., it was stipulated that D. should cut on his property 2,000,000 feet of wood, board measure; that he should carry it to the mill, and saw it, and pile it ready to be shipped on order. The lumber company on its part, undertook to make advances to D. on each of his operations and to remit to him the product of sales which it was authorized to make, less advances made, all costs and disbursements, $1 per 1,000 feet upon the net profit, and $2.50 per 1,000 feet to be applied in re-

ducing the debt. It was provided that the lumber company assumes no risk for sales which it may make D., reserving the right to oppose sales which might offer some risk. Later, on January 26, 1916, D. transferred the wood to the lumber company as security for $7,000 advances. Held, that the lumber company was never the owner of the wood. It never had it in its possession until January 26, 1916, and the possession that the transfer of that date gave to it was only that of a pledge, which could not affect the privilege which the wood cutters then had, and were able to acquire since, for the payment of their wages under R.S.Q. art. 7464. Consequently, the intervention filed in the case, which claims neither privileges nor right of retention but a right of property which the intervening party (the lumber company) has never had, is not well founded.

Pelletier v. Lagace, 24 Rev. de Jur. 21.

SALE OF WOOD—REDEMPTION.

A clause in a contract of sale of a certain quantity of wood, with right of redemption, which authorizes the vendor to exercise his right in part only, according to his need of the wood, must be interpreted in his favour and not against him or in the interest of the purchaser, and, if the vendor so prefers, he may exercise his right of redemption once only.

Heroux v. La Compagnie de Brique et de Sable des Laurentides, 53 Que. S.C. 517.

The contract by which the owner of an immovable grants the possession and use of it, by means of a lease, for a term, at the expiration of which he undertakes to consent to a sale to the lessee is a mixed contract of renting and promise of sale. The latter remains subject to the suspensive condition of the lease which alone determines the judicial relations between the parties during the term and gives to the owner all the remedies of a lessor in case of nonobservance of his obligations by the lessee including the action for resiliation of the lease in default of payment of rent and that with saisie-gagerie to recover the amount.

Carey v. Carey, 42 Que. S.C. 11.

TO REPLACE FURNACE IF NOT SATISFACTORY—DETERMINATION.

The vendor of a building who agrees to install a "Daisy" furnace in place of a "King" if the latter, actually in the building, does not give satisfaction to the purchaser, is bound to do so on the demand of the latter; he cannot refuse to fulfill his obligation on the ground that the "King" furnace is as good as the other and gives as much satisfaction; the vendor cannot substitute his discretion for that given to the purchaser according to the contract which was made between them.

Lapointe v. Bernier, 50 Que. S.C. 269.

PROMISE TO PAY OVER PART OF PROCEEDS OF SALE OF LANDS—VALIDITY—SATISFACTION BY CONVEYANCE TO HUSBAND OF PROMISES—FINDING OF TRIAL JUDGE.

Kelly v. Harrington, 13 O.W.N. 78.

VENDOR AND PURCHASER—AGREEMENT FOR SALE OF LAND—UNCERTAINTY AS TO LAND INTENDED TO BE SOLD—DESCRIPTION—BOUNDARIES—EVIDENCE OF IDENTITY—SMALL ELEMENT OF UNCERTAINTY—DISREGARD BY COURT.

Donohue v. McCallum, 7 O.W.N. 534. [Affirmed, 8 O.W.N. 199.]

SALE OF LAND IN SEVERAL LOTS—DIVISIBILITY.

A contract for sale of nine lots of land is divisible in its performance, especially if it is proved that the vendor can only partially execute his obligation, the provisions of art. 1122 C.C. being in his favour. A unilateral agreement for the sale of land is valid in law, and an actual sale results therefrom from the time the parties have manifested, in any form whatever, their mutual assent.

Langlois v. Charpentier, 47 Que. S.C. 97.

DEALING WITH LANDS—SHARE OF PROFITS—ACCOUNT—AMENDMENT.

Drake v. Brady, 6 O.W.N. 309.

PURCHASE OF LAND FOR SPECULATIVE PURPOSE—AGREEMENT TO DIVIDE PROFITS—ABSENCE OF CONSIDERATION—MISREPRESENTATION—SECRET COMMISSION.

Marcon v. Coleridge, 6 O.W.N. 608, 26 O.W.R. 507.

AGREEMENT FOR SALE OF LAND—OPTION CONTAINED IN INFORMAL LEASE—ACCEPTANCE—ACTION BY LESSEE FOR SPECIFIC PERFORMANCE—SALE BY LESSOR BEFORE ACTION TO THIRD PERSON—PURCHASER NOT BEFORE COURT—CASE FOR DAMAGES NOT MADE—CONSIDERATION FOR OPTION—REVOCATION—STATUTE OF FRAUDS—ABSENCE OF TIME-LIMIT FOR ACCEPTANCE.

Bennett v. Stodgell, 6 O.W.N. 163, 25 O.W.R. 188.

SALE OF REALTY—OFFER TO BUY WITHIN A SPECIFIED TIME—EFFECTS OF ACCEPTANCE—FORMAL EXECUTION—HOW AFFECTED BY DELAY.

When an offer to buy real estate within a specified delay, for a price and upon conditions mentioned, is accepted by the owner, the agreement is perfected and the formal execution of it by the making and signing of the deed of sale, the payment of the cash instalment, etc., are not affected by the expiry of the delay specified, as aforesaid, in the offer to buy.

Dufresne v. Dubois, 23 Que. K.B. 28.

TERMS OF OFFER—TIME FOR CLOSING SALE.

The condition in a proposal to purchase land that the deed would be delivered within 15 days is not on pain of nullity, and failure to comply with it does not entitle the proposed vendor to a dismissal of an action for damages based on such noncompliance. The agreement for sale resulting

from acceptance merely of an offer to buy should be carried out in the terms of such offer and the proposed vendor cannot demand the insertion in the deed of conditions foreign to it, for instance, that default in payment of the instalments of the purchase money will effect a rescission of the sale.

Dubeau v. Greffe, 44 Que. S.C. 113.

Sale of land—Mortgage as part of purchase price.

It was held that, under an agreement containing the following clauses: "The vendor agrees to sell to the purchaser the land in question at and for the price and sum of $1,585, payable as follows: $600 on delivery of these presents; the receipt of which is hereby acknowledged; the balance of $985 as follows: On the first day of November A.D. 1913 (the figures '1913' were first typewritten '1915,' and the 5 was afterwards changed to '3'). The purchaser agrees to assume and pay a certain mortgage in favour of the Mortgage Company of Canada, numbered 1884, for $600 and interest. The property to be clear of all encumbrances with the above exception." (This mortgage was payable $50 each year, and the last payment would have been made in 1915.) The mortgage was to be part of the purchase price of $1,585.

Todd v. Worthington, 32 W.L.R. 366.

(§ II D—171)—Construction—Real property—Agreement to sell for "not less than" a stated sum.

An option agreement to sell land "for not less than $10,000" is an offer to sell for that figure. [Re Richard, 38 Can. S.C.R. 294, and Leeming v. Snaith, 16 Q.B. 275, 117 E.R. 884, applied.]

Hunter v. Farrell, 14 D.L.R. 556, 42 N.B. R. 323, 13 E.L.R. 354.

(§ II D—173)—Coal reservations in agreement for sale of land—Not set out in deed—Intention of parties—Evidence of solicitor.

In an action to obtain a declaration that the plaintiff was the owner of the surface rights of certain lands, and of the mines, beds of coal and other minerals lying thereunder, the Court of Appeal for British Columbia held that as nothing was said during the negotiations about the coal reservations the true inference was that there was no reservation of the coal. Their Lordships of the Privy Council reversed this judgment on the evidence of the solicitor who acted for the plaintiff during the negotiations, which shewed conclusively that the respondent had got all he bargained for or that it was intended to sell, which was the land minus all minerals lying thereunder.

Mackenzie v. Bing Kee, 48 D.L.R. 287, [1919] 3 W.W.R. 221, reversing 47 D.L.R. 43.

Construction—As to quantity of land.

A contract for the sale of "lots 1 to 4" in a land sub-division is to be construed as inclusive of all four of the lots. [Haggart v. Kernahan, 17 U.C.Q.B. 341, distinguished; Re Bronson & Ottawa, 1 O.R. 415, approved.]

Quail v. Beatty, 9 D.L.R. 784, 5 A.L.R. 482, 24 W.L.R. 242, 4 W.W.R. 55.

As to quantity of land.

Where an agreement for the sale of a specified number of feet of land more or less for a lump sum, provides that, upon any valid objection to title being made which the vendor is unable or unwilling to remove, the agreement shall be null and void, and an objection is made by the purchaser on the ground that parts of the land are subject to rights of way, the vendor, if he acts in good faith, and promptly under the circumstances, and not unreasonably or capriciously, and does not waive his rights, or omit anything which the ordinary prudent man, having regard to his contractual relations with other parties, is bound to do, is entitled to rescind the agreement. [In re Jackson & Haden's Contract, [1906] 1 Ch. 412; Wilson Lumber Co. v. Simpson, 22 O.L.R. 452; and In re Dames and Wood, 29 Ch. D. 626, referred to.]

Jewer v. Thompson, 3 D.L.R. 628, 3 O. W.N. 1122, 22 O.W.R. 610.

Purchase of timber—Personal inspection—Deficiency in quantity—Liability for purchase price.

One who, after personally examining a piece of land, purchased the right to cut and remove the timber therefrom, cannot, after removing the timber without complaint as to the extent of the land, in an action for the balance of the purchase money, assert that there were not as many acres in the property as called for in the deed thereof, where the court found that he purchased it as he found it on examination, entirely independent of an exact or approximate measurement or acreage.

Leclaire v. Laviolette, 3 D.L.R. 716.

Description of lands sold—Indefiniteness.

Where the subject of a written contract of sale is therein referred to as premises "known" by a specified name indicating a building such as an apartment house and as also "known" by the street number also specified in the agreement, it is not to be assumed, in the absence of evidence to prove what proprty is in fact "known" by such indefinite description, that all lands used in connection with the lands upon which the buildings stood are to be included.

Reynolds v. Foster (No. 2), 9 D.L.R. 836, 4 O.W.N. 694, 23 O.W.R. 933, affirming 3 D.L.R. 506, 3 O.W.N. 983.

Unsurveyed lands—Purchase rights on Crown lands to be located for the buyer—Title.

Smith v. Bond, 16 D.L.R. 873, 28 W.L.R. 163.

Construction — Real property — As to quantity — Evidence admissible — Vendor and purchaser.

The interpretation of an agreement of

sale of realty ambiguous on its face as to the description of the property sold may be based on the subsequent conduct of the parties to the agreement, and where one of such parties later than the sale makes a notarial declaration in a collateral matter fixing the description such declaration is admissible as against him in construing the contract.

Berlind v. Tipograph, 18 D.L.R. 258, 21 Rev. de Jur. 183.

(§ II D—174)—As to evidence of title.

A stipulation in a promise to sell to the effect that the vendor will not be obliged to furnish copies of title deeds under which the property was sold to him, but that same may be inspected in the hands of a named custodian does not release him from the obligation of giving communication of his own deed of acquisition which had not been in the same custody.

Poirier v. Archambault, 1 D.L.R. 358.

Vendor selling land—Title under an agreement—Purchaser's right to inspect agreement.

A person contracting to buy land from one he knows to be merely a holder of an agreement for its purchase, is entitled to an inspection of such an agreement before he pays any part of the purchase price and the vendor has no power to cancel the agreement upon a failure of the purchaser to pay the first instalment of the purchase price when due where he has refused the other's request for such inspection and ignored the further demand, on the latter's part, for a solicitor's abstract of title both made before any part of the purchase price was due, even though time was made of the essence of the contract as far as the payment of the purchase price was concerned. [Gamble v. Gummerson, 9 Gr. 193, and Cameron v. Carter, 9 O.R. 426, specially referred to. See also Knight v. Cushing, 1 D.L.R. 331, and annotation, 1 D.L.R. 3[illegible].]

Langan v. Newberry, 2 D.L.R. 298, 845, 20 W.L.R. 826, 2 W.W.R. 10. [Affirmed 8 D.L.R. 845, 47 Can. S.C.R. 114, 3 W.W.R. 426.]

(§ II D—175)—Agreement "to take accumulations of scrap"—Implied agreement to sell—Breach—Damages.

A contract in writing whereby the defendants agree "to take the accumulations of scrap" from the plaintiffs for one year at certain specified prices, held to imply an agreement on the part of the plaintiffs to sell to the defendants the accumulations of scrap for a period of one year, and damages were recoverable for breach of this agreement. [Churchward v. The Queen, L.R. 1 Q.B. 173, followed; The Queen v. Demers, [1900] A.C. 103, distinguished.]

Canada Cycle & Motor Co. v. Mehr, 48 D.L.R. 579, 45 O.L.R. 576.

Timber—Quantity—Other contracts.

An agreement to furnish a quantity of lumber during a logging season, and "all logs cut to apply to the contract," creates an obligation to deliver the specified quantity; but logs cut for another person cannot be claimed.

McLaughlin v. Tompkins, 31 D.L.R. 320, 44 N.B.R. 249.

As to transfer of personal property.

Upon the sale of certain machinery and accessories where the buyer agreed to give the seller a lien or charge on certain lands for the price, but because of the seller's failure to deliver three of the articles enumerated an allowance was agreed upon in lieu of such articles and their delivery was waived, such does not constitute a substitution of a new verbal contract for the original written agreement, but only a modification of one part of it, to which modification the defendant was a consenting party, and the sellers were entitled not only to judgment for the balance of the original debt but to a lien or charge on the lands referred to and a sale of the buyer's interest therein to realize the amount of the debt and costs. [Rustin v. Fairchild, 39 Can. S.C.R. 274, distinguished.]

Gaar-Scott v. Mitchell (No. 2), 8 D.L.R. 129, 22 Man. L.R. 474, 3 W.W.R. 19.

Construction of contracts for sale of personalty—C.C.1027.

Where two persons are entitled to personal property by virtue of instruments of different dates the one whose right is superior in point of time is entitled to preference under C.C. 1027 where he was the first to reduce the property in possession.

Klock v. The Molsons Bank (No. 2), 3 D.L.R. 521, 44 Que. S.C. 193.

Sale and delivery of goods at named prices per ton—Breach—Deficiencies in deliveries—"About"—"Approximate" — Damages — Allowances—Mistake in wording of written contract—Finding of referee—Discrediting of witnesses—Appeal.

Where the subject of a contract of sale of goods is not a bulk lot with an estimate of the probable quantity, but the engagement is to furnish goods to a certain amount, the quantity specified is material, and governs the contract. The addition, in such a case, of a qualifying word such as "about" or "approximate," when not supplemented by other words, provides only against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight. [Brawley v. United States, 96 U.S. 168, and Steel Co. of Scotland v. Tancred Arrol & Co., 26 Sc. L. Repr. 305, 314, followed.] A contract for the supply by the defendants of "about 150 tons" of shell steel turnings at so much a ton, and another for "approximate quantities" of "200 tons steel shell turnings" at so much a ton and "100 tons shell ends and defective shells" at so much a ton, were made. Under the first contract, precisely 100 tons were delivered; under

the second, 175 tons instead of 200, and 38 and a fraction instead of 100:—Held, that, in estimating the damages for breach of the contract, no allowance should be made in favour of the defendants on account of the use of the words "about" and "approximate"—the damages should be based on the actual deficiencies. Report of a referee varied on appeal. Before the referee the defendants contended that in the second contract "200" was a mistake; but the referee discredited the evidence which was adduced on this point by the defendants:—Held, that the appellate tribunal was not in a position to differ from the referee on this point. [Wood v. Haines, 38 O.L.R. 586, followed.]

Susman v. Baker, 44 O.L.R. 39.

AGREEMENT TO PURCHASE TIMBER BERTHS—SALE OF TIMBER BEFORE PURCHASE—SUSPENSIVE CONDITION.

Where two parties agreed to purchase from the government certain timber berths at private sale, one furnishing the experience and knowledge, the other the funds, and that no sale could be obtained from the government, but that later on the same timber was publicly sold by auction, and one of the contracting parties bought them, the other party has no right to claim that the sale falls under the contract, as this later must be considered as a contract under a suspensive condition which has failed.

Rainboth v. O'Brien, 24 Que. K.B. 88.

SALE OF AUTOMOBILE—COMMISSIONS—NOTE.

A contract by which an automobile company sells a machine and receives in payment a note at 60 days with the following conditions: "It is agreed that A.B. (purchaser) becomes agent for the St. O.M. Company, and that for every car that the latter shall sell or cause to be sold for the said company, the sum of $100 will be credited to him upon the above mentioned note, and upon full payment of the note through the commission the St. O. M. Company will afterwards pay $100 commission on each car that A.B. shall sell or cause to be sold," does not stipulate that the amount of the note shall be payable only by means of the commissions which the agent may gain, and if the company in good faith ceases to do business the maker of the note must pay it.

Huot v. Beaudoin, 52 Que. S.C. 381.

"F.O.B."—PERFORMANCE OF CONTRACT.

The expression of "f.o.b. cars" in a contract for the sale of wood means that the purchaser ought to place at the disposal of the vendor the cars required to carry the wood, but this rule is modified if the parties have by their actions given to the contract a contrary signification, or if such signification results from circumstances in which the delivery should take place, such as the disposal at the place of delivery, of public vehicles intended for the carriage of similar goods. When one party to a contract carries it out in a certain way he cannot afterwards alter his interpretation and claim that it should be carried out differently, unless a mistake is proved. If a date is fixed for delivery of goods sold, and a portion is delivered before such period, the vendor can not allow the period to elapse and then ask that the sale be voided because the purchaser has not fulfilled his obligations; his silence is a ratification of the way in which the purchaser carried out the contract.

Perras v. Grace, 27 Que. K.B. 343.

SALE OF GOODS—BREACH—CONSTRUCTION OF CONTRACT — "SPECIFICATIONS" — "SPECIFY"—DIMENSIONS OF WIRE—EVIDENCE—EXPLANATION OF TECHNICAL TRADE TERMS.

Owen Sound Wire Fence Co. v. United States Steel Products Co., 15 O.W.N. 206, varying 13 O.W.N. 104.

EXCHANGE OF HORSES — EVIDENCE — FINDING OF FACT OF TRIAL JUDGE.

Shaw v. Torrance, 6 O.W.N. 172, and 403.

PURCHASE OF PLANT AND BUSINESS—RIGHT OF PURCHASERS TO BENEFIT OF CONTRACT FOR SUPPLY OF MATERIAL—REFUSAL OF CONTRACTORS TO SUPPLY — EVIDENCE — NOVATION—EQUITABLE ASSIGNMENT — STATUTE OF FRAUDS—BREACH OF CONTRACT—DAMAGES—MEASURE OF—SEIZURE OF CHATTELS AND BOOK ACCOUNTS —LOSS OF PROFITS.

Milo Candy Co. v. Browns, 8 O.W.N. 99.

SALE OF GOODS—"MORE OR LESS"—INTERLINEATION — FRAUD — REFORMATION — FINDINGS OF FACT OF TRIAL JUDGE.

Blohm v. Hayes; Hayes v. Blohm, 9 O.W.N. 203.

SALE OF HOTEL BUSINESS—ACTION FOR BALANCE OF PURCHASE-MONEY—TERMS OF CONTRACT NOT FULLY CARRIED OUT BY VENDOR—FAILURE TO PROCURE LEASE OF PREMISES FREED FROM OPTION TO PURCHASE BUSINESS — POSSESSION GIVEN AND RENT PAID—LIQUOR LICENSE TRANSFERRED AND BUSINESS CARRIED ON—PART FAILURE OF CONSIDERATION—DAMAGES OFFSET PRO TANTO AGAINST BALANCE OF PRICE—IMPLICATION OF TERM AS TO PROHIBITORY LIQUOR LAW.

Loudon v. Small, 11 O.W.N. 268; 12 O. W.N. 60.

LEASE OF MACHINERY—PROVISION FOR CANCELLATION UPON INSOLVENCY OF LESSEE-COMPANY—PAYMENT OF SUMS TO PUT MACHINERY IN GOOD ORDER AND FOR DETERIORATION—FRAUD ON INSOLVENCY LAWS.

Re Durnford Elk Shoes, 11 O.W.N. 59, 105.

(§ II D—178)—CONSTRUCTION—SALE OF GOODS — "AT FACTORY COST" — "OVERHEAD CHARGES" — ROYALTIES — LIST PRICE IN EXCESS OF ACTUAL COST—REFUND OF EXCESS.

Gramm Motor Truck Co. v. Gramm Motor Truck Co., 7 O.W.N. 448, 8 O.W.N. 121.

SUPPLY OF ELECTRIC POWER—RATE OF PAYMENT.

Toronto Electric Light v. Interurban Electric Co., 8 O.W.N. 272.

(§ II D—179)—SUPPLY OF ICE—EVIDENCE PAYMENT ACCORDING TO SUPERFICIAL AREA.

Therien v. Mountjoy Lumber Co., 7 O. W.N. 257.

SALE OF COMPANY SHARES AND MONEY CLAIM—TERMS OF PAYMENT—PROMISSORY NOTE—WRITTEN AGREEMENT—VARIATION BY ORAL AGREEMENT—FINDINGS OF FACT OF TRIAL JUDGE.

Crocker v. Galusha, 8 O.W.N. 610.

(§ II D—180)—JOINT DEALING IN MINING LANDS AND COMPANY-SHARES—MONEYS PAID—CHARGE ON SHARES—CONVERSION OF PART—PERSONAL JUDGMENT AGAINST ESTATE—LIEN ON SHARES REMAINING—COSTS.

Konkle v. Konkle, 11 O.W.N. 242.

(§ II D—185)—CONSTRUCTION CONTRACTS—MEDICAL AND HOSPITAL EXPENSES—RIGHT OF SUBCONTRACTOR TO REIMBURSEMENT.

An agreement by a contractor to supply medical and surgical attendance for the employees of a subcontractor cannot be inferred from a letter written by the contractor to the latter stating that a certain physician had been appointed to attend to the medical work in connection with the construction of a line of railway, and requesting the subcontractor to collect a stated sum monthly from each of his employees, and to remit it to the contractor, who would deliver it to the medical department. Even though a contractor may be liable for medical and surgical services the employees of a subcontractor by virtue of a letter written the latter to the effect that a certain physician had been appointed to attend to the medical work in a certain district in connection with the construction of a line of railway, and requesting the subcontractor to collect a stated sum monthly from each employee and to remit it to the contractor to be turned over to the medical department, where such physician afterwards notifies the contractor and subcontractor that after a certain day he will not continue to serve at the old rate, and the subcontractor subsequently pays for such services at a sum in excess of the contract price, the contractor, who was not informed by the former that he was paying such extra charge, is not bound to reimburse the subcontractor therefor.

Larose v. Webster (No. 2), 14 D.L.R. 79, 25 W.L.R. 517, 7 A.L.R. 6, affirming 11 D. L.R. 319, 24 W.L.R. 325.

CONSTRUCTION CONTRACTS—INDEMNITY OF EMPLOYER FROM LIABILITY FOR CONTRACTOR'S NEGLIGENCE—WITHIN—NEGLIGENCE OF EMPLOYER'S SERVANTS.

A contract to fence a railway right-of-way in which the contractor agreed to indemnify the railway company against claims for injury to persons or property "occasioned in carrying on the work," does not entitle the company to indemnity against a claim of an employee of the contractor for injuries received through the negligence of an employee of the railway company.

Walker v. C.N.R. Co. (No. 2), 15 D.L.R. 118, 6 S.L.R. 403, 26 W.L.R. 137, 5 W.W.R. 754, reversing 11 D.L.R. 363, 24 W.L.R. 158, 4 W.W.R. 451.

PARTICULAR WORDS AND PHRASES—CONSTRUCTION OF BUILDINGS OR WORKS—"LABOUR AND SUPPLIES" FURNISHED IN BUILDING RAILWAY.

The term "labour and supplies" as used in a contract for the construction of a railway giving the contractee the right to pay for labour and supplies furnished in the work, before paying the contractor, includes the furnishing of a plant for use in the work; railway sleepers, and coal and hay, as well as the boarding of men, and money furnished to pay labourers; but does not include services rendered by a secretary, an expert accountant, or a civil engineer, or the claim of a contractor or subcontractor for work performed. The word "labour" as used in a contract permitting a contractee to pay for labour and supplies furnished a contractor in connection with the work, will ordinarily include only claims for manual labour. [Morgan v. London General Omnibus Co., 53 L.J.Q.B. 352, referred to.] Where a provincial government, by the terms of a contract for the construction of a railway, before paying the contractor, is entitled to be satisfied that he had paid all claims for "labour" performed on the work, the word "labour" will not cover services performed by a commissioner appointed by the government under the Public Inquiries Act, R.S.N.S. 1900, c. 12, to ascertain whether the contractor has paid all such claims; since the commissioner must be compensated by the government in the absence of statutory power to charge it to some one else.

Irvine v. Hervey, 13 D.L.R. 868, 47 N.S.R. 310, 13 E.L.R. 297.

SUBCONTRACT — CONSTRUCTION WORK — CHANGE OF SCHEME OF WORK—RESTRICTIONS — VARIATIONS—SCALE OF PAYMENT.

A subcontractor for railway construction work who by reason of a change of the scheme of work by the supervising engineer demands the right to proceed with certain new work which the change necessitated as "grading" is restricted to the price stipulated for that class of work between himself and the principal contractor although the latter, because of the extra expense which such grading entailed, was paid by the railway on the higher scale pertaining to "trainfilling;" nor was the subcontractor entitled to claim upon a percentage clause in the subcontract which applied only to

"variations" in the specified work for which the subcontract provided.

Swanson v. McArthur, 20 D.L.R. 434, 24 Man. L.R. 632, 28 W.L.R. 870, reversing 16 D.L.R. 872, 27 W.L.R. 285.

BUILDING CONSTRUCTION—SECOND CONTRACT FOR ADDITIONAL WORK BY SAME CONTRACTOR—DELAY IN COMPLETION—PENALTY CLAUSE.

[Kilmer v. B.C. Orchards, 10 D.L.R. 172, referred to.]

Papineau v. Guertin, 15 D.L.R. 513, 22 Que. K.B. 529, affirming 40 Que. S.C. 97.

MEDICAL AND HOSPITAL EXPENSES—WORKMEN PAYING MONTHLY FOR SUPPORT OF HOSPITAL AND PHYSICIAN'S SALARY.

Potter v. G.T.P.R. Co., 45 D.L.R. 749, [1919] 1 W.W.R. 988.

FOR SERVICES, CONSTRUCTION OF BUILDINGS OR WORKS.

Where the specifications for a plumbing contract for installation of plumbing on the construction of a row of attached houses, stipulated that the contractor should supply all stacks necessary to fill all requirements of city by-laws and the tender and formal contract did not mention the number of stacks, the contractor will be bound to supply separate stacks for each house in conformity with the city building by-law although the plans shewed only one stack for each pair of houses.

Elford v. Thompson, 1 D.L.R. 1, 5 S.L.R. 96, 19 W.L.R. 809, 1 W.W.R. 409.

SUPPLY OF TIMBER BOLTS—BREACH—COUNTERCLAIM—DAMAGES.

Keenan Woodware Mfg. Co. v. Foster, 6 D.L.R. 861, 4 O.W.N. 168, 23 O.W.R. 153.

CONSTRUCTION — MUNICIPAL CORPORATION—COMPLIANCE WITH CONTRACT—ACCEPTANCE — COUNTERCLAIM — DEFAULT — DAMAGES.

Canadian Electric & Water Power Co. v. Town of Perth, 3 D.L.R. 884, 3 O.W.N. 1449, 22 O.W.R. 319.

REMUNERATION FOR SERVICES — COMPANY SHARES RECEIVED.

Warfield v. People's R. Co., 1 D.L.R. 897, 3 O.W.N. 522.

CONSTRUCTION—SERVICES—QUANTUM MERUIT—IMPLIED TERMS.

In defence of an alleged excessive charge for machine shop work done for which the ordering party was to pay all reasonable time expenses as for job work, he may adduce evidence of what others in the same line of business as the plaintiff would charge for similar work and the time it would take to do the work.

Western Foundry Co. v. Edmonton Interurban R. Co., 19 D.L.R. 561.

RIGHT OF CONTRACTOR TO EXCAVATED MATERIALS—CONVERSION.

Unless the right is established by custom or usage, or is deducible from the owner's intention of abandonment, a building contract does not imply a right on the part of the contractor to appropriate excavated materials to his own use.

McLeod v. Sault Ste. Marie Public School Board, 29 D.L.R. 661, 36 O.L.R. 415.

LIQUIDATED DAMAGES—INTENTION.

In construing a contract the court will not go outside of it to ascertain the intention of the parties; where possible damages were evidently the subject of consideration when making the contract and a certain reasonable sum was agreed upon, it will be allowed as liquidated damages.

Farmers' Advocate v. Master Builders' Co., 38 D.L.R. 409, 28 Man. L.R. 340, [1917] 3 W.W.R. 1095, reversing 31 D.L.R. 558.

AGREEMENT TO DO WORK—MISCONCEPTION—MISREPRESENTATION — CHANGES IN PLANS.

Westholme Lumber Co. v. Corp. of City of Victoria (B.C.), 39 D.L.R. 805.

CONSTRUCTION OF PAVEMENTS—GUARANTEE BOND—DEFECTIVE WORK AND MATERIALS — ACTION ON BOND — RECOVERY OF AMOUNT OF BOND LESS SUM EXPENDED IN REPAIRS—FINDINGS OF FACT OF TRIAL JUDGE.

Town of Oshawa v. Ont. Asphalt Block Paving Co., 15 O.W.N. 11. [Affirmed, 15 O.W.N. 406.]

CONSTRUCTION OF BUILDINGS OR WORKS—PLUMBING AND HEATING.

O'Rourke v. Bell, 8 D.L.R. 1027, 2 W.W.R. 143.

MANUFACTURE AND DELIVERY OF LUMBER—SHIPMENT—PAYMENT FOR LUMBER DELIVERED—INSPECTION OF LUMBER—INTEREST.

Olds v. Owen Sound Lumber Co., 6 O.W.N. 586.

AGREEMENT TO DRILL FOR OIL—COVENANT THAT EQUIPMENT FREE FROM LIENS AND CLAIMS—BREACH—RIGHT TO SEIZURE.

The plaintiff and the defendant entered into an agreement whereby the plaintiff was to bore for oil for the defendant at a definite rate. The defendant agreed to pay $5,000 on the execution of the agreement and $5,000 when the drilling equipment was on the ground, which sums were to be in payment of the work thereafter done. The first $5,000 was paid. The agreement provided: "The contractor hereby covenants to place their equipment, material, tools and appliances on the ground free of debt and of all and every lien and encumbrance, and to so keep and maintain the said equipment, material tools and appliances until the completion of this contract, and not to sell the same until this contract has been performed in every respect by the contractor. It is further agreed that if the contractor abandons the work before the completion of either well to the depth of twenty-five hundred feet as provided in this contract, or fails in any respect in the substantial performance of any of the agreements herein contained, the company shall

have the right forthwith and without notice by any officer or agent of the company to seize the drilling equipment, material, tools and appliances owned by the contractor on the well site and to complete the well." After placing the equipment on the ground the plaintiff demanded the payment of the second $5,000. There was a balance of $4,045 of the purchase price of the machinery still unpaid and on that account the defendant's manager objected to pay the $5,000 due by it. An order for the unpaid balance was given to the sellers by arrangement with them upon the defendant, and an affidavit shewing that the machinery was paid for in full was made by the plaintiff's manager and taken to the defendant's manager with an order to pay the balance of the $5,000 into a bank to the credit of the seller. He did not do so, but next day seized all of the equipment, giving notice that the defendant would continue drilling with it. In an action for damages because of the seizure:—Held, that although the plaintiff was indebted for the machinery, there was no lien against the machinery within the meaning of the contract, i.e., there was no charge on the machinery itself, and, moreover, it was only a failure in the substantial performance of the agreement which would have justified the defendant's act, and in this case the machinery was in substance, at least, paid for, by the acceptance of the order on the defendant and, if it was not in reality paid for, the non-payment was because of the defendant's refusal to do what it was, by the terms of the agreement, bound to do.

Alberta Drilling Co. v. Dome Oil Co., 8 A.L.R. 340, 8 W.W.R. 996.

MANUFACTURING LUMBER — QUANTITY AND PRICE — MEASUREMENTS — EXTRA PAYMENT OR BONUS—VOLUNTARY PROMISE —ABSENCE OF CONSIDERATION—NONPERFORMANCE OF CONTRACT—NONCOMPLIANCE OF CONDITION—TERMINATION BY CONSENT—RESERVATION OF RIGHTS—FINDINGS OF TRIAL JUDGE—VARIATION ON APPEAL.

Orton v. Highland Lumber Co., 6 O.W.N. 470, 26 O.W.R. 681.

WORK AND LABOUR UNDERTAKEN FOR CITY CORPORATION—CHANGE IN EXTENT AND CHARACTER OF WORK—CERTIFICATE OF CITY ENGINEER—DISPENSING WITH, AS CONDITION PRECEDENT TO PAYMENT—EXTRA WORK—ABSENCE OF WRITTEN ORDER — ACCEPTANCE — REMOVING OBSTRUCTION—CONTRACT WORK—SALVAGE—INTEREST ON SECURITY DEPOSIT—INTEREST ON AMOUNTS CLAIMED—COUNTERCLAIM — UNSKILFULNESS IN PERFORMANCE OF WORK—PENALTY FOR DELAY.

Loomis v. City of Ottawa, 7 O.W.N. 542.

SERVICES RENDERED—MATERIAL SUPPLIED—MONEY PAID—CLAIM FOR PAYMENT OF BALANCE—COUNTERCLAIM.

Fauquier v. King, 6 O.W.N. 310, 26 O.W.R. 288.

WORK AND LABOUR—ITEMS OF ACCOUNT—EVIDENCE.

Cusson Bros. v. King, 8 O.W.N. 298.

WORK AND LABOUR—SUBSTANTIAL PERFORMANCE—QUANTUM OF RECOVERY.

The plaintiff agreed to raise the defendant's house and make certain additions for $375:—Held, upon the evidence, that, although all the work agreed upon had not been done, there had not been such a substantial nonperformance as to disentitle the plaintiff to remuneration for the work done; and the plaintiff was entitled to recover the contract price, less an abatement for work not done and for work negligently done. [Sumpter v. Hedges, 67 L.J.Q.B. 545, distinguished; Mattinson v. Hewson, 6 E.L.R. 568, and Sydney Boat and Motor Co. v. Gillis, 7 E.L.R. 75, followed.] Held, also, that the plaintiff, having been successful on the main issue, was entitled to his costs of the action.

Carlson v. Smilak, 27 W.L.R. 187.

(§ II D—186) — CONSTRUCTION—SUBCONTRACTOR'S RIGHTS—ASSIGNABILITY.

Where a railway contractor turns over to the plaintiff a number of contracts for the construction of railway stations under an arrangement which was in effect that the plaintiff should supply all materials for and construct the stations in the place and stead of the original railway contractor and that the latter would pay over to the plaintiff the progressive payments as and when they were from month to month received from the company, such a turning over is a valid and enforceable equitable assignment placing the assignee in the shoes of the original contractor, even without the railway company's consent as a literal compliance with the original contract, and the plaintiff can collect for his work and materials. [See also Kennerley v. Hextall (No. 2), 10 D.L.R. 501.]

Fraser v. Imperial Bank, 10 D.L.R. 232, 47 Can. S.C.R. 313, 23 W.L.R. 445, 3 W.W.R. 649, reversing, sub nom. Fraser v. C.P.R. Co., 1 D.L.R. 678, 22 Man. L.R. 58, 20 W.L.R. 530, 1 W.W.R. 924.

SUBCONTRACT.

A contractor who agreed to build a house for a fixed advance above the cost of material cannot recover from the owner money paid a subcontractor for extra work the contractor should have done.

MacKissock v. Black, 3 D.L.R. 653, 21 W.L.R. 424, 2 W.W.R. 465.

CONSTRUCTION — PRINCIPAL AND SUBCONTRACTOR — PAYMENT — RECOVERY OF MONEY DUE—C.C. ARTS. 1047, 1048.

This case is a contract given to a general contractor who subcontracts for a certain part of work. The owner has no recourse to the subcontractor for recovery of money overpaid; if he made his payments on the written agreement of the general contractor. His recourse is against his

real contractor seeing that there is a legal bond between him and the subcontractor.

St. Denis v. Asconi & Scifos, 25 Rev. Leg. 190.

RAILWAY CONSTRUCTION—PROGRESS CERTIFICATES—PROVISION AS TO RETENTION OF PAYMENTS—ASSIGNMENT TO BANK—SUBCONTRACT—WAIVER—ESTOPPEL.

Ledingham v. Merchants Bank, 10 W.W.R. 1360.

SUBCONTRACT—SUBCONTRACTORS BOUND BY PROVISIONS OF MAIN CONTRACT—ITEMS OF CLAIM AND COUNTERCLAIM—FINDINGS OF FACT—REFERENCE—COSTS.

Weddell v. Larkin, 8 O.W.N. 499.

SCOPE OF SUBCONTRACT FOR VENTILATING AND HEATING OF BUILDING—TEMPORARY HEATING DURING PROGRESS OF WORK—BREACH OF CONTRACT—DAMAGES.

Braden v. Varlow Foundries, 8 O.W.N. 575, 9 O.W.N. 93.

WORK AND MATERIAL—RATE OF PAYMENT.

Rochfolson v. Grand, 10 O.W.N. 213.

(§ II D—187)—CUTTING AND DELIVERING HAY.

One who agrees verbally to cut, stack, bale and haul to the station the hay growing on a piece of land owned by the other party to the agreement, and to load it on the cars as that party shall order, for a stated price per ton, is bound to cut all the hay upon the land which is capable of being cut.

Webber v. Copeman, 7 D.L.R. 58, 5 S.L.R. 262, 21 W.L.R. 961, 2 W.W.R. 882.

DEEPENING DRAIN—PLANS AND SPECIFICATIONS—PRICE.

Where a contract for deepening drains provides a price for earth and a much higher price for rock, but in reliance upon the fact that the plans and specifications do not mention any stone in the ground, it is stipulated for a lump sum representing the earth excavation only, he has a right to be paid the price mentioned for the rock if he encounters it in considerable quantities in the execution of the work, although it constitutes an increase in the price agreed upon.

Wilson v. City of Hull, 48 Que. S.C. 238.

(§ II D—188)—CONTRACTOR—ABANDONMENT OF CONTRACT—COMPLETION OF BY OTHER PARTIES—SAVING ON ORIGINAL PRICE—NOT ENTITLED TO AMOUNT SAVED—ENTITLED TO RETURN OF DEPOSIT.

A contractor who has entered into a contract to do certain work, who abandons the contract before completion, such contract being completed by other parties at a saving on the original price, is not entitled to the amount so saved. A deposit made by the contractor on entering into the contract as security for its "due performance" if not used in accordance with the terms of the contract for the construction and completion of the work must be returned to the defaulting contractor.

Dussault & Pageau v. The King, 44 D.L.R. 421, 58 Can. S.C.R. 1, affirming 39 D.L.R. 76, 16 Can. Ex. 228.

BUILDER'S CONTRACT—CONDITION—CERTIFICATE OF ABANDONMENT—NECESSITY OF CERTIFICATE.

Where a building contract stipulates as a condition precedent to the owner's right to take over the contractor's plant for use in completing the works that the manager of the owning company shall certify that, in his opinion, the contractor has abandoned the contract, such certificate is necessary to give the owner, the right to the possession and use of the contractor's plant as against a sheriff's execution against the contractor, although the later had written the owner giving notice of the stoppage of the works on account of alleged unjustifiable interference therewith.

Upland v. Goodacre, 20 D.L.R. 68, 50 Can. S.C.R. 75, affirming 13 D.L.R. 187, 18 B.C.R. 343, which affirmed 12 D.L.R. 407.

BUILDING CONTRACTS.

The failure of a contractor to keep an account of materials used and time devoted to extra work on a building he agreed to erect for a stated consideration, does not prevent his recovery of the value thereof, where he was not required by the terms of his contract to keep such account, but it was a requirement imposed by an architect for his own convenience in fixing the value thereof. The owner of a building erected by a contractor at a fixed price, is answerable for material and labour for extras ordered by or approved of by him.

Jack v. Kearney, 4 D.L.R. 836, 10 E.L.R. 298. [Reversed on different points, 10 D.L.R. 48, 41 N.B.R. 293.]

EXCAVATION WORK—SUBSIDENCE OF ADJOINING BUILDING OF SAME OWNER.

It is not to be assumed that a contractor authorized by the landowner to make excavations for footings is to protect adjoining buildings belonging to the landowner with whom he contracted from subsidence by reason thereof where it was apparent that the work would interfere with the support of such buildings; the landowner should himself see to such protection and cannot recover from the contractor unless the latter's work was done negligently.

Kinnesten v. Maclean, 9 D.L.R. 800, 24 W.L.R.237, 3 W.W.R. 1039.

CONSTRUCTION OF BUILDING CONTRACT—FOUNDATION AND WALLS.

One who contracts merely to build the foundation and walls for a building will not be held liable to do the beam filling thereon where such was not specifically mentioned in the contract or specifications nor was any evidence given to shew that such work was impliedly included in such trade contracts.

Iredale v. Drewey, 4 D.L.R. 868, 19 W.L.R. 931.

EXTRAS—REFUSAL OF CONTRACTORS TO EXECUTE CONTRACT FOR ANOTHER BUILDING—CONTRACT LET AT HIGHER RATE—NEGLECT TO READVERTISE AFTER REJECTING LOWER TENDERS—TENDER NOT ACCEPTED BY CORPORATION UNDER CORPORATE SEAL—COSTS.

Teagle & Son v. Toronto Board of Education, 3 D.L.R. 874, 3 O.W.N. 1332, 22 O.W.R. 254.

BUILDING CONTRACTS—SUBLETTING PORTION—PAYMENT OF FIXED ADVANCE ABOVE COST.

A written agreement to build a house at a fixed advance above the cost of material will not prevent the contractor subletting such portions of the work as are usually undertaken by special trades, and from recovering the cost thereof from the person for whom the work was done. A statement in a written agreement by a contractor to build a house at a cost of "about" 83,500 is a mere expression of judgment and does not amount to a warranty or a condition limiting its costs to that figure.

MacKissock v. Black, 3 D.L.R. 653, 21 W.L.R. 424, 2 W.W.R. 465.

BUILDING CONTRACT—WRONG NAME FILLED IN BY MISTAKE IN ONE COPY—ORAL EVIDENCE.

Where a building contract was intended to be made out in duplicate and an agreed alteration of a name therein was made on one copy left with the owner and authority given to the building contractor to similarly alter his copy, the contractor may, in case of variance, rely on the copy produced from the possession of the property owner in preference to his own copy on shewing by parol that the wrong name had been filled in on his copy by mistake. Where the signed memorandum of a building contract had the specifications attached to it, but the latter were not signed, they may still be incorporated by reference into the signed memorandum so as to constitute both writings one agreement.

Donaldson v. Collins, 3 D.L.R. 359, 5 S.L.R. 293, 21 W.L.R. 56, 2 W.W.R. 47.

BUILDING CONTRACTS—CONSTRUCTION OF.

Favrean v. Rochon, 8 D.L.R. 1031, 46 Can. S.C.R. 647, reversing 21 Que. K.B. 61.

EXTRAS—ARCHITECT—COUNTERCLAIMS.

Hamilton v. Vineberg, 2 D.L.R. 921, 3 O.W.N. 605, 21 O.W.R. 139.

BUILDING CONTRACTS—ENTIRE CONTRACT NOT PERFORMED BECAUSE OF FIRE—RIGHTS OF BUILDING.

Under a contract, whereby plaintiff agreed to perform certain work and supply materials in connection with the erection of a building for defendant, for a definite sum, a certain per cent of which was payable at stated periods during the performance of the work and the balance after the completion of the work, plaintiff is not entitled to recover more than the sums which had accrued due at the stated times where the work was not completed by reason of the destruction of the building by fire from causes not attributable to either party. [Collins Bay Rafting Co. v. New York & Ottawa R. Co., 32 Can. S.C.R. 216, applied.]

Charette-Kirk Co. v. McKittrick, 8 D.L.R. 365, 22 Man. L.R. 724, 22 W.L.R. 711, 3 W.W.R. 448.

PAROL MODIFICATION OF WRITTEN AGREEMENT—EVIDENCE—ONUS—ALLOWANCE FOR MATERIALS—SERVICES OF ARCHITECT—QUANTUM MERUIT.

McKenzie v. Elliott, 2 D.L.R. 899, 3 O.W.N. 1083, 21 O.W.R. 929. [Affirmed, 10 D.L.R. 466, 4 O.W.N. 1151.]

LIABILITY FOR CONDITION OF BUILDING—WORKS IN WATER—COFFERDAM.

Art. 1688, C.C. Que., making a contractor and architect jointly and severally liable for the work, even if the building perishes from the unfavourable nature of the ground, applies to works in water and to the construction of a cofferdam.

Fraser Brace & Co. v. Can. Light & Power Co., 26 D.L.R. 655, 49 Que. S.C. 145.

BOWLING ALLEYS—FLOORS—VENTILATION.

Under a contract to install bowling alleys which provides that the foundation therefor is to be prepared by the owner according to the instructions of the contractor, the latter is bound to make reasonable provision for ventilation of the floor.

Smith v. Brunswick Balke Collender Co., 38 D.L.R. 455, 25 B.C.R. 37, at 41, [1917] 3 W.W.R. 1071.

BUILDING CONTRACT—TIME LIMIT—ALTERATIONS—EXTRA WORK—VARIANCE.

Where a building contract renders certain what is intended to be the time limit, the erroneous statement of the time limit in the accompanying specifications has not the effect of altering it. The power reserved in a building contract to make alterations or additions must be reasonably exercised by the owner. [Dodd v. Churton, [1897] 1 Q.B. 562, 66 L.J.Q.B. 477, and McLeod v. Wilson, 2 Terr. L.R. 312, referred to.] The addition of an extra story to a six-story building pursuant to a condition of a building contract and in respect to which addition the cost of the extra work was agreed upon and an extension of time granted by the architect, is not such a variance from the original undertaking as will operate as a waiver by the owner of his right to claim the per diem allowance for the contractor's delay in completion upon the demurrage clause in the contract. [Clydebank v. Yzquierdo y Castaneda, [1905] A.C. 6, and Dodd v. Churton, [1897] 1 Q.B. 562, 66 L.J.Q.B. 477, referred to.]

Westholme Lumber Co. v. St. James, 21 D.L.R. 549, 21 B.C.R. 100, 8 W.W.R. 122, 30 W.L.R. 781.

BREACH—DEFECTIVE MATERIAL USED IN BUILDING BY CONTRACTOR—WANT OF SUPERVISION BY ARCHITECT—RIGHT OF ACTION AGAINST—IMPLIED CONTRACT—SEPARATE ACTIONS BY BUILDING OWNER AGAINST CONTRACTOR AND ARCHITECT—ACTIONS TRIED TOGETHER AND CONSOLIDATED—JUDGMENT AGAINST BOTH DEFENDANTS FOR SAME SUM—DAMAGES—SEPARATE CONTRACTS — MERGER OF CAUSE OF ACTION IN JUDGMENT—CONSOLIDATION ORDER — VARIATION — JOINDER OF PARTIES—RULES 67, 134, 320—RIGHTS OF DEFENDANTS INTER SE.

Campbell Flour Mills Co. v. Bowes, 32 O.L.R. 271.

BUILDING CONTRACT—CONTRACTOR DELAYED IN PERFORMANCE OF WORK BY DELAY OF PRIOR CONTRACTOR—CLAIM FOR DAMAGES—CLAUSE IN CONTRACT EXEMPTING OWNER—CHANGE IN CIRCUMSTANCES—EXTRAS — SPECIAL ITEMS — PAYMENT INTO COURT—COSTS.

Webb v. Pease Foundry Co., 6 O.W.N. 416. [Affirmed, 7 O.W.N. 212.]

BUILDING CONTRACT — DISPUTED ITEMS—FINDINGS OF TRIAL JUDGE—INTEREST—COST.

Olsen v. Canadian Alkali Co., 12 O.W.N. 85.

BUILDING CONTRACT—WAGES AND MATERIAL—PAYMENT TO CONTRACTOR—QUANTUM MERUIT.

Bresette v. Roy, 10 O.W.N. 142.

BUILDING CONTRACT—CONSTRUCTION—WORK TO BE DONE—AMOUNT PAYABLE TO CONTRACTOR — ARBITRATION — AWARD — APPEAL—REMOVAL OF MATERIAL—INTEREST—COSTS.

Re Thames Quarry Co. and R.C. Episcopal Corp., 9 O.W.N. 40.

BUILDING CONTRACT—WORK TAKEN OVER BY MUNICIPALITY—ABSENCE OF JUSTIFICATION—PROVISIONS OF CONTRACT—DELAY—CLAIM OF CONTRACTOR FOR WORK DONE — FORFEITURE — ACQUIESCENCE—QUANTUM MERUIT.

Beck v. Township of York, 5 O.W.N. 836. [Affirmed, 7 O.W.N. 493.]

PENALTY OR LIQUIDATED DAMAGES—SET-OFF.

When a building contract stipulates that the contractor shall pay to the owner as liquidated damages a sum of $5 for each day of delay of the work, the owner cannot set up the amount of this penalty in compensation of a demand for the price of the work done by the contractor, this debt not being one to be considered as liquidated and exigible. The owner should proceed by conventional demand. It is not necessary for the plaintiff in such case to oppose the compensation offered by an inscription en droit.

Phœnix Bridge and Iron Works v. Desautels, 26 Que. K.B. 6.

BUILDING MATERIALS—PRICE—ERROR.

The owner of a house under construction writing to the furnishers of material that he does not acknowledge liability for any further sum "beyond the $400 and $200 already advised of and accepted" thereby undertakes to pay to them the latter sums. When an obligation is assumed for an amount "of about $600" it is incumbent on the plaintiff, who claims performance of the contract, to establish the exact amount which is due. The mere word of one party to a contract does not constitute legal proof of an error.

Lapointe v. Bureau, 51 Que. S.C. 402.

The contractor for construction of work according to his own plans is subject to the ten years' guarantee provided for by arts. 1688 and 1696 C.C. He cannot plead the nature of the soil, its porosity, etc., nor the custom of the place, as to the mode of construction. The words "if a building perish in whole or in part" in art. 1688 C.C. are not limitative but comprise grave defects which involve serious inconvenience. The acceptance of the work and payment of the price by the owner do not extinguish this obligation of warranty especially as regards poor work and imperfections constituting latent defects. The contractor in the above circumstances has no recourse in warranty against his subcontractor who constructed the work according to his plans and under his direction.

Audet v. Guérard, 42 Que. S.C. 14.

WORK DONE IN ERECTION OF BUILDING—WHETHER CONTRACT MADE WITH OSTENSIBLE BUILDING-OWNER OR WITH COMPANY REPRESENTED BY HIM—UNDISCLOSED PRINCIPAL—PERSONAL LIABILITY OF AGENT—ACCEPTANCE OF PROMISSORY NOTES OF COMPANY—REVIVAL OF LIABILITY UPON DISHONOUR—RECOVERY OF JUDGMENT ON ONE NOTE AGAINST COMPANY—JUDGMENT AGAINST INDIVIDUAL—RETURN OF NOTES—ASSIGNMENT OF JUDGMENT.

Orsini v. Bott, 12 O.W.N. 290.

BUILDING CONTRACT—BREACH BY PROPOSED BUILDING-OWNER—LOSS OF CONTRACTOR—DAMAGES.

Deisenroth v. Toronto Board of Education, 12 O.W.N. 197.

FURNISHING WORK AND MATERIAL—BREACH—DELAY—RIGHT TO REPUDIATE—MEASURE OF DAMAGES — DEDUCTION FROM CONTRACT PRICE OF SUM TO BE EXPENDED IN COMPLETION—ANTICIPATED LOSS ON CONTRACT TO BE COMPENSATED BY ADVERTISING BENEFIT—ELEMENT IN ASSESSMENT.

Mortimer Co. v. Dominion Suspender Co., 11 O.W.N. 397.

RAILWAY CONSTRUCTION WORK—CLAIM OF SUBCONTRACTORS — COUNTERCLAIM — EVIDENCE — PAYMENT INTO COURT — COSTS.

Hamer & Co. v. O'Brien & Co., 12 O.W.N. 379. [See also 13 O.W.N. 147.]

BUILDING CONTRACT—DELAY—FORCE MAJEURE.

A clause in a contract for the construc-

tion of a church, that "the contractor shall, without remedy against church authorities, bear the consequences of any delay in the execution of the work which may be caused by force majeure, legal proceedings or other causes independent of the act of the authorities," does not entitle the contractor to indefinitely suspend the works until the authorities are able to procure the necessary funds for completing it. There is no force majeure justifying the suspension from the fact that the church has not been able to borrow at an ordinary rate the amount sufficient to continue the work on account of the unsettled state of the money market.

Tessier v. Fabrique of Parish Notre Dame-Du-Perpetuel-Secours, 52 Que. S.C. 510.

BUILDING CONTRACT — PRICE — EVIDENCE — FINDINGS.

In an action by plaintiffs to recover a sum of money claimed for goods and materials sold and delivered, and for work and labour done in connection with the erection of a building for defendants and for a commission of ten per cent on the goods and materials and work and labour, the whole amounting to some $35,000, the only persons who were in a position to speak as to the terms of the contract were a member of the defendant firm and B., who was agent for the plaintiffs at the time the contract was entered into, both of whom agreed that the contract was that plaintiff company should erect the building at a cost not to exceed $25,000. Held, that under the evidence, the court could not properly reverse the finding of fact made by the learned Trial Judge in defendant's favour. Also, that the costs of a reference for which plaintiffs were responsible, which were made costs in the cause, were rightly awarded to defendants.

Rhodes Curry Co. v. Redden, 51 N.S.R. 17.

BUILDING CONTRACT—COST OF MATERIALS.

Although a contract for the construction of a building according to plans and specifications includes the materials, a contract "providing to do the work for the sum of $1,200, to be paid part when the work is finished and the balance in 30 days, and the materials comprising the artificial stones to be charged to the said owners" . . . comprises only the labour, and leaves the cost of the materials to be paid by the owner.

Canestrari v. Lecavalier, 47 Que. S.C. 296.

BUILDING CONTRACT — BREACH — TERMINATION OF CONTRACT—DAMAGES—REMOVAL OF MATERIAL ON GROUND—COUNTERCLAIM—COSTS.

Helfand v. Slatkin, 6 O.W.N. 707, 26 O.W.R. 731.

BUILDING CONTRACT—WORK AND LABOUR—CONSTRUCTION OF SEWER SYSTEM—INTERPRETATION OF CONTRACT—BONUS—COST OF WORK—EXTRAS.

Armour v. Town of Oakville, 5 O.W.N. 980.

BUILDING CONTRACTS — PENAL CLAUSE — STIPULATED DAMAGE—DELAY—COMPENSATION—EXECUTION OF CONTRACT—C. C., ARTS. 1131, 1187, 1188.

When a contract of lease on hire of work contains the following clause: "I will deliver the machinery completed on your premises on or before the first of May, 1911, for the sum of $33,000. If I make late delivery of all on any one of the distinct and separate machine I have undertaken to deliver on the 1st of May, 1911, I agree to allow you to deduct, when paying me from the purchase price as stipulated in the contract $25 for each day's delay in the delivery of each of the separate machine, and this a liquidated damage, and not by way of forfeiture," and delay takes place in the delivery of the works, the sum mentioned in the penal clause must be considered as liquidated damages, and the defendant opposing that clause need not allege nor prove any damage. The defendant was not obliged to allege that the delay was due to the fault of the plaintiff. When the defendant opposed this clause to the action for the balance of the price of the works done, by deducting the liquidated damages from the price stipulated, he did not plead compensation, but was only executing the contract.

Canadian General Electric Co. v. Canadian Rubber Co., 47 Que. S.C. 24.

One who contracts to erect a building for another can claim payment only when he has entirely completed the work. Therefore he cannot recover the value of work done and materials furnished by offering to deduct the amount of damages caused by defective work, delays, etc. Except in cases expressly provided for by law the court cannot set aside a contract, under the provisions of art. 1065 C.C. unless the decree can restore the parties to the position in which they formerly were. If it gives an advantage to the one to the prejudice of the other cancellation should be refused.

Rochon v. Favreau, 21 Que. K.B. 61, reversing 38 Que. S.C. 421. [Reversed 8 D.L.R. 1031, 46 Can. S.C.R. 647.]

BUILDING CONTRACT—ENTIRE CONTRACT—SPECIFICATIONS — CONTRACT-PRICE NOT PAYABLE UNTIL COMPLETION—ACCEPTANCE — WAIVER — KNOWLEDGE OF DEFECTS — CONTRACT PRICE — ALLOWANCE FOR EXTRAS—COSTS.

Where there is a contract to erect a building, according to specifications, for a lump sum, the price is not recoverable until the building is completed in accordance with the specifications, unless the defendant has accepted the work with a knowledge of the

defects, or has done something from which a new contract to pay for the work can be inferred or unless the variations from the specifications or omissions in details are so unimportant or trifling as to exclude the general rule, and so entitle the plaintiff to recover. [Broley v. Mills, 1 S.L.R. 20, and French v. Holiby, 10 W.R. 821, followed.] The contract for the painting of the defendant's house by the plaintiffs was held, to be an entire contract, to which the above principle was applicable. Although, during the progress of the work, the defendant moved into the house and occupied it, using such portions as were ready for occupation this did not constitute an acceptance or waiver. The defendant had no knowledge of omissions or defects up to the time the plaintiffs declared the work completed. The defendant did not nothing from which a new contract could be inferred. The plaintiffs did not upon the evidence, complete their contract to an extent which entitled them to payment of the contract price—there were substantial omissions. The plaintiffs, were, however, entitled to recover a small sum for extras, with costs on the scale of the small debt procedure; and the defendants were entitled to their costs on the district court scale, set-off pro tanto directed.

Knoor v. Clark, 27 W.L.R. 753.

BUILDING CONTRACTS—RIGHT OF RECOVERY OF PART PERFORMANCE — QUANTUM MERUIT.

The plaintiffs contracted with the defendant to erect a house, the defendant to pay for lumber and materials and allow the plaintiffs 10 per cent on the cost for their trouble and supervision. Before the house was finished, the defendant notified the plaintiffs that he would finish the house, to which the plaintiffs agreed, and the defendant accordingly completed it:—Held, upon the defendant's appeal from the judgment in an action brought in a District Court, that the contract was not an entire one, and the Trial Judge was right in allowing the plaintiffs $300 for commission—there was evidence of a fresh contract by the defendant to pay for the work done. [Sumpter v. Hedges, [1898] 1 Q.B. 673, distinguished.] Held, also, that the sum of $163 allowed to the defendant on his counterclaim for damages for defective construction, should be increased; the measure of damages being the difference between the value of the work as performed by the plaintiffs and the value it would have had if it had been performed in a proper and workmanlike manner; and that the defendant, after accepting the house, was not entitled to the cost of tearing down and rebuilding the walls, unless he had been compelled to tear them down. [Smith v. Johnson, 15 L.L.R. 179, referred to.]:—Held, also, that r. 737 of the Supreme Court Rules was applicable to the practice of the District Courts, and, by that rule, the judge had power to award a lump sum for costs, and had properly exercised his discretion in limiting the defendant's costs to $50.

Bain & Torrey v. Eagle, 7 S.L.R. 169, 29 W.L.R. 335, 6 W.W.R. 1551.

BUILDING CONTRACT—INCOMPLETE PERFORMANCE — ENCROACHMENT ON ADJOINING LOT—WAIVER—RIGHT TO RECOVERY.

Where a building is erected by a contractor so as to encroach slightly on an adjoining lot, and action is taken by the contractor for the moneys payable under the building contract, the procuring by agreement of a transfer of the portion of the adjoining lot encroached upon, after the commencement of the action, but before the trial, operates as a waiver of objection by the building owner on the ground of the encroachment. A building contract whereunder the principal pays the contractor at the end of each month the cost of labour and material plus ten per cent is not an entire contract, and the contractor may from time to time recover from the principal these payments as they accrue due.

Lecky & Co. v. Carman, 7 S.L.R. 360, 7 W.W.R. 691.

BUILDING CONTRACT—MEASURE OF DAMAGES—ESTIMATES—FRAUD.

Under a contract made between the plaintiffs and defendant on April 28, 1913, the plaintiffs undertook the erection of a building for the defendant. The plaintiffs were to supply the plant and tools necessary in the construction and attend to all details of construction under the supervision of defendant's architect and the defendant was to pay for all labour, material and other charges incidental to the work from time to time as such payments were due and notified to the defendant by plaintiffs. For this work the defendant agreed to pay the plaintiffs a fixed sum of $15,000 subject to increase or deduction by a sum equal to 20 per cent of such sum as ultimately was found to be less than or in excess of $189,000, being the fixed estimated cost of the work. This estimated cost had been furnished by the plaintiffs and was by them guaranteed. The work commenced upon the execution of the agreement and continued until some time in November, 1913, when it stopped because the defendant was unable to furnish the money to carry out his part of the contract. In fact his financial condition had been embarrassing before November and he had become indebted to plaintiffs for advances of about $7,000, which he finally paid in 1916. The defendant in July, 1916, advertised for tenders to complete the building in a modified form. Before any new contract was let he received a letter from plaintiffs protesting against the work being continued under any contract but the one here in question, and warning defendant that he was not relieved from this contract. Without any serious effort, however, to get rid of this contract, the defendant entered into a new one with other contractors. Thereupon this action

was brought to recover damages for breach of contract. Judgment was given for the plaintiffs at the trial and reversed on appeal [1917] 3 W.W.R. 1021, on the ground of fraud in making the estimate. The plaintiffs appealed. Held, that the defence of fraud was not available; also, that the plaintiffs were entitled to damages for breach of contract as of the date when the new contract was let by the defendant, and that, in ascertaining such damages, the total cost of the building if completed under the plaintiff's contract had they resumed work on the date of the breach should be estimated, and to the extent to which that cost should exceed or fall below $189,000, 20 per cent thereof should be deducted or added, as the case might be, to the amount to which the plaintiffs might be found entitled in respect of the $10,000 (balance of $15,000, less $5,000 paid), and in ascertaining the damages payable in respect of this item there should be taken into account the value of the time, labour and expense which the plaintiffs were saved through being relieved of their obligation to carry out their contract and any contingencies which might have interfered with their doing so, and that the defendant having broken his contract, was not entitled to anything in respect of the 20 per cent on estimated increased cost over $189,000, except by way of set-off against the plaintiffs' recovery in respect of the $10,000 item.

Jones & Lyttle v. Mackie (Can.), [1918] 2 W.W.R. 82, reversing [1917] 3 W.W.R. 1021.

BUILDING CONTRACT — AQUEDUCT — CHANGE OF PLAN — EXTRA WORK — QUANTUM MERUIT.

A contract for the construction of an aqueduct, according to a design adopted by the owner's engineers required the contractors to reinforce one section thereof with steel. After the work had been begun the contractors, owing to the development of certain defects, were ordered by the owner's engineers to reinforce the whole work. The Trial Judge found that no blame attached to the contractors for these defects, but that they resulted wholly from natural causes, which an aqueduct constructed without steel reinforcement and according to the design contracted for was unable to resist. In an action for the price of the extra steel on a quantum meruit basis, held that the terms of the contract failed to provide for the contingency which resulted in the change of plan and that there was an implied agreement to pay for the extra work and material on a quantum meruit. [Boyd v. South Winnipeg, [1917] 2 W.W.R. 489, applied; Thorn v. London Corp., 1 App. Cas. 120, distinguished.]

J. H. Tremblay Co. v. Greater Winnepeg Water District, [1918] 3 W.W.R. 713. [Reversed, [1919] 1 W.W.R. 1083.]

BUILDING CONTRACT — EXTRAS — PAROL EVIDENCE—JURISDICTION OF COURTS—MECHANICS' LIENS.

A contract for the construction of a building containing a clause that "the owner may, without invalidating the contract, make changes which he deems necessary to make in the plans and specifications of the works to be done, provided, however, that all increases or decreases, as the case may be, be added or deducted," is not a contract for a fixed price to which apply the rules of art. 1690 C.C. (Que.) relating to payment for works resulting from changes or increases made in the plans and specifications. Such contract being of a commercial nature, parol evidence is admissible to prove the works ordered by the owner. A clause in the contract stipulating that all difficulties shall be settled by the architect, whose decision shall bind the parties without appeal, does not take away their recourse before the courts. One who builds upon a lot of land which does not belong to him has not the right to ask for the obliteration of the privileges of a builder, of furnishers of material and of workmen registered upon the building and the land, or the voiding of the contract signed by him for the erection of such building.

Amyot v. Pageau, 53 Que. S.C. 414.

EXTRAS—UNLIQUIDATED DAMAGES.

Where a proprietor, derogating from article 1690 C.C., stipulates with a contractor regarding any sum to be paid for extras as to "any work which may be done by the contractor and not mentioned or referred to (in the devis) which may be considered as an extra, will require to be recognized either verbally or in writing by the architect or proprietor before payment can be collected for such work," it applies only to increase in the labour and materials, and does not apply to any change from the plan and specifications which remain regulated by art. 1690 C.C. Although unliquidated damages must be offered in compensation by an incidental demand, a proprietor sued by his contractor for works done, may plead directly that this latter has not executed his contract according to agreement, and that the costs of completing it should be deducted from his claim by way of compensation; doing this, he is not asking for damages.

Nutt v. Marshall, 24 Rev. Leg. 120.

BUILDING CONTRACT—EXTRAS—VARIATION—NOTICE BY CONTRACTOR—CONDITION PRECEDENT — ARCHITECT — BUILDING-OWNER—WAIVER—INDEPENDENT PIECE OF WORK NOT SUBJECT TO TERMS OF CONTRACT — REFERENCE — REPORT — APPEAL—COSTS.

Benstein v. Jacques, 15 O.W.N. 82.

(§ II D—190)—DIGGING WELL.

Where, as the result of his own negligence, the plaintiff was compelled to abandon a well he had sunk for the defendant under an agreement to do so for a stated

price per foot, but with no stipulation that he should go to any particular depth to obtain water, and without a new agreement, but with the knowledge and consent of the defendant, he began another, which, after going a considerable depth, he also abandoned without finding water, the defendant is answerable only for drilling the second well, since it became necessary to do so as the result of the plaintiff's own negligence.

Wright v. Edwards, 4 D.L.R. 497, 21 W.L.R. 851, 2 W.W.R. 746.

DRILLING—PRICE OF WORK.

Where one is employed to perform drilling work, and no price for the work has been agreed upon, the court will fix a price that is fair.

Robertson v. Beadle (Alta.), 36 D.L.R. 156, [1917] 3 W.W.R. 184.

DRILLING CONTRACT—COVENANT AGAINST ENCUMBERANCES—SEIZING EQUIPMENT.

An agreement whereby an oil drilling contractor covenants the drilling equipment to be free of debt, lien or incumbrance and to so maintain it until completion of the contract, and that in the event of an abandonment or failure to substantially perform the contract the oil company is given the right to seize the equipment and complete the well, does not entitle the company to exercise the right of seizure for an outstanding indebtedness on the machinery not amounting to a charge or lien, and that it is only upon the failure of substantial performance of the contract that the right to seizure may lawfully be exercised.

Alberta Drilling Co. v. Dome Oil Co., 27 D.L.R. 118, 8 A.L.R. 340, 8 W.W.R. 996. [Affirmed in 28 D.L.R. 93, 52 Can. S.C.R. 561.]

ARTESIAN WELL—DEPTH—PRICE.

By a contract for digging an artesian well, at the rate of $2 per foot, provided that drinkable water be obtained but with no condition as to the depth, the contractor, when stopped by the owner at 85 feet in depth because he has not yet found drinkable water, has a right to the price agreed upon for the 85 feet.

Viens v. Lukis, 51 Que. S.C. 15.

(§ II D—192)—BUILDING CONTRACTS—EXTRAS ONLY ON ARCHITECT'S WRITTEN ORDER.

A building contractor is bound by the strict terms of a building contract whereby he has agreed to make no claim for extras done without the written order of the architect, nor can he set up in support of his claim for extras the verbal order of the architect in the face of such condition of the contract where no fraud or collusion is shown between the owner and the architect.

Vandewater v. Marsh, 14 D.L.R. 737, 5 O.W.N. 213, 25 O.W.R. 178, affirmed 10 D.L.R. 810, 4 O.W.N. 882.

CONDITIONS PRECEDENT.

Where a building contract provides that any dispute as to extras or reductions after the issuance of the architect's certificate shall be referred to arbitration and also provides for the recovery of what is "justly due," the latter stipulation not being conditioned upon an architect's certificate or upon an award, and the contract does not contain any proviso that the certificate of the architect shall be final, the contractor is entitled to recover the amount earned under the contract and for extras, without either an architect's certificate or an award, particularly where no certificate had been given by the architect until after the litigation had begun and no arbitrator had been appointed.

Contractors' Supply Co. v. Hyde, 2 D.L.R. 161, 3 O.W.N. 723, 21 O.W.R. 530.

(§ II D—193)—ADVERTISING CONTRACTS.

Where the plaintiff claims a balance as due for advertising, under a written contract which purported to lease to the defendant for one year for advertising purposes a numbered space on the "specialty drop curtain" of the "Empress Theatre" with a proviso for a pro rata reduction if the "theatre" during the term should close, or fail to give the regular number of performances; and, where the evidence shewed that such theatre was of the vaudeville class and within four months was moved with all its plant and scenery, except the "specialty drop curtain," to another building on another street in the city, and there adopted the same name "Empress Theatre" and that the name of the original "Empress Theatre" building was changed to the "Bijou," and was operated for the remainder of the term as a moving picture show under that name, the advertisement on the curtain remaining in the "Bijou" on the original drop curtain left there, the true construction of the words "Empress Theatre" read with "theatre" in contract, as gathered from the whole instrument, is that the parties thereby contemplated the organization, including the plant and scenery, as an active theatre and vaudeville show giving regular performances, and therefore that as to the remaining eight months the defendant was not liable under the contract, the advertisement in the "Bijou" was not of the kind contracted for.

Winnipeg Advertising Co. v. Hilson, 6 D.L.R. 143, 22 W.L.R. 200.

WHAT ACTIONABLE—PUBLISHING FIRM PUBLISHING A CITY DIRECTORY—RESPONSIBILITY FOR UNINTENTIONAL OMISSIONS.

Where a publishing firm publishes from year to year a directory of the names and addresses of the inhabitants of a city, and sells copies thereof to any residents who may choose to become subscribers, under a custom that the names and business addresses and callings of such subscribers shall be published in large, heavy type, the enterprise being a private one in the

publishing firm's own interest, it is presumed to take all the risks of oversights and omissions in respect of any such subscriber, and may be held responsible in damages therefor. Where the defendants have for several years been publishing an annual city directory, and the plaintiff, a practising barrister, gives the defendants a written order for a copy of the directory for a certain year, and where it was and had been the custom of the defendants to publish in large, heavy type the names, callings and office addresses of all subscribers, and where all this was omitted from the directory in respect of the plaintiff, the omission is actionable.

Archambault v. Lovell, 8 D.L.R. 611, 42 Que. S.C. 344.

VOTING CONTEST — NEWSPAPER AWARD — RIGHTS OF WINNER THEREUNDER.

A newspaper held a voting contest in order to increase its circulation and offered to give a trip to the five ladies obtaining the greatest number of votes. The terms of the contest further provided that the lady who obtained the greatest number of all the votes cast had the right to choose the chaperon of the party. The plaintiff obtained the greatest number of votes and appointed H. chaperon. A few days later she changed her mind and appointed M. chaperon. The newspaper was not prejudiced by the change and the manager of the newspaper agreed to it. Subsequently the directors of the newspaper notified the plaintiff that, having appointed H. she could not reconsider her choice. When the tickets for the trip arrived, the newspaper tendered one to the plaintiff. She refused to accept it, because she was not tendered one for M. as well and obtained an injunction, restraining the defendant from delivering a ticket to H.:—Held, that the plaintiff had the right to change her mind and was entitled to receive as damages the price of the chaperon's ticket and certain expenses incurred in preparing for the trip:—Held, that the appointment of the chaperon was not in the nature of an execution of a power.

Murchie v. Mail Publishing Co., 42 N.B. R. 36.

ADVERTISING — PROVISION AS TO RATE OF PAYMENT IN CASE OF INSOLVENCY OF ADVERTISER — CONSTRUCTION — PENALTY OR LIQUIDATED DAMAGES—AMOUNT FOR WHICH CREDITOR ENTITLED TO RANK ON ESTATE OF INSOLVENT.

Ottawa Free Press v. Welsh, 7 O.W.N. 537.

(§ II D—194) — LUMBER CAMP — PUBLIC HEALTH ACT.

The employment under an oral contract of a duly qualified practitioner to look after the employees in a lumber camp is a sufficient compliance with regulation 4 of s. 118 of the Public Health Act (R.S.O. 1914, c. 218).

Unger v. Hettler Lumber Co., 42 D.L.R. 690, 42 O.L.R. 538.

TO REPAIR — NEW MATERIAL SUPPLIED BY REPAIRER — REDELIVERY TO OWNER — SALE OF MATERIAL—LIABILITY—DELAY —UNREASONABLENESS—DAMAGES.

Under a contract to repair, where new material is put into the article repaired by the repairer, the new material so supplied passes to the owners by way of sale with all the rights incident to a sale, on redelivery of the article to the owners, and the repairer is bound to supply such material as is fit for the purpose for which it is required and is liable for latent defects in such material. The owner of the article repaired is entitled to have the defects remedied by the repairer, or by some one else at the expense of the repairer, but unreasonableness and delay on his part will disentitle him to damages for expenses which would not have been incurred but for such delay and unreasonableness.

Sterling Engine Works v. Red Deer Lumber Co., 48 D.L.R. 484, [1919] 2 W.W.R. 519. [Reversed, 51 D.L.R. 509.]

SALE OF INTEREST IN OPTION ON MINING PROPERTY — ALTERATION OF TERMS BY DIFFERENT AGREEMENT—AMBIGUITY.

Ruthrauff v. Black, 16 B.C.R. 359.

PLEDGING OF CONTRACTORS' PLANT AND MATERIALS AS SECURITY — WHAT CONSTITUTES PLANT AND MATERIALS.

Clancy v. G.T.P.R. Co., 15 B.C.R. 497.

LITERARY WORK — PUBLISHER AND AUTHOR —OBLIGATION TO PUBLISH.

Morang v. LeSueur, 45 Can. S.C.R. 95.

CONTRACT FOR WORK AND LABOUR — QUESTION AS TO RATE OF PAYMENT.

Montgomery v. Cockshutt Plow Co., 2 O.W.N. 924, 18 O.W.R. 905.

SALE OF BAKERY — PURCHASE PRICE DISPUTED — PAROL EVIDENCE — RECTIFICATION OF AGREEMENT.

Strothers v. Taylor, 19 O.W.R. 789, 2 O.W.N. 1435.

WORK AND LABOUR — REPAIRS ON BOAT — PAYMENT NOT DUE UNTIL WORK COMPLETED — BOAT DESTROYED BY ACT OF GOD — IMPOSSIBLE TO COMPLETE CONTRACT.

Laurie v. Polson Iron Works, 3 O.W.N. 213, 20 O.W.R. 314.

ENFORCEMENT OF OBLIGATION TO FURNISH MONEY — DISCRETION — LIMITATION —"DURING HIS PRESENT ILLNESS"— DURATION OF LITIGATION—RELEASE.

McKnight v. Robertson, 2 O.W.N. 231.

JOINT AND SEVERAL LIABILITY—ART. 1105, C.P.Q.

Joint and several liability arises only from agreement of contracting parties: it will not be presumed, and, at common law, the obligation of two debtors towards a

creditor without a stipulation to the contrary, binds them jointly only.

Lefebvre v. Lupien, 12 Que. P.R. 438.

MISTAKE AS TO FRONTAGE OF LOT—MISDESCRIPTION — PURCHASE PRICE A BULK SUM — KNOWLEDGE OF PURCHASER — QUESTION OF TITLE OR CONVEYANCE.

Bullen v. Wilkinson, 19 O.W.R. 408, 2 O.W.N. 1202.

BUILDING CONTRACTS—ACTION FOR PRICE OF BARN — ABANDONMENT OF CONTRACT — SUBSTITUTED CONTRACT.

McKenzie v. Elliott, 19 O.W.R. 726, 2 O.W.N. 1364.

EXTRA WORK—CERTIFICATE OF ARCHITECT.

Quinlan v. Redmond, 39 Que. S.C. 145.

BUILDING CONTRACT — STIPULATION NOT TO ASSIGN—STIPULATION NOT TO EMPLOY SUBCONTRACTOR — EQUITABLE ASSIGNMENT.

Fraser v. C.P.R.Co., 19 W.L.R. 369.

BUILDING CONTRACT—ERECTION OF MUNICIPAL BUILDING—PROGRESS ESTIMATES—REFUSAL OF ARCHITECT TO GRANT CERTIFICATE—DUTY TO DECIDE IMPARTIALLY.

Alberta Bldg. Co. v. Calgary, 16 W.L.R. 443.

SUBCONTRACT—FAILURE OF CONTRACTOR TO COMPLETE WORK — MONEY SPENT IN COMPLETING—RENT OF EQUIPMENT.

Tucker v. Puget Sound Bridge and Dredging Co., 15 B.C.R. 393, 14 W.L.R. 408.

PAYMENT — CONDITION PRECEDENT — SATISFACTION OF ENGINEER — DEFECTIVE WORK — PROGRESS CERTIFICATE — ACTUAL DAMAGES—MEASURE OF DAMAGES.

Merriam v. Public Parks Board of Portage la Prairie, 18 W.L.R. 151 (Man.).

WORK AND LABOUR—PRICES—DISMISSAL OF SUBCONTRACTORS.

Woollek v. Bradley, 18 W.L.R. 622 (Sask.).

CONTRACT NOT CONCLUDED—PRICES—TERMS —SELECTION OF LOTS.

Frewen v. Hayes, 16 B.C.R. 143, 16 W.L.R. 253, 14 W.L.R. 632.

ARCHITECT'S CERTIFICATE—CONDITION PRECEDENT—DELAY CAUSED BY STRIKES.

Alsip v. Robinson, 18 W.L.R. 39 (Man.).

III. Validity and effect.

A. In general.

As affected by drunkenness, undue influence, see Deeds, II G—70; Contracts, I D—45.

(§ III A—195) — VALIDITY AND EFFECT —CONTRACT OF EMPLOYMENT BY ONE UNDER EXISTING CONTRACT — KNOWLEDGE OF CONTRACTEE — ACTION FOR BREACH.

Under the axiom ex turpi causa oritur actio an action cannot be maintained for the breach of a contract of employment where the plaintiff, at the time the agreement was made, was aware that it could not be performed without the defendant breaking an existing contract of employment with a third person. [Harrington v. Victoria Graving Dock, 47 L.J.Q.B. 594, followed. And see, as to injunctions generally in restraint of personal service, Chapman v. Westerby, W.N. (1913) 277.]

Wanderers Hockey Club v. Johnson, 14 D.L.R. 42, 18 B.C.R. 367, 25 W.L.R. 434, 5 W.W.R. 117.

ILLEGAL—STIFLING PROSECUTION—ENFORCEMENT.

An agreement to stifle a prosecution or which has a tendency, however slight, to affect, the due administration of justice, is illegal, and any obligation assumed by a person not previously liable therefor as a result of such agreement cannot be enforced. [Lound v. Grimwade, 39 Ch. D. 605; Windhill v. Vint, 45 Ch. D. 351; Williams v. Bayley, L.R. 1 H.L. 200, applied.]

Pachal v. Schiller, 20 D.L.R. 851, 7 S. L.R. 391.

ILLEGAL — AGREEMENT — SIGNATURE — PREFERENTIAL PAYMENT—RECOVERY OF INDUCEMENT—C.C. ART. 989, 990, 1140.

A debtor who has paid a sum of $200 to one of his creditors, to obtain his consent and his signature to an agreement, has a right to recover this sum which has been paid by virtue of an illegal and illicit contract.

Coté v. Kingsbury Footwear Co., 55 Que. S.C. 86.

SALE OF LAND—PHYSICIAN AND PATIENT—CONFIDENTIAL RELATIONSHIP — INDEPENDENT ADVICE.

A medical man is placed in a position of trust and confidence towards his patient which requires from him the same degree of good faith, plain dealing, and guarded conduct which the law requires shall subsist between trustee and cestui que trust and in other relations of the same character.

Ralston v. Tanner, 43 O.L.R. 77.

STOLEN GOODS—COMPROMISE.

A promise to pay a debt as soon as it "will be possible," or when the promissor's "finance will permit it," is a legal contract; it is for the court to declare, when the debtor is sued, if he is in a condition to satisfy his obligation. A compromise effected by the seller of stolen goods with a buyer, to whom he had fraudulently sold them, does not bind the owner of the effects, who may sue this latter for the price of sale.

Orban v. Levy, 27 Que. K.B. 370.

MUNICIPAL CONTRACT—PARTIAL INVALIDITY.

If a by-law or municipal ordinance, or a contract of a municipality, can only be interpreted as a whole, the nullity of a part involves the nullity of the whole; but if, on the other hand, the stipulations are independent one of the other, one part of a contract, or even one part of a clause of a

contract, may be null and the other part legal and valid.

Compagnie Elder Ebano v. Ville de Maisonneuve, 24 Rev. de Jur. 95, 27 Que. K.B. 95.

IMPROVIDENT TRANSACTION—RELIEF THEREFROM.

In order to have a valid contract or conveyance of property, there must be a reasonable degree of equality between the contracting parties. Quit-claim deed set aside because the court was of opinion that the giving of it under the circumstances was an improvident transaction from which the parties giving it were entitled to be relieved.

Barker v. Baker, [1919] 2 W.W.R. 335.

B. ILLEGAL BY EXPRESS PROVISION.

(§ III B—200)—SALE OF OIL—STIPULATION AS TO FOREIGN STANDARD MEASURES.

The sale of a quantity of oil is considered to be made according to the Canadian standard measures, and a contract which stipulates that such sale is made subject to the American standard measures is void.

Premier Oil Co. v. Lavigne, 47 Que. S.C. 543.

VOID—LORD'S DAY ACT—COMPENSATION—DUTY OF COURT.

A contract entered into by a tradesman on the Lord's Day for the sale of goods is void. The purchaser, however, having received the goods must either return them or compensate such tradesman (R.S.S. 1909, c. 69). It is the duty of the court to notice that such contract was made in violation of the Lord's Day Act although no objection on that ground is taken in the pleadings.

Dutchzesan v. Bronfman, 48 D.L.R. 645, 12 S.L.R. 402, [1919] 3 W.W.R. 565.

VALIDITY—VIOLATION OF STATUTE—ALIEN LABOUR CONTRACT—BANK CLERK.

A contract to work as a bank clerk is within s. 3 of c. 43, of the B.C. Master and Servant Amendment Act of 1899, declaring void all contracts for the performance of labour or service in the province made by a nonresident before emigrating to or entering the province.

Ashmore v. Bank of B.N.A., 13 D.L.R. 73, 18 B.C.R. 257, 24 W.L.R. 840, 4 W.W.R. 1014.

STIPULATION AS TO EXTRAS.

The law which declares that a contractor cannot claim any extras, except under certain conditions, is not a law of public order, and the parties can contravene to it by private agreement.

Great Northern Construction Co. v. Ross, 25 Que. K.B. 385, 404.

ILLEGAL BY EXPRESS PROVISION — VIOLATIONS OF STATUTE, PUBLIC POLICY.

No right of action can spring out of an illegal contract; an agency contract constituting an essential part of a scheme to evade the B.C. Land Act, R.S.B.C. 1911, c. 129, and therefore illegal as contrary to public policy, is not enforceable. [Brownlee v. McIntosh, 15 D.L.R. 871, 48 Can. S.C.R. 588, followed; N.W. Salt Co. v. Electrolythic Alkali Co., 107 L.T. 439, referred to.]

Clark v. Swan, 16 D.L.R. 382, 19 B.C.R. 532, 6 W.W.R. 319, 27 W.L.R. 694.

WORKMEN'S COMPENSATION ACT.

Any agreement contrary to the Workmen's Compensation Act is null.

St. Maurice Lumber Co. v. Cadorette, 25 Que. K.B. 410.

(§ III B—211)—VALIDITY AND EFFECT—SALES OF LIQUOR FOR RESALE IN VIOLATION OF LAW.

A nonresident vendor who contracts to sell an article (ex. gr., intoxicating liquor) with the knowledge that it is to be used for resale in violation of law cannot recover the price by action in the courts of the province, the laws of which would be infringed by the contemplated resale.

Wilson Co. v. Mayflower Bottling Co., 14 D.L.R. 711, 47 N.S.R. 441, 13 E.L.R. 489.

SALE OF LIQUOR.

Where a sale of intoxicating liquor is made by a principal through an agent to a purchaser who, to the knowledge of the agent, acting in the course of his employment and within the scope of his authority, intends to dispose of the same in violation of law, the contract is void for illegality and the principal cannot recover the purchase price. In such a case the knowledge of the agent is attributed to the principal and it makes no difference that the principal reserves to himself a discretion as to whether he will accept the order or not. [Craigellachie v. Bigelow, 37 N.S.R. 482, 37 Can. S.C.R. 55, distinguished.] Drysdale, J., dissented on the ground that the agent in question only had a limited authority to solicit and transmit orders and had no authority to make sales, and his knowledge (as to which he thought the evidence insufficient) was therefore not sufficient to bind the principal.

St. Charles & Co. v. Vassallo, 45 N.S.R. 195, 9 E.L.R. 355.

C. PUBLIC POLICY.

Stifling prosecution, duress, see Compromise and Settlement, I—4; Mischief, I—15.

Secret preference to creditor, see Insolvency, II—5.

(§ III C—215) — BIASING MIND OF PURCHASER—CORRUPT ACT.

An agreement to pay a sum of money for biasing the mind of a prospective purchaser to accept the bargain is a corrupt act and unenforceable. [Wyburd v. Stanton, 4 Esp. 179; Harrington v. Victoria Graving Dock Co., 3 Q.B.D. 549, followed.]

Sproule v. Isman, 23 D.L.R. 68, 8 S.L.R. 237, 8 W.W.R. 1133, 31 W.L.R. 776.

(§ III C—216)—BY GUARDIAN.

An agreement made by the grandfather of a child to pay the mother of a child a

fixed sum annually on condition that he be appointed the guardian of the child is not void as against public policy where such appointment is merely asked for as a guarantee that the education of the child shall be finished in an institution named by the grandfather, and there is no desire otherwise to divest the mother of her rights and liabilities with respect to the child. [Humphreys v. Pollys, [1901] 2 K.B. 385, distinguished.]

Chisholm v. Chisholm, 45 N.S.R. 288.

(§ III C—228)—As to changing jurisdiction of court.

A covenant in a contract that litigation arising from it, shall be had before the court in a different district from that in which it should be had in the ordinary course, is not invalid, but no consent of parties, by contract or otherwise, can vest in a judge or a court a jurisdiction that the law does not give them.

Jonquières Pulp Co. v. Chicoutimi Pulp Co., 41 Que. S.C. 97.

(§ III C—238)—Immoral consideration—Title.

A contract with an immoral consideration is of no effect. It cannot constitute a title sufficient to transfer property nor one upon which to found possession animo domini.

Lafortune v. Vézina, 25 Que. K.B. 544, 48 Que. S.C. 254. [Reversed in 41 D.L.R. 208, 56 Can. S.C.R. 246.]

Immoral use of property—House of ill-fame.

A contract founded upon a consideration illegal or contrary to public order or good morals is noneffective. There is no right of action for recovery of the price of an immoveable to be used as a house of ill-fame when this unlawful and immoral use was the sole consideration and determined the price in excess of the intrinsic value of the immoveable.

Noel v. Brunet, 48 Que. S.C. 119.

Lease for immoral purpose — Contracts for sale.

An agreement for sale of a house for a price exceeding its value payable by instalments, the excess being agreed to in consideration of the immoral use which the purchaser, to the knowledge of the vendor, proposed to make of it, having become void through failure of the purchaser to pay the instalments, the vendor is not entitled to an action to annul it nor to recover moneys payable thereunder when he has already received more than the value of the property.

Bruneau v. Vézina, 44 Que. S.C. 189.

Immoral purposes—Repayment.

A donation inter vivos of an immoveable for immoral purposes, for a house of prostitution, is void as being contrary to arts. 708 and 990, C.C. Que. The demand for repayment of money paid to a person who is not in the cause should be refused.

Balthazar v. Quillam, 51 Que. S.C. 193.

(§ III C—239)—Immoral motives.

Where both parties enter into a contract from an improper and immoral motive, then that motive becomes the real cause of the contract and the contract is illegal.

Bedard v. Phœnix Land & Improvement Co., and Drolet, 8 D.L.R. 686, 43 Que. S.C. 50.

Validity and effect—Against public policy—To compound crime—Test.

The misappropriation of his employer's money by an employee creates a debt in favour of the employer for which he may lawfully take security so long as there is no agreement not to prosecute. [Ward v. Lloyd, 6 M. & G. 785, referred to.]

Groves v. Harris, 18 D.L.R. 475, 7 S.L.R. 63, 29 W.L.R. 331, 7 W.W.R. 68.

Ratification of forgery—Compounding crime.

The forgery of another's name may be ratified by the party whose name has been attached without his authority unless such ratification involves an agreement to stifle a prosecution. [Scott v. Bank of New Brunswick, 23 Can. S.C.R. 277, 283, applied; for previous decisions see 6 D.L.R. 119, 8 D.L.R. 68.]

Re De Blois Estate, 22 D.L.R. 731, 48 N.S.R. 529.

Immoral purposes.

The ground upon which the court refuses to enforce immoral contracts is that they are against public policy as encouraging and aiding immorality. It is not necessary in order to render the contract unenforceable that the plaintiff should expect to be paid out of the proceeds of the immoral act. The distinction is to be observed between those things which, while necessary or useful for the ordinary purposes of life, may also be applied to an immoral purpose and those which under the circumstances appear not to have been required except for an immoral purpose. Where additions to a house of ill-fame are known to the contractor to be required for the purpose of increasing the immoral business, he cannot enforce a mechanic's lien in respect thereto. In an action to enforce a mechanic's lien for such additions when judgment in favour of the plaintiff is reversed on appeal, there should be no costs of either action or appeal. [Pearce v. Brooks, L.R. 1 Ex. 213, 35 L.J. Ex. 134, as explained in Clark v. Hagar, 22 Can. S.C.R. 510; Perkins v. Jones, 1 W.L.R. 41, followed.]

Miller v. Moore, 3 A.L.R. 297, 17 W.L.R. 548.

To compound crime.

Defendant had allowed a fire to escape from his land, and was liable to a fine and costs under the Forest Fires Act. He was informed by the defendant, an officer charged with the enforcement of the act, that he would be liable to a fine of $20

and that the costs of extinguishing the fire would amount to $25 more. Wishing to prevent an information being laid against him the plaintiff agreed to pay the defendant these amounts, and actually paid him $29 on account. Held, that if the agreement was a legal one, there was consideration for the payment, and if the agreement was illegal then the plaintiff was a party to it, and in either event the money could not be recovered back.

Chipman v. Whitman, 11 E.L.R. 313.

PUBLIC POLICY—TO COMPOUND CRIME.

A loan of money by the victim of a robbery to the father of the thief to enable him to stifle the prosecution by paying the expenses incurred is not a nullity as being made for a consideration contrary to good morals and public order.

Doucet v. Lanoix, 22 Que. K.B. 473.

CONVEYANCE OF LAND—ILLEGAL CONSIDERATION—STIFLING PROSECUTION—THREATS—DURESS—AGREEMENT TO HOLD DEED AS SECURITY.

Boon v. Fair, 11 O.W.N. 177.

IMMUNITY CLAUSE—RESPONSIBILITY—PUBLIC ORDER—INSURANCE—TRANSFEREE—ACTION—C.C., ART. 1054—R.S. [1906], C. 37 (RAILWAY ACT), ARTS. 226, 340, 346.

A party to a contract may legally stipulate that he will not be responsible for the negligence of his employees. Therefore, a clause in an agreement between a railway company and a private individual for the building of a siding, connecting with the company's railways, which purports to exempt the company from liability for injury or loss caused by its negligence or that of its servants in use of said siding, is not void as being against public order, as far as the fault of the Company's employees is concerned. This contract does not require the authorization and approval of the Railway Commission under art. 340 of the Railway Act. An insurance company which has paid the damages suffered by the insured in an accident, may, as transferee, sue the party responsible for the accident in recovering the amount paid in the name of the insured.

Canadian Northern Quebec R. Co. v. Argenteuil Lumber Co., 28 Que. K.B. 408.

(§ III C—247)—AS TO STEAMSHIP COMPANIES.

An agreement between steamship companies fixing rates for freight and passengers for one season is not void as against public policy if the rates are proper and reasonable and the contract in fact beneficial to the public. The plaintiffs proved one breach of such contract by the defendants and the court directed the jury that in the absence of evidence to the contrary they might infer that other breaches had been committed. Held, the direction was right, inasmuch as the defendants knew and could have given evidence as to whether or not other breaches had been committed.

St. John River Steamship Co. v. The Star Line Steamship Co., 40 N.B.R. 405.

(§ III C—249)—FOR TERM OF YEARS—EXPIRATION OF TIME—NO NEW CONTRACT—CONTINUATION UNDER TERMS OF OLD CONTRACT—RENEWAL FROM YEAR TO YEAR OR MONTH TO MONTH.

A contract for the supply of water was entered into in 1886 to extend over a period of 20 years with right of renewal. At the end of that period no new contract was entered into, but the company continued to supply water at the old rate, and no effort was made to secure a renewal of the contract. Held, that the contract had not been renewed for a period of twenty years and at the most the supplying of water under the original conditions and at the original rates could not be construed as anything more than a renewal of the contract from year to year or possibly only from month to month.

The King v. Board of Commissioners of Public Utilities; Ex parte Town of Milltown, 47 D.L.R. 219.

(§ III C—260)—HIRE OF HORSES—MILITARY OFFICER—LIABILITY OF CROWN.

A contract for the hire of horses entered into by an officer of the Crown's military forces acting under the authority of the commanding officer is binding upon the Crown.

Gulf Pulp & Paper Co. v. The King, 41 D.L.R. 508, 17 Can. Ex. 294.

AGREEMENT TO REMUNERATE PLAINTIFF FOR USE OF POLITICAL INFLUENCE WITH SERVANTS OF CROWN TO OBTAIN BENEFIT FOR DEFENDANTS—ACTION UPON AGREEMENT—SUMMARY DISMISSAL AS CONTRARY TO PUBLIC POLICY—COSTS.

An action to cover a commission for procuring for the defendants contracts from the Crown was summarily dismissed, upon it appearing, by the admissions of the plaintiff upon his examination for discovery, that the commission was claimed under an agreement by which the plaintiff was to use his political influence with servants of the Crown to obtain the contracts, which was an agreement contrary to public policy. [Montefiore v. Menday Motor Components Co., [1918] 2 K.B. 241, followed.] The action was dismissed with costs, the plaintiff having been paid a part of the commission, which he did not legally earn.

Yeomans v. Knight, 45 O.L.R. 55.

(§ III C—262)—OF PUBLIC OFFICERS—COMPENSATION — SPECIALTY CONTRACT — STATUTE OF LIMITATIONS.

A claim for unpaid salary by a public school inspector is a claim in debt on the statute, hence a specialty contract and not barred for twenty years under 10 Edw. VII., c. 34, s. 49, although the facts bringing the defendant within the liability of the Act may be dehors the statute. [Cork & Bandon R. Co. v. Goode, 13 C.B. 826; Shepherd

v. Hills, 11 Ex. 55, 105 R.R. 386, followed; Ross v. G.T.R. Co., 10 O.R. 447; Essery v. G.T.R. Co., 21 O.R. 224; Beatty v. Bailey, 26 O.L.R. 145; Magherafelt v. Gribben, 24 L.R. Ir. 529, referred to.]

Carlyle v. County of Oxford, 18 D.L.R. 759, 30 O.L.R. 413.

(§ III C—264)—Private interest of public officer—Contract for a municipal work.

A contractor with a municipality who had entered into an arrangement with the mayor whereby the latter was to receive from him a bonus for financial assistance personally given by the mayor in carrying out the work contracted for, under circumstances which gave the mayor an interest in the contract incompatible with his official duty and in violation of the statute 58 Vict. (Que.), c. 42, ss. 1 and 2, is not entitled to retain the illegal bonus money out of proceeds of the contract coming to his hands; the contractor may recover same either as money had and received to his use or under the statute 58 Vict. (Que.), c. 42, s. 17.

Lapointe v. Messier, 17 D.L.R. 347, 49 Can. S.C.R. 271.

D. Gambling and wager contracts.

As affected by Cr. Code, grain future, see Gaming, 1-5.

(§ III D—270)—Purchase on margin—Cheque.

Purchasing stock on margin for speculative purposes, without an actual transfer of the stock certificates, does not constitute the transaction a gaming contract as affecting the validity of a cheque given to a broker in consideration thereof, whose only interest in the contract is his commission. [Forget v. Ostigny, [1895] A.C. 318; Stevenson v. Brais, 7 Que. Q.B. 77, followed; S. 231 of the Cr. Code, R.S.C. 1906, c. 146, referred to.]

Bernstein v. Shapiro, 26 D.L.R. 406, 49 Que. S.C. 350.

Gaming — Stakeholder — Return of deposit.

The deposit with a third party by a bettor of his stake is not a mere revocable promise to pay but an actual payment subject to the conditions on which the bet is made. [See Marquis v. Cantin, 42 Que. S.C. 132.] The bettors, with a contract in writing, are bound by the declaration made when it is executed, that the recognized betting rules will be observed. Therefore, the announcement by the judges and starter on a race course that the racing will be conducted according to the rules of the National Trotting Association, compels the bettors to submit to the decision of the judges, after four heats had been run, to postpone the last heat to another day owing to the late hour as allowed by said rules, especially when the contract is silent on the matter. Oral proof of the said rules and declaration is admissible. The bettor who refuses to accept the judges' decision loses his bet and his opponent may recover the stake from the depository.

Giroux v. Allaire, 44 Que. S.C. 425.

(§ III D—272)—Grain—"Futures"—Intention as to delivery—Crim. Code, s. 231.

The plaintiffs, grain-merchants and grain-brokers, acting as brokers for the defendant, a bank clerk, bought and sold for him grain upon the Winnipeg Grain Exchange. All the transactions were in "futures." The defendant never ordered a purchase or sale with the intention of accepting or making delivery, and the plaintiffs' manager knew that the defendant was merely a bank clerk, and that his orders were purely speculative: —Held, that the transactions were prohibited by s. 231 of the Criminal Code, and the plaintiffs could not recover a balance said to be due to them when they sold at a loss the grain which the defendant had previously purchased upon margin through them. [Beamish v. James Richardson & Sons, 49 Can. S.C.R. 595, followed.]

Richardson & Sons v. Gilbertson, 39 D.L.R. 56, 39 O.L.R. 423, 28 Can. Cr. Cas. 431.

Brokers—Dealings in company-shares—Payments—Limitations Act.

[Chinnery v. Evans, 11 H.L.C. 115; Cockburn v. Edwards, 18 Ch. D. 449, referred to.]

Stark v. Somerville, 40 O.L.R. 374.

Brokers — Dealings in grain for customer—Terms on which dealings conducted — Memorandum in writing — Notice to customer — Right of brokers to sell grain when margins exhausted — Authority to purchase grain — Illegality of transactions under s. 231 of Criminal Code—Failure to shew.

Maloof v. Bickell, 14 O.W.N. 289, affirming 13 O.W.N. 4.

Stock—Margin.

The client of a stock broker deposited into his hands a margin of 2 per cent on a certain stock on the following condition: (a) if, at a certain date, the price of the shares dropped, on the New York Stock Exchange, to the price covered by the margin, the client loses the margin and remained liable for interest; (b) if the stock went down, but not below the margin, the client would have the right to withdraw his margin less the amount represented by the decline of the market and ¼ per cent commission; (c) if the stock went up, the client could close the option, and the broker would pay him the profits represented by the rise of the market and his margin. Neither of the parties ever contemplated the delivery of the stock. It was held, that this transaction was a pure gambling in the rise or fall of the shares in New York Stock Exchange, and that it was illegal as contrary to the civil and criminal laws.

Wilson v. North American Securities, 52 Que. S.C. 522.

DEALINGS ON MARGIN ON GRAIN EXCHANGE—SPECULATIVE OPTIONS—PRIVITIES.

This was an application for leave to appeal to the King in Council from a decision of the Supreme Court of Canada, 16 D.L.R. 855, 49 Can. S.C.R. 595, 6 W.W.R. 1258, in favour of the defendant, which leave was refused.

Richardson v. Beamish, 8 W.W.R. 109.

(§ III D—273)—BETTING ON HORSE RACE—MONEY LENT—ACTION TO RECOVER.

Scully v. Ryckman, 4 O.W.N. 850, 24 O. W.R. 221.

(III D—274)—STAKES, RIGHT TO RECOVER.

The deposit with a third part of the stakes by the makers of a wager is not a mere revocable promise to pay but a real payment by anticipation and subject to the conditions governing the wager. From the time that it is decided the stakes become the property of the winner by that very event and the loser has no means of recovering it either from the winner or from the depository.

Marquis v. Cantin, 42 Que. S.C. 132.

E. IN RESTRAINT OF TRADE.

As to personal service, exclusive agency, time and space, see Injunction, I B—22.

Criminal restraint of trade, see Monopoly and Combinations.

(§ III E—275)—RESTRAINT OF TRADE—CRIM. CODE.

A contract whereby the sale of about 90 per cent of the salt output in Canada is controlled, but where the quantity imported and subject to competition exceeds the home manufactured article, and the prices not having been enhanced thereby, is not in undue restraint of trade in violation of s. 498 of the Criminal Code.

MacEwan v. Toronto General Trusts Co., 35 D.L.R. 435, 54 Can. S.C.R. 381, 28 Can. Cr. Cas. 387, reversing 29 D.L.R. 711, 36 O.L.R. 244.

RESTRAINT OF TRADE—SALE OF GOODS BY MANUFACTURERS—CONDITION AS TO PRICES AT WHICH SALES TO BE MADE BY VENDEE TO CUSTOMERS—CRIMINAL CODE, S. 498 (b), (d)—UNDULY PREVENTING OR LESSENING COMPETITION.

Dominion Supply Co. v. Robertson Co., 34 D.L.R. 740, 39 O.L.R. 495.

MONOPOLY—MUNICIPAL CORPORATION.

The contract of a municipal corporation "not to use or allow to be used any other asphalt or bitumen than that of the plaintiff, especially where it has awarded, or will award, the contract for any paving work directly or indirectly within the limits of the city or elsewhere where the contracts are awarded, or it can exercise any control until the end and completion of the paving work which will be constructed within the limits of the said city and of its dependencies" restricts its natural liberty of doing business and is contrary to public order as preventing competition and creating a monopoly.

Elder-Ebano Asphalt Co. v. City of Maisonneuve, 51 Que. S.C. 295. [Reversed in 27 Que. K.B. 95.]

(§ III E—282)—RESTRICTING PRICES TO BE PAID.

An agreement between two dealers in junk aimed to destroy all competition in that business in the territory in which they were operating and aimed to lower prices paid by them for the stuff and indirectly to raise prices paid to them by their customers, the profits resulting to be divided between them, is not void at common law as being in restraint of trade.

Weidman v. Shragge, 2 D.L.R. 734, 46 Can. S.C.R. 1, 2 W.W.R. 330, reversing on appeal 20 Man. L.R. 178, 15 W.L.R. 616.

AGREEMENT CREATING MONOPOLY—ENHANCING PRICES.

An injunction to restrain the defendant from selling goods of the plaintiffs' manufacture, except at prices mentioned in an agreement between them, was refused, where the stipulations imposed by the vendor-plaintiffs were such as unreasonably to enhance the price to the purchasing public; the element of crime came in and affected the freedom on contract. [Wampole & Co. v. F. E. Karn Co., 11 O.L.R. 619, followed; Elliman Sons & Co. v. Carrington & Son, [1901] 2 Ch. 275, not followed.]

Stearns v. Avery, 33 O.L.R. 251, 8 O.W.N. 70.

(§ III E—285)—TO REFRAIN FROM BUSINESS—VIOLATION OF COVENANT—ACTING AS MANAGER.

Acting as manager of a competing business is a breach of a covenant given by defendant on selling out to plaintiffs that the defendant would not "alone or jointly with or as agent or otherwise for any other person, firm or company, directly or indirectly, enter into competition with or opposition" to the business of the plaintiffs within a stated time and radius.

Parkers Dye Works v. Smith, 20 D.L.R. 500, 32 O.L.R. 169, affirming 18 D.L.R. 631.

COVENANT NOT TO ENGAGE IN BUSINESS—PENALTY FOR—FORFEITURE OF.

A penal clause becomes operative the moment proof of violation of the contract is made, and the entire penalty becomes exigible without any proof of wrongful intention or damages suffered being required. This is different from the "concurrence déloyale" where the vendor of a stock-in-trade and goodwill proceeds to solicit his old customers.

Fortin v. Perras, 9 D.L.R. 16, 43 Que. S.C. 313.

REASONABLE RESTRAINT—TIME AND SPACE—INJUNCTION—DAMAGES.

A perpetual injunction will be granted restraining the vendor of the stock in trade and good will of a business from carrying

on a business of a similar kind in a city where, in the circumstances of the case, such restraint seems reasonably necessary to protect the interest of the purchaser and is not injurious to the public.

Mizon v. Pohoretzky, 38 D.L.R. 214, 40 O.L.R. 239, affirming 12 O.W.N.167.

RESTRAINT OF TRADE—SALE OF BUSINESS—COVENANT BY VENDOR NOT TO ENGAGE IN BUSINESS OF "MILK-DEALER" — ACTION FOR BREACH—WHETHER SALE OF BUTTER AND BUTTERMILK INCLUDED —EVIDENCE OF UNDERSTANDING OF PERSONS IN TRADE—EVIDENCE OF CONDUCT OF PARTIES—DECLARATION OF RIGHTS UNDER AGREEMENT.

Willis v. People's Dairy Co., 15 O.W.N. 257.

TO REFRAIN FROM BUSINESS—INJUNCTION —INSCRIPTION IN LAW.

A covenant by which a commercial traveller agrees, if he leaves his employ for any cause, not to be engaged by any one in Canada in the same capacity during one year or not to engage in the same line of business himself, is too restrictive, going beyond what was reasonably necessary for the protection of the employer's business and could not be enforced against him by an injunction.

Canada Metal Co. v. Berry, 15 Que. P.R. 178.

(§ III E—287)—TO REFRAIN FROM BUSINESS—REASONABLENESS AS TO SPACE —RESTRAINT OF TRADE.

A covenant against competing in trade is reasonable as to space, although it includes the entire Province of Ontario where the covenantee's business embraces Ontario.

Parkers Dye Works v. Smith, 18 D.L.R. 631, 32 O.L.R. 169. [Affirmed, 20 D.L.R. 500, 32 O.L.R. 169.]

REASONABLENESS — SPACE — MISREPRESENTATION.

A covenant by a cake salesman not to engage in the sale of cakes or confectionery within 12 months after the termination of his employment, within a city of a half million inhabitants, is reasonable as to time, but unreasonable as to space, and is unenforceable, particularly when obtained under a misrepresentation that other employees have signed a similar contract; where the reasonable and unreasonable parts are not separable the contract is wholly unenforceable.

George Weston v. Baird, 31 D.L.R. 730, 37 O.L.R. 514.

COVENANT BY SERVANT NOT TO ENGAGE IN SIMILAR BUSINESS WITHIN DEFINED TERRITORY—BREACH—INJUNCTION.

Skeans v. Keegan, 10 O.W.N. 225.

(§ III E—288)—LIMITATION AS TO TIME AND SPACE.

Restraint of trade—Injunction—Patent for invention—Infringement.

William Peace Co. v. William Peace, 5 D.L.R. 891, 4 O.W.N. 63, 23 O.W.R. 22.

F. RATIFICATION; VALIDITY; HOLDING OUT AS AGENT.

(§ III F—290)—RATIFICATION—VALIDATING.

A company is liable to third parties who in good faith contract with a person in reality not the agent of the company under the belief that he was so when the company and its directors have given reasonable cause for such belief.

French Gas Saving Co. v. The Desbarats Advertising Agency, 1 D.L.R. 136.

ILLEGALITY—EXPRESS STATUTORY PROVISION —WAIVER—SERVICE TO BE PERFORMED.

The performance of services and the bringing of an action for wages earned under a contract is a waiver of the right to assert its invalidity because made by a nonresident of the province in violation of s. 19 of c. 153 of R.S.B.C. 1911.

Ashmore v. Bank of B.N.A., 13 D.L.R. 73, 18 B.C.R. 257, 21 W.L.R. 840, 4 W.W.R. 1014.

VALIDITY AND EFFECT—RATIFICATION WITHOUT SEAL OF AGREEMENT UNDER SEAL.

An agreement under seal for the sale of land made by one purporting to be the agent of the owner, may be ratified by the owner by a writing not under seal, since the seal on the agreement of sale is mere surplusage, if the agreement is otherwise a sufficient memorandum to satisfy the Statute of Frauds. [Hunter v. Parker, 7 M. & W. 322, applied. See also French Gas Savings Co. v. Desbaratas Advertising Agency, 1 D.L.R. 136.]

Cobbledick v. Bersch, 11 D.L.R. 235, 24 W.L.R. 259.

VOIDABILITY—RATIFICATION—FINALITY.

An election to affirm a voidable contract made with full knowledge is final. [Clough v. London & North Western R. Co., L.R. 7 Ex. 26, adopted.]

Jackson v. Irwin & Billings Co., 20 B.C.R. 487, 7 W.W.R. 815.

CANCELLATION OF CONTRACT—SIGNATURE OF HUSBAND INSERTED BY HIS WIFE—RATIFICATION—WRITING MADE VALIDLY —EVIDENCE BY WITNESSES OF A CONTRADICTORY NATURE—C.C. ART. 1234.

A written contract, in which a wife inserted the signature of her husband without his authority, may be valid if the husband later on ratifies the signature of his wife. Beyond this oral evidence cannot be admitted to contradict the terms. Acceptance by the husband of advances paid to his wife in execution of a contract, which she signed without authority but which is subsequently read to him, constitutes ratification of the contract.

Tousignant v. Lemieux, 28 Que. K.B. 212.

(§ III F—291)—MISREPRESENTATION—CONTRACT INDUCED BY—PARTIAL INFORMATION RATIFICATION.

It is insufficient to prove partial information giving rise to suspicion only, to

prove affirmance of a contract notwithstanding the false representation on which it was obtained; there can be no effective affirmation or election which is not based on complete and exact knowledge. [Jarrett v. Kennedy, 6 C.B. 319; Clough v. London & N.W.R. Co., L.R. 7 Ex. 26; Re London & Prov. Electric; Ex parte Hale, 55 L.T.R. 670; Morrison v. Universal Marine, L.R. 8 Ex. 40, 197, referred to.]

Carrique v. Catts & Hill, 20 D.L.R. 737, 32 O.L.R. 548.

SYNDICATE PURCHASE OF LAND—MISREPRESENTATION—PAYMENT OF INSTALMENT—WANT OF RATIFICATION.

The respondent, a member of a syndicate, brought an action to set aside an agreement of the sale entered into by the appellant, the owner of the lots, and the syndicate, on the ground that her assent to the purchase had been procured by fraudulent representations as to the situation of the lots bought. It was shewn that the respondent, with full knowledge of the fraud, had given an option on these lots to a third party and had paid without protest an instalment due under the contract. The court held, Davies and Anglin, JJ. dissenting, that, on the evidence and under the circumstances of the case, the respondents' acts did not constitute ratification or confirmation or a waiver of her right of revocation.

Montreal Investment & Realty Co. v. Sarault, 44 D.L.R. 530, 57 Can. S.C.R. 464, affirming 24 Que. K.B. 249.

G. REMEDIES; PROCEEDS OF UNLAWFUL CONTRACT.

(§ III G—295)—VIOLATION OF FARM IMPLEMENT ACT—RIGHTS OF SELLER.

An agreement of sale of threshing machinery in violation of the Farm Implements Act (Sask.), is not illegal, but merely unenforceable, and the seller has the right to recover the machinery and the profits made therewith by the buyer.

George White & Sons v. Jashansky, 34 D.L.R. 271, 10 S.L.R. 81, [1917] 2 W.W.R. 173.

RECOVERY OF PROHIBITED SECURITY.

Bonds pledged as collateral security for an alleged indebtedness which arose from transactions prohibited by laws as against public order, can be recovered at the instance of the debtor.

Wilson v. North American Securities, 52 Que. S.C. 522.

(§ III G—300)—REMEDIES—ILLEGALITY—STATUTORY PROHIBITION IN PUBLIC INTEREST.

Ramage v. Deyoe, 14 D.L.R. 243, 23 W.L.R. 306, 3 W.W.R. 950.

PUBLIC POLICY—IMMORAL MOTIVES—WANT OF CONSIDERATION—PROMISE EX TURPI CAUSA.

A promise made in consideration of the cessation of illicit cohabitation is void simply for want of any consideration, so that if made in the form of an instrument under seal, there may be prima facie a valid contract; yet if the transaction is of such a nature as to hold out an inducement or to constitute to either party a motive to continue the connection, the instrument would be void ex turpi causa and no claim or defence can be maintained which requires to be supported by allegation or proof of such an agreement; hence each of the parties thereto is powerless to enforce or to set aside an agreement of this character by judicial process.

Pepperas v. Dubuc, 11 D.L.R. 193, 24 O.W.R. 563.

RESTRAINT OF TRADE—UNDERTAKING NOT TO ENGAGE IN SIMILAR BUSINESS—LIMITATIONS OF TIME AND SPACE.

Kelly v. McLaughlin, 19 W.L.R. 633.

WANT OF CONSIDERATION — RECOVERY OF MONEY PAID—ILLEGAL CONTRACT.

Belize v. Godbout, 40 Que. S.C. 469.

AGREEMENT BY SERVANT NOT TO ENGAGE IN BUSINESS OF A SIMILAR KIND TO THAT OF MASTER—DEPARTMENTS OF BUSINESS—RESTRICTION EXTENDING TO THE WHOLE OF CANADA.

Allen Mfg. Co. v. Murphy, 22 O.L.R. 539, 23 O.L.R. 467, 17 O.W.R. 917.

IV. Performance; breach.

A. IN GENERAL.

(§ IV A—315)—BREACH—DISCLOSING TERMS.

Parties to a joint venture owe an obligation to each other not to do any act which will prevent or render less probable the contingency which will make the venture successful, and the one who throws over the opportunity of himself closing the transaction in which he is to divide the profits with another working in the same interest so as to enable a third party to secure the benefit which is the object of the venture because of the latter's offer to divide with him may be compelled to pay out of the profits so received to his partner in the venture the amount which the latter would have been entitled to receive had the defendant made the deal himself. [Inchbald v. Western, etc., Coffee Co., 17 C.B.N.S. 733, referred to.]

Cole v. Reed, 22 D.L.R. 686, 20 B.C.R. 365. [Affirmed, 26 D.L.R. 564, 52 Can. S.C.R. 176, 9 W.W.R. 1137.]

AGISTMENT CONTRACT—DEGREE OF CARE.

On a contract of agistment the onus is upon the agister to prove that the death of the pony, which was turned out on his range for food and shelter for the winter season, did not arise by reason of the agister's neglect to use such care as a prudent or careful man would exercise in regard to his own property. [Phipps v. The New Claridge's Hotel, 22 T.L.R. 49; Platt v. Waddington, 23 O.L.R. 178, referred to.]

Pye v. McClure, 22 D.L.R. 543, 21 B.C.R. 114, 8 W.W.R. 538.

PURCHASE BY DEFENDANT OF SHARES AND ASSETS OF MANUFACTURING COMPANY—EMPLOYMENT OF PLAINTIFF AS SUPERINTENDENT OF WORKS—AGREEMENT TO ASSUME AND PAY CLAIM OF PLAINTIFF AGAINST COMPANY — MISREPRESENTATIONS—HONEST BELIEF—FAILURE OF CLAIM FOR DECEIT—CLAIM FOR RESCISSION ON GROUND OF INNOCENT MISREPRESENTATIONS—IMPOSSIBILITY OF RESTORING PARTIES TO FORMER POSITION—CLAIM FOR SALARY AND BONUS—CONSTRUCTION OF AGREEMENT—TIME FOR PAYMENT OF MONTHLY BONUS POSTPONED.

Dawson v. Quinlan & Robertson, 17 O.W.N. 84.

DELIVERY OF COMPANY SHARES—BREACH—DELAY—ACTION BY ASSIGNEE OF PURCHASER—RIGHT TO SUE—CONVEYANCING AND LAW OF PROPERTY ACT, S. 49—ADDITION OF ASSIGNOR AS PLAINTIFF—READINESS TO DELIVER STOCK—DAMAGES—INTEREST—COSTS.

McTavish v. Corbet Foundry & Machine Co., 15 O.W.N. 41.

BUILDING OF SHIP—COMPLETION—DELAY—PRICE NOT FULLY PAID—DELIVERY OVER UPON PAYMENT INTO COURT OF BALANCE DUE—INJUNCTION.

Heinstein & Sons v. Polson Iron Works, 15 O.W.N. 94.

ORDER FOR GOODS—ACCEPTANCE—FAILURE TO DELIVER—REPUDIATION OF CONTRACT — SPECIFICATIONS—ELECTION—NOTICE—DAMAGES.

Perkins Electric Co. v. Electric Specialty & Supply Co., 14 O.W.N. 190. [Affirmed in 15 O.W.N. 352.]

AGREEMENT FOR USE OF CHATTELS—LEASE—OPTION OF PURCHASE—CONSTRUCTION OF AGREEMENT — RENT OF CHATTELS — RIGHT TO RETURN OF CHATTELS—DAMAGES—INJUNCTION—COSTS.

Walt v. Wright, 14 O.W.N. 240. [Affirmed in 15 O.W.N. 238.]

SALE OF PULPWOOD—BREACH BY VENDOR—ACTION BY PURCHASER FOR DAMAGES—DEFENCE — REPUDIATION OF CONTRACT BECAUSE OF MISREPRESENTATIONS — FAILURE OF PURCHASER TO SHEW DAMAGE—RELIEF OF PURCHASER FROM LOSS BY TRANSACTION WITH STRANGER.

New Ontario Timber Co. v. McDonald, 14 O.W.N. 261.

DELIVERY OF GRAIN—BREACH—DAMAGES.

Burford Coal & Grain Co. v. McPherson, 14 O.W.N. 283. [Affirmed in 15 O.W.N. 85.]

CONSTRUCTION OF SIGN—COMPLIANCE WITH UNDERWRITERS' RULES.

One who has undertaken to make and set up a sign is not obliged to comply with the rules of the "Canadian Association of the Insurers against Fire," unless he is under such obligation by his contract.

Macey Sign Co. v. Routtenberg, 48 Que. S.C. 346.

IN GENERAL—QUALITY OF MATERIALS.

The word "edifice" in art 1688 C.C. comprises all large works of any nature whatever, for instance, an aqueduct which a municipality has had constructed for the use of its inhabitants. The contractor is not relieved from the liability provided for by said article from the fact that the work was not superintended by an architect. When loss occurs through the poor quality of the materials used in construction the contractor is liable notwithstanding that the owner had himself directed the work and made changes in the specifications. In such case it is not the owner but the contractor who must make certain that the materials are good quality.

Village of Warwick v. Gagnon, 22 Que. K.B. 280.

DEBTOR AND CREDITOR—DEFENDANTS UNDERTAKING THAT A CERTAIN SUM BE PAID PLAINTIFF BY A COMPANY—REFUSAL OF COMPANY TO PAY BY REASON OF INDEBTEDNESS TO IT ON OTHER ACCOUNTS—LIABILITY OF DEFENDANTS TO PLAINTIFF.

By an agreement signed by plaintiff and defendants and others it was agreed that plaintiff was to be credited by M. Co. with certain salary and expenses "and said amount to be paid in cash;" and by another agreement defendants undertook and agreed that said amount should be paid by M. Co. forthwith. M. Co. refused payment to plaintiff alleging that plaintiff was indebted to it on other accounts exceeding said amount. It was held that plaintiff could recover against defendants even though had the M. Co. been sued by plaintiff it might have counterclaimed.

Camsusa v. Smith & Christie, [1919] 2 W.W.R. 332.

(§ IV A—316)—PERFORMANCE—BREACH—WHO MUST PERFORM—UNFORESEEN CONTINGENCIES.

Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although through unforeseen contingencies its performance has become unexpectedly burdensome or even impossible.

Inland Investment Co. v. Campbell, 18 D.L.R. 177, 24 Man. L.R. 703, 29 W.L.R. 561, 7 W.W.R. 375, affirming on this principle, 16 D.L.R. 410.

WHO MUST PERFORM — AGREEMENT BETWEEN SHAREHOLDERS—AS TO CONTRIBUTION TO COMPANY.

Kenworthy v. Kenworthy, 6 D.L.R. 919.

PERFORMANCE—DUTY CREATED BY PARTY—NEGLECT TO PROVIDE AGAINST ACCIDENT.

Where a party by his own contract creates a duty or charge upon himself, he is bound to make it good notwithstanding any accident, by inevitable necessity, because he might have provided against it by his contract. [Wallbridge v. Gaujot, 14 A.R. (Ont.) 460, affirmed in Palmer v. Wallbridge, 15 Can. S.C.R. 650; Ridgeway v.

Sneyd, Kay 627; Clifford v. Watts, L.R. 5 C.P. 577, at p. 586, 40 L.J.C.P. 36; Gowan v. Christie, L.R. 2 Sc. App. 273, and Leake on Contracts, 6th ed. (Can.) 495, specially referred to.]

Sunday v. Dominion Natural Gas Co., 4 D.L.R. 663, 3 O.W.N. 1575, 22 O.W.R. 743.

(§ IV A—319)—Notice, offer.

There cannot be recovery for a breach of warranty in the sale of an engine, where the purchaser did not give notice of its failure to work properly in the manner required by the contract of sale, but continued to use it for nearly a year afterwards.

Robert Bell Engine Co. v. Burke, 4 D.L.R. 342, 5 S.L.R. 75, 19 W.L.R. 934, 1 W.W.R. 707.

Condition as to notice.

Where it is stipulated in a contract that one of the parties may exercise certain rights by giving 3 months' notice to the other party, the admission by the latter that he has received a verbal notice is sufficient to make the notice regular.

Ménard v. Thuot, 50 Que. S.C. 289.

(§ IV A—321)—Recovery for extra work.

A contractor who built the foundation and walls for a stone building, may recover for extra work caused by the property owner enlarging the dimensions of the building from those specified in his contract.

Iredale v. Drewey, 4 D.L.R. 868, 19 W.L.R. 931.

Extra work—"Effective" construction of coffer-dam.

A contract for the construction of a coffer-dam providing, that "whatever type of dam is used the contractor shall assume all responsibility for the effectiveness and maintenance thereof," renders the contractor responsible for the full effectiveness of the coffer-dam, and will preclude him from claiming any additional sum for extra work or delays in sealing the dam so as to make it effective. [Art. 1690, C.C. Que., applied.]

Fraser Brace & Co. v. Can. Light & Power Co., 26 D.L.R. 655, 49 Que. S.C. 145.

Extra work—Contract price.

A contractor who has agreed to do any work ordered by the owner, "notwithstanding to what extent such increase or diminution of quantities may be carried during the performance of the work," cannot charge any additional price, if he has done the work without protest, and has accepted payment at the contract price without objection.

Vinet v. Canadian Light & Power Co., 42 D.L.R. 709, 54 Que. S.C. 134.

Building contract—Extras—Changes—"Written instructions."

Changes by way of substitution are not necessarily extras, except in cases where the substitution is of a character which necessarily involves greater expense; the plans may form the "written instructions" required by the agreement to make such changes.

Purdy & Henderson Co. v. Parish of St. Patrick (Alta.), 37 D.L.R. 642, [1917] 3 W.W.R. 710, 12 A.L.R. 263, varying [1917] 1 W.W.R. 1416.

Building — Extra work — Authority of architect.

An architect employed to prepare plans and supervise a building is not thereby given the power of a general agent to bind his employer beyond the limits of the contract for the work; he cannot bind him for extra work without his authorization.

Caisse v. Bessette, 37 D.L.R. 167, 52 Que. S.C. 199.

City sewers—Extra work — Certificate of engineer—Finality—Misrepresentation.

Where a contract for the construction of city sewers stipulates against any claim for extra work unless on the written order and approval by the city engineer, whose decision shall be final, the contractor will be entitled to recover for extra work if the engineer's decision was influenced by the city's Board of Control; but not on the ground of an innocent misrepresentation as to the depth of the rock to be encountered in course of the work, it being the duty of the contract to satisfy himself thereof from the plans and specifications.

Brennan & Hollingsworth v. Hamilton, 37 D.L.R. 144, 39 O.L.R. 367.

Building agreement — Extras — Reasonable additional expenses—Transportation—Delays.

Allison v. Greater Winnipeg Water District, 28 D.L.R. 784, 34 W.L.R. 494, 10 W.W.R. 573.

Agreement to seed land—Claim for extra work authorized — Payment — Counterclaim.

Langlois v. Amyot, 31 D.L.R. 572.

Claim for payment for work done—Extras—Certificate of engineer—Impartiality.

Curley v. Village of New Toronto, 26 D.L.R. 750, affirming 8 O.W.N. 274.

Recovery for extra work.

A claim by a contractor for extra time because of severely cold weather will not be considered in the absence of any clause in the contract making such weather condition a ground for extension, particularly where the contract does provide for extension on certain grounds and where the work contracted for was to be done in the middle of the winter the contractor would be estopped from setting up the cold weather as a ground for extension of time.

Cockshutt Plow Co. v. Alberta Bldg. Co., 3 A.L.R. 503, varying 2 A.L.R. 472.

Erection of building—Action for balance of contract price, extras, and damages — Counterclaim — Disputed items—Findings of fact of trial judge.

McLeod v. Sault Ste. Marie School Board, 8 O.W.N. 569.

EXTRAS—CHANGES IN PLANS.

Art. 1690, C.C. Que., respecting changes in the plans and specifications of construction works undertaken at a fixed price, has no application where it has been stipulated in the contract that the owner should have the right to make changes and that the contract price should be increased or diminished accordingly.

Bernier v. Dockhands of Montreal, 59 Que. S.C. 337.

EXTRA WORK—WRITTEN ORDER.

Where there is a stipulation in a contract that "no allowance shall be made for any extra or additional work, unless the same be ordered in writing by said city or architects," the acknowledgment of the architect who has ordered the additional works for which the contractor claims the cost, takes the place of the requisite writing. A letter of the architect "to have the excavation carried down and the terrace wall built on rock as required under the specifications and to proceed with the work accordingly," cannot be considered as a written order to make the excavation as additional or extra work but rather to execute the works according to the contract.

Quinlan v. Montreal, 25 Que. K.B. 272.

EXTRA WORK.

A tender for work accepted by the owner, without plans or specifications other than the details in the tender, is not a contract within the provisions of art. 1690, C.C. Que., respecting claims for extra work.

Lalonde (Damien) v. Galeries Parisiennes Co., 51 Que. S.C. 134.

(§ IV A—322)—AGREEMENT WITH CROWN AND STUDENT FOR EDUCATION—PAYMENT OF EXPENSES GUARANTEED BY GUARDIANS — STUDENT A MINOR — BREACH—SUIT FOR DEBT.

The guarantors of a debt owing under an agreement between the Crown and a minor, are liable to the Crown for such debt on proof of same, when the minor has defaulted. [Harris v. Huntbach, 1 Burr. 373, 97 E.R. 355, referred to; Hancock v. Hodgson, 4 Bing. 269, 12 Moore 504; M'Intyre v. Belcher, 14 C.B. (N.S.) 654, 8 L.T. 461, followed.]

The King v. Novak, 50 D.L.R. 412, 30 Man. L.R. 86, [1920] 1 W.W.R. 136.

B. EXCUSE FOR FAILURE OF PERFORMANCE.

(§ IV B—325)—EXCUSE FOR FAILURE OF PERFORMANCE.

A persistent failure on the part of the vendors to respond to the frequent calls of the vendee for more grain under several contracts for future delivery justifies a breaking off of the contract on the part of the vendee.

Wilks v. Matthews, 7 D.L.R. 395, 22 Que. K.B. 97.

FAILURE TO MAKE TEST.

Where a dealer in motor cars sells a car unfit for ordinary use, due in part to a defective battery resulting from the want of a proper primary charge, that is, in this instance from a failure to properly saturate the cell plates of the battery, without which a car could not be expected to work properly; it was the duty of the seller in the circumstances to have had a proper primary charge made, and in this respect there was no obligation whatever upon the buyer, who neither knew nor could be expected to know of such requirements. Where a dealer in motor cars sells a car with a stipulation to equip it with a certain kind of battery and without the buyer's knowledge substitutes a different kind of battery, such variance constitutes a breach of contract notwithstanding the seller's opinion that the substitute may be better than the stipulated appliance. [Forman & Co. v. The Ship "Liddesdale," [1900] A.C. 190, applied.]

Trethewey v. Moyes, 8 D.L.R. 280, 4 O.W.N. 445, 23 O.W.R. 563.

BREACH OF PROMISE OF MARRIAGE—EVIDENCE OF PROMISE — CORROBORATION — EVIDENCE ACT, S. 11—FINDINGS OF JURY —SANITY OF PLAINTIFF—MENTAL UNFITNESS FOR MARRIAGE—DEFENCE TO ACTION — APPEAL — OBJECTION TO CHARGE NOT MADE AT TRIAL AND NOT TAKEN IN NOTICE OF APPEAL—RULE 493 —DISCRETION OF COURT—DEFENCE NOT PASSED UPON BY JURY.

At the trial of an action for breach of promise of marriage the jury, in answer the questions, found: (1) That the defendant promised to marry the plaintiff; (2) that he broke that promise; (3) damages, $10,000; (4) that the plaintiff was sane at the time the promise was made; (5) and at the time when it should have been fulfilled. The Trial Judge directed that judgment be entered for the plaintiff for $10,000, and the defendant appealed: Held, that, although the evidence as to the promise was contradictory, there was evidence which, if believed, warranted the finding that the promise was made, and it could not be said that the finding was one which no reasonable jury could make. (2) That there was sufficient corroboration in the testimony of the plaintiff's father and mother, as well as in the admitted acts and conduct of the defendant, to satisfy the Evidence Act, R.S.O. 1914, c. 76, s. 11. The plaintiff laid the promise in August, 1915, and the breach in August, 1917. The defendant, besides denying the promise, pleaded "that the plaintiff now is and subsequent to the month of August, 1915, became mentally unfit to marry, and that such unfitness existed in the month of January, 1917, and has ever since continued." It was argued for the defendant before the Appellate Court that the jury were misdirected or not directed on the question of the alleged mental condition of the plaintiff and the issue raised as to that condition rendering her unfit to marry. This objection was not taken in the notice of appeal:—Held,

per Meredith, C.J.O., that the objection was not open to the appellant (the defendant). Per Hodgins, J.A.:—The objection was open, in the discretion of the court, notwithstanding the omission to take it in the notice. Rule 493 should not be strictly enforced in a case where the objection not taken in the notice may be considered without unfairness to the opposite party. But effect could not be given to the contention that there was such a mental unfitness, not necessarily insanity, as justified the defendant in refusing to marry the plaintiff. At the trial mental unfitness was treated as equivalent to insanity: the jury were not asked to consider whether the evidence disclosed the kind of mental unfitness that was now urged as a defence: and there was, therefore, no proper foundation for a decision of the question whether mental unfitness, in the sense now urged, was a good defence. Per Ferguson, J.A.:—The Trial Judge was not asked to leave to the jury a question with regard to the contention now made, and the judge's charge was not objected to before him on the ground that he had failed to bring that contention to the attention of the jury; the contention now made was an afterthought which could not and should not be given effect to in an appellate court either as a matter of right or a matter of grace.

Lowry v. Robins, 45 O.L.R. 84.

AGREEMENT FOR SALE—DEFAULT IN PAYMENT—ANNULMENT—FEAR OF TROUBLE—OCCUPATION—TESTIMONIAL PROOF—C.C. ARTS. 776, 1233, 1521, 1535, 2268.

A purchaser can demand a renewal of an action to nullify an agreement of sale in default of payment by alleging fear of trouble. He should either make an offer and demand security or he should abandon the property and sue to annul the agreement. When a contract is annulled in default of payment the vendor has a right to rent from the purchaser; this right is by virtue of the principle that in the case of contracts where there is rescission the parties ought to be placed in the same condition that they held before the agreement. Art. 776 C.C. in making an exception in favor of gifts of chattels accompanied by delivery, only touches the form of donations, as regards matter these gifts are subject to the ordinary rules.

Bastarache v. Bastarache, 25 Rev. Leg. 183.

REMOVAL OF BUILDINGS TO ANOTHER SITE.

McKenzie & Blundell v. Ball, 24 W.L.R. 367.

(§ IV B—330)—STRIKE.

Delay caused by a strike over which a party to a contract has no control, should not be counted in deciding what is a reasonable time for the performance of such contract.

Henry Hope & Sons v. Canada Foundry Co., 39 D.L.R. 308, 40 O.L.R. 338, affirming 12 O.W.N. 168.

EMBARGO—REASONABLE TIME.

If it is within the contemplation of the parties to a contract at the time the contract is entered into that an existing embargo of the railway company is of a temporary character and may be raised at any time, the vendor is not justified in repudiating the contract on the ground of impossibility of delivery until a reasonable time has elapsed; what is a reasonable time is a question of fact in view of the contemplated duration of the contract and circumstances of the case.

Brenner v. Consumers Metal Co., 41 D.L.R. 339, 41 O.L.R. 534.

IMPLIED CONDITION—CARGO SHIPS.

A vendor is released on the ground of impossibility of performance, if an implied condition in the contract, that freight space could be booked for certain deliveries, by general cargo ships in the ordinary course of transport, cannot be realized. If there is no such implied condition it must be proved that the goods could not be shipped from another port or on any tramp vessel.

Wilcox & Frost v. Lamarre, 40 D.L.R. 653, 27 Que. K.B. 265.

PROMISE TO TRUSTEES OF CHURCH—DEATH OF PROMISOR—IMPOSSIBILITY OF PERFORMANCE—CONSTRUCTIVE FRAUD.

An action by the trustees of a church against the administrator of the estate of a deceased member of the congregation to enforce an agreement made between the trustees and the member, whereby she was to make a gift of $1,000 to the church as a contribution to a fund for the erection of a parsonage and lend $1,500 to the trustees to be also expended in the erection of the parsonage, was dismissed, on the ground that her death had made the performance of the agreement, having regard to its terms and conditions and the delay of the trustees in proceeding with the building, impossible of performance; and that part of the promised money which was meant to be charity and that part which was meant to be for a consideration, could not be separated. The transaction, it was considered, was not open to attack on the ground of constructive fraud. The dismissal of the action was without costs.

Reinhart v. Burgar, 43 O.L.R. 120.

BUILDING—QUALITY OF MATERIAL—DECAY—INEVITABLE ACCIDENT.

Where a contractor puts up the woodwork of a building of a different quality of timber than that set forth in the specifications, resulting in "dry rot" setting in on account of the inferiority of quality, he is liable to the owner for the costs of reconstruction of the building to render it safe, and even for replacing the wood material with that of steel; it is not a case of force majeure or inevitable accident.

Canada Spool Cotton Co. v. Peter Lyall & Sons, 35 D.L.R. 783, 51 Que. S.C. 227.

CONDITIONS—FAILURE TO PLEAD.

Where the issue is not raised on the

pleading, it cannot be set up that an agreement for the supply of ties was subject to a verbal condition not to supply the whole quantity of ties in case there was not sufficient snow during the winter enabling the doing so, and that the stipulated supply was prevented by a lack of snow during a portion of the winter.

Giese v. Bell & McPhee, 26 D.L.R. 28, 9 A.L.R. 427, 33 W.L.R. 300, 9 W.W.R. 826.

IMPOSSIBILITY OF PERFORMANCE—INCONSISTENCY OF CONDITIONS.

An agreement to purchase all the structural steel work needed under a municipal contract, if "consistent with the conditions" of the latter contract, is rendered impossible of performance and inoperative upon the municipality awarding such contract on condition that the steel and iron works should be purchased from another party.

Browning v. Masson, 27 D.L.R. 360, 52 Can. S.C.R. 379, reversing 24 Que. K.B. 389.

SERVICE RENDERED TO MASTER—PROMISE TO REMUNERATE AT DEATH OF MASTER—PROMISE OF MARRIAGE—BREACH—COMPENSATION—INSTRUMENT IN WRITING SIGNED BY MASTER SUED UPON AS PROMISSORY NOTE—CERTIFICATE OF PROMISE TO PAY—BILLS OF EXCHANGE ACT, S. 176—EVIDENCE OF PROMISE — STATUTE OF FRAUDS—UNCERTAINTY AS TO TIME OF FULFILMENT — WILL — ACTION AGAINST EXECUTORS—CORROBORATION—EVIDENCE ACT, S. 12—RECOVERY UPON CONTRACT OR UPON QUANTUM MERUIT.

The plaintiff before the year 1901, was engaged by B., a money lender, as bookkeeper, at a salary of $10 a week. She remained in his employment down to the time of his death in November, 1915. His wife died in September, 1910. For many years, and until his death, the plaintiff was B.'s bookkeeper and secretary, made his collections, and managed nearly the whole of his business; and, besides, attended his wife as nurse during a long period, and afterwards was housekeeper and nurse to B. until two years before his death. During his wife's lifetime, B. promised to marry the plaintiff upon his wife's death and to make provision for her in his will if she would nurse his wife until her death, which the plaintiff did. He did not marry the plaintiff after his wife's death, though he renewed his promise to marry her, but he did, in June, 1910, make a will in which he gave the plaintiff the income of $10,000, referring to her as his "bookkeeper and faithful nurse." This bequest B., early in 1913, purported to cancel. In March, 1913, after B. had refused to marry the plaintiff and was contemplating marriage with another person, he promised to give the plaintiff $10,000 in lieu of the provision made for her in the will, and he then signed a document worded thus: "This is to certify that I have this day given to the plaintiff "a promise of $10,000 . . . at my death." He was then 80 years of age. In July, 1913, he signed another document as follows: "To whom it may concern. You will please pay to the bearer any money due to her as such collection is authorized by me." He made a new will in June, 1915, in which he gave the plaintiff $3 a week. This will was cancelled in August, 1915, and a new will made, in which no bequest was made to the plaintiff. The last will signed by B. was dated September 15, 1915—2 months before his death. In it he gave to the plaintiff "who was for many years my private secretary and bookkeeper for her long and faithful service in my behalf the sum of $10,000 . . . the same to be accepted by her in full satisfaction of any claims that she may have against my estate." This was signed by B., but was not properly attested; and the will of August, 1915, was admitted to probate. The plaintiff sued the executors upon the promise made in 1913, alleging it to be a promissory note for $10,000:—Held, that the document was not a promissory note; Bills of Exchange Act, s. 176. [Dasylva v. Dufour, 16 L.C.R. 294, referred to.] The document, however, was evidence of a promise by B. to pay the plaintiff $10,000 at his death, not only as compensation for her services, which had not, upon the evidence, been adequately remunerated, but also as compensation for the breach of his promise to marry her, that is, the promise made after his wife's death. The agreement was not within s. 4 of the Statute of Frauds: Agreements consisting of mutual promises to marry do not require written evidence under the statute; and the contract was not to be regarded as one not to be performed within a year: Where there is no mention of time, and the time is uncertain, the agreement is not within the statute. [Hanau v. Ehrlich, [1912] A.C. 39, followed.] There was ample corroboration to satisfy s. 12 of the Evidence Act, R.S.O. 1914, c. 76. The plaintiff was entitled to recover either upon B.'s contract to pay her $10,000 or upon a quantum meruit—in the circumstances of the case, $10,000 should be fixed as a reasonable allowance.

Sheehan v. Mercantile Trust Co. of Canada, 45 O.L.R. 422. [Reversed 17 O.W.N. 322.]

LOAN—PENAL CLAUSE—FORCE MAJEURE.

A clause, in a loan agreement, stipulating that the principal and interest should be payable at the residence of the lender, should be understood to be the residence of the lender at the time of the contract, and not that which the creditor has at the time of the payment. 2. When the creditor transfers his debt, the place of payment is the domicile of the new creditor, if the position of the debtor is not thereby rendered more onerous. 3. If the debt is transferred to different people, the debtor is not bound to pay at the place agreed upon, even if he has consented to the transfers, because in that case the position of the debt-

or has become more onerous, and, in such case the debt becomes payable at the domicile of the debtors. 4. In a case where interest is to be demanded at the domicile of the debtor, the creditor must go there to make his demand for payment, otherwise the debtor is not at fault, and the creditor cannot claim the penalty attaching to his default in payment. So a loan agreement which stipulates that, upon default by the borrower to pay the interest due, the principal shall become due without demand at law, or formal demand or other method, does not dispense with the creditor making his demand for payment of interest, at the place where he ought to make the payment; if he has not done so, the penalty clause cannot be enforced. 5. One who, on account of force majeure, does not fulfil an obligation to which a penalty clause is attached, is thereby freed from the penalty. 6. It is force majeure when a debtor allows to run by the delay, for paying a debt without doing so, because, found wounded and senseless near his residence, he remained for a week in entire unconsciousness and inertness, having lost his speech and memory of passing events.

Trester v. Desève, 27 Que. K.B. 237.

Heating system — Warranty — Impossibility of performance.

Though it may not be possible to lay down a rule as to the length of pipes necessary to produce 70 degrees of heat in a dwelling house seeing that it is a question of fact depending on the circumstances as well as the number and the size of the openings, the situation of the building itself and the arrangement of the rooms, nevertheless, he who undertakes to place a heating apparatus capable of developing 70 degrees of heat in a house that he is well acquainted with or that he has himself examined, cannot relieve himself from liability by pleading that it was impossible to do more than to place in the premises a heating apparatus able in the ordinary conditions to furnish the degree of heat agreed upon.

Roy v. Barbeau, 47 Que. S.C. 395.

(§ IV B—331)—Early frost.

A consignee is justified in refusing to accept a consignment of figs, which, through the negligence of the carrier, were frozen in transit.

Albo v. G.N.R. Co., 2 D.L.R. 290, 17 B.C.R. 226, 20 W.L.R. 844, 1 W.W.R. 1105.

(§ IV B—333) — Impossibility of performance — Machinery for making shells—Fixtures.

Kokomo Investment Co. v. Dominion Harvester Co. (Alta.), 43 D.L.R. 198, [1918] 3 W.W.R. 366, 14 A.L.R. 27.

Traveling salesman — Commission basis—Agreement for advances—Business depression — Impossibility of getting goods from Europe—Cancellation of contract.

Business depression and the impossibility of procuring goods from Europe on account of the war is sufficient to justify an employer cancelling an agreement, with a traveling salesman, selling high-class specialties (luxuries) on a commission basis. Such salesman has no claim for damages, based on an agreement to advance monthly a certain sum to be charged against commissions.

Greenberg v. The Gresen Co., 46 D.L.R. 231, 55 Que. S.C. 263.

Force majeure—State of war.

War, and the disturbances which it causes in commerce, industry and transportation do not constitute a fortuitous event or irresistible force which the debtor can invoke to escape from obligations which he has contracted during the existence of such economic conditions.

Duchaine v. La Compagnie Marier et Trudel, 53 Que. S.C. 302.

Force majeure—Floods.

An architect, who has hired his services at a time when the owner did not yet know the delay he was to grant for the completion of the works, cannot reasonably argue that the delay subsequently fixed is the delay which the architect and owner had in mind at the time of the agreement between them; he cannot either conclude that such delays stipulated solely for the benefit of the owner are the delays normally required for the execution of the works. No additional fee is due the architect, whatever may be the delay incurred by the contractor, if such a delay is caused by a fortuitous event, or superior force, or by a fact independent of the owner's or architect's will; the architect may only, in such a case, ask the cancellation of his contract and the value of his services to date; he cannot either ask an additional fee owing only to ordinary delays which happen in most contracts, but only in the case of delays resulting from gross neglect, and provided he himself takes against the contractor all the recourses mentioned in the contract and also that he protests the owner. River floods in the fall or spring are not, properly speaking, fortuitous events; but their intensity may sometimes cause them to be considered as such, and excuse a contractor's delays.

Surveyor v. Town of GrandMere, 53 Que. S.C. 357.

(§ IV B—335)—Nonperformance — Prevention by other party.

A penal clause in a contract to erect a building, that the contractor will pay a fixed sum for every day of delay beyond a date fixed for the completion of the work, as liquidated damages, apart from any loss or damages that the owner may sustain, cannot be enforced in the case of delay caused by the doing of work to the building under a distinct subsequent contract between the owner and the contractor.

Papineau v. Guertin, 15 D.L.R. 513, 22

Que. K.B. 529, affirming Papineau v. Guertin, 40 Que. S.C. 97.

PREVENTION OR HINDRANCE BY OTHER PARTY.

Where a term of a contract is that it shall be completed by the plaintiff by a certain time and the defendant by his own act makes it impossible for the plaintiff to complete within the specified time, the contract is impliedly varied and the time for completion is extended for a reasonable time. Under a contract by the plaintiffs to cut railway ties, the defendant furnishing the permits for cutting such ties, the plaintiffs are not bound to select the timber limits, and are entitled to damages for being prevented from carrying out their contract by reason of the permits not being provided.

Kelly v. Nepigon Construction Co., 8 D.L.R. 116, 4 O.W.N. 279, 23 O.W.R. 298.

OPTION AGREEMENT — BREACH — NOTICE — ACTION FOR DAMAGES — TIME LIMIT —TENDER OF PURCHASE MONEY.

Where there has been a breach of an option agreement to purchase land, the holder of the option may, upon receiving notice of the breach, bring an action for damages, although the time limit named in the option has not expired. It is not necessary for him to tender the purchase money required under the option to be paid within the time limit, before bringing the action.

Stover v. Gold, 48 D.L.R. 620, [1919] 3 W.W.R. 503, reversing the judgment of Stuart, J.

PART PERFORMANCE — OUSTED BY EMPLOYER—PAYMENT CONDITIONED ON COMPLETION.

A provision in a contract for work and labour that no formal payment will be made on account of the work until completion and acceptance thereof becomes inoperative if the contractor is wrongfully ousted by the other party from the work before its completion. [See also Leake on Contracts, 6th ed., 507; and compare Dodd v. Churton, [1897] 1 Q.B. 562.]

Neres v. Swanson, 1 D.L.R. 833, 20 W.L.R. 175, 1 W.W.R. 711.

HINDRANCE BY OTHER PARTY — ORDERS FOR FURTHER QUANTITIES.

It is no defence that a party was unable to complete a contract for the supply of ties by reason of having been required by the other party to the contract to proceed with the manufacture of lumber, not provided for by the agreement, where the contract provided for the delivery, in addition to the stipulated quantity of lumber, any such further quantity as may be ordered.

Giese v. Bell & McPhee, 26 D.L.R. 28, 9 A.L.R. 427, 33 W.L.R. 300, 9 W.W.R. 826.

PERFORMANCE — EXCUSE FOR FAILURE — PREVENTION OR HINDRANCE BY OTHER PARTY.

The prima facie liability of a builder, for failure to complete the construction of a building for the owner until some months after the time stipulated, resulting in damages to the owner, is subject to abatement if it be shewn that part of the delay was due to the default of the owner himself.

Alberta Engineering Co. v. Blow, 17 D.L.R. 497, 28 W.L.R. 391.

There can be no recovery on a contract express, for a definite sum and for definite work, where the contract is not performed by reason of the plaintiff's own default.

Hyland v. Harrison, 49 N.S.R. 75.

HIRING OF WORK — PAVING OF STREETS — DEPOSIT — RESTITUTION — COMPENSATION—C.C. ARTS. 1013, 1188, 1190.

A principal contractor for the paving of streets who has received from his subcontractor a deposit repayable when the paving is finished cannot retain this deposit under the pretext that the work is not yet completed on two streets; when the work upon these two streets has been suspended by order of the town and the principal contractor has himself sued the latter for damages on this account. Even if it is stipulated in the subcontract that the work will not be finally accepted until two years after its completion and reception, the principal contractor cannot retain this deposit where the subcontractor has undertaken the obligation to maintain the pavements in good condition, and where the principal contractor has kept back 10 per cent of the contract price to guarantee the execution of this. The obligation to carry out the work and that of maintaining in good repair being different and distinct. No compensation arises in the case of a debt contested and sued for, nor in that of restitution of a deposit which is considered as a sacred obligation.

Palermo v. Gagnon & Massicotte, 55 Que. S.C. 150.

BUILDING CONTRACT — HINDRANCE — VIS MAJOR.

A building contractor who agrees to protect, by canvas or otherwise, a building of which he has undertaken to repair or raise the roof, is responsible for all damages resulting from insufficient protection and he cannot be permitted to invoke, as vis major, the inclemency of the season, however extraordinary it may have been. There can be no application of a penal clause when the debtor has been prevented, by the act of the creditor, from executing his obligation.

Boivin v. Paquet, 25 Que. K.B. 69.

C. INCOMPLETE PERFORMANCE; SUFFICIENCY OF PERFORMANCE.

Sufficiency of performance, under building contract, see Mechanics' Liens, VIII—66; Under towage agreement, see Towage, I—5.

Substantial performance, see Mechanics Liens, II—5.

(§ IV C—340) — Substantial performance — Building contract — Defects.

Substantial performance of a building contract entitles the builder to recover the contract price subject to deduction for so much as ought to be allowed for defects.

Diebel v. Stratford Improvement Co., 33 D.L.R. 296, 38 O.L.R. 407, varying 37 O.L.R. 492.

Building contract—Condition of floors —Frost.

A contract for the supplying of a special material for the hardening of concrete floors provided as follows: "We (the defendant) will ask you to pay us at thirty days from date of shipment, 25 per cent of the amount of the bill. The balance we will allow to stand for six months without interest, at the end of which time you are to be the judge as to whether the floors are perfectly satisfactory to you. Then, if satisfactory, we will expect settlement of the balance. If not, we will undertake to make them satisfactory, failing which we will refund you the 25 per cent which you have paid us." The plaintiffs paid the 25 per cent, but the floors proved unsatisfactory to them and the defendant did not make them satisfactory. The plaintiffs sued to recover the sum paid by them and for damages for breach of contract. It was held that the condition of the floors was due to frost, and that, as the plaintiffs had failed in their duty to keep the building sufficiently warm, the action should be dismissed. On appeal, held that the evidence did not show that the condition of the floors was due to lack of heating and that the plaintiffs were entitled to recover the $614 paid by them. Cameron, J.A., was of the opinion that the plaintiffs were also entitled to damages for injury to their printing machinery because of dust on the floors and for the cost of painting the floors.

Farmers Advocate v. Master Builders Co. (Man.), 38 D.L.R. 409, 28 Man. L.R. 340, [1917] 3 W.W.R. 1095.

Purchase of measured electrical current—Unmeasured current offered — Purchase of measured current elsewhere — Right to recover excess in price.

One who has contracted to purchase measured electrical current is not obliged to take unmeasured current, and incur the danger of a controversy, but is entitled to obtain the measured current elsewhere at the best price procurable, and charge the defaulting party with the excess in price.

Yukon Gold Co. v. Canadian Klondyke Power Co., 47 D.L.R. 146, [1919] 2 W.W.R. 814.

Sufficiency of performance — Contract to furnish electric motor.

A contract to install a silently running electric motor having carbon brushes is not satisfied with a motor of a type without such brushes, and which would not run as silently as a motor of the character described in the contract.

Stevens v. Pryce-Jones, 13 D.L.R. 746, 25 W.L.R. 172.

Building contract — Subsidence of walls during progress of work — Fault of contractors — Refusal to repair — Termination of employment — Justification — Construction of contract — Modification of specifications — Negligence or lack of judgment of architects — Burden of proof — Refusal of progress certificate — Counterclaim — Expense incurred in completing building — Injury to neighbouring building — Measure of damages — Offer to restore — Estoppel — Delay in completion — Loss of rents — Liquidated damages — Extension of time — Extras — Damages for non-completion within time specified by contract.

The judgment of Mathers, C.J.K.B., 16 W.L.R. 627, was affirmed by the Court of Appeal as regards the dismissal of the plaintiffs' claim, and varied in respect of the recovery by the defendants upon their counterclaim, by the disallowance of the sum awarded as liquidated damages and in other respects.

Grace v. Osler, 21 Man. L.R. 641, varying 16 W.L.R. 627.

Work and labour — Trimming land — Failure to perform contract — Part performance — Quantum meruit — Counterclaim.

In his statement of claim the plaintiff alleged a contract by which he undertook to cut the poplars and grub the willows on 34 acres of land of the defendant and that he had done the work; and he claimed the stipulated remuneration. The defendant admitted the contract, but alleged that the plaintiff had not performed it, inasmuch as he had never grubbed the willows. At the trial, the plaintiff swore that his agreement was to cut the brush, both poplar and willow, but not to grub the willows. The defendant swore that the contract was as alleged in the statement of claim, and in this he was corroborated:—Held, that the evidence, that the contract was that sworn to by the defendant; and, as the plaintiff did not grub the willows, he had not performed his part of the agreement, and was not entitled to recover anything thereunder:—Held, however, that the plaintiff was entitled to recover quantum meruit for the work he had done, of which the defendant had the benefit, and of which the fair value was $100. The defendant counterclaimed for several sums, all of which were disallowed except one of $53; deducting this from the $100, the balance in the plaintiff's favour was $47, for which judg-

ment was entered with costs on the small debt scale.

Fuerster v. Aebig, 27 W.L.R. 18.

Transfer of mining rights — Sufficiency of performance — Title.

The assignor of mining rights, who covenants to deposit with a third party within a stipulated time, the evidence of title to the rights assigned under a penalty of $75,000, acquits himself of his obligation by depositing documents which substantially prove the title though they lack certain formalities such as the consent, required by law, of the minister or an authorized official to the transfer made by the original locators, and the failure of the latters' attorney, who signed the transfers for them, to file his power of attorney.

Marshall v. Leckie, 22 Que. K.B. 364, affirming 41 Que. S.C. 206.

(§ IV C—345)—Right of recovery on part performance.

In an action for an overdue instalment of the purchase money under an agreement for the sale of land, the defendant cannot set up as a defence that he paid the instalment by virtue of a new contract with the plaintiffs for the sale to them of an interest in other land at a price equivalent to the amount of the new instalment sued for; where the evidence shewed that the new contract was only in the nature of a security and was upon a condition which was not performed and there was a total failure of consideration for it.

McCutcheon Brick Co. v. Gardiner, 4 D.L.R. 487, 21 W.L.R. 72.

Part performance — Ouster — Quantum meruit.

Where a contract for railway grading empowered the employing party, if in the opinion of a certain specified person there was not sufficient force at work to complete the grading within the time called for by the contract, to put on an additional force to be charged to the contractor or to take over the work by giving due notice of such intention, and the employing party after notifying the contractor that an additional force would be put on without notice that the work was to be taken over, not only put an additional force but also took charge of the work and of the contractor's workmen, it amounts to an ouster of the contractor from the work and he is entitled to recover on a quantum meruit for the work performed by him with damages, if any, sustained by reason of not being permitted to complete the same.

Nevins v. Swanson, 1 D.L.R. 833, 20 W.L.R. 175, 1 W.W.R. 711.

Incomplete performance — Quantum meruit.

The mere fact of a building contractor abandoning his contract does not preclude him from recovering on a quantum meruit for the work already done if there is evidence of a fresh contract to pay for same, and such fresh contract may arise from a notice by the property owner to the contractor that he will engage other tradesmen to complete the work and charge the cost to the contractor's account. [Sumpter v. Hedges, [1898] 1 Q.B. 673, followed.]

Elford v. Thompson, 1 D.L.R. 1, 5 S.L.R. 96, 19 W.L.R. 809, 1 W.W.R. 409.

Right of recovery on part performance.

In an action by way of quantum meruit for the partial performance of a contract to do certain work on the defendant's premises, where it appears that the plaintiff contracted to do the work for a specific sum to be paid on completion of the whole, the plaintiff is not entitled to recover anything until the whole work is completed, unless it is shewn that the performance of his contract was presented by the default of the defendant. [See Appleby v. Myers, L.R. 2 C.P. 651, and King v. Low, 3 O.L.R. 234.]

Moir v. O'Brien, 9 D.L.R. 578, 6 S.L.R. 11, 22 W.L.R. 953, 3 W.W.R. 745.

Part performance — Entire contract — Recovery.

In the absence of acts amounting to acquiescence or acceptance, a contractor cannot recover on a contract to be executed in a specified manner and not to be paid for until completion, if the work as done is different from that stipulated in the contract. [Sumpter v. Hedges [1898] 1 Q.B. 673, referred to. See also Elford v. Thompson, 1 D.L.R. 1.]

Harris v. Westholme, 12 D.L.R. 640, 3 W.W.R. 783.

Right of recovery on part performance —Substantial compliance.

The liability of a builder, for failure in certain respects to complete the construction of a building for the owner pursuant to agreement, is properly met by a fair allowance for the expenditures made and to be made by the owner, in remedying the defects, it appearing that there was a substantial compliance resulting in a practically first class job by the builder.

Alberta Engineering Co. v. Blow, 17 D.L.R. 497, 28 W.L.R. 391.

Work and labour — Part performance —Premature action—Remedying defects in work.

Where a contract for work and labour provides that after giving notice to the contractor to remedy any defective work, the owner may, on his default, have the defective work remedied and the cost charged to the original contract for lack of its completion, nor can he sue in the alternative, on the owner's election to have the contract finished by another, until the cost of remedying the defective work can be ascertained.

Beresford v. Halloran Construction Co., 17 D.L.R. 729, 28 W.L.R. 208.

Building contract — Work improper — Intervention of inspector — Substituted work.

Galbreath v. Crich, 28 D.L.R. 369, 37 O.L.R. 424.

Maintenance of mother — Part performance—Statute of Frauds.

Maintenance of his mother by an illegitimate son, presumably under an oral agreement, by which she promised to devise and bequeath to him her whole estate, in return for such maintenance, is not such an act of part performance of the agreement as to take the case out of the Statute of Frauds, as it might be referable to the relationship between them. The son is, however, entitled to remuneration for the maintenance.

Noecker v. Noecker, 41 D.L.R. 138, 41 O.L.R. 296.

Part performance — Discharge of "agreement" — Laws Declaratory Act.

Section 2 (33) of the Laws Declaratory Act, R.S.B.C. 1911, c. 133, which provides that part performance of an obligation extinguishes the obligation "when expressly accepted by the creditor in satisfaction or tendered in pursuance of an agreement for that purpose," does not change the law that a promise, not under seal, requires a consideration to support it, and the word "agreement" therein means a binding agreement. It seems, moreover, that in the case of a debt the part performance referred to is something other than the payment of money.

Bell v. Quagliotti, 25 B.C.R. 466, [1918] 2 W.W.R. 915.

Architect—Work and services in erection of building — Contract — Remuneration — Work taken out of architect's hands during progress of work — Recovery on quantum meruit basis — Negligence and incompetence — Counterclaim — Dismissal — Money paid into court — R. 316 — Payment out on account of amount of judgment.

Gominlock v. Maclean, 14 O.W.N. 142. [Varied in 15 O.W.N. 70.]

Recovery of wages—Completion of term.

Where a farm labourer has hired for the season at a certain sum per month, but the wages are not to be paid until the end of the season, the contract is an entire one, and the employee is bound to complete the term before he can recover any wages. [Owen v. James, 4 Terr. L.R. 174, followed; Mousseau v. Tone, 6 W.L.R. 117, distinguished.]

La Plante v. Kinnon, 21 D.L.R. 293, 8 S.L.R. 25, 8 W.W.R. 332, 30 W.L.R. 949.

Excavation work — Difficulty in completing — Work to be executed "according to plans" — Abandonment — Money expended in completion — Damages — Ascertainment of — Reference — Election — Costs.

Pemberthy v. Corner, 15 O.W.N. 383.

Right to recover on part performance.

McKinnell v. Rembrandt School District Trustees, 25 W.L.R. 372.

Work and labour—Work not completed according to contract — Acceptance —Waiver — Costs — Deduction of sum for work not completed.

Keith v. Brown, 15 O.W.N. 255.

Breach of contract to thresh whole crop — Right of payment for part threshed.

The fact that defendant threshers broke their contract in not threshing the whole of plaintiff's crop as agreed held not to deprive them of their right to be paid for what they threshed, no stipulation having been made that they were not to be paid until all the threshing was done.

Hill v. Howie, [1919] 2 W.W.R. 392.

Recovery for part performance.

A building contractor cannot claim the price agreed upon until he has completely executed his contract. The court cannot condemn the owner to pay him the price of part of the work done, and of that which remains to be done or repaired, in case the contractor should finish it in a satisfactory manner within a certain delay without even reserving to the owner the right to do it himself at the expense of the contractor.

Painchaud v. Trahan, 26 Que. K.B. 188.

The contractor for construction work has no right of action against the owner so long as he has not entirely finished his contract in conformity with the conditions agreed upon. This is especially the case when the cost of the work remaining to be done exceeds the sum claimed.

Bertrand v. Pépin, 51 Que. S.C. 496.

Substantial performance — Quantum meruit.

Where an entire contract for work and labour has not been substantially performed or where the contractor, although the contract has been substantially carried out, refuses to complete it, he is not entitled to recover quantum meruit. [Dakin & Co. v. Lee (1915), 84 L.J.K.B. 2031; Hollingsworth v. Lacharite, 19 Man. L.R. 379; Adams v. McGreevy, 17 Man. L.R. 115, distinguished.]

Yakowchuk v. Crawford (Man.), [1917] 3 W.W.R. 479.

(§ IV C—347)—Architect's deduction.

A provision in a building contract from an architect's certificate as to the completion of the work, that if the work is incomplete but may be readily completed by the contractors, to state in what particulars, being for the benefit of the contractor, so that he may then complete the work if in his power, does not call for the architect to set out, in his certificate, the particulars of the deduction made if the incomplete part of the work cannot then be readily finished and the certificate is a final one directing the deduction of the value thereof in pursuance of an alternative power reserved to the architect to de-

duct such value, together with a fixed percentage thereof, if the work cannot readily be completed for reasons beyond the contractor's control.

Brown v. Bannatyne School District, 2 D.L.R. 264, 22 Man. L.R. 260, 21 W.L.R. 80, 2 W.W.R. 176.

(§ IV C—350) — Subletting of export liquor warehouse — Conditions — Permit to carry on business — Permission of license commissioners — Permission not obtained — Failure of consideration.

Finkelman v. Lyons Wine & Spirit Co., 48 D.L.R. 716.

Sale of second-hand trucks — To be "properly overhauled" — Misrepresentation — Performance — Onus of proof—Liability.

On the sale of two 3½ ton second-hand Sheffield motor trucks the vendor agreed to "properly overhaul trucks and turn them out in A1 shape mechanically." The purchasers knew that they were getting old trucks that had been discarded by a mercantile company, and there was no misrepresentation or fraud. Held, that the contract was not to turn them out as good as new, but in first-class shape mechanically for second-hand trucks, and to succeed in a counterclaim for breach of the contract it must be shewn that the overhauling given them by the plaintiffs was not such as to put them in first-class condition mechanically for second-hand trucks, it was not sufficient to shew that they did not run satisfactorily. The onus of proving that the supplying of other engines in the trucks, and of goods and services charged for, was in the endeavour to implement their contract to "properly overhaul the trucks and put them in A1 shape mechanically," was on the defendant, and there was no evidence to establish this contention.

Hall Motors v. F. Rogers & Co., 46 D.L.R. 639, 44 O.L.R. 327.

"Satisfactory completion" — Substantial performance.

The substantial performance of work under a contract is a "satisfactory completion" thereof, though minor details have not been supplied, and the contractor is entitled to the contract price less the cost of supplying the minor omissions.

Canadian Western Foundry & Supply Co. v. Hoover, 37 D.L.R. 285, 13 A.L.R. 347, [1917] 3 W.W.R. 594.

Alternative methods of performing work.

A stipulation in a building contract, that the footings should be sunk to hard bearings, and in case where sloping rock beds are encountered the same must be levelled, affords an alternative method of performing the contract, which may be done by levelling where rock is struck, to answer the purpose of footings.

McLeod v. Sault Ste. Marie Public School Board, 29 D.L.R. 661, 36 O.L.R. 415.

Completion of work — Supplying defects — Reference — Report of referee — Appeals — Costs.

Elliott v. Simpson, 8 O.W.N. 208.

Restoration of building — Services of architect — Remuneration — Evidence.

Meredith v. MacFarlane, 9 O.W.N. 160.

Conditions—Hindrance.

A stipulation to pay "as soon as the contract which we have for the property shall be in good and proper shape," contains on the part of the debtor, not a conditional obligation, but an obligation with a term. In the case of conditional obligations the condition is presumed to have been performed when the debtor, who is bound under the condition, has prevented its performance.

Serré v. Bourgon, 50 Que. S.C. 187.

Completion of building—Sufficiency.

A contractor whose duty it is to place the brick on woodwork constructed by another, cannot justify the poor execution of his work by pleading that the woodwork was badly done. It is the duty of the contractor in such case to serve a protest on the owner and refuse to carry out his contract unless the owner assumes the risk of it.

Chevalier v. Tompkins, 48 Que. S.C. 53.

Building contract — Insufficient performance.

When a contractor sues for the balance of the price of the work done by him, it is presumed that they are entirely completed according to the contract. If they have been improperly done, he is responsible for damages to the proprietor without any other putting in default.

Gagnon v. Maheux, 24 Que. K.B. 129.

(§ IV C—351) — Educational course — Nonperformance by defendant — Plaintiff ready and willing — Action to enforce.

A party to a contract cannot by his own act or default defeat the obligations which he has undertaken to fulfil. [Sailing Ship "Blairmore" Co. v. Macredie, [1898] A.C. 593, applied.]

Alexander Hamilton Institute v. McNally, 49 D.L.R. 606.

Sufficiency of tender or offer to perform.

A tender on the part of the vendors during the lifetime of a contract for future delivery of grain by sending a number of cars loaded for the purpose of fulfilling the contracts or some one of them, but subsequently diverting such shipments to some other destination at the request of the vendee, is not a pro tanto fulfilment of the contract, in the absence of a shewing that the parties intended to treat the tender of these cars as such part fulfilment.

Alberta Elevator v. Vancouver Co., 7 D.L.R. 392, 2 W.W.R. 526.

DELIVERY BY INSTALMENTS — ORDER OR REQUEST.

A written contract should receive that construction which its language will admit and which will best effectuate the intention of the parties, to be collected from the whole of the agreement, and greater regard should be had to the clear intent of the parties than to any particular words which they have used in the expression of that intent. The court held that, under a contract for "1,560 bags H. Queen 82.45—delivery as required—30 bags week is to be taken out by Nov. 1st," neither party was entitled to make or have delivery otherwise than in weekly instalments, not exceeding 30 bags a week, that the time fixed for delivery and request for delivery were of the essence of the contract, that on the lapse of time fixed for each delivery there was a mutual termination of rights in reference to that delivery. The plaintiff was not entitled to ask for or receive delivery in any other manner. [Doner v. Western Canada Flour Mills Co., 41 D.L.R. 476, followed.]

Sierichs v. Hughes, 43 D.L.R. 297, 42 O.L.R. 608.

DELIVERY BY INSTALMENTS — TIME — ESSENCE OF.

In a contract for the sale of flour for 1,000 bags of one kind of flour and 1,000 bags of another kind to be "Delivered as required up to Nov. 1, 35 bags week" the court held that this must be read to mean that the flour was to be delivered as required, in instalments of about 35 bags per week, and that it was incumbent upon the purchaser to specify his requirements and accept delivery in instalments of about 35 bags a week, that if he failed to prove such specifications and requests, time and manner being of the essence of the contract, he was not entitled to ask or demand delivery at any other time or in any other manner. [Doner v. Western Canada Flour Mills Co., 41 D.L.R. 476, 41 O.L.R. 503, followed.]

Gerow v. Hughes, 43 D.L.R. 307, 42 O. L.R. 621, reversing 13 O.W.N. 8.

FAILURE TO MEET PAYMENTS WHEN DUE — SET-OFF — DELIVERY BY INSTALMENTS — REMEDIES OF PARTIES.

The contract being for different quantities, at different prices, of three different kinds of flour, there must be an order or request from the buyers for what they required, before the obligation to ship arose. The contract, being for delivery by instalments and for payment for each instalment separately, is to be treated as a separate contract for each instalment; the purchasers are entitled to damages for nondelivery of an instalment for which an order had been duly given, but are not entitled to call for delivery, in a subsequent month, of any instalment in respect of which no order to ship was given in due time.

Doner v. Western Canada Flour Mills Co., 41 D.L.R. 476, 41 O.L.R. 503, reversing 12 O.W.N. 301.

(§ IV C—355)—WAIVER OF OBJECTIONS—MISTAKE IN CONSTRUCTION OF FOUNDATIONS—DUTY AS TO LAYING OUT GROUND—AUTHORITY OF CLERK OF WORKS — POWERS OF ARCHITECT.

Vandewater v. Marsh, 10 D.L.R. 810, 4 O.W.N. 882, 24 O.W.R. 133. [Affirmed, 14 D.L.R. 737, 5 O.W.N. 213.

WORK ON SHIP — LIGHTING APPARATUS — ACCEPTANCE AND RETENTION.

Where a contract for the installing of a lighting apparatus in a vessel has been performed, and the work has been accepted and a promissory note given for the contract price, the defendant in an action for the contract price cannot, certainly where he retains the apparatus, set up defective installation or that the work was not performed according to contract. The plaintiff's right in the res is not affected by a judicial sale of the vessel subsequent to his seizure.

Electric Repair & Contracting Co. v. S.S. "Prefontaine," 16 Can. Ex. 328.

(§ IV C—356)—ACCEPTANCE OF BUILDING.

The mere taking possession of a building agreed to be built is not, of itself, acceptance of the work. Where a contract is to erect a building to certain specifications for a lump sum, the price is not recoverable until the building is completed in accordance with the specifications, unless the owner has accepted the work with a knowledge of the defects or variations, or has done something from which a new contract to pay for the work done can be inferred. [Broley v. Mills, 1 S.L.R. 20, followed; Elford v. Thompson, 1 D.L.R. 1, specially referred to.]

Donaldson v. Collins, 3 D.L.R. 359, 5 S. L.R. 293, 21 W.L.R. 56, 2 W.W.R. 47.

CONSTRUCTION OF WORKS — DEFECTS — SEVERAL CONTRACTORS.

A person who accepts a delegation of payment for certain construction work, which he declares in the same document to have been done to his entire satisfaction, cannot afterwards refuse to pay by pleading compensation for defects in the work and the poor quality of the materials furnished, his acceptation of the delegation being equivalent to a promise to pay and to a complete abandonment of every recourse by reason of these works. In the construction of a building when the work is given out by contract and executed by several contractors separately it can also be accepted separately and each contractor is liable only for his own work.

Lalonde v. Austria-Hungarian Sick Benefit Society, 47 Que. S.C. 364.

(§ IV C—357) — Building contract — Defects — Waiver.

The failure of a contractor to join the ends of some of the reinforcing rods in a cement structure as required by contract, will be deemed waived by the owner's failure to require it to be done when the omission occurred, of which he was then aware, as the defect was one that could not be afterwards rectified.

Rice v. Sockett, 12 D.L.R. 506, 4 O.W.N. 1570, 24 O.W.R. 882.

Building encroaching on other property — Waiver of defect.

Where the building contractor, by his own mistake, encroached upon adjoining property with the building, an agreement between the contractor and the owner of the building that the former would procure and furnish to the owner a title to the strip of land encroached upon will, if carried out, operate as a waiver of an objection on that score.

Lecky v. Carman, 22 D.L.R. 225, 7 S.L.R. 360, 30 W.L.R. 409.

Delay in performance — Error—Waiver.

A contractor is not responsible for the delay in the completion of a work occasioned by the joint error of the parties, particularly where such delay is condoned by their subsequent conduct.

Fraser Brace & Co. v. Can. Light & Power Co., 26 D.L.R. 655, 49 Que. S.C. 145.

Acceptance of work — Occupation — Right to payment.

A contractor for the construction of a house has no right of action for the balance of the price of sale or to demand the execution of the contract by the owner, if the payment was to be made by a mortgage upon the lot built upon unless he has executed the work in a manner sufficiently complete, regular and honest. The habitation by the owner and his lessees of a house built by a contractor is not an acceptance of the latter's work, if such occupation was brought about by force of circumstances to avoid greater damages to the contractor, the owner and his lessees having no other lodgings which they could occupy.

Lalonde v. Fickles, 47 Que. S.C. 257.

Possession of building after examination—Waiver of defects.

When an owner constructs for his lessee a warehouse according to certain plans and specifications, the latter, after having examined the building, takes possession and sublets it without protest, cannot complain that the work was not done in conformity with the conditions agreed upon and claim to be authorized to do the work on default of the owner.

Manion v. Bertrand, 47 Que. S.C. 270.

D. Condition; certificate of performance.

See Mechanics' Liens, VI.—45

(§ IV D—360)—Certificate of performance.

Where a builder's contract calls for payment as the work progresses, the owner of the building is not entitled to retain in his hand a large amount of the contract price on the ground that the work has not been properly done, when it is established that the work of a value of $8,000 is all finished saving a few trifling imperfections (e.g., $15.40), and in such case the owner will be condemned to pay the balance of the contract price less the value of such imperfections. A builder or contractor who agrees to build according to plans and specifications for a fixed price cannot recover for alterations and extras unless such alterations and extras and the price to be paid therefor are stipulated in writing, and parol evidence of such additional contract alleged to have been made verbally is inadmissible.

Dulac v. Lauzon, 8 D.L.R. 400.

Building contract—Time for final payment—Stated time after completion—Necessity of procuring architect's final certificate.

A stipulation in a building contract to the effect that final payment should be made within twenty days after the substantial completion of the structure, does not mean twenty days after the architect's final certificate was given, and an action begun three days after the giving of such certificate was not premature, where the building was substantially completed more than twenty days before. Where a building contract provided that if the contractor did not give satisfactory proof that there were no liens against the building, final payment should be made two days after the expiration of the time within which liens might be filed, it is no defence to an action by the contractor for the balance of the contract price due him brought after the expiration of the time within which liens might be filed, that he did not give satisfactory evidence that no liens existed other than of his own or liens of which he held discharges.

Brown v. Bannatyne School District (No. 2), 5 D.L.R. 623, 21 W.L.R. 827, 2 W.W.R. 742, varying 2 D.L.R. 264, 22 Man. L.R. 260.

Building and construction contracts—Stipulation to refer differences to engineer—Disqualification.

Where an engineer is appointed by the contract to be the arbitrator or referee between the partners on questions as to the execution of the work, he must retain a neutral position between the parties, and if he places himself in such a position that his independence is destroyed and he is no longer a free agent, the stipulations so to

refer and for his certificate as a referee become inoperative.

MacDougall v. Penticton, 16 D.L.R. 436, 20 B.C.R. 401, 6 W.W.R. 478, 27 W.L.R. 713.

BUILDING CONTRACT — CHANGE IN SPECIFICATIONS — BUILDING OF DIFFERENT CHARACTER — QUANTUM MERUIT.

Where a clause in the specifications in a building contract permits the proprietor to modify in detail the plans and specifications, the contractor is not bound to accept changes which would make the building one of a different character, as by the substitution of plans for a one-storey building where a three-storey building was the subject of the contract and the first storey was completely changed; and if the builder, without protest, proceeds under the new plans and the proprietor accepts his work, the builder is not restricted to a pro rata share of the original contract price, but may recover on a quantum meruit; semble, had he declined to proceed under the new plans, he might have recovered damages for loss of profits on the cancellation of his contract.

Jalbert v. Cardinal, 20 D.L.R. 841, 45 Que. S.C. 468.

MUNICIPAL IMPROVEMENTS — CERTIFICATE OF PERFORMANCE.

Where the question of proper work and of due diligence in proceeding with the work to be done for a municipal corporation in making road improvements is left to the decision of the construction engineer under the contract, and upon the contractor's default and due notification of the engineer's decision in respect thereof, the municipality takes the work out of the contractor's hands under a condition of the contract empowering it so to do, the contractor may still be liable to the municipality for the loss incurred by the latter through the failure of the contractor to fulfil his contract, if the option given by the contract for terminating the contractor's work expressly reserves any right of action to which the contractor may be subject from any neglect in not proceeding with the work in accordance with the specifications.

Robinson v. Burnaby, 22 D.L.R. 788, 31 W.L.R. 419.

SUBSTITUTION OF MATERIAL — ACCEPTANCE — CERTIFICATE.

Where a contract calls for an article of a specified type, and the purchaser knowingly receives and uses another, he is liable for the contract price, despite the nonapproval of the furnished article by the purchaser's architect.

O'Leary v. Keufell & Esser Co. of New York, 36 D.L.R. 709, 52 Que. S.C. 263.

INSTALLATION OF TELEPHONE SYSTEM — PERFORMANCE—PLANS AND SPECIFICATIONS — CERTIFICATE OF ENGINEER — EXTRA WORK.

Reid v. Pipestone, 23 D.L.R. 884, 32 W. L.R. 161.

CONSTRUCTION OF FAIR GROUNDS — CERTIFICATE OF PERFORMANCE — WORKMANSHIP — PUTTING IN FLOOR PREVIOUS TO ROOF — EXTRA WORK — DEMURRAGE — PENALTY OR LIQUIDATED DAMAGES.

Lund v. Vancouver Exhibition Assn., 25 D.L.R. 863, 22 B.C.R. 258, 9 W.W.R. 556, 32 W.L.R. 845.

EXTRA WORK—CERTIFICATE OF ENGINEER.

There can be no recovery for extra work performed in connection with a contract entered into with the Crown, in the absence of an authorization and certificate of the chief engineer required by the stipulations of the contract. The court, under s. 48 of the Exchequer Court Act, is bound to adjudicate upon the claim in accordance with the stipulations.

Beaulieu v. The King, 17 Can. Ex. 298.

ALTERATIONS IN AND ADDITIONS TO PLANS AND SPECIFICATIONS PROVIDED FOR IN THE CONTRACT — BUILDING CONTRACT — QUANTUM MERUIT.

During the progress of the work, defendant's engineer changed the specifications and required the plaintiffs to supply and use steel reinforcements for the concrete. The plaintiffs, in complying with this order, had to purchase and put in place 1,517,345 pounds of steel over and above the quantity originally estimated. Owing to an advance in the price of steel, this excess quantity cost the plaintiffs 5 cents per pound and they claimed in this action $22,894.34, being the amount paid for it in excess of the price allowed under the terms of the contract, contending that the extra work had been done and extra materials supplied, not under the original contract, but under a new agreement to be inferred from the circumstances by which they were to be paid on a quantum meruit for such extra work and materials. Held, that the changes in the work made by the defendant were fully covered and provided for in the contract and that the plaintiffs could not recover. [Bristol v. Aird, [1913] A.C. 241; Thorne v. London, 1 App. Cas. 120, followed; Bush v. Whitehaven, 2 Hudson on Building Contracts, 122, distinguished.]

Tremblay v. Greater Winnipeg Water District Board, 29 Man. L.R. 359, [1919] 1 W.W.R. 1083.

BUILDING CONTRACTS — ARCHITECT'S CERTIFICATE.

Edwards v. Public School Board (East Oxford), 5 O.W.N. 537, 25 O.W.R. 437.

SUPPLY OF PILES FOR GOVERNMENT WORKS BY SUBCONTRACTORS TO PRINCIPAL CONTRACTORS — ACCEPTANCE—SUBSEQUENT REJECTION BY GOVERNMENT ENGINEER—PROPERTY PASSING — DETERIORATION — ACCOUNT—REFERENCE—COSTS.

Herron Bros. v. Canadian Stewart Co., 12 O.W.N. 212.

RAILWAY CONSTRUCTION.

Although ordinarily a contractor can claim his payment only after the comple-

tion of his works, there may be facts and circumstances where that rule cannot be applied, as in the case of the construction of a railway, where the company takes possession of the line when a very small portion of it remained to be done, and the contractor offers to the company to leave in its hands a sufficient sum to finish the line. A condition, that the contractor shall be paid only on a final estimate prepared by the engineer of the company, becomes obsolete when the company neglects to replace the engineer who has resigned, without the necessity on the part of the contractor to put the company in default mise en demeure.

Great Northern Construction Co. v. Ross, 25 Que. K.B. 385, 404.

(§ IV D—361)—Extra work and variations—New plans—Rejection.

A condition in a building contract entitling the owner to vary, by way of extra work or omission, from the plans of specifications, justifies the contractor from proceeding with variations of extra work radically different from the original plans, and upon the termination of the contract for such refusal, he will be entitled to recover damages for the breach, or upon a quantum meruit for work performed and materials furnished. [R. v. Peto, 1 Y. & J. 37, 52, followed.]

Ramsay v. Board of School Trustees, 24 D.L.R. 133, 21 B.C.R. 589, 8 W.W.R. 1228, 32 W.L.R. 77.

Building contract — Alterations — Extra work.

Where the circumstances of a building contract are so changed as to make the special conditions of the contract inapplicable (e.g. by nonadherence to the original plans and substitution of others without the knowledge or sanction of the contractor at the time of entering upon performance, but subsequently acquiesced in by him in the honest belief that he would be paid for additional work), the contractor may treat the contract as at an end and recover upon a quantum meruit. [Bush v. Whitehaven Trustees, 2 Hudson on Building Contracts 122, applied.] If additional work done by a building contractor is the kind of additional work contemplated by the contract, the contractor must be paid the contract price, but if the additional or varied work is so peculiar, so unexpected, and so different from what any person reckoned or calculated upon, it may not be within the contract at all, and in that case he can either refuse to go on or claim to be paid on a quantum meruit. [Thorn v. London Corp., 1 App. Cas. 120, applied.] It would be a fraud on the part of a building owner to desire by his engineer alterations, additions and omissions to be made, and then to stand by and see the expenditure going on upon them, and then refuse payment on the ground that the expenditure was incurred without proper orders having been given for the purpose. [Hill v. S. Staffordshire Ry., 12 L.T. 63.] A party who has done work for another under a supposed contract void for fundamental error (e.g., where building contractor and building owner appear to contract, but with reference to different sets of plans) can sue only for the value of his work. Where a building contractor has as part of the consideration for obtaining the contract put himself in the hands of the owner's engineer, he is bound by the findings of the engineer. [Bristol v. Aird, [1913] A.C. 241, referred to.]

Boyd v. South Winnipeg, [1917] 2 W.W.R. 489, affirming 33 W.L.R. 786, 9 W.W.R. 1470.

(§ IV D—362)—Building contract—Conclusiveness of final certificate — Right of contractor in respect to deposit.

As an architect's final certificate is conclusive as to the completion of a structure by a contractor, upon the giving of such certificate, the contractor is entitled to have returned to him a deposit made to secure the execution of the contract, or which was given in lieu of a bond as security for the performance of the contract.

Brown v. Bannatyne School District, 5 D.L.R. 623, 21 W.L.R. 827, 2 W.W.R. 742, varying 2 D.L.R. 264, 22 Man. L.R. 260.

Necessity of certificate.

Where payment under a building contract is conditioned on the completion of the work to the satisfaction of the engineer, and upon the strict compliance with all the provisions of the contract, the contractor cannot recover the contract price without asserting and proving strict compliance with all conditions precedent. [Brydon v. Lutes, 9 Man. L.R., at pp. 471, 472, followed.]

Merriam v. Public Parks Board, 2 D.L.R. 702, 22 Man. L.R. 107, 20 W.L.R. 603, 1 W.W.R. 1082.

Condition precedent to recovery — Inspector's certificate — Good faith —Finality.

A certificate of an inspector that the ploughing and improving of land by the plaintiff had been done to the satisfaction of the former, as was required by the terms of the contract, is a condition precedent to the right of the plaintiff to recover for doing such work, and, where such inspector acts honestly and in good faith, his decision that the work was not performed in accordance with the contract is final and cannot be questions in the courts. [McRae v. Marshall, 19 Can. S.C.R. 10, applied.]

Schultz v. Faber & Co., 4 D.L.R. 707, 4 A.L.R. 422, 21 W.L.R. 163, 2 W.W.R. 79.

Necessity of certificate.

Where in a building contract an architect's certificate of completion of the undertaking is required and the architect is not

a mere agent of the owner but is required to exercise his own judgment, his approval is a condition precedent to the contractor's right to recover the contract price even if the architect is unreasonable in withholding his certificate. Where contractors fail to obtain the architect's final certificate, this being a condition precedent to the contractor's right to recover, the owner may after taking the proper course as to giving notice, as required by the contract, complete the building to the satisfaction of the architect and recover the outlay from the contractor. Where material alterations were contemplated by a building contract and the contract provided for extensions of time to be certified by the architect, the contractor will not be allowed such extensions unless the architect so certifies.

Cockshutt Plow Co. v. Alberta Bldg. Co., 3 A.L.R. 503.

CONDITION — CERTIFICATE OF PERFORMANCE —NECESSITY OF ARCHITECT'S CERTIFICATE—BUILDING CONTRACT.

Under a building contract which provides that the price shall be paid the contractor in instalments as certified by the architects from time to time according to the progress of the work, failure to pay the amount of the first certificate does not dispense with the necessity of obtaining further certificates before bringing action for the additional work or for the entire price; the refusal to pay the amount of the first certificate is not a repudiation by the owner of the architect's authority to certify.

Champion v. World Bldg., 18 D.L.R. 555, 20 B.C.R. 156, 29 W.L.R. 299, 6 W.W.R. 1469.

EXTRAS — CONDITION PRECEDENT — ARCHITECT'S CERTIFICATE.

Italian Mosaic & Marble Co. v. Vokes, 5 O.W.N. 15, 24 O.W.R. 970.

(§ IV D—363)—CONCLUSIVENESS AND SUFFICIENCY OF CERTIFICATE.

Where the architect under the agreement has not the power to settle or waive claims of the owner against the contractor, a progress certificate issued by the architect, does not, even if it authorizes payment of a sum which the owner could have set off damages against, waive any claim for damages. A penalty of $17 a day fixed by contract was allowed for each day's delay as liquidated damages, the total contract being for $10,921.

Cockshutt Plow Co. v. Alberta Bldg. Co., 3 A.L.R. 503.

BUILDING CONTRACT — PAYMENT — CERTIFICATE OF ENGINEER — AUTHORITY TO GRANT FINAL CERTIFICATE.

Where provision is contained in a contract for the construction of certain works that payment is to be made on the completion of the work to the satisfaction of the engineer, the authority of the engineer is to be confined to what is specially conferred on him by the contract including the specifications, and while he may, pursuant to the provisions of the specifications, issue progress estimates from time to time, he has no authority to release the contractor from the performance of any essential part of the work, nor has he power to give a certificate, final in its nature, until the work is completed to his satisfaction. [Davidson v. Francis, 14 Man. L.R. 141; Canty v Clark, 44 U.C.R. 222, followed.] In a proviso in a building contract that, if the contractor shall observe and keep its terms and conditions, the owner will make monthly payments to him of a fixed percentage of the estimate certified by the engineer or architect in a progress certificate, the payments so provided for are subject to adjustment or readjustment at the end of the contract, and, if the contractor abandons the work so that he is disentitled to claim for the work done, his right to claim on the progress certificate falls with the principal claim and he cannot recover thereon. [Tharsis v. McIlroy, 3 App. Cas. 1040, applied.]

Merriam v. Public Parks Board, 2 D.L.R. 702, 22 Man. L.R. 107, 20 W.L.R. 603, 1 W.W.R. 1082.

BUILDING CONTRACT — CERTIFICATE AS TO EXTRAS.

Where a stipulation in a building contract leaves it to the architect to settle what extras should be allowed and the value thereof by his final certificate, such certificate is binding upon the parties as an award, until set aside for cause.

Alsip v. Monkman, 9 D.L.R. 97, 22 Man. L.R. 779, 22 W.L.R. 667, 3 W.W.R. 459.

BUILDING CONTRACT — CERTIFICATE OF PERFORMANCE — CONCLUSIVENESS OF ARCHITECT'S CERTIFICATE — RIGHT TO ARBITRATION UNDER STIPULATION

A stipulation in a building contract that on a "final certificate being given by the architect either of the completion of the works and the amount due in respect of the last payment to be made by the owner or stating in what respects the works are incomplete, the architect's decision should be final, subject to arbitration," confers a right to an arbitration in the manner provided for in another clause of the contract not only where the certificate is of the unfinished details but where under an admittedly complete contract the owner desires to review the correctness of the certificate as to "last payment due" and "the amount thereof."

Gunn v. Hudsons Bay Co., 18 D.L.R. 420, 24 Man. L.R. 388, affirming 16 D.L.R. 540, 28 W.L.R. 575, 6 W.W.R. 1224.

CERTIFICATE OF PERFORMANCE—CONCLUSIVENESS—BAD WORKMANSHIP.

Where it is a term of the building contract that payment on any certificate granted by the architect is not to exonerate the contractor from liability for bad material or bad workmanship, such defects are likewise available in defence of an action brought by the contractor to enforce pay-

ment of the amount certified by the architect. Where the builder and the architect knew when a progress certificate was being given by the latter that there was nothing due from the owner and that more than the entire value of the work up to that time had already been paid, the architect's certificate is not binding between the builder and the owner. [Smallwood v. Powell, 1 O.W.N. 1025, followed; Hickman v. Roberts, [1913] A.C. 229, referred to.]

Price v. Forbes, 23 D.L.R. 532, 33 O.L.R. 136.

CONCLUSIVENESS AND SUFFICIENCY OF CERTIFICATE.

An architect's decision as to the value of work performed or of materials furnished for a building erected under a contract declaring that his decision should be final, is not open to attack if he acts fairly and honestly and no collusion between him and the contractor is shewn.

Hamilton v. Vineberg, 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238, affirming on appeal, 2 D.L.R. 921, 3 O.W.N. 605, 21 O.W.R. 139.

RAILWAY CONSTRUCTION — ESTIMATE OF ENGINEER EMPLOYED BY ANOTHER COMPANY—CONCLUSIVENESS.

The C.N.P.R. Co. contracted with the Northern Construction Co. and Patrick Welsh for the construction of their roadbed between Inkitsaph Creek and Lytton. The Construction Company then subcontracted to Griffin & Welch, who again subcontracted to the plaintiffs. The final contract with the plaintiffs provided that the final estimate of the engineers of the Northern Construction Co. as to the quantity and classification of the plaintiffs' work should be binding on the parties. The engineers who made the final estimate were in fact in the employ of the C.N.P.R. Co., and had no connection in any way with the Northern Construction Co. As the work progressed, the plaintiffs were paid from time to time on the estimates of these engineers. In an action for the recovery of the balance due under the contract, it was held by the Trial Judge that the plaintiffs, by their own action, were estopped from setting up that the engineers were not the engineers of the Northern Construction Co., and were bound by their final certificate as to the quantity and classification of the work:—Held, on appeal (reversing the decision of Hunter, C.J.B.C.), that the plaintiffs are only bound by the estimate of the engineers of the Northern Construction Co., and the engineers who gave the final certificate as to the work not being in the employ of that company, the plaintiffs were entitled to a new trial.

Spadafora v. Griffin & Welch, 20 B.C.R. 475.

BUILDING CONTRACT—EXTRAS—RULINGS OF ARCHITECT—CROSS-CLAIM—BAD WORK.

Bull v. Stewart, 10 O.W.N. 235, 11 O.W.N. 43.

(§ IV D—364)—APPLICATION TO ARCHITECT FOR CERTIFICATE—NOTICE.

It is no defence to an action for the balance due for the erection of a building that no notice was given the owners of the contractor's application to the architect for a final certificate where the contract was silent in that regard and required the architect upon notice from the contractor that the latter considers the work complete, to issue a final certificate and to make deductions from the price for unfinished work. [Brown v. Bannatyne, 2 D.L.R. 264, 5 D.L.R. 623, followed.]

Alsip v. Monkman, 9 D.L.R. 97, 22 Man. L.R. 779, 22 W.L.R. 667, 3 W.W.R. 459.

CONDITION — CERTIFICATE OF PERFORMANCE —FORMAL CERTIFICATE, WAIVER OF.

Where a town, under a construction contract, treats an inspector's informal certificate as if it were in fact a final one, although not in the exact form contemplated by the contract, the necessity of a formal certificate is waived, and a recovery may be had on such informal certificate.

Pigott & Son v. Town of Battleford, 12 D.L.R. 171, 6 S.L.R. 235, 24 W.L.R. 365.

ENGINEER'S CERTIFICATE—FINALITY OF.

A document signed by an engineer on the construction of works certifying to the correctness of a statement shewing the balance due a contractor up to a fixed date, and that the same had not been previously certified to, but withholding a sum "pending repairs," is not a final certificate, nor can it be construed as a progress estimate.

Merriam v. Public Parks Board, 2 D.L.R. 702, 22 Man. L.R. 107, 20 W.L.R. 603, 1 W.W.R. 1082.

APPLICATION FOR CERTIFICATE.

It is no defence to an action for the balance due for the erection of a building that no notice was given the owners of the contractor's application to the architect for a final certificate where the contract was silent in that regard and required the architect upon notice from the contractor that the latter considers the work complete, to issue a final certificate and to make deductions from the price for unfinished work. Where a contract for the erection of a building authorized the architect to give a final certificate that the work was completed, or if incomplete to state in writing in what particulars, and in the next sentence it was stipulated that, if any part of the work remained incomplete for reasons not within the contractor's control, the architect should deduct the value of the incomplete portions from the contract price and that he should be the judge of the propriety of such deduction and its amount, a certificate stating that a specified sum should be deducted for work not complete is not objectionable because it fails to shew that the work for which the deduction was made could not then have been readily completed. [Richards v. May, 10 Q.B.D. 400, specially referred to.] Under a con-

tract for the construction of a building which stipulated that the work was to be performed "to the satisfaction of" the architect and authorizing him to give a final certificate that the work was completed as a prerequisite to the final payment therefor, a final certificate stating that the contractor was entitled to final payment on his contract is sufficient though it fails to certify in terms that the work was "completed" in accordance with the contract. [Accord, 3 Halsbury's Laws of England, p. 214, s. 429, 1 Hudson on Building Contracts, 3rd ed., 383.] A contract for the erection of a building authorizing the architects, if there was any part of the work remaining uncompleted for reasons not within the contractor's control, to deduct the value of the incomplete portions from the contract price and to issue a final certificate that the works were completed, gives the architect no power to accept the contractor's guarantee that he will complete the uncompleted portions of the work in lieu of the deduction required by the contract and a certificate by the architect to that effect is not a final one.

Brown v. Bannatyne School District, 2 D.L.R. 264, 22 Man. L.R. 260, 21 W.L.R. 80, 2 W.W.R. 176. [Varied, 5 D.L.R. 623, 21 W.L.R. 827.]

(§ IV D—365)—Building contract—Incomplete performance — Condition precedent.

The completion of a building contract is a condition precedent to the builder's right to recover unless the contract provides otherwise or unless there has been a waiver of such condition by the other party, or an interference preventing the completion of the contract. [See Elford v. Thompson, 1 D.L.R. 1.]

Dixon v. Ross, 1 D.L.R. 17, 46 N.S.R. 96.

Failure to complete a building in accordance with the specifications in a building contract precludes recovery of the contract price and the enforcement of a mechanic's lien thereon.

Simpson v. Rubeck, 3 O.W.N. 577, 21 O.W.R. 260.

E. Breach and its effect.

(§ IV E—365)—Defective heating system—Right to fixtures.

Failure to perform an entire contract to install a heating system capable of properly heating the premises, precludes recovery of the lump sum price agreed upon; the owner of the premises has a right to counterclaim for the breach of contract, but he is not entitled to retain the fixtures installed.

Brazeau v. Wilson, 30 D.L.R. 378, 36 O.L.R. 396.

Breach—Disintegration of work caused by temperature condition of building—Duty of owner to provide sufficient heat.

Farmers Advocate v. Master Builders, 31 D.L.R. 558. [Reversed on finding of fact 38 D.L.R. 409.]

To deliver goods—Measure of damages.

In an action for damages for breach of contract to deliver goods the measure of damage is the difference between the contract price and the price of similar goods the measure of damage is the difference between the contract price and the price of similar goods in the open market at the time of the breach.

Lamontagne v. C. Parsons & Son, 42 D.L.R. 365, 54 Que. S.C. 297.

Sale of machinery—Delivery—Damages.

Held, that a printed condition forming part of the contract, and providing "that retention of the property forwarded after thirty days from the date of shipment shall constitute a trial and acceptance, and be a conclusive admission of the truth of all the representations made by or for the consignor and void all contracts of warranty, express or implied," did not relieve the plaintiff company from its obligation provided in the written part of the contract to ship and deliver at a specified time, and that the defendant company's right to counterclaim for a breach was not waived by accepting and retaining the machinery. The defendant company having sold the output of its mill for the season, of which fact the plaintiff company had knowledge before entering into the contract, bought and delivered to the purchaser of such output at his request, at an advance of fifty cents per thousand feet on the price to be paid by such purchase, 1,000,000 feet of lumber to supply an alleged shortage in output of mill caused by machinery not having been delivered according to agreement between the defendant company and plaintiff company. Held, on appeal (reversing the judgment of Barry, J., in this particular) that the defendant company was not entitled to recover on its counterclaim this advance of 50 cents per thousand on this 1,000,000 feet so purchased as damages resulting from a breach of the plaintiff company's contract, where it did not appear that the defendant company was bound to deliver any specific quantity of lumber other than the actual cut of its own mill.

Berlin Machine Works v. Randolph, 45 N.B.R. 201.

Building contract — Breach — Stipulations.

In a contract for the supplying and erecting of steel work for buildings and machinery a clause providing that the contractors "shall not be responsible or liable for any direct or indirect damage, loss, stoppage or delay which the purchaser may sustain, whether the said plant or machinery is specified for any particular purpose or not," held not to apply to such breaches of contract as the long-delayed frame contracted for. Another clause provided that "we (the contractors) would expect to make shipments of this material about the 1st April to complete erection of the steel work in about two months after the arrival of the same at site," held not to amount to a con-

tract to ship and complete the work at the dates mentioned, but only to bind the contractors to ship the material and complete the work within, in each case, a reasonable time in that behalf.

Canada Foundry Co. v. Edmonton Portland Cement Co. (P.C.), 43 D.L.R. 583, [1918] 3 W.W.R. 866, affirming 32 D.L.R. 114, 25 D.L.R. 683.

CONTRACT TO SUPPLY LUMBER—BREACH—IMPLIED TERMS—DAMAGES—PRESUMPTIONS.

If a person enters into a contract which can take effect only by the continuance of an existing state of circumstances there is an implied engagement on his part that he shall do nothing of his own motion, e.g., the selling of his assets, which will put an end to that state of circumstances. [Stirling v. Maitland, 5 B. & S. 840, at 852, followed.] In respect to damages for breach of contract, the injured party is entitled to the benefit of every reasonable presumption as to the benefit which he might have obtained had the agreement been performed. [Wilson v. Northampton & Banbury Junction R. Co., L.R. 9 Ch. 279, followed.]

Morse v. Mac & Mac Cedar Co., 25 B.C.R. 417, 2 W.W.R. 205

BREACH AND ITS EFFECT.

Where a contract between the owner of land and a real estate agent provided that the land in question be sold at a profit to be divided equally between them, and the owner declines to entertain an offer, made either by the real estate agent or any other person, the real estate agent is not obliged to treat such refusal as a breach of the contract, but may elect, either to consider the contract as still in existence and await the performance of the same or to treat it as a breach and in the absence of such election the contract still stands. Johnstone v. Milling, 16 Q.B.D. 460, and McGowan v. McKay, 13 Man. L. R. 509, specially referred to.]

Donough v. Moore, 2 D.L.R. 525, 22 Man. L.R. 79, 20 W.L.R. 334, 1 W.W.R. 845.

FAILURE TO DELIVER GOODS CONTRACTED FOR — SPECIFICATIONS — WAIVER— ACQUIESCENCE — TIME — DAMAGES — MEASURE OF.

Dominion Radiator Co. v. Steel Co. of Canada, 13 O.L.R. 356.

BROKERS — STOCK EXCHANGE — SALE OF SHARES—FUTURE DELIVERY—RELEASE —ASSESSMENT OF DAMAGES.

McMahon v. Kiely Smith & Amos, 43 O.L.R. 294.

ASSIGNMENT OF MINERAL OPTION.

Held, reversing the decision of Hunter, C.J.B.C. (Galliher and McPhillips, JJ.A., dissenting), that it was a positive agreement on the part of the assignee of an option for the purchase of mineral claims to give the assignor a two-sevenths' interest in the claims to be acquired under the option and he is liable in damages for the loss the assignor has suffered owing to the agreement not having been carried out.

McLaren v. McPhee, 21 B.C.R. 366.

PENALTY — BREACH — DAMAGES — MORTGAGE CLAIM — SET-OFF — INTEREST — COSTS.

McLeod v. Rorey, 5 O.W.N. 784.

AGREEMENTS FOR SUPPLY OF ROOFING MATERIAL AND CONSTRUCTION AND PLACING OF ROOF — DEFECTIVE MATERIAL — DEFECTIVE WORKMANSHIP — BREACH OF CONTRACT — GUARANTY — DAMAGES — COSTS.

Canadian Malleable Iron Co. v. Asbestos Mfg. Co., etc., 7 O.W.N. 787.

BREACH AND ITS EFFECT.

Dick & Sons v. Standard Underground Cable Co., 5 O.W.N. 82, 889, 25 O.W.R. 53.

AGREEMENT TO BUILD VESSEL—DISPUTE AS TO TERMS—FINDING OF JURY—PROMISED SPEED NOT ATTAINED—BREACH OF CONTRACT—RETURN OF MONEY PAID—DAMAGES.

Donovan v. Chatham Bridge Co., 8 O.W.N. 235.

BREACH — REPUDIATION — RECOVERY OF MONEYS PAID WITHOUT CONSIDERATION —GENERAL DAMAGES—EVIDENCE—LIS PENDENS.

Clarkson v. Fidelity Mines Co. & Ontario Fidelity Mines Co., 6 O.W.N. 604.

BREACH—ACTION FOR DAMAGES—COUNTERCLAIM—DISMISSAL OF BOTH—COSTS.

King Construction Co. v. Canadian Flax Mills, 7 O.W.N. 606.

RECTIFICATION—BREACH—DAMAGES.

Milo Candy Co. v. Browns, 7 O.W.N. 466.

PERFORMANCE BY PARTY SEEKING REMEDY.

In bilateral contracts if one of the parties to the contract wishes to take advantage of nonperformance by the other he should first shew that he himself is in a position to execute the contract; in the same way the party who complains of fault on the part of the other should first shew that he himself is not in fault.

Cyr v. Lecours, 47 Que. S.C. 86.

CANCELLING — RULING OF ACCOUNTS — PENALTY CLAUSE—C.C. ARTS. 991, 1134.

It is not necessary to demand of tribunals the cancellation of a contract when the parties have annulled it themselves and have rejected the accounts. Thus in a contract with a penalty clause not taking effect till after one year, if the parties in their ruling of accounts before this delay have established a settlement in favour of one of them, he may claim his rights without taking into account this penalty clause.

Greenleese v. Villeneuve & Barnard, 25 Rev. Leg. 148.

(§ IV E—366)—INSUFFICIENT DRILLING APPARATUS—ONUS.

In an action for damages for breach of contract, alleging failure to provide good and sufficient drilling apparatus of a kind specified in the contract, the burden of proof

is upon the plaintiff to shew that the system used, which was different from that specified, was insufficient for the purpose required.

Fidelity Oil & Gas Co. v. Janse Drilling Co., 27 D.L.R. 651, 9 A.L.R. 439, 34 W.L.R. 370, 10 W.W.R. 533.

BREACH—TENDER OF SHARES.

Warren, Gzowski & Co. v. Forst & Co., 10 D.L.R. 849, 4 O.W.N. 1284, affirming 9 D.L.R. 879.

WHAT CONSTITUTES A BREACH—TRANSFER OF MONEY AND SECURITY TO RELATIVE—PROMISE OF RELATIVE TO LEAVE BY WILL TO INFANT CHILDREN OF TRANSFEROR—DEATH OF RELATIVE INTESTATE—ACTION BY CHILDREN AGAINST EXECUTOR.

McArthur v. McLean, 5 O.W.N. 447.

SALE AND DELIVERY OF LUMBER—CONSTRUCTION OF AGREEMENT—UNCONDITIONAL AGREEMENT TO DELIVER SPECIFIED QUANTITY—DAMAGES FOR BREACH—SECOND CONTRACT—AGREEMENT IN DUPLICATE—INSERTION IN VENDEES' COPY "AT LEAST"—EVIDENCE—BURDEN OF PROOF.

Reid v. C.G. Anderson Lumber Co., 16 O.W.N. 383.

AGREEMENT TO TAN SKINS—LOSS BY DESTRUCTION AND SEIZURE.

The defendant agreed with the plaintiff to tan 1,000 skins (sheerlings). Eleven bundles were tanned and returned. The other skins were not returned; and, after being kept for a long time some were burned by the defendant as having deteriorated, and the balance were taken out of the possession of the defendant by one of his creditors. Subsequently the plaintiff brought an action claiming that the skins returned were not the skins delivered to the defendant, and for nonperformance of the agreement to tan. The Trial Judge held on the facts, that the skins returned were those received by the defendants, but gave judgment for the plaintiff for the price of the skins not returned with County Court costs without a set-off.

Pinx v. Grouch, 31 W.L.R. 961.

(§ IV E—367)—SALE OF UNISSUED SHARES IN COMPANY — IMPOSSIBILITY OF PERFORMANCE—REMEDIES—ELECTION

Where a contract is for certain specified stock of a company and a sufficient number of unissued shares to give the purchaser a controlling interest in the company, both parties believing at the time of entering into the contract that such unissued shares existed when in fact they did not exist. The purchaser has the right at his election to the enforcement or rescission of the part of the contract which can be carried out, and that the amount paid for the unissued shares be returned to him, and to damages in respect of these shares. [Mortlock v. Buller, 10 Ves. 292, 32 E.R. 857, applied.]

Smith v. Schon, 46 D.L.R. 233.

BREACH OF AGREEMENT TO REPURCHASE.

An agreement of a vendor to repurchase land he had agreed to sell the plaintiff, although unenforceable because within the Statute of Frauds, will constitute a good defence to an action by the vendee for damages for the vendor's refusal to convey.

Frith v. Alliance Investment Co., 10 D.L.R. 765, 6 A.L.R. 197, 23 W.L.R. 830, 4 W.W.R. 88, affirming 5 D.L.R. 491.

EFFECT OF BREACH.

One who erected a water tank and a steel supporting structure therefor on the roof of a building, under a contract calling for first-class material and workmanship, is liable to the owner of the building for damages caused by the fall of the tank as a result of defects of which the defendant should have been aware, in the construction of the supporting structure.

Wilson v. The H. G. Hogel Co.; The H. G. Hogel Co. v. Gardiner; Gardiner v. The Locomotive & Machine Co., 4 D.L.R. 196.

BREACH OF COVENANT TO SUPPLY NATURAL GAS — DAMAGES—CONTINUING BREACH.

Where a contract was entered into between a natural gas company and certain holders of stock in another company in the same business absorbed by the contracting company whereby it was agreed on the part of the company as a further consideration for the purchase of such stock, that the holders should be entitled to receive from the company gas free for use in their private dwellings in the district where the company was carrying on its operations and the company continued to supply the other party to the contract with natural gas free of charge for more than six years when it discontinued doing so and took up the pipe line by which the gas was delivered and sold the wells producing it to third persons from whom the other parties to the contract were obliged to secure their supply of gas upon the company refusing to furnish it and to pay therefor and the company claimed that its action was caused by the fact that the wells in the district had run down to a point that made it commercially unfeasible to continue to pipe from them, though after the pipe line was taken up, it was still drawing gas from wells in the same field which it still owned and was piping it by another line to the same place where the old line ended, the company is liable to the other parties to the contract for the breach of the agreement for failing to provide the gas free, without prejudice to their rights in any future action, if the company continue to refuse to supply them with free gas, the covenant to supply the same being still an existing and binding one under the circumstances shewn.

Sundy v. Dominion Natural Gas Co., 4 D.L.R. 663, 3 O.W.N. 1575, 22 O.W.R. 743.

BREACH—EFFECT OF—DAMAGES IN ADDITION.

Where an owner is relieved from mak-

ing further payments under a building contract by reason of defective workmanship and failure to supply materials specified, he may also recover additional damages on proof thereof, after taking into account the balance unpaid on the contract.

Donaldson v. Collins, 3 D.L.R. 359, 5 S.L.R. 293, 21 W.L.R. 56, 2 W.W.R. 47.

Breach of contract to purchase timber — Purchaser's improvements — Forfeiture.

Not only property sold under a contract for the sale of timber rights but also the purchaser's lumbering plant found on the land at the time of the seller's re-entry for the purchaser's default, belongs to the former under a stipulation of such contract that upon such default "all plant and timber cut" as well as "all improvements shall remain the property of the" seller "without recourse or claim of any nature whatsoever in damages for compensation against" him.

Klock v. The Molsons Bank (No. 1), 3 D.L.R. 521, 44 Que. S. C. 193.

The fact that property was genuinely listed for sale with a real estate exchange, which, for a monthly payment, sold a list thereof to real estate brokers, who make sales therefrom, and that the exchange acted bona fide throughout the transaction, will not relieve it from responsibility for a breach of warranty to a subscriber who made a sale of property of which, it afterwards appeared, there was no such listing as the exchange held out to its subscribers, and which could, therefore, not be carried out. [Collen v. Wright, 8 E. & B. 647; Firbank v. Humphreys, 18 Q.B.D. 54, 62; Starkey v. Bank of England, [1903] A.C. 114, and Younge v. Toynbee, 79 L.J.K.B. 208, followed.]

Austin v. Real Estate Exchange, 2 D.L.R. 324, 17 B.C.R. 177, 20 W.L.R. 921, 2 W.W.R. 88.

When there is a voluntary forbearance to enforce a contract for sale of goods by one party at the request of the other, and the party so asking such forbearance finally makes default, the party damaged by such default is entitled to damages as of the date when the final default took place. 2. That to entitle the plaintiff to such damages it is not necessary to shew a completed agreement for such extension; it is sufficient to shew forbearance at the request of the defendant, or that the plaintiff extended the time for the benefit of the defendant, and so notified the defendant, if the defendant does not dissent from such extension or then indicate his intention not to deliver at all.

Glens v. Schaffer, 4 S.L.R. 508.

Maintenance of grantor—Default.

In consideration of the conveyance of an immovable the transferee covenanted to "board, lodge and maintain" the transferor securing the covenant by an hypothec on said immovable. He failed in his obligation and diminished the security by alienating the immovable:—Held, that the transferor had a right of action for such nonperformance and was entitled to join his demand there in a saisie-arrêt conservatoire to conserve the price of sale of the immovable in the hands of the purchaser.

Perrault v. Durocher, 43 Que. S.C. 451.

(§ IV E—368)—Waiver of breach.

Where the buyer of a motor car by sample incidentally learns after its delivery of a certain disparity in the car as to the number and sizes of its cells, and where pending further tests he maintains silence with respect to such discovery, he is not necessarily estopped thereby from setting up such disparity to establish the seller's noncompliance with the contract, especially where the seller's agent lulled him into security by giving a false reason for the difference. [Adam v. Richards, 2 H. Bl. 573; Heilbutt v. Hickson, L.R. 7 C.P. 438, referred to.]

Trethewey v. Moyes, 8 D.L.R. 280, 4 O. W.N. 445, 23 O.W.R. 563.

(§ IV E—369)—Breach and its effect—Recovering back money paid.

Money paid a person for the purpose of locating and applying for certain coal lands for the joint benefit of the parties may be recovered back by the payer on the failure of the former to perform his part of the agreement.

Butterfield v. Cormack, 13 D.L.R. 817, 7 A.L.R. 26, 25 W.L.R. 457, affirming 11 D. L.R. 797.

Recovery back of money paid, condition precedent to payment.

Upon the failure to sink a well to the depth specified in a contract, money advanced the contractor by the other party to the agreement may be recovered back where the contract expressly provided that boring the well to the depth specified should be a condition precedent to the contractor's right to retain any money advanced to him.

Wallace Bell Co. v. Moose Jaw (No. 1), 3 D.L.R. 273, 21 W.L.R. 36, 2 W.W.R. 221. [Affirmed, 4 D.L.R. 438, 5 S.L.R. 155, 21 W.L.R. 871, 2 W.W.R. 752.]

F. Time.

See Ante, II C.

(§ IV F—370)—Sale of timber—Time limit for removal—Question of title to lands—Action—Consent of owner—Delay—Extension of time.

Where it is clearly shewn that one party has been led to believe by the conduct and actions of the other that the latter will not insist on his strict legal rights under the contract, such party will be entitled to equitable relief. [Hughes v. Metropolitan R. Co., 2 App. Cas. 439, followed; Beatty v. Mathewson, 40 Can. S.C.R. 557, distinguished.]

Thompson v. Johnson, 50 D.L.R. 361.

Option to purchase—Manner of acceptance.

A contract of option for the purchase of land which does not specify a time or manner for the acceptance of the option, but which fixes a date, about two months later, when the first payment of the purchase price was to be made, may be accepted within a reasonable time, and an acceptance before the time for such first payment is not an unreasonable delay. [Paterson v. Houghton, 19 Man. L.R. 168, referred to.]

Carey v. Roots (No. 2), 11 D.L.R. 208, 5 A.L.R. 125, 23 W.L.R. 890, 4 W.W.R. 354, affirming 5 D.L.R. 670.

Written agreement—Sale of goods—Separate letter—Effect as to varying contract.

Leonard v. Kremer (No. 2), 11 D.L.R. 491, 48 Can. S.C.R. 518, 4 W.W.R. 332, affirming 7 D.L.R. 245.

Yearly telephone contract—Instalment payable quarterly—Default.

The regular form of contract in use by the Bell Telephone Company is a contract for one year, with instalments payable quarterly, and on default of payment of any instalment the company may remove the instrument and collect the amount owing for the balance of the year, and a customer will not be relieved from the contract on the ground that he did not read the conditions and did not receive a copy of the contract.

Bell Telephone Co. v. Duchesne, 21 D.L.R. 822.

Threshing — Reasonable time — Capacity of machine for daily output of work — Compensation.

Gillespie v. McKeen (Sask.), 38 D.L.R. 750.

Printing—Delay—Damages.

When a printer undertakes to print a catalogue and envelopes to be delivered within a fixed time, and by the fault of the other party in delaying to furnish him with copy and correcting the proofs, he can only deliver his work two months after the expiration of the time fixed, he is not liable for damages which may result therefrom, and may, in making tender of the work done, claim the price of his contract.

American Fashion Co. v. Lavesque, 24 Rev. Leg. 419.

Time for performance not fixed—Tender—Default.

When, in a contract, each party assumed reciprocal obligations, and no time was fixed in the deed for its performance, one party cannot claim that his obligation is extinguished because the other party did not make him a tender with promptness. In order to be freed, he must himself make tender to the other of the presentation of which he is debtor, and put the other in fault by accepting and carrying out his part of the contract within the time fixed.

Lebrun v. Gruninger, 27 Que. K.B. 210.

Time.

Where a written order for the purchase of goods fixes a date for delivery, and the buyer having duly signed the order in transmitting same to the seller writes and mails concurrently a separate letter to accelerate the delivery, such letter has not the legal effect of varying the contract but the date of delivery is determined from the written order without reference to the letter.

Leonard & Son v. Kremer, 7 D.L.R. 244, 4 A.L.R. 156, 20 W.L.R. 147, 1 W.W.R. 642.

Sale of goods—Breach of contract—Evidence—Finding of fact of trial judge—Money in court—Payment out—Costs.

Voskoboinik v. Dyke, 17 O.W.N. 125.

Building contract — Delay of subcontractors — Waiver — Reasonable time for delivery of material and completion of work.

Norcross Bros. Co. v. Henry Hope & Sons, 11 O.W.N. 156.

(§ IV F—371)—Time of the essence—Default—Proviso for forfeiture of instalments paid.

Where a contract of sale of lands upon deferred payments stipulates that time shall be of the essence of the agreement and that in default of punctual payment of any instalment of purchase-money or of any part thereof the agreement should be void and all payments absolutely forfeited to the vendor and that the vendor should be at liberty immediately to resell, the court should relieve against the strict letter of the contract when the arrears are paid into court in the vendor's action brought shortly after the default for the enforcement of the forfeiture, particularly where the strict wording of the agreement would otherwise involve the right to confiscate sums of money increasing from time to time as the agreement approached completion in case of default occurring upon subsequent instalments.

Kilmer v. B.C. Orchard Lands Co., 10 D.L.R. 172, [1913] A.C. 319, 23 W.L.R. 566, 3 W.W.R. 1119, reversing 2 D.L.R. 396, 17 B.C.R. 230.

Failure as to time—Time of essence—Waiver.

Where the time limited for completion of a sale contract has passed, but the vendor thereafter by his conduct recognized the contract as subsisting and continued the negotiations for completing the same, he cannot set up the stipulation of the contract that time shall be of the essence thereof, but must give notice to the other party and allow a reasonable time thereafter for completion before he is enabled to declare the contract off for the other's default. [Webb v. Hughes, L.R. 10 Eq. 281, applied; Foster v. Anderson, 16 O.L.

R. 565; and Upperton v. Nickolson, L.R. 6 Ch. 436, referred to.]

Norman v. McMurray, 10 D.L.R. 757, 4 O.W.N. 1256, 24 O.W.R. 532.

SALE OF INTEREST IN MINING COMPANY—INDEFINITE AND INCOMPLETE AGREEMENT—TIME DEEMED OF ESSENCE—ABANDONMENT — RESCISSION — CAUTION.

Thomson v. McPherson, 6 D.L.R. 867, 4 O.W.N. 216, 23 O.W.R. 226, affirming 3 D.L.R. 269, 3 O.W.N. 791.

TIME OF THE ESSENCE—NOTICE FIXING TIME TO COMPLETE.

Where a contract calls for performance within a given period, and time is not made of the essence, or where although originally made of the essence, the time fixed for completion has ceased to be applicable by reason of waiver or otherwise, the employer must by notice fix a reasonable time for completion and allow the contractor an opportunity to complete within the so extended period before he can dismiss the contractor. [Halsbury's Laws of England, vol. 3, p. 191, approved; Taylor v. Brown, 9 L.J. Ch. 14; Lowther v. Heaver, 41 Ch. D. 268, specially referred to.]

Municipal Construction Co. v. City of Regina, 2 D.L.R. 690, 5 S.L.R. 78, 20 W.L.R. 405, 1 W.W.R. 958.

SALE OF LAND—TERMINATION OF CONTRACT FOR DEFAULT.

O'Hearn v. Richardson, 6 D.L.R. 913, 3 O.W.N. 945, 21 O.W.R. 553. [See 3 D.L.R. 886, 3 O.W.N. 1430.]

(§ IV F—372)—BUILDING CONTRACT—WORKING DAYS — DELAY—DAMAGES—COSTS.

Where dredges or machinery are hired from the Crown by the day, only working days can be charged for. The Crown, by failing to deliver a tug, as required by the terms of the lease, cannot recover the rent therefor, but is not liable for damages to the lessee, more or less remote, by reason of delays in work occasioned thereby. 2. An offer or statement of settlement based on error is not binding and cannot operate as a judicial admission under the Quebec Civil Code. 3. The Crown cannot be held for delays occasioned by it in the performance of a building contract, where by the terms of the contract it was relieved from liability in any such event. The court, under § 48 of the Exchequer Court Act, is bound to decide in accordance with the stipulations of the contract. 4. Where a party does not succeed on all the issues of an action, the court has a discretion to deprive him of the costs. 5. The right of action having arisen in the Province of Quebec, interest upon the amount due under the contract was allowed from the date of the deposit of the petition of right with the Secretary of State.

Trudel v. The King, 42 D.L.R. 671, 18 Can. Ex. 103.

BREACH—AGREEMENT TO ADVANCE MONEY TO OPERATE MINE—SHARES TO BE GIVEN IN CONSIDERATION THEREFOR—BELIEF OF WITNESSES—PREPONDERANCE OF EVIDENCE.

Beath v. Townsend, 20 O.W.R. 837.

BREACH — CARRIAGE OF FREIGHT — CUTTING ROADS — DELAY BY THIRD PARTIES CLAIMING FOR USE OF ROAD.

Canadian Contracting & Development Co. v. Jamieson, 3 O.W.N. 449, 20 O.W.R. 762.

SALE OF MINING PROPERTY—PURCHASE PRICE PAYABLE BY INSTALMENTS—MOTION BY VENDORS FOR RESCISSION OF CONTRACT UNLESS INSTALMENTS IN ARREARS BE PAID WITHIN TIME FIXED BY COURT.

Leckie v. Marshall, 3 O.W.N. 86, 20 O.W.R. 117.

AGREEMENT TO REPAIR BOAT—LOSS OF BOAT THROUGH THE ACT OF GOD—AGREEMENT BINDING THOUGH NOT DUE.

Polson Iron Works v. Laurie, 19 O.W.R. 352, 2 O.W.N. 1187.

TO LEASE HOTEL—IMPOSSIBILITY OF PERFORMANCE THROUGH NEGLECT OF DEFENDANT—DAMAGE.

Brown v. Brown, 19 O.W.R. 447.

BREACH—EVIDENCE OF TERMS OF CONTRACT—ACTION FOR DAMAGES.

Williamson v. Bawden Machine & Tool Co., 2 O.W.N. 725, 18 O.W.R. 215.

BREACH—EVIDENCE OF PLAINTIFF CREDITED—REFERENCE.

Black v. Townsend, 2 O.W.N. 1273, 19 O.W.R. 496.

DEFECTIVE WORK—DAMAGES.

One who contracts to execute certain works is liable for damages resulting from its execution in an imperfect, useless and improper manner, in other words from defects in the work, without the necessity of putting him en demence to do it over again.

Vermette v. Parent, 20 Que. K.B. 156.

BUILDING CONTRACT — DEFECTS — PENAL CLAUSE—DELAY.

Guertin v. Papineau, 40 Que. S.C. 97.

CONTRACT TO SUPPLY SLOP-FOOD FOR CATTLE — BREACH — ACCOUNT — AVERAGES —REFERENCE.

Dean v. Corby Distillery Co., 3 O.W.N. 242, 20 O.W.R. 367.

BREACH—FAILURE TO PROPERLY PERFORM—DAMAGES.

O'Brien v. Crowe, 9 E.L.R. 107 (N.S.).

PROMISE TO CONVEY LAND OF CERTAIN VALUE—OFFER OF LAND OF LESS VALUE —MISREPRESENTATION — LEAVE TO AMEND.

Cockwell v. Standard Publishing Co., 19 W.L.R. 57 (Sask.).

MAKING ROADS—DELAY IN FURNISHING MATERIAL TO CONTRACTOR—DEDUCTION.

Ross v. Regina Agricultural Assn., 19 W.L.R. 53 (Sask.).

OPTION — ACCEPTANCE — FORMALITIES — COMPLETION OF CONTRACT.

Lister v. Bannerman, 19 W.L.R. 182 (Man.).

BREACH — REPUDIATION — QUANTUM MERUIT.

Tuhotte v. Jervis Inlet Lumber Co., 18 W.L.R. 336 (B.C.).

V. Change or extinguishment.

A. IN GENERAL.

(§ V A—375)—DIMINUTION OF SECURITY.

A creditor cannot declare his debtor deprived of the benefit of the term fixed for the performance of his obligation on account of diminution of security, unless such diminution affects the sureties who were specially furnished to him by the contract.

Jacques v. Bellehumeur, 50 Que. S.C. 319.

(§ V A—376)—SPECIFIED WORKS—TIME SPECIFIED FOR COMPLETION—FINAL CERTIFICATES GRANTED BY ENGINEER—PAYMENT BY CORPORATION — POSSESSION—EXTENSION OF TIME.

A contract with a corporation for the execution of certain specified works, provided that the works should be completed by a certain day and contained a clause that: "If the contractor shall fail to complete the work by the time specified, a sum of $25 per day for each and every day thereafter as liquidated damages . . . shall be deducted from the money payable under this contract and the engineer's certificate as to the amount of this deduction shall be final." Held, that the granting of certificates by the engineer without deduction, including one marked "final," such certificates being paid by the municipality without deduction, coupled with the circumstance of the municipality having taken possession, and with the correspondence, justified the court in drawing the inference that the time for completion was extended until the date when the works were substantially completed by the contractor.

Calgary v. Janse-Mitchell Construction Co., 48 D.L.R. 328, 59 Can. S.C.R. 101, [1919] 3 W.W.R. 150, affirming 45 D.L.R. 124, 14 A.L.R. 214.

(§ V A—377)—MODIFICATION BY PAROL.

Where plaintiff relies on an extension of an existing option to purchase land, or the making of a new option, and a plea of the Statute of Frauds is entered by defendants, it is necessary for the plaintiff to shew that the alleged new agreement was in writing.

Adamson v. Vachon, 8 D.L.R. 240, 5 S.L.R. 400, 22 W.L.R. 494, 3 W.W.R. 227.

HIRE OF WORK—APPLICABILITY OF ART. 1690 C.C.—EXTRAS—TESTIMONIAL PROOF—C.C., 1233, 1690.

Article 1690 C.C. ought only to be applied to anticipated cases, that is to say to a contract pure and simple. It does not concern an agreement to paint a house when the parties have stipulated clauses and conditions which modify the contract. In this case testimonial proof of supplementary work will be admitted.

Renaud v. Bernier & de Jerres, 25 Rev. Leg. 389.

(§ V A—379) — REPUDIATION — STOCK BOUGHT AT RATE ON DOLLAR.

Where, under the terms of a written contract a stock of goods had been bought at "the rate of one hundred and ten cents on the dollar, invoice price," the failure of the seller to produce invoices for all of the goods is not sufficient ground to justify the buyer in repudiating the contract, if the buyers' representative had been engaged in the store for a month preceding the stock-taking, and had been given the private cost mark and had every opportunity to acquaint himself with the price marking system in force, and if the buyers did not insist on the production of the missing invoices at the time of the stocktaking.

Periard v. Bergeron, 9 D.L.R. 537, 47 Can. S.C.R. 289, 23 W.L.R. 425, 3 W.W.R. 633, reversing 2 D.L.R. 293.

RELEASE—ASSENT—TO ENGAGE IN SAME BUSINESS.

A party to an agreement that he shall not carry on a certain business within a particular locality, will not be restrained from doing so where the other party's conduct amounts to a release from the obligation. [Freeth v. Burr, 43 L.J.C.P. 91, considered.]

Harris v. Geiger, 29 D.L.R. 233, 9 S.L.R. 216, 10 W.W.R. 338.

REPUDIATION—"INVOICE PRICE"—MEANING OF.

[Periard v. Bergeron, 2 D.L.R. 293, 9 D.L.R. 537, referred to.]

Healman v. David, 20 D.L.R. 949, 7 W.W.R. 180, 29 W.L.R. 528.

(§ V A—381) — CHANGE OR EXTINGUISHMENT—ABANDONMENT—LAND SALE.

A vendee of property, under an agreement for the sale thereof, will be held to have abandoned the agreement where it appears that he never went into actual possession of the land, which was purchased on speculation, though the first cash payment was made and a caveat filed by him and the agreement registered, but where default was made in the payment by the second instalment of the purchase price, time being expressly of the essence, and where his subsequent conduct for a period of over four years after default clearly indicated that he had relinquished all rights under the agreement, and his letter after suit was of like effect. [Hicks v. Laidlaw, 2 D.L.R. 460, 22 Man. L.R. 96, applied.]

Fox v. Reid, 11 D.L.R. 735, 23 Man. L.R. 152, 23 W.L.R. 963, 4 W.W.R. 200.

ABANDONMENT.

The contract for the sale of an interest in a mining claim of a fluctuating character must be held to have been rescinded

where a caution was filed against the claim after the execution of the agreement and the vendor knowing that it was useless to try to complete the sale while the caution remained undischarged had so conducted himself as to give the vendees reasonable ground to conclude that he had abandoned the contract and they did so conclude. [Morgan v. Bain, L.R. 10 C.P. 15, specially referred to.]

Thomson v. McPherson, 3 D.L.R. 269, 3 O.W.N. 791, 21 O.W.R. 646.

ABANDONMENT—CLEAR RIGHTS, HOW GUARDED.

Abandonment of a clear right, by way of a half-interest in lands, cannot properly be inferred, except upon very convincing evidence; evidence reasonably consistent only with such conclusion. [Prendergast v. Turton, 13 L.J. Ch. 268, referred to.]

Cook v. Cook, 17 D.L.R. 661, 19 B.C.R. 311, 27 W.L.R. 930.

OPTION OF TENANT TO PURCHASE DEMISED PREMISES—WAIVER OF.

An option in a lease permitting a tenant to purchase the demised premises during his term is rendered inoperative before the expiry of the term by the tenant accepting a new lease for a further period to commence immediately after the expiry of the original term where the new lease contains terms and conditions inconsistent with the right to exercise such option. Matteawson v. Burns, 18 D.L.R. 287, 30 O.L.R. 186, reversing 12 D.L.R. 236, 4 O.W.N. 1477. [Reversed, 18 D.L.R. 399, 50 Can. S.C.R. 115.]

ABANDONMENT—PRESUMPTION AS TO—LONG DELAY.

Although abandonment of an acquired right is not easily presumed, a long period of inaction on the part of a claimant in circumstances in which inaction tends to confirm the version of adversary, whilst, if his own version were the true one, he would have had reason to have acted and spoken, affords a strong support to the pretension of the adversay.

Rainboth v. O'Brien, 24 Que. K.B. 88.

B. TERMINATION.

Failure of subject-matter as termination of contract, see Landlord and Tenant, II D-30.

(§ V B—385)—BY STATEMENT OR DECLARATION.

The flat declaration that an agreement is void cannot be construed a declaration of an intention to put an end to it. [Canadian Fairbanks Co. v. Johnson, 18 Man. L.R. 589, referred to.]

Price v. Ruggles (Man.), 28 Man. L.R. 132, [1917] 2 W.W.R. 1035.

(§ V B—387)—BY DEATH OF PARTY.

A contract by the testator to pay a specified sum of money per annum payable quarterly in advance, so long as he was able to do so and whilst the payee was self-dependent, provided the payee would agree to place her daughter (testator's granddaughter) in a certain educational institution until she had finished her education, is not terminated by the death of the testator but continues as against his executors.

Chisholm v. Chisholm, 2 D.L.R. 57, 46 N.S.R. 27.

(§ V B—388)—RIGHT TO TERMINATE BUILDING CONTRACT—DISMISSAL OF CONTRACTOR — JUSTIFICATION — FORCIBLE REMOVAL FROM PREMISES—RIGHTS OF BUILDING OWNER—TERMINATION OF LICENSE.

McInnis v. Public School Board, 9 O.W.N. 281.

BUILDING CONTRACT—CHANGE OF PLANS—QUANTUM MERUIT.

Where the original plans upon which a tender is made and a contract entered into for the performance of certain work are not adhered to, but a new set of plans and profiles is prepared and used without the knowledge or sanction of the contractor, when he first entered upon the performance of his contract, but in which he acquiesces subsequently, in the honest belief that he would be paid for the additional work thereby entailed, the circumstances contemplated by the building contract so changed as to make the special conditions of the contract (for example a provision that the obtaining and filing of an engineer's certificate for the work claimed would be in each case a condition precedent to the right of the contractor to payment), the contractor may treat the contract as at an end and recover upon a quantum meruit. [Bush v. Whitehaven Trustees, 52 J.P. 392, followed.]

Boyd v. South Winnipeg, 33 W.L.R. 786. [Affirmed [1917] 2 W.W.R. 489.]

INSOLVENCY OF BUYER.

The seller of goods, who agrees to release the buyer from the payment of a balance of the price, for the consideration that the latter will order a further specified quantity of the goods before such balance falls due, is relieved from the agreement by the insolvency of the buyer.

White Sewing Machine Co. v. Bélanger, 44 Que. S.C. 402.

C. RESCISSION; CANCELLATION.

See Vendor and Purchaser, I E; Sale, III C.

(§ V C—390) — SALE OF LAND — ORAL AGREEMENT TO RESCIND.

An agreement for the sale of lands may be rescinded by the parties by an agreement not in writing, notwithstanding an action could not be maintained thereon because the agreement is within the Statute of Frauds.

Frith v. Alliance Investment Co. (No. 2), 10 D.L.R. 765, 6 A.L.R. 197, 23 W.L.R. 830, 4 W.W.R. 88, affirming 5 D.L.R. 491, 4 A.L.R. 238.

RESCISSION—MISTAKE—NEGLIGENCE

Rescission of a contract entered into by

reason of mistake as to the subject-matter will be granted where the plaintiff can prove that the parties were never ad idem and that the mistake was not caused by his negligence, but on the contrary was contributed to by the other party's language and conduct. [Slouski v. Hopp, 15 Man. L.R. 548, and Van Praagh v. Everidge, [1902] 2 Ch. 266, discussed.]

Cancilla v. Orr, 16 D.L.R. 115, 24 Man. L.R. 355, 27 W.L.R. 122, 5 W.W.R. 1294.

RESCISSION—REPUDIATION.

Repudiation of a contract by one of the parties thereto does not operate as a rescission unless accepted by the other party; a right to withdraw from a contract, and to recover back payments thereon, may arise from the terms of the contract.

Cromwell v. Morris, 34 D.L.R. 305, 12 A.L.R. 534, [1917] 2 W.W.R. 374.

NONPAYMENT OF INSTALMENTS DUE ON ON LAND CONTRACT — RIGHT TO HAVE CANCELLED—IPSO FACTO VOID.

Where a contract for the sale of lands does not provide for its cancellation by the vendor but that it shall be ipso facto void upon nonpayments of instalments of purchase money, a court will not declare a cancellation thereof for nonpayment.

McIlvenna v. Goss, 3 D.L.R. 690, 21 W. L.R. 180, 2 W.W.R. 285.

REPUDIATION—WAIVER.

There can be no waiver of the right to repudiate an agreement where there has been no knowledge of the facts on which the right to repudiate is based.

The Quebec Bank v. Greenlees, 32 D.L.R. 282, 10 A.L.R. 419, 35 W.L.R. 746, [1917] 1 W.W.R. 746. [Affirmed, 33 D.L.R. 696, 10 A.L.R. 431.]

CANCELLATION IN PART — WHAT CONSTITUTES CANCELLATION.

Where one contract has been made for the construction of three machines the purchaser cannot cancel it as to part and retain it as to part, but must either cancel or retain the entire contract. Where a contract has been made for the construction of three machines a letter containing the words, "I do not wish you to deliver any more as we will have to refuse same until they have been satisfactorily demonstrated as being able to do the work contracted for," is not a cancellation of the contract, but a suspension of delivery until a demonstration is had.

Mechanical Equipment Co. v. Butler, 21 D.L.R. 714, 47 Que. S.C. 478.

ACTION FOR.

The commencement of an action for rescission is a sufficient repudiation of the contract for sale of lands. [Reeve v. Mullen, 14 D.L.R. 345, followed.]

Krom v. Kaiser, 21 D.L.R. 700, 8 A.L.R. 287, 31 W.L.R. 742, 8 W.W.R. 239, reversing 18 D.L.R. 226, 7 A.L.R. 467.

MISREPRESENTATION—MATERIALITY.

The test of a material inducement on a claim to rescind a contract for misrepresentation is not whether the buyer would have acted differently if the misrepresentation had not been made, but whether he might have done so; it is sufficient to prove that in the ordinary course of events the natural and probable effect of the misrepresentation was to influence the mind of a normal representee in the manner alleged.

Young v. Smith, 21 D.L.R. 97, 8 A.L.R. 256, 30 W.L.R. 642, 7 W.W.R. 1355.

FRAUD AND MISREPRESENTATION — RIGHTS OF ASSIGNEES—REPAYMENT.

Rescission of a contract for sale of lands may be granted on the ground of fraud and misrepresentation, although the purchaser seeking the rescission had assigned the contract, if the assignees are parties to the action and therein repudiated the contract; and if it appears that the money paid to the vendor was in fact the money of such assignees with whom the original purchaser had contracted in advance of his own agreement to purchase, the court may in such action in which all parties are before it, direct repayment of such moneys to be made direct to the assignees. [Medcalf v. Oshawa Lands and Investments, 15 D.L.R. 745, referred to.]

Oshawa Lands v. Newsom, 21 D.L.R. 838, 27 O.L.R. 744.

ACTION FOR CANCELLATION — FAILURE OF PROOF—COSTS.

Erindale Power Co. v. Interurban Electric Co. (No. 2), 9 O.W.N. 24.

FRAUD—RETURN OF MONEY PAID.

Acres v. Consolidated Investments, 8 O. W.N. 193; Wyatt v. Consolidated Investments, 8 O.W.N. 194.

EXECUTION—CANCELLATION.

A party to a contract, after having asked for its execution, cannot afterwards demand its cancellation for the same causes.

Lapierre v. Magnan, 46 Que. S.C. 395.

(§ V C—391)—RESCISSION—NOTICE OF INTENTION TO CANCEL — REGULARITY OF NOTICE.

Under a contract of excavation on an irrigation ditch for active work and completion by a specified time, where the contractor breaks the contract by undue delay, thus giving the contracts the right to cancel, such cancellation is subject to the strict condition precedent that the contractee must give to the contractor due notice of intention to cancel unless the default is remedied.

McMillan v. Southern Alberta Land Co., 13 D.L.R. 426, 25 W.L.R. 177.

REGULARITY OF NOTICE.

Notwithstanding time is declared to be of the essence of a contract for the sale of lands, specific performance will be decreed where a failure to promptly make a stipulated payment was due to the inadvertence of the vendee's partner, with whom, upon his departure for England, the

vendee had left funds with which to make payments which came due during his absence, and it appeared that a day or two after such payment was due the vendor called up the vendee's office and without inquiring whether the latter had left instructions regarding the payment, obtained his address in England; and afterwards the vendor mailed a notice of forfeiture to the vendee's office in an unofficial looking envelope, addressed in a lady's handwriting, marked "private," on account of which the vendee's partner returned it to the post office; and the notice of forfeiture forwarded to the vendee's English address was not received by him until after his return to Canada, as these circumstances cast such suspicion upon the vendor's conduct as to require a strict construction of the stipulation in the contract providing that notice of forfeiture should be given by personal service, or by delivery at the vendee's place of business by registered mail.

Mills v. Marriott, 3 D.L.R. 266, 17 B.C.R. 171, 20 W.L.R. 917, 2 W.W.R. 150.

SALE OF LAND — CANCELLATION BY VENDOR UPON DEFAULT.

A notice by a vendor of land while the purchaser was in default in respect of some of the payments stipulated for, that unless immediate payment is made "proceedings of foreclosure will follow" is not a sufficient notice of intended cancellation under a contract providing for a notice of intended cancellation and for forfeiture in thirty days thereafter. A notice is insufficient to cancel a contract for the sale of land which, contrary to the terms of the agreement, demands compound interest, and the payment of the balance due within thirty days from the date of the notice and not from the time of its service as required by the contract, where service was not effected until the thirty-day period had about expired.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C.R. 16, 1 W.W.R. 987.

(§ V C—395)—ACTION BY ASSIGNEE.

The effect of s. 101 of the Land Titles Act (Alta.) is to make the assignment of the purchaser's rights under a written contract for the sale of land effectual at once even without notice to the vendor, subject to the proviso that any rights at law or in equity acquired under the agreement by the vendor before he receives notice shall not be prejudiced by the assignment; an action by a purchaser's assignee against the vendor to declare the contract rescinded and for a return of the money paid thereunder is not subject to the limitations of the Judicature Ordinance, 1907, Alta., c. 5, s. 7, subs. 3, as to a preliminary written notice of assignment of a chose in action. [Armstrong v. Marshall, 19 D.L.R. 183, disapproved; Torkington v. Magee, [1902] 2 K.B. 427; McNiven v. Piggott, 19 D.L.R. 846, referred to.]

Armstrong v. Marshall, 22 D.L.R. 51, 8 A.L.R. 449, 8 W.W.R. 300.

(§ V C—396)—RESCISSION OF—MISREPRESENTATION — LACHES — CONSEQUENCE OF.

The only legal consequences of inaction or laches on the part of the representee in rescinding a contract to purchase land on the ground of fraudulent misrepresentation is to furnish some evidence with other facts, in support of a plea of knowledge, or affirmation, against himself, or to give scope for the intervention of the jus tertii, or of the plea of inability to make specific restitution to the representor; but, where the inaction, for however long a period it extends, is not sufficient to constitute such evidence, or where, notwithstanding the lapse of time, no innocent person has, in fact, acquired rights or interests under the contract sought to be set aside, and the property to be restored to the representator, as the condition of rescission, can be so restored in the same plight as that in which it was received, the delay, laches, or so-called "acquiescence" does not constitute a defence.

Wright v. Weeks, 46 D.L.R. 322, 14 A.L.R. 467, [1919] 2 W.W.R. 270.

RESCISSION — PROMPTNESS — STALLION —MUTUAL MISTAKE — RETAINING POSSESSION AFTER DISCOVERY.

Rescission of a contract for the sale of a stallion on the ground that the wrong animal was delivered, will not be allowed where it appears that the delivery of the wrong stallion on the part of the seller was an honest mistake, and where after the mistake was discovered and the selling price had been paid, instead of rejecting the horse the buyer retained possession of him and hired him out frequently for breeding purposes.

Moachon v. Blair, 9 D.L.R. 396, 23 W.L.R. 59, 3 W.W.R. 831.

PROMPTNESS.

The redhibitory action (or action in cancellation of sale for latent defects) must be brought with reasonable diligence according to the nature of the defect and the usage of the place where the sale is made; and where there is no usage, the old French law prescription of six months from the date of the sale will be applied.

Jacobsen v. Peltier, 3 D.L.R. 132, 42 Que. S.C. 35.

(§ V C—397)—BREACH—RESTORING BENEFITS.

On the breach of a contract, based on a valuable consideration, to support another for life, the person from whom the consideration flows must be restored to as good a position as he occupied before the contract was made.

Spencer v. Spencer, 11 D.L.R. 801, 23 Man. L.R. 461, 24 W.L.R. 420, 4 W.W.R. 785.

CANCELLATION OF CONTRACT — FRAUD AND MISREPRESENTATION — RESTORATION OF BENEFITS.

The leasing of an orchard upon land the lessor had been induced to purchase by false representations, does not amount to such dealing with the property as will take away his right to rescind upon the ground of fraud, where the lease had been cancelled and the vendee was in a position to restore the land to the vendor practically as he received it.

Boulter v. Stocks, 10 D.L.R. 316, 47 Can. S.C.R. 440, affirming 5 D.L.R. 268.

RESTORING BENEFITS.

The repudiation by an incorporated company of a contract with one of its directors, on the ground of misrepresentation, must be made promptly after the discovery of the misrepresentation, and while the company is still in a position to restore matters, not necessarily to their precise original position, but to a position which shall be just with reference to the rights which the director had before the contract. [Adam v. Newbigging, 13 A.C. 308, referred to. See also Kerr on Fraud and Mistake, 4 ed., pp. 365 et seq.]

Denman v. The Clover Bar Coal Co., 7 D.L.R. 96, 6 A.L.R. 305, 22 W.L.R. 128, 2 W.W.R. 986. [Affirmed, 15 D.L.R. 241, 48 Can. S.C.R. 318.]

RETURN OF CASH PAYMENT IF "CONTRACT NOT COMPLETED"—RESCISSION.

Where an offer to sell property was accepted in writing on condition that a cash payment should be returned "if the contract was not completed," it is sufficient to permit the purchaser to rescind where it was shewn that such condition was inserted at his instance for his own benefit, since it would be difficult to perceive how it could benefit the purchaser unless it conferred the right to rescind. An option for the purchase of property providing that a specified sum of money deposited by the person to whom the option was given, should be returned to him "if contract not completed" calls for a return of such sum to the person who furnished the money and for whom the person who secured the option was acting, where no further steps were taken to carry out the contract except the writing of a letter by the vendor authorizing its agent and the agent of the purchaser to insert in the option the name or names of the persons for whom the latter assumed to act.

Munn v. Vigeon (No. 2), 4 D.L.R. 341, 3 O.W.N. 1532, 22 O.W.R. 736, affirming 2 D.L.R. 246, 3 O.W.N. 811.

RESTORING BENEFITS.

The general rule that in order to entitle a purchaser of property to rescind a voidable contract against the vendor, such purchaser must be in a position to offer back intact the subject-matter of the contract does not apply where such subject-matter has become deteriorated solely by the fault of the vendor himself. [Clough v. L. & N.W.R. Co., L.R. 7 Ex. 26, 41 L.J. Ex. 17, applied.]

Sager v. Man. Windmill & Pump Co., 23 D.L.R. 556, 7 W.W.R. 1213, affirming 13 D.L.R. 203, 16 D.L.R. 577, 7 S.L.R. 51.

RESCISSION—RESTORING BENEFITS.

The general rule is that a rescission on account of the seller's innocent misrepresentations will be ordered in respect of a contract of sale only where the transaction can be rescinded in toto and where there can be restitutio in integrum.

O'Connor v. Sturgeon Lake Lumber Co., 17 D.L.R. 316, 6 S.L.R. 60, 27 W.L.R. 813, 6 W.W.R. 701.

RESTITUTIO IN INTEGRUM.

Rescission of a contract cannot be had where there can be no restitutio in integrum.

Moncur v. Ideal Mfg. Co., 31 D.L.R. 465, 37 O.L.R. 361.

HIRE OF WORK—CONSTRUCTION OF RAILWAY —CIVIL ENGINEER—C.C., ART. 1691.

An agreement with a railway contractor by which a civil engineer binds himself, for a commission, on the cost of the construction of a railway, to prepare the plans and specifications and act as a consulting engineer, is a contract of hire of personal services, which the contractors cannot set aside without paying the agreed commission.

Francis v. Dominion Timber & Minerals, 25 Rev. Leg. 436.

(§ V C—400)—GROUNDS OF.

Where an appellant, the widow, had become, on the death of her husband, a life usufructuary of the husband with whom she had been in matrimonial community of property; and where, under a contract of mandate, she appointed the respondent as manager of the estate in question, stipulating to pay him for a period of ten years, to cover his work and expenses as such manager, a commission of five per cent annually on the net value of the entire estate to be by him administered during the ten-year period; and where part of the property consisted of bank stocks and loans which were not disturbed or realized upon; and where the respondent charged his commission annually on the total net value of the succession and of the appellant's share of the assets of the community; the appellant will be allowed the full five per cent without deduction as claimed, and the fact that such commission absorbs the bulk of the estate and that the bank stocks and investments were never disturbed or realized upon will not operate to defeat the terms of the mandate.

Genereaux v. Binet, 18 Rev. de Jur. 471.

SALE — LOAN — FALSE REPRESENTATIONS — MISTAKE — NULLITY — AGENCY —C.C. ARTS. 992, 1727.

When an agent, even in good faith represents to a purchaser that the land which

he is selling him is situated on a certain street in the St. Louis quarter of Mille-End of Montreal, when it is on another street in part of the parish of St. Lawrence annexed to Montreal where the neighboring land is lower in value, and this mistake is repeated in the deed, the purchaser has an action to cancel the contract. The agent employed by a party to effect a loan and who finds a lender on the condition that the borrower will buy a lot from him, represents the vendor in the negotiations for the sale, just as he is the agent of the borrower in affecting the loan, and if he makes false representations to effect the sale, he binds his principal. For the cancellation of a contract matter the cause of the mistake does not matter; it does not matter whether it is the fault of the party who finds himself mistaken or of the other party who instigated the mistake. If a sale is made on the occasion, and conditionally, upon a loan, and then cancelled on the ground of mistake, the borrower is not bound to return the sum borrowed, the two contracts being distinct, and the nullity of the one not entering into the other.

Latour v. Breux, 56 Que. S.C. 302.

The plaintiff in a former action against the appellant made a transfer, while that action was pending, to the respondents, his attorneys of record, of the sum for which judgment would be recovered. The former action having been decided in favour of the plaintiff, the respondents (transferees) thereupon served the transfer upon the appellant, who then took the present action to have the transfer set aside as having been made in violation of art. 1485. The respondents inscribed in law, alleging want of interest in the appellant to take the action and further setting forth that it appeared from the plaintiff's declaration that the transfer having been signified upon the debtor only after judgment, the respondents consequently became seized of the claim, only after it had ceased to be litigious:—Held, reversing the judgment whereby the inscription in law had been maintained, that the debtor of a claim transferred in violation of art. 1485 C.C. had an interest to attack the transfer by action, and is not restricted to pleading the ground of nullity in defence as in a case of retrait litigieux and that the illegality would affect a transfer made before the judgment in the former suit though served upon the debtor only after judgment.

Talbot v. Girouard, 18 Rev. de Jur. 93.

(§ V C—401) — Rescission — Stock subscription — Company's representation of interest.

Where the plaintiff, a physician, made a contract with an insurance company to buy shares of its stock, on condition that within a certain fixed time, the company would be in active business in a certain city and plaintiff would be appointed its medical examiner for that city; upon breach by the company of a material part of the stated condition the agreement may be rescinded and any payments made may be recovered back at the instance of the plaintiff.

International Casualty Co. v. Thomson (No. 2), 11 D.L.R. 634, 48 Can. S.C.R. 167, 25 W.L.R. 256, 4 W.W.R. 385, affirming 7 D.L.R. 944.

(§ V C—402)—Rescission—Grounds of —Fraud.

An agreement for the sale of land whereby the purchaser was to take the property at "its fair actual value" to be fixed by the vendor may be rescinded, where it appears that the vendor fraudulently made the purchase price of the property several hundred dollars in excess of "its fair actual value" the purchaser being a woman who lacked business experience and who was unable to form an opinion herself as to the real value of the property, notwithstanding that she went into possession and leased part of the land and sold another part, it appearing that she had not become aware of the fraud until the action.

Larson v. Rasmussen, 10 D.L.R. 650, 5 A.L.R. 479, 24 W.L.R. 239, 4 W.W.R. 53.

Rescission on ground of fraud—Sale of timber lands — Inability to place parties in original position.

Notwithstanding the fact that a vendee was induced to purchase timber lands through the vendor's misrepresentations as to the number of acres thereof, rescission of the contract of purchase will be denied the former after he had entered into a contract with the vendor under which the latter had begun to carry on lumbering operations on the land for the vendee, on the ground that, as the parties could not be placed in their original positions, both contracts must stand.

Eaton v. Dunn, 5 D.L.R. 604, 11 E.L.R. 52, 46 N.S.R. 156. [Affirmed, 9 D.L.R. 303, 47 Can. S.C.R. 205.]

Fraud—Executed contract—Failure of consideration—Timber.

In an action to rescind upon a ground of misrepresentation an executed contract for the sale of timber business where the consideration therefor has been paid and the licenses transferred to the purchaser, there must be proven unless a case of fraud be made out, such a difference in substance between what was supposed to be taken under the contract and what was in fact so taken as to constitute a failure of consideration. [Kennedy v. Panama, etc., Royal Mail Co., L.R. 2 Q.B. 580, 36 L.J. Q.B. 260; Pope v. Cole, 29 Can. S.C.R. 291; Angel v. Jay, [1911] 1 K.B. 666, followed.] In the present case wherein the plaintiffs, who sued for rescission of such a contract, alleged a deficiency in the expected quantity of timber covered by the licenses, it was held that it was not a complete failure of consideration so as to entitle them to rescission.

Alberta North-West Lumber Co. v. Lewis, 38 D.L.R. 228, 24 B.C.R. 564, [1917] 3 W. W.R. 1007, reversing 27 D.L.R. 722, 33 W.L. R. 128

In an action for rescission of a contract transferring timber licenses on the ground of misrepresentation as to title:—Held, that the contract was an executed one and fraud had not been proven and that, therefore, the plaintiff was not entitled to succeed. [Alberta North-West Lumber Co. v. Lewis, 38 D.L.R. 228, followed.]

Foulger v. Lewis, 24 B.C.R. 556, [1917] 3 W.W.R. 1015.

RESCISSION — MISREPRESENTATION — GOOD FAITH, EFFECT OF.

Rescission of a contract will be allowed for a material misrepresentation made by the other party, although the misrepresentation may have been made in good faith in a belief of its truth. [Derry v. Peek, 14 App. Cas. 337, applied.]

Eisler v. Canadian Fairbanks Co., 8 D. L.R. 390, 22 W.L.R. 888, 3 W.W.R. 753.

RESCISSION — GROUNDS OF — FOR FRAUD OR MISREPRESENTATION — EXPRESSION OF OPINION AS TO FUTURE EARNINGS.

What purports to be a mere expression of opinion as to the future earnings of a company on the part of its authorized agent may be false and fraudulent so as to constitute a ground for rescission of a contract to subscribe for stock in the company made on the faith of such statements

Pioneer Tractor Co. v. Peebles, 18 D.L.R. 477, 7 S.L.R. 322, 29 W.L.R. 371, 7 W.W.R. 124.

RESCISSION OF CONTRACT — MISREPRESENTATION — ABSENCE OF FRAUD — EXECUTED OR EXECUTORY CONTRACT.

An executed contract induced by misrepresentation cannot be set aside unless the misrepresentation be fraudulent, but this rule does not extend to executory contracts. [Angel v. Jay, [1911] 1 K.B. 666; Abrey v. Victoria Printing Co., 2 D.L.R. 208, 3 O.W.N. 868; Reese River Co. v. Smith, L.R. 4 H.L. 64; Adam v. Newbigging, 13 App. Cas. 308, and Angus v. Clifford, [1891] 2 Ch. 449, specially referred to.]

Kinsman v. Kinsman, 5 D.L.R. 871, 3 O. W.N. 966, 22 O.W.R. 979

RESCISSION — AGENCY — FIDUCIARY RELATIONSHIP — DEALING AT ARM'S LENGTH.

A communication from a person representing a real estate agent made to an owner of land from whom he was trying to get a contract of option for the purchase of his property, that there were no other property transactions going on in the neighborhood in which this property was situated, although the person making the communication may have known that his principal had been buying other pieces of property in that neighbourhood, is not a misrepresentation dans causam contractui which would be ground for rescission, where the parties were dealing at arm's length and there was no duty of disclosure.

Kelly v. Enderton, 9 D.L.R. 472, [1913] A.C. 191, 23 W.L.R. 310, 3 W.W.R. 1003, affirming 5 D.L.R. 613, 22 Man. L.R. 277.

MISREPRESENTATION — IMPLIED CONDITION OF FITNESS.

The right to repudiate a contract for the purchase of goods on the ground of misrepresentation is a right to repudiate the contract as a whole. The purchaser cannot repudiate as to part and affirm as to part. But if through the agent of the manufacturer the purchaser makes known the purpose for which the goods are required, and if the purchaser relies on the skill of the manufacturer to furnish goods reasonably fit for that purpose, so that there is an implied condition that the goods shall be fit for the purpose, the purchaser is entitled to reject the goods if the condition is broken, and where the sale is of a number of articles each one of which must be of the kind and quality ordered, the purchaser may accept some and reject the others upon finding that they are not suitable for the purpose required. The fact that there was a breach of the condition in respect of those rejected will not support a claim for general damages. [Molling v. Dean, 18 T.L.R. 217, followed; Hopkins v. Jannison, 18 D.L.R. 88, 30 O. L.R. 305, referred to.]

Dominion Paper Box Co. v. Crown Tailoring Co., 43 D.L.R. 557, 42 O.L.R. 249.

TIME.

Where there has been a false representation entitling a purchaser to repudiate a contract, the repudiation need not be immediate, and natural deterioration of the article while it is retained will not disentitle to rescission.

Gearhart v. Kraatz, 40 D.L.R. 26, 11 S.L.R. 106, [1918] 1 W.W.R. 910.

FRAUD — SUBSCRIPTION — DELAY IN ATTACKING.

A debtor who discovers that he has been deceived in buying the stock of a company, and who is desirous to have his contract set aside, as having been obtained by fraud and false representations, must act promptly; and a delay of three years, if not explained, is not a reasonable delay.

Anson v. Stark, 24 Rev. Leg. 292.

EXCHANGE OF LANDS — MISREPRESENTATION — RESCISSION.

Hamilton v. Colloway (Alta.), 43 D.L.R. 768.

MISREPRESENTATIONS — MATERIALITY.

In order to succeed on a claim to rescind a contract for misrepresentation or to obtain damages as an alternative, it must be shewn that the statement complained of was untrue and was made by the vendor with knowledge of its falsity or with such recklessness as to amount to moral guilt, and that the statement was in regard to a material fact and was an inducing cause

leading the purchaser to enter into the contract.

Langley v. Hammond, 22 D.L.R. 42, 21 B.C.R. 175.

MISREPRESENTATION—WAIVER.

The right to set aside a contract for misrepresentation by the other party which was unintentional and did not amount to fraud, may be waived or released by payments made thereon after the untruth of the misrepresentation had been clearly revealed. [Re Bank of Hindustan, 42 L.J. Ch. 771, applied; Morse v. Royal, 12 Ves. 373, and Moxon v. Payne, L.R. 8 Ch. 881, distinguished.]

Bramble v. Lloyd, 21 D.L.R. 321, 8 A. L.R. 247, 30 W.L.R. 659, 7 W.W.R. 1343.

MISREPRESENTATION.

Both materiality and inducement are questions of fact on a claim to rescind a contract for misrepresentation. [Young v. McMillan, 40 N.S.R. 52, considered.]

Young v. Smith, 21 D.L.R. 97, 8 A.L.R. 256, 30 W.L.R. 642, 7 W.W.R. 1355

RESCISSION — MISREPRESENTATION — GROUNDS — MANIFESTING "FIXED INTENTION" — "INTENTION" IS A FACT, WHEN.

Where the plaintiff was induced to buy shares of the capital stock of an insurance company upon its manifesting and expressing a "fixed intention, readiness and capacity" to commence its regular insurance business in a certain city on a fixed date, the existence or nonexistence of that "intention" is a fact, and, if the plaintiff entered into the contract to buy and parted with the purchase price on the faith of the statements made in respect of such intention, and those statements were material his right (if misled) to rescind the contract is the same as if he acted on and was misled by a representation of any other material fact. (Per Fitzpatrick, C.J.)

International Casualty Co. v. Thomson (No. 2), 11 D.L.R. 634, 25 W.L.R. 256, 48 Can. S.C.R. 167, 4 W.W.R. 385, affirming 7 D.L.R. 944.

FOR FRAUD OR MISREPRESENTATION.

Misrepresentation by the director of an incorporated company inducing a contract between him and the company, gives the company the right, not merely to a future judicial rescission of the contract by a judgment of the court, but to repudiate the contract by its own act.

Denman v. The Clover Bar Coal Co., 7 D.L.R. 96, 6 A.L.R. 305, 22 W.L.R. 128, 2 W.W.R. 986. [Affirmed, 15 D.L.R. 241, 26 L.R. 435.]

TIMBER LIMITS AND LICENSES—ESTIMATES — MISREPRESENTATIONS — RESCISSION OF AGREEMENT—COUNTERCLAIMS.

Cromwell v. Morris, 23 D.L.R. 888, 9 W.W.R. 55, 32 W.L.R. 289.

REPUDIATION — MISREPRESENTATION — MATERIALITY.

Bell-Irving v. Matthew, 31 D.L.R. 240.

FRAUD AND MISREPRESENTATION — ASSIGNMENT OF INTEREST IN ESTATE IN CONSIDERATION OF ADVANCES—RESCISSION —REPAYMENT OF ADVANCES—COSTS.

Hamilton v. Gallow, 8 O.W.N. 440.

FRAUD AND MISREPRESENTATION — MONEY PAID FOR ASSIGNMENT OF INTEREST IN PATENTED INVENTION — FALSE REPRESENTATIONS OF ASSIGNOR'S AGENT—RESCISSION — RETURN OF MONEY PAID — DAMAGES FOR DETENTION.

Street v. Murray, 8 O.W.N. 436, 9 O.W.N. 250.

PURCHASE OF COMPANY SHARES — ACTION FOR RESCISSION — GROUNDS — FAILURE TO MAKE FULL DISCLOSURE OF FACTS.

McMillan v. Ryan, 10 O.W.N. 461.

FRAUD AND MISREPRESENTATION — INDUCEMENT FOR MAKING CONTRACT—EVIDENCE —RECKLESS STATEMENTS MADE WITHOUT REGARD TO TRUTH OR FALSEHOOD —DELAY IN ASSERTING RIGHTS—ABSENCE OF PREJUDICE—ESTOPPEL—REFUSAL OF LEAVE TO AMEND.

Craven v. Campbell, 16 O.W.N. 71. [Affirmed, 16 O.W.N. 277.]

VENDOR AND PURCHASER — AGREEMENT OF SALE OF LAND—FRAUD OF AGENT OF PURCHASERS — COMMISSION PAID BY VENDORS TO AGENT — KNOWLEDGE OF VENDORS OF RELATION BETWEEN AGENT AND PURCHASERS—RESCISSION OF CONTRACT—REPAYMENT OF MONEYS PAID ON ACCOUNT OF PURCHASE-PRICE.

Meloche v. Tuban, 17 O.W.N. 35.

FRAUD—FALSE REPRESENTATIONS—NULLITY —C.C. ARTS. 1522, 1524.

Whatever may be the negligence of the buyer to render himself accountable for default of the thing sold, if the seller by fraudulent representation has induced him to buy, the contract is null.

Chevier v. Girard, 25 Rev. Leg. 169.

MISREPRESENTATIONS.

False representations are grounds for rescission of a contract, if they have led the other party into error as to the quality of the subject-matter which he had mainly in view while contracting and which determined his assent.

Talbot v. Pare Richelieu Co., 51 Que. S.C. 87.

CONTRACT FOR EXCAVATING — REPRESENTATIONS AS TO SOIL — REPRESENTATIONS IN WRITTEN CONTRACT—EVIDENCE OF VERBAL REPRESENTATIONS REJECTED IN VIEW OF WRITTEN REPRESENTATIONS AND TERMS OF CONTRACT—SOIL OF SUCH NATURE THAT CONTRACTOR RELIEVED FROM FURTHER WORK — PAYMENT ONLY AT CONTRACT-PRICE FOR WORK DONE.

Where plaintiff claimed that to induce him to make a contract for excavating with his digging machine the defendants verbally falsely represented that the material to be

excavated was sandy loam or sandy loam and clay mixed and was soft and easily worked and free from rock, etc., and that plaintiff's machine was fitted to do the work, etc., the facts that the parties intended the agreement to be put into writing and the written contract contained what defendants proposed to be bound by, viz., the representation that the surface conditions were suitable for machine excavating and that the plaintiff was to excavate only loam, clay and gravel, and would not be bound to excavate rock, etc., or any material which could not reasonably be handled by his machine, led the court to refuse to give effect to evidence of such alleged verbal misrepresentations, as the terms of the contract were notice to him that rock, etc., might possibly be encountered and sufficient to warn him that he should not rely on any other or stronger verbal assurances. The court found that the surface conditions were suitable as represented in the written contract, but that the ground was not suitable and the work was too heavy for plaintiff's machine, for although fair progress was made the plaintiff was entitled to consider the effect on his machine; the plaintiff was therefore entitled to stop work and be paid for what he had done but only at the contract price though the part done might not be any better than the part undone.

DeVal v. Archibald & Co., [1919] 2 W.W.R. 984.

(§ V C—403)—Municipal contract—Error in awarding.

Unless the transaction is fraudulent or ultra vires, an error of judgment committed by a municipal body in the awarding of a contract does not give rise to an action at law to set it aside.

Warner-Quinlan Asphalt Co. v. Montreal, 27 D.L.R. 540, 25 Que. K. B. 147. [See also 26 D.L.R. 72, 24 Que. K.B. 499.

Error.

He who pleads error in a written contract should demand its rescission; if he does not do so he cannot be relieved from the consequences of his error.

Cyr v. Lecours, 47 Que. S.C. 86.

(§ V C—404)—Insanity—Knowledge of.

Quære, as to how far the rule, that it is necessary for a party attacking a document on the ground of insanity to prove knowledge of such insanity on the part of the person supporting it, has been affected by Daily Telegraph Newspaper Co. v. McLaughlin, [1904] A.C. 776; Molyneux v. Natal Land Co., [1905] A.C. 555.

Moore v. Confederation Life Assn., 25 B.C.R. 465, [1918] 2 W.W.R. 895.

(§ V C—406)—Voluntary conveyance—Undue influence—Laches.

A voluntary deed whereby a woman purports to release to the remainderman her contingent life interest in a farm "in the event of her marrying or leaving the property," procured under undue influence and executed by her without independent advice, will be set aside by the court: Delay for twelve years in commencing the action will not disentitle her to relief.

Stonehouse v. Walton, 27 D.L.R. 662, 35 O.L.R. 485, reversing 35 O.L.R. 17.

Undue influence, duress.

Plaintiff's husband purchased certain land from defendant, and caused it to be conveyed to plaintiff, paying a certain amount in cash and the balance by notes, without security. Plaintiff's husband having been imprisoned, the defendant appears to have become anxious about his security, and approached the plaintiff in regard thereto, and ultimately procured a reconveyance of the land. It was found on contradictory evidence that this transfer was made by plaintiff without independent advice, for an inadequate consideration, and under the influence of threats by defendant to shoot her unless she reconveyed. In an action to set aside the reconveyance:—Held, that transfer having been made by an ignorant woman in distress, without independent advice, and under the influence of threats, should be set aside.

Kolp v. Hunker, 4 S.L.R. 379.

Conveyance of land by parent to child—Reservation of life estate—Evidence—Want of understanding of grantor—Improvidence—Undue influence—Lack of independent advice—Estoppel.

Kirton v. Dillman, 8 O.W.N. 429.

Conveyance of land by aged person—Improvidence—Absence of independent advice—Consideration—Deed set aside—Moneys expended in maintaining grantor—Allowance for—Costs.

Bare v. Bare, 8 O.W.N. 502.

Illegal combination—Action to set aside agreement, conveyance, and mortgages—Failures of proof.

Hutchinson v. Standard Bank, 11 O.W.N. 183.

Duress—Trust deed—Undue influence of beneficiary.

Houston v. London & Western Trust Co., 5 O.W.N. 336.

One, who through threats of a criminal prosecution cedes his rights in a heritage, can intervene in an action for partition, brought by the transferee, to have such demand dismissed.

Gagnon v. Seguin, 49 Que. S.C. 355.

(§ V C—407)—Breach—Right to terminate—Special clause—Computation of time.

Where a contract for the supply of electric current gives the purchaser the right to terminate such contract if the supply is interrupted for a certain period, interruptions caused by such purchaser's own fault or by the act of God are not to be in-

cluded in computing the length of such interruptions.

Yukon Gold Co. v. Canadian Klondyke Power Co., 47 D.L.R. 146, [1919] 2 W.W.R. 814.

BREACH, REPUDIATION OR DELAY.

The absence of sills from doors, the faulty manner in which bricks are placed, a leaking roof, are not latent defects which can give rise to the redhibitory action in respect of the sale of real property thereon used as dwellings, latent defects being those which a buyer could not possibly have ascertained at the time of the purchase, either personally or by an expert's examination, and which are so inherent to the thing sold that they cannot possibly be remedied; it does not suffice even that they be not apparent if they could be easily ascertained.

Jacobsen v. Peltier, 3 D.L.R. 132, 42 Que. S.C. 35.

A sale of a gas producer, a gas engine, and an air compressor for starting it, will be cancelled by the court, where the vendor was unable, after fair trial, to get the engine to work without a larger fluctuation of speed than the limit of fluctuation warranted against by the contract. Where a contract for the sale of a gas producer a gas engine, and an air compressor for starting it, provided that the vendor would furnish free of charge for a month, the services of a superintending engineer, also stipulated against liability for defects in design, material, or workmanship, and guaranteed that the engine should develop 50 horse power when operating under certain fuel conditions, and that its speed should not vary more than 2 per cent under changing load conditions, a contract relation in respect to the right of rescission, materially different from that existing in the ordinary sale of a chattel, is created, which will permit the vendee a reasonable time for experimentation and adjustment of the machinery before electing whether he will rescind. Where the purchaser of a gas producer, a gas engine, and an air compressor for starting it, gave his notes for the purchase price, and after operating it for about two months, informed the vendor by letter that the machinery was working satisfactorily, although he stated the existence of what were then regarded as trifling defects, which were, however, of a more serious nature than they were then supposed to be, such conduct is not destructive of the right to rescind upon it subsequently becoming evident that the machinery would not comply with the written guaranty.

The Canada Producer & Gas Engine Co. v. The Hatley Dairy, Light & Power Co., 4 D.L.R. 369, 22 Que. K.B. 12.

NONPAYMENT—TRUST FUND—ESCROW.

Where under the terms of a contract a fund has been deposited in a bank, in escrow, to be paid by the bank to the defendant from time to time, upon receipt of a letter signed by the parties to the contract, the bank becomes a trustee for both parties, and after the plaintiff has directed payment out of the fund, but it has not been accepted by the defendant, the latter cannot cancel the contract under a provision therein for cancellation in case of nonpayment.

Fidelity Oil & Gas Co. v. Janse Drilling Co., 27 D.L.R. 651, 9 A.L.R. 439, 34 W.L.R. 370, 10 W.W.R. 533.

CANCELLATION BY PARTIES—CONTRACT UNDER SEAL—ABANDONMENT.

To successfully set up the cancellation of an agreement under seal, some definite act of cancellation must be proved; mere inaction under the agreement or the handing of the document over by one to the other without a mutual agreement to abandon it will not be considered sufficient, where in view of the surrounding circumstances such was not inconsistent with the continuance of the agreement as between a father and his adopted son.

Harrison v. Crowe, 16 D.L.R. 288, 47 N.S.R. 508.

RESCISSION—GROUNDS OF—BREACH BY DELAY.

Where a person lets a contract for excavation work on an irrigation ditch to a contractor with a stipulation for its completion within a specified time and the contractor knows it is vital to the contractee's interests to actively carry on and promptly complete the work within the stipulated period, the default of the contractor to actively prosecute the work is ground to cancel at the contractee's option.

McMillan v. Southern Alberta Land Co., 13 D.L.R. 426, 25 W.L.R. 177.

RESCISSION OF CONTRACT—BREACH OF CONTRACT—DAMAGES.

Where a contract for the sale of an engine is rescinded for a false representation of a material character made by the defendant's representative as to the sufficiency of the engine to do a certain class of work, and the contract itself provided that if the engine was not of sufficient horse-power to do such work the sellers would forthwith supply him with a more powerful engine which would do the work, the plaintiff cannot, in addition to rescinding, obtain damages as for a breach of contract.

Eisler v. Canadian Fairbanks Co., 8 D.L.R. 390, 22 W.L.R. 888, 3 W.W.R. 753.

STIPULATION FOR RESCISSION ON BREACH—PENALTY CLAUSE.

Where there is a stipulation in an agreement that a forfeiture is incurred if on a certain day the agreement remains either wholly or in part unperformed, in which case the real damage, may be either very large or very trifling, such stipulation is to be treated as in the nature of a penalty and the court may relieve against it. [Re Dagenham (Thames) Dock Co., L.R. 8 Ch. 1022, approved.]

Kilmer v. B.C. Orchard Lands Co., 10 D.L.R. 172, [1919] A.C. 319, 82 L.J.C.P. 77, 23 W.L.R. 566, 3 W.W.R. 1119.

Breach—Performance.

The court will not decree the rescission of a contract for breach of an obligation therein, when upon mis-en-demeure and before any judicial action is taken the obligation is executed.

Levis v. Bienville, 49 Que. S.C. 156.

Breach of contract.

Where a party to a transaction does not fulfil the conditions of the contract, the other party has the right to demand the entire execution of the agreement and damages, but he cannot demand the cancellation of the transaction, if it be impossible to replace the parties in the same condition as they were before.

Burtner Coal Co. v. Gano Moore Co. & C.P.R., 24 Rev. Leg. 435.

Telephone contract—Breach—Cancellation.

A shareholder who subscribed to the capital stock of a telephone company upon the faith of a by-law guaranteeing a free telephone service "as long as the said company shall be in existence, to any shareholder owning ten shares to the amount of $500," is quite justified in demanding the cancellation of the contract and reimbursement of the amount of his subscription, when by reason of the disposal of a part of the system, it is impossible for the company to fulfil its agreement with him. The fact that the contract was partially fulfilled, and that the shareholder has, for 10 years, enjoyed the privilege granted, does not constitute a plea in bar in an action for cancellation of the contract.

La Compagnie de Téléphone de Kamouraska v. Houle, 27 Que. K.B. 400.

(§ V C—408)—Option—Rescission—Failure of consideration.

Defendant's right to avoid an option given plaintiffs to purchase land, because a cheque given by one of them for one-half the consideration of the option was dishonoured, is not affected because the other plaintiff, on receiving notice of cancellation of the option, offered defendant the amount of the cheque. In an action to specifically perform an agreement to convey, wherein defendant vendor asserted forfeiture of plaintiff's option to purchase because a cheque given by one of them for one-half the consideration was dishonoured, the onus was on plaintiffs to shew that the other plaintiff offered to pay the amount of the cheque before defendant declared the option cancelled because of the default.

McGregor v. Chalmers, 11 D.L.R. 157, 24 W.L.R. 176, 4 W.W.R. 256.

Transfer of mining claims—Action to set aside—Failure of consideration—Company shares.

Henrotin v. Foster, 9 O.W.N. 451.

(§ V C—409)—Nonacceptance of offer.

Where one who has given an option to purchase land, arranges to meet the holder of the option at a certain place and time, for the purpose of closing the sale, and, with the intention of evading acceptance of the option, fails to attend at the place and time arranged, he is not precluded from setting up an absence of any acceptance of the option.

Beer v. Lea, 7 D.L.R. 434, 4 O.W.N. 342, 29 O.L.R. 255. [Affirmed, 14 D.L.R. 236.]

Services to be performed — Failure of consideration—Rescission.

Where personal considerations or services are the foundation of a contract a refusal on the part of one of the parties to give the services required entitles the other party to rescind.

Kennedy v. The Eastern Telephone Co., 45 N.S.R. 26, 8 E.L.R. 523.

Measure of damages—Quantum meruit.

Vanscoyoc v. Simons, 3 A.L.R. 49.

Default by purchaser—Cancellation by vendor under power in contract—Forfeiture—Relief.

Smeaton v. Lynn, 4 S.L.R. 187, 18 W.L.R. 409.

Contract to supply electricity for five years—Right to terminate it at the end of any year by giving notice.

Montreal Light, Heat & Power Co. v. Plow, 40 Que. S.C. 128.

Oral contract for sale of land—Extension of time—Statute of Frauds—Relief against forfeiture.

Funk v. Simonson, 19 W.L.R. 1 (Alta.).

Shares—Transfer—Refusal to register—Transferees indebted to company.

Fuller v. Northern Light Power & Coal Co., 19 W.L.R. 175.

Drunkenness—Incapacity to contract—Evidence—Onus.

Funk v. Simonson, 19 W.L.R. 1 (Alta.).

VI. Actions; liabilities.

A. In general.

(§VI A—410)—Sale of goods—Repudiation by purchaser before property in goods has passed—Action for price not maintainable—Action for damages.

Where the purchaser of goods repudiates the contract before the property in the goods has passed to him, the vendor cannot maintain an action for the price of the goods sold, but must be content with such damages for nonacceptance as it can prove itself entitled to, based on the difference in value between the contract and the market price at the date of the breach.

Gold Medal Furniture Co. v. Homestead Art. Co., 45 D.L.R. 253.

Money paid to the use of another.

Where the defendant has taken upon himself, by agreement with the plaintiff, the duty of discharging a liability which would otherwise fall on the plaintiff, and by reason of the defendant's breach of such agreement the plaintiff has been compelled to pay, he may recover the amount as money paid to the defendant's use. [See Royal

Bank of Canada v. The King, 9 D.L.R. 337.

Taylor v. Waddell, 17 D.L.R. 192, 27 W.L.R. 615, 6 W.W.R. 258.

PERSONAL LIABILITY OF RAILWAY PRESIDENT —FAILURE TO COMPLETE BRANCH LINE —RIGHTS OF BONDHOLDERS.

An agreement whereby a railway president undertakes on behalf of himself and the company to build an extension line in order to secure a township the benefit of competitive freight rates, in consideration that the manufacturers and citizens of the township purchase the railway bonds, renders the president personally liable with the company to the purchasers of the bonds upon their failure to complete the line.

Wood v. Grand Valley R. Co., 22 D.L.R. 614, 51 Can. S.C.R. 283, affirming 16 D.L.R. 561, 30 O.L.R. 44.

RIGHT TO SUE—PRIVITY—THIRD PARTY.

An agreement that all logs cut and procured shall be the property of a third person, creates no privity of contract with the latter, and in the absence of written notice of an assignment of the contract to him, as required by the Judicature Act, he cannot sue for a wrongful detention of logs in breach thereof.

Dalhousie Lumber Co. v. Walker, 34 D.L.R. 554, 44 N.B.R. 455.

ACTION UPON COVENANT FOR INDEMNITY—JUDGMENT RECOVERED AGAINST PLAINTIFF—INTEREST—COSTS—DEFENCE TO ACTION—REFORMATION OF DEED—INDEPENDENT COLLATERAL AGREEMENT —SPECIAL INDORSEMENT—DEFENCE SET UP BY AFFIDAVIT FILED WITH APPEARANCE—RULE 56—TRIAL UPON RECORD CONSISTING OF INDORSEMENT AND AFFIDAVIT—CROSS-CLAIM FOR DAMAGES FOR DECEIT—UNASSIGNABLE CLAIM — INDEMNITY AGAINST PAYMENT OF MONEY NOT ACTUALLY PAID—APPLICATION OF MONEY—AMOUNT FOR WHICH JUDGMENT TO BE ENTERED.

McDonald v. Peuchen, 41 D.L.R. 619, 42 O.L.R. 18, 13 O.W.N. 380.

CONSTRUCTION OF PUBLIC HIGHWAY—AGREEMENT OF LANDOWNER TO PAY BONUS—CONSTRUCTION OF DRAIN—AGREEMENT TO PAY PROPORTION OF COST—COUNTERCLAIM—COST OF REMOVING BUILDINGS —INJURIES TO PROPERTY OF LANDOWNER—FINDINGS OF TRIAL JUDGE—APPEAL.

Toronto & Hamilton Highway Commission v. Coleman, 15 O.W.N. 389.

PAYMENT FOR SERVICES — COVENANT — BREACH — DAMAGES — QUANTUM MERUIT — COUNTERCLAIM — INTEREST —COSTS.

Rice v. Harness, 7 O.W.N. 846.

ACTION FOR PRICE OF WORK AND MATERIALS — NONPAYMENT BY CONTRACTORS OF WAGES OF WORKMEN — CONDITION PRECEDENT.

Construction & Paving Co. v. Toronto, 10 O.W.N. 390.

CLAIM FOR DAMAGES FOR FAILURE TO DELIVER COMPANY-SHARES — CONSIDERATION —FAILURE TO PROVE AGREEMENT.

Cartwright v. Pratt, 10 O.W.N. 177.

MONEY DEMAND — DEFENCE — PAYMENT — RESERVATION OF RIGHTS AS TO MONEYS COLLECTED IN FOREIGN COUNTRY.

Banque Nationale v. Saenger, 10 O.W.N. 213.

MIXED CONTRACT—DAMAGES—EVIDENCE.

Art. 1235, of C.C. (Que.), which provides that "in commercial matters in which the sum of money or value in question exceeds $50 no action or exception can be maintained against any party or ties represented unless there is a writing signed by the former in the following cases: 4. Upon any contract for the sale of goods unless the buyer has accepted or received part of the goods or given something in earnest to bind the bargain," does not apply to a contract by which a contractor undertakes to furnish and place, at a fixed price, artificial stone for the construction of a wall; such contract may be proved by witnesses, since it is a mixed contract of sale and lease of labour.

Paiement v. Boisvert, 53 Que. S.C. 233.

BUILDING CONTRACT—ACTION FOR PRICE—DISMISSAL.

An action by a builder for the balance of the contract price, where the cost of doing the work over again, including loss of time, would cover the amount claimed will be dismissed.

Bertrand v. Pepin, 24 Rev. de Jur. 232.

SERVICES — REMUNERATION — PERCENTAGE — ACCOUNT — ALLOWANCES — REPORT—APPEAL.

Jackson v. McCoy, 15 O.W.N. 112.

RAILWAY SUBSIDIES—DIFFERENCE IN VALUE.

If a railway company transfers to its contractor the subsidies obtained from the government, it is not responsible for the difference between the amount mentioned in the contract for the construction of its line and the amount actually paid by the government, unless the contractor proves that the subsidies were not fully paid owing to the fault of the company.

Great Northern Construction Co. v. Ross, 25 Que. K.B. 385, 404.

ACCRUAL OF RIGHT OF ACTION.

When one party to a contract refuses to admit the rights and claims of the other party the latter has an interest sufficient to entitle him to bring an action to have his rights and claims recognized.

Belisle v. Labranche, 51 Que. S.C. 289.

CLAIM FOR MONEY LENT—DEFENCE—AGREEMENT OF SETTLEMENT OR COMPROMISE—EVIDENCE—FINDING OF TRIAL JUDGE—APPEAL—INTEREST RECOVERABLE ONLY FROM DATE OF DEMAND FOR REPAYMENT —COSTS.

McDermid v. Fraser, 12 O.W.N. 292

WORK DONE BY SUBSTITUTE FOR SUBCONTRACTOR AFTER DEFAULT AND ABANDONMENT — ASSIGNMENT OF SUBCONTRACT — PAYMENT FOR WORK DONE — LIABILITY OF PRINCIPAL CONTRACTOR — IMPLIED CONTRACT OR PROMISE TO PAY — COSTS.

Armstrong v. Brookes, 12 O.W.N. 294.

SALE OF BUSINESS AND CHATTELS—SHORTAGES — DAMAGES — COUNTERCLAIM — PROMISSORY NOTE — SET-OFF — COSTS.

Ross v. Murray, 12 O.W.N. 29.

REPAIRS TO ELEVATORS IN BUILDING—ASCERTAINMENT OF TERMS OF ORAL CONTRACT — EVIDENCE — AGREEMENT — CONDITIONS ON WHICH WORK UNDERTAKEN — WORK DONE OF NO BENEFIT — FINDINGS OF TRIAL JUDGE—APPEAL—COUNTERCLAIM — COSTS.

Roelofson v. Grand, 12 O.W.N. 260, reversing 10 O.W.N. 213.

ADVERTISING — LIABILITY FOR PRICE OF — ADVERTISING AGENT — INCORPORATED COMPANY — ACTION AGAINST BOTH — JUDGMENT BY DEFAULT RECOVERED AGAINST COMPANY — PERSONAL LIABILITY OF AGENT — DEBT NOT MERGED IN JUDGMENT — LIABILITY UPON GUARANTY.

Imrie v. Eddy Advertising Service, & E. B. Eddy, 12 O.W.N. 27, 289.

AGREEMENT TO DEVISE FARM TO NEPHEW—SERVICES RENDERED BY EXPECTANT DEVISEE—ACTION TO ENFORCE AGREEMENT AGAINST ADMINISTRATORS OF ESTATE OF UNCLE — EVIDENCE — CORPORATION — INTENTION OF TESTATOR — FAILURE TO PROVE CONTRACT — STATUTE OF FRAUDS — WAGES OR REMUNERATION FOR SERVICES — UNCLE IN LOCO PARENTIS — LIMITATIONS ACT — WAGES FOR ONLY SIX YEARS BEFORE DECEASE.

Rycroft v. Trusts & Guarantee Co., 12 O.W.N. 240.

MONEY DEMAND ARISING OUT OF DEALING IN LAND — EVIDENCE — WEIGHT OF — INDEPENDENT ADVICE.

Bowerman v. Stephens, 11 O.W.N. 255.

USE OF ROOMS IN HOUSE — LIFE-INTEREST IN LAND — DESTRUCTION OF HOUSE BY FIRE — REFUSAL TO REBUILD OR PROVIDE OTHER ACCOMMODATION — DAMAGES — FUTURE PAYMENTS IN LIEU OF ROOMS.

Boardman v. Furry, 12 O.W.N. 247.

FRAUD AND MISREPRESENTATION — EARNINGS OF MECHANIC ENTRUSTED TO PERSON CONTROLLING EMPLOYER-COMPANIES — PROMISSORY NOTE — TENDER OF SHARES IN NEW COMPANY.

Stevenson v. Brown, 13 O.W.N. 180.

(§ VI A—411)—ROAD BUILDING — PROVISION FOR REPAIR — 10% OF CONTRACT PRICE HELD BACK — PERIODICAL NOTICE TO KEEP IN REPAIR — NO REPAIRS DONE — RECOVERY OF BALANCE DUE — COUNTERCLAIM — ADJUSTMENT.

A firm making a contract with a city to build roads and allowing the city to hold back ten per cent to insure repairs, which, according to the contract, must be made by the firm on due notice, cannot on suit recover the full amount of the hold-back when notice has been given and the necessary repairs required to be done by them under the contract have not been made.

Blome & Sinek v. City of Regina, 50 D.L.R. 93.

RECOVERING BACK MONEY — LOAN UNDER ABORTIVE SCHEME — LENDER'S RIGHTS.

Where money has been paid to borrowers in consideration of the undertaking of a scheme to be carried into effect and the scheme becomes abortive, the lender has a right to claim the return of the money in the hands of the borrowers as being held to his use. [Wilson v. Church, 13 Ch.D. 1, in appeal sub nom. National Bolivian Navigation Co. v. Wilson, 4 App. Cas. 176, referred to.]

Royal Bank of Canada v. The King, 9 D.L.R. 337, 108 L.T. 129, [1913] A.C. 283, 23 W.L.R. 315, 3 W.W.R. 994.

RECOVERING BACK OF MONEY.

A party is not entitled to recover back money paid for a consideration which has failed where the failure has been caused by the party's own default.

Maritime Gypsum Co. v. Redden, 8 D.L.R. 155, 46 N.S.R. 285, 11 E.L.R. 155.

FRAUD OF VENDOR—RESCISSION OF CONTRACT —RECOVERY OF DEPOSIT BY PURCHASER.

Where a land company was engaged in selling lots from land to which had been given a name similar to that of a townsite owned by a railway company and issued circulars carefully and designedly prepared to create the impression, without explicitly so stating, that they were selling lots from the railway company's townsite, a person is entitled to recover the deposit paid by him on a contract to buy one of the lots under a belief induced by the circulars that he was buying a lot in the railway company's townsite.

Dunn v. Alexander, 2 D.L.R. 553, 17 B.C.R. 347, 20 W.L.R. 902, 1 W.W.R. 1117.

REPURCHASE OF STOCK SOLD—RECOVERY OF MONEY PAID.

Where the sales agent of the defendants, an incorporated company empowered to engage in the business of company promotion and of selling corporate shares, induced the plaintiff to buy shares of another company by representing that the defendants had power to repurchase this stock within a certain time if the plaintiff desired to sell, and the defendants received the purchase price therefor from the plaintiff and afterwards refused the purchaser's demand to repurchase the shares, the plaintiff is entitled, upon surrendering the stock to the defendants, to

recover the sum paid thereon with interest from the time of his demand on them to repurchase, as the contract was unenforceable.

Whaley v. O'Grady (No. 2), 4 D.L.R. 485, 22 Man. L.R. 379, 21 W.L.R. 617, 2 W.W.R. 663, reversing 1 D.L.R. 224, 19 W.L.R. 885.

RECOVERING BACK MONEY PAID — SALE OF LAND — DEFAULT IN PAYMENT OF THE BULK OF THE PURCHASE PRICE.

Under an agreement of sale of lands on the small monthly instalment plan where the purchaser after a few monthly payments abandons the contract by omitting to make any further payment for four years, and where the vendors rescind the contract owing to the purchaser's persistent default, the purchaser by such default disentitles himself to any return of the payments which he did make.

Handel v. O'Kelly, 8 D.L.R. 44, 22 W.L.R. 407, 22 Man. L.R. 562, 3 W.W.R. 367.

PUBLIC POLICY — MUNICIPAL OFFICER — PRIVATE INTEREST.

Under art. 989 of the Civil Code (Que.), which declares that a contract without consideration or with an unlawful consideration has no effect, money paid upon a contract which is merely illicit or contrary to public policy and not in se immoral or criminal, is recoverable. [Consumers' Cordage Co. v. Connolly, 31 Can. S.C.R. 244, applied.]

Lapointe v. Messier, 17 D.L.R. 347, 49 Can. S.C.R. 271.

MONEY HAD AND RECEIVED — FAILURE OF CONSIDERATION.

When money has been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as for money had and received to his use; and this principle extends to cases where the money has been paid for a consideration that has failed.

Royal Bank of Canada v. The King, 9 D.L.R. 337, [1913] A.C. 283, 49 C.L.J. 230, 331, 23 W.L.R. 315, 3 W.W.R. 994.

RECOVERY BACK OF MONEY PAID ON ACCOUNT OF PURCHASE-PRICE — VENDOR REFUSING TO CARRY OUT TERMS OF CONTRACT.

A purchaser, ready and willing to carry out the terms of an agreement for the purchase of an hotel property, at a stipulated price, who is prevented from carrying out the agreement, by the vendor insisting on payment being made, in addition to the stipulated price, for some goods and chattels, which were included in the subject matter of the agreement for sale, is entitled to a return of the money paid on account of the purchase-price together with such expenses as he may have been put to by reason of the vendor's refusal either to carry out the terms of the contract or to repay the amount paid on account.

Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205, [Affirmed, 10 D.L.R. 822.]

RECOVERY BACK OF MONEY PAID — NONPERFORMANCE OF PROMISE — DAMAGES.

Money cannot be ordered repaid as upon a failure of consideration, where the failure is the nonperformance of a promise, the remedy in such a case is the recovery of damages for the breach of the promise.

Wood v. Grand Valley R. Co., 16 D.L.R. 361, 30 O.L.R. 44, reversing in part 10 D.L.R. 726; reinstating, in part, 5 D.L.R. 428, 26 O.L.R. 441, 3 O.W.N. 1356. [Affirmed 22 D.L.R. 614, 51 Can. S.C.R. 283.]

RECOVERY OF MONEYS ADVANCED — SALE OF PULPWOOD — BREACH.

New York & Pennsylvania Co. v. Holgevac, 10 O.W.N. 394.

REFUND OF MONEY OVERPAID—SHIPMENTS OF HAY — SALE ON COMMISSION — CORRECTNESS OF RETURNS.

Williams & Co. v. Sparks, 10 O.W.N. 391.

RECOVERING BACK MONEY — MONEY LENT — ACTION TO RECOVER — CONFLICT OF EVIDENCE.

Scully v. Ryckman, 4 O.W.N. 1341, 24 O.W.R. 644.

RIGHT TO REPAYMENT — TREATMENT FOR ALCOHOLISM — FAILURE OF CONSIDERATION.

A person who enters into a contract with an institution, by which the latter undertakes to cure him of indulgence in intoxicating liquors in three days, with the clause that "if at the end of the treatment the said patient is not cured of the drinking habit, the said company undertakes immediately to return to the patient the sum paid," may, even after four months if he is not cured, recover back the amount so paid, the contract and the payments not having been made for valuable consideration.

Laferrière v. Neal Institute, 47 Que. S.C. 105.

(§ VI A—413)—VENDOR'S REPUDIATION — ACTION BY PURCHASER TO ESTABLISH — TIME FOR DELIVERY NOT ARRIVED.

Upon a vendor's repudiation of an agreement for sale of goods, the purchaser is entitled to bring an action to have the agreement established, although the time for delivery of the goods sold has not arrived.

Kay v. Ratz, 44 D.L.R. 145, 14 A.L.R. 72, [1918] 3 W.W.R. 885.

SHARE OR INTEREST IN BUSINESS — WRITTEN AGREEMENT NOT EXECUTED — ORAL EVIDENCE — CORROBORATION — ACCOUNT — VALUATION OF STOCK — EXPERT TESTIMONY — FINDING OF FACT OF TRIAL JUDGE.

Booth v. Provincial Motors Livery, 15 O.W.N. 403, 17 O.W.N. 129.

B. Defences.

(§ VI B—415)—Actions — Defences — Fraud.

Fraud which vitiates a contract is a full defence to either an action for damages or for its specific performance. [Slater v. Canada Central R. Co., 25 Gr. 363; Watson v. Hawkins, 24 W.R. 884; and Phelps v. White, 7 L.R. Ir. 160, referred to.]

Beckman v. Wallace, 13 D.L.R. 541, 29 O.L.R. 96.

Defences.

It is no defence to an action by a subcontractor, against the contractor on a bill of exchange and two promissory notes given by the contractor for work done by the subcontractor in connection with a portion of the contract, that the original contract with the Crown entered into by the contractor, contained a stipulation "that the parties of the first part shall not in any way dispose of, sublet, or relet any portion of the work embodied in this contract."

O'Toole v. Ferguson, 5 D.L.R. 868, 46 N.S.R. 165.

Oral agreement of vendor to repurchase — Statute of Frauds as a defence — Action by vendee for specific performance.

An agreement of a vendor to repurchase land he had agreed to sell the plaintiff, although unenforceable because within the Statute of Frauds, will constitute a good defence to an action by the vendee for damages for the vendor's refusal to convey. [MacPherson v. Warner, 9 T.L.R. 397, specially referred to.]

Frith v. Alliance Investment Co., 5 D.L.R. 491, 4 A.L.R. 238, 20 W.L.R. 551, 1 W.W.R. 907.

Actions — Defences — Consideration — Real party contracted with — Essential element.

Whenever the consideration of the person with whom one is willing to contract enters as an element into the contract he is willing to make, error with regard to the person destroys the consent and is ground for annulment of the contract. [Smith v. Wheatcroft, 9 Ch. D. 223; Smith v. Kay, 7 H.L.C. 750; Pulsford v. Richards, 22 L.J. Ch. 559, referred to.]

Page & Jacques v. Clark, 19 D.L.R. 530, 31 O.L.R. 94.

Action to recover money lent — Improvident transactions — Undue influence — Evidence.

Richardson v. McAuley, 10 O.W.N. 38.

Promise to pay large sum—Forgery—Scheme to defraud.

Laurin v. St. Jean, 9 O.W.N. 411, 11 O.W.N. 65.

Indemnity and guaranty—Action to enforce — Defence — Fraud and misrepresentation — Failure to prove.

Baldry Yerburgh & Hutchinson v. Williams, 10 O.W.N. 309, 11 O.W.N. 173.

Action for money payable under contract — Counterclaim for rectification — Evidence.

McLeod v. McIlmoyle, 10 O.W.N. 211.

Delivery of timber not made as agreed — Deduction from price — Quality of timber — Inferiority.

Thorne v. Hodgson, 10 O.W.N. 461, 11 O.W.N. 135.

Building contract — Insufficient performance.

Where in an action for the balance of the price for work done under a building contract it is found that the contractor is not entitled to recover because the work was improperly done, the court, upon the dismissal of the action, will also dismiss a cross-demand for damages resulting from such nonperformance, where the faults thereof are partly chargeable to the proprietor.

Gagnon v. Maheux, 24 Que. K.B. 129.

Action for damages — Breach of drilling contract — Counterclaim for work done and for hauling of material.

Fidelity Oil & Gas Co. v. Janse Drilling Co., 31 W.L.R. 503.

Action for material supplied and services rendered — Counterclaim for damages.

Mainland Iron Works v. Empire Lumber, 32 W.L.R. 388.

Want of consent—Evidence.

The party to a contract sous seing privé, who has signed it voluntarily, will not be allowed to prove by witnesses that the contract did not contain all that was agreed upon between the contracting parties and that his assent to it was obtained by the consideration of special conditions which were not in the contract and which should be inserted therein.

Compagnie Immobiliere of Three Rivers v. Lupien, 52 Que. S.C. 412.

VII. Public contracts.

See Municipal Corporations; Crown.

A. In general.

(§ VII A—420) — Department of Public Printing — Sale of goods to government — Authority to contract.

Where goods are ordered contrary to the formalities of s. 24 of the Public Printing Act, R.S.C. 1906, c 80, but which have been received by the proper officers of the Crown for the use and benefit of the Crown, the Crown, under special circumstances, may be held liable as upon an implied contract. Goods ordered for the Department of Public Printing and Stationery by the Superintendent of Stationery must be ordered in strict conformity with the first clause of s. 24 of R.S.C. 1906, c. 80, and all persons dealing with officers of the Crown

must be taken to have knowledge of the statute governing such dealings.

Gresham Blank Book Co. v. The King, 14 Can. Ex. 236.

PUBLIC CONTRACT — CONSTRUCTION OF — POWERS OF MUNICIPALITY — FRANCHISE TO SUPPLY ELECTRICITY — MUNICIPAL BY-LAWS — VALIDITY.

A contract in conformity with a by-law, by which a town corporation gives a party, for a period of 10 years, the exclusive privilege to supply electricity in the town for lighting, heating, motive power, electrolysis, metal-working, locomotion and generally for all the purposes for which electricity may be used, with a preference, at the end of that period, of renewal of the contract, over any competitor, for a further period of ten years, at the rates offered by such competitor, is a contract for a period, not of twenty years, but of ten only at the expiration of which it ceases and is determined. Lavergne & Gervais, JJ., dissentientibus. Per Cross, J., such a grant is ultra vires of a town municipality and the contract is therefore null and void.

Ricard v. Town of Grand'mere, 23 Que. K.B. 97.

AS TO ASPHALT FOR PAVING STREETS.

The undertaking to deliver to a municipal corporation all the asphalt which it shall need for the paving of its streets at a price fixed, and the obligation is assumed by the municipal corporation, constitutes a unilateral promise to sell without reciprocal promise to buy and the municipality incurs no liability by abstaining from purchasing. The obligation of the municipality not to allow the contractors for paving its streets to use any other asphalt than that of the plaintiff, is an undertaking on behalf of a third party over whom the defendant corporation has no control and the stipulation is void under the terms of arts. 1028 and 1062 C.C. Que. as impossible of performance.

Elder-Ebans Asphalt Co. v. City of Maisonneuve, 51 Que. S.C. 295. [Reversed in 27 Que. K.B. 95.]

ARCHITECT — ERECTION OF SCHOOL BUILDING — LIABILITY OF SCHOOL BOARD FOR PAYMENT — ABSENCE OF WRITING AND SEAL — ACCEPTANCE OF PLANS — MISUNDERSTANDING AS TO COST OF BUILDING.

Nicholson v. St. Catharines Collegiate Institute Board, 11 O.W.N. 236.

CROWN — ABSENCE OF ORDER IN COUNCIL AUTHORIZING CONTRACT — NO RECOVERY AGAINST CROWN — PAYMENT UNDER ORDER IN COUNCIL NOT CONSTITUTING RATIFICATION OF CONTRACT OR RECOGNITION OF OTHER WORK DONE.

The suppliants in an action against the Crown were held disentitled to recover payment for certain consulting engineering services in connection with the construction of public edifices on the ground that (although, where necessary, appropriations were made by statute for the construction of the buildings) there was no order in council authorizing the contract. Where one of the payments made to the suppliants in connection with their work was made under authority of an order in council, but the minister's recommendation to council did not, nor did the order in council, refer to a general contract or any contract, nor contained anything from which it could be inferred that the payment was a payment on account or that the services paid for formed a whole with other services, but the amount was simply paid as consultation fees "reheating, plumbing and ventilating, being $200 re Central Power House, Winnipeg, and $300 re the New Parliament Buildings," such payment could not constitute a ratification of the contract so as to entitle the suppliant to recover in respect thereof; nor did such recognition of the services paid for extend by implication to other services claimed for and constitute an acceptance of all the work done and entitle the suppliants to payment on a basis of quantum meruit. [Reg. v. Lavery, 5 (Que.) Q.B. 310, distinguished on this point.] As the municipal commissioner has charge only of the maintenance, and not of construction, of the law courts and goals, the construction is a matter to be dealt with by order in council; notwithstanding the facts that the legislature does not make provision for maintenance and construction of law courts and goals, this being provided by the municipalities, and that the municipal commissioner is a body corporate. His department is declared to be a department of the civil service and all functions that are not expressly assigned to him can only be discharged by the Lieutenant-Governor in Council. Recommendation made by the court that suppliants be paid a certain amount to which they were deemed equitably entitled, as a matter of grace and favour.

Canadian Domestic Engineering Co. v. Regem in the Right of the Province of Manitoba, [1919] 2 W.W.R. 762.

B. ADVERTISEMENTS AND BIDS; LETTING.

(§ VII B—427) — PLANS AND SPECIFICATIONS — PAVING — LOWEST BIDS — DISCRETION.

There is no clause either in the City Charter of Montreal (art. 21, s. 7), or in the statute 1909 (9 Edw. VII., c. 82), which prescribes as a necessary condition precedent, before awarding a contract for public works, that plans and specifications shall be prepared in all cases; they are only necessary for the construction of buildings, aqueducts, etc.; but a tender imparts sufficient data if it calls "to complete the asphaltic pavement by the penetration method." The word "shall" of art. 564 of the Montreal Charter, that the city shall tender for municipal works and "when its tender is the lowest, it shall, if it deems expedient, have such work done,"

merely confers a discretionary and not imperative duty.

Warner-Quinlan Asphalt Co. v. Montreal, 27 D.L.R. 549, 25 Que. K.B. 147. [See also 26 D.L.R. 72; 24 Que. K.B. 499.]

VIII. Wrongful interference with.

Conspiracy to procure dismissal from employment, see Conspiracy, II. B.—15.

(§ VIII—435)—Actionability.

An intentional violation of the plaintiff's legal right by an interference with his contractual relations without sufficient justification, founds a good cause of action and damages are recoverable therefor. [Quinn v. Leathem, [1901] A.C. 495, 70 L.J.P.C. 77; Giblan v. National, [1903] 2 K.B. 608, 72 L.J.K.B. 907, referred to.]

Sleuter v. Scott, 22 D.L.R. 900, 21 B.C.R. 155, 8 W.W.R. 714, affirming 16 D.L.R. 659.

Ecclesiastic persuasion to stop trading.

For a person to persuade another to refrain from doing something which the other may lawfully refrain from doing, such as the forbidding by an ecclesiastic of the members of his church from trading with the plaintiff, is not an actionable wrong, although the plaintiff's trade is injured thereby, if there is no allegation of threats, intimidation, molestation, conspiracy, or other unlawful means. [Allen v. Flood, [1898] A.C. 1; Lyon v. Wilkins, [1899] 1 Ch. 255, applied; Quinn v. Leatham, [1901] A.C. 495; Giblan v. Labourers' Union, [1903] 2 K.B. 600, distinguished.

Heinrichs v. Wiens, 23 D.L.R. 664, 8 S.L.R. 153, 30 W.L.R. 854, 8 W.W.R. 373, affirming 21 D.L.R. 68.

(§ VIII—440)—Wrongful interference.

Preventing owner of chattels from removing same—C.C. (Que.), art. 1053.

Lord v. Bergeron, 7 D.L.R. 809.

CONTRE-LETTRE (Que.).

Loan—Authentic document.

A note given to a lender in payment of part of a loan, evidenced by an authentic document in which the debtor acknowledges that he received the full amount lent, is only a contre-lettre and effective only between the contracting parties but cannot be set up against a third party.

Rivet v. Beauvais, 51 Que. S.C. 83.

CONTRIBUTION.

(§ I—1) — Between wrongdoers — Company directors—Judgment against one for false statements in prospectus — Prima facie case — What necessary to establish.

In an action by a director of a company against his co-directors for contribution in respect of a judgment against him obtained by one induced to subscribe for shares by misrepresentations contained in the prospectus, in order to recover under s. 92 (4) of the Companies Act, B.C. Stat. 1910, c. 7, R.S.B.C. 1911, c. 39, s. 93, rendering all directors jointly and severally liable for any loss or damage sustained by those subscribing for shares on the faith of the prospectus, the plaintiff must establish such a case as the subscriber himself would be required to make were he the plaintiff in the action. [Frankenburg v. Great Horseless Carriage Co., [1900] 1 Q.B. 504, referred to.]

Johnson v. Johnson, 14 D.L.R. 756, 18 B.C.R. 563, 26 W.L.R. 3, 5 W.W.R. 525.

(§ I—3)—Joint defendants—Joint act of both—Liability.

Where two independent acts of negligence respectively committed by the two defendants caused the injury and each of such acts would have been innocuous but for the other of them, both defendants are liable for the damages and there is no right of contribution or indemnity between them, but the court has a discretion to direct contribution as to the costs awarded to the plaintiff against them.

Till v. Town of Oakville, 20 D.L.R. 635, 31 O.L.R. 405. [Varied 21 D.L.R. 113, 33 O.L.R. 120.]

Joint defendants—Liability established against one.

Where circumstances in a negligence action brought against two defendants are such that upon the face of the transaction or occurrence it was reasonable to join both and to seek to make each of them liable, and the plaintiff could not know which one was at fault, and, in the event, liability is established only against the one who had contended that the other was solely liable, the court may include in its judgment against the one so found to be liable the plaintiff's costs incurred against the codefendant and also the costs which the plaintiff is ordered to pay to the successful defendant. [Besterman v. British Motor Co., [1914] 3 K.B. 181, followed.]

Till v. Town of Oakville, 21 D.L.R. 113, 33 O.L.R. 120. [Followed in Burrows v. G.T.R. Co., 23 D.L.R. 173.]

(§ I—5)—Between co-obligors on mortgage.

An obligor on a mortgage, or his assignee, who has not paid his share of the mortgage, is not entitled to sue a co-obligor for contribution.

Dominion of Canada Investment & Debenture Co. v. Gelhorn, 36 D.L.R. 154, 10 S.L.R. 278, [1917] 3 W.W.R. 231.

Cosureties—Contribution—Liability of cosurety—Promissory notes—False representation.

Robinson v. Ford (No. 2), 25 W.L.R. 674.

(§ I—6)—Joint land adventure—Liability on guarantees.

There is no right to contribution on the liabilities incurred on guarantees assumed by one of the parties without the assent of the other in a joint venture for the sale

of lands upon a basis of an equal sharing in the profits.

Montgomery v. McQueen, 24 D.L.R. 167, 31 W.L.R. 769.

DEFAULTING DEFENDANTS—SERVICE OF JUDGMENT—CONTRIBUTION.

Secord v. Lessier, 3 A.L.R. 56.

CONTRIBUTORIES.

Liability of shareholders as, see Companies.

CONTRIBUTORY NEGLIGENCE.

See Negligence, II; Highways; Automobiles; Railways; Carriers; Street Railways; Master and Servant.

Findings and instructions as to, see Trial; New Trial.

CONVERSION.

See Trover; Detinue.

CONVICTION.

See Summary Conviction; Certiorari; Habeas Corpus; Criminal Law.

COPYRIGHT.

See Trademark; Patents.

(§ I—1)—TITLE OR NAME OF BOOK—"PASSING OFF."

Generally the title or name of a book cannot from the subject of copyright, unless the title itself amounts to a literary, scientific, or artistic composition within the meaning of s. 4 of the Copyright Act, R.S.C. 1906, c. 70; the words "The New Canadian Bird Book" or "The Canadian Bird Book" are merely descriptive, and unless public reputation of the title of the book is established, or a design of "passing off" is shewn, there is no right to complain of marketing the book under a similar name. [Rose v. McLean Publishing Co., 27 O.R. 325, 24 A.R. (Ont.) 240, distinguished.]

McIndoo v. Musson Book Co., 26 D.L.R. 550, 35 O.L.R. 342.

WHAT SUBJECT OF.

Copyright does not extend to mere ideas or methods apart from their expression and there is no infringement unless the printed matter itself is copied; consequently a copyrighted "legal directory" in which a cross-reference is given to the names of the law agents of solicitors listed therein by allocating to each agent a special number and placing the same number opposite the name of the solicitor, is not infringed by another directory adopting the same plan, but using a distinct set of numbers, provided that the information is obtained from original sources. [Hollinrake v. Truswell, [1894] 3 Ch. 420, followed; see also MacGillivray on Copyright, 1st ed., p. 15.] It is an infringement of a copyright to make use of the copyrighted original matter of a professional directory as the basis for an opposition directory, although such use is made only after making substantial corrections and alterations due to changed conditions, the information for which was obtained from original sources by the publisher of the later book. [Compare Bain v. Henderson, 16 B.C.R. 318.]

Cartwright v. Wharton, 1 D.L.R. 392, 25 O.L.R. 357.

(§ I—2)—NOTICE OF COPYRIGHT IN BOOKS—STATUTORY FORM.

Since the amendment of the Copyright Act (Can.) in 1908, the notice required to be published in a book for Canadian copyright, i.e., the words "Copyright, Canada" with the name and year, is obligatory in place of the former notice form which was in the words "Entered according to Act of Parliament of Canada," etc.; and a notice in the old form is no longer valid. [Garland v. Gemmill, 14 Can. S.C.R. 321, distinguished.]

Henderson Directories v. Tregillus Thompson Co., 15 D.L.R. 209, 6 A.L.R. 393, 5 W.W.R. 899.

(§ I—8) INFRINGEMENT—FOREIGN AUTHORS—CONFLICT OF LAWS—BERNE CONVENTION.

The Berne Convention (1886, 49-50 Vict., c. 33) and the Imperial copyright statutes for the protection of the rights of foreign authors and playwrights are in force in Canada, and a foreign author has the right to sue here for the statutory penalties for any infringement of his rights and may bring the action in his own name though a member of a society of authors; an unauthorized representation of a play in a moving picture hall instead of a regular theatre constitutes an infringement.

Joubert v. Geracimo, 35 D.L.R. 683, 26 Que. K.B. 97. [Appeal to Supreme Court of Canada quashed (not reported).]

INFRINGEMENT—BREACH OF INJUNCTION RESTRAINING—CONTEMPT OF COURT.

Cartwright v. Wharton (No. 3), 6 D.L.R. 890, 4 O.W.N. 210, 23 O.W.R. 214.

(§ I—20)—CRIMINAL OFFENCES—SUPPRESSING NAME OF FOREIGN AUTHOR.

The person who suppresses the name of the author of a theatrical play written by a foreigner but protected by the Imperial Statute (1886) 49-50 Vict., c. 33 (Berne Convention), without the consent of the author, and who has it represented in a theatre in Canada, renders himself guilty of a criminal offence falling under s. 508B of the Criminal Code.

R. v. Daoust, 28 D.L.R. 293, 26 Can. Cr. Cas. 69, 49 Que. S.C. 65.

REGISTRATION—RIGHT TO IN BOOK CONTAINING PIRATED MATERIAL—AUTHORSHIP.

Bain v. Henderson, 16 B.C.R. 318, 17 W.L.R. 125.

BASSO-RELIEVO CAST FROM ENGRAVING—"WORK OF ART."

A basso-relievo cast from an engraved historical portrait, being artistic work, is

a proper subject matter of copyright, and gives the author, after registration, the remedies against infringement provided in the Copyright Act, R.S.C. 1906, c. 70.

Beullac v. Simard, 39 Que. S.C. 97. [Affirmed, 39 Que. S.C. 517.]

CORONER.

Bribery of, see Bribery.

Inquest of as evidence, see Evidence.

(§ I—5)—Verdict of—Omission to follow statutory directions.

The verdict of a coroner's jury finding the petitioner guilty of manslaughter by negligence will not be quashed on certiorari for the coroner's failure to make the preliminary declaration of belief that the death was caused by violence, negligence or unlawful means, as required by the Quebec statute 4 Geo. V. 1914, c. 38, or for omission to follow other merely directory regulations contained in that statute.

Robin v. MacMahon, 27 Can. Cr. Cas. 407, 50 Que. S.C. 267. [See also Davidson v. Garrett, 5 Can. Cr. Cas. 200, 30 Ont. R. 653.]

CORPORATIONS.

See Companies.

CORPSE.

Carriers duty as to, see Carriers.

Damages in respect to, see Damages.

As to prescriptive rights acquired by burial in private grounds, see Easements.

Wrongful removal from burial lot by municipal officer—Liability of municipality.

A municipality is answerable in damages to the owner of a cemetery plot for the wrongful removal by municipal officers in the course of the construction of a roadway, without the lot owner's consent or other lawful authority, of human remains interred therein.

O'Connor v. City of Victoria, 11 D.L.R. 577, 4 W.W.R. 4.

CORROBORATION.

See Evidence, XII: Witnesses.

CORRUPTION.

See Principal and Agent.

School Commissioners.

An offence committed by two school commissioners who declared themselves ready to accept a gift of $3,000 for obtaining the passing of a by-law, by the school commission of which they were members, for a claim of $9,630 due by the commission, does not come under s. 161 of the Criminal Code, seeing that this section only contemplates municipal councillors and not school commissioners. It falls under s. 69 of the same Code. It constitutes, also, an attempt to commit an offence such as is provided for in s. 72 of the same Code. It is likewise an offence under the common law. If it is proved that one who made the offer of gift had no intention of paying any sum of money, the school commissioners who accepted the offer so made are rendered no less guilty of a criminal offence.

Le Roi v. Legault, 32 Can. Cr. Cas. —, 27 Que. K.B. 516.

COSTS.

I. Right to recover; liability for.
II. Taxation; practice; collection.

Annotation.

Right of alien enemy to recover: 23 D.L.R. 375, 383.

I. Right to recover; liability for.

Of appeal, failure to enter, see Appeal, VI A—280.

Sheriff's fees, poundage, see Sheriff, I—3.

In expropriation matters, see Damages, III L—240.

Foreclosure of mortgage, priorities, see Mortgage, II A—35.

Security for "special circumstances," see Appeal, III G—100.

Security for, summary conviction, fine, see Certiorari, II—26.

Liability of school trustees for wrongful disbursements as to, see Schools, III A—55.

Correction of judgment as to, see Judgment, I G—55.

(§ I—1)—Discretion in awarding—Review.

The question of awarding costs is within the discretion of the Trial Judge, and will not be interfered with even where on appeal the defendant succeeds in sustaining his defence.

Duffy v. Duffy, 26 D.L.R. 479, 48 N.B.R. 555.

Rule of awarding—Exceptions.

As a general rule costs are awarded to the discretion of the Trial Judge, and will costs is mentioned only when an exception to that rule is made.

Beament v. Foster, 26 D.L.R. 474, 35 O.L.R. 365.

Landlord's action for possession.

The failure of a landlord in a proceedings under the Overholding Tenants Act (R.S. N.S. 1900, c. 174) for want of a written demand required by the statute, renders him liable for costs, although the tenant's possession was illegal. [Russell v. Murray, 34 N.S.R. 548, distinguished.]

McKay v. McDonald, 30 D.L.R. 609.

Liability for — Tender — Payment into bank before action—Notice.

Where the maker of a note forwarded the amount of same by mail on the day after maturity to the bank where it was discounted but the payee for whom it was discounted had already taken it up when such remittance arrived, and then sued the maker before getting notice of such remittance, he will be entitled to the costs of suit so incurred although the money had been forthwith placed to his credit by the

bank, if the latter had not been shewn to be the plaintiff's agent to receive the money.

McMennamin v. Evans, 13 D.L.R. 197, 41 N.B.R. 481, 13 E.L.R. 269.

UNSUCCESSFUL ACTION AGAINST INDORSER OF CHEQUE.

Held, that the plaintiff bank was not entitled to recover from the defendant bank the costs incurred in unsuccessful actions brought against the indorsers of the cheques.

Bank of B.N.A. v. Standard Bank, 34 O.L.R. 648.

GARNISHMENT—SET-OFF.

Where the plaintiff has obtained judgment in the action in the court below, and the defendant is successful in subsequent garnishee proceedings in the Court of Appeal, the costs of the garnishee proceedings will be set off against the judgment.

Patton v. Hartley, 24 B.C.R. 5.

COMPANY LIQUIDATION.

The attorney for the liquidator of an insolvent company has no recourse against the individual creditors for his costs when the assets of the company have been exhausted.

Beaubien v. Corticelli Silk Co., 14 Que. P.R. 194.

UPON NONPRODUCTION OF DOCUMENT.

Where a defendant, in his defence, takes exception to the nonproduction of a note, and the plaintiff does not file the note in the record until the time of the filing of his answer, the plaintiff should bear the costs of his action up to the time of the filing of the answer.

National Breweries v. Guillemette, 50 Que. S.C. 329.

TRESPASS ACT—SMALL DEBTS COURT ACT.

Where an action under the Trespass Act, R.S.B.C. 1911, c. 230, is brought before a stipendiary magistrate, he can adjudicate thereon only by virtue of the powers conferred upon him by subs. 1 of s. 4 of the Small Debts Court Act, R.S.B.C. 1911, c. 57; the court in which he sits is the Small Debts Court and no fees or costs, other than disbursements, can be taxed against the unsuccessful party.

Farquharson v. Cortesi (B.C.), [1918] 3 W.W.R. 193.

TRESPASS—PAYMENT INTO COURT—AMENDMENT OF DEFENCE.

Where in an action for trespass against a railway company the defendant made a payment into court after defence, to the knowledge of counsel for the plaintiff, although it did not amend the defence accordingly, but the Trial Judge stated that he had intended to allow the amendment, that he thought he had done so, that leave was given at the commencement of the trial, and the trial proceeded on that assumption, and the plaintiff took chances on a decision in his favour, held that an order giving the plaintiff costs up to the leave to amend the defence had been properly made.

Tutt v. Grand Trunk Pacific R. Co., [1918] 3 W.W.R. 500, 26 B.C.R. 90.

ACTION FOR TRESPASS BROUGHT AGAINST AGENT OF REAL TRESPASSER—JUDGMENT FOR COSTS RECOVERED AGAINST DEFENDANT—MOTION FOR ORDER FOR PAYMENT OF SUCH COSTS BY PRINCIPAL—ELECTION TO SUE AGENT—IRREVOCABILITY AFTER JUDGMENT.

Gentles v. Byrne, 14 O.W.N. 4.

ACTION FOR MONEY DEMAND—DEFENCE OF FRAUD—FAILURE TO ESTABLISH—ALLOWANCE OF FULL COSTS.

In an action, to recover a balance of the price of machinery sold by the plaintiffs to the defendant, the defendant set up fraud and misrepresentation, and at the trial failed to substantiate his allegations; the trial lasted four days, almost wholly taken up by the defence:—Held, that the plaintiffs should be allowed their full costs against the defendant, irrespective of the statutory limit of $300.

Case Threshing Machine Co. v. Godin, 29 W.L.R. 26.

DELAY OF DELIVERY OF DEFENCE—COSTS.

Where defendants file a demand for notice of proceedings and postpone a delivery of defence until after they have received notice of an application for judgment in default of defence they should bear the costs of that application so rendered abortive by their action.

Haggas v. Schickendanstz, 7 W.W.R. 996.

INTEREST ON.

A defendant, who pays costs prior to a successful appeal to the Supreme Court, is not upon their return entitled to interest upon such costs.

Royal Bank v. Whieldon (B.C.), [1917] 2 W.W.R. 58.

APPLICATION OF COSTS R. 29.

Rule 29 of Rules as to costs applied, and although plaintiff recovered judgment on his claim for more than the defendants' judgment on their counterclaim, the defendants (the purchasers), being much the more successful in the action, were alone allowed to tax and recover costs.

Yeast v. Knight & Watson, [1919] 2 W.W.R. 467.

CLAIM MADE AT TRIAL—OPPOSED—GENERAL COSTS GIVEN.

Plaintiff's claim for recognition as a shareholder of defendant company was not made until the trial, but as the claim was opposed by defendant's counsel plaintiff was given his general costs of action.

Lindsay v. Red Jacket Rural Telephone Co., [1919] 3 W.W.R. 51.

(§ I—2)—INTERLOCUTORY MOTION—NEW POINT.

Costs should not be refused the successful party upon an interlocutory motion merely because the point of practice raised is new in that jurisdiction.

Burton v. Hyland, 16 D.L.R. 13, 47 N.S.R. 561.

ON DISMISSAL OF APPEAL FROM EXPROPRIATION AWARD — TAXATION — AMOUNT AWARDED.

Sask. Land & Homestead Co. v. C. & E.R. Co. (Alta.), 33 D.L.R. 174.

SET OFF—WORKMEN'S COMPENSATION—ALLOWANCE AFTER UNSUCCESSFUL NEGLIGENCE ACTION.

On allowing compensation under the Workmen's Compensation Act (B.C.) it may be directed that the plaintiff receive only such costs as would have been incurred had her claim been limited to statutory proceedings under the latter Act, with a deduction therefrom of the defendant's extra costs occasioned by reason of the plaintiff proceeding by action. [Cattermole v. Atlantic Transport Co., [1902] 1 K.B. 204, 71 L.J.K.B. 173, 18 T.L.R. 102, applied.]

McCormick v. Kelliher (No. 2), 7 D.L.R. 732, 18 B.C.R. 57, 2 W.W.R. 719. [Affirmed, 9 D.L.R. 392, 18 B.C.R. 57 at 58.]

LIABILITY FOR — ON DISMISSAL — AMENDMENT OF PLEADINGS AT TRIAL.

A defendant cannot be required to pay the general costs of an action for damages which wholly fails. While the court may, on allowing the defendant to amend his pleading at the trial, by setting up the Statute of Frauds, impose terms for the payment of the costs so far incurred, and may relieve against such costs if it turns out that there was a good defence dehors the added plea, the court cannot impose costs on the defendant where such leave was granted unconditionally and the action was dismissed, particularly where there was a good defence apart from the Statute of Frauds.

Vipond v. Sisco, 14 D.L.R. 130, 29 O.L.R. 200.

REFUSAL OF, ON DISMISSAL—DEFENDANTS JOINED AND PLEADING WITHOUT SEVERING OF DEFENCE.

Where the owner of an automobile and the person who was running it at the time of an accident were joined as defendants and, without severing their defences, were represented at the trial by the same counsel, costs will not be granted either defendant where the damage action was dismissed as to the owner of the automobile because the person operating it was not his servant, and as to the latter because of the plaintiff's own negligence in the operation of his car.

The B. & R. Co., v. McLeod, 7 D.L.R. 579, 5 A.L.R. 176, 22 W.L.R. 274, 2 W.W.R. 1093.

DISMISSAL OF ACTION—PLAINTIFF MISLED BY DEFENDANT'S CONDUCT.

Upon the dismissal of an action for damages for the breach of an agreement to sell land, upon the ground that those who purported to act for the defendant had no authority to make such contract, costs will not be awarded against the plaintiff, who was misled by the defendant's conduct into the belief that he was dealing wth a person who had the right to contract with him.

Boland v. Philp, 5 D.L.R. 81, 3 O.W.N. 1562, 22 O.W.R. 819.

SUCCESSFUL DEFENDANT—SLANDER ACTION.

Costs of defence may be refused in an action for slander to a successful defendant who is found not to have used the alleged slanderous words, if by his pleading he has set up not only a denial of the use of the words but also a plea that if he had used them they were true, if the evidence shews that they were not true.

Lucyk v. Goski, 3 D.L.R. 805, 21 W.L.R. 581, 2 W.W.R. 669.

DISMISSAL OF ACTION—AMOUNT AWARDED DEFENDANTS.

Where an action is dismissed on the ground that the court is deprived of jurisdiction by a statute, the defendant may be allowed only such costs as he would have been entitled to, if he had specially pleaded the statute and then moved for judgment on the pleadings.

Sandwich Land Improvement Co. v. Windsor Board of Education, 3 D.L.R. 423, 3 O.W.N. 1150.

WHERE SUCCESS DIVIDED—PART OF ACTION DISMISSED.

In an action for various sums of money claimed to be due the plaintiff from the defendant, the defendant, among other defences, asserted that no demand was ever made for one of the sums claimed to be due, and also filed a statement of account between the parties shewing the balance due the plaintiff and paid the same into court and the statement was found to be correct, and the defences were upheld, except that the demand aforesaid was found to have been made, and there was judgment for the plaintiff for the amount paid into court, the plaintiff should have costs up to the trial and costs of trial as to the issue on the demand and the defendant his costs of trial on the issues in which he was successful.

Chapdelaine v. Wilkinson, 4 D.L.R. 200, 20 W.L.R. 775.

RIGHT TO RECOVER—IRREGULAR LOCAL OPTION ELECTION—STATUS OF PROMOTERS AND MUNICIPALITY.

Where both the promoters of a by-law to repeal a local option by-law and the municipality were cognizant of gross irregularities in the submission and voting and did not protest, neither party is entitled to costs in an action for a declaration that the by-law was irregular.

Stoddard v. Town of Owen Sound, 8 D.L.R. 932, 27 O.L.R. 221.

UNSUCCESSFUL APPLICANT—IN LUNACY PROCEEDINGS.

The unsuccessful applicant for an order declaring lunacy may be ordered to pay

the costs of an issue directed upon his application.

Peel v. Peel, 3 D.L.R. 696, 3 O.W.N. 1127, 21 O.W.R. 945.

ON DISMISSAL—ABSENCE OF OFFERING ANY EVIDENCE—PREFERENCE.

Gold Medal Furniture Co. v. Stephenson, 7 D.L.R. 811, 22 Man. L.R. 471, 22 W.L.R. 633, 4 W.W.R. 7.

ON SETTLEMENT OR COMPROMISE.

A defendant who settles a case directly with the plaintiff prevents the fulfilment of the conditional right of plaintiff's attorney to payment of his costs, and the fulfilment of such condition being so prevented by the debtor the condition becomes absolute. (C.C. 1084.)

Scale v. Bowers, 1 D.L.R. 632.

COSTS OF ONE DEFENDANT UNPROVIDED FOR —REMEDY—PRACTICE.

Benedict v. Brandon, 3 D.L.R. 887, 3 O.W.N. 1508.

APPEAL FROM SUMMARY CONVICTION — QUASHING FOR NONPROOF OF NOTICE—HEARING AND DETERMINING—COSTS UNDER RECOGNIZANCE.

Although Cr. Code, s. 755 applies to authorize an order against the appellant for costs of an appeal not prosecuted or entered only in case a valid notice of appeal has been given from a summary conviction, the court has power under Code, s. 751 to award costs where the appeal is brought on for hearing, but the defendant (respondent) succeeds in having the same quashed or dismissed upon objection taken that notice of appeal had not been served upon him and that there was no sufficient proof of compliance with an alternative method of service available to the appellant, viz., service upon the trial justice. [R. v. Edelston, 17 Can. Cr. Cas. 155, disapproved; Ex parte Sprague, 8 Can. Cr. Cas. 109, considered.] Where the appellant has filed his recognizance in the statutory form on an appeal from a summary conviction he thereby submits to an award of costs against him on the quashing of the appeal for failure to prove compliance with the statutory prerequisites, and this apart from the power given under Cr. Code 751.

Pahkala v. Hannuksela (No. 1), 8 D.L.R. 34, 20 Can. Cr. Cas. 247, 2 W.W.R. 911.

ON ADJOURNMENT.

Where immediately before the time set for the trial of an action the party who finally prevailed changed his solicitor and was therefore not ready to proceed to trial at that time, the other party will be entitled to the costs occasioned by the delay and the prevailing party will be entitled only to the same fees for the attendance of his witnesses as if the trial had proceeded on the day fixed for it.

Alfred Thien v. The Bank of B.N.A., 4 D.L.R. 388, 4 A.L.R. 228, 21 W.L.R. 192, 1 W.W.R. 795.

ON APPEAL.

An appellant who succeeds to a substantial extent on the appeal is entitled to be allowed the costs of the appeal.

Munic. of Bow Valley v. McLean, 26 D.L.R. 716, 33 W.L.R. 893, varying 24 D. L.R. 587.

REHEARING OF APPEAL OF REMITTED CASE.

Johnson v. Chomyszyn, 30 D.L.R. 553, 9 S.L.R. 301, 34 W.L.R. 1166. [See also 27 D.L.R. 786, 34 W.L.R. 389.]

APPEAL—OPPRESSIVE CONDUCT.

A respondent who simply declines to do anything to assist an appellant in his appeal is not guilty of oppressive conduct entitling the court to deprive him of the costs of the appeal.

Thompson v. Denny, 39 D.L.R. 421, 25 B.C.R. 29, [1918] 1 W.W.R. 435.

FOREIGN COMPANY — APPEAL — SECURITY.

If a foreign person or company is brought into an action in Ontario, either by being properly served abroad, or on his application to be added as a party defendant, and after having been heard is unsuccessful and desires to appeal, the court has power to order such person or company to give such security as will enable the resident parties to recover their costs if they succeed. The amount fixed should be sufficient only to cover the costs of the appeal.

Bailey Cobalt Mines v. Benson, 43 D.L.R. 692, 43 O.L.R. 321. [See 14 O.W.N. 174, 44 O.L.R. 1, 45 D.L.R. 585.]

EXECUTION FOR—APPEAL TO SUPREME COURT OF CANADA BY ONE PLAINTIFF—ENFORCEMENT OF EXECUTION AGAINST NONAPPEALING PLAINTIFFS—STAY UPON PAYMENT OF AMOUNT INTO COURT TO ABIDE RESULT OF APPEAL—COSTS OF APPLICATION—FORUM—JUDGE OF APPELLATE OR HIGH COURT DIVISION—SUPREME COURT ACT, R.S.C. 1906, c. 139, s. 76.

Maple Leaf Lumber Co. v. Caldbick and Pierce, 14 O.W.N. 99. [See 39 O.L.R. 512.]

ACTION FOR ALIMONY—APPEAL—DISBURSEMENTS.

Whimbey v. Whimbey, 14 O.W.N. 158.

MONEY PAID INTO COURT BY DEFENDANT—APPLICATION FOR COSTS UNDER R. 18 DISTRICT COURT RULES.

A defendant paid a certain sum of money into court with his defence and denied liability. Judgment was subsequently given to the plaintiff for this amount and costs. On motion to vary the judgment on appeal and have the costs of the action governed by r. 18 District Court Rules, costs were awarded to the defendant in the action subsequent to the delivery of the defence. [J. R. Munday v. London County Council [1916], 1 K.B. 159, [1916] 2 K.B. 331, referred to.]

Cook-Henderson Co. v. Allen Theatre Co., 49 D.L.R. 503, [1919] 3 W.W.R. 782, varying 47 D.L.R. 357.

On dismissal—Absence of offering any evidence—Preference.

Gold Medal Furniture Co. v. Stephenson (No. 2), 10 D.L.R. 1, 23 W.L.R. 664, 4 W.W.R. 7, varying 7 D.L.R. 811, 23 Man. L.R. 159.

Higher scale—Deceit of defendant.

Flagrant deceit on the part of the defendant in the dealings complained of is a good ground for allowing the plaintiff costs on the higher scale, although the amount recovered is within the lower scale tariff.

MacKissock v. Brown, 10 D.L.R. 472, 23 Man. L.R. 348, 23 W.L.R. 782, 4 W.W.R. 60.

On dismissal—Trade-mark registration—Petition against refusal to register.

Costs incurred by the trade-mark branch of the Department of Agriculture in successfully opposing a petition to the Exchequer Court for an order to register a trade-mark may be ordered to be taxed against the petitioner.

Re Noelle, 14 D.L.R. 385, 13 E.L.R. 366.

Discretion to refuse on dismissal—Joining unwarranted defence.

Costs may be refused the ship owners on dismissal of an action for seamen's wages, if the owners, in addition to the defence upon which they succeeded, have pleaded other alleged grounds of defence not warranted by the facts, and thereby added to the expense of the trial.

McArthur v. "The Johnson," 9 D.L.R. 568, 18 B.C.R. 94, 14 Can. Ex. 321, 23 W.L.R. 619.

On dismissal—Special power in alimony actions.

The court may in a proper case order the defendant husband to pay his wife's full costs of an alimony action where satisfied that his conduct has been reprehensible although insufficient to constitute legal cruelty so as to entitle her to a decree.

Moon v. Moon, 9 D.L.R. 679, 6 S.L.R. 41, 23 W.L.R. 153, 3 W.W.R. 856.

On appeal—On granting relief on question first raised on appeal.

Costs will be refused on granting relief from a forfeiture where such relief was not claimed in the pleadings, and was raised for the first time in the appellate court.

Brandon Construction Co. v. Saskatoon School Board (No. 2), 13 D.L.R. 379, 6 S.L.R. 273, 25 W.L.R. 6, 4 W.W.R. 1243.

On appeal—Correcting error which might have been corrected below.

Costs of appeal will not be awarded an appellant who succeeds only in respect of an error which was a mere oversight in the judgment appealed from and which it could be assumed would have been corrected had application been made to the trial judge.

Gordon v. Gowling, 14 D.L.R. 517, 5 O.W.N. 269, 25 O.W.R. 276.

On appeal—To Privy Council—When chargeable against unsuccessful appellant.

An appellant should be charged with the costs of an unsuccessful appeal to the Privy Council as of the date when the judgment therefor is made a judgment of the court in which it is to be enforced.

Williams v. Box, 15 D.L.R. 261, 24 Man. L.R. 31, 26 W.L.R. 461, 5 W.W.R. 912.

On appeal—New trial.

On the allowance of an appeal from a judgment granting a nonsuit, on the defendant's application, at the close of plaintiff's case, the costs of the appeal and of the abortive trial may be awarded against him as a term of granting a new trial to enable him to adduce evidence in answer.

Mars v. Drury, 9 D.L.R. 638, 6 S.L.R. 185, 23 W.L.R. 538, 3 W.W.R. 1143.

Appeal—Petition to revise—Delay pending appeal—Justification.

The party ordered to pay costs under a judgment of the Court of King's Bench, Que. (appeal side), is justified in delaying his petition to revise the plaintiff's bill of costs in the Superior Court until an appeal from the King's Bench, Que., to the Privy Council on the merits has been disposed of, particularly where the plaintiffs had not tried to execute the judgment in their favour until after the Privy Council decision affirming same. [Wills v. Central Ry. Co., 19 D.L.R. 174, referred to.]

Wills v. Central R. Co., of Canada, 20 D.L.R. 943. [See also, 19 D.L.R. 174.]

On appeal—How taxed—Important questions.

Mowatt v. Goodall, 24 D.L.R. 891, 22 B.C.R. 167, 33 W.L.R. 230. [See also, 24 D.L.R. 781.]

Proceeding under Municipal Act—County Court Judge—Power to award costs—Judges' Order Enforcement Act—Costs of appeal.

Re Township of Ashfield & County of Huron, 36 D.L.R. 785, 39 O.L.R. 332, varying as to costs 34 D.L.R. 338, 38 O.L.R. 538.

Taxation—Counterclaim.

Where the plaintiff fails in his action and the counterclaiming defendants succeed on their counterclaim, the rule is to allow the defendants their general costs in the action and additional costs so far as the costs have been increased by reason of the counterclaim. [Saner v. Bilton, 11 Ch. D. 416, and Atlas Metal Co. v. Miller, [1898] 2 Q.B. 500, applied; Les Soeurs v. Forest, 20 Man. L.R. 301, applied.]

Cox v. Canadian Bank of Commerce, 9 D.L.R. 846, 23 Man. L.R. 25, 23 W.L.R. 376, 3 W.W.R. 1011, affirming 8 D.L.R. 30.

On set-off or counterclaim—Scale of.

The costs of a counterclaim should be on the scale of the court in which the action is brought, unless otherwise ordered by

the court. [Foster v. Viegel, 13 P.R. 133, followed.]

Gordon v. Gowling, 14 D.L.R. 517, 5 O.W.N. 269, 25 O.W.R. 276.

WAR RELIEF ACT, 8 GEO. V. 1918, ALTA. C. 24—TECHNICALITY—COSTS TO DEFENDANT—SET-OFF IN FAVOUR OF PLAINTIFF—NEW ACTION TO BE BROUGHT—UNPAID COSTS OF DEFENDANT'S SOLICITORS—LIEN—APPEAL.

Costs in an action under the War Relief Act, 8 Geo. V. 1918, Alta., c. 24, dismissed because of a technicality, should be awarded to the defendant, but as the plaintiff's right of action is unaffected, these costs should be set off against any costs which may be awarded him in a new action. Any claim by the defendant's solicitors to a lien for costs will not interfere with such set-off. [Puddephatt v. Leith (No. 2), [1916], 2 Ch. 108, followed; Automatic Weighing Machine Co. v. Combined Weighing & Advertising Machine Co., 58 L.J., Ch. 647, distinguished.]

Union Bank v. Ballard, 46 D.L.R. 640, [1919] 3 W.W.R. 988.

COUNTERCLAIM FOR TORT—WAIVER.

The defendant's right to the costs of a successful counterclaim for conversion is not waived by adoption of the amount for which the converted materials were sold as a measure of damages.

McLeod v. Sault Ste. Marie Public School Board, 29 D.L.R. 661, 36 O.L.R. 415.

ACTION FOR BREACH OF WARRANTY—COUNTERCLAIM.

A defendant counterclaiming for the price of goods in an action for breach of warranty of sale will not be allowed his costs where the counterclaim is undisputed and the plaintiff otherwise succeeds on all the issues of the action, notwithstanding that on appeal by the plaintiff and cross-appeal by defendant the amount of damages allowed for the breach had been reduced.

Victoria Saanich Co. v. Wood Motor Co., 23 D.L.R. 79, 21 B.C.R. 515, 31 W.L.R. 853, 8 W.W.R. 1124.

PLEA OF SET-OFF.

Costs may be properly allowed to a defendant who succeeds on the plea of set-off.

Powell v. Montgomery, 23 D.L.R. 213, 8 S.L.R. 224, 31 W.L.R. 759.

ACTION FOR BALANCE OF PRICE OF GOODS—DISPUTE AS TO QUANTITY SOLD—FINDINGS OF FACT OF TRIAL JUDGE—FAILURE OF PLAINTIFF ON MAIN ISSUE—RECOVERY OF SMALL SUM—PLAINTIFF ORDERED TO PAY DEFENDANTS' COSTS—DISCRETION OF TRIAL JUDGE—JUDICATURE ACT, SS. 24, 74, (1)—APPEAL.

The plaintiff sued the defendants for $1,432.65, the balance of the price of a stock of glue which he alleged he had sold to the defendants. There was a dispute between the parties as to the quantity of glue that had been sold. The glue was in two lots, one a small lot, upon the plaintiff's own premises, the other a larger lot, in a warehouse. Both lots were sent to the defendants; they refused to accept the larger lot, and endeavoured to return it, but the plaintiff would not receive it back. The trial judge (there was no jury) gave judgment for the plaintiff for the price of the small lot only, $162.85, and directed that the plaintiff should pay the defendants' costs of the action, less the $162.85:—Held, upon appeal, that the finding of the Trial Judge upon the evidence could not be disturbed, and the court could not interfere with his discretion as to the costs: ss. 24 and 74 (1 of the Judicature Act, R.S.O. 1914, c. 56. Discussion of the extent of the discretion of the court as to costs and reference to authorities.

Le Page v. Laidlaw Lumber Co., 43 O.L.R. 400.

APPEAL FROM COUNTY COURT—AMOUNT INVOLVED.

In an action brought in the County Court on a promissory note under $80, the judge of that court set aside the defence and there was an appeal to the Supreme Court where the judgment in the County Court was affirmed. Held, that the order dismissing the appeal should be taken with costs on the lower scale.

Shaffner v. Miller, 49 N.S.R. 279.

APPEAL—INTERLOCUTORY JUDGMENT.

An order nisi of foreclosure of an agreement for sale is an interlocutory judgment within the meaning of s. 122 (1) of the County Courts Acts, and the costs of the appeal from such judgment are limited to $50.

Gale v. Powley, 22 B.C.R. 527. [See also 24 D.L.R. 450.]

APPEAL INVOLVING SEVERAL ESTATES.

In an appeal asserted by defendant against several parties two estates were concerned, the position of the one being somewhat different from the other. There was but one appeal and one argument although a third counsel was permitted to be heard. The appeal was dismissed:—Held, that under the circumstances, two bills of costs should be allowed, but, as the brief and counsel fee would be the principal items, the aggregate of the two bills should not greatly exceed what would be allowed if there was but one bill against defendant.

Grey v. Anderson, 50 N.S.R. 556.

OF APPEAL.

Costs of an appeal not given a successful appellant who was responsible for the wrong order appealed from and costs of the application below given to the respondent.

Sellon v. Keane, 24 B.C.R. 238, [1917] 3 W.W.R. 342.

ON INSCRIPTION FOR REVIEW.

A defendant, who has appeared but not pleaded, and who inscribes for review the judgment given ex parte, will not be given costs against his opponent if the judgment is modified on the grounds which only arose on the hearing of the case.

Versailles v. Harel, 47 Que. S.C. 468.

ON ADJOURNMENT—ORDER FOR PAYMENT OF OPPONENT'S COSTS OCCASIONED BY DEFAULT—DISMISSAL OF ACTION IN DEFAULT OF PAYMENT.

Broom v. Royal Templars, 25 O.W.R. 250.

APPEAL FROM ORDER IN INTERLOCUTORY PROCEEDING.

A successful appellant from a judgment or order in an interlocutory proceeding is as a general rule entitled to the costs of the appeal forthwith after taxation and to the costs below in any event in the cause.

Malkin Co. v. McGaghran, 20 B.C.R. 479.

WITHDRAWAL OF APPEAL.

An objection to the jurisdiction should be taken by motion to quash. If left until the case comes on for hearing and the appeal is quashed, the respondent should only have the costs of a motion to quash.

Dirks v. Fast, 8 S.L.R. 343, 32 W.L.R. 967, 9 W.W.R. 583.

COSTS ON APPEAL—JUDGMENT MAINTAINING INJUNCTION—APPEAL MAINTAINED EXCEPT AS TO PECUNIARY CONDEMNATION—COSTS — C.P. 549 — DELAY FOR REVISION—C.P. 554.

If a judgment confirming a defendant to a certain amount of costs and declaring perpetual an interlocutory injunction given against him, in appeal from, and the pecuniary condemnation is maintained "with costs, as prayed for in the court below," but the injunction is dissolved with costs of the appeal, Superior Court costs will not be allowed on the injunction proceedings. The delay to have the taxation of a bill of costs revised is suspended by an appeal to the Privy Council. [Henderson v. Craig, 7 Que. S.C. 516; Odell v. Bell, 2 Que. P.R. 202.]

Wilkes v. Central R. Co. of Canada, 16 Que. P.R. 279.

DISMISSAL — NOMINAL PLAINTIFF — HUSBAND AND WIFE.

Where an action is dismissed with costs against the plaintiff, and the defendant being unable to realize such costs, moves for an order for the payment thereof by a person not a party to the action on the ground that the action was really that of such person and the plaintiff was put forward in order that he might not be held for costs, and the material before the court is not such as would have justified an order for security for costs against the plaintiff, the application will a fortiori fail.

Hill v. Wright, 12 A.L.R. 96, [1917] 3 W.W.R. 442.

The costs of the attorney for the wife who fails in an action en séparation de corps brought without the husband's consent but authorized by the court can only be recovered from the wife personally and not from the husband as head of the community or from the community.

Hackett v. Standish, 13 Que. P.R. 210.

The party whose claim or process has been dismissed by the court can take fresh proceedings without having first paid the costs incurred by the adverse party in the orginal claim so dismissed.

Mercure v. Bassinet, 13 Que. P.R. 379.

Where the plaintiff could have secured the relief to which he was entitled without proceeding to trial, the principal should not be required to pay the costs of the successful defendant. The agent who defended only as to the issues in which relief was asked as against the agents was entitled to be paid his costs by the plaintiff, but the agent who defended as to all issues should not get any costs.

Waite v. Edwards, 4 S.L.R. 300.

TARIFF — ACTION FOR OVER $10,000 — PLAINTIFF DISCONTINUING ON RETURN DATE.

When a plaintiff discontinues his action for over $10,000 on the very day of the return of the writ, the defendant who has appeared is entitled to his appearance fee but not to the additional fee granted by s. 5 of the tariff, in a contested case.

Shapiro v. Rosenburg, 15 Que. P.R. 436.

HUSBAND AND WIFE — ALIMONY — COSTS OF UNSUCCESSFUL APPEAL BY WIFE — DISBURSEMENTS — R. 388.

Wiley v. Wiley, 15 O.W.N. 408.

DISMISSAL ON APPEAL.

If on appeals from judgments maintaining a principal action and an action in warranty, both actions are dismissed, the defendant in warranty is entitled to a whole bill of costs, and not only to half fees. [Compare Leduc v. Corp. de St. Louis-de-Gonzague, 5 Que. P.R. 448.]

Employers Liability Assur. Corp. v. Moineau, 17 Que. P.R. 409.

DISMISSAL OF ACTION—DISCRETION.

When a defendant succeeds in his defence, and has the action dismissed, he is entitled to his costs, unless the judge refuses them to him on the ground of special reasons. It is not sufficient for him to declare that the defendant is of a fighting disposition.

Payette v. Hébert, 54 Que. S.C. 122.

DISMISSAL OF SEPARATION ACTION.

The discretion granted to the Trial Court by art. 549 C.C.P., as to the granting of costs, applies to an action for separation from bed and board; and a defendant, who succeeds in having the application made against him by his wife dismissed, will be given the costs when the use of such discretion is justified by special circumstances.

Langlois v. Gourgue, 54 Que. S.C. 330.

APPEAL DISMISSED FOR WANT OF PROSECUTION — COSTS OF MOTION ONLY GIVEN WHERE DEMAND MADE.

Bell v. C.P.R., 34 W.L.R. 1227.

UPON STRIKING OUT APPEARANCES.

Under O. X, relating to striking out appearance, the defendant is only entitled to the costs of applications thereunder, (1) if the plaintiff makes an application not within the order, or (2) where the plaintiff in the opinion of the judge knew that the

defendant relied on a contention which would entitle him to unconditional leave to defend.

Quebec Bank v. Kohn, 9 W.W.R. 576.

EXECUTION — APPEAL — CREDITOR'S RELIEF ACT.

Unsuccessful execution creditors held liable for costs on an application by a sheriff under s. 13 of the Creditor's Relief Act, and on appeal from the judgment thereon.

Rogers Lumber Yards v. Stuart, 39 D.L.R. 771, [1917] 3 W.W.R. 1090.

CRIMINAL LAW — CONVICTION QUASHED ON CERTIORARI PROCEEDINGS.

Where a conviction is quashed on certiorari proceedings costs may be given to appellant against informant. [Review of authorities.] As a general rule, both in appeals by way of stated case and appeals by way of certiorari the costs should follow the event; but there will be many exceptions to the rule, and the circumstances in each case must be taken into account.

R. ex rel. Van Corder v. Standall, [1919] 2 W.W.R. 632.

SUPREME COURT ACT, S. 55.

Where appellant succeeded on appeal in reducing the amount awarded by the jury by an item of damages improperly allowed and wrongly admitted in evidence, he was nevertheless ordered to pay the costs of appeal, having regard to s. 55 of the Supreme Court Act as he had not objected to the admission of such evidence at the trial. Explanation of the question of the costs in Gavin v. Kettle Valley Ry. Co., and references to the reasons for judgment of the Supreme Court of Canada in that case, 47 D.L.R. 65, 58 Can. S.C.R. 501, [1919] 2 W.W.R. 612.

Ward v. Mainland Transfer Co., [1919] 3 W.W.R. 193.

AMENDMENT OF PLEADINGS — ADJOURNMENT — VENDOR SETTING UP NONCOMPLIANCE WITH ACT RESPECTING HOMESTEADS IN DEFENCE TO ACTION BY PURCHASER — DISMISSAL OF ACTION — COSTS.

Where at commencement of trial defendant who was sued as vendor for specific performance of sale of land applied to amend by setting up that part of the land was his homestead and an Act respecting Homesteads was not complied with, but rather than have the trial adjourned withdrew the application but the case was adjourned at request of plaintiff who subsequently, having examined defendant for discovery on the point and on defendant moving again to amend, agreed to an order dismissing the action, costs were given against plaintiff. [Etter v. Saskatoon, 39 D.L.R. 1, distinguished.] It is the duty of any one dealing with lands, a purchaser as well as a vendor, to see that a public statute such as an Act respecting Homesteads is complied with.

Parks v. Miles, [1919] 2 W.W.R. 659.

(§ I—3)—ON AMENDMENT.

Upon permitting an amendment as to the name of one defendant from the "municipality of Saanich" to its true corporate name, "the corporation of the district of Saanich," costs will not be awarded the defendants where they were not misled by the error in the name of such defendant.

Robinson v. District of Saanich and Aikman, 7 D.L.R. 499, 20 W.L.R. 235, 20 Can. Cr. Cas. 241.

ACCOUNT — PARTNERSHIP — DEATH OF PARTNER — ADMINISTRATION — COSTS OF REFERENCE.

Moore v. Moore, 10 O.W.N. 7.

IN SUIT FOR ACCOUNT.

When the defendant ès qualité denies the right of the plaintiff to an account and asks to have the action therefor dismissed he will be personally ordered to pay the costs if the judgment declares that the account should have been rendered.

Hathorn v. O'Borne, 13 Que. P.R. 200.

(§ I—4)—RIGHT TO ALLOWANCE — INJUNCTION.

On judgment for plaintiff in an action for injunction against, and damages for, trespass upon lands and for cutting timber therefrom, he is entitled to costs, though defendants acted innocently in the trespass, especially where they could have avoided prosecution of the action beyond an injunction motion by admitting their wrong and by submitting to an injunction. [Cooper v. Whittingham, 15 Ch.D. 501, referred to.]

Field v. Richards, 11 D.L.R. 120, 4 O.W.N. 1301, 24 O.W.R. 606. [Affirmed, 13 D.L.R. 943, 24 O.W.R. 987.]

IN SUIT FOR INJUNCTION.

Where the plaintiff, a ratepayer, upon being informed by an alderman that a city council intended to carry out an illegal agreement for the exchange of land without submitting the agreement to the people, or passing a by-law in relation thereto, obtained an injunction preventing the carrying out of such agreement, the subsequent abandonment of the plan will not deprive the plaintiff of his costs.

Pringle v. Stratford, 4 D.L.R. 173, 22 O.W.R. 215.

REAL LITIGANT BEHIND NOMINAL PLAINTIFF.

The real litigant who puts up a man of straw in whose name the litigation is carried on in order to avoid liability on the part of the real litigant for costs may, on dismissal of the claim, be cited by notice to appear and shew cause and may thereupon be ordered in a proper case to pay the costs of the opposite party even when the nominal litigant had a legal status similar to that of the real litigant to institute the proceedings. [The Queen v.

Greene, 4 Q.B. 646, 12 L.J. N.S. Q.B. 239, applied.]

Re Sturmer and Town of Beaverton, 2 D.L.R. 501, 25 O.L.R. 566, 21 O.W.R. 55, affirming 25 O.L.R. 190.

INTERIM INJUNCTION — MOTION TO CONTINUE.

Southby v. Southby, 11 O.W.N. 163.

INTERLOCUTORY INJUNCTION — CAUSE OF ITS ISSUE DISAPPEARED — COSTS — QUE. C.P. 549, 957.

On Aug. 28 the city of Montreal adopted a resolution which it amended on Sept. 1 following. On Sept. 3, the petitioner had served a petition for interlocutory injunction, complaining of that part of the resolution which had been struck out at the sitting on Sept. 1. The petitioner's negligence in not going to consult the registers in order to ascertain the changes, justifies the court in condemning him to pay the costs of the petition.

Seneeal v. Montreal, 16 Que. P.R. 178.

(§ I—6)—BORNAGE — CONTESTATION OF BOUNDARIES — AMENDMENT.

In an action en bornage the plaintiff who demands a boundary following his possession and his title, but who alleges that he holds land of a greater extent than that allowed him by the judgment, should not for that reason be condemned to pay the costs of the action. On the contrary, the defendant who contests the necessity of the bornage and asks that the action be dismissed, and who finally acquiesces in the bornage only during the hearing by an amendment to his defence, should be condemned to pay the costs of the action.

Courtemanche v. Girouard, 48 Que. S.C. 168.

CONTESTATION OF BOUNDARIES.

A party asking that an action for the settling of boundaries be dismissed on the ground that the plaintiff is not an adjoining owner must pay the costs of the action and of the contestation if he fails in his claims.

Morneau v. Bélanger, 49 Que. S.C. 39.

(§ I—7)—ON FORECLOSURE — MORTGAGES — PRIORITY.

An unsuccessful mortgagee upon a dispute with other mortgagees as to priority of encumbrances is not entitled to add his costs to the mortgage debt so as to charge the land where the priority of registration of the mortgage under which he claims is displaced by proof of notice of the other mortgage within the exception contained in the Registry Act (Ont.).

Heney v. Kerr, 19 D.L.R. 597, 30 O.L.R. 506.

FORECLOSURE OF MECHANICS' LIEN — SUBSEQUENT ACTIONS.

Where more than one action is brought for the enforcement of mechanics' liens, the person bringing the subsequent action will not be entitled to the costs thereof.

St. Pierre v. Rekert, 23 D.L.R. 592, 8 S.L.R. 416, 31 W.L.R. 909.

ON FORECLOSURE.

Where no claim was made against some of the defendants in an action to foreclose a mortgage, they are not entitled to costs against the plaintiff.

McGregor v. Hemstreet, 5 D.L.R. 301, 20 W.L.R. 642, 2 W.W.R. 284.

MORTGAGEE'S COSTS ON FORECLOSURE — OFFER TO PAY WITHOUT TENDER.

A mortgagee is entitled to the costs of foreclosure subsequent to an offer of the mortgagor to pay the arrearages and costs, when taxed, unless the latter pays or tenders the mortgagee the amount so due him. [Hodges v. Croydon, 3 Beav. 86, followed; Greenwood v. Sutcliffe, [1892] 1 Ch. 1, specially referred to.]

The Western Trusts Co. v. Popham, 3 D.L.R. 326, 5 S.L.R. 226, 21 W.L.R. 187, 2 W.W.R. 297.

FORECLOSURE BY ASSIGNEE FOR CREDITORS.

In a suit for foreclosure an official assignee for benefit of creditors under the Manitoba Assignments Act, who is made one of the defendants to the action, is not liable to be ordered to pay costs either personally or out of the funds of the insolvent estate if before defence he had given notice to the plaintiff that he disclaimed all interest in the land and did not propose to defend unless costs were asked against him, and on refusal of this term made a similar disclaimer in his defence filed. [Ford v. Chesterfield, 16 Beav. 520, followed.]

Gibson v. Snaith, 21 D.L.R. 716, 25 Man. L.R. 278, 8 W.W.R. 247.

FORFEITURE ACTION — REPORT OF EXPERTS.

The costs of an action in which the plaintiffs ask that the defendant be deprived of his right to the usufruct to certain immovable properties are to be taxed according to the value of these properties. A party to an action has no right to enter in his bill of costs the expense of documents ordered and paid for in view of the trial. If there have been in the one cause reports made by different experts, appointed at different times by the court, the cost of the two reports may be entered in the bill of costs.

Rochon v. Sareault, 18 Que. P.R. 349.

ON FORECLOSURE — MORTGAGE — REDEMPTION — PAYMENT INTO COURT — MORTGAGEES IN POSSESSION.

Geller v. Benner, 4 O.W.N. 1565, 24 O.W.R. 875.

FORECLOSURE — FIRST AND SECOND MORTGAGES — CONSOLIDATION OF ACTIONS — SOLICITOR'S FEES.

Imperial Bank v. Norris (Alta.), 10 W.W.R. 1230.

FORECLOSURE OF MORTGAGE.

In an action for foreclosure of a mortgage none of the defendants appeared. The taxing master disallowed from the plain-

tiff's bill letters between the plaintiff and his solicitors acknowledging instructions, and between the plaintiff's solicitors and other parties obtaining information necessary for the commencement of proceedings, also letters from the plaintiff's solicitors to their legal agents acknowledging services and remitting fees, of affidavits of default and of military service used by the plaintiff's solicitors on the motion for the order nisi, copy of the bill of costs submitted for taxation, instructions for brief and brief on the motion for order nisi, and a counsel fee on the reference to the chambers clerk that was directed to ascertain the amount due under the mortgage for insertion in the order nisi. On review the Master in Chambers allowed all of the items.

Webber v. Wasili (Sask.), [1917] 3 W.W.R. 358.

(§ I—S.)—In expropriation matters.

On an information exhibited by the Attorney-General of Canada in pursuance of s. 3 of the Expropriation Act (c. 143, R.S.C. 1906), to determine the amount of compensation for the expropriation of land for a public work of Canada, the court may allow the defendant the costs of the action notwithstanding that his claim is extravagant and is materially reduced by the court.

The King v. McLaughlin, 26 D.L.R. 373, 15 Can. Ex. 417.

In eminent domain proceedings.

The successful owner taxing costs against a railway company in expropriation proceedings under s. 199 of the Railway Act, R.S.C. 1906, c. 37, must file an affidavit of increase as regards items of disbursement which he seeks to charge as reasonable expenses actually incurred, and it is not a valid objection to their allowance that the items do not correspond to any particular items of the tariff of costs promulgated by the court of superior jurisdiction in the province. Costs should be allowed for everything necessarily or reasonably done, and for every disbursement necessarily or reasonably made in order to properly present his case to the arbitrators, and the taxation should be on a solicitor and client basis rather than under the practice prevailing in party and party taxations. [C.N.R. Co. v. Robinson, 17 Man. L.R. 579, 8 Can. Ry. Cas. 244, followed; and see Hyde v. Mayor of Manchester, 12 C.B. 474; Malvern v. Malvern, 83 L.T. 326.]

Re False Creek Flats Arbitration (No. 3), 8 D.L.R. 922, 17 B.C.R. 376.

Interpleader issue.

In an interpleader issue in respect of an automobile seized by judgment creditors on execution which was found to be the property of the debtor's wife no costs should be taxed against the creditors where the wife permitted the machine to be registered in her husband's name.

Kelly v. Macklem, 3 D.L.R. 58, 3 O.W.N. 873.

Expropriation — Arbitrators' fees.

The arbitrators' fees are not to be included in and made part of the award in an expropriation for railway purposes; such fees are governed by s. 199 of the Railway Act, Can., and are to be taxed if the parties do not agree upon the amount.

Green v. C.N.R. Co., 22 D.L.R. 15, 8 S.L.R. 53, 19 Can. Ry. Cas. 139, 7 W.W.R. 1072.

Expropriation proceedings — Solicitor and client.

In case of an abandonment of expropriation proceedings, the owners are entitled to be fully indemnified for their costs as between solicitor and client and for all legitimate and reasonable charges and disbursements in consequence of the proceedings.

Quebec, Jacques-Cartier Electric Co. v. The King, 24 D.L.R. 424, 51 Can. S.C.R. 594.

Expropriation proceedings — Discretion as to awarding.

The power conferred on arbitrators by s. 344 of the Municipal Act, R.S.O. 1914, c. 192, as incorporated in the Public Parks Act, R.S.O. 1914, c. 203, to award costs as a fixed sum or on the scale of the courts, is discretionary, which they can exercise by disallowing costs.

Re Hislop & Stratford Park Board, 23 D.L.R. 753, 34 O.L.R. 97.

Expropriation of land — Costs of arbitration — Jurisdiction to grant.

Re Windatt & Georgian Bay & Seaboard R. Co., 24 D.L.R. 877, 34 O.L.R. 198.

Interpleader issues — Discretion as to — Execution creditor and claimant — Seizure of crop.

Beaver Lumber Co. v. Dolsen, 24 D.L.R. 895, 8 S.L.R. 231, 31 W.L.R. 819, 8 W.W.R. 1137.

Requirements of statutory notice as condition precedent to costs — Expropriation by railway.

A railway company expropriating lands must give the notice contemplated by the statute, i.e., offering to pay "a certain sum or rent, as compensation," in order to be entitled to costs in the event of the arbitrators finding that the offer of the company was sufficient for compensation. The fact that a landowner has not appealed from or moved to set aside an award made in arbitration proceedings to ascertain the compensation to be paid for the taking of his lands by a railway, does not preclude him from objecting to the payment of the company's costs of arbitration with which the arbitrators assumed to deal although without jurisdiction to do so.

Re G.T.R. Co. & Ash, Re G.T.R. Co. & Anderson, 9 D.L.R. 453, 4 O.W.N. 810, 15 Can. Ry. Cas. 48. [Affirmed, 10 D.L.R. 824, 24 O.W.R. 522.]

OF ARBITRATION — RAILWAY EXPROPRIATION AMOUNT OF AWARD.

The costs of an arbitration in expropriation proceedings under the Railway Act (Can.) are fixed and payable under the terms of that statute, and are not subject to variation in an action by the landowner for trespass and compensation in which the expropriation and award are set up in defence. The taxed costs of the arbitration are not to be added to the amount of the award in fixing the liability for costs of the arbitration under s. 199 of the Railway Act, R.S.C. 1906, c. 37, in expropriation proceedings.

Gauthier v. Canadian Northern R. Co.; Dagenais v. Canadian Northern R. Co., 17 D.L.R. 193, 7 A.L.R. 229, 19 Can. Ry. Cas. 144, 28 W.L.R. 240, 6 W.W.R. 949, varying, 14 D.L.R. 490 and 494.

INTERPLEADER ISSUE—ISSUE FOUND IN FAVOUR OF EXECUTION CREDITOR WITH COSTS — MOTION TO COMPEL EXECUTION DEBTOR TO PAY COSTS OR TO ENFORCE PAYMENT AGAINST SURPLUS OF GOODS.

Young v. Spofford, 11 O.W.N. 232, 253. [See also 32 D.L.R. 262, 37 O.L.R. 663.]

PROCEEDINGS UNDER WINDING-UP ACT — CONTRIBUTORIES — APPEAL — "ORIGINATING MOTION IN COURT" — TARIFF "A," ITEM 17.

Re Carpenter; Hamilton's Case, 10 O.W.N. 287. [See also 29 D.L.R. 683, 35 O.L.R. 626.

EXPROPRIATION PROCEEDINGS UNDER MUNICIPAL ACT—DISTRIBUTION OF COMPENSATION MONEYS—PAYMENT INTO COURT—CONTESTATION AS TO RIVAL CLAIMS — DISCRETION OF COURT — OBLIGATION OF EXPROPRIATION BODY.

Re Linden and Toronto, 7 O.W.N. 681.

INTERPLEADER PROCEEDINGS — FINAL OR INTERLOCUTORY—"ACTION."

Interpleader proceedings arising out of a seizure by the sheriff of goods under an execution against A., which goods are claimed by B., are interlocutory proceedings, and the costs of an interpleader order, made on the application of the sheriff, should be taxed and allowed according to item 9 of tariff "A" (Rr. of 1913). Rule 3 (b)—"'Action' shall include . . . proceedings for relief by interpleader"—does not change the clearly established law that interpleader proceedings in an action are interlocutory; it affects merely the right of appeal.

Western Canada Flour Mills Co. v. D. Matheson & Sons, 39 O.L.R. 59.

ARBITRATION—AWARD — REFERENCES BACK —RAILWAY ACT, R.S.C. 1906, c. 37, s. 199.

Re Coleman and Toronto & Niagara Power Co., 13 O.W.N. 272. [See 38 D.L.R. 65, 40 O.L.R. 130.]

INTERPLEADER.

The practice of leaving interpleader costs to be dealt with by the judge who tries the issue is reasonable and well established. [Child v. Mann, L.R. 3 Eq. 806, considered.]

Smith v. Farquharson, 10 S.L.R. 54, [1917] 1 W.W.R. 1892.

TAXATION OF "COSTS OF THE ARBITRATION" —SCALE OF TAXATION—R.S.B.C. 1911, c. 194, s. 58.

The "costs of the arbitration" mentioned in R.S.B.C. 1911, c. 194, s. 58, are to be taxed as between party and party, but not on a liberal scale.

Re C.N.P. R. Co. and Bradshaw, 19 B.C.R. 236.

PRACTICE — SHERIFF'S INTERPLEADER — SMALL DEBT ACTION.

Held, that the costs of garnishee and also of interpleader proceedings arising in small debt actions are taxable on the ordinary scale of the district court.

Pike v. Laver, 12 S.L.R. 78, [1919] 1 W.W.R. 420.

MUNICIPAL EXPROPRIATION.

A municipality which expropriates land under the Cities and Towns Act is bound to pay the expropriated party the costs occasioned by the expropriation. [See Town of St. Lambert v. Boissy, 17 Que. P.R. 221.] Recovery of these costs may be by ordinary action. The acceptance by the expropriated party, of a sum awarded by the arbitrators, does not constitute an abandonment of his right to recover the costs.

Caron v. Town of Beaconsfield, 18 Que. P.R. 1, 50 Que. S.C. 325.

Where land is expropriated for public purposes the owner is entitled to all the costs and expenses reasonably incurred by him in prosecuting his cause to a finish so that the indemnity awarded to him shall not be diminished. In an expropriation under the Quebec law the court should tax not only the costs given by art. 79 of the tariff of attorneys but also the costs of the arbitration which comprise the disbursements and other costs reasonably incurred by the party expropriated. Therefore the advocates of the latter, although they may have been engaged in several expropriation cases at the same time, are entitled to the fees mentioned in arts. 24, 43 and 44 of the tariff and to the sum of $15 for preparing a factum for the arbitration. The arbitrators are entitled to $5 a day in each case even when they proceed with several cases on the same day if there was a prior agreement therefor between the parties. The prothonotary also, on the reply or defence of the owner being filed, is entitled to his fee as in ordinary causes.

Shawinigan Water & Power Co. v. Magnan, 13 Que. P.R. 365.

(1) By virtue of the law of Quebec concerning the expropriations by the railroad companies, the attorneys have the right to costs as between the parties only and not as between the attorney and client. (2) Article 79 of the tariff regulates the fees

of the attorneys in the cases of expropriation, when there is no other special provision of the law which fixes such fees. (3) The railroad company which abandons the expropriation will be held to pay the stenographic fees if it has consented that the depositions should be thus taken. (4) The attorney for the party against whom the proceedings have been started, when the company abandons its expropriation, has no right to the fee of $80 provided by art. 24 of the tariff for litigation, neither to one of $25 provided by art. 43, for general fee of inquiry, neither to one of $50 for additional fee in an action exceeding $10,000, such as provided by art. 5 of the tariff.

Lachine, Cartier & Maisonneuve R. Co. v. McArthur & Co., 13 Que. P.R. 254.

TAXATION OF COSTS—EXPROPRIATION FOR PROVINCIAL RAILWAYS—TARIFF.

Cases in expropriation for the construction of provincial railways should be taxed as cases taken to the Superior Court, and according to the amount granted by the arbitrators' award, because the plaintiff company only brings an action based on the rights given to it by law and public interest.

La Baie Ha Ha R. Co. v. Coulombe, 15 Que. P.R. 285.

INTERPLEADER ISSUE—LIABILITY OF EXECUTION CREDITORS.

Where an interpleader tried under r. 569 (Sask.) the execution creditors join on the issue as defendants and the claimant is successful and costs are given to the sheriff and claimant, the execution creditors are jointly and severally liable for those costs which may not be apportioned. [Carter v. Stewart, 7 P.R. 85, followed.] The Creditors' Relief Act, R.S.S. c. 63, s. 3, subs. (6), has not altered the above rule.

Macdonald v. Nicholson, 31 W.L.R. 510; 8 S.L.R. 187, 8 W.W.R. 963.

INTERPLEADER.

The costs of interpleader proceedings must be taxed on the same scale as costs in the action in which the proceedings are taken.

Shupe v. Heller, 10 W.W.R. 874. [Disapproved 12 S.L.R. 78.]

OF MOTION FOR APPOINTMENT OF ARBITRATOR—VANCOUVER INCORPORATION ACT, S. 133 (9).

Matte v. City of Vancouver (B.C.), [1917] 2 W.W.R. 53.

(§ I—9)—LIABILITY OF EXECUTOR—DISCRETION OF COURT—REVIEW.

Where an action is defended by an executor and judgment rendered against him, the court has the discretion, where there is an insufficiency of assets in the estate, to award the costs against the executor personally, to be paid out of his own estate; such discretion is not subject to review.

Hawley v. Hand, 48 D.L.R. 384, 45 O.L.R. 272, affirming 15 O.W.N. 170.

ACTION AGAINST EXECUTOR—APPORTIONMENT.

Where an action against an executor is not unreasonable, and the plaintiff failed in the main issues both in the action and on appeal, the costs will not be apportioned, but each party will be made to bear his own costs both of the action and appeal.

Sproule v. Murray, 48 D.L.R. 368, 45 O.L.R. 326.

RIGHT TO ALLOWANCE—ACTION AGAINST EXECUTORS.

On judgment against executors on a note given by their testator, but not produced, costs should not be awarded where it is not their fault that the note has not been produced, and they had no knowledge, until after the close of the pleadings, of the existence of letters upon which the liability rests; but the executors are entitled to be paid their costs, as between solicitor and client, out of the estate.

Board of Governors of King's College, Windsor v. Poole, 11 D.L.R. 116, 24 O.W.R. 601, 4 O.W.N. 1293.

TRUSTEE'S COSTS.

A person appointed by the court as sequestrator to an immovable concerning the ownership of which two or more parties are litigating has a joint and several recourse for the costs of his administration against all the parties to the said litigation.

Maillet v. Fontaine, 2 D.L.R. 218, 21 Que. K.B. 426, 18 Rev. de Jur. 470.

EXECUTORS.

Where the defendants are sued in a special capacity and are condemned to pay costs, the condemnation cannot be construed to be personal against them, unless the judgment says so. If three testamentary executors are sued and contest the action together, two only cannot be condemned to costs, the three should be condemned jointly.

McDonald v. Saunderson, 50 Que. S.C. 422.

AGAINST SOLICITOR—ACTION IMPROPERLY INSTITUTED.

Where an action is begun by a solicitor on the instructions of a managing director not endowed with power to institute proceedings, the solicitor and not the managing director should be ordered to pay costs. [Fricker v. Van Grutten, [1896] 2 Ch. 662, applied; La Compagnie de Mayville v. Whitley, [1896] 1 Ch. 788, distinguished.]

The Standard Construction Co. v. Crabb, 7 S.L.R. 365, 30 W.L.R. 151, 7 W.W.R. 719.

(§ I—10)—DISCRETION IN GIVING OR REFUSING—AWARDING AGAINST SUCCESSFUL PARTY—UNTRUE AND UNCALLED FOR ISSUES.

Where a plaintiff sets out various allegations and claims which at the trial are either found untrue or are not proceeded with, the general costs of the action will be given against him, although successful

as to a portion of his claim, the principle being, that where matters in controversy are capable of being split into separate heads, each involving a different class of evidence, the maxim applies that he who loses shall pay, although they may not constitute "issues" in the pleader's sense. [Whitmore v. O'Reilly, [1906] 2 Ir. K.B. 357; Forster v. Farquhar, [1893] 1 K.B. 564, followed.]

Matheson v. Kelly (No. 2), 15 D.L.R. 508, 24 Man. L.R. 695, 26 W.L.R. 691, 5 W.W.R. 1140. [Affirmed, 18 D.L.R. 228.]

ALBERTA RULES—TAXATION—DISCRETION OF JUDGE.

While the general purpose of r. 769 (Alta.) is to provide for a general cleaning up of all costs so that the parties may know exactly where they stand, the rules are merely rules of procedure and the rules generally and r. 769 in particular should not be considered to have so exceedingly stringent a force as to leave the defaulting party absolutely helpless where the delay has been slight. The court has power either under r. 556 or under the statute giving the court power to relieve against forfeitures to give relief and allow the costs to be taxed, the length of the delay is a question for the discretion of the judge.

Rowan & Cuthill v. Paitson, 49 D.L.R. 111, [1919] 3 W.W.R. 516.

DISCRETION — LIBEL ACTION — REFUSING COSTS TO SUCCESSFUL PLAINTIFF.

The Trial Judge has a complete discretion as to refusing costs to a successful plaintiff in a libel action, and may take into consideration everything which led to the libel. [Harnett v. Vise, 5 Ex. D. 307, followed.]

Pickels v. Lane, 16 D.L.R. 347, 47 N.S.R. 465.

DISCRETION OF COURT IN GIVING OR REFUSING.

Upon holding that the plaintiff who plowed and improved land under a contract which required it to be plowed to a certain depth, was not entitled to compensation, since the inspector, whose decision was, by the terms of the contract, to be final, refused to approve of the work, the court may exercise its discretion in refusing to award costs to the successful defendant where it appears that, notwithstanding the defective manner of carrying out the contract, the defendant would be able to raise a fair crop of the class for which the work was done.

Schultz v. Faber & Co., 4 D.L.R. 707, 4 A.L.R. 422, 21 W.L.R. 163, 2 W.W.R. 79.

DISCRETION—ACTION FOR WRONGFUL EJECTMENT.

The landlord may be refused his costs of successful defence of an action by the tenant for damages for wrongful ejectment if the ejectment be shewn to be wrongful, but the plaintiff fails by reason of omission to prove any damage therefrom.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

DISCRETION OF COURT TO ALLOW OR REFUSE VENDOR AND PURCHASER—APPLICATION.

Costs will be awarded against the purchaser on a summary application as to title under the Vendors and Purchasers Act, 10 Edw. VII. (Ont.) c. 58, if the title is such as in an action by the vendor for specific performance the purchaser would have been forced to accept.

Re Jones and Cumming, 2 D.L.R. 77, 3 O.W.N. 672, 21 O.W.R. 248.

DISCRETION OF TAXING OFFICER—INTERFERENCE WITH—ABSENCE OF ANY GOVERNING PRINCIPLE—RIGHT TO REVIEW.

The rule that, where a taxing officer has not made any mistake in principle, and the amount allowed by him as remuneration for a solicitor's services is not so grossly large or so extremely small as to be beyond all question improper, the court should not interfere with his discretion, is not applicable to services not governed by any authorized tariff, but in such cases the principle is that the solicitor is to be allowed the value of his services, and such value is a question of fact to be determined by proper evidence, and, while the taxing officer is at liberty freely to apply his own special knowledge and experience, his conclusion is just as much open to review as that of any other judicial officer dealing with a question of fact, e.g., the assessment of damages by a judge at a trial without a jury.

Re Solicitors, 7 D.L.R. 323, 4 O.W.N. 47. [See 12 O.W.R. 1074.]

DISCRETION OF COURT—ABIDING THE EVENT.

It is only in exceptional cases for which the reasons should be given that the court may exercise its discretion and avoid charging all costs to the losing party (C.P. 549). [C.P.R. Co. v. Couture, 2 Que. Q.B. 502, specially referred to.]

Martin v. Madore, 3 D.L.R. 441, 731, 18 Rev. de Jur. 481.

DISCRETION—ABIDING EVENT OF FURTHER LITIGATION.

On the disposal of the purchaser's objection to close his purchase by a vesting order in his favour of the right and title of both the vendor, plaintiff, and of the adverse claimant made a codefendant with the purchaser in an action for specific performance, and on security being provided by payment into court or to a receiver to answer the claimant's demand should he substantiate it, the purchaser who was not at fault may be dismissed from the litigation and his costs ordered to be paid by the unsuccessful party on the future determination of rights between the other litigants in respect of the adverse claim.

Jennison v. Copeland, 3 D.L.R. 52, 3 O.W.N. 795, 21 O.W.R. 689.

DISMISSAL ON GROUNDS NOT RAISED BY DEFENDANT'S PLEADING—COSTS AGAINST SUCCESSFUL DEFENDANT.

Where an action is dismissed solely on grounds not raised in the statement of defence, the court has a discretion to order payment of plaintiff's costs by the defendant. [See Manitoba Stats. 7-8 Edw. VII. c. 12, s. 3.]

Mansfield v. Toronto General Trusts Corp., 1 D.L.R. 503, 22 Man. L.R. 49, 20 W.L.R. 344.

UNTRUE AND UNCALLED FOR DEFENCES—AWARDING AGAINST SUCCESSFUL PARTY.

Where the prevailing party to an action raised untrue and uncalled for issues by his pleadings, costs as to such issues will be awarded against him.

Bell v. Schultz, 4 D.L.R. 400, 21 W.L.R. 408, 5 S.L.R. 273, 2 W.W.R. 491.

GIVING OR REFUSING—SET-OFF OF EXTRA COSTS—VERDICT FOR SUM WITHIN INFERIOR JURISDICTION.

Gross misconduct of the defendant causing the death for which damages are awarded against him under the Fatal Accidents Act (Ont.) constitutes a good ground for refusing a set-off in favour of defendant against the verdict of his extra costs of defending in the High Court in which the action was brought when the verdict was for an amount within County Court jurisdiction.

Johnston v. Clark & Son, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

DISCRETION—REFERENCE.

McDonald v. Trusts & Guarantee Co., 6 D.L.R. 916, 4 O.W.N. 192, 23 O.W.R. 192.

DISCHARGE OF ORDER—COSTS OF GARNISHEES—SALARY OF JUDGMENT DEBTOR PAID IN ADVANCE.

Bartlett v. Bartlett Mines, 2 D.L.R. 904, 3 O.W.N. 1155.

DISCRETION — REFUSAL WHERE SUCCESS WHOLLY ON TECHNICAL GROUNDS.

That the respondent was protected from paying for extras under the building contract sued upon by reason of a condition requiring the written sanction of the architect, while only a verbal order of the latter could be shewn, is a sufficient ground for exercising the discretion of the Appellate Court in refusing to award to the respondent the costs of successfully opposing an appeal upon which it was found that the appellant would be entitled to recover for the extras, but for the condition; but the Appellate Court may, in such case, give the successful respondent the option of taking his costs of the appeal on consenting to pay for the extras.

Vandewater v. Marsh, 14 D.L.R. 737, 5 O.W.N. 213, 25 O.W.R. 178.

DISCRETION—MANDAMUS AGAINST ELECTION OFFICER.

On issuance of mandamus to compel a returning officer to add disputed votes allowed by the court of enquiry under the Alberta Elections Act, 9 Edw. VII. c. 3, he was left to pay his own costs, but applicants' costs were awarded against a candidate who unsuccessfully opposed the application.

Re Clearwater Election, 11 D.L.R. 353, 24 W.L.R. 306. [Affirmed in part, reversed in part, Re Clearwater Election (No. 2), 12 D.L.R. 598.]

DISCRETION IN GIVING OR REFUSING—INDEMNITY RIGHT AGAINST CODEFENDANT AS TO COSTS—TRUSTEES FOR COMPANY BONDHOLDERS.

Where a claim for a mechanics' lien against the lands and building could not succeed because the registration of the lien claim was late, but judgment is given the plaintiff against the principal defendant (a company) with which the contract was made for the balance owing thereon, the court may properly refuse costs to the trustees for the bondholders joined as defendants in the action in respect of their title interest in the lands, where the trustees defended by the same solicitors as their co-defendant and were entitled to be indemnified by their codefendant against their costs of defence.

Steven v. Pryce-Jones, 13 D.L.R. 746, 25 W.L.R. 172.

DISCRETION—SUCCESS ON TECHNICALITY, MERITS WITH OPPOSITE PARTY, EFFECT.

Costs may be refused to a successful litigant where he succeeds solely on a technicality, and the merits are with the opposite party.

Union Bank of Canada v. A. McKillop & Sons, 11 D.L.R. 449, 4 O.W.N. 1253, 24 O.W.R. 549.

DISCRETION—GIVING COSTS.

On dismissal of an action to compel defendant to carry out a purchase at an auction sale of land misdescribed in the advertisement of sale as being located at "No. 171 Chesley street," whereas the property was situated on an alley, defendant is entitled to costs, where the misleading character of the description resulted from the fault of plaintiff or his agent, for reliance upon which the defendant was not to blame.

Porter v. Rogers, 11 D.L.R. 304, 42 N.B. R. 82, 12 E.L.R. 551.

DISCRETION OF COURT IN GRANTING OR REFUSING—HIGH COURT SCALE.

Where a jury have assessed the damages at a sum within the jurisdiction of the County Court, but it appears to the court that any solicitor advising that there was liability would have considered the case a proper one for the High Court, the court may, in its discretion, award costs to the plaintiff on the High Court scale.

Moran v. Burroughs, 3 D.L.R. 392, 3 O.W.N. 1214. [Reversed 10 D.L.R. 181.]

DISCRETION—CONSOLIDATION FOR TRIAL.

When two cases between the same parties are consolidated for trial, an adjudication, in one of them, in relation to the whole cost of the trial (enquête), made in

the exercise of its discretionary powers, by the Court of Review, will not be interfered with in appeal.

Papineau v. Guertin, 22 Que. K.B. 529.

An allocatur is not necessarily an order to tax costs, but only as fixing the amount, and it is within the discretion of the registrar to judge whether it is a proper case to tax a counsel fee.

Rainsford v. McVey, 40 N.B.R. 381.

SUCCESSFUL PARTY—APPLICATION TO STRIKE OUT PORTION OF DEFENCE—DISCRETION IN GRANTING.

Where a plaintiff comes to enforce a legal right and completely succeeds and has been guilty of no misconduct, there are no materials upon which the court can exercise a discretion, and the plaintiff is entitled to his costs. [Cooper v. Whittingham, 15 Ch. D. 501; Civil Service v. General Steam Navigation Co., [1903] 2 K.B. 756, referred to.]

Edmanson v. Chelie, 7 S.L.R. 34, 7 W. W.R. 96.

SURVEYS — WITNESSES EQUIPPING THEMSELVES TO TESTIFY.

Bogardus v. Hill, 25 W.L.R. 436.

UNNECESSARY PROCEEDINGS.

Plaintiff made a number of motions for delay of trial by reason of absence of one K., who he claimed was the agent of defendants and bound defendants by acceptance of an order and was a necessary witness. The evidence of K. was finally procured through interrogatories. The court found that whether or not the order bound the defendants, a contract was subsequently made by plaintiff with defendants on the basis of that order; so that it never was necessary to delay the trial on account of K.'s absence, or to take his evidence. The plaintiff was therefore not allowed costs of the interrogatories and the defendants were given costs for the motions for delay of trial.

Stewart v. Stonewall Gravel, [1919] 1 W.W.R. 344.

(§ I—11)—LIABILITY OF MUNICIPAL COUNCILLORS—MANDAMUS.

Members of a municipal council are liable for costs incurred in proceedings occasioned through their refusal to discharge their statutory duties, and must indemnify the municipal corporation against all liability in respect thereof.

Re West Nissouri Continuation School, 33 D.L.R. 209, 38 O.L.R. 207, varying, as to costs, 11 O.W.N. 197.

THIRD PARTY PROCEEDINGS.

Costs incurred by a defendant in obtaining leave to issue and take out a necessary third party notice, may be taxed by the taxing officer where the plaintiff, before trial, discontinues his action without leave, and the propriety and reasonableness of such costs, and the fact that they were reasonably and properly incurred, will be assumed in the absence of material to the contrary. [Harris v. Leutner, 16 Ch.D. 559, specially referred to.]

Butler v. Bank of Ottawa, 5 D.L.R. 260, 21 W.L.R. 406.

LIABILITY OF THIRD PARTY TO PAY BOTH PLAINTIFF AND DEFENDANT.

The court has jurisdiction to order a third party to pay the costs of both the plaintiff and defendant. [Hornby v. Cardwell, 8 Q.B.D. 329; Piller v. Roberts, 21 Ch.D. 198; Edison & Swan United E. L. Co. v. Holland, 41 Ch.D. 28, specially referred to.]

Stoness v. Anglo-American Ins. Co., 3 D.L.R. 63, 3 O.W.N. 886, 21 O.W.R. 465.

THIRD PARTIES—CLAIM OF INDEMNITY—SET-OFF.

Walker and Webb v. MacDonald (No. 2), 6 D.L.R. 851, 4 O.W.N. 64, 23 O.W.R. 244.

ADDING MUNICIPALITY AS DEFENDANT.

Costs may properly be allowed a plaintiff where it appears reasonable and proper for him to add as a party defendant a municipality chargeable with negligence. [Till v. Town of Oakville, 21 D.L.R. 113; Besterman v. British Motor Cab Co., [1914] 3 K.B. 181, followed.]

Burrows v. G.T.R. Co., 23 D.L.R. 173, 18 Can. Ry. Cas. 183, 34 O.L.R. 142.

MUNICIPAL ACTIONS.

Although the question of costs is a matter for the discretion of the Trial Judge, which will ordinarily not be interfered with on appeal unless there has been a misapprehension of fact or disregard of principle, the general guiding principle is that the party who succeeds is entitled to costs against the unsuccessful party; but a municipality, on whose behalf a ratepayer successfully contests the validity of an agreement with a company, cannot be properly taxed with the costs of the codefendant company. [Gariepy v. Greene, 23 D.L.R. 797, referred to.]

Livingstone v. Edmonton Industrial & City of Edmonton, 25 D.L.R. 313, 9 A.L.R. 343, 33 W.L.R. 164, 9 W.W.R. 794, varying as to costs 24 D.L.R. 191.

ACTION AGAINST LOCAL BOARD OF HEALTH AND MEDICAL OFFICER OF HEALTH—TAXATION AGAINST PLAINTIFFS OF COSTS ORDERED TO BE PAID TO DEFENDANTS—RIGHT TO COSTS—DEFENCE CONDUCTED BY MUNICIPAL CORPORATION—PUBLIC HEALTH ACT, S. 26—MUNICIPAL ACT, SS. 8, 245 (5)—PAYMENT OF SALARY TO CORPORATION SOLICITOR.

*Simpson v. Local Board of Health of Belleville, 13 O.W.N. 283, 41 O.L.R. 320. [See 33 D.L.R. 783, 38 O.L.R. 244.]

MUNICIPAL MATTERS—BY-LAW.

A statute ratifying and validating a by-law illegally passed by a municipality as to the "pending causes in respect to the costs thereof" enables the court to impose upon the municipality the costs of an action then pending, if the nullities alleged in the ac-

tion would have been sufficient to quash the by-law without the Remedial Act.

St. Jerome Power & Electric Light Co. v. Town of St. Jerome, 26 Que. K.B. 534.

PUBLIC INVESTIGATION — COSTS — S. REF. [1909], ARTS. 5940, 5948.

A person who receives a notice from an Examining Judge, in pursuance of art. 5940, S. ref. [1909], of an investigation held at the request of a municipal corporation, which in the request names this person, may consider himself as a defendant in the action. When the judge in this report declares that the municipality asking for the enquiry should pay the costs, including the fees of the Examining Judge, the municipality ought also to pay the expenses of the defendant's solicitors at the enquiry.

City of Hull v. Couture, 28 Que. K.B. 135.

CROWN COSTS ACT—APPEAL UNDER SUCCESSION ACT.

In an appeal from a judge's decision on an application under s. 43 of the Succession Duty Act to fix the succession duty taxable on an estate the court has no power to order costs against the Crown, as the Crown Costs Act applies.

In re Van Horne Estate (No. 2), [1919] 3 W.W.R. 598. [See 47 D.L.R. 529.]

(§ 1—12)—CERTIORARI—MOTION TO QUASH CONVICTION.

The fact that a defect in the first conviction was cured by an amended conviction made out and returned to a certiorari before the launching of the motion to quash, is not a ground for depriving the prosecutor of his costs of such motion. [R. v. McAnn, 3 Can. Cr. Cas. 110, 4 B.C. R. 587, distinguished.]

R. v. Shatford, 38 D.L.R. 366, 51 N.S.R. 322, 28 Can. Cr. Cas. 284.

PENAL CASES — SECURITY FOR — S. 750 CR. CODE—CONSTRUCTION.

Section 750 of the Code as amended by c. 9 of the Statutes of 1909 (Dom.) requiring security for costs to be given by the appellant, has in contemplation only an appeal on the part of the accused. Where the Crown is appellant no security is required.

Dunnett v. Williams, 45 D.L.R. 514, 12 S.L.R. 117, [1919] 1 W.W.R. 1028.

CRIMINAL LIBEL.

The Trial Judge may himself tax the costs payable to defendant under Cr. Code, s. 904a, by the private prosecutor on dismissal of a criminal prosecution for defamatory libel.

R. v. Fournier; Martin v. Fournier, 28 D.L.R. 379, 25 Can. Cr. Cas. 430, 25 Que. K.B. 536, 25 Can. Cr. Cas. 443.

ON CERTIORARI.

It is a ground for granting costs to the successful applicant for a certiorari that a term is imposed that no action shall be brought for proceeding under the conviction which is set aside.

R. v. Hubley, 28 D.L.R. 376, 25 Can. Cr. Cas. 102, 49 N.S.R. 281.

ON CONVICTION UPON SUMMARY TRIAL.

It is for the magistrate or other official holding a summary trial under Part 16 of the Code to fix the costs imposed upon a conviction, the tariff of costs provided for summary conviction proceedings under Part 15 being excluded from operation under Part 16, by virtue of Code s. 798; and the court will not interfere on certiorari with the amount awarded if they are fixed within reason and are not shewn to include anything which ought not to have been included.

R. v. Emery, 33 D.L.R. 556, 10 A.L.R. 139, 27 Can. Cr. Cas. 116, [1917] 1 W.W. R. 337.

ON QUASHING SUMMARY CONVICTION.

Under the British Columbia practice, the court on quashing a summary conviction has jurisdiction to award costs against the prosecutor. [Re Narain Singh, 13 B.C.R. 477, applied; R. v. Bennett (1902), 5 Can. Cr. Cas. 456, 4 O.L.R. 205, not followed.]

R. v. Ferguson (B.C.), 33 D.L.R. 42, 26 Can. Cr. Cas. 220.

CRIMINAL MATTERS — CERTIORARI PROCEEDINGS.

No power is conferred under N.W.T. Crown r. 39, in force in Alberta under the Act, 4-5 Edw. VII. (Can.) c. 3, s. 16, upon the court to order the Crown directly to pay the costs of the successful applicant in certiorari proceedings about a criminal matter, although the application was opposed by counsel instructed by the Att'y-Gen'l.

R. v. Knowles; R. v. Wilson, 13 D.L.R. 773, 22 Can. Cr. Cas. 66, 6 A.L.R. 221, 25 W.L.R. 302, 5 W.W.R. 20.

IN CRIMINAL CASES — VIOLATION OF NOVA SCOTIA TEMPERANCE ACT.

On conviction of a violation of the N.S. Temperance Act of 1910, costs may be imposed notwithstanding the act is silent with regard thereto, since the provisions of the Summary Convictions part of Cr. Code, R.S.C. 1906, c. 146, as to costs is, by reference, made a part of the former act.

Re Hoskins, 13 D.L.R. 25, 21 Can. Cr. Cas. 435, 13 E.L.R. 143.

IN CRIMINAL CASES — OF COMMITMENT — EXCESSIVENESS—PRESUMPTION OF REGULARITY.

In the absence of an affirmative shewing that the excess above the legal costs of commitment to gaol on two warrants, on both of which costs of commitment were endorsed, although there was but one conveyance to gaol, was not allowed by the magistrate for the expenses and disburse-

ments of the trip, such costs will not be declared excessive.

Re Hoskins, 13 D.L.R. 25, 21 Can. Cr. Cas. 435, 13 E.L.R. 143.

CRIMINAL AND PENAL CASES.

Where an information was laid before a police magistrate for the publication of a defamatory libel and the accused was committed for trial but was discharged at the assizes because the prosecutor did not appear and an order was made in general terms by the court for the recovery by the accused from the prosecutor of his costs occasioned by the proceedings, the same to be taxed, such order was made under s. 689 of the Cr. Code, 1906, and therefore included the costs of the preliminary inquiry as provided in such section.

Re Constantineau and Jones, 5 D.L.R. 483, 26 O.L.R. 160, 21 O.W.R. 880.

CRIMINAL CASE — APPEAL FROM SUMMARY CONVICTION.

Prosecutions under the Alien Labour Act, R.S.C. 1906, c. 97, being subject to the summary conviction procedure of the Cr. Code, 1906, no costs can be awarded to the successful party on the allowance of an appeal from a summary conviction thereunder, in excess of the costs taxable under the summary convictions clauses, Part 15 of the Cr. Code.

Windsor Hotel Co. v. Hinton (No. 2), 5 D.L.R. 228.

CERTIORARI PROCEEDINGS—OFFENCE AGAINST TOWN ORDINANCE — CRIMINAL MATTER —UNOPPOSED MOTION.

Where a conviction under a municipal ordinance has been removed by a writ of certiorari and is quashed by the court for want of jurisdiction in the convicting justice, and terms are imposed that no action is to be brought against the prosecutor, the court has jurisdiction and discretion to give or withhold costs, and may do so even though the motions for the writ and to quash are unopposed.

R. v. Sullivan, 19 D.L.R. 112, 23 Can. Cr. Cas. 22, 48 N.S.R. 38.

OF QUASHING SUMMARY CONVICTION — ORDERING AGAINST BOTH MAGISTRATE AND PROSECUTOR.

Where the prosecution was wholly inexcusable, unfounded and unlawful, and the summary conviction purported to be made under an order-in-council, which any reasonable man must see did not cover the case of the accused, the court, on quashing the conviction, will not only refuse an order of protection, but order costs against both the magistrate and the prosecutor.

R. v. Hackam, 30 Can. Cr. Cas. 414, 44 O.L.R. 224.

APPEALS FROM SUMMARY CONVICTIONS.

Where the conviction appealed from under Code, s. 754, awards imprisonment in default of paying a fine and costs, the defendant is subject to have the costs of the appeal included in a new order for conditional imprisonment, made by the District Court on the appeal on entering a substituted conviction against him. [R. v. Hawbolt, 4 Can. Cr. Cas. 229, followed.]

R. v. Miller, 25 Can. Cr. Cas. 151, 25 W.L.R. 296.

REASONABLENESS OF AMOUNT.

While Cr. Code, s. 751, gives the court hearing an appeal from a summary conviction a discretionary power to allow costs, this is to be interpreted as giving the power to allow only such costs as are strictly just and reasonable.

Ex parte Cronkhite: R. v. Wilson, 26 Can. Cr. Cas. 224, 44 N.B.R. 69.

TO WHOM AWARDED.

Costs ordered under Cr. Code, s. 871, on a conviction for keeping a disorderly house, made under the summary trials clauses (Code, ss. 773 (f) and 774), are to be awarded to the prosecutor and not to the clerk of the police court where he is not the prosecutor.

R. v. Miller, 25 Can. Cr. Cas. 151, 25 W.L.R. 296.

Costs will not be granted against the informant and the magistrate on quashing a summary conviction in certiorari proceedings, unless misconduct is proved against them.

Kokoliades v. Kennedy, 18 Can. Cr. Cas. 495, reversing 17 Can. Cr. Cas. 4.

CROWN—SUCCESSFUL APPEAL FROM CONVICTION—INFORMATION LAID BY CHIEF OF POLICE OF MUNICIPALITY — CROWN COSTS ACT, R.S.B.C., 1911, c. 61.

Where appeal is allowed from conviction the information leading to which was laid by the chief of police of a municipality, no costs should be allowed, as such chief of police is "an officer, servant or agent of and acting for the Crown" within the meaning of the Crown Costs Act.

Matson v. Leask, [1919] 2 W.W.R. 59.

CROWN OFFICE RULES—CROWN COSTS ACT, 1910—CRIMINAL CASES.

R. v. Jones, 16 B.C.R. 117, 18 Can. Cr. Cas. 414, 16 W.L.R. 429.

(§ I—13)—SUING AS POOR PERSON—FORMA PAUPERIS.

A party who pleads in forma pauperis and selects an official stenographer without warning him of the fact, is bound to pay him his usual fees.

Gagnon v. Pilote, 14 Que. P.R. 175.

ON APPEAL TO PRIVY COUNCIL—ORDER FOR LEAVE TO APPEAL IN FORMA PAUPERIS—SCOPE AS TO DATE OF EFFECT.

An order for leave to appeal in forma pauperis to the Judicial Committee of the Privy Council takes effect only from the date at which it is made, and has no effect whatever on costs incurred before that date: so where the appeal is allowed with costs the appellant's costs of the petition for special leave to appeal in forma pauperis are not limited to the pauper scale.

Levine v. Serling, 19 D.L.R. 111, [1914] A.C. 665, 111 L.T. 355, 29 W.L.R. 87.

(§ 1—14)—SECURITY — NONRESIDENT CO-PLAINTIFF.

Where one of several plaintiffs who are joined in a common action resides outside the jurisdiction, no order for security for costs in respect of that individual plaintiff should be granted. The Judicature Act has not altered the pre-Judicature Act practice in that respect.

Martin v. Dominion Trust Co., 32 D.L.R. 51, 27 Man. L.R. 91, [1917] 1 W.W.R. 445.

BONDS—LEAVE TO APPEAL—ACTION ON EXECUTION.

As a term of obtaining a stay of proceedings under a judgment, to permit applications for special leave to appeal being made to the Judicial Committee, the respondents filed bonds securing payment of the debt and costs, the obligation being void if such special leave should not be granted and the respondents should pay such damages and costs as awarded. The court held that it was not incumbent upon the applicants to shew that they had exhausted their remedies against the respondents by execution before taking any step towards recovery upon the bonds, the leave having been refused and the debt and costs being unpaid.

Geall v. Dominion Creosoting Co.; Salter v. Dominion Creosoting Co., 43 D.L.R. 547, 57 Can. S.C.R. 226. [See 39 D.L.R. 242.]

ORDER FOR SECURITY—CONSENT—MISTAKE — SETTING ASIDE — APPLICATION FOR NEW DATE.

Knolinski v. Nelson, 40 D.L.R. 163, 13 A.L.R. 1, [1918] 1 W.W.R. 663.

SECURITY FOR COSTS — CONSOLIDATION OF ACTIONS—AMOUNT OF SECURITY.

Smith v. Tp. of Tisdale, 15 O.W.N. 134. [See 14 O.W.N. 111.]

SECURITY FOR — SCOPE OF PRAECIPE ORDER —COSTS OF MOTION TO ALLOW FOREIGN COMPANY TO INTERVENE — "AND PROCEEDINGS THEREOF IN THIS ACTION"—COSTS RESULTING FROM INTERVENTION—ADDITIONAL SECURITY FOR COSTS—APPLICATION FOR — MONEY PAID INTO COURT AS SECURITY—PAYMENT OUT.

Bailey Cobalt Mines v. Benson, 14 O.W.N. 33. [See 43 D.L.R. 692, 14 O.W.N. 174, 43 O.L.R. 321, 44 O.L.R. 1, 45 D.L.R. 585.]

SECURITY FOR — FOREIGN PERMANENT RESIDENCE—TEMPORARY RESIDENCE IN DISTRICT FOR PURPOSE OF ENFORCING CLAIM —RULE 526 (SASK.)—PRACTICE.

O'Sullivan v. Canadian Klondyke Mining Co. (Yukon), 42 D.L.R. 756, [1918] 3 W.W.R. 82.

APPLICATION FOR — SECURITY — ACTION BY FOREIGN COMPANY—COMPANY IN HANDS OF RECEIVER — SANCTION OF COURT TO INSTITUTION OF PROCEEDINGS—LIABILITY OF RECEIVER.

Franco-Belgium Invest. Co. v. Dubuc (Alta.), 41 D.L.R. 711, [1918] 2 W.W.R. 684.

SECURITY — RESIDENT OUT OF PROVINCE — DISCRETION.

Rule 373 provides that security for costs may be ordered, (b) where the plaintiff is ordinarily resident out of Ontario, though he may be temporarily resident within Ontario:—Held, that when there is shewn an actual and bonâ fide change of residence from without Ontario to a place within Ontario, before the cause of action accrued, the case is not within the rule. [Kavanaugh v. Cassidy, 5 O.L.R. 614, distinguished.] If there was a discretion, as said in McTavish v. Lannin and Aitchison, 39 O.L.R. 445, it should be exercised, in this case, by refusing to order the plaintiff to give security.

Erickson v. McFarlane, 42 O.L.R. 32.

SECURITY FOR COSTS — PLAINTIFF OUT OF ONTARIO — COUNTERCLAIM — ONUS —DEFENDANT REGARDED AS ATTACKING PARTY.

Sutter v. Sutter, 15 O.W.N. 137.

SECURITY—TEMPORARILY RESIDENT.

Where on an application by defendant for security for costs on the ground that the plaintiff is only temporarily resident within the jurisdiction, the plaintiff's material satisfies the judge that the plaintiff will be present at the trial, security should be refused. [Michiels v. Empire Palace, 66 L.T. 132, followed.]

De Schelking v. Zurbrick (B.C.), [1918] 3 W.W.R. 472.

SECURITY—RESIDENCE—DOMICILE.

Security for costs cannot be demanded from a plaintiff residing in the Province of Quebec about 12 months, at the time of the demand for such security, although he may have his domicile in the United States.

Mathews S.S. Co. v. McCarthy, 24 Rev. Leg. 325.

SECURITY—ALIEN LEAVING FOR ARMY.

An unmarried Russian subject, who leaves the province to take up his duties as a soldier in the Russian army, will be bound to give security for costs in the suits wherein he is plaintiff.

Gorochowsky v. Quebec Fire Ins. Co., 19 Que. P.R. 244.

SECURITY — FOREIGN PLAINTIFF — CHANGE OF RESIDENCE.

A foreign plaintiff who has been ordered to give security judicatum solvi cannot, at the expiration of the delays granted him to do so, relieve himself of his obligation by declaring that he now resides in the Province of Quebec.

Teney v. Marcil, 19 Que. P.R. 235.

SECURITY — FOREIGN PLAINTIFF — PLEADING—POWER OF ATTORNEY.

A defendant, who by way of motion required the plaintiff residing outside the province to furnish security judicatum solvi, may, within the delay fixed by law, after service of notice that such security has been furnished, plead to the merits of the action or urge preliminary exceptions, such as an application for a power of attorney. If the plaintiff, without reason, opposes such application, he should pay the costs of the dilatory exception.

Ingeniera Importadora, etc., Co. v. San Martin Mining Co., 19 Que. P.R. 436. [See 43 D.L.R. 322, 27 Que. K.B. 527.]

SECURITY—PROMPTNESS.

The duty of every party applying for security for costs is to apply promptly.

Mather & Noble v. Diamond Vale Supply Co (B.C.), 25 B.C.R. 446, [1918] 3 W.W.R. 581.

SECURITY—DELAY.

A motion for security for costs, not being a preliminary exception, need not be made within the delay fixed by art. 164, C.C.P.

Home Loan & Mtge. Co. v. Fishman, 19 Que. P.R. 220.

SECURITY — NONRESIDENT — DELAY IN APPLYING.

A defendant who learned long since that the plaintiff had ceased to reside in the Province of Quebec, and has continued the proceedings on the merits notwithstanding his departure, is deprived of the right to ask later for security judicatum solvi.

Brander v. Reid, 19 Que. P.R. 139.

SECURITY — ACTION AGAINST BOARD OF HEALTH — PUBLIC AUTHORITIES PROTECTION ACT, S. 16 — "PERSON" — INTERPRETATION ACT, S. 29 (X) — FATAL ACCIDENTS ACT — AFFIDAVITS — DEFENCE—PUBLIC HEALTH ACT, S. 26— REDUCTION OF SECURITY.

Simpson v. Local Board of Health of Belleville, 33 D.L.R. 783, 38 O.L.R. 244. [See also 12 O.W.N. 241, 13 O.W.N. 64, 283.]

SECURITY—SHERIFF EXECUTING WRIT OF FI. FA.—PUBLIC AUTHORITIES PROTECTION ACT.

A sheriff executing a writ of fi. fa. is not fulfilling a public duty; and is not entitled, under s. 16 of the Public Authorities Protection Act, R.S.O. 1914, c. 89, to security for costs of an action brought against him for something done under a fi. fa.—although he is entitled to the protection of s. 13. [Creighton v. Sweetland, 18 P.R. 180, followed.] Section 3 of the Act passed in 1899, 62 Vict. (2) c. 7, while it declared that a sheriff should be deemed an officer, did not declare that in the execution of a fi. fa. he should be deemed to fulfil a public duty.

Maple Leaf Lumber Co. v. Caldbick and Pierce, 38 O.L.R. 205. [See also 34 D.L.R. 766, 39 O.L.R. 201.]

SECURITY — PUBLIC AUTHORITIES PROTECTION ACT.

In an action against peace officers for trespass and slander while making an arrest, the defendants are not entitled to security for costs under s. 16 of the Public Authorities Protection Act (R.S.O. 1914, c. 89), if the alleged acts were not done in the execution of a public duty, and no good defence upon the merits has been shewn nor that the action is trivial or vexatious.

McTavish v. Lannin and Aitchison, 37 D.L.R. 307, 39 O.L.R. 445, reversing 39 O.L.R. 49.

ON MOTION FOR SECURITY.

The court upon refusing an application for security for costs cannot make the costs of the application costs in the cause. [Att'y-Gen'l v. Cameron, 43 N.S.R. 49, considered.]

Tucker v. Northwest Fire Ins. Co., 34 D.L.R. 302, 50 N.S.R. 552.

SECURITY FOR—PAYMENT OUT OF SUCCESSFUL PLAINTIFF'S DEPOSIT—ON SUCCESS IN PROVINCIAL COURTS — FURTHER APPEAL TO SUPREME COURT OF CANADA.

A nonresident plaintiff who has given security for costs and has successfully appealed from a dismissal of his action and obtained judgment in his favour from the highest provincial court is entitled to payment out of his deposit, although the defendant has launched a further appeal to the Supreme Court of Canada, the latter not being a step in the cause in which the security was given within the Manitoba K.B. Rules. [Day v. Rutledge, 12 Man. L.R. 309, and Hamill v. Lilley, 56 L.T.(N.S.) 620, followed; Canadian Land v. Dysart, 11 P.R. (Ont.) 51, considered.]

Scandinavian American National Bank v. Kneeland, 17 D.L.R. 43, 24 Man. L.R. 439, 28 W.L.R. 73, 6 W.W.R. 729.

SECURITY FOR COSTS — NONRESIDENT — ABSENCE WHETHER TEMPORARY OR NOT.

A motion to compel the plaintiff to give security for costs is an interlocutory proceeding, and accordingly may be supported by an affidavit of information and belief if reasonable grounds of belief are also stated; the onus may therefore be thrown upon the plaintiff, by proof of absence and of enquiries made which negative permanent residence, to prove that his recent return to the province was a bona fide resumption of residence therein.

Robillard v. G.T.P.R. Co., 16 D.L.R. 447, 24 Man. L.R. 233, 27 W.L.R. 736, 6 W.W.R. 490.

SECURITY FOR BY NONRESIDENT — SUFFICIENCY OF INTEREST IN MINING CLAIMS AS EXCUSING BOND—TEST.

Registered ownership of a three-eighths interest in a group of mining claims in British Columbia will not be accepted as

dispensing with the usual security for costs by a nonresident plaintiff, if the values of such claims upon which certain development work has been done is found by the court to still be speculative and problematic.

Trimble v. Cowan, 19 D.L.R. 562, 20 B. C. R. 247, 29 W.L.R. 477, 7 W.W.R. 146.

SECURITY FOR COSTS—WORKMEN'S COMPENSATION ACT (ALTA.) — PROCEDURE LESS FORMAL AND EXPENSIVE.

The general practice relating to security for costs in Alberta is not applicable to proceedings under the Workmen's Compensation Act, Alta., Stat. 1908, c. 12, the policy of the Act being to assist a supposedly poor class of persons by a procedure less formal and expensive than is required in ordinary disputes. [As to a District Court Judge's power under the Act, see also Bolner v. West Canadian Collieries, 8 D.L.R. 462.]

Cessarini v. Hazell, 16 D.L.R. 738, 7 A.L.R. 134, 28 W.L.R. 662, 6 W.W.R. 649.

LIBEL ACTION — NEWSPAPER ACT, R.S.M. 1913, c. 143 — REQUIREMENTS UNDER THE ACT—FAILURE TO COMPLY—SECURITY FOR COSTS.

Security for costs under the Libel Act, R.S.M. 1913, s. 10, will be refused the publishers of a newspaper sued for libel if the newspaper has failed to publish the complete data required by the Newspaper Act, R.S.M. 1913, c. 143, so that any one aggrieved or injured by anything appearing in the newspaper may by referring to the newspaper itself ascertain who is legally responsible for what is published.

Skryha v. Telegram Printing Co., 20 D.L.R. 692, 24 Man. L.R. 725, 29 W.L.R. 505, 7 W.W.R. 167.

SECURITY FOR COSTS—FOREIGN CORPORATION AS PLAINTIFF—REGISTRATION IN PROVINCE.

The registration of a foreign company in a province and the appointment of an attorney upon whom process may be served, does not give it any residential status, so as to absolve it from liability to give security for costs as a nonresident in an action brought by it in such province. [Ashland v. Armstrong, 11 O.L.R. 414, and Canadian R. Accident Co. v. Kelly, 5 W.L.R. 412, followed.]

Frost & Wood Co. v. Howes, 4 D.L.R. 527, 3 A.L.R. 43, 21 W.L.R. 335, 2 W.W.R. 321.

ACTION BROUGHT BY CREDITOR IN NAME OF ASSIGNEE FOR CREDITORS — CREDITOR OUT OF THE JURISDICTION — AFFIDAVIT OF ASSIGNEE—DISPUTE AS TO PLACE OF RESIDENCE.

Skill v. Lougheed, 1 D.L.R. 899, 3 O.W.N. 647, 23 O.W.R. 167.

ORDERING SECURITY FOR COSTS—"SHEWING" GOOD DEFENCE.

On an application for security for costs made by a newspaper proprietor in respect of an alleged libellous news item for which he is sued, his affidavit that he has a good defence on the merits is not a compliance with the Ontario statute, 9 Edw. VII., c. 12, s. 40, which enables the court to order security where the publication has been made in good faith and where it is "shewn on affidavit" that the defendant has a good defence on the merits; the newspaper proprietor claiming the benefit of the statute must state the facts under oath and not merely his conclusion as to their legal effect which is a question to be decided by the court.

Duval v. O'Beirne, 1 D.L.R. 78, 3 O. W.N. 513, 20 O.W.R. 884.

SECURITY FOR, BY NONRESIDENT — FOREIGN CORPORATION WITH BRANCH IN JURISDICTION.

A foreign corporation with a branch office within the jurisdiction, will not be absolved from giving security for costs on bringing an action if its only asset immediately exigible under execution within the jurisdiction and apart from bills receivable, is the office furniture as to which the landlords' preferential lien might defeat any judgment which the defendant might secure for costs against it.

Miller v. Winn, 1 D.L.R. 35, 3 O.W.N. 496.

SECURITY FOR COSTS — NONRESIDENT — OWNERSHIP OF PROPERTY WITHIN THE JURISDICTION.

To relieve a nonresident plaintiff from giving security for costs on the ground that he is the owner of property of sufficient value within the jurisdiction, the property must be liable to seizure under the ordinary execution of the court. The plaintiff, therefore, although he was the owner in fee simple of a one-third interest in land held in the name of another in trust, was ordered to give security under r. 714. [Slack v. Malone, 4 W.L.R. 549; Clark v. Fawcett, 4 W.L.R. 529, and C.P.R. Co. v. Silzer, 3 S.L.R. 162, followed.]

Young v. Lewis, 7 D.L.R. 477, 22 W.L.R. 297, 3 W.W.R. 30.

NOMINAL PLAINTIFF—FORMER APPLICATION —RES JUDICATA—COSTS OF INTERLOCUTORY MOTION UNPAID.

Rickart v. Britton, 3 D.L.R. 890, 3 O.W. N. 1512.

SECURITY—DISCRETION OF COURT.

Where a counterclaim in respect of the same matter or transaction upon which the claim is founded the court will consider whether the counterclaim is not, in substance, put forward as a defence to the claim, whatever form in point of strict law and of pleading it may take, and where the counterclaim is in substance a defence, the court may in its discretion refuse to order security for costs against a nonresident plaintiff by counterclaim.

Cartwright v. Pratt, 3 D.L.R. 460, 3 O. W.N. 1279, 22 O.W.R. 92.

PRIOR ACTION BETWEEN SAME PARTIES — PROPERTY IN CONTROVERSY, ONLY RELIED ON—SUGGESTED CONSOLIDATION.

Moore v. Thrasher, 6 D.L.R. 910, 4 O. W.N. 302.

SECURITY FOR COSTS — RESIDENCE OUT OF JURISDICTION — PLAINTIFF CLAIMING FUND IN COURT.

A claimant in an issue to determine the right to a fund in court, if resident out of the jurisdiction, may be required to give security for costs. [Boyle v. McCabe, 24 O.L.R. 313, followed.]

Re Riddell, 3 D.L.R. 401, 3 O.W.N. 1232, 22 O.W.R. 40.

SECURITY — COUNTERCLAIM—NONRESIDENT.

Where a counterclaim is put forward in respect of a matter wholly distinct from the claim, and the person putting it forward is resident out of the jurisdiction, the case may be treated as if that person were a plaintiff and only a plaintiff, and the court may order security for costs to be given by him.

Cartwright v. Pratt, 3 D.L.R. 460, 3 O. W.N. 1279, 22 O.W.R. 92.

SECURITY FOR COSTS—DISMISSAL OF APPLICATION—ASSETS WITHIN JURISDICTION.

It is only in cases where an interlocutory motion by the defendant for security for costs was rendered necessary by the fault of the plaintiff that the latter should be called upon, on security being ordered, to pay the costs of the motion in any event; ordinarily the costs of a motion for security in which fault cannot be attributed to either party should be made costs in the cause. [Lock v. Snyder, 2 D.L.R. 414, 20 W.L.R. 466, distinguished.]

McEwan and Dougherty v. Marks, 4 D.L.R. 369, 21 W.L.R. 34, 5 S.L.R. 222, 2 W.W.R. 228.

PLAINTIFFS RESIDING OUT OF ONTARIO — ACTION BY UNINCORPORATED ASSOCIATION AND MEMBERS—CLASS ACTION—ADDITION AS PLAINTIFF OF MEMBER RESIDING IN ONTARIO.

Rickert v. Britton, 2 D.L.R. 893, 3 O.W. N. 1008.

SECURITY FOR—TEMPORARY RESIDENTS.

Roberts v. Daniels, 25 D.L.R. 864, 49 N. S.R. 257.

SECURITY FOR ON APPEAL—DELAY IN ASKING.

Where it appears that the appellant is unable to pay the costs in the event of a dismissal of the appeal, an application for security of such costs must be made promptly, and where the application is delayed until after the appellant had prepared and filed his factum, the court will refuse to entertain same.

The King v. Gerow; Ex parte Gross, 24 D.L.R. 664, 43 N.B.R. 352.

SECURITY FOR — DISCOVERY — EXAMINATION FOR—NO DEFENCE SHEWN—GOODS REPOSSESSED—RIGHTS OF DEFENDANT.

Malotte Cream Separator Co. v. Graham, 21 D.L.R. 865.

SECURITY FOR—PAST AND FUTURE COSTS—PLAINTIFF'S ABSENCE FROM PROVINCE—INTERPRETATION OF CONTRACT — QUESTIONS OF LAW.

Crossman v. Purvis, 23 D.L.R. 883, 9 W.W.R. 2, 32 W.L.R. 215.

SECURITY FOR — DOUBLE ACTIONS AGAINST PRINCIPAL AND AGENT.

A plaintiff who has taken action and recovered judgment against the maker of a promissory note given for the price of a chattel should not be ordered to give security for costs under Alberta r. 9 (c), in a future action against the undisclosed principals of the maker of the note for the price of the chattel, the second action not being one for the same cause as the first. [Caswell v. Murray, 18 C.L.J. 76; Brunsden v. Humphrey, 14 Q.B.D. 141, referred to. Compare Ontario r. 373 (c), 1913.]

Paitson v. Rowan, 23 D.L.R. 271, 8 W. W.R. 802, 31 W.L.R. 394.

SECURITY FOR — NONRESIDENT — DISCRETION OF JUDGE.

The court may as an exercise of discretion, refuse to require a nonresident plaintiff to furnish security for costs where it is apparent that the defendant has no bona fide defence to the action.

W. E. Sanford Mfg. Co. v. McEwen, 11 D.L.R. 734, 12 E.L.R. 119.

SECURITY FOR COSTS—DELAY IN APPLYING.

A motion by defendant for security for costs is warranted at any stage of the proceedings under rr. 714 and 715 of the Sask. Practice Rules, 1911, and may be granted after the case has been placed on the trial list. [Lydney, etc., Co. v. Bird, 23 Ch.D. 358, and Re Smith, Bain v. Bain, 75 L.T. 46, applied.]

Dodd v. Mathieson, 9 D.L.R. 636, 23 W.L. R. 711, 4 W.W.R. 42.

ACTION FOR BENEFIT OF PLAINTIFF'S CREDITORS — ASSIGNMENT FOR BENEFIT OF CREDITORS—10 EDW. VII. C. 64, SS. 8, 9, 14 (O.)—INTEREST OF ASSIGNOR.

Tucker v. Bank of Ottawa, 10 D.L.R. 829, 4 O.W.N. 1090, 24 O.W.R. 363.

SECURITY — TEMPORARY RESIDENCE WITHIN JURISDICTION.

Rae v. Parr, 9 D.L.R. 292, 23 W.L.R. 40.

LIBEL — INSOLVENT PLAINTIFF — LIBEL INVOLVING CRIMINAL CHARGE—REPORT OF PROCEEDING BEFORE MAGISTRATE—ANIMUS—IMPLICATION.

McVeity v. Ottawa Citizen Co., 5 D.L.R. 882, 4 O.W.N. 37, 23 O.W.R. 15.

EXTENSION OF TIME—INSUFFICIENT AFFIDAVIT—CON. RR. 1203, 518, 524, 312.

Nieminen v. Dome Mines, 6 D.L.R. 899, 4 O.W.N. 301.

ONTARIO CON. R. 1198 (D.)—COSTS OF FORMER ACTION UNPAID.

Warner v. Norrington, 1 D.L.R. 915, 21 O.W.R. 400.

PLAINTIFF OUT OF JURISDICTION—PROPERTY IN JURISDICTION — COMPANY SHARES —UNDERTAKING.

Wallberg v. Jenckes Machine Co., 3 D. L.R. 888, 3 O.W.N. 1509.

PLAINTIFF OUT OF THE JURISDICTION—CON. R. 1198 (A)—MONEYS IN HANDS OF DEFENDANTS—REDUCTION OF AMOUNT OF SECURITY.

Coyne v. Metropolitan Life Ins. Co., 1 D.L.R. 909, 3 O.W.N. 648, 21 O.W.R. 169.

PROPERTY IN JURISDICTION—ONUS.

Harrison v. Knowles, 1 D.L.R. 904, 3 O. W.N. 688.

SECURITY—ACTION REMOVED FROM SURROGATE COURT—"PLAINTIFF."

The lodging of a caveat is not the institution of proceedings in a Surrogate Court. The executor who propounds the will institutes the proceedings, and the onus is upon him to prove it. In an action removed from a Surrogate Court into the Supreme Court of Ontario, a motion by the plaintiff, the executor who propounded the will, for an order requiring the defendant, the caveator, who was resident out of Ontario, to give security for costs, was dismissed. Clauses (a) to (i) of r. 373 provide for the giving of security by a plaintiff; a "plaintiff" is defined by s. 2 (r) of the Judicature Act; clause (i) of r. 373 applies to a different case. [Ward v. Benson, 2 O.L.R. 366, and Moran v. Place, [1896] P. 214, followed.] Newcombe v. Evans, 40 O.L.R. 299.

SECURITY FOR COSTS—ONE OF TWO PLAINTIFFS OUT OF THE JURISDICTION—SOLVENT PLAINTIFF IN JURISDICTION — JOINT CLAIM OF TWO PLAINTIFFS.

Labrosse v. McLeod, 9 O.W.N. 246.

SECURITY FOR—ACTIONS BY WIFE AGAINST HUSBAND — ALIMONY — CUSTODY OF CHILDREN—WAIVER.

Schmidt v. Schmidt, 9 O.W.N. 336.

SECURITY FOR COSTS—ORDER FOR, ON GROUND OF FORMER ACTION FOR SAME CAUSE—SUBSTANTIAL IDENTITY NOT ESTABLISHED—ORDER SET ASIDE.

Coombe v. Murphy, 12 O.W.N. 18.

SECURITY—FORMER ACTION INVOLVING SAME ISSUE—ADDITION OF NECESSARY PARTIES—NOMINAL PLAINTIFF.

Byrne v. Gentles, 12 O.W.N. 203.

SECURITY—R. 373 (R)—PLAINTIFF ORDINARILY RESIDENT OUT OF ONTARIO, THOUGH TEMPORARILY RESIDENT WITHIN—DISCRETION.

Erickson v. McFarlane, 42 O.L.R. 32.

SECURITY — CORPORATION — PLAINTIFF — "RESIDES OUT OF ONTARIO"—RULE 373 (A).

United Electric Co. v. Clements Mfg. Co., 16 O.W.N. 303.

SECURITY—PRÆCIPE ORDER—SERVICE OF NOTICE—RESIDENCE OF DEFENDANT—WRIT OF SUMMONS—DEFENDANT OUT OF JURISDICTION—"PLAINTIFF"—JUDICATURE ACT, R.S.O. 1914, c. 56, s. 2 (R)—RULE 165 (2), 169, 375.

Toronto General Trusts Corp. v. Kinzie, 11 O.W.N. 29.

SECURITY—ACTION AGAINST CONSTABLE FOR ASSAULT AND FALSE IMPRISONMENT—PROTECTION OF PUBLIC AUTHORITIES ACT, R.S.O. 1914, c. 89, s. 16—AFFIDAVIT—INQUIRY AS TO MEANS OF PLAINTIFF—DEFENCE.

Gage v. Reid, 10 O.W.N. 208.

SECURITY—TEMPORARY RESIDENCE.

A plaintiff who comes to reside in the province only during the time in which his action continues may be obliged to furnish security for the costs.

Easty v. Carrick, 18 Que. P.R. 21.

SECURITY — CERTIFICATE OF DEPOSIT — NOTICE.

It is not necessary to give notice of the certificate of the prothonotary, that the deposit required in motions for security for costs, has been made, unless the complaining party establishes that he suffered prejudice from the omission.

Case Threshing Machine Co. v. Patenaude, 18 Que. P.R. 129.

SECURITY FOR COSTS—DEFAULT OF PLAINTIFF—SECURITY FOR COSTS—ORDER DISMISSING—APPEAL—RELIEF FROM ORDER AS INDULGENCE—TERMS.

Bianco v. McMillan, 5 O.W.N. 196, 25 O. W.R. 197.

SECURITY FOR COSTS—RULE 373 (D), (G)—STAY OF PROCEEDINGS—REFUSAL TO EXERCISE INHERENT JURISDICTION OF COURT.

Bateman v. Nussbaum, 8 O.W.N. 250, 305.

SECURITY FOR—PROCEEDINGS TO QUASH BY-LAW.

Notice of the giving of security in proceedings to quash a by-law is not required by the M. C.; the security may be attacked when the application for which it was given is presented.

Tournel v. County of Ottawa, 14 Que. P. R. 261.

SECURITY FOR COSTS—LIBEL AND SLANDER ACT, 9 EDW. VII. c. 40, s. 19—CON. R. 373 (G)—WORDS IMPUTING UNCHASTITY.

Cook v. Cook, 25 O.W.R. 25.

SECURITY FOR COSTS—HABEAS CORPUS PROCEEDING—CUSTODY OF INFANT—APPLICANT OUT OF JURISDICTION.

Re Kenna, 5 O.W.N. 40, 25 O.W.R. 35.

SECURITY FOR COSTS—PUBLIC AUTHORITIES PROTECTION ACT — POLICE MAGISTRATE —ACTION AGAINST FOR TORT—UNOFFICIAL ACT—CAUSE OF ACTION.

Fritz v. Jelfs, 4 O.W.N. 1271, 24 O.W.R. 710.

SECURITY FOR COSTS—PRÆCIPE ORDER—ONE PLAINTIFF IN JURISDICTION.

Fischer v. Anderson, 4 O.W.N. 647, 23 O.W.R. 792.

SECURITY FOR COSTS—ACTION AGAINST POLICE OFFICERS.

Meredith v. Slemin, 4 O.W.N. 885, 24 O.W.R. 155.

SECURITY FOR COSTS—ACTION BY COMPANY—WINDING-UP IN ANOTHER PROVINCE—AMOUNT OF SECURITY.

Bishop Construction Co. v. City of Peterborough, 4 O.W.N. 946, 24 O.W.R. 261.

SECURITY FOR COSTS—LIBEL AND SLANDER ACT, 9 EDW. VII. (ONT.) c. 40, s. 12—AFFIDAVIT.

St. Clair v. Stair, 4 O.W.N. 645, 731, 23 O.W.R. 740, 930.

SECURITY FOR COSTS—FOREIGN COMMISSION—EXAMINATION OF DEFENDANT ON BEHALF OF PLAINTIFF — SECURITY FOR COSTS OF COMMISSION.

Carter v. Foley-O'Brien Co., 4 O.W.N. 835, 24 O.W.R. 114.

SECURITY FOR COSTS—INCREASED SECURITY.

Badie v. Astor, 4 O.W.N. 880, 1180, 24 O.W.R. 147, 441.

SECURITY FOR COSTS — NONPAYMENT OF COSTS OF FORMER ACTION—"FOR THE SAME CAUSE"—PROOF OF IDENTITY.

Scully v. Ontario Jockey Club, 4 O.W.N. 678, 23 O.W.R. 970.

SECURITY FOR COSTS—PLAINTIFF ORDINARILY RESIDENT OUT OF JURISDICTION—ASSETS IN JURISDICTION.

Trowbridge v. Home Furniture & Carpet Co., 4 O.W.N. 910, 1140, 24 O.W.R. 181, 481.

SECURITY FOR COSTS—ON APPEAL.

If several defendants have filed separate appearances, and separate but identical pleas by the same attorneys, the plaintiff inscribing in review must make a deposit for each defendant, especially when it does appear that while the pleas were identical in language each one was broad enough to cover a defence peculiar and personal to the defendant on whose behalf it was filed.

Aaron v. Trudel, 14 Que. P.R. 272.

SECURITY FOR—INTERVENTION—C.P. 179.

A plaintiff cannot be forced twice to give security for costs and file power of attorney. An intervenant is bound by the proceedings made in the case previous to his intervention, and said intervention cannot have any retroactive effect so as to give him the right to call for security, if the delays are expired.

Martin v. Molsons Bank, 15 Que. P.R. 147.

SECURITY FOR COSTS.

The delay of putting in security in a contestation of a municipal election must be interpreted strictly, it is not in the power of the court to extend it, any more than to extend the delay to contest after the expiration of the 30 days given for the filing of the contestation.

Galbraith v. Shepherd, 14 Que. P.R. 294.

SECURITY FOR—COMPANIES OUTSIDE PROVINCE—POWER OF ATTORNEY—PROCURATION—POWER TO SUE.

A company which has its head office outside of the province, but does business within it, cannot be considered as a resident and must furnish security for costs on bringing an action. If a foreign plaintiff has, under the law, an absolute power to sue in the province, a special power of attorney will not be required.

Employers' Liability Ass'ce Corp. v. United Shoe Machinery Co., 15 Que. P.R. 84.

SECURITY—MUNICIPAL LIABILITY—DEPOSIT.

The deposit of $10 mentioned in art. 793 M.C., is required in actions for damages as in penal actions. The plaintiff who has not made this deposit at the institution of his action will be ordered to do so within 6 days on paying his adversary the costs of the exception.

Duval v. Cap de La Madeline, 15 Que. P.R. 88.

SECURITY FOR—SAISIE-ARRET AFTER JUDGMENT.

The saisie-arrêt after judgment is only a mode of execution: so long as there has been no contestation of the declaration of the tiers-saisi, there is no action, no instance, no process and consequently, a motion for an order to compel the judgment creditor to give security for costs cannot be granted.

Drouet v. Blanc, 15 Que. P.R. 122.

SECURITY FOR COSTS.

Even if security for costs may be asked in habeas corpus proceedings (which is doubted), it must be asked in limine.

Woollven v. Aird, 14 Que. P.R. 165.

SECURITY FOR—ACTION IN REPRESENTATIVE CAPACITY.

Where another person is in fact proceeding with an action in the name of the party on the record, and that party is not insolvent, the court will compel him for whose benefit the action is proceeding to come in and give security for costs. [Andrews v. Morris, 7 Dowl. P.C. 712, applied.]

Bruce v. Nova Scotia Fire Ins. Co., 25 Man. L.R. 724, 9 W.W.R. 342.

SECURITY FOR — BONDING COMPANY AS PLAINTIFF.

Security for costs will not be ordered against a plaintiff company where the company is one approved by the Lieutenant-Governor-in-Council, to furnish security required by the court, under the Guarantee Companies Security Act (Sask.).

U. S. Fidelity v. Gouin, 8 S.L.R. 182, 31 W.L.R. 912, 8 W.W.R. 1198.

A motion for security for costs served after the legal delays notwithstanding the fact that it appears by the writ of summons that the company plaintiff had its principal office outside the province, will

be dismissed if the conclusions of said motion are those of a dilatory exception. (2) Such motion will be dismissed without costs.

The Canadian General Electric Co. v. The Canadian Rubber Co., 13 Que. P.R. 334.

A demand of security for costs is a dilatory exception and, therefore, must be offered within the delay and with the formalities of preliminary exceptions. [Canada General Electric Co. v. Canadian Rubber Co., 13 Que. P.R. 324.]

Alter Lax v. Calgary Fire Ins. Co., 13 Que. P.R. 233.

SECURITY FOR COSTS — PLAINTIFF'S RESIDENCE OUT OF THE JURISDICTION—INSUFFICIENCY—PROPERTY IN JURISDICTION—AFFIDAVITS.

Patterson v. Allan, 6 O.W.N. 125.

SECURITY FOR COSTS—INCREASED SECURITY —ADMISSIONS—INCREASE OF COSTS OCCASIONED BY COUNTERCLAIM—ADMITTED BALANCE DUE ON PLAINTIFFS' CLAIM.

Reynolds v. Walsh, 6 O.W.N. 310.

SECURITY FOR COSTS—FOREIGN PLAINTIFF—QUE. C.P. 179.

The security "judicatum solvi" is due only by the foreign plaintiff and the defendant is not bound to furnish same.

Legallee v. Cooper, 16 Que. P.R. 173.

SECURITY FOR COSTS—DELAY—DILATORY EXCEPTION—QUE. C.P. 179.

When it appears from the writ that the plaintiff lives abroad, if the defendant demands security for costs he must do so within 3 days from the return of the writ, this demand being in the nature of a dilatory exception.

Wilcox & Frost Co. v. Lamarre, 15 Que. P.R. 278.

SECURITY FOR COSTS—MOTION TO FURNISH—DELAY—QUE. C.P. 165.

A motion for security for costs is not a preliminary exception subject to the formality of the deposit. [Ferrel & Saultry, 16 K.B. 369, followed.] A motion for security for costs, served within the 2 days after the judgment relieving the defendant from foreclosure to appear, and after payment by the defendant of the costs incurred by his default, is made in due time.

Major v. Seguin, 16 Que. P.R. 151.

SECURITY FOR COSTS—DEPOSIT MADE SUBSEQUENTLY—POWER OF ATTORNEY—QUE. C.P. 165, 179.

A defendant who applies for security for costs and a power of authority, may make his deposit later, and it may be confirmed upon his motion.

Hees v. Hannan, 16 Que. P.R. 50.

SECURITY FOR COSTS—TEMPORARY RESIDENCE OUT OF JURISDICTION.

Plaintiff, at the time of action brought, was resident at B. in Nova Scotia, where he had lived some 8 years before. At the time defendant applied for security for costs, the plaintiff was working at a place in New Brunswick, but his wife and family were then living at B. and supported by the plaintiff. Plaintiff also swore that his employment, at the time, was only temporary, that he had not removed permanently from Nova Scotia, and that he hoped to resume his residence there:—Held, that plaintiff was not residing out of the jurisdiction permanently, or under such conditions otherwise as would entitle defendant to an order for security against him.

White v. Lake, 11 E.L.R. 517.

SECURITY FOR COSTS—CAPIAS—GARNISHMENT BEFORE JUDGMENT.

If a capias and a garnishment before judgment are quashed by way of a petition, there is then left only one action, and the foreign plaintiff will be bound to furnish only one supplementary security.

MacKenzie v. O'Connell, 16 Que. P.R. 301.

SECURITY FOR COSTS—EXPIRATION OF DELAYS TO FURNISH—NEW DELAY—QUE. C.P. 182.

The nonobservation of the delay to furnish security for costs does not imply the dismissal of the action, but the action might be declared not in order for the present time. The court has discretionary power to grant a new delay for security for costs.

Freeman v. Freeman, 15 Que. P.R. 421.

SECURITY—NONRESIDENT PLAINTIFF.

The opposant to judgment has a right to demand pendente lite that the plaintiff who has ceased to reside in the province shall furnish security judicatum solvi. An uncontradicted allegation under oath of the departure of the plaintiff, of the sale of his house and office furniture and the transport of his menage to the United States, suffices to authorize the court to order him to furnish security for costs.

Chaput v. Goltman, 18 Que. P.R. 327.

SECURITY—NEW TRIAL—APPEAL.

Under r. of court 652, security for costs in the case of an application for a new trial should be awarded on the same principles as the case of an ordinary appeal. Where the material shewed that the respondents' costs of action had been taxed and were not paid; that there were no means of realizing these costs from the appellant, and that the appellant had no property out of which any costs ordered to be paid by her could be realized, the appellant was ordered to furnish security for the costs of her application for a new trial.

Peterson v. Davenport, 9 S.L.R. 118, 34 W.L.R. 64.

DEFAMATION—B.C. LIBEL AND SLANDER ACT —ACTION FOR LIBEL IN NEWSPAPER—SECURITY FOR COSTS — WHETHER ALLEGED LIBEL INVOLVING A CRIMINAL CHARGE AND SO WITHIN EXCEPTION IN S. 16 (A)—APPLICATION OF SECTION WHERE NO DIRECT CRIMINAL CHARGE MADE BUT INNUENDO NECESSARY.

In an action for libel contained in a

newspaper where the words are alleged by the plaintiff to have been used in a sense which involves the making by the person using them of a criminal charge against the plaintiff, and may have that meaning, the case is brought within the exception, disentitling defendant to security for costs, contained in s. 16 (a) of the Libel and Slander Act, which exception is applicable to cases where an innuendo is necessary to give the words complained of a defamatory sense; and upon application for security there cannot be a trial of the action on the merits in order to determine whether the words used involve a criminal charge.

Wallace v. Lawson, [1919] 2 W.W.R. 408.

SECURITY FOR—PRIMA FACIE RIGHT AGAINST NONRESIDENTS.

Where upon the face of the proceedings it appears that the plaintiff is resident—or if a corporation has its chief place of business without the jurisdiction, the defendant is prima facie entitled to the costs of an application for security, although the application is dismissed upon the plaintiff shewing assets within the jurisdiction.

Whitla v. Stoffel, 33 W.L.R. 109.

SECURITY FOR—CROSS-EXAMINATION ON AFFIDAVIT.

Where a defendant has moved for security for costs under Costs r. 10 (Alta.), and disclosed a prima facie defence in his affidavit and cross-examination thereon, the plaintiff should not be allowed to continue the cross-examination for the purpose of controverting that defence. [Scott v. Holmes, 6 W.W.R. 1190, considered.]

Victor v. Webb, 32 W.L.R. 887.

SECURITY FOR COSTS—JURISDICTION OF COURT TO ORDER FURTHER SECURITY AGAINST EXTRA PROVINCIAL COMPANY.

Matuso Co. v. Wallace Shipyards, [1919] 2 W.W.R. 549.

SECURITY FOR — BOND — SUFFICIENCY OF SURETIES—CASH DEPOSIT.

Imperial Elevator & Lumber Co. v. Hillman, 31 W.L.R. 546.

SECURITY—DISCLOSURE OF REAL PLAINTIFF.

Where on a motion for security for costs on the ground that the plaintiffs are nominal plaintiffs only, an officer of the alleged real plaintiff is examined, and having deposed that claim sued upon was assigned for the purposes of suit only, and that the proceeds of the action would be "applied on" the indebtedness of the nominal plaintiff to the real, refuses to answer questions as to the amount of that indebtedness, he may be compelled to answer the same. [Delaney v. McLellan, 13 P.R. (Ont.) 63; Pritchard v Patterson, 19 P.R. (Ont.) 180, and Mayor v. McKenzie, 17 P.R. (Ont.) 18, considered.]

Annable Co. v. Younglove, 34 W.L.R. 214.

SECURITY FOR—ACTION AGAINST TRUSTEE FOR ACCOUNTING—DEFENCE THAT PLAINTIFF NOT OWNER—ALLEGED OWNER ADDED AS DEFENDANT — SECURITY FOR COSTS GIVEN ORIGINAL DEFENDANT—RIGHT OF ADDED DEFENDANT TO SECURITY—COMPARISON WITH INTERPLEADER PROCEEDINGS.

In an action against a trustee for an accounting where the defendant set up that a person other than the plaintiff was really the owner of the property in respect to which the accounting was sought and such other person was then added as a party defendant and alleged that the property belonged to him, the principal issue to be decided being whether the plaintiff or the added party was the party to whom the defendant should account, and the original defendant had obtained an order for security for costs which the plaintiff had complied with, the added defendant was held not entitled to security for his costs, as he had not shown that he relied bona fide upon disputing the existence or execution of the trust acknowledgment alleged by the plaintiff. [McPhillips v. Wolf, 4 Man. L.R. 309 applied.]

Hamelin v. Newton, [1919] 1 W.W.R. 14.

RULE OF SECURITY—DISCRETION.

When a defendant has shown himself entitled to security for costs at all, he is entitled to ample security for all his costs, and the mere fact that he may not have made application until notice of trial was given does not, of necessity, deprive him of his rights to the order. The discretion given by r. 715 to the judge making the order is to enable him to do justice to the particular circumstances of different cases, but does not affect the defendant's right as just stated.

Reum v. Rutherford (Sask.), [1917] 2 W.W.R. 1104

SECURITY FOR COSTS—EXAMINATION AS TO MERITS OF ACTION—R. 520.

On a motion for security for costs, the defendant may be compelled to answer questions relative to the merits of his defence.

Scott v. Holmes, 6 W.W.R. 1190.

SECURITY FOR—TIME FOR MAKING APPLICATION — REQUISITES OF AFFIDAVIT — RULES OF COURT.

An affidavit in support of an application for security for costs is sufficient if it states that defendant has a good defence upon the merits and that the deponent is informed and verily believes that plaintiff resides outside the province. [O.W. Kerr Co. v. Lowe, 3 W.L.R. 400; Balcovski v. Olsen, 3 W.L.R. 367, followed.] An application for security for costs may be made at any stage of the proceedings. [Lydney and Wigpool Iron Ore Co. v. Bird, 23 Ch. D. 358; In re Smith, 75 L.T.R. 46, followed.]

Cameron v. Royal Bank of Canada, 7 S.L.R. 301, 30 W.L.R. 157.

SECURITY—NONRESIDENT PLAINTIFF.

Where any of joint plaintiffs reside within jurisdiction, no order for security of

costs should be made against those resident outside the jurisdiction.

Martin v. Dominion Trust Co., 35 W.L.R. 445.

SECURITY FOR COSTS —PLAINTIFF OUT OF ONTARIO—ALIEN CONVICTED OF CRIME—ENLISTMENT FOR MILITARY SERVICE IN CANADIAN BATTALION — DISCHARGE FROM SERVICE—LEGALITY OF, ATTACKED —DEPORTATION FROM CANADA—RIGHT TO REMAIN IN CANADA AND TO PROSECUTE ACTIONS WITHOUT GIVING SECURITY—DENIAL OF.

Vigo v. Hamilton, 16 O.W.N. 98.

(§ 1—16)—PAYMENT OUT OF FUNDS OR ESTATE.

Upon a proper application for the application or distribution of a charitable gift cy-près, the costs may come out of the fund.

Re Northern Ontario Fire Relief Fund Trusts, 11 D.L.R. 15, 4 O.W.N. 1118, 24 O.W.R. 459.

OUT OF ESTATE—SUCCESSFUL CONTEST OF CLAIM TO DECEDENT'S PROPERTY.

Where the plaintiff successfully contested the defendant's right to money belonging to a deceased person, and the defendant was the recipient of two-thirds of all the property of the former, the plaintiff's costs, as between solicitor and client, will be paid from the estate of the deceased; the defendant being left to pay his own costs.

Nogler v. Campbell, 11 D.L.R. 605, 4 O. W.N. 1380, 24 O.W.R. 680. [Reversed, 14 D.L.R. 480.]

OUT OF INSOLVENT'S ESTATE—APPEAL BY CREDITORS. [See Re Wilson Assignment, 25 D.L.R. 417.]

Re Wilson Estate, 25 D.L.R. 758, 9 W. W.R. 582, 33 W.L.R. 13.

OUT OF FUND OR ESTATE.

Where, upon the payment into court, on the sale of land, charged with the payment of a legacy, of the amount thereof, costs will be deducted therefrom where no claim was made to the money and the whereabouts of the legatee, if living were unknown.

Re Gallagher, 3 D.L.R. 729, 3 O.W.N. 1302, 22 O.W.R. 226.

LEGACY PAYABLE OUT OF PERSONALTY—MOTION BY SPECIFIC LEGATEE—OPPOSITION BY RESIDUARY LEGATEE.

The residuary legatee should pay the costs upon the granting of an order declaring the construction of a will resulting in the legacy claimed by the mover of the order being given to him, where the residuary legatee and the executor of the estate made no reply to letters written them on behalf of the legatee requesting the payment of his legacy and on the argument of the motion his claim was strenuously resisted, though there was filed after the motion was launched a letter from a solicitor of the residuary legatee disclaiming any dispute as to the right of the legatee to his legacy.

Re Craig, 3 D.L.R. 59, 3 O.W.N. 870.

OUT OF FUND—PRIORITIES—FUND OF VARYING AMOUNT—SUCCESSIVE ATTACHING ORDERS.

Where garnishment proceedings are served on different dates by two attaching creditors in respect of the debtor's bank account, and the fund to the debtor's credit is increased between the dates of such services, the attaching creditor making the later service will have priority for his costs on a distribution under the Creditors' Relief Act (Alta.) as against such increase, while the first attaching creditor will have priority for his costs on the amount standing to the debtor's credit when the first garnishee summons was served.

Canniff v. Chandler; Sargent v. Chandler, 15 D.L.R. 909, 7 A.L.R. 355, 27 W.L.R. 145, 5 W.W.R. 1357.

EXECUTORS—ALLEGED WILL—PROBATE REFUSED — JUDGE — DISCRETION AS TO COSTS.

Where the parties named as executors propounded an alleged will which on its face is in regular form and probate is refused, the Trial Judge has a discretion also to refuse costs to such parties out of the estate, but on appeal the court may confirm an arrangement to pay a part of such costs.

Murphy v. Lamphier, 20 D.L.R. 906, 32 O.L.R. 19, affirming 31 O.L.R. 287.

ACTIONS RESPECTING WILLS.

Where an action for the revocation of the probate of a will raised the question of testamentary capacity and certain of the next of kin joined as codefendants with the executor filed pleas merely submitting their rights to the court, they will properly be refused their costs against the unsuccessful plaintiff if, notwithstanding their formal pleading, they made common cause with the plaintiff at the trial.

Toal v. Ryan, 4 D.L.R. 25, 3 O.W.N. 1267, 22 O.W.R. 127.

UNSUCCESSFUL PROPOUNDING OF WILL—COSTS OUT OF ESTATE.

Where an action to establish a will is dismissed as the statutory requirements as to the mode of execution required by the statute (Wills Act, R.S.B.C. 1911, c. 241, s. 6) had not been fully complied with, but the plaintiff's conduct as regards the defective execution was held to be exemplary, the court may allow him his costs out of the estate.

Peden v. Abraham, 8 D.L.R. 403, 3 W.W. R. 265.

RIGHT OF EXECUTOR TO COSTS AS BETWEEN SOLICITOR AND CLIENT—AMOUNT RECOVERED WITHIN COUNTY COURT JURISDICTION—HIGH COURT SCALE.

When an executor is justified in bringing an action in the High Court, having regard to the information in his hands before action, he is entitled as against the estate to costs out of the estate, as between solicitor and client, upon the High Court scale,

though the amount recovered in the action is within the County Court jurisdiction.

Little v. Hyslop, 7 D.L.R. 478, 4 O.W.N. 285, 23 O.W.R. 247.

GIVING EFFECT TO TERMS OF WILL—PARTY OPPOSING—LIABILITY FOR COSTS.

Where a daughter was by the terms of her father's will displaced as one of his universal legatees by her brother by her inheritance of land supposed to belong to her brother under their grandfather's will, it is their duty to give active effect to the terms of their father's will, and where she remained passive after the brother had served upon her a notarial notice to sign a deed establishing his rights upon replacing her as such legatee under their father's will, and had provided for the costs thereof, if it became necessary for him to resort to an action to establish such rights the sister must pay the costs incurred by him.

Greece v. Greece, 3 D.L.R. 841, affirming upon other grounds 39 Que. S.C. 233.

AGAINST COMPANY IN LIQUIDATION—PREFERRED CLAIM.

An unconditional judgment for costs recovered in an action against a company in liquidation, which was defended by the liquidator on behalf of the estate, is payable in full out of the assets of the estate in the hands of the liquidator, and does not rank pari passu with general claims. [Re Bank of Hindustan (Smith's Case), L.R. 3 Ch. 125; Re Bailey, L.R. 8 Eq. 94; Re Wenborn, [1905] 1 Ch. 413; Re Home Investment, 14 Ch. D. 167; Re Dominion Plumbago Co., 27 Ch. D. 34; Re London Metallurgical Co., [1895] 1 Ch. 758; Re Baden Machinery Co., 12 O.L.R. 634, followed.]

Re Transcontinental Townsite Co., Plainview Farming Case, 25 D.L.R. 597, 25 Man. L.R. 803, 33 W.L.R. 241, 9 W.W.R. 733.

OUT OF DECEDENT'S ESTATE—UNSUCCESSFUL OPPOSITION TO PROBATE OF WILL.

Momberg v. Jones, 25 D.L.R. 768, 9 W. W.R. 270, 32 W.L.R. 544, 9 W.W.R. 220.

ISSUES AS TO VALIDITY OF WILL.

Armitage v. Scrase, 9 O.W.N. 267.

TAXED COSTS—IN LIEU OF COMMISSION—ADMINISTRATION PROCEEDING — RULE 653.

Re Goldenberg, 7 O.W.N. 789.

OUT OF FUND OR ESTATE—INQUIRY AS TO NEXT OF KIN OF INTESTATE—DISPOSITION OF ESTATE—ESCHEAT TO CROWN.

Re Corr, 4 O.W.N. 1487, 24 O.W.R. 818.

PARTNERSHIP ACTION—COST OUT OF ESTATE.

In a partnership action the defendant admitted the partnership, but alleged that he was not bound to account and that the plaintiff had abandoned his partnership rights before action brought (which defences he abandoned at the trial), and counterclaimed for a balance alleged to be due him on private account. A reference was ordered, and the Master found that only one asset of the partnership remained to be collected, and that the defendant was indebted to the plaintiff in a certain sum. Further directions and costs were reserved: —Held, that the plaintiff's costs of the action up to and including trial and examinations for discovery should be paid by the defendant personally. Held, also, that the costs of the reference and the hearing on further directions should come out of the estate. Semble, that as the costs directed to be paid out of the estate included the costs of both parties and were not costs which might be taxed and allowed to the successful party in an action as against any other party thereto, the r. 951 did not apply. Semble, that this was not such a case as would justify interfering with the statutory limit as to costs provided for by r. 951 Held, also, that the plaintiff should have his costs of the defendant's unsuccessful appeal from the Master's report, to be paid by the defendant personally.

Hawkshaw v. Peltier, 33 W.L.R. 43.

(§ I—17)—TENDER—MUNICIPALITY.

In the absence of proof that tender of the amount recovered was made, a municipality is not entitled to the costs of an action under s. 525 of the City Act (Sask.).

Wilkes v. City of Saskatoon, 32 D.L.R. 42.

CONSENT TO—COSTS TO CERTAIN DATE.

A letter from defendant to a plaintiff in an action for damages for expulsion from a lodge should, in order to deprive the plaintiff, if successful, of costs, containing an express consent to payment of costs to that date, an express statement that no dues for the period of alleged expulsion would be expected from the plaintiff and that the defendant would pay nominal damages. But if, although the defendant's letter does not measure up to such requirements, the plaintiff continues the action on the belief that he is entitled to more than nominal damages, and recovers nominal damages only, he should, under the doctrine of Florence v. Mallinson, 65 L.T. (N.S.) 354, be deprived of costs from the date of the receipt of the letter.

Humphrey v. Wilson, 25 B.C.R. 110, [1917] 3 W.W.R. 529. [See also, [1917] 3 W.W.R. 937.]

(§ I—18)—AMOUNT OF RECOVERY AS AFFECTING.

Where, in an action in the High Court to recover weekly instalments under an accident insurance policy, the total amount of the instalments accrued at the date of the issue of the writ is a sum within the jurisdiction of the County Court, but the plaintiff has not, at that date, recovered from his injuries, and the judgment in his favour deals also with the instalments yet to accrue, costs may be awarded on the High Court scale.

Wallace v. Employers' Liability Ass'ce Corp. (No. 2), 3 D.L.R. 546, 3 O.W.N. 1179, 21 O.W.R. 845.

An action under the Workmen's Compensation Act when the amount claimed is not

stated, is of the second class, even when the verdict against the defendant is for $300 and $32.50 per month for twenty-four months.

Rivet v. G. T. R. Co., 13 Que. P.R. 334.

WHEN REFUSED—APPEALS INVOLVING SMALL AMOUNTS.

Costs were refused to mark the intention of the court to discourage appeals involving small amounts in County Court actions from provinces which have established Courts of Appeal.

Hammond v. Daykin & Jackson, 8 W.W.R. 312.

AMOUNT OF RECOVERY AS AFFECTING—FORECLOSURE.

Rule 27, subs. of the rule as to costs, read in conjunction with subs. 1, must be interpreted to mean, that in all actions other than an action in which the only relief claimed is the payment of a stated sum of money, by way of damages or otherwise (which would seem to include liquidated demands), or for the payment with the added claim for foreclosure or sale of property mortgaged, etc., the costs in a District Court action should be taxed assuming that the amount claimed or recovered in the action is the sum of $400.

Bienvenue v. Stafford, 8 W.W.R. 423.

(§ I—79)—SEPARATE AND DISTINCT ISSUES—APPORTIONMENT OF.

Where there are separate and distinct issues involved in an appeal, the general costs thereof go to the party who succeeds, but the costs of those issues upon which the other party succeeds must be given to that party. [Reid v. Joseph, [1918] A.C. 717, applied.]

Seattle Construction & Dry Dock Co. v. Grant, Smith & Co., 45 D.L.R. 476, [1919] 1 W.W.R. 783. [See 44 D.L.R. 90, affirmed by Privy Council, 48 D.L.R. 172.]

CONSOLIDATION ACTION FOR SEAMEN'S WAGES.

Where a number of seamen, by consolidation, join in one action their individual claims for wages against the owner of one or more ships engaged in a common enterprise with resulting liens on different ships, each claimant is not thereby liable for costs consequent upon the failure of another claimant to establish a specific lien not set up by the former, but the costs in each case are awarded according to the discretion conferred by r. 132 (B.C.).

Morrisette v. The "Maggie," 27 D.L.R. 464, 22 B.C.R. 424, 476, 16 Can. Ex. 494, 498, 34 W.L.R. 39, 120, 10 W.W.R. 228.

RIGHT TO RECOVER—APPORTIONMENT—COSTS AFFECTED BY WAIVER OF OBJECTION.

The fact that the material upon a motion was defective and that the moving party would in consequence have had to submit to a dismissal or have asked a postponement to supplement the material had not the opposing party by his counsel admitted the material fact which the affidavits did not shew, will be taken into consideration on the disposal of the costs when the motion is allowed.

Re Gibbons v. Cannell, 8 D.L.R. 232, 4 O.W.N. 270, 23 O.W.R. 401.

APPORTIONMENT—DIVISION OF SUCCESS—N.S. JUDICATURE ACT—DEFENCE SUCCEEDING IN PART.

Since the Nova Scotia Judicature Act, where the success is divided between the parties, the costs may be apportioned in accordance with the findings on the several issues. Where the defendant in an action of trespass defends as to the whole of the area in dispute and fails as to part, the plaintiff being successful in part should not be ordered to pay the whole of the defendant's costs as well as his own costs of action.

Swinehammer v. Hart, 5 D.L.R. 106, 46 N.S.R. 194, 11 E.L.R. 260.

OF USELESS CONTESTATION.

Where a boundary line has been drawn between neighbors and one of them refuses to accept the same and brings action to have such line declared incorrect and another drawn, and the other contests the action on the ground that the line was correctly found, that he is ready to fix the boundary and prays for the dismissal of the action, the court will, on finding the plaintiff's claim unfounded, dismiss the action, but the costs of contestation should fall on the defendant, seeing his contestation was useless.

Mathieu v. Morin, 9 D.L.R. 170.

APPORTIONMENT ON PARTIAL SUCCESS—SETTING-OFF COSTS.

Saint John River Steamship Co. v. Crystal Stream Steamship Co. (No. 2), 10 D.L.R. 938, 41 N.B.R. 398, 12 E.L.R. 397.

APPORTIONMENT—SUIT FOR PARTNERSHIP ACCOUNTING—ASCERTAINMENT OF ASSETS LIABLE.

In an action by a member of a partnership against other members of the firm asking for an accounting, the costs of the action from the commencement thereof are usually taxed against the partnership assets, that is, the assets remaining after payment of all the partnership debts including balances due to any of the partners. [Hamer v. Giles, 11 Ch. D. 942, followed; Ross v. White, [1894] 3 Ch. 326; Chapman v. Newell, 14 P.R. (Ont.) 208; Mitchell v. Lister (No. 2), 21 O.R. 318; Lindley on Partnership, 8th ed., 597, referred to.]

Clark v. Wilson, 10 D.L.R. 360, 23 Man. L.R. 10, 23 W.L.R. 258, 3 W.W.R. 937.

APPORTIONMENT—SUCCESS DIVIDED—PROMISSORY NOTE WITH COUNTERCLAIM FOR DAMAGES.

In an action by the plaintiff on a promissory note for part of the purchase price of an automobile wich a counterclaim by the defendant for damages, where the success is divided the costs on appeal may be similarly apportioned.

Automobile Sales v. Moore, 10 D.L.R. 184, 4 O.W.N. 700, 24 O.W.R. 26.

RIGHT TO RECOVER — APPORTIONMENT BY COURT—SUCCESS DIVIDED.

In an action on a fire insurance policy where two issues are raised by the defence, one of fraud in overvaluation of the loss, as to which the plaintiff succeeds at the trial, and one of the quantum of damages as to which a reference is directed, the plaintiff is entitled to costs up to the hearing only so far as they have been incurred upon the issue in which he has succeeded; the costs of the other issue, and of the reference, should be reserved until after the Master shall have made his report. [See Calvert v. C.N.R. Co., 18 Man. L.R. 307.] Where the success is divided in an action by the plaintiff against an insurance company setting up a claim for a fire loss, the court will apportion the costs, each case being governed by its circumstances, under judicial discretion.

Nassar v. Equity Fire Ins. Co. (No. 2), 8 D.L.R. 645, 4 O.W.N. 340, 23 O.W.R. 340, [See also 1 D.L.R. 222.]

APPORTIONMENT WHERE SUCCESS DIVIDED—SAME SOLICITOR—SETTLEMENT BY TRIAL JUDGE.

Where an apportionment of costs becomes necessary because of divided success of two of the parties defendant represented by the same solicitor, the proportionate part of the costs of the joint defence to be awarded against the plaintiff in respect of the successful defence of one defendant should be settled by the Trial Judge in preference to its being left to to be disposed of by the taxing officer.

Duryea v. Kaufman, 2 D.L.R. 468, 3 O.W.N. 651, 21 O.W.R. 141.

ON STATED CASE.

Where a special case is stated in a pending action for the opinion of the court on a preliminary question of law arising therein, the practice is for the costs of the hearing of the special case to be disposed of by the judgment in the action and not at the hearing of the stated case unless the question of costs was also referred and ordered to be then disposed of. [Attorney-General v. Toronto General Trusts Corp., 5 O.L.R. 607, referred to.]

Sarnia Gas & Electric Light Co. v. Sarnia, 4 D.L.R. 19, 3 O.W.N. 1455, 22 O.W.R. 558.

SPECIFIC PERFORMANCE.

Costs will be granted against a defendant in an action for the specific performance of an agreement to sell land, who, although in fact he was an agent for the owner, negotiated a sale with the plaintiff, claiming an interest in the land without disclosing that it was that of an agent only.

Edgar v. Caskey, 4 D.L.R. 460, 5 A.L.R. 245, 21 W.L.R. 444, 2 W.W.R. 413.

LAND TITLES PROCEDURE.

Where the application by the registered owners of land for an order vacating the registration of a caveat against it was denied and instead an order was made directing the caveator to bring an action to establish his claim against the land, the costs of the application will be costs in the cause if the action is brought, and, if, through the default of the caveator the action is not brought or is dismissed for his default in proceeding to trial as directed by the order, the costs of the application will be to the owners.

Re MacCullough & Graham, 5 D.L.R. 834, 21 W.L.R. 349, 5 A.L.R. 45, 2 W.W.R. 311.

APPLICATION BY VENDOR TO REMOVE CAVEAT — "MALUM PROHIBITUM" —CONDITION OF GRANTING.

Since a contract executed by the plaintiff giving the defendant an option to purchase land, although void under C.O. (N.W.T.) 1898, c. 91, s. 3, as preserved by the Lord's Day Act, R.S.C. 1906, c. 153, s. 16, because made on the Lord's Day, is not malum in se but is malum prohibitum only, a caveat filed thereon by the defendant will be vacated upon the application of the plaintiff upon condition that the latter pay the costs of the application.

Fallis v. Dalthaser, 4 D.L.R. 705, 4 A.L.R. 361, 21 W.L.R. 171, 2 W.W.R. 132.

ISSUES—ISSUE DIRECTED ON AN APPEAL—INSUFFICIENT RECORD.

Independent Lumber Co. v. David & Hurlburt, 7 D.L.R. 876, 5 S.L.R. 316, 22 W.L.R. 465, 3 W.W.R. 224.

PARTY—DEPRIVED OF COSTS—JUST GROUND.

A party to an action is entitled to expect that, when a Trial Judge deprives him of his prima facie right to costs, the materials for a just ground of principle shall be made to appear in some form or other either upon the evidence or some recorded observation of the judge.

Leonard v. Whittlesea, 43 D.L.R. 62, 13 A.L.R. 550, [1918] 3 W.W.R. 215.

EFFECT OF SATISFACTION—APPORTIONMENT.

A plaintiff who receives satisfaction from a defendant upon a point on which he is right, but who nevertheless continues his action, and also a defendant who begins by contesting and then gives in to the plaintiff's demand, both contribute to useless litigation, and should bear equally the costs of the suit.

Sénécal v. Charest, 27 Que. K.B. 133.

PARTNERSHIP ACTION—CONTRIBUTION—INTERLOCUTORY COSTS.

Stirton v. Dyer, 10 O.W.N. 393, 11 O.W.N. 15.

Where a final judgment maintains the action with costs, although only one of the defendants has contested, the other two not having appeared, the judge, on a subsequent motion by the plaintiff, may declare that the three defendants are jointly condemned to pay the costs incurred up to the filing of the declaration, and that the one who has contested is alone condemned to pay all the costs incurred by his defence.

Savoie-Guay v. Houle, 49 Que. S.C. 116.

Where in an uncontested action the de-

fendants having been jointly condemned to pay each a specified sum, the plaintiff has a right to one bill of costs only, the class of action being determined by the total amount of the condemnation. In such case each defendant should pay a part of the bill of costs correspondent to the relation between the amount he is condemned to pay and the total amount of the judgment.

Margoles v. Miller, 18 Que. P.R. 58.

APPORTIONMENT.

If the two parties succeed and fail equally in their claims all the costs cannot be put upon one of them.

Barré v. Verdon, 48 Que. S.C. 274.

PARTIAL SUCCESS.

A plaintiff who succeeds in the court of first instance, though only partially, is entitled to his costs. Thus, one who sues for a sum of money and for the maintenance of a privilege, and who obtains only a pecuniary condemnation against the defendant, cannot be condemned to pay his own costs.

Benoit v. Vendetti, 48 Que. S.C. 56.

CROWN COSTS ACT, R.S.B.C., c. 61—COURT OF APPEAL ACT—COSTS TO FOLLOW THE "EVENT"—CROWN COSTS ACT APPLICABLE—DISTRICT REGISTRAR OF TITLES—OFFICER OF CROWN—NO COSTS AGAINST HIM ON APPEAL.

The Crown Costs Act, prohibiting the court from making any order or direction as to costs for or against the Crown or its officers, etc., applies even to cases where by statute, as under the Court of Appeal Act, costs are to follow the event; as to give effect to the right of the successful party in such case the court must make an order or direction. The district registrar of titles is an "officer, servant or agent" of the Crown within the meaning of the Crown Costs Act and costs should not be given against him on dismissal of an appeal by him to the Court of Appeal.

In re Land Registry Act & Scottish Temperance Life Ass'ce Co., [1919] 2 W.W.R. 125.

SEVERAL DEFENDANTS—APPORTIONMENT.

Where one solicitor appears for one and another for two successful defendants in the same action, and one set of costs is given, the Taxing Master has discretion to divide such costs, giving one-third and two-thirds to the defendants respectively, and the court will not interfere with such discretion.

Molison v. Woodlands (Man.), 34 W.L.R. 523.

QUASHING APPEAL WHERE ONLY ONE JUSTICE SERVED—NO COSTS TO RESPONDENT—INDIAN ACT.

The King v. Edelston, 17 Can. Cr. Cas. 155 (Sask.).

APPEAL TO SUPREME COURT OF CANADA—OBJECTION TO JURISDICTION DELAYED UNTIL HEARING—REFUSAL OF COSTS.

Brompton Pulp & Paper Co. v. Bureau, 45 Can. S.C.R. 292.

ISSUE DIRECTED TO BE TRIED IN SURROGATE COURT—PLAINTIFFS IN ISSUE RESIDENT OUT OF PROVINCE.

Forbes v. Forbes, 23 O.L.R. 518, 19 O.W.R. 47.

ISSUE AS TO IDENTITY OF CLAIMANT OF INTEREST IN LAND.

Boyle v. McCabe, 24 O.L.R. 313, 19 O.W.R. 948.

COSTS INCURRED BY MORTGAGEE BEFORE ACTION—REVIEW OF TAXATION—CONTRIBUTION AMONG DEFENDANTS.

Secord v. Tessier, 3 A.L.R. 56.

OF ABANDONED APPEAL—DEMAND.

An application for costs of an abandoned appeal will not be allowed to the respondent unless he has made a previous demand for payment.

MacBeth v. Vandal, 15 B.C.R. 377.

SPECIAL ORDER ALLOWING FULL TAXABLE COSTS—HEARING ON FURTHER DIRECTIONS.

Buchanan v. Winnipeg, 21 Man. L.R. 101, 17 W.L.R. 631.

OF NEW TRIAL—EXCESSIVE DAMAGES.

In an action for damages for injuries sustained in a railway accident, the negligence was admitted and the case tried only on the question of amount of damages. The sum of $15,000, the amount sued for, was awarded, and defendants appealed. A new trial was ordered, but it was directed that, in the circumstances, the plaintiff should pay the costs of the first trial.

Carty v. B.C. Electric R. Co., 16 B.C.R. 3, 16 W.L.R. 224.

UNSUCCESSFUL ACTION TO SET ASIDE WILL.

Where probate of a will was granted without opposition, and this action was afterwards brought to vacate the probate and nullify the will, for alleged undue influence and testamentary incapacity, on insufficient evidence and without any proper inquiry, the plaintiff was ordered to pay all the costs of the defendants who actively defended. Rules as to ordering payment of costs out of the estate and relieving unsuccessful litigants of the payment of costs, in causes testamentary.

McAllister v. McMillan, 25 O.L.R. 1, 20 O.W.R. 305.

ACTION FOR UNLIQUIDATED DAMAGES—CONDITIONAL TENDER BEFORE ACTION—PAYMENT OF MONEY INTO COURT.

Wainwright v. Farmer, 16 B.C.R. 468, 17 W.L.R. 670.

COSTS OF APPEAL—SECURITY—ORDER OF COUNTY JUDGE.

Fyffe v. Loo Gee Wing, 15 B.C.R. 388.

PLAINTIFF RESIDENT TEMPORARILY OUT OF JURISDICTION.

Richards v. Verrinder, 15 B.C.R. 431.

SECURITY FOR COSTS—PLAINTIFF SHEWING EQUITABLE INTERESTS IN LANDS IN PROVINCE.

Ranney v. Stirrett, 4 S.L.R. 179, 18 W.L.R. 5.

SLANDER—UNDUTIFUL CONDUCT OF DEFENDANT—REFUSAL TO GRANT COSTS.

In a slander action, the defendant was not allowed costs, he being a nephew of the plaintiff and his conduct towards plaintiff having been such as to meet the disapproval of the court.

Bootham v. Smith, 19 O.W.R. 147, 2 O. W.N. 1037.

MOTION FOR SECURITY—PRACTICALLY AN APPEAL FROM JUDGE'S ORDER.

Johnston v. Occidental Syndicate, 3 O.W. N. 403, 20 O.W.R. 695.

SECURITY FOR—TWO ACTIONS FOR THE SAME CAUSE—RULE 1198, (C) AND (D).

Lucas v. Cruickshank, 13 P.R. 31; Caughell v. Brower, 17 P.R. 438; Wendover v. Ryan, 7 O.W.R. 160, referred to.

Weir v. Weir, 19 O.W.R. 351, 2 O.W. N. 1187.

SECURITY FOR—PLAINTIFF OUT OF JURISDICTION—RESIDENCE DISTINGUISHED FROM DOMICILE—NO INTENTION OF RETURNING.

Langdon v. Molsons Bank, 19 O.W.R. 701, 2 O.W.N. 1387.

SECURITY FOR—ACTION FOR LIBEL IN NEWSPAPER—PROPERTY OF PLAINTIFF AVAILABLE.

McVeity v. Ottawa Free Press Co., 2 O. W.N. 613, 703, 18 O.W.R. 146.

SPECIAL SUPERINTENDENT — QUEBEC PRACTICE—ACTION FOR COSTS.

The action to recover the taxed costs of a special superintendent where the amount exceeds $100 may be brought in the Superior Court. The jurisdiction given to the Circuit Court by arts. 807 and 1042 of the Municipal Code upon such a claim is not exclusive.

Parish of Ste. Anne La Perade v. Lafleur, 12 Que. P.R. 376.

SUIT WITHOUT PRIOR DEMAND—DELAY ASKED BY DEBTOR—PAYMENT INTO COURT WITH PLEA.

The request by a debtor of delay for payment and the fact that on the day the debt matures, he has no funds at his domicile wherewith to pay it, do not put him in default, so as to relieve the creditor from the obligation of making a demand of payment upon him.

Paciment v. Dubois, 39 Que. S.C. 507.

SECURITY FOR COSTS AND POWER OF ATTORNEY—EXTRA PROVINCIAL CORPORATION.

Standard Gold Mines v. Robinson, 13 Que. P.R. 52.

FOREIGN HOLDER OF NOTE—TRANSFER FOR COLLECTION.

As the holder in due course of a promissory note may, by indorsement, transfer it to an agent for collection, the latter is not obliged, in suing thereon, to furnish security for the costs of his action though the indorser resides outside the province.

Dunlop v. Colonial Engineering Co., 12 Que. P.R. 362.

ELECTION OF DOMICILE—FOREIGN CREDITOR—DEMAND OF ASSIGNMENT—SERVICE OF MOTION.

Jubinville v. Scott, 12 Que. P.R. 426.

INSCRIPTION IN REVIEW—SEPARATE DEFENCE—DEPOSIT.

When two defendants to an action have pleaded separately by different attorneys the unsuccessful plaintiff, on inscribing in review, should make two deposits though the enquête was common and the actions were decided at the trial by one judgment for both.

Lavergne v. Larivière, 12 Que. P.R. 206.

PENAL ACTION—DEPOSIT.

A motion for an order for security for costs, even in a penal action, is not of the nature of a preliminary exception and is not, therefore, subject to the deposit required by art. 165 C.P.Q.

Schoolarinos v. Calenos, 12 Que. P.R. 194.

SECOND ACTION—MOTION FOR DISMISSAL—COSTS OF FIRST ACTION.

A motion for dismissal of an action on the ground that the costs of a former action had not been paid is in the nature of a preliminary exception and should be accompanied by a deposit.

Chagnon v. Auclaire, 12 Que. P.R. 132.

APPEAL — MOTION TO DISMISS — SECURITY BOND.

Brunet v. The United Shoe Machinery Co., 12 Que. P.R. 207.

MOTION FOR—DEPOSIT.

1. A motion for security for costs, pendente lite, cannot be considered as a preliminary plea and a deposit is not required therewith. 2. A delay of 3 days in order to demand security for costs applies only when the demand is made by dilatory exception, and not by motion.

Parmelee v. Broulliard, 12 Que. P.R. 103.

SECURITY FOR COSTS—APPEAL FROM MUNICIPAL COUNCIL—QUEBEC PRACTICE.

The Quebec Election Act does not provide for any security for costs, on an appeal from the decision of a municipal council which may have neglected or refused to take into consideration a complaint against the voters' list.

Ducharme v. Corp. of Magog, 13 Que. P.R. 118.

PRINCIPAL AND AGENTS JOINED AS DEFENDANTS — ACTION SUCCESSFUL AGAINST PRINCIPAL, BUT UNSUCCESSFUL AGAINST AGENTS—ALTERNATIVE CLAIM.

Waite v. Edwards, 17 W.L.R. 566 (Sask.).

II. Taxation; practice; collection.

As to solicitor's fees, see Solicitors.

In arbitration matters, see Arbitration, III–15.

(§ II—20)—UNSUCCESSFUL ALIMONY ACTION.

Rule 388 is imperative, and, while the court cannot order the husband to pay the costs of the wife's unsuccessful action for

alimony, it may require him to pay the wife the amount of the cash disbursements actually and properly made by her solicitors.

McIlwain v. McIlwain, 28 D.L.R. 167, 35 O.L.R. 532.

ON JURY MOTION.

Where a plaintiff does not desire a jury, but the defendant demands one and the plaintiff asks that, if a jury be ordered, it shall be a special one, the costs of such special jury should be costs in the cause.

Canadian Financiers Trust Co. v. Ashwell, 31 D.L.R. 786, 23 B.C.R. 341, 35 W.L.R. 459, [1917] 1 W.W.R. 459.

ACTIONABILITY—LOSSES CAUSED BY JUDICIAL PROCEEDINGS—NECESSITY OF ORDER.

Armishaw v. Sacht, 30 D.L.R. 288, 34 W.L.R. 1180. [Affirmed, 24 B.C.R. 53.]

THIRD PARTY.

A third party has no right to increase the costs of a plaintiff who was not responsible for bringing him in, and no right to costs, against a defendant where the third party does not dispute his liability to the defendant if the defendant be liable to the plaintiff.

Johansson v. Cronquist, 38 D.L.R. 508, 12 A.L.R. 225, [1917] 3 W.W.R. 1229.

AGAINST INSTIGATOR OF ACTION—CODEFENDANT—"CASE OF SPECIAL IMPORTANCE OR DIFFICULTY."

A court has inherent jurisdiction to compel the real instigator or promotor of unfounded litigation, to pay the costs thereof, whether he is a party to the proceedings or not, and to award such costs against a codefendant; a case does not become one of "special importance or difficulty," as ground for awarding more than the usual costs, because negligence and fraud were charged.

Perry v. Perry, 37 D.L.R. 89, 29 Man. L. R. 23, [1917] 3 W.W.R. 315. [Affirmed, 40 D.L.R. 628, [1918] 2 W.W.R. 485.]

AMBIGUOUS ORDER.

Where the words of a judge's order for costs are ambiguous, the proper course is to apply to the judge who made the order to correct the ambiguity, and the meaning which he intended should be adopted. Costs down to, and including the trial, should be taxed on the Supreme Court scale; costs subsequent to the trial should be taxed as provided for in r. 649.

Avery & Son v. Parks, 35 D.L.R. 71, 39 O.L.R. 74, affirming except as to costs, 38 O.L.R. 535.

RIGHT OF ATTORNEY TO DEMAND COSTS—POWER OF ATTORNEY NECESSARY.

No proper demand of payment of costs can be made by an attorney unless he has the authority of a specific power of attorney, and a rule of court ordering payment of the costs and not stating to whom they are to be paid, is vague and uncertain.

The King v. Borden; Ex parte Kinnie, 24 D.L.R. 197, 48 N.B.R. 299.

PRACTICE—RIGHT TO RECOVER—NONCOMPLIANCE WITH CON. R. 362 (ONT.).

Upon an application to set aside an order irregularly made, the applicant will get no costs if his notice of motion does not comply with Con. r. 362, and does not set out the irregularity complained of and the several objections intended to be insisted on.

Yolles v. Cohen, 9 E.L.R. 452, 4 O.W.N. 819, 24 O.W.R. 66.

AMOUNT, PRACTICE, COLLECTION.

In an action for alimony the plaintiff's costs up to judgment are an execution debt only, but where an application is made by way of petition for sale of the lands of the husband to enforce the statutory charge for arrears of alimony due under the judgment, the costs of such application and of the sale are to be paid in priority out of the fund realized by the sale.

Abbott v. Abbott, 1 D.L.R. 697, 3 O.W.N. 683, 21 O.W.R. 281.

PROCEEDINGS ON BEHALF OF ONLY ONE CREDITOR—PREFERRED COSTS—SEQUESTRATOR'S COSTS NOT PRIVILEGED.

Where expenses or costs are incurred for the benefit of one creditor alone and not for the creditors generally, there can be no privileged claim therefor. There is a preference or privilege only for those law costs or expenses incurred for the seizure and sale of the property of a common debtor and those of judicial proceedings for enabling creditors generally to obtain payment of their claims. A sequestrator's costs of administration, however, are not privileged law costs within the meaning of C.C. 2009 and cannot be recovered hypothecarily from a third party who buys the immovable from the person declared to be the true owner by the court.

Maillet v. Fontaine, 2 D.L.R. 218, 21 Que. K.B. 426, 18 Rev. de Jur. 470.

TAXATION—CERTIFICATE SETTLED ON EX PARTE HEARING—RELIEF AGAINST DEFAULT.

Where the party entitled to oppose a taxation was not represented because of the sudden illness of his solicitor and the taxation proceeded ex parte and a certificate was issued, the court may invoke its inherent jurisdiction upon an appeal from the taxation to vacate the certificate and extend the time for filing objections, so as to conform to a general order of court which limits such appeals to items concerning which objections were filed before the close of the taxation.

Caron v. Bannerman, 1 D.L.R. 24, 22 Man. L.R. 24, 19 W.L.R. 881.

PREMATURE ACTION OR APPLICATION.

The costs of an unsuccessful summary application to remove an arbitrator made before the writ was issued in an action for that purpose which failed for want of jurisdiction, may be disposed of in the subse-

quent action under Ontario Con. r. 1130 (Rules of 1897).

Plaunt v. Gillies Bros., 3 D.L.R. 283, 3 O.W.N. 921, 21 O.W.R. 509.

PRACTICE ON TAXATION—FILING OBJECTIONS FOR REVIEW—APPLICATION TO SOLICITOR AND CLIENT TAXATIONS.

The Manitoba King's Bench rr. 968 and 969 as to carrying in written objections to the ruling of the taxing officer, specifying the items objected to upon the taxation of any bill of costs has a general application to solicitor and client taxations as well as to taxations between party and party.

Re Phillipps & Whitla, 1 D.L.R. 291, 22 Man. L.R. 150, 20 W.L.R. 229, 1 W.W.R. 840.

SCALE OF—ACTION BROUGHT IN SUPREME COURT — RULE 649 — RECOVERY BY PLAINTIFF AT SECOND TRIAL OF AMOUNT WITHIN COMPETENCE OF COUNTY COURT —COSTS OF FIRST TRIAL MADE "COSTS IN THE CAUSE TO THE PLAINTIFF"—SCALE OF COSTS APPLICABLE TO FIRST TRIAL.

An action brought in the Supreme Court of Ontario was dismissed at the first trial. Upon motion of the plaintiff, a new trial was granted by an Appellate Court, which ordered "that the costs of the former trial and of this motion be costs in the cause to the plaintiff." At the new trial there was judgment for the plaintiff for $400 and "costs to be taxed:"—Held—the amount of the judgment being within the proper competence of a County Court and no order to the contrary having been made (r. 649) —that the costs of the first trial, as well as of the second, should be taxed on the scale applicable to County Courts. [Brotherton v. Metropolitan District R. Joint Committee, [1893] 1 Q.B. 666, applied; Avery & Son v. Parks, 38 O.L.R. 535, 39 O.L.R. 74, distinguished.]

Jarvis v. London Street R. Co., 46 O.L.R. 141.

TAXATION—APPEAL—ITEMS DISALLOWED BY LOCAL OFFICER—FEES PAID TO WITNESSES EXAMINED UPON FOREIGN COMMISSION—PREPARATION FOR TRIAL—COSTS THROWN AWAY BY REASON OF POSTPONEMENTS OF TRIAL—SPECIAL ORDER FOR PAYMENT—TARIFF "A," ITEM 6 —ALLOWANCE FOR CORRESPONDENCE—TARIFF ITEM 16—COSTS OF INTERLOCUTORY MOTIONS FOR POSTPONEMENTS—EXPERT WITNESSES—PREPARATION OF PHOTOGRAPHS—RULE OF DECEMBER 24, 1913—FEES PAID TO FOREIGN WITNESSES —REASONABLE AND NECESSARY PAYMENTS — EVIDENCE — RECONSIDERATION OF ITEMS BY PRINCIPAL TAXING OFFICER.

Upon appeal by the defendant from the taxation by a local officer of her costs of the trial of the action, it was held:—(1) That a prima facie case for the allowance of fees paid to witnesses examined upon commission in the state of Massachusetts was made by filing upon the taxation of an affidavit of an attorney practising in Massachusetts that the disbursements were necessarily made; and, in the absence of contradiction, if it appeared to the satisfaction of the officer that it was necessary or reasonable to examine the witnesses, the fees should have been allowed. This item should be reconsidered by the principal taxing officer, and upon the reconsideration either party should be at liberty to adduce further evidence of the law of Massachusetts. (2) The case was on the list for trial at each of the sittings held in Sept. 1916, Nov. 1916, and Jan. 1917, and was tried in May, 1917. A fee of $50 was allowed (upon the fiat of the principal taxing officer) for preparation for trial at the sittings of Sept. 1916. There is no indication in tariff "A" of an intention that, in the absence of special order, costs of preparation for trial wholly or partly thrown away by a postponement should be allowed; nor that, in the absence of special order, there should in any circumstances be more than one fee for preparation for trial (item 6 of tariff). In Jan. 1917, the order postponing the trial awarded to the defendant the costs thrown away by the postponement; and this entitled the defendant to payment for such of the services covered by item 6 as were performed specifically with reference to the expected trial, and were thrown away by the postponement. As to this there should be a reconsideration. There was no special order for costs in respect of the other postponements, and none authorizing the allowance of a fee for preparation for the trial in May, 1917. The one fee taxable in virtue of item 6 had been allowed; the tariff allowed it once once, and the taxing officer, having allowed it where it first appeared in the bill, had no authority to allow it again. (3) In addition to a $10 fee taxed under tariff item 16, the defendant claimed an allowance for correspondence necessitated by the postponements. This should not be allowed except under a special order. If any correspondence was thrown away by the postponement in Jan. 1917, the defendant was entitled to payment for it under the order then made, and there should be an extra allowance unless the $10 allowed fairly covered all the correspondence in the course of the action, including that necessitated by the postponement of Jan. 1917. This must be reconsidered. (4) The costs of contested interlocutory motions in court for the postponements of Nov. 1916, and Jan. 1917, were properly disallowed: There was no order for the payment of them, and the officer had no authority to tax them. (5) Expert evidence was given at the trial as to whether a disputed signature was genuine, and the expert witnesses prepared photographs of the disputed signature and other signatures proved to be

genuine, and in their testimony referred to these photographs. Whether some or all of the photographs were reasonably "necessary for the due understanding of the evidence," so as to warrant the allowance of a reasonable sum for the preparation of them, under the rule of Dec. 24, 1913, was something to be determined upon the taxation. Other photographs were of documents which could not be produced at the trial. If it would have been proper to use the documents, it was proper to use the photographs; and the officer should have dealt with each on its merits. The question of an allowance for both classes of photographs should be reconsidered. (6) The defendant claimed fees paid to foreign witnesses brought to the place of trial in Nov. 1916, Jan. 1917, and May, 1917. There having been no award of the costs occasioned by the postponement of the trial in Nov. 1916, no allowance could be made for the witnesses than brought to the place of trial. The defendant was entitled under the order of Jan. 1917, to the costs then thrown away, and under the judgment to the costs of the trial in May, 1917. These costs the officer taxed, and in taxing them professed to apply the rule stated in Ball v. Crompton Corset Co., 11 P.R. 256, and to allow whatever had been reasonably and necessarily paid to the witnesses respectively. Confusion having arisen in applying the rule, there should be reconsideration, and new evidence should be allowed to be given.

Newcombe v. Evans, 44 O.L.R. 628.

TAXATION—DEFENDANTS SEVERING IN THEIR DEFENCE—TWO SETS OF COSTS—TRUSTEE AND CESTUS QUE TRUST—RULE 669—TRUSTEE CONFINED TO COSTS OF WATCHING CASE.

Fulton v. Mercantile Trust Co., 41 O.L.R. 192.

NOMINAL PLAINTIFF — INSURANCE — SUBROGATION—RULING OF TAXING OFFICER—APPEAL.

The plaintiff's automobile was injured by the negligence of the defendants' employees. The plaintiff was insured against injury by such an accident as that which occurred, and the insurance company adjusted and paid his loss. This action was brought by the insurance company, in the name of the plaintiff, to recover damages for the loss sustained, and in the action there was judgment for the plaintiff for $600 and costs:—Held, in Chambers, upon appeal from a ruling of the Senior Taxing Officer, that the insurance company, being called upon by the plaintiff to indemnify him, was by law subrogated to his rights against the wrongdoer; when the judgment was recovered, though in the name of the assured, it was the property of the insurer; the costs awarded were in the same way the costs of the insurer, though awarded in the name of the assured; and the rule that a party cannot tax against his opponent solicitor's fees which he is not called upon to pay, had no application. [Walker v. Gurney-Tilden Co., 19 P.R. 12; James Nelson & Sons v. Nelson Line, [1906] 2 K.B. 217, explained and distinguished.] Semble, where the insurer sues in the name of the assured, he is a nominal plaintiff, and in proper cases security for costs may be ordered; also the insurer is a person for whose benefit the action is brought, and from whom discovery may be had. An appeal by the defendants from the decision was dismissed by a Divisional Court of the Appellate Division. No opinion was expressed as to whether there was a right of appeal without leave.

Gough v. Toronto & York Radial R. Co., 42 O.L.R. 415, affirming 14 O.W.N. 154.

MOTION TO STAY EXECUTION—INTERLOCUTORY OR ORIGINATING.

A motion to stay execution upon an order of the Dominion Board of Railway Commissioners, made a rule of the Supreme Court of Ontario, while neither an interlocutory motion in an action nor an ordinary motion upon originating notice, has such analogy (r. 2) to the latter as to justify the taxation of the costs of it according to the provisions of the Tariff of Fees applicable to motions upon originating notices.

Re Toronto & Toronto R. Co., 42 O.L.R. 413. [See 43 D.L.R. 739, 42 O.L.R. 82, 23 Can. Ry. Cas. 218.]

STAY OF EXECUTION—TERMS.

The successful party on a trial should in no event be made liable for the costs of an application for a stay of execution pending an appeal, and therefore an order staying an execution and making the costs, costs in the cause to the successful party on the appeal, was varied, and the costs were made costs in the cause to the successful party on the trial, if he succeeded on the appeal. There is no general rule in this province as to the terms that should be imposed on staying the execution pending an appeal. The terms are in the discretion of the court or judge making the order.

Cheeseman v. C.P.R., 45 N.B.R. 191. [See 45 D.L.R. 257, 23 Can. Ry. Cas. 429.]

ACTION AGAINST RAILWAY—COMPENSATION—PLEA.

In an action against a railway company for compensation because of its encroachment on a foreshore adjoining the plaintiffs' lands and for the taking of a part of the plaintiffs' lands for railway purposes, the plaintiffs succeeded with respect to the foreshore only, and they were allowed the costs except so much thereof as related to the questions in controversy decided in favour of the defendant, the costs relating to said questions being given to the defendant. Held, that, as the defendant had failed upon the issue raised by its plea of justification, it was not entitled to the costs relating to that branch of the

plea, viz., the construction of the line upon which it had succeeded.

Nelson v. Pacific Great Eastern R. Co., 26 B.C.R. 1, [1918] 3 W.W.R. 85. [See [1918] 1 W.W.R. 597.]

WITNESS FEES.

In deciding whether a party is entitled to the fees of witnesses who were in attendance but not called, the test, especially where there is a jury trial, is whether the witnesses were "necessary" at the time they were subpœnaed, and not whether they were "necessary" at the trial.

Endersby v. Consolidated Mining & Smelting Co. (B.C.), [1918] 3 W.W.R. 579.

DISPOSITION AT TRIAL—COSTS OF COMMISSION.

After judgment has been entered, the Superior Court has power, by virtue of marginal r. 319, to make an order disposing of costs that had been reserved for disposition at the trial but through oversight were not then disposed of, and the County Court, by virtue of s. 11 of the County Courts Act, can invoke said rule and exercise the power so given.

Wood v. Sherman, 24 B.C.R. 376, [1918] 1 W.W.R. 177.

GARNISHMENT — PAYMENT INTO COURT — TAXATION OF COSTS — NECESSITY OF ORDER FOR.

Gwillim v. Carr & Staffen (Sask.), [1918] 2 W.W.R. 864.

QUEBEC PRACTICE—QUESTION OF LAW.

As the dispositions of the Code of Procedure concerning the "decision on a point of law when the facts are admitted," do not determine the principles on which the court should assess the costs, rules of the common law and of art. 549 C.C.P. must apply.

Trudel v. Rhéaume, 54 Que. S.C. 292.

WINDING-UP ACT—APPLICATION TO REMOVE LIQUIDATOR.

An application for the removal of a liquidator appointed under the authority of R.S.C., c. 144, should, if contested, be treated for the purpose of taxation of fees as an action of the second class.

Metro Pictures v. McNeil, 20 Que. P.R. 228.

MOTION FOR REVISION—REASONS.

A motion to revise a bill of costs, which does not contain reasons in support of the application, will be refused. If such reasons have not been pleaded, the costs of the motion will be compensated.

Rumlos v. Sherwin, 20 Que. P.R. 147.

CLASS OF ACTION—CANCELLATION OF SUBSCRIPTION.

An action for the cancellation of a subscription for company shares, and the repayment of the first instalment, is governed, as to the taxation of costs, by the amount of the subscription the cancellation of which is asked for.

Leroy v. Davis, 19 Que. P.R. 20.

RECOVERY BY PLAINTIFF AGAINST DEFENDANT—RECOVERY OVER BY DEFENDANT AGAINST THIRD PARTY.

United States Fidelity & Guaranty Co. v. Union Bank of Canada, 12 O.W.N. 200. [See 36 D.L.R. 724, 39 O.L.R. 338.]

TAXATION — REPORT OF MASTER — ALLOWANCE OF COSTS—REPORT SET ASIDE—REFERENCE BACK — COSTS NOT YET AWARDED—MOTION TO SET ASIDE APPOINTMENT FOR TAXATION—COSTS OF.

Peppiatt v. Reeder, 11 O.W.N. 356.

COSTS—SCALE OF COSTS—RULE 649—ACTION BROUGHT IN SUPREME COURT OF ONTARIO—CAUSE OF ACTION—REMEDY—INJUNCTION — DAMAGES — VALUE OF LAND IN QUESTION—JURISDICTION OF COUNTY COURTS—COUNTY COURTS ACT, R.S.O. 1914, c. 59, s. 22 (1) (B) (C), (1), 28.

Bragg v. Oram, 17 O.W.N. 184.

UNNECESSARY PARTIES—CLAIM AGAINST CO-DEFENDANTS—INJURY TO REVERSION—AMENDMENT—INJUNCTION.

Baldwin v. O'Brien, 12 O.W.N. 322. [See 40 O.L.R. 24, 287, reversing 10 O.W.N. 304.]

TAXATION—ADJOURNMENT OF TRIAL—SEVERAL ACTIONS—ONE MOTION TO ADJOURN—COPIES OF AFFIDAVITS—RULE 193—COSTS THROWN AWAY—PREPARATION FOR TRIAL—CORRESPONDENCE—COUNSEL FEES—DISCRETION OF TAXING OFFICER—APPEAL—WITNESS FEES.

Smith v. Ontario & Minnesota Power Co., 11 O.W.N. 337. [See 42 O.L.R. 167, 45 D.L.R. 266.]

ACTIONABILITY—"EXTRA COSTS"—TRAVELING EXPENSE—LOSS OF TIME.

In an action for damages by reason of the defendant conspiring to injure the plaintiffs, it appeared that legal proceedings previously brought by one of the defendants against the plaintiffs were dismissed with costs, but no order had been taken out, or any attempt made, to collect the costs from the unsuccessful party. The jury found there was a conspiracy which was carried out by the taking of said legal proceedings, and the damages were particularly set out as "legal costs, fares and expenses to Vancouver and return, loss of time on farm." Held, on appeal, that although party and party costs of the former proceedings may be recovered in such an action, it must first be shewn that the costs could not have been recovered from the unsuccessful party, and that as the damages particularized "fares and expenses to Vancouver and return, loss of time on farm," refer to losses caused by the former civil proceedings, they come within the term "extra costs" and are not recognized by law. [Cotterell v. Jones and Ablett, 21 L.J.C.P. 2, followed.]

Armishaw v. Sacht, 24 B.C.R. 53, affirming 30 D.L.R. 288, 34 W.L.R. 1180.

INTERLOCUTORY PROCEEDINGS — DEFENDANT —PARTLY SUCCEEDING.

In the absence of evidence to shew what disposition was made as to the costs of an interlocutory application, a party cannot, upon the taxation of his general costs of the action, get any costs of such application, though he succeeded upon it. When the judgment gives the plaintiff the costs of the action less the costs occasioned by a controversy in which he failed and gives the defendant the costs occasioned by that controversy, the taxing officer should not tax to the defendant the general costs of his defence, but only those items in his bill which apply exclusively to the controversy referred to. [Sparrow v. Hill, 7 Q.B.D. 362, 8 Q.B.D. 479, and Davis v. Hurd, 4 O.L.R. 466, followed.] The taxation of the costs should not be affected by anything which took place subsequent to the judgment.

Robin Hood Mills v. Maple Leaf Milling Co., 27 Man. L.R. 303, [1917] 1 W.W.R. 79.

MOTION FOR SUMMARY JUDGMENT.

When on a motion for summary judgment under r. 135 the defendant is found entitled to a trial, the plaintiff should, in the absence of special circumstances, pay the costs of the unsuccessful application. [McEwan v. Marks, 4 D.L.R. 369, followed.]

Foster v. Dlugos, 10 S.L.R. 361, [1917] 3 W.W.R. 183.

UNDERTAKING OF COUNSEL FOR RETURN OF COSTS—HOW ENFORCED.

Upon an application of a successful appellant to include in the minutes of the order for judgment a direction to return the costs of the trial paid upon counsel's undertaking to refund in case the appellant were successful:—Held, that it is not within the province of the court to make the order. After taxation has taken place the parties may then apply in the proper quarter to have an undertaking carried out according to its true intent and meaning.

Thompson v. Columbia Coast Mission, 26 B.C.R. 144.

The limitation of costs provided for by s. 1 of c. 12 of 7 and 8 Edw. VII., applies to all costs up to and inclusive of the final determination of the action in the Court of King's Bench, and, although there has been an expensive trial followed by a reference to the Master and a hearing on further directions, the costs of all of which were given to the plaintiff and, as ordinarily taxable, would largely exceed said limit, the taxing officer could not, without such a certificate from the Trial Judge as that section requires, allow the plaintiff in all more than $300 and disbursements.

Buchanan v. Winnipeg, 21 Man. L.R. 714, 19 W.L.R. 761.

CAVEATOR'S ACTION—PAYMENT AS CONDITION PRECEDENT TO BRING NEW ACTION.

Where a second action by a caveator is for a new cause of action, the costs of a former suit will not be ordered paid as a condition precedent to bringing the new action. [Abdy v. Abdy, 12 Times Rep. 524, Land Titles Act (Sask.), R.S.S. 1909, c. 41, s. 132, subs. 2, considered.]

Re Otis' Caveat, 31 W.L.R. 534.

DISTRESS FOR RENT.

If an attachment for rent is dismissed with costs, the landlord is justified in issuing a second attachment when another instalment becomes due, but the defendant is also justified in setting up such unpaid costs in compensation for such rent. In such a case the plaintiff will have costs against defendant up to after plea filed, subsequent costs being against plaintiff.

Gilbert v. Hart, 18 Que. P.R. 168.

ELECTION CONTEST—FEES OF PROTHONOTARY.

A prothonotary will be allowed a fee of one dollar on the filing of the defendant's appearance in a controverted federal election but the attorney for the defendant is not entitled to a fee for his service.

Paradis v. Cardin, 18 Que. P.R. 187.

OF PART OF ACTION.

When a defendant sued on divers heads contests them all and is condemned upon some only, he is obliged to pay the costs of the action taxed according to the amount found against him without having a right to any costs in respect to the part of the action which is dismissed. It is the same when the plaintiff abandons a part of his conclusions after contestation.

Monk v. Desnoyers, 51 Que. S.C. 446.

HYPOTHECARY ACTION—THIRD PARTY.

The costs of a personal action brought against his debtor by an hypothecary creditor, who has been unable to obtain payment by the usual mode of execution against his movables or immovables, may in an hypothecary action subsequently brought against a third party, holder of the property, be added to the debt and claimed in the same right as the capital and interest.

St. Pierre v. Tafler, 51 Que. S.C. 198.

ACTIONABILITY.

An action will not lie for the judicial costs which the defendant has been condemned to pay to the plaintiff in prior litigation.

Massé v. Bertrand, 26 Que. K.B. 335.

In the absence of a mention on the writ of execution and on the proceedings of notice to a sheriff of the consent of the solicitors that the party should distrain for their costs, such party has no right to a writ of execution permitting him to distrain for costs of such solicitors, unless such a consent should appear on the fiat to obtain such a writ.

Jetter v. G.T.R. Co. of Canada, 18 Rev. de Jur. 204.

The fee chargeable by the prothonotary on the return of an action is a single fee, no matter how many writs are issued and addressed to bailiffs of different districts.

Eastern Tps. Bank v. The Alliance Ass'ce Co. & Macdonald, 13 Que. P.R. 409.

DILATORY EXCEPTION—PAYMENT OF COSTS OF FORMER SUIT—QUE. C.P. 177.

Default in payment of the costs of an action instituted previously by the plaintiff, who was therein nonsuited, does not justify a dilatory exception by the defendant by which he asks for a suspension of proceedings until the costs of the former action are paid.

Phelan v. Coutlee, 15 Que. C.P. 428.

BAILIFF'S TARIFF—SEIZURE OF SUBDIVISIONS OF LOTS—SEPARATE CHARGE FOR EACH SEIZURE.

When the seizure of subdivision of lots was made separately, and moreover the subdivision of the cadastre was made for the purpose of selling by lots, which exploitation is essentially divisible, the bailiff may charge a separate fee for the seizure of each lot. [See Gault v. Dufort, 5 Q.P.R. 353.]

Wherry v. Charest, 15 Que. P.R. 393.

PRACTICE—RULE 536—NO JURISDICTION IN LOCAL JUDGE TO HEAR APPEALS FROM TAXATION IN SUPREME COURT CASES.

In re Solicitors' Costs, [1919] 1 W.W.R. 678.

(§ II—21)—COSTS OF DEPOSITIONS — UNNECESSARY EXAMINATION FOR DISCOVERY.

An application by defendants for a fiat to tax the costs of examining for discovery a person out of the jurisdiction will be refused where it appears that by the examination of that person the defendants obtained no material discovery that they had not already obtained from other witnesses, that no part of the examination was used at the trial nor did defendants apply for leave to use it, but instead they brought in that person as a witness on the trial, although the examination may have been sought to disclose and did disclose that the witness in question could give material evidence for the defendants.

Winnipeg v. Winnipeg Electric R. Co., 9 D.L.R. 399, 23 Man. L.R. 533, 23 W.L.R. 49.

(§ II—23)—WINDING-UP—CLAIMS.

One claiming under the Winding-up Act (R.S.C. 1906, c. 144, s. 73) is in the same position as an opposant à fin de conserver; if he is examined by the liquidator on his claim his attorney has a right to the fees for the petition, enquête and hearing.

Renaud, King & Patterson v. Montreal Public Service Corp., 18 Que. P.R. 174.

COMPULSORY WINDING-UP — UNSUCCESSFUL PETITION.

Unsuccessful petitioners for the compulsory winding-up of a company who know that their action is not approved by many of the creditors of the company should be ordered to pay the costs of the company (or its assignees), those of the creditors opposing the petition, and (semble) those of opposing contributories. [In re Strathy Wire Fence Co., 8 O.L.R. 186, and Re New Gas Co., 5 Ch.D. 703, applied.]

Re Olympia Co., 9 W.W.R. 405, 32 W.L.R. 628. [Affirmed in 25 D.L.R. 620, 26 Man. L.R. 73.]

PERSONAL LIABILITY OF LIQUIDATOR.

Following the case of Jackson v. Cannon, 10 B.C.R. 73, the Court of Appeal of British Columbia, held that where a liquidator's name appeared as a party to litigation an order would be made against him personally for payment of costs. (In this particular case the liquidator had won an action in the County Court, but had been defeated on appeal.)

Perrin v. Antlers Realty Co., 8 W.W.R. 631.

WINDING-UP—REVIEW.

A judge of the Supreme Court has no power to review a taxation made in the winding-up of a company.

Re Federal Mortgage Corp.; Re Dominion Winding-up Act (B.C.), [1917] 2 W.W.R. 52.

(§ II—24)—EXAMINATION FOR DISCOVERY —REMOVAL OF STATUTORY BAR—FURTHER ALLOWANCE.

British America Elevator Co. v. Bank of B.N.A., 48 D.L.R. 731, [1919] 3 W.W.R. 456.

APPEAL BOOKS—ADDITIONAL COST OF TYPEWRITING—EXTRA COPY OF APPEAL BOOK AT COUNSEL'S REQUEST — EXTRA COPY OF TRANSCRIPT FOR DRAFT APPEAL BOOK —TARIFF OF COSTS, ITEM 130.

On appeal to the Court of Appeal an appellant may either print or type the appeal book, but if he adopt the more expensive method he will, on a party and party taxation, be allowed only for the least expensive mode of preparing the books. The taxing officer may, however, take into consideration difficulties in special cases of having the appeal book printed. The cost of an extra copy of the appeal book, supplied at the request of the unsuccessful party, will not be allowed on a party and party taxation. A copy of the transcript of evidence supplied by the reporter, made for incorporation in the draft appeal book will not be allowed on a party and party taxation where the transcript itself could have been used for that purpose.

Canadian Financiers Trust Co. v. Ashwell, 25 B.C.R. 473.

PRACTICE—TAXATION—PARTY AND PARTY — INCREASED COUNSEL FEE — ORDER LXV., R. 27, SUBS. 29—REGISTRAR'S POWERS.

On a taxation as between party and party there is no discretion in the registrar under Order LXV., r. 27, subs. 29 of the Supreme Court Rules to allow an in-

creased counsel fee above the tariff without a fiat of a judge to that effect.

Snelly Bros. v. Callopy, 26 B.C.R. 149.

(§ II—25)—Costs of counsel appointed by court.

Where an order is made under Alberta r. 57, for the representation as defendant of the estate of a person presumed to be dead because he had not been heard from in seven years, the court may at the same time direct that the costs of such counsel in attending at the hearing and examining witnesses shall be paid by the plaintiff.

Wallace v. Potter, 7 D.L.R. 114, 22 W.L.R. 281, 2 W.W.R. 1085.

(§ II—26)—Solicitor suing or defending in person.

A solicitor, suing or defending an action in person, is entitled, if he obtains judgment, to tax his costs in the ordinary way, but is not entitled to tax unnecessary costs, such as instructions to himself and attendances upon himself. [London & Scottish Benefit Society v. Chorley, 13 Q.B.D. 872; King v. Moyer, 9 P.R. (Ont.), 314, referred to.]

McArdle & Davidson v. Howard, 21 D.L.R. 409, 9 W.W.R. 1056, 31 W.L.R. 705.

Solicitor—Bill of costs—Action to recover amount of—Solicitors Act, R.S.O. 1914, c. 159, s. 34—Services rendered by plaintiff in capacity of solicitor—Reference for taxation—Lump sum charged for specific items set out in bill—Compliance with statute—Costs of action and appeal—Scale of costs.

Lynch Staunton v. Somerville, 46 D.L.R. 748, 44 O.L.R. 575, reversing 43 D.L.R. 756, 43 O.L.R. 282.

Counsel fees—Solicitor suing or defending in person.

Clarke v. Stewart (Alta.), 34 D.L.R. 723, 10 A.L.R. 393, [1917] 2 W.W.R. 38.

Fee for solicitor—Per diem allowance—"Day"—Separate actions.

Item 14 of the tariff of costs provides that the fee allowed to a solicitor attending the trial of an action is $20, but, "if the trial lasts more than one day, then for each additional day $20:"—Held, that where the trial began at 3 p.m. on a Monday, was continued on Tuesday, and concluded before 3 p.m. on Wednesday, the allowance should be for two days only: the unit of "a day" begins at the hour when the trial begins and ends 24 hours thereafter. Held, also, that where two actions are tried together, the same solicitor appearing in both, the fee of $20 a day, fixed by the tariff, should be allowed in both actions.

Henstridge v. London Str. R. Co., 42 O.L.R. 41.

Action against Board of Health—Solicitor for municipality—Public Health Act—Municipal Act.

In an action against the Local Board of Health and the Medical Officer of Health of a city, the defence was undertaken by the city council and conducted by the regular solicitor for the corporation. The action being dismissed with costs, it was held, that the defence was in substance the defence of the corporation, the actual defendants being public officers representing the inhabitants and ratepayers of the city, and the costs of the defence were taxable against the plaintiffs. The Public Health Act, R.S.O. 1914, c. 218, s. 26, gave the council the right to appoint the solicitor to conduct the defence and this carried with it the right to costs duly incurred in the conduct of the defence. [Re City of Berlin & the County Judge of the County of Waterloo, 33 O.L.R. 73, and R. on the prosecution of Cobham v. Archbishop of Canterbury, [1903] 1 K.B. 289, followed.] The general rule laid down in Jarvis v. Great Western R. Co., 8 U.C.C.P. 280, 285, that, "if the client be not liable to pay costs to his attorney he cannot have judgment to recover those costs against the opposite party," is undoubted, but inapplicable to this case. [The application of that rule in Walker v. Gurney-Tibden Co., 19 P.R. 12, commented on.] The Municipal Act, R.S.O. 1914, c. 192, s. 245 (5), removes all difficulty as to the payment of the corporation-solicitor by salary.

Simpson v. Local Board of Health of Belleville, 41 O.L.R. 320. [See 33 D.L.R. 783, 38 O.L.R. 244, 39 D.L.R. 442, 40 O.L.R. 406.]

Solicitor—Taxation of bill of costs—Place of reference—Solicitors Act, s. 38 (3).

Re Solicitor, 15 O.W.N. 96.

Counsel fee—Written arguments.

Solicitor's charges in connection with written arguments supplementing oral arguments held not to be taxable under a fiat for an increased counsel fee.

McFeeley v. B.C. Elec. R. Co. (B.C.), [1918] 3 W.W.R. 15. [See, [1918] 1 W.W.R. 339.]

Table of costs—Discretion of registrar.

On a taxation of costs between party and party the registrar is not authorized to allow for services performed any amount in excess of the amount fixed by the table of costs, unless expressly authorized to do so. Sub-r. (29) of r. 27 of O. 65 only applies to costs, charges and expenses not provided for by the table of fees.

John Palmer Co. v. Palmer-McLellan Shoepack Co., 45 N.B.R. 257. [See 37 D.L.R. 201.]

Lawyer's tariff—Additional fee—Action on lease.

In an action claiming arrears of rent amounting to $1,750, in virtue of a lease worth $52,500, and also claiming the cancellation of that lease, an Attorney is not entitled to the additional fee of $100 under s. 24 of the Lawyers Tariff, before the Court of King's Bench, as the principle of art. 1152, C.C.P., applies to the additional fee

as to jurisdiction of the court and the class of action.

Duchess Amusement Co. v. Desmarteau, 27 Que. K.B. 552, 20 Que. P.R. 97.

ATTORNEY'S FEES—CLASS OF ACTION.

The class of an action to set a judgment aside depends on the net value of the estate of the de cujus. If two defendants appear and plead the same grounds separately, through the same Attorney, two complete bills of costs may be made. No fee is allowed Attorneys on the reinscribing of a case for hearing.

Brown v. Winterbottom, 19 Que. P.R. 162.

SOLICITOR'S FEES — INTEREST — EXPROPRIATION—RAILWAY ACT—APPEAL.

Interest upon the costs of advocates of parties in an arbitration does not run from the award, but from the service of the action brought to give effect to it, the award itself not being a judgment. An action brought by the advocates of one party to an arbitration award, by virtue of the Dominion Railway Act, for recovery of their costs, when another action, brought by the one whose land was expropriated to increase the amount of the award, but not including the costs of such advocates, is still pending in appeal, is not prematurely brought.

Pélissier v. Lachine, Jacques-Cartier & Maisonneuve R. Co., 53 Que. S.C. 172.

EXPROPRIATION—ATTORNEY'S TARIFF.

An expropriation, in which the compensation is contested, constitutes a real action, submitted to a real judicial tribunal, and the fees of attorneys who practice before it should be based after the tariff of their order. An attorney of one whose property is expropriated, who has succeeded in increasing the amount offered, has a right, in addition to the fees fixed by art. 79 of the tariff, to the fees of contestation, of enquête, and of hearing, as well as to an additional fee if the amount awarded justifies it. An attorney whose absence has been the cause of an adjournment of a sitting has no right to the fee provided by the tariff for an adjournment. There is a fee of $10 in each proceeding for the appointing or replacing of arbitrators, whether such replacement be by petition, motion or simple notice.

Provincial Light, Heat & Power Co. v. Latreille, 19 Que. P.R. 451.

ADVOCATE'S TARIFF—WORKMEN'S COMPENSATION ACT.

The plaintiff's attorney's bill of costs, in an action under the Workmen's Compensation Act, in which the judgment grants the plaintiff a certain amount and an annual rent, must be taxed as of an action of second class, even if, after the judgment, plaintiff asks the capital of the rent, which amounts to over $1,000.

Spearman v. G.T.R., 19 Que. P.R. 136.

ATTORNEY'S FEES — DOMINION ELECTIONS ACT.

A demand for account following a Dominion election, withdrawn before the accounting has taken place, must be considered, as to the question of fees, as a second class action after discontinuance. If there is a discontinuance after the summoning of the returning officer and after the exhibiting of the ballot boxes, the respondent's attorney is entitled to the enquête and hearing fees. A returning officer is entitled to be reimbursed his traveling expenses and to be paid for his vacations, attendances and loss of time. The criers' and messengers' fees must be included in the taxation.

Blondin v. Tremblay, 20 Que. P.R. 15.

ATTORNEY'S FEES—WINDING-UP ACT.

The contestation of an application for the winding-up of a company need not necessarily be in writing; the production of documents by the company is a sufficient defence to give its attorney who succeeds the fees of a contested case. The company's attorney who obtained the dismissal of the application for liquidation has a right to the general fee of a contested action (first class), and to the hearing fee, but not to the fee on the petition if there were no witnesses heard but only documents produced. The supplementary fee provided by art. 5 of the attorney's tariff (S.C.), is not granted upon the contestation of an application for winding-up.

Durocher v. Le Club Champêtre Canadien, 20 Que. P.R. 58.

ATTORNEY'S TARIFF—RESALE.

If a petition for resale for false bidding is refused, the attorney for the purchaser has a right only to the fee under art. 339 of the advocate's tariff.

Waxman v. Girouard, 20 Que. P.R. 43.

ATTORNEY'S TARIFF—LIQUIDATION OF PARTNERSHIP.

The attorney's fees on a petition to appoint a sequestrator to a partnership are those mentioned in the tariff for the proceedings for appointment of sequestrators.

Vincent v. Hyde, 19 Que. P.R. 107.

ATTORNEY'S TARIFF—ACTION DISMISSED.

An action dismissed on a preliminary exception should be treated, as regards attorney's fees, as a contested action.

Duggan v. Howard, 20 Que. P.R. 146.

SOLICITOR'S COSTS—PRACTICE—RULE NISI.

When costs are distraits to an attorney ad litem, the later is a creditor of the debtor for these costs, and his client cannot issue a rule nisi against the debtor under art. 590, C.C.P., without the consent of his attorney, unless he shows that he has paid the said costs to the latter.

Normandin v. Montreal Tramways Co., 24 Rev. Leg. 56.

ATTORNEY WITHDRAWING FROM CASE.

An attorney ad litem, who asks permission to discontinue acting as such, under art. 260, C.C.P. (Que.), and Practice Rule 43 of Superior Court, cannot require his client to pay his costs before the appointment of a new attorney in the case; such

right only exists in the case of revocation of the attorney's powers by his client.

Chapman v. Petry, 20 Que. P.R. 254.

CONSOLIDATION OF ACTIONS — COSTS OF MOTION.

If several actions have been consolidated for the purpose of proof and hearing, the party who succeeds has the right to tax, in each case, a fee for supplementary proof. An attorney may make a motion to consolidate in each of the cases and may tax a fee in each case.

Gallagher v. La Cité de Montreal, 20 Que. P.R. 264.

QUESTION OF LAW—FACTUMS—FEES.

If a case is submitted on factums after an inscription ex parte, by consent, as only questions of law are raised, the facts being admitted, the fees shall be those of a contested action and a hearing fee will be allowed.

Law v. Etna Life Ins. Co., 19 Que. P.R. 325, 33 Que. S.C. 162, 24 Rev. de Jur. 63.

SOLICITORS—ORDER FOR TAXATION OF ITEMIZED BILL OF COSTS — LUMP-SUM ALLOWED BY TAXING OFFICER—REFERENCE BACK WITH DIRECTION TO PASS UPON EACH ITEM—NON-TARIFF ITEMS—EVIDENCE.

Under an order for the taxation of an itemized bill of costs rendered, the taxing officer must tax the bill, pass upon each item; he has no power, acting under the order, to allow a bulk-sum. Per MULOCK, C.J. Ex.:—If a bill contains nontariff charges, the value of the services charged for must be determined upon evidence submitted. Per RIDDELL, J.:—The duty of the taxing officer, under an order to tax, is to deal seriatim with each item by way of allowance or disallowance. [In re Grant Buleraig & Co., [1906] 1 Ch. 124, 128.]

Re Solicitors, 44 O.L.R. 273.

TAXATION AS BETWEEN SOLICITOR AND CLIENT—EXAMINATION OF IMPORTANT WITNESS ON FOREIGN COMMISSION—ATTENDANCE OF COUNSEL FROM ONTARIO TO EXAMINE WITNESS — SPECIAL CIRCUMSTANCES — COUNSEL FEE — TRAVELING EXPENSES.

C. v. C., 13 O.W.N. 213. [See also 39 O.L.R. 571, affirming 33 D.L.R. 151.]

TAXATION— APPEAL— COUNSEL FEES— DISCRETION OF TAXING OFFICER—SEPARATE BILLS OF COSTS OF TWO CONCURRENT PROCEEDINGS — TAXATION OF ONE — REGARD HAD TO FEES ALLOWED IN THE OTHER—COSTS INCIDENT TO MOTION FOR LEAVE TO APPEAL TO SUPREME COURT OF CANADA.

Re Jones & Tp. of Tuckersmith, 13 O. W.N. 383. [See also 23 D.L.R. 569, 33 O.L.R. 634.]

SET-OFF—SEPARATE AWARDS OF COSTS IN SAME ACTION — SOLICITOR'S LIEN — SECURITY FOR COSTS—DELIVERY OUT OF BOND AND PAYMENT OF MONEY OUT OF COURT.

St. Jean v. Laurin, 11 O.W.N. 350.

DISPOSAL OF ON FURTHER DIRECTIONS — BOTH PARTIES PARTLY SUCCESSFUL—COUNTERCLAIM—REFERENCE—SET-OFF—SOLICITOR'S LIEN.

Sask. Land & Homestead Co. v. Moore, 10 O.W.N. 453.

SOLICITOR — COSTS — TAXATION — RETROSPECTIVE APPLICATION OF TARIFFS OF COSTS APPENDED TO RULES OF 1913—APPEAL FROM TAXATION OF LOCAL OFFICER—RIGHT OF APPEAL UNDER RULE 508—OBJECTIONS TO TAXATION—PROCEDURE UNDER RR. 681, 682—APPLICATION OF—REFERENCE TO SENIOR TAXING OFFICER AT TORONTO.

Re Solicitors, 6 O.W.N. 625.

SURROGATE COURTS—TARIFF OF COSTS—INCREASED FEES—SOLICITORS.

Re Martin, 6 O.W.N. 404.

SOLICITOR AND CLIENT.

The decision of the registrar on a question of fact on a reference with regard to a solicitor and client bill of costs will not be interfered with by the Court of Appeal, unless convinced he is clearly wrong.

Re Dickie, De Beck & McTaggart & Sherman, 23 B.C.R. 583.

TARIFF OF ADVOCATES.

The special fee mentioned in par. 8 of art. 72 of the Tariff of Advocates is only allowed when an amount which justifies it is claimed by the conclusions. It is of no importance that in the resolutions of the defendant School Commission, of which the nullity is demanded, there may be a question of an outlay equal to the amount in question.

Desjardins v. Maisonneuve School Commission, 18 Que. P.R. 302, 51 Que. S.C. 450.

TARIFF OF ADVOCATES — ASSIGNMENT FOR CREDITORS.

A demand for an assignment for benefit of creditors is now treated and considered, from the point of view of the fees of the advocates, as an ordinary action. If a demand of assignment is withdrawn after a preliminary pleading (with costs against the debtor) the advocate of the petitioning creditor will have a right to the fee allowed by art. 23 of the tariff, to the fee of $2 provided for by art. 76 (par. 5) on the filing of the claim, and to the fee of $6 for the petition, equivalent to the fee for judgment after withdrawal.

De Sales Mfg. Co. v. Budyk, 18 Que. P.R. 322.

TARIFF OF ADVOCATES — PARTITION — SEPARATE DEFENCES.

In actions for partition an attorney who appears separately for several defendants has a right to the fees allowed by the tariff for proceedings of the same nature made and filed in ordinary causes. On proceedings after judgment in ordinary actions he has a right to as much of the fees provided for by pars. 4 and 5 of art. 61 of the tariff as there are defendants for whom he appears separately. He has no right to any other fee upon proceedings taken after

judgment, as for instance on a motion by the plaintiff to adjourn and continue the sale. If before judgment the defendants represented by the same attorney unite to take certain proceedings, the attorney of the defendants will have a right to a single fee only in the common proceedings. If an attorney appear after there is already an appearance on the docket for the same defendant, an appearance which is neither observed by the attorney appearing in the second place nor brought to his attention by the plaintiff's attorney, the attorney who has first appeared will have the sole right to the fees allowed the defendants' attorneys in actions for partition.

Tasse v. Tasse, 18 Que. P.R. 340.

WARRANTY —CONSOLIDATION —ATTORNEY'S FEES.

If the main action is maintained for part of the amount claimed, and an action in simple warranty is maintained, the costs of the action in warranty will be of the class of an action for the joint amount of the judgments and the costs of the main action and of the defence of the plaintiff in warranty of that of a main action for the amount of the judgment. Joinder of causes cannot prevent the attorneys of the parties from taxing the fee for enquête and hearing in each case, nor a fee for an additional day of enquête.

Major v. Montreal Light, Heat & Power Co., 18 Que. P.R. 256.

EXPROPRIATION — EXPERTS — ATTORNEY'S FEES.

The attorneys of the party who succeeds in expropriation proceedings are entitled to the fees for the enquête and hearing and to the additional fee according to the amount granted by the award. They have the right to enter in the bill of costs the attendances, proceedings, and fees of their expert witnesses.

City of Outremont v. Russell, 18 Que. P.R. 407.

EXPROPRIATION—FACTUM.

In an expropriation under the Railway Act the attorneys have the right to fees of contestation, enquête and hearing, as well as to an additional fee if there is reason to allow it. The accounts of arbitrators and of a notary in rendering the award cannot be entered in the bill of costs of the attorneys of the expropriated party. If a factum has been filed to replace the oral arguments no fee will be allowed for it. In the matter of expropriation the tariff allows nothing for the proceedings by the attorney of the expropriated party for the preparation of the cause.

Lachine, Jacques Cartier & Maisonneuve Railway Co. v. Charlebois, 18 Que. P.R. 373.

ATTORNEY'S FEES—REGISTRATION OF JUDGMENT.

An attorney who registers a judgment has a right to his disbursements and to a fee determined by the class of action.

McGee v. Morrison, 18 Que. P.R. 38.

ATTORNEY'S FEES—WINDING UP.

The fee of an attorney on application for the appointment of liquidators is the same as in an ordinary action for a sum equal to the value of the assets. [See Henderson v. Harbec, 8 Que. P.R. 126.]

Re Westmount Plumbing & Heating Co. & Antill, 17 Que. P.R. 450.

IN EXPROPRIATION MATTERS.

An attorney, who represents a party whose land has been expropriated for hydraulic purposes, has a right to the fees provided by arts. 23, 43-4 of the tariff of attorneys in the Superior Court and not only to those provided by art. 79 of this tariff. [See Montreal v. Matley, 14 Que. P.P. 180.]

Cedars Rapids Mfg. & Power Co. v. Houle, 17 Que. P.R. 417.

No additional fee is taxable in favour of respondent in review, when an inscription is desisted from after the filing of respondent's appearance.

Brisebois v. Semelhaack, 17 Que. P.R. 369.

APPRAISEMENT — EXPERTISE — SOLICITORS' TARIFF.

In a valuation of lands sold under execution the amount in litigation for each creditor who has recorded a lien or a mortgage is that which appears in his favour at the registry office. [Doutre v. Gosselin, 7 L.C.J. 290.] There are as many fees as there are creditors. Art. 78 of the Solicitors' Tariff in the Superior Court applies to matters before experts even for claims of less than $100.

Hyde & Sons v. Godin, 17 Que. P.R. 370.

SOLICITORS RETAINED ON SPECIAL APPLICATION— SALE OF COSTS.

When one who is not a solicitor on the record is retained to make or oppose a special application in the action, the amount involved in the motion of the client, if the same is ascertainable, might appropriately be considered in fixing the scale of his fees to his client. They should not necessarily be taxed upon the scale appropriate to the amount of the judgment in the action. The fees provided by the schedule constitute the maximum of the charges which a solicitor can tax, and it by no means follows that in every case such fees should be allowed.

Northern Crown Bank v. Woodcrafts; re Varley Taxation of Goods, [1919] 2 W.W.R. 917.

ATTORNEY'S FEES—AMOUNT OF BILL.

Where a solicitor-plaintiff who, on a motion for summary judgment, is ordered to have his bill taxed, brings in a bill for a much larger amount than he has sued for, he should pay the costs of the taxation, but he is entitled upon getting the major part of his original bill allowed to his costs of action.

Varley v. Commonwealth Trust Co., 33 W.L.R. 421.

DISCONTINUANCE OF ACTION—DISPUTE NOTE FILED.

Where in a small debt action the plaintiff files a notice of discontinuance after a dispute note had been entered, but before the action has been set down for trial, the defendant is entitled to tax a counsel fee in the same manner as if he had been successful at the trial. [Kitchen Overall and Shirt Co. v. Skeele, 7 W.W.R. 623, distinguished.]

Krankenhagen v. McGavin, 33 W.L.R. 623.

(§ II—27)—DILATORY EXCEPTION—DELAY TO MAKE AN INVENTORY AND DELIBERATE—DEPOSIT—QUE. C.P. 177, PAR. 1.

A dilatory exception to an inventory and deliberate must be accompanied by a deposit; otherwise, it will be dismissed.

Brossoit v. Desormeau, 16 Que. P.R. 48.

STAY—APPEAL—SECURITY.

Where, in a case pending before the Supreme Court of Canada, an execution is issued for the costs of the lower courts, and the debtor makes an opposition on the ground that his security ($500) suspends the execution, his opposition will not be dismissed on an inscription in law.

Vipond v. Furness, Withy & Co., 18 Que. P.R. 13.

(§ II—28)—SCALE OF COSTS—ACTION IN SUPREME COURT—CAUSE OF ACTION—OBSTRUCTION TO HIGHWAY — PROPER JURISDICTION IN COUNTY COURT — COUNTY COURTS ACT, R.S.O. 1914, c. 59 s. 22 (1) 28—SET-OFF—RULE 649.

When an action has been brought in the Supreme Court of Ontario, which might properly have been brought in a county court by virtue of the County Courts Act, ss. 22 and 28, the costs will be taxed on the county court scale, and the usual set-off under r. 649 granted. [Martin v. Banister (1879), 4 Q.B.D. 491; Stiles v. Ecclestone [1903] 1 K.B. 544, referred to.]

Bragg v. Oram, 50 D.L.R. 623.

SCALE—CLASS OF ACTION—DISTRICT COURT —"SMALL DEBT PROCEDURE."

Where a counterclaim filed in a District Court (Sask.) is for a debt or liquidated amount and properly a matter of set-off, the dismissal of such counterclaim with costs carries costs to the plaintiff on the District Court scale and not under the small debt procedure if the excess claimed by the defendant over the admitted portion of the plaintiff's claim was over $100. [Amon v. Bobbett, 22 Q.B.D. 543, 58 L.J. Q.B. 219, applied.]

Baxter v. Elliott, 20 D.L.R. 64, 7 S.L.R. 312, 30 W.L.R. 73, 7 W.W.R. 698.

SCALE—CLASS OF ACTION—DAMAGES—SPECIFIC PERFORMANCE.

A County Court in Manitoba would have no jurisdiction to entertain in the form of a simple action for a money demand an action by a purchaser of lands for damages in lieu of specific performance where the latter relief is beyond the competence of a County Court under the County Courts Act (Man.), and this although the relief of specific performance could not be had in the particular case because the vendor had resold the lands to another; therefore a judgment with costs in an action brought in the King's Bench for specific performance of a contract to sell for a price exceeding $500 carries costs on the King's Bench scale, although by reason of the resale the plaintiff took only a judgment for $141 damages. [Richards v. Trottier, 18 D.L.R. 508, 24 Man. L.R. 473, and Cornwall v. Henson, [1900] 2 Ch. 398, referred to.]

Mignez v. Harrison, 20 D.L.R. 233, 25 Man. L.R. 40, 7 W.W.R. 650, 30 W.L.R. 39.

SLANDER ACTION—IMPERIAL STATUTE—21 JAC. c. 16.

The provisions of the Judicature Act and of the County Courts Act (N.B.) override the statute of 21 Jac., c. 16, s. 6, in respect of costs in actions for slander, and where the amount of damages awarded to the plaintiff is only one dollar, the costs are taxable on the County Court scale.

Rosenburg v. Rich, 35 D.L.R. 369, 45 N.B.R. 86.

SCALE OF COSTS.

Upon an arbitration in eminent domain proceedings in reference to damage occasioned to land by railway construction, the "costs of the arbitration" under the Railway Act, R.S.C. 1906, c. 37, to be allowed to the owner who succeeds in the arbitration are not to be restricted to costs upon the scale or tariff applicable to ordinary litigation in the province, although the latter may be accepted as a general guide. [C.N.R. Co. v. Robinson, 17 Man. L.R. 579, 8 Can. Ry. Cas. 244, applied.]

Re False Creek Flats Arbitration (No. 3), 8 D.L.R. 922, 17 B.C.R. 376.

SCALE OF—DEFENDANT'S COSTS ON DISMISSAL.

In taxing costs in the County Court on the dismissal of the action, the defendant is entitled to tax his costs upon the scale determined by the amount of the plaintiff's claim. [County Court Act, R.S.N.S. 1900, c. 156, s. 78, considered.]

McGillivray v. Conroy, 3 D.L.R. 398, 46 N.S.R. 463, 11 E.L.R. 111.

SCALE OF COSTS—SOLICITOR AND CLIENT—LIMITATION.

The common-law rule as to solicitor and client costs being payable to a successful party, out of the estate, is limited to the executor of trustee representing the estate and may not be extended to a successful beneficiary.

Re Mountain, 4 D.L.R. 737, 26 O.L.R. 163, 21 O.W.R. 866.

DISCRETION OF COURT AS TO SCALE OF COSTS —TRUSTEES AS LANDLORDS.

The Court of Chancery had and the High Court of Justice in Ontario now has, in matters of equitable jurisdiction, a general discretionary power to give costs as between solicitor and client; but even in

equity did not do so, except in special cases such as suits affecting charity by funds, administration suits, actions as to trusts, etc., and an action by trustees, as landlords only, does not fall within such class of cases and the rule should not be extended.

Holman v. Knox, 3 D.L.R. 207, 25 O.L.R. 588, 21 O.W.R. 325.

SCALE OF COSTS — VERDICT FOR NOMINAL SUM—RULES OF COURT.

Where the jury has given a verdict for a nominal sum only, the court will not, under ordinary circumstances, interfere by special order to raise the scale of costs which would be applicable to such verdict under general rules of court.

Hastings v. Dunbar; Davies v. Dunbar, 4 D.L.R. 168, 20 W.L.R. 200.

SCALE—FORECLOSURE ACTION AGAINST PURCHASERS FOR VALUE WITHOUT NOTICE—ERROR IN FILING MORTGAGE IN LAND TITLES OFFICE.

Where an action for the foreclosure of a mortgage against the mortgagor and two purchasers from him who had each bought a third of the land, was dismissed as to the purchasers because they were bona fide purchasers for value and without notice of the mortgage, due to the fact that the mortgage had been recorded in the land titles office, by an oversight by someone therein, only as against the remaining third of the land and not against the two-thirds so bought, it is proper under such circumstances for the court to give such purchasers costs as against the plaintiff on the County Court scale and not on the High Court scale which ordinarily they would be entitled to claim.

Ramsay v. Luck, 5 D.L.R. 416, 3 O.W.N. 1053.

HIGH COURT SCALE—DAMAGES WITHIN INFERIOR JURISDICTION.

In an action for damages for flooding lands where the ownership of the land is not admitted, the court properly ordered that costs be paid on the High Court scale, although the amount of damages recovered might have been within the jurisdiction of an inferior court. [McGrath v. Pearce Co., 2 O.W.N. 1496, 19 O.W.R. 904, affirmed on appeal.]

Cain v. Pearce Co., 5 D.L.R. 23, 3 O. W.N. 1321 affirming on appeal 2 O.W.N. 1496, 1498, 22 O.W.R. 174.

SCALE—SETTLEMENT OF ACTION.

Where a defendant to buy his peace pays to plaintiff a certain sum after suit brought, he will also be condemned to pay costs of an action of the amount paid, as such payment is equivalent for this purpose to a confession of judgment; and this, even if on the merits of the case defendant would have obtained the dismissal of the action.

Seale v. Bowers, 1 D.L.R. 632.

COMMISSION IN LIEU OF COSTS—PARTITION ACTION—CON. RULE (ONT.) 1146.

The commission and disbursements allowed in lieu of taxed costs in partition actions (and administration suits) under Con. Rules (Ont.) 1897, r. 1146, include all future costs to the close of the case as well as the costs up to the date of the report whereby the amount is certified, the proper future disbursements being included therein and fixed in advance.

Welsh v. Harrison, 7 D.L.R. 116, 4 O. W.N. 139, 23 O.W.R. 120.

SCALE OF COSTS—JURISDICTION OF COUNTY COURTS — ACTION REMOVED INTO SUPREME COURT.

Hibbard v. Tp. of York, 25 D.L.R. 856, 34 O.L.R. 377. [Appeal dismissed with costs.]

TAXATION—GENERAL OR SMALL DEBT PROCEDURE—DAMAGE CLAIM—DEBT OR LIQUIDATED DEMAND.

Waterloo Mfg. Co. v. R. A. Allan (Sask.), 36 D.L.R. 596 [1917] 3 W.W.R. 162.

TAXATION BETWEEN PARTY AND PARTY—ITEMS OF BILL.

Young v. Electric Steel & Metals Co.; Howarth v. E. S. & M. Co., 10 O.W.N. 67. [See also 29 D.L.R. 293, 35 O.L.R. 596.]

ACTION IN SUPREME COURT AGAINST SEVERAL DEFENDANTS—VERDICT OF JURY—DAMAGES WITHIN COMPETENCE OF COUNTY COURT—TITLE TO LAND DISPUTED BY TWO DEFENDANTS—SCALE OF COSTS—SET-OFF — DISCRETION — RULE 649 — JUDICATURE ACT, S. 74.

Liboiron v. McCormack, 8 O.W.N. 400.

SCALE—CLASS OF ACTION.

Everly v. Dunkley, 5 O.W.N. 65, 25 O.W. R. 29.

TAXATION—ACTION BROUGHT IN SUPREME COURT—COSTS ADJUDGED TO BE PAID ON SCALE OF COUNTY COURT—ALLOWANCE OF INCREASED COUNSEL FEE—POWERS OF TAXING OFFICER AT TORONTO—PRACTICE —RULE 2.

Murray v. Fitch, 17 O.W.N. 103.

ACTION REMOVED INTO SUPREME COURT FROM COUNTY COURT AT INSTANCE OF DEFENDANT—COSTS AWARDED TO DEFENDANT ON SUPREME COURT SCALE.

Pratt v. Toronto & York Radial R. Co., 9 O.W.N. 453.

TAXED COSTS—CLASS OF APPEAL—REDDITION OF ACCOUNT.

In an action in reddition of account where the balance claimed by the plaintiff is over $1,000, the bill of costs in appeal must be taxed as of first class. In an appeal from interlocutory judgment, the following item in the bill of costs, to wit: attendance in chambers, $5; factum, $50; copy for printer, $20; correcting proof sheets, $4; fyling factum, $13; printing factum $10, will be allowed if the parties have produced and used voluntarily the factum with the approbation of the Court.

Barnard v. de Sambor, 24 Que. K.B. 480.

SCALE OF—TAXATION.

Peppiatt v. Reeder, 8 O.W.N. 517.

Scale—Assignment for creditors—Contestation of claim.

In the matter of an assignment, the contestation of a claim must be considered as an opposition for payment, and the class of action is determined by the amount of the contested claim and not by the amount of the reduction prayed for.

Boston Shoe Co. v. Montreal Star Publishing Co., 16 Que. P.R. 326.

Tariff fees—Jury trial—Que. C. P. 559.

In a jury trial, if a motion for judgment according to the verdict has been put in writing and granted with costs, such costs must be included in the taxable costs. There is no fee on the demand to withdraw the case from the jury. The crier is entitled to a certain fee, according to custom and the rules of practice.

Brassard v. G.T.R. Co., 16 Que. P.R. 225.

Attachment—Quashing.

No additional fee will be given to the party who has succeeded in having a conservatory attachment quashed upon petition, whatever the amount in issue may be.

Girard v. Gariépy, 17 Que. P.R. 406. [See 49 Que. S.C. 284, 17 Que. P.R. 396.]

Taxation—Exemption controversy.

By a judgment the plaintiffs were given the costs of the action less the costs occasioned by controversy as to exemptions, and the defendants were given the costs occasioned by that controversy. Held, that under such an order defendants should only be given such items of their bill as related exclusively to the controversy as to exemptions.

Robin Hood Mills v. Maple Leaf Milling Co., [1917] 1 W.W.R. 796. [See also 26 Man. L.R. 238.]

Scale—Jurisdictional amount.

Where a plaintiff, who has sued for a debt within the competence of the District Court, has taken out of court in satisfaction of his claim the amount paid in by the defendant, which amount would not be within the competence of the District Court, he is nevertheless entitled to tax his costs on the District Court scale. [Stephens v. Toronto R. Co., 13 O.L.R. 363, 9 O.W.R. 259, considered.]

Hippe v. Murphy, 33 W.L.R. 571. [Reversed in 33 W.L.R. 748.]

(§ II—29)—Review of taxation—Sask. R. 732.

The direction of r. 732 (Sask. Judicature Rules, 1911), that the dissatisfied party may "within ten days and on two days' notice" apply for a review of a taxation, implies that the return date of the notice must be within the ten days; and it is not sufficient that the notice should be served within the ten days if returnable after that period.

Re A Taxation, 11 D.L.R. 191, 6 S.L.R. 308, 24 W.L.R. 358, 4 W.W.R. 715.

Trial — Adjournment — Costs of day — What taxable — Witness fees —Disbursements.

Mulcahy v. Edmonton: Dunvegan & B.C. R. Co., 46 D.L.R. 654, [1919] 1 W.W.R. 928.

Review of taxation.

A question of the scale of costs of the whole bill as distinguished from the separate consideration of items, is one of principle and may be brought up in a County Court case in Nova Scotia by a motion to review the taxation and an appeal from the refusal instead of by an appeal direct from the taxation itself. [Canadian Bank of Commerce v. Colwell (unreported); Sparrow v. Hill, 7 Q.B.D. 362; and Tupper v. Wright, James' R. 303, specially considered.]

McGillivray v. Conroy, 3 D.L.R. 398, 46 N.S.R. 463, 11 E.L.R. 111.

Taxation — Appeal — Conflict between rules and statute.

Jolicoeur v. Town of Cornwall, 5 O.W.N. 597.

Taxation—Instructions on examination for discovery—Review of taxation.

It is as necessary for the party who is to be examined to give instructions upon examination for discovery, as it is for the party examining. The costs of instructions to consent to change of place of trial asked for by the other party should be allowed. The costs of separate letters to defendants not appearing at the trial to the effect that judgment has been reserved may be allowed. The costs of letters asking parties to call to swear affidavits of disbursements may be allowed.

Hodgson v. Gowan, 6 W.W.R. 186.

Review of items of taxation—Scale—Surrogate Court r. 52—"Property devolving" exceeding $10,000 but value of property in relation to which application made for advise, in respect of which the question of costs arose, not exceeding said sum.

Imperial Canadian Trust Co. v. Webster, [1919] 1 W.W.R. 876.

Review of taxation—Items not objected to before taxing officer—Counsel fees—Discretion of taxing officer—Noninterference therewith.

Items of costs to which no objection has been taken before the taxing officer should not be reviewed. The costs allowed for counsel fees for attending on examination for discovery are, under tariff item 78, discretionary with the taxing officer. Where an amount is discretionary with the taxing officer and no principle or rule of decision has been violated and there has been no plain error his discretion should not be interfered with.

Rural Municipality of South Qu'Appelle v. Kidd, [1919] 3 W.W.R. 1030.

(§ II—30)—Recovery on security bond.

A judgment dismissing an action with costs grants an advocate distraction of his costs for defending the suit, and vests

him with ownership of his bill of costs so as to permit him to maintain an action in his own name on a security bond given by the plaintiff in the former action notwithstanding it ran in favour of the defendant therein, under the laws of Quebec Province. [Millette v. Gibson, 17 R.L. 600, specially referred to.]

Rioux v. Proulx, 4 D.L.R. 162, 41 Que. S.C. 430.

TAXATION OF COSTS—NECESSITY OF FILING WRITTEN OBJECTIONS.

Where in an action to recover a liquidated sum of money, defendants do not deny the plaintiff's claim, but set up a counterclaim, and the plaintiff instead of entering judgment upon his claim and going to trial on the counterclaim alone, sets the action down for trial on both claims, and judgment is rendered allowing plaintiff's claim with costs and dismissing defendant's counterclaim with costs, the plaintiff is allowed to tax only the costs on the counterclaim, and where costs were taxed on both claims, they will be readjusted on review and sent back to the taxing officer for revision, so that the plaintiff will get only those items which he could properly have taxed in respect of his defence to the counterclaim. Under Manitoba K.B. r. 684, allowing "any party who may be dissatisfied with the certificate of a taxing officer, as to any item or part of an item which may have been objected to," to apply to a Judge in Chambers for an order to review the taxation, written objections are not a prerequisite to the right of appeal; oral objections being sufficient.

Cooney v. Jickling (No. 2), 7 D.L.R. 728, 22 Man. L.R. 468, 3 W.W.R. 302.

The delay for applying for review of the taxation of a bill of costs in the Superior Court is suspended while the cause is before the Court of Review. The motion for dismissal of an opposition to judgment as frivolous is not a contestation but a preliminary exception giving the right, in an action of the third class, to a fee of 86 in addition to the same fee for appearance.

Courchesne v. Talbot, 13 Que. P.R. 197.

(§ II—31)—BLOCK TARIFF.

The limitation of the amount of costs taxable upon an appeal under a statute (7 & 8 Edw. VII. (Man.) c. 12, s. 2), whereby no greater sum than $100 and disbursements shall be allowed for costs of appeal to the successful party in any appeal to the Court of Appeal, applies not only to costs ordered directly by the Court of Appeal, but to costs ordered in favour of the ultimately successful party upon the reversal of the judgment of the Court of Appeal upon a further appeal to the Supreme Court of Canada.

Williams v. Box, 3 D.L.R. 684, 22 Man. L.R. 258, 21 W.L.R. 590, 2 W.W.R. 852.

BRIEFS—CHAMBERS PROCEEDINGS.

There is no provision in the tariff of costs for briefs on interlocutory proceedings in Chambers.

Hill v. Can. Home Invest. Co. (No. 2), 22 B.C.R. 304.

(§ II—32)—TAXING OFFICER—POWERS—DISCRETION—APPEAL.

Rule 304, Rules of Court, Sask., contemplates that it is in his capacity as taxing officer, and upon a taxation that the taxing officer is to exercise the discretion vested in him by the rule; his jurisdiction is not concurrent with that of the Trial Judge, and an appeal to the local master is a proper appeal.

Can. Bank of Commerce v. Eye, 43 D.L.R. 464, 11 S.L.R. 468, [1918] 3 W.W.R. 823.

POWERS OF TAXING OFFICER—TAXATION—AWARD UNDER RAILWAY ACT (CAN.)—REASONABLE EXPENSES.

Re Vancouver, Victoria & Eastern R. Co., & Ingram, 7 D.L.R. 912.

A taxing officer has jurisdiction to order the cross-examination of a party on his affidavit of disbursements.

Johnson v. Moore, 4 D.L.R. 399, 17 B.C.R. 219, 21 W.L.R. 569, 1 W.W.R. 1102.

ALBERTA RULES—TAXATION—POWERS OF DISTRICT JUDGE—SUPREME COURT JUDGE.

Rule 17, of the rules of procedure and tariffs of costs, does not give to a District Court Judge the power to increase the amount of costs by directing them to be taxed on a higher scale or by directing that r. 27 shall not apply. Under r. 21 this power is only given to the Supreme Court or a Judge thereof; this does not apply to District Court Judges acting as Local Judges of the Supreme Court.

Coleman v. Garvie, 49 D.L.R. 147, [1919] 3 W.W.R. 511.

ACTION TO ENFORCE MECHANIC'S LIEN—POWER OF MASTER OR REFEREE TO FIX COSTS AT LUMP-SUM—DISCRETION—APPEAL—JUDICATURE ACT, S. 74 (4).

Jamieson v. Hagar, 17 O.W.N. 104.

DISTRESS ACT AMENDMENT ACT, 1913—TAXATION OF BAILIFF'S COSTS—NO REVIEW BY COUNTY JUDGE.

The Judge of the County Court has not power to review the taxation by the Deputy Registrar under the Distress Act Amendment Act, 1913, of the bill of the costs incurred by a bailiff under a landlord's warrant.

In re The Distress Act, [1919] 3 W.W.R. 318.

POWERS OF TAXING OFFICER.

A taxing officer has no power under order 65, rr. 8 and 27 (29) to allow a smaller sum than the amount specified in Appendix M; subr. 38 (a) only applies where taxing officer may exercise his discretion.

Re Winding-up Act & Bank of Vancouver, [1917] 3 W.W.R. 461.

AMOUNT—DISCRETION.

A Trial Judge alone has discretion to

allow costs over $300 under the proviso to r. 951; therefore, where a case has not come to trial there is no judge capable to exercising such discretion.

Metro v. Standard (Man.), [1917] 2 W.W.R. 526.

(§ II—34)—Agreement for compensation—Scope as to costs "incidental to the reference."

Where a railway company agreed with a town corporation to pay the latter any damages accruing by reason of the building of a bridge by the railway company, such damages to be ascertained in a summary manner by a referee appointed by the Dominion Railway Board for the purpose, and subsequently pursuant to this agreement an application was made to the Board and a referee appointed, in which order of appointment it was provided "that the costs of and incidental to the reference, including those of the referee shall be in the discretion of the said referee," the referee has power to award the costs of the application to the Board, notwithstanding the general policy of the Board not to award costs of proceedings before it. [Curry v. C.P.R. Co., 13 Can. Ry. Cas. 31, criticized; Re Bronson & Canada Atlantic R. Co., 13 P.R. (Ont.) 440, applied. See also Re False Creek Flats Arbitration, 8 D.L.R. 922.]

Re C.P.R. Co. & Town of Walkerton, 10 D.L.R. 347, 4 O.W.N. 756, 15 Can. Ry. Cas. 85, 24 O.W.R. 50.

(§ II—35)—Statutory tariff—Application of.

The new tariff of costs in Ontario which became operative September 1, 1913, applies to all taxations between party and party after that date. [Re Solicitors, 6 O.W.N. 625, followed.]

Volcanic Oil & Gas Co. v. Chaplin, 22 D.L.R. 708, 8 O.W.N. 66.

Fixing by statute—Right of solicitor to recover without delivery of bill of costs.

Where, by private Act of Parliament, 2 Geo. V. (Ont.) c. 125, s. 6, the costs of the plaintiff in an action against a township were fixed "as between solicitor and client" at $1,800 to be paid by the township the plaintiff's solicitors acquired no rights from the Act against him as to compensation, and they can maintain an action therefor only after the delivery of a detailed bill of costs as required by the Solicitors Act, R.S.O. 1897, c. 174. [Jarvis v. Great Western R. Co., 8 U.C.C.P. 280; Drew v. Clifford, 2 C. & P. 68, referred to.]

Gundy v. Johnston, 12 D.L.R. 71, 28 O.L.R. 121, affirming in part 7 D.L.R. 300. [Affirmed, 15 D.L.R. 295, 48 Can. S.C.R. 516.]

(§ II—37)—Several defendants, same contestation.

The court may restrict the costs of the successful defendants to those of one contestation where each filed a separate defence in identical form instead of a single defence for all, when all of the defendants were in the same interest. [Hétu v. Humphrey, 32 Que. S.C. 169, and Van Felson v. Boudreau, 18 Rev. de Jur. 216, applied.]

Black v. Carson & The Crown Reserve Mines Co., 7 D.L.R. 484, 22 Que. K.B. 217. [Affirmed, 36 D.L.R. 772.]

Several defendants—Same contestation—Third party notice—As between codefendants.

Where one of two defendants sued in negligence for flooding lands is found solely responsible for the injury but had served a third party notice claiming indemnity against his codefendant and offered evidence at the trial to throw the blame on such codefendant, the costs of the codefendant may be ordered against the party so found responsible for the injury.

Nicholson v. G.T.R. Co., 19 D.L.R. 759, 7 O.W.N. 480.

Apportionment — Division — Two defendants—Same contest.

Where defendant's wife was joined as a defendant after her husband's examination for discovery and was represented by the same counsel at the trial, a judgment against the husband with costs but dismissing the action as against the wife with such costs as she incurred in her own defence solely because plaintiff elected to proceed aginst the husband as having held himself out as principal instead of taking judgment against the wife as the real principal, is properly worked out by allowing in the wife's costs one-half only of the counsel fee which would be taxable to her had she been the sole defendant and had succeeded.

Stovel v. Detremaudan, 20 D.L.R. 465.

Only one bill of costs will be taxed on appeal to the Court of Review when the parties by tacit if not formal consent have treated two causes as one and the Court of Review, as well as the Superior Court, have pronounced one judgment only.

Beaudry v. Lavigne, 13 Que. P.R. 229.

Taking executor's accounts — Parties with same interest represented by different solicitors.

In taking executor's accounts parties with the same interest should not be represented by different solicitors at the expense of the estate. Where a solicitor appears for the official guardian and another for other parties with the same interest the latter should not get costs out of the estate. The proper course in such case is to get directions from the Surrogate Court Judge as to who shall have charge in opposing the executor's accounts.

In re Souply Estate, [1919] 2 W.W.R. 746.

(§ II—38)—On accepting payment into court.

Where the plaintiff sets up two alternative claims, and the defendant pays money into court in satisfaction of one of them,

the plaintiff on taking money out of court in satisfaction of that claim must abandon the other claim if he wishes to tax his costs of the action and sign judgment for such costs under r. 425 (Ont. C.R. 1897).

Frost & Wood Co. v. Leslie, 8 D.L.R. 941, 27 O.L.R. 450, 23 O.W.R. 567.

(§ II—40)—Stay of proceedings—Test case—Abiding result—Benefit.

Where an action is stayed by order until the disposal of another independent action against the same defendant upon the same state of facts, with the result of which action the plaintiff in the stayed action was to be bound, but no stipulation was made in the order as to payment of the costs in the contested action, a summary order cannot be made, on the dismissal of the latter, for payment of defendant's costs by the plaintiff in the stayed act on the ground that the former had been carried on for his benefit.

Stokes v. B.C. Electric R. Co., 12 D.L.R. 379, 3 W.W.R. 957.

Expropriation proceedings — Disallowance of costs.

Where the party succeeding on the issue as to title under the sheriff's deed had previously stood by without attacking the deed, such party was not allowed the costs of that issue in the expropriation proceedings.

The King v. Ross, 15 Can. Ex. 33.

(§ II—45)—Setting off costs—Workmen's Compensation Act (Alta.).

Where the plaintiff, having failed in his common law action against his employer, subsequently proceeds under subs. 4 of s. 3 of the Alberta Workmen's Compensation Act, Statutes of 1908, the compensation assessed under that Act against the employer may be subject to a set-off for the defendant's costs of defending the common-law action so brought.

Ferguson v. Brick & Supplies, 16 D.L.R. 67, 7 A.L.R. 337, 5 W.W.R. 1227, 27 W.L.R. 70.

Collection—Setting off costs.

Munro v. DeBlois, 12 D.L.R. 858, 13 E.L.R. 45.

Setting off costs.

In an action for goods sold and delivered in which the plaintiff succeeded on his claim, the defendant also succeeded on a counterclaim for damages resulting from delay in delivery, though to an amount less than he claimed and judgment was ordered to be entered for the plaintiff for the difference between the amount of his claim and the damages allowed the defendant, together with interest from the issue of the writ, and both the plaintiff and defendant were allowed their costs, the one being set-off against the other, the difference to be set off or added to the amount of the judgment and the costs of the trial, except the counsel fee which was allowed the plaintiff, was allowed to the defendant.

Edmonton Iron Works v. Cristall, 3 A.L.R. 338.

Setting off costs—Quebec Election Act R.S.Q., s. 240.

If an appeal, asking to add certain names to, or remove certain names from, an electoral list, succeeds as to a certain part only, they may be a set-off of costs.

Longpré v. St. Gabriel de Brandon, 16 Que. P.R. 238.

(§ II—47) — Experts — Verification by experts—Costs—Que. C.P. 404.

Experts charged to examine the working of a machine have the right to require the services of workmen to do work of which they should only verify the result, and the costs of such workmen goes into the costs of the action, from whatever distance the workmen may have come.

Desfonds v. Leclair, 16 Que. P.R. 380.

(§ II—50)—Of unnecessary proceedings—Insufficiency of issues submitted—Costs on granting new trial.

Where the plaintiffs on appeal seek a new trial and it appears that through their own inadvertence there was an insufficiency of issues submitted on the trial, the case may be sent back for retrial, but upon exemplary terms as to costs penalizing the plaintiffs for the unnecessary proceedings through their default.

Imperial Roofing Co. v. Dick, 10 D.L.R. 484, 5 A.L.R. 470, 23 W.L.R. 821, 4 W.W.R. 100.

Of unnecessary proceedings.

Money disbursed as expenses in the preparation of the owner's case to the arbitrators upon an arbitration under the Railway Act, R.S.C. 1906, c. 37, may be disallowed if they appear to have been incurred through over-caution or unnecessarily.

Re False Creek Flats Arbitration (No. 3), 8 D.L.R. 922, 17 B.C.R. 376.

Of unnecessary proceedings—Defect of parties — Unnecessary delay of successful party.

In an action by an inhabitant of a license district against a license commissioner praying for an injunction restraining the latter from acting on a requisition presented to him for a poll to determine whether licenses should be granted for the sale of liquor within his district, under s. 124 of the Liquor License Ordinance, C.O. 1898 (N.W.T.), c. 89, as amended by statutes 2 and 3 Geo. V. (Alta.) c. 8, s. 26, where it appears that the action, as originally brought, should have been dismissed, because the plaintiff had no status to maintain the action, but the action was saved by the adding of another person who was entitled to maintain the action, the new plaintiff, although successful, is not entitled to costs, since the defendant could have had the action dismissed before the new plaintiff was brought in, and the defendant is entitled to tax as costs, only such items as he could have taxed as the result of the motion to dismiss which he failed to make.

Gross v. Strong; Pinchebeck v. Strong, 10 D.L.R. 393, 5 A.L.R. 49, 23 W.L.R. 340, 362.

Of unnecessary proceedings—Foreclosure—Untenable defence.

Costs in a foreclosure action caused by untenable defences are against the defendant.

Essen v. Cook, 18 D.L.R. 51, 20 B.C.R. 213, 28 W.L.R. 462, 6 W.W.R. 1080.

Unnecessary proceedings — Successful party's misconduct—Effect on apportionment.

Cameron v. Carse, 20 D.L.R. 952.

(§ II—60)—Setting case down for trial—Notice of—Right of counsel to fee at trial.

Where a defendant is justified in setting his case down for trial and giving notice of trial the solicitor becomes entitled to deliver briefs to counsel, and if intending to take his own brief as a barrister is entitled to counsel fee at trial. In a number of cases which are identical, where one solicitor counsel is retained for all the cases, he is entitled to counsel fee in each case. The general rule that the discretion of the taxing officer is not to be interfered with as to quantum does not preclude the Appellate Court from so interfering in very special circumstances.

Flexlume Sign Co. v. Globe Securities Co., 47 D.L.R. 22, 44 O.L.R. 277.

Drainage referee—Power to make rules regarding.

Subject to the general rules, as to costs under the Drainage Act, the drainage referee has power to make any order he may see fit, as to the payment of costs, and may make a general rule that in all drainage cases for the year 1915, each party must pay its own costs, unless in some special case the referee thinks such general rule would not be reasonable.

Tp. of Colchester North v. Tp. of Anderdon; Tp. of Gosfield North v. Tp. of Anderdon, 21 D.L.R. 277. [Reversed in 24 D.L.R. 143, 34 O.L.R. 437.]

Privilege in Quebec.

The law costs for which there is a privilege on the movable and immovable property of the insolvent debtor are those only which are incurred in the common interest of all the creditors. It cannot be claimed against an hypothecary creditor for costs which have not benefited him. Therefore, the attorneys who prepared the demand for a cession de biens and had charge of the subsequent proceedings up to liquidation cannot be collocated for their costs in preference to the hypothecary creditors of the insolvent.

Langevin v. Girouard; Re Daigle, 43 Que. S.C. 341.

Scale of costs (Que.).

The plaintiff who, in an action for alimony, succeeds to the extent of $60 only is not entitled to the cost of the depositions. The word dépens ou frais includes disbursements as well as fees (art. 551, C.P. Que.).

Ascher v. Ascher, 14 Que. P.R. 437.

Exception.

The costs of the defendant's attorney on a declinatory exception which was maintained and an order made for transmission of the record to another district will be those of an action dismissed after contestation.

Biron v. Provost, 14 Que. P.R. 304.

Remedy for, in insolvency proceedings.

Where an insolvent trader transfers all his assets to certain of his creditors to be realized and the proceeds distributed among the body of creditors the liquidators are only depositaries of the property and money they received, and, so long as they retain possession of it, can be compelled, by means of a writ of saisie-arrêt, to pay, to the extent of the same, the amount directed by a judicial order. In these circumstances, when an action against the insolvent and his liquidators is defended by the insolvent alone but at the instigation of the liquidators and in the interest of the creditors generally, if the action is maintained with costs against the insolvent only the plaintiff has a right, by saisie-arrêt, to compel payment of these costs out of moneys in the hands of the liquidators.

Hill v. Hudon, 43 Que. S.C. 481.

Scale—Quebec practice.

When an action is brought to recover a sum exceeding $2,000 and the plaintiff, who has obtained judgment for $150 only, inscribes in review where the judgment is affirmed, the costs of the proceedings in review will be those of the first class.

Solomon v. Montreal St. R. Co., 14 Que. P.R. 371.

Exceptions—In Quebec.

If two preliminary exceptions, e.g., a declinatory motion and a motion to the form, are embodied in the same document, the latter must be double-stamped and two deposits made.

Bernier v. Leboeuf, 15 Que. P.R. 22.

Annulment of sale—Quebec.

The costs on a petition to annul a sheriff's sale of an immovable for taxes for an amount of over $200 when execution has been issued in said Circuit Court, will be those of a first-class Circuit Court action, and not the fees of a Superior Court action.

City of Westmount v. Evans, 15 Que. P.R. 110.

Scale—Quebec.

Every step in a cause is governed as to the costs, by the tariff in force when the proceedings in the cause began.

Racine v. Dansereau, 14 Que. P.R. 395.

Article 72, par. 7 of the tariff for attorneys, in force since 1st Sept., 1912, allows a sum of $15 for traveling from any other district to Montreal or Quebec, made specially for the hearing of causes in review. This fee should be allowed to an attorney attending a hearing with the special object

of watching the case even when it would have been argued by counsel. The additional fee to which the attorney is entitled in a cause involving more than $5,000 should be settled by the tariff in force at the time when the bill of costs was taxed and not that in force at the institution of the action.

Contant v. Ducharme, 14 Que. P.R. 414.

QUEBEC PRACTICE — MIXED AND PERSONAL ACTIONS.

An action by a purchaser to compel the vendor to fulfil the stipulations of a sale of real property is a mixed action; an action by the vendor is a personal action.

Giguere v. Boisjoli, 16 Que. P.R. 235.

IN CONDEMNATION PROCEEDINGS.

The application for the appointment of the third arbitrator is only part of the preliminary proceedings in an expropriation case and the costs are only those provided for by art. 79 of the tariff. [Mattey v. Montreal, 14 Que. P.R. 79, distinguished.]

Town of Outremont v. Missionary Sisters of the Immaculate Conception, 14 Que. P.R. 346.

EXPROPRIATION—QUEBEC.

There is no difference as to costs between an expropriation under a Federal or Provincial Railway Act or under an act relating to cities and towns so long as the quantum of the costs is alone in question and the tariff is the best guide in determining this quantum. In an expropriation under the provisions of the charter of Montreal the solicitors are entitled to costs, not only as between solicitor and party but also as between solicitor and client.

Montreal v. Hatley, 14 Que. P.R. 180.

(§ II—65)—PRACTICE—EXPENSE OF SURVEY OF LANDS—COST OF MAPS—FIAT GRANTED PRIOR TO ALLOCATUR—B.C. COSTS TARIFF (1906), SCHEDULE 4.

Bogardus v. Hill, 16 D.L.R. 243, 18 B.C.R. 358, 25 W.L.R. 436.

COSTS OF APPEAL TO BE FIXED BY COUNTY JUDGE—UNAUTHORIZED AWARD OF COSTS TO BE TAXED BY CLERK.

The King v. Hamlink, 17 Can. Cr. Cas. 162 (Ont.).

IMPRISONMENT ON DEFAULT OF PAYING FINE —EXCESSIVE FEES FOR CONVEYING TO GAOL.

The King v. Berrigan, 17 Can. Cr. Cas. 329.

OF UNSUCCESSFUL MOTION FOR LEAVE TO APPEAL TO SUPREME COURT.

Re Ontario Sugar Co. and McKinnon, 44 Can. S.C.R. 659.

TAXATION OF DISBURSEMENTS.

Herman v. McConnell, 3 A.L.R. 136.

ACTION—COUNTERCLAIM.

Les Soeurs de la Charité v. Forrest, 20 Man. L.R. 301.

CONCURRENT WRIT—COUNSEL FEES.

Colonial Investment & Loan Co. v. Smith, 3 S.L.R. 482, 16 W.L.R. 151.

APPEAL BOOKS ILLEGIBLY TYPEWRITTEN—PARTY APPELLANT DEPRIVED OF COSTS.

Where appeal books permitted to be typewritten were typewritten illegibly, costs of same were disallowed.

Onsum v. Hunt, 2 A.L.R. 480.

TENANT—SUMMARY PROCEEDINGS FOR EJECTMENT.

The costs of a summary proceeding under the Landlords and Tenants Act, R.S.M. 1902, c. 93, to eject a tenant are the costs of an action in the King's Bench and taxable on the same scale.

West Winnipeg Development Co. v. Smith, 20 Man. L.R. 274, 15 W.L.R. 343.

ACTION IN SUPREME COURT—AMOUNT ADJUDGED WITHIN COUNTY COURT JURISDICTION.

An appeal from the decision reported (1910), 15 B.C.R. 303, was allowed on the ground that the facts shewed that the learned judge below had not exercised his discretion, and the case was remitted to be dealt with on that basis.

Yong Hong v. MacDonald, 16 B.C.R. 133, 14 W.L.R. 475.

ACTION AGAINST MEMBER OF LEGAL FIRM DEFENDED BY FIRM, ONE OF WHOM IS NOT A SOLICITOR—COUNSEL FEES PAID TO PARTNERS IN LAW FIRM.

Wright v. Elliott, 21 Man. L.R. 337, 17 W.L.R. 405.

ACTION IN COUNTY COURT—DIVISION COURT JURISDICTION — ASCERTAINMENT OF AMOUNT.

McIlhargey v. Queen, 2 O.W.N. 364, 781, 916.

COUNSEL FEE ON POSTPONEMENT OF TRIAL.

McDonald v. G.T.R. Co., 18 O.W.R. 561.

ARBITRATORS HAVE NO RIGHT TO MAKE THE SUCCESSFUL PARTY TO AN ARBITRATION PAY THE COSTS.

Farmers Bank v. Todd, 19 O.W.R. 703, 2 O.W.N. 1389.

REFERENCE — TO ASCERTAIN AMOUNT OF "REASONABLE REBATE" IN RENT.

Hessey v. Quinn, 3 O.W.N. 442, 20 O.W.R. 779.

RELEASED BY CLIENT TO PLAINTIFF IN ORDER TO EFFECT A SETTLEMENT OF LITIGATION —NOTICE TO PLAINTIFF OF SOLICITOR'S LIEN.

Pears v. Stormont, 3 O.W.N. 374, 20 O.W.R. 625.

CERTIFICATE OF JUDGMENT—VARIED SO AS TO RELIEVE THIRD PARTIES OF COSTS.

Stavert v. McMillan & four other actions, 3 O.W.N. 267, 20 O.W.R. 513.

REFERENCE TO TAKE ACCOUNTS—RAISING QUESTIONS OF FRAUD AND FORGERY—APPEAL.

Where a plaintiff although he succeeds in part on his claim makes improper and unfounded charges of fraud and forgery on the taking of accounts before a referee after

a judgment referring has been given, will not be awarded costs.

Neal v. Rogers, 2 O.W.N. 1482, 19 O.W.R. 873, affirming judgment reported, 2 O.W.N. 1107, 19 O.W.R. 132.

TAXATION—SOLICITOR AND CLIENT—SERVICES OUTSIDE OF SOLICITOR'S WORK.

Re Solicitor, 12 O.W.R. 1094 and Murphy v. Corry, 7 O.W.R. at p. 336, followed.

Re Solicitors, 19 O.W.R. 753, 2 O.W.N. 1421.

ISSUE DIRECTED TO TRY ALLEGED INSANITY —COSTS DISPOSED OF BY TRIAL JUDGE OR ON APPLICATION UNDER 1 GEO. V. C. 20.

Re John James Peel, 19 O.W.R. 511.

COSTS OF SURROGATE COURT PROCEEDINGS—CERTIFICATE OF TAXING OFFICER.

Re Solicitor, 19 O.W.R. 965.

QUANTUM — TAXATION — LIMITATION OF AMOUNT.

Buchanan v. City of Winnipeg, 19 W.L.R. 761 (Man.).

STATEMENT OF DEFENCE FILED UNDER MISTAKE AS TO FACTS.

Northern Sulphite Mills v. Occidental Syndicate, 2 O.W.N. 1015.

DEPUTY REGISTRAR'S CERTIFICATE SAME EFFECT AS A REPORT—FINAL BEFORE TAXATION—CONFIRMED BY LAPSE OF TIME.

The Laurentian Stone Co. v. Bourgne, 19 O.W.R. 220.

INTERDICTION—DEFENCE FEES.

Lacroix v. Chabot, 12 Que. P.R. 395.

TARIFF—DECLINATORY EXCEPTION.

When, in an action of the first class in the Circuit Court which is not appealable, a declinatory exception is maintained and the record transmitted to another district for adjudication the fee to the defendant's attorney will be $3.00 pursuant to art. 39 of the Circuit Court tariff.

Courchesne v. Maritime Nail Co., 12 Que. P.R. 136.

SEPARATE PLEADINGS—SINGLE JUDGMENT—TARIFF.

Lavergne v. Lariviere, 12 Que. P.R. 149.

EXPROPRIATION—MOTION FOR TAXATION OF COSTS.

When a sum of $17,000 has been granted to an expropriated party on an appeal confirming the decision of the arbitrators, such party's solicitor is entitled to a sum of $200 besides the taxable costs, which, in this case, amount to $115.

G.T.R. Co. v. Garceau, 12 Que. P.R. 337.

ACTION UNDER COPYRIGHT ACT—ACCOUNT—TARIFF.

Beullac v. Simard, 12 Que. P.R. 363.

COSTS OF LITIGATION — EXIGIBILITY — RIGHT OF ACTION—CAPIAS—LIQUIDATED DEBT — REQUÊTE CIVILE — RIGHT OF APPEAL.

Maxwell v. Longmoore, 40 Que. S.C. 534.

REVIEW—AMOUNT IN CONTROVERSY—DEPOSIT.

Morissette v. Clement, 12 Que. P.R. 413.

TAXATION—ACTION AND COUNTERCLAIM—SEPARATE ACTIONS—LIMITATION OF AMOUNT.

St. Boniface Hospital v. Forrest, 16 W.L.R. 395. [Affirmed, 16 W.L.R. 647 (Man.).]

PARTNERSHIP—ACCOUNT—COSTS.

In a partnership action for an account an order was made that the plaintiff and defendant should respectively have the costs of the different issues on which each succeeded.

Wheatley v. Wheatley, 17 W.L.R. 117 (Man.).

COTENANCY.

I. IN GENERAL.

II. CREATION AND EXISTENCE.

III. RIGHTS AND REMEDIES AS TO EACH OTHER.

Interests of tenants in common as entitling them to compensation for injury to land, see Expropriation, III. E—171.

II. Creation and existence.

(§ II—5)—CREATION—TESTAMENTARY GIFT —EQUAL DIVISIONS.

A testamentary gift "to be divided" between two or more, means an equal division and creates a tenancy in common.

Re Hislop, 22 D.L.R. 710, 8 O.W.N. 53, affirming 7 O.W.N. 614. [Referred to in Re Chatham Glebe Trust, 22 D.L.R. 798, 8 O.W.N. 169.]

DEPOSIT IN BANK TO JOINT CREDIT—SURVIVORSHIP—WILL.

The plaintiff's father made a deposit of money in a bank, and he and the plaintiff signed a memorandum, addressed to the manager of the bank, saying that they thereby agreed jointly and severally with the bank and each with the other that any moneys which might from time to time be placed to the credit of their joint names and the interest thereon should be subject to withdrawal by either of them, and that the death of one should not affect the right of the survivor to withdraw such moneys and interest; and each of them irrevocably authorized the bank to pay any such moneys and interest to either of them and to the survivor. The money deposited was entirely that of the father, who died shortly afterwards. In an action against the executors and a legatee under the father's will for a declaration of the plaintiff's right to the money, evidence as to the intention of the testator was admitted, and some of it shewed an intention to benefit the plaintiff. The father, by his will, which was made two months after the signing of the memorandum, bequeathed $300 to the plaintiff, and made no mention of the deposit.

Smith v. Gosnell, 43 O.L.R. 123.

JOINT SAVINGS ACCOUNT—SURVIVORSHIP—WILL.

To create a voluntary bestowment in joint tenancy, as distinct from a gift inter vivos or mortis causa, there must be unity of interest, unity of title, arising at one and the same time, and unity of possession—both joint tenants being seized per mie et per tout, each has an undivided moiety of the whole. Where a man withdrew the money standing to his credit in a savings bank account, and redeposited it to the credit of a new account opened in the names of himself and his wife, giving the bank a written declaration, signed by both, that "all moneys deposited and that may be deposited by us and each of us to the credit of this account are our joint property, but they may be withdrawn by cheques made by either of us or the survivor of us," it was held, after the death of the husband, that the money was the property of the wife by right of survivorship. The source of the money was immaterial, and after it became joint property it was not subject to being disposed of by the will of either party. [Re Ryan, 32 O.R. 224; Everly v. Dunkley, 8 D.L.R. 839, followed.]

Weese v. Weese, 37 O.L.R. 649.

III. Rights and remedies as to each other.

(§ III—10)—TENANTS IN COMMON—AGENCY OF ONE FOR THE OTHERS—SALE OF LAND BY MORTGAGEE—GUARANTY—ACTION BY CO-OWNERS TO SET ASIDE—ABANDONMENT—ESTOPPEL.

Loveland v. Sale, 8 O.W.N. 576, 10 O.W.N. 238.

(§ III—18)—ACCOUNTING—USE OF PROPERTY BY COTENANT.

One cotenant is not answerable to another cotenant for profits from the operation of a mill where the latter, who was not prevented from using the mill, to the same extent as the defendant had he so desired, would not contribute towards the cost of putting the mill in order so that it could be used. [Henderson v. Eason, 17 Q.B. 701, referred to.]

Harmony Pulp Co. v. DeLong, 12 D.L.R. 409, 13 E.L.R. 99.

JOINT OPTION—ACCEPTANCE BY ONE—ACCOUNTING.

The relation of joint holders of an option on land is not that of partners, but of joint owners, and the exercise of it by one enures to the benefit of the other, and an account of the profits realized must be made.

Woodside v. Lands & Homes Co. (Man.), 36 D.L.R. 713, [1917] 2 W.W.R. 1227.

ACCOUNTING—EXCLUSIVE POSSESSION.

Where one of joint owners of property has had during a period of time the exclusive possession and enjoyment thereof, his coproprietor cannot claim from him the incomes therefrom received during such enjoyment: his only recourse in this respect is by an action for an account. When such property consists of moveables, the coheirs may each demand his proportion thereof in kind; but neither of them can oblige the other coheir to purchase his part thereof nor to pay him its value.

Fiset v. Fiset, 50 Que. S.C. 114, reversing 49 Que. S.C. 400.

COUNCIL.

See Municipal Corporations.

Qualification of members, see Elections; Officers.

COUNTERCLAIM.

See Set-off and Counterclaim; Pleading.

COUNTIES.

See Municipal Corporations.

County Court, see Courts.

County or township bridge, see Bridges.

The county seat of the county, by terms of the Municipal Code, is the place where the County Council holds its sessions and, in consequence, it is the business of the council to hold its sessions in an appropriate place to establish a county seat. Following the provisions of the Municipal Code, the county seat of the county, once established, may be changed only by a by-law passed by two-thirds of the members of the council in office, nevertheless, if it appears that such a by-law has been passed, without being adopted by the requisite majority, and which said by-law has been always followed so that all the sessions of County Council, during thirty years, were continually held in a place within the limits of the municipality which was defined by said by-law, such a place of holding sessions, by the force of circumstances, will be declared as determined legally, de facto.

La Corporation de Ste. Foye v. La Corporation Du Comte de Quebec, 18 Rev. de Jur. 99.

A County Council may cause to be homologated a procès-verbal for opening a road situate part in one and part in another municipality of the county, declaring it by the procès-verbal to be a county road. When the municipalities have passed by-laws, under the provisions of art. 535 M.C., for the maintenance of the road, the declaration in the procès-verbal that each of them will maintain the part situate in its territory is sufficient. The County Council can, by the procès-verbal, order that the expenses thereof shall be borne in equal proportions by the two municipalities.

Parish of Lotbinière v. County of Lotbinière, 42 Que. S.C. 148.

The powers conferred by art. 762 on the County Council, in case of the roads to be made, may be exercised in regard of a road already made by a competent authority, and as to those the completion of which is not yet effected; in other words, a County Council may not establish, on

its proper authority, a local road, which has not existed in any form but for the said County Council, after having itself established a local road, to convert, thus established, into a county road. In case a special inspector named by a local council, should appeal, in violation of art. 782, to contribute to opening and completing of a local road, the corporation and the taxpayers of a neighbouring municipality may not authorize the County Council to assume the jurisdiction, before having regularly and suitably disposed of the requirements of arts. 758 and 761 of the Municipal Code.

Brunet & Hainault v. Corporation Du Comte De Beauharnois, 18 Rev. de Jur. 141.

COUPONS.

(I—1) — DETACHED INTEREST COUPONS — RAILWAY BONDS—SALE OF RAILWAY—DISTRIBUTION OF PROCEEDS—CONFLICTING CLAIMS—PRIORITIES.

A holder of detached interest coupons clipped from mortgage bonds issued by a railway company can sue on them without being at the same time the holder of the bond. The coupon does not lose the benefit of the mortgage lien when detached. (McKenzie v. Montreal & Ottawa R. Co., 29 C.C.C.P. 333.) As against bondholders, who presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to take them up under an undisclosed agreement with the company, that the coupons should be delivered to him uncancelled as security for his advances, is not entitled to an equal priority in the lien of the proceeds of the mortgage by which the coupons are secured. The question as to whether there was a payment in satisfaction or by way of purchase, lies in the knowledge and intention of both parties to that payment—which knowledge may be inferred from the circumstances and in case of doubt the scale will be turned against the idea of purchase either by the want of proof of mutual intent or by the fact that there is not enough in the security to pay the principal of the debt and the coupons as well; so that a purchase would be prejudicial to the bondholders. [Review of American authorities.]

Trusts & Guarantee Co. v. Grand Valley R. Co., 47 D.L.R. 656, 44 O.L.R. 398.

COURSE OF EMPLOYMENT.

See Master and Servant.

COURTS.

I. JURISDICTION AND POWERS IN GENERAL.
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  B. Over nonresidents; territorial limitations.
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  A. In general.
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  E. Following decisions of courts of other province or country.
  F. Federal courts following provincial decisions.

Annotations.

Judicial discretion; appeals from discretionary orders: 3 D.L.R. 778.

Jurisdiction; criminal information: 8 D.L.R. 571.

Jurisdiction as to foreclosure under land titles registration: 14 D.L.R. 301.

Jurisdiction as to injunction; fusion of law and equity as related thereto: 14 D.L.R. 460.

Jurisdiction; power to grant foreign commission: 13 D.L.R. 338.

Jurisdiction; "view" in criminal case: 10 D.L.R. 97.

Power of legislature to confer authority on Masters: 24 D.L.R. 22.

Constitutional powers as to creation of courts and appointments thereon; justices of peace: 37 D.L.R. 183.

Publicity; Hearings in camera: 16 D.L.R. 769.

Specific performance; jurisdiction over contract for land out of jurisdiction: 2 D.L.R. 115.

I. Jurisdiction and powers in general.

A. In general; inherent powers.

Jurisdiction of Prize Court, see Prize Court.

Constitutional powers as to creation of inferior courts, justices of the peace, see Constitutional Law, I E—130.

Jurisdiction of Commissioners of Sewers, see Drains and Sewers, III.—15.

(§ I A—1)—District courts martial — Interference of Civil Court—Civil rights affected.

A civil court will interfere only where the rights affected by the judgment of a district court martial of a person in military service are civil rights and the court is acting without jurisdiction.

Ex parte John Fogan, 48 D.L.R. 194, 46 N.B.R. 370.

Jurisdiction — Inherent powers — Railway Board — Tax appeal — Reopening of.

Where the assessment for school purposes of a power company was fixed on the company's appeal to the Ontario Railway and Municipal Board on the consent of the company and the municipality in an unorganized district of Ontario, that Board had no jurisdiction after the passing and entry of such order, to reopen the appeal on the application of the town school board and a ratepayer, and to substitute a higher assessment for its previous order; the effect of subs. 5 of s. 4 of the Ontario Railway and Municipal Board Act, 6 Edw. VII. c. 31, providing that the Board shall have all the powers of a court of record, gave it such jurisdiction as is inherent in a court of record but not powers which are conferred on particular courts by statute or by rules of court passed under statutory authority.

Re Ontario & Minnesota Power Co. & Town of Fort Frances, 19 D.L.R. 429, 30 O.L.R. 373.

Jurisdiction of magistrate's court — Civil action—Fraud.

In an action in a magistrates' court (N. S.) on a promissory note given for the purchase price of a chattel, the defence of fraud connected with the sale may be set up as in any other court.

Wright v. Bentley, 11 D.L.R. 515, 46 N. S.R. 534, 12 E.L.R. 270.

Seaman—Action for wages—Exchequer Court.

An action by a seaman for the recovery of wages under $200 may be brought in the Exchequer Court under s. 191 of the Canada Shipping Act, where the owner of the ship is insolvent or where neither the owner nor the master resides within 20 miles of the place where the seaman is discharged or put ashore.

Young v. The Ship "Minnie A," (Ex.), 40 D.L.R. 408.

Jurisdiction — Commissioners' Court — Discontinuance of part of claim — Proof of discontinuance — Que. C.P. 59, 275.

A court, in order to be validly seised of a case, ought to have had jurisdiction from the beginning, and if it then had jurisdiction the plaintiff cannot oust its jurisdiction by reducing his demand. If the court never had jurisdiction the plaintiff cannot confer it on the court by increasing his demand. The summons is the procedure which begins an action, and the jurisdiction of the court ought to be decided by the amount claimed in the writ. A plaintiff who sues in the Commissioners' Court for $29.50 and also for "half of a crop of potatoes," should amend his claim by specifying this value, or at least give proof of it, and not discontinue, verbally, this part of his claim. Proof, by affidavits that the plaintiff has thus discontinued verbally a part of his claim on the day of the trial is contrary to law, in the same way as proof of the defendant's agreement to proceed the very day of the return of the writ in court.

Poulin v. Raymond, 15 Que., P.R. 348.

Review of discretionary power.

Municipal corporations have power by means of a procès-verbal (arts. 796-813 M.C.) on application of one interested party and, in the absence of proof of injustice towards one or more of those opposing it, the Superior Court should not intervene to annul or modify what has been done in the exercise of a discretionary power recognized by law.

Charest v. Parish of Saint Donat, 43 Que. S.C. 539.

Pleading — Hearing — List — Powers of judge—C.C.P., arts. 293, 294.

The court has power to change the order of hearing of cases, and to order that two actions in which the counsel are the same shall be tried by the same judge, when the interests of justice seem to require it and when the legal rights of the parties are not jeopardized.

Raymond v. Graham, 56 Que. S.C. 454.

Domestic and ecclesiastical courts — By-laws — Jurisdiction — Religious opinion.

When domestic or ecclesiastical tribunals are established, and the members of the society have expressly or tacitly accepted their rulings, they are deemed to submit to those ruling, and civil courts should not interfere with their by-laws unless the essential principles of justice have been violated. Nobody may be forced before a court of justice to disclose personal religious opinions unless the questions bear on the case or

are necessary for the administration of justice.

Wesleyan College v. Workman, 23 Que. K.B. 403.

JURISDICTION — DIVISION COURTS ACT — PLACE OF PAYMENT — AMOUNT — PROHIBITION.

Re American Standard Jewelry Co. v. Gorth, 5 O.W.N. 600.

INFERIOR COURT — WANT OF JURISDICTION — APPARENT ON FACE OF PROCEEDINGS — PROHIBITION — NOT DISCRETIONARY — WAIVER OR ACQUIESCENCE — LACHES.

Where the jurisdiction of an inferior court is not apparent on the face of the proceedings it should not be inferred. Where the want of jurisdiction is apparent on the face of the proceedings prohibition is not a matter of discretion but should be granted. In such case waiver or acquiescence (unless there is a statutory provision of which advantage has been taken) cannot create jurisdiction; nor can laches operate to defeat the right to prohibition.

In re Nowell & Carlson, [1919] 1 W.W.R. 587.

[§ 1 A—2]—REVIEW OF JUDGMENT — HABEAS CORPUS.

A court of superior criminal jurisdiction has inherent power of review over an order in habeas corpus proceedings made by a single judge sitting for the court and as its delegate; and a general order providing, as does Alberta Crown practice r. No. 20, for such review by way of appeal to the Appellate Division of the same court either by the accused or the prosecutor in a criminal matter is not ultra vires, although statutory authority would be necessary were the appeal to a separate court. [R. v. Marceau, 22 D.L.R. 336, 23 Can. Cr. Cas. 456; R. v. Stubbs, 25 D.L.R. 424, 24 Can. Cr. Cas. 303; Re Sproule, 12 Can. S.C.R. 140, applied; Cox v. Hakes, 15 App. Cas. 506; United States v. Gaynor, 9 Can. Cr. Cas. 205, [1905] A.C. 128, and Att'y-Gen'l v. Fedorenko, 18 Can. Cr. Cas. 256, considered; Sheppard v. Godfrey, 24 D.L.R. 646; R. v. Alexander, 13 D.L.R. 385, 21 Can. Cr. Cas. 473, referred to.]

R. v. Thornton, 30 D.L.R. 441, 26 Can. Cr. Cas. 120, 9 A.L.R. 163, 34 W.L.R. 178, 398, 9 W.W.R. 825, 968.

INHERENT POWERS — INJUNCTION RESTRAINING LOCAL OPTION POLL.

The Alberta Supreme Court has jurisdiction to grant an injunction restraining a license commissioner from acting on a requisition presented to him for a poll to determine whether licenses should be granted for the sale of liquor in his district under s. 124 of the Liquor License Ordinance, C.O. 1898 (N.W.T.) c. 89, as amended by statutes 2-3 Geo. V. (Alta.) c. 8, s. 26, where it appears that the commissioner had no jurisdiction because the requisition did not comply with the statute, notwithstanding subs. 11 of s. 124.

Gross v. Strong, Pinchebeck v. Strong, 10 D.L.R. 392, 5 A.L.R. 49, 23 W.L.R. 340, 362.

POWER OF COURT TO ORDER EXAMINATION.

The court will not order and has no power to enforce an order for any further examination of the plaintiff in an action under the Workmen's Compensation Act, R.S.Q., arts. 7338–7346, where he has already submitted, at the request of the defendant, to an examination on the morning of the trial.

Martin v. Cape, 23 D.L.R. 869, 47 Que. S.C. 390.

On the sale of a moveable right for a fixed sum, as on the sale of the right to operate a mine, without any stipulation as to the time within which such right is to be exercised, i.e., within which the purchaser is to remove the balance of the mineral sold, the courts have no jurisdiction under Quebec law to fix a term or delay within which the purchaser shall be restricted in the exercise of the rights contracted for. [Begin v. Carrier, 33 Que. S.C. 1, specially referred to.]

Houle v. Quebec Bank & Vivier, 4 D.L.R. 614, 41 Que. S.C. 521.

The court has inherent power to grant relief against any manifest hardship in respect of proceedings taken upon default where the default was accidental and without blame on the part of the person seeking to set aside the adjudication made in his absence.

Caron v. Bannerman, 1 D.L.R. 24, 22 Man. L.R. 24, 19 W.L.R. 881.

JURISDICTION OF JUDGE TO ENTERTAIN MOTION FOR A FOREIGN COMMISSION.

A judge has jurisdiction to entertain a motion for a foreign commission to take testimony, notwithstanding that the original summons had been made by the registrar of the court and that the application should therefore have been first made to the registrar.

Cluff v. Brown, 7 D.L.R. 688, 46 N.S.R. 514, 11 E.L.R. 78.

JURISDICTION—INHERENT POWER—RIGHT TO GRANT INTERIM ALIMONY.

The Supreme Court of Alberta has inherent jurisdiction to grant interim alimony.

Secrest v. Secrest, 5 D.L.R. 833, 5 A.L.R. 359, 22 W.L.R. 51, 2 W.W.R. 928.

CONSOLIDATION OF ACTIONS — INHERENT JURISDICTION OF COURT — R.S.O. 1897, C. 51, S. 57, SUBS. 9, CON. RULE (ONT.) 1897, 435.

Con. Rule (Ont.) 1897, 435, providing that actions may be consolidated by order of the court or a judge in the manner in use in the Superior Courts of common law prior to the Judicature Act 1881, is intended to deal with the consolidation of actions in the strict sense of that term, that is, to stay absolutely all actions but

one and in that to require the party to include the whole of his claims, the jurisdiction to stay actions as part of the inherent power of the court over its own process, being recognized and confirmed by subs. 9 of s. 57 of the Judicature Act, R.S.O. 1897, c. 51.

Kuula v. Moose Mountain, 5 D.L.R. 814, 26 O.L.R. 332, 22 O.W.R. 64, affirming 2 D. L.R. 900, 3 O.W.N. 1085.

JURISDICTION OF LOCAL MASTER — RIGHT TO SEARCH RECORDS FOR MATERIAL NECESSARY TO SUPPORT MOTION.

Where, on a motion by a subsequent mortgagee to obtain payment from the proceeds of sale of mortgaged premises which had been paid into court, there was no abstract of title shewing that the applicant was prior in title to the other defendants, the motion was properly denied, since the Local Master was not obliged to search the records of the office of the registrar for material necessary to support the motion.

Allin v. Ferguson, 5 D.L.R. 19, 21 W. L.R. 246, 5 S.L.R. 204, 2 W.W.R. 327.

TAXATION OF BILL — JURISDICTION OF MASTER.

The Master in Chambers has no jurisdiction under a statute, unless he is expressly named therein.

Re Solicitor, 3 D.L.R. 718, 3 O.W.N. 1132, 21 O.W.R. 948.

JURISDICTION AND POWERS OVER INCOMPETENT PERSONS — INHERENT POWERS — THE LUNACY ACT, 9 EDW. VII. (ONT.) C. 37, S. 3.

The powers, jurisdiction and authority conferred upon the court by s. 3 of the Lunacy Act, 9 Edw. VII. (Ont.) c. 37, or its inherent jurisdiction, as representing the King, over the persons and estates of lunatics or persons of unsound mind, can be exercised only after a declaration, upon due inquiry, that the person in question is of unsound mind.

Re Fraser; Fraser v. Robertson; McCormick v. Fraser, 8 D.L.R. 955, 26 O.L.R. 508, 22 O.W.R. 353.

JURISDICTION — STATUTORY POWER TO GRANT ALIMONY — EXTENSION — N.S. LAW, 1903, C. 64, 1904, C. 35.

Chapter 64 of the Nova Scotia Laws, 1903, as amended by c. 35 of the N.S. Laws, 1904, conferring upon the Supreme Court of Nova Scotia the right to grant alimony in certain cases and upon the happening of certain circumstances, cannot be extended to the granting of alimony pendente lite, the jurisdiction conferred being a statutory one and the latter power not being specifically mentioned.

Dorey v. Dorey, 9 D.L.R. 150, 46 N.S.R. 469.

COURT OF REVIEW — JURISDICTION — JUDGMENT ORDERING EXPROPRIATING PARTY TO MAKE A CERTAIN DEPOSIT—C.P. 72.

Held, the Court of Review has jurisdiction to take cognizance of a judgment of the Superior Court ordering a tunnel company to deposit a certain amount before proceeding to excavate as allowed by its charter.

The Mount Royal Tunnel & Terminal Co. v. Brown, 16 Que. P.R. 241.

JURISDICTION AND POWERS — ORIGINATING SUMMONS — ISSUE OF — JURISDICTION OF DISTRICT JUDGE.

The judge of a district court has no jurisdiction to issue an originating summons.

Canadian Bank of Commerce v. Bookout & Hayden, 6 W.W.R. 111.

JURISDICTION OF DISTRICT REGISTRAR—GARNISHMENT.

A district registrar has jurisdiction to grant a garnishee order against a partnership.

Hemphill v. Bell, 9 W.W.R. 626.

(§ I A—4)—SUBSTITUTE JUDGE—"ABSENCE OR INABILITY TO ACT."

A statute which enables a certain magistrate to hold the court of sessions only in case of the "absence or inability to act" of the Sessions Judge (R.S. Que., art. 3202 (a)) implies that "absence" may mean something different from "inability to act"; "absence" connotes physical nonpresence from whatever cause, and it is to be presumed that the absence was due to some good and sufficient reason. The jurisdiction of the magistrate acting in substitution for the Sessions Judge is sufficiently established if it appears that when the trial began the Sessions Judge was not in the court room; such jurisdiction would not be displaced by the Sessions Judge casually entering the court room with no intention of intervening in a trial which had already been commenced by the magistrate in his capacity as a substitute judge, particularly where the substitution had been arranged by and took place with the concurrence of the judge himself. [Bingham v. Chabot, 3 Dal. (U.S.) 19; Byrne v. Arnold, 24 N.B.R. 161; R. v. Parkin, 7 Q.B. 165, and Ex parte Cormier, 17 Can. Cr. Cas. 179, referred to.]

Brunet v. The King, 42 D.L.R. 405, 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 10, affirming 27 Que. K.B. 481. [See also 30 Can. Cr. Cas. 9.]

(§ I A—6)—POWER OF PARTIES TO AFFECT.

Although all the parties interested consent to the making of an order or even ask for it, a court should not grant it unless it appears that the order is a proper one to make, since a court is not to be made a mere convenience for achieving some desired end.

Re McLeod v. Amiro, 8 D.L.R. 726, 27 O.L.R. 232.

STIPULATION FOR ARBITRATION — ABORTIVE ARBITRATION — REMEDIAL JURISDICTION.

Where an arbitration for any reason becomes abortive, it is the duty of the court in working out a contract (of which such arbitration is part of the practical machin-

ery) to supply the defect which has occurred, and this not at all as a matter of procedure but as going to the capacity of the court to effectuate justice in any given case. [Hamlyn v. Talisker Distillery, [1894] A.C. 202, at 211, applied.]

Cameron v. Cuddy, 13 D.L.R. 757, reversing 7 D.L.R. 296, 25 W.L.R. 236, 5 W.W.R. 56.

AGREEMENT CONFERRING JURISDICTION—CONTRACT FOR SALE OF GOODS.

Manitoba Windmill & Pump Co. v. McLelland, 4 S.L.R. 127, 16 W.L.R. 283.

(§ I A—7)—LICENSE ACT — CITY OF LACHINE — COUNCIL'S RESOLUTION REFUSING TO CONFIRM CERTIFICATE — GROUND FOR ATTACKING — SUPERIOR COURT JURISDICTION — QUE. C.P. 50 — CITIES AND TOWNS ACT, S. 937 — QUE. M.C. 100, 698, ET SEQ.

Concerning its jurisdiction, especially a statutory jurisdiction, the Superior Court is absolutely bound by the text, and cannot extend it even by taking advantage of Que. C.P. 50. The city of Lachine, by refusing certificates of licenses, acts within the powers conferred upon it by the License Act; and, in the present case, such a decision is subject to be quashed under Que. M.C. 100, 698, et seq. and not according to the terms of the new Cities and Towns Act, by which the respondent is governed. Desrosiers v. Lachine (City), 15 Que. P.R. 408.

APPEAL FROM COUNTY COURT—JURISDICTION —"PRIVATE DWELLING-HOUSE" — SUITE OF ROOMS.

The Court of Appeal has jurisdiction to entertain an appeal by an accused from a judgment of a County Court Judge affirming a conviction by a police magistrate for an offence against the Prohibition Act, c. 49, 1916.

R. v. Sit Quinn, 25 B.C.R. 362.

B. OVER NONRESIDENTS; TERRITORIAL LIMITATIONS.

(§ I B—10)—CLAIM AGAINST RECEIVER.

A plaintiff who is asserting a claim to effects and property in the possession of a liquidator should apply by summary petition to the court of which such liquidator is an officer. No other court has any jurisdiction to try an action, suit, attachment or seizure against such liquidator in his capacity of liquidator.

Girard v. Duhamel & C.P.R., 42 D.L.R. 558, 54 Que. S.C. 367.

JURISDICTION — ATTACHMENT — SALARY OF NONRESIDENT — POWERS AS REGARDS CORPOREAL AND INCORPOREAL THINGS.

The courts of the Province of Quebec have jurisdiction to maintain an attachment of the salary owing to a nonresident, provided that the garnishee was served within the province and made no protest and that the debtor did not dispute the jurisdiction at any time. But the courts cannot order the sale or disposition of corporeal property, such as a moveable, situate wholly within another province.

Hobbs v. Gordon & Canadian Bank of Commerce, 50 D.L.R. 605.

NONRESIDENTS — FAILURE TO DISPUTE JURISDICTION WAIVER.

If a defendant, resident out of the territorial jurisdiction of the court and over whom the court would not otherwise have jurisdiction, appears and defends the action without raising any objection to the jurisdiction in his statement of defence as required by s. 29 of the District Courts Act (Alberta Stat. 1907, c. 4), such appearance is a waiver of any objection to the jurisdiction and cannot be raised later at the trial, and if the court has jurisdiction over the subject-matter of the action, a judgment thus recovered against him is binding upon him. [Reid v. Taber Trading Co., 7 D.L.R. 229, referred to.]

Churgin v. Guttman, 27 D.L.R. 107, 11 A.L.R. 267, 34 W.L.R. 253, 10 W.W.R. 239.

OVER NONRESIDENTS.

Where it appears that an action brought under s. 72 of the Division Courts Act (Ont.) should have been entered in some other court of the same or some other county, the provision of s. 79 of the Act that the action "shall not fail for want of jurisdiction," but may be transferred to "any court having jurisdiction in the premises," does not give the court in which the cause was improperly brought any jurisdiction to hear and determine the case, even where no objection is taken or if taken is wrongly passed upon or not tried.

Re Gibbons v. Cannell, 8 D.L.R. 232, 4 O.W.N. 270, 23 O.W.R. 401.

JURISDICTION — SERVICE OF PROCESS OUT OF JURISDICTION — ASSETS WITHIN.

Ont. C.R. 162 (h) (Ont. Practice Rules of 1897) permits the making of an order for the service of process outside of the province where the defendant has assets of the value of $200 within the jurisdiction of the court, although consisting wholly of debts due the defendant; and it is not necessary in order to support such order, that such assets should be available at the time judgment may be rendered.

Gibbons v. Berliner Gramophone Co., 13 D.L.R. 376, 4 O.W.N. 1244, 28 O.L.R. 620, reversing 8 D.L.R. 471, 27 O.L.R. 402; In 10 D.L.R. 825 dismissing preliminary objection as to necessity of obtaining leave to appeal.]

CONCLUSIVENESS OF PROBATE IN QUEBEC OF HOLOGRAPH WILL—ONTARIO COURT.

The admission to probate by the Superior Court, Quebec, of a holograph will executed in accordance with the laws of that province is not a judicial act conclusive upon an Ontario Court in determining the question whether the testator had changed his domicile to Ontario after making such will, and by his subsequent marriage in Ontario revoked the holograph will at least as re-

gards property in Ontario; a probate in the province of Quebec differs from the proof of a will in a Surrogate Court in Ontario, the probate in Quebec being issued as a matter of course upon the filing of a petition and an affidavit shewing the due execution of the will.

Seifert v. Seifert, 23 D.L.R. 440, 32 O.L.R. 433.

DIVISION COURTS — TERRITORIAL JURISDICTION — CAUSE OF ACTION, WHERE ARISING — CONTRACT BY — CORRESPONDENCE — TRANSFER OF CAUSE TO DEBTOR'S PLACE OF RESIDENCE.

McNeilly v. Bennett, 25 D.L.R. 785, 34 O.L.R. 400.

DIVISION COURTS — TERRITORIAL JURISDICTION—CAUSE OF ACTION, WHERE ARISING — DEFENDANTS NOT APPEARING — PLACE OF CONTRACT.

Re Patterson v. Royal Wholesale Tailors, 10 O.W.N. 332.

JURISDICTION OF SUPREME COURT OF ONTARIO — FOREIGN LANDS — ACTION BY JUDGMENT CREDITOR TO SET ASIDE CONVEYANCE OF, AS FRAUDULENT — PARTIES RESIDENT IN ONTARIO — PLEADING — STATEMENT OF CLAIM—CAUSE OF ACTION.

Canadian Land Investment Co. v. Phillips, 7 O.W.N. 652.

DISTRICTS—ELECTION OF DOMICILE.

An election of domicile signed by a farmer in the district of his domicile is of no effect.

Julien & Co. v. Veilleux, 18 Que. P.R. 8.

ELECTION OF DOMICILE — AMENDMENT — PLACE OF CONTRACT — LAND.

Where the jurisdiction of a court is questioned, the court may, nevertheless, take cognizance of an incidental pleading which is intended to render certain the jurisdiction which does not appear. When a declinatory exception has been filed the court may allow a motion to amend the declaration. A court has control of the cause which is submitted to it, and all incidents relating to jurisdiction may be entertained in order to permit it to decide upon the declinatory exception. Where an offer for the sale of property, dated at Montreal, is accepted at Gentilly, District of Nicolet, by an agent for several purchasers, and the deed of sale which contains an election of domicile at Montreal has been ratified by all the purchasers, the court in the District of Montreal is that which has jurisdiction in a cause relating to the performance of the contract.

Greater Montreal Land Invest. Co. v. Tourigny, 25 Que. K.B. 498.

DISTRICT COURTS — TERRITORIAL JURISDICTION OF.

The District Court of one judicial district has jurisdiction to deal with actions in which the cause of action does not arise and where the parties do not reside within such district.

Manitoba Engines v. Paisley, 7 W.W.R. 1097.

PRACTICE — COUNTERCLAIM AGAINST FOREIGN PLAINTIFF — COURT'S JURISDICTION.

The court has jurisdiction to entertain a counterclaim against a foreign plaintiff in an action instituted by him in it, even though it would not have jurisdiction to entertain an independent action brought by the defendant against the plaintiff upon the same cause of action; and the defendant should be allowed to set up such a counterclaim if there is nothing in the character of any of the subjects of counterclaim which would have made it vexatious or embarrassing to have them disposed of in the action if the action were between parties both residing within the jurisdiction and the cause of action disclosed by the counterclaim arose within the jurisdiction.

Browns v. Browns, [1919] 3 W.W.R. 903.

(§ I B—12)—JURISDICTION OVER NONRESIDENTS — CONTRACT IN OTHER PROVINCE.

A statement in a written contract of hiring that the parties elect domicile at a place located in another province of Canada should not be construed as an agreement not to sue in the courts of another province to which the plaintiff might otherwise resort.

Carveth v. Railway Asbestos Packing Co., 9 D.L.R. 631, 4 O.W.N. 872, 24 O.W.R. 151.

(§ I B—17)—TRANSITORY ACTIONS.

Where, in an action in its nature transitory, a writ is issued and served upon the defendant whilst he is within the territorial jurisdiction of the Supreme Court of British Columbia, that court has jurisdiction over the action. [Jackson v. Spittall, L.R. 5 C.P. 542, followed.]

Parshley v. Hanson, 5 D.L.R. 658, 17 B.C.R. 364, 21 W.L.R. 969, 2 W.W.R. 868.

(§ I B—24)—CRIMINAL LAW — ACCEPTING BRIBE — OFFENCE COMMITTED BEYOND COUNTY LIMITS — JURISDICTION OF COUNTY JUDGE TO TRY.

A County Court Judge of the County of Vancouver has jurisdiction under s. 577 of the Cr. Code to try a sleeping car conductor on a through train from Calgary to Vancouver for accepting a bribe from persons to permit them to ride free in his car, although the offence was committed prior to the arrival of the train within the boundaries of the County of Vancouver. The words "within the jurisdiction of said court to try" in the section have reference, not to the territorial limits of the court, but to any crime or offence within the competence of the court to try. [The King v. McKeown, 8 D.L.R. 611, 20 Can. Cr. Cas. 492, followed.]

R. v. Nevison, 45 D.L.R. 382, 31 Can. Cr. Cas. 116, [1919] 1 W.W.R. 793.

(§ I B—25)—Sale of land — Rescission — Powers of Master.

Upon an application for cancellation of an agreement for sale of land, the applicant is entitled to such judgment as the material presented by him shews him to be entitled to. The Master has no authority to postpone or adjourn the application upon payment of a less sum than the applicant was legally entitled to.

Simmons v. Sheffield, 39 D.L.R. 454, 13 A.L.R. 351, [1918] 1 W.W.R. 633.

Jurisdiction — Circuit Court — Clause in a lease allowing prospective lessees to visit the premises—C.P. 50, 54, 171, 1126.

The Circuit Court has no jurisdiction to give an order to compel a lessee to conform to a clause of the lease requiring him to permit prospective lessees to visit the premises from 1st of February to the end of the lease.

Marois v. Miller, 15 Que. P.R. 402.

(§ I B—27)—Real property in other country.

A Michigan Court of Chancery may empower the executors of a resident of that state to sell and execute the necessary conveyances to themselves of land of their testator situated in Ontario. [Penn v. Lord Baltimore, 1 Ves. Sr. 444, referred to.]

Re Mills, 3 D.L.R. 614, 21 O.W.R. 887.

(§ I B—28)—Vacation of registrations.

A decree or judgment for rescission of a contract for the sale of land upon nonpayment of the purchase money, may direct that all registered instruments depending thereon be vacated unless all arrearages are paid within a time limited by the judgment.

Southwell v. Williams & Schank, 4 D.L.R. 1, 17 B.C.R. 209, 21 W.L.R. 771, 2 W.W.R. 697.

(§ I B—32)—Specific performance of contract.

A contract to convey land will be enforced by the courts of one province where the parties are within its jurisdiction, notwithstanding that the land is located in a different province.

Smith v. Ernst, 3 D.L.R. 736, 22 Man. L.R. 363, 21 W.L.R. 483, 2 W.W.R. 498, affirming 2 D.L.R. 213.

(§ I B—33)—Foreclosure of land contract—Property situated out of jurisdiction.

A court of equity has jurisdiction to grant a decree in personam in foreclosure actions respecting lands situated out of the jurisdiction, providing the defendant resides within the jurisdiction. [Toller v. Carteret, 2 Vern. 494; Paget v. Ede, L.R. 18 Eq. 118, applied.]

Plainview Farming Co. v. Transcontinental Townsite Co., 25 D.L.R. 594, 25 Man. L.R. 677, 9 W.W.R. 247, 32 W.L.R. 499.

(§ I B—40)—Foreign corporations—Jurisdiction — Contract of hiring — Service of writ—Sufficiency of.

The Superior Court at Montreal has jurisdiction to entertain an action for salary under a contract for hiring of services entered into with a foreigner, the defendant being a company incorporated in France, but having an office in Montreal, where the services were performed. Service on a foreign company having an office in the province in which it does business is properly made on an employee of the company at such office.

Boulay v. The French Company of Alimentary Specialties, 44 Que. S.C. 532.

(§ I B—42)—Actions against corporations.

Ontario Courts have no jurisdiction to restrain by injunction acts of a foreign corporation in the country of their origin, although the foreign corporation may transact business within Ontario in such a way as to enable Ontario process to be served in conformity with the Consolidated Rules of Practice in respect of business transactions within the jurisdiction. [See Dicey on Conflict of Laws, 2nd ed., 160-163; 17 Hals. 204.]

Capital Mfg. Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.R. 920.

(§ I B—43)—Action against insurance company.

An insurance company that was registered in British Columbia cannot be sued therein on a cause of action which arose in the province of its organization, where it had its head office and principal place of business, notwithstanding the British Columbia Companies Act provides that for the purpose of s. 67 of c. 53 of R.S.B.C. 1911, a company registered therein shall be considered as carrying on business in such province.

Pearlman v. Great West Life Ass'ce. Co., 4 D.L.R. 154, 17 B.C.R. 417, 21 W.L.R. 557, 2 W.W.R. 563.

Tort — Land — Lex loci.

The court will not entertain an action for tort committed in a foreign jurisdiction, in connection with land situated therein, unless it is alleged and proved that it is actionable by the laws of the place where committed. [Campbell v. McGregor, 29 N. B.R. 644, distinguished.]

Long v. Long, 36 D.L.R. 722, 44 N.B.R. 599.

Land in another province—Appearance.

Where a half-owner of real estate, who is trustee for the other half-owner, is sued by the latter for his share of the proceeds of a sale of the property under an agreement binding on the plaintiff, the plaintiff is entitled to judgment notwithstanding the property is in another province and the defendant a resident thereof, if the defendant has submitted himself to the jurisdic-

tion of the court by entering an unconditional appearance to the action.

Reynolds v. Jackson (Sask.), [1917] 3 W.W.R. 507.

C. Relation to other departments of government.

Powers of judiciary over Lieutenant-Governor-in-Council, see Action, I B—5.

Judges' Orders Enforcement Act, County Court, municipal matters, see Costs, I—2c.

(§ I C—45) — Public utilities Commission.

The jurisdiction given to the Commission for services of public utilities is exclusive, and the Superior Court cannot take cognizance of matters within it. The manner of placing poles and attaching electric wires thereto by an electric company, the inconvenience, danger and damage which may result therefrom to another company of the same kind, as well as the remedies for the same, are matters within the exclusive jurisdiction of the commission.

Que. R., Light & Power Co. v. Dorchester Electric Co., 43 Que. S.C. 528.

(§ I C—46)—Jurisdiction over executive government — Distribution of public funds.

The powers conferred by a statute on the executive government respecting the payments or disposition of certain funds are subject to the review of and construction by the judiciary, and does not extend to the disposition of money, the right to which is sub judice inter partes and held in medio by the order of the court. [Irvine v. Hervey, 13 D.L.R. 868, 47 N.S.R. 310, affirmed.]

Eastern Trust Co. v. Mackenzie, Mann & Co., 22 D.L.R. 410, [1915] A.C. 750, 113 L. T. 346, 31 W.L.R. 248, reversing the decision of the Supreme Court of Canada.

(§ I C—47)—Railway commission.

Where a municipality is entitled to relief by reason of the unauthorized act of a telephone company in proceeding with the erection of poles and wires on the highway without complying with the conditions imposed by the Railway Act of Canada, which act also provides that municipalities have the right to apply to the Board of Railway Commissioners in respect to matters arising in connection with the undertakings of telephone companies, this latter provision is not to be deemed the exclusive remedy and does not oust the jurisdiction of the High Court of Justice of Ontario to deal with the trespass thereby committed by the telephone company. [Kemp v. London & Brighton R. Co., 1 Railway Cas. (Eng.) 495, 504; Simpson v. South Staffordshire Waterworks Co., 34 L.J. Ch. 380; River Dun Navigation Co. v. North Midland R. Co., 1 Railway Cas. (Eng.), 135, 154, referred to.]

County of Haldimand v. Bell Telephone Co., 2 D.L.R. 197, 25 O.L.R. 467, 21 O.W.R. 194.

Relation to other departments of government — Dominion Railway Commission — Forfeiture of railway franchise — Power of court.

Since the Dominion Railway Act, R.S.C. 1906, c. 37, does not confer jurisdiction on the Railway Board to declare or relieve from a forfeiture, it being clothed only with such powers as are conferred by the act, or by some special act, or such as relate to the enforcement of orders, regulations and directions made thereunder, the courts are not deprived of jurisdiction to declare the forfeiture of a street railway franchise for substantial breaches of its terms. [Town of Waterloo v. City of Berlin, 7 D.L.R. 241, and in appeal, 12 D.L.R. 390, distinguished.]

City of Brantford v. Grand Valley R. Co., 15 D.L.R. 87, 5 O.W.N. 583, 25 O.W.R. 545.

(§ I C—60)—To determine question of conflict of legislation.

The Court of King's Bench (Que.), may, on its own motion or on behalf of any person interested, in a matter properly before it, determine whether a Provincial Act conflicts with an act of the Dominion Parliament.

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

(§ I C—62)—Powers of Legislature.

Parliament may take away the right of an accused person to be tried in the district, county or place where a criminal offence is supposed to have been committed.

The King v. Lynn (No. 2), 15 Can. Cr. Cas. 129, 4 S.L.R. 324.

(§ I C—81)—Public purposes, taxes.

The provisions of the Assessment Act (Ont.), 4 Edw. VII. c. 23, s. 89, whereby a municipal corporation is declared to have a special lien on lands for tax arrears confers no jurisdiction upon the court to pronounce a decree declaratory of such lien unless consequential relief can be given in the case. [Mutrie v. Alexander, 23 O.L.R. 396, followed.]

Town of Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 31 O.L.R. 62, 23 O.W.R. 170.

(§ I C—82) — Jurisdiction and powers of — Relation to other departments of government — Eminent domain — Power to determine necessity for.

The question whether a necessity exists for the expropriation of land by a company is not one to be decided by a court in the first instance, but for the Governor-in-council, where the charter of the company, ss. 17 and 19 of c. 113 of N.S. Acts, 1911, provide that whenever it is necessary that the company should be vested with land, lakes or streams or land covered with water for the purposes of its business and no agreement can be made for the purchase thereof, the Governor-in-council may order its expropriation if satisfied that the property is actually required for the business of the company, and that it is not more than is reasonably necessary therefor, and

that the expropriation is otherwise just and reasonable.

Miller v. Halifax Power Co., Thomson v. Halifax Power Co., 13 D.L.R. 844, 47 N.S.R. 334.

(§ I C—95)— JURISDICTION — MUNICIPAL MATTER — ERECTION OF VILLAGES — ANNULLING ADMINISTRATIVE MEASURES.

Where a portion of the territory of a parish municipality is erected into a village, and all prescribed formalities have been observed, the municipality has no recourse in the courts for the purpose of annulling this administrative measure on equitable grounds. An application must be made to the Lieutenant-Governor before he issues an order-in-council under art. 61 M.C.

Sainte-Philomène Parish Municipality v. Lotbinière County Municipality, 46 Que. S.C. 117.

(§ I C—102) — JURISDICTION — CONTROL OVER MUNICIPAL ORDINANCES.

Re Pelton (No. 2), 11 D.L.R. 623, reversing 7 D.L.R. 465, 47 N.S.R. 103.

(§ I C—104)—MUNICIPAL MATTERS — NECESSITY OF TAKING OR ACQUIRING PROPERTY.

The court has no jurisdiction to rescind a sale actually carried out to a municipal corporation at the suit of a ratepayer, or to compel the vendor to repay the price if the municipality had statutory power to purchase lands for the object specified, although the actual user of the lands for that object could only be carried out with the consent of another municipality which consent had not yet been obtained.

Verner v. Toronto, 1 D.L.R. 530, 3 O.W.N. 586, 21 O.W.R. 170.

(§ I C—106) — MUNICIPAL MATTERS — HIGHWAYS.

Where, on account of the refusal of the municipal council to exercise a power as to highways, by the adoption of a by-law, an injustice has resulted, the party who suffers has a right of appeal to the county council; but the Superior Court has no jurisdiction to interfere in such a case except where the injustice has been of so grave a character as to amount to oppression or might indicate manifest bad faith equivalent to fraud.

Parish of Cacouna v Thibault, 25 Que. K.B. 213.

(§ I C—108)—JURISDICTION OF — MUNICIPAL MATTERS — TAXATION.

Apart from any right to bring an action for money illegally exacted as and for taxes, the Ontario courts have no jurisdiction to grant a declaratory judgment or an injunction to restrain the enforcement of an assessment, since, under c. 31 of the Ontario Railway and Municipal Board Act, 6 Edw. VII., 3 and 4 Geo. V. c. 37, R.S.O. 1914, c. 186, the Railway and Municipal Board has exclusive jurisdiction over questions pertaining to taxation. Whether property is subject to taxation is, under ss. 17 (3) and 51 of the Ontario Railway and Municipal Board Act, 6 Edw. VII. c. 31, 3 and 4 Geo. V. c. 37, R.S.O. 1914, c. 186, conferring authority on the Railway and Municipal Board, a question exclusively within its jurisdiction, which cannot be determined by the courts in the first instance, but only by way of appeal in the manner pointed out by the act.

New York & Ottawa R. Co. v. Tp. of Cornwall, 15 D.L.R. 433, 29 O.L.R. 522.

JURISDICTION OF SUPERIOR COURT — MUNICIPAL MATTERS — ILLEGAL TAX VALUATIONS.

A direct action taken by a ratepayer against the actions of a municipal council for illegal tax valuations will only be maintained when the result of these actions would be unjust, arbitrary and against the public interest, as the Superior Court should not interfere with the administration of municipal matters nor decide a question left to the approbation of the municipal council unless authorized therefor by a formal text of the law.

Rivard v. Parish of Wickham, 47 Que. S.C. 441.

(§ I C—110)—REVIEW OF MUNICIPAL BY-LAWS—QUASHING—DISCRETION.

Under s. 118 of the city charter of the city of Calgary (Alta.), providing that a judge may quash a by-law in whole or in part for illegality, the power to quash rests in the sound discretion of the court after an examination of extraneous evidence unless the by-law appears on its face to be illegal. [Grierson v. County of Ontario, 9 U.C.Q.B. 623; Re Johnston v. Township of Tilbury East, 25 O.L.R. 242, applied.]

Taprell v. City of Calgary, 10 D.L.R. 656, 5 A.L.R. 277, 23 W.L.R. 498, 3 W.W.R. 987.

POWER TO QUASH BY-LAWS PASSED BY POLICE COMMISSIONERS.

The power of the court to quash by-laws of municipal corporations conferred by s. 283 of the Municipal Act, R.S.O. 1914, c. 192, does not include by-laws passed by Police Commissioners; the latter by-laws are not subject to the procedure of a summary motion to quash. [McGill v. License Comm'rs, 21 Ont. R. 665; Winterbottom v. Police Comm'rs, 1 O.L.R. 549, cited. John Deere Plow Co. v. Wharton, 18 D.L.R. 353, distinguished.]

Re Major Hill Taxicab Co. & Ottawa, 21 D.L.R. 495, 33 O.L.R. 243.

(§ I C—113)—REVIEW OF DISCRETION AS TO GRANTING LIQUOR LICENSES.

Municipal councils have an absolute discretion to grant or refuse the confirmation of a certificate of license for the sale of spirituous liquors, and courts of justice have no jurisdiction to intervene in these discretionary matters.

Latour v. Montreal, 48 Que. S.C. 61.

D. Jurisdiction over associations, etc.; conclusiveness of decisions of their tribunals.

(§ I D—120)—Jurisdiction over corporations.

The court has no jurisdiction to interfere with the internal management of joint stock companies acting within their powers. [Burland v. Earle, [1902] App. Cas. 83, followed.]

Dominion Cotton Mills Co. v. Amyot & Brunet, 4 D.L.R. 306, [1912] A.C. 546.

Jurisdiction over associations — Fraternal society — Necessity of property rights being involved.

The courts are without jurisdiction to determine whether the establishment of a branch or off-shoot of a fraternal society is ultra vires where no property rights are affected by such action. [Rigby v. Connoll, 14 Ch.D. 482, applied.]

Whelan v. Knights of Columbus, 14 D.L.R. 666, 5 O.W.N. 432, 25 O.W.R. 450.

Jurisdiction — Railways — Operation — Structure near tracks — Clearance.

Applications to the Board, under the provisions of general Order No. 65, which provides that "No structure over four feet high shall hereafter be placed within six feet from the gauge side of the nearest rail without first obtaining the approval of the Board," for the purpose of obtaining a limited clearance, affect a matter connected with the operation of the railway, and should be made by the railway company concerned and not by the individual or industry affected.

In re General Order No. 65, 16 Can. Ry. Cas. 412.

(§ I D—124) — Jurisdiction — Matters under jurisdiction of Railway and Municipal Board.

The courts will not entertain a suit for an accounting of profits from the operation of a railway by two municipalities under a formal agreement executed not voluntarily but in conformity to an order of the Ontario Railway and Municipal Board, since the matter was one exclusively within the jurisdiction of the Board.

Town of Waterloo v. City of Berlin, 12 D.L.R. 390, 28 O.L.R. 206, affirming 7 D. L.R. 241.

Jurisdiction — Municipal matters — Mandamus.

The right of action for a mandamus to compel a municipal corporation to give a water supply to an annexed district will not be held to have been taken away in favour of the jurisdiction of the Ontario Railway and Municipal Board merely by reason of the fact that the Board's order for the annexation had provided that the taxation rate should not be increased until the municipal water supply had been extended to the annexed district. [Town of Waterloo v. City of Berlin, 7 D.L.R. 241, referred to.]

Malone v. Hamilton, 10 D.L.R. 305, 4 O.W.N. 755, 23 O.W.R. 956.

Jurisdiction — Public Health Act — Violations — Action for penalty.

The Superior Court has jurisdiction to adjudicate on infractions of the Public Health Act and may entertain an action brought to recover a penalty therefor.

Board of Health of Quebec v. Village of Coteau Landing, 15 Que. P.R. 111.

Another magistrate sitting for a police magistrate at his request — Statute authorizing in case of police magistrate's "absence."

Ex parte Cormier, 17 Can. Cr. Cas. 179.

Magistrate—Resident in the district.

Ex p. Giberson (No. 3), 18 Can. Cr. Cas. 355.

Stipendiary magistrates in Nova Scotia —Jurisdiction.

Johnston v. MacDougall (No. 1), 17 Can. Cr. Cas. 58 (N.S.).

Parish Court Commissioner in New Brunswick—Jurisdiction.

Ex parte Monahan, 17 Can. Cr. Cas. 53, 39 N.B.R. 430.

New judicial district.

1. The creation by statute of a new judicial district gives to the officers of the new district exclusive jurisdiction and there is not concurrent jurisdiction remaining in judicial officers of the former territory from part of which the new district was formed. 2. A magistrate for Algoma has no jurisdiction to entertain a charge for an offence under the Liquor License Act (Ont.), committed at a place formerly in Algoma but now in Sudbury judicial district.

R. v. Harrington, 17 Can. Cr. Cas. 62.

Division Courts (Ont.) — Jurisdiction —Personal judgment against married woman before 1897.

Re Hamilton v. Perry, 24 O.L.R. 38, 19 O.W.R. 370.

Municipal corporations — By-law — Approval by electors — Consent of council to quash.

Re Angus & Tp. of Widdifield, 23 O.L.R 479, 18 O.W.R. 913.

Costs — Inherent jurisdiction of court —Motion to quash municipal by-law — Nominal applicant put forward by real litigants—Additional security for costs — Insufficiency of amount required—Real litigants ordered to pay deficiency — Judicature Act, s. 119.

Re Sturmer & Town of Beaverton, 25 O.L.R. 190, 19 O.W.R. 156, 20 O.W.R. 560. [Affirmed, 2 D.L.R. 501, 3 O.W.N. 613.]

Jurisdiction—Fire damage to realty out of jurisdiction.

There is no jurisdiction to try an action for injury to real estate situate outside of the jurisdiction of the court in respect

of the value of the building, burned down through the negligence of a railway company, if the title to the real estate is disputed, although the company is within the jurisdiction of the court in other respects; but this objection does not apply to an action for damages in respect of the contents of the building.

Winnipeg Oil Co. v. C.N.R. Co., 21 Man. L.R. 274, 18 W.L.R. 424.

BOTH PARTIES RESIDENT IN ANOTHER PROVINCE—BREACH OF TRUST IN ONTARIO—FORUM.

Russell v. Greenshields, 23 O.L.R. 171, 18 O.W.R. 264.

ACTION AGAINST NONRESIDENT UPON CAUSE OF ACTION ARISING OUT OF PROVINCE—PERSONAL SERVICE.

First National Bank of Idaho Springs v. Curry, 20 Man. L.R. 247, 16 W.L.R. 102.

FOREIGN JUDGMENT — AGREEMENT CONFERRING JURISDICTION — CONTRACT FOR SALE OF GOODS.

Manitoba Windmill & Pump Co. v. McLelland, 4 S.L.R. 127, 16 W.L.R. 283.

ACTION AGAINST NONRESIDENT FOR CANCELLATION OF AGREEMENT—SALE OF LAND NOT IN JURISDICTION.

Burley v. Knappen, 20 Man. L.R. 154.

II. Provincial Courts.

A. JURISDICTION.

Procedural jurisdiction of lower court until filing security for appeal, see Appeal, V D—275.

Powers of Master in foreclosure actions, deficiency judgment, see Mortgage, VI I—135.

Jurisdiction of stipendiary magistrate, see Justice of the Peace, III—10.

Jurisdiction as to divorce, see Divorce and Separation, II—5.

(II A—150) — "PERSONAL ACTIONS FOR TORT"—INJURY TO LAND.

The jurisdiction of County Courts under s. 57 of the County Courts Act (R.S.M. 1913, c. 44), over "personal actions for tort," applies also to actions for injury to land caused by fires.

Dubue v. C.N.R. Co., 34 D.L.R. 401, 27 Man. L.R. 520.

"PERSONAL ACTION"—TRESPASS—TITLE TO LAND.

An action for trespass to land, in which no question of title is involved, is a "personal action" within the jurisdiction of a Division Court, under s. 62 (1) (a) of the Division Courts Act, R.S.O. 1914, c. 63. [Harmston v. Woods, 39 O.L.R. 105, overruled.]

McConnell v. McGee, 37 D.L.R. 486, 39 O.L.R. 460.

An action for trespass to land is not within the jurisdiction of a Division Court. The words "personal actions" in s. 62 (1) of the Division Courts Act, R.S.O. 1914, c. 63, do not include an action for trespass to land. [Neely v. Parry Sound River Improvement Co., 8 O.L.R. 128, followed.]

Harmston v. Woods, 39 O.L.R. 105.

The ruling in Re Harmston v. Woods, 39 O.L.R. 105, that a Division Court had no jurisdiction (s. 62 (1) (a) of the Division Courts Act), in an action for trespass to land, having been overruled by an Appellate Court, in McConnell v. McGee, 37 D.L.R. 486, 39 O.L.R. 460, the plaintiff in the former case applied to the Appellate Division to extend the time for appealing from the order of Middleton, J., the time allowed having expired before the decision in the latter case; and it was held, that the application was unnecessary, at all events until after the judge in the Division Court had been asked and had refused to try the case; and that, if it became necessary to move again, the application should be to the High Court Division. The judge in the Division Court should, upon having his attention called to the fact that that court had jurisdiction, try the action if no right or title to land came in question in it; and, if it did, he should transfer the action to the Supreme Court of Ontario, under s. 69 of the Division Courts Act.

Re Harmston v. Woods, 39 D.L.R. 793, 40 O.L.R. 171.

ONTARIO RAILWAY AND MUNICIPAL BOARD ACT — CONSTRUCTION — INTENTION —JURISDICTION OF COURT.

Section 63 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII., c. 31 (transferred with some modification to the Ontario Railway Act, R.S.O. 1914, c. 185, s. 260), which was intended to get over the difficulty of forcing the railway company to obey an order of the Board does not deprive the Supreme Court of jurisdiction to entertain an action for damages for breach of contract.

Toronto v. Toronto R. Co., 46 D.L.R. 435, 44 O.L.R. 308, affirming 42 O.L.R. 603, 24 Can. Ry. Cas. 255. [Affirmed, 51 D.L.R. 48.]

OPEN WELLS ACT — BREACH OF—DAMAGES — OWNER OF LAND RESIDING OUT OF PROVINCE—JURISDICTION.

Having an open well, dangerous to stock on his premises, is a breach of the Open Wells Act (Sask.), and gives any person suffering damage on account thereof an action for tort against the owner, and the tort being committed on land within the province the court has jurisdiction over the owner although not residing therein.

Brotherson v. Kennedy, 47 D.L.R. 131, 12 S.L.R. 304, [1919] 2 W.W.R. 803.

PROVINCIAL COURTS — JURISDICTION — ALBERTA ELECTION ACT.

The Alberta Supreme Court has no jurisdiction to enjoin the returning officer from holding a nomination and election on the dates appointed in an election writ issued by the Lieutenant-Governor-in-council, under s. 105 of the Alberta Election Act, Alta. Statutes 1909, c. 3, notwithstanding

that the provisions of that section had not been complied with, since the court has no jurisdiction over matters pertaining to elections unless specially authorized by statute. [Re Dubuc, 3 W.L.R. 248, followed; McLeod v. Noble, 28 O.R. 528, referred to.]

Redman v. Buchanan, 11 D.L.R. 389, 7 A.L.R. 35, 4 W.W.R. 85.

JURISDICTION TO SET ASIDE APPEARANCE — ACTION COMMENCED IN ANOTHER COUNTY.

A judge of the Supreme Court of Nova Scotia has jurisdiction as a Judge in Chambers to determine an application made to him in one county to set aside an appearance to an action commenced in another county for a cause of action which arose in still another county.

Corning v. Town of Yarmouth (No. 1), 9 D.L.R. 275, 12 E.L.R. 205.

JURISDICTION — DIVISION COURT — SOLICITOR AND CLIENT—CONTRACT—TORT.

A promise by a solicitor by way of a positive contract to do a specific act for his client (for instance, to hold the purchase money of certain lands entrusted to the solicitor by the client and not to pay it over until the taxes on the land shall have been paid) being one the breach of which constitutes a breach of contract and not a tort, a cause of action for less than $100 but more than $60 arising thereunder falls within the competency of a Division Court.

Burke v. Shaver, 14 D.L.R. 780, 29 O.L.R. 365.

COURT OF REVIEW, QUEBEC — DEPOSIT BY COMPANY—JURISDICTION TO REDUCE—STATUTORY POWERS.

The Court of Review, Que., has jurisdiction on appeal to reduce the amount ordered by a Judge of the Superior Court in Chambers to be deposited by a tunnel company before excavating under private property in pursuance of its statutory powers. [C.P.R. v. Little Seminary, 16 Can. S.C.R. 606; Richelieu R. v. Menard, 7 Que. K.B. 486, referred to.]

Mount Royal Tunnel & Terminal Co. v. Brown, 20 D.L.R. 809.

JURISDICTION OF PROVINCIAL COURTS.

The jurisdiction of a District Court is not ousted merely by reason of the fact that defendant resides, and the cause of action arose, without the limits of the judicial district in which the action is brought.

Reid v. Taber Trading Co., 7 D.L.R. 229, 22 W.L.R. 283, 3 W.W.R. 12.

INFERIOR COURT—OBJECTION FOR WANT OF JURISDICTION—LOCAL MASTER—COSTS.

Where an inferior court had no jurisdiction in the matter from the beginning, the objection of want of jurisdiction is not waived by taking a step in a cause before it, or by failure to object at the commencement of the proceedings; but, if the jurisdiction is contingent, the defendant must object at the proper time if he desires to destroy the jurisdiction, and in default cannot do so later. [Moore v. Gamgee, 25 Q. B. D. 244, 248; Farquharson v. Morgan, 70 L.T.R. 152, referred to.] A Local Master of the Supreme Court of Saskatchewan has no jurisdiction under Sask. r. 620 to entertain an application to dispose of the costs of an action in that court where the debt sued for had been paid pendente lite.

Larson v. Anderson, 23 D.L.R. 659, 8 S.L.R. 177, 8 W.W.R. 758.

JURISDICTION OF SUPERIOR COURT, QUEBEC — HYPOTHECARY ACTION TO RECOVER SCHOOL TAXES.

An hypothecary action to secure recovery of school taxes or assessments, whatever be the amount thereof, is of the exclusive jurisdiction of the Superior Court. A personal action for the recovery of school taxes or assessments is of the exclusive jurisdiction of the Circuit Court, whatever be the amount thereof.

School Commissioners of Westmount v. Galarneau, 7 D.L.R. 407, 44 Que. S.C. 385, 14 Que. P.R. 104.

JURISDICTION OF SUPREME COURT, ALBERTA, TO VARY REFEREE'S FINDING AS TO DAMAGES.

The Supreme Court of Alberta cannot entertain an application to vary the finding of a clerk of the court on a reference to him to ascertain damages, since that can be done only on an appeal from the final judgment in the action. [Marson v. G.T.P. R., 17 W.L.R. 693, on appeal, 1 D.L.R. 850, 20 W.L.R. 161, followed.]

Lavallee v. C.N.R. Co., 4 D.L.R. 376, 4 A.L.R. 245, 20 W.L.R. 547, 1 W.W.R. 913.

JURISDICTION OF A JUDGE IN CHAMBERS—CON. RULE 1322 — JUDICATURE ACT (ONT.) S. 110.

Under Con. R. 1322, on an application to a Judge in Chambers, pursuant to s. 110 of the Judicature Act (Ont.), he must exercise his judgment as to whether a case shall be tried with or without a jury, as he cannot pass that responsibility over to the Trial Judge, and if it appears to him that a case should be tried without a jury he must so direct. [Ont. C.R. 1322 (6 January, 1912) construed.]

Bissett v. Knights of the Maccabees, 3 D.L.R. 714, 3 O.W.N. 1280, 22 O.W.R. 89.

JURISDICTION OF COUNTY COURT — MANDAMUS TO PUBLIC BODY.

While the Consolidated Rules of Practice, 1897, govern the practice and procedure in County Courts as well as in the High Court of Justice and Court of Appeal for Ontario, the Consolidated Rules confer no jurisdiction on the County Courts, and a County Court has no jurisdiction to entertain an application for the prerogative writ of mandamus to a public body to perform a public duty even where the amount

in dispute, if it could be treated as a debt, would be within County Court jurisdiction.

Rich v. Melanethon Board of Health, 2 D.L.R. 866, 26 O.L.R. 48, 21 O.W.R. 516.

COUNTY COURTS — JURISDICTION OF JUNIOR JUDGE — FIXING ADDITIONAL SITTINGS OF COURT — ACQUIESCENCE OF SENIOR JUDGE — COUNTY COURTS ACT, R.S.O. 1914, c. 58, ss. 4, 6.

Re Badder v. Ontario Canners, 7 O.W.N. 839.

OF PROTHONOTARY — OPPOSITION TO JUDGMENT.

Under art. 33, C.C.P. (Que.), when a judge is unable for any reason to discharge his duties at the chief place of the district, the prothonotary may perform his duties in cases of evident necessity, or when, by reason of delay, a right might otherwise be lost or endangered. Art. 70, C.C.P., as amended by 1 Geo. V. c. 43, extends the jurisdiction of a judge to the prothonotary in the matters contained in the articles which it enumerates, although the articles relating to the opposition to judgment are not included in the enumeration; nevertheless art. 70 gives the prothonotary jurisdiction concurrent with that of the judge in certain cases, but it does not take away from him what art. 33 gives him in all cases of urgent necessity when the judge is absent, ill, or otherwise prevented from performing his duties. This jurisdiction is not concurrent, as is that of art. 70. It can be exercised only in the absence of the judge and it extends to all matters which are within the jurisdiction of a Judge in Chambers.

Lemieux v. Crepeau, 24 Rev. de Jur. 85.

HYPOTHECARY ACTION—SCHOOL TAXES.

In the chief place of each district, the Circuit Court has no jurisdiction to hear an action in declaration of hypothec in which the plaintiff prays for the abandonment of the property. It does not matter whether the amount originally due was due for school taxes and was less than $100. The Circuit Court of the district of Montreal has no jurisdiction to hear actions in declaration of hypothec which are appealable.

School Commissioners of Parish of La Prairie v. Westwark Realty Co., 19 Que. P.R. 164.

TITLE TO LAND — ELECTION — QUALIFICATIONS.

Although the Circuit Court has no jurisdiction to declare null the title to land so as to affect the rights of contracting parties, it can, in a controverted municipal election, take cognizance of a title to verify the qualification of the candidates and for this purpose to declare it insufficient, fictitious or simulated.

Lapointe v. Cauchon, 52 Que. S.C. 393.

EVOCATION—PENAL ACTION—FUTURE RIGHTS —MONEY PAYABLE TO CROWN.

The object of evocation is to make appealable judgments which can be relied on as chose jugée in future judicial proceedings. A judgment rendered in a penal action for contravention of a statute does not constitute chose jugée as to future contraventions except by way of precedent. Therefore there can be no evocation from the Circuit Court to the Superior Court in an action of this kind on the ground that it affects the future rights of the delinquent. The Circuit Court has no jurisdiction in an action to recover the amount of the penalty imposed under art. 1682d C.C. Que. Actions to recover money payable to the Crown are not in all cases subjects of evocation, but only in cases which deal with matters which may affect future rights. In setting aside the evocation of a cause from the Circuit Court to the Superior Court, the latter should not dismiss the action on the ground that the Circuit Court was without jurisdiction. It should remit the record to the Circuit Court, which is the tribunal to decide the question of jurisdiction.

Trudel v. C.N.R., 52 Que. S.C. 502.

QUEBEC COURTS — HYPOTHECARY ACTION —SCHOOL TAXES.

Under the School Act (Que.), the jurisdiction of the Superior Court in an hypothecary action is taken away except it be invoked by the defendant upon an opposition to a seizure or be resorted to after the other means of collection provided by the School Act have been adopted without success.

School Com. of St. Joseph-de-Bordeaux v. Gagnon, 51 Que. S.C. 175.

Hypothecary actions are within the jurisdiction of the Superior Court, but in order that an order may be hypothecary it should demand the abandonment of the immovable. The conclusion that the immovable may be declared affected by a hypothec does not prevent the action from being purely personal. When an action for the recovery of school taxes is brought before the Superior Court for a sum exceeding $100, the court should not dismiss it but should refer it to the Circuit Court.

School Commissioners of St. Paul v. Compagnie de Placement de la Cité, 51 Que. S.C. 185.

An action for school taxes personally against the debtors liable is always within the competence of the Circuit Court although the conclusions ask that an immovable be declared to be affected and hypothecated for payment of the tax.

School Commissioners of Coteau St. Pierre v. Bernard, 18 Que. P.R. 201.

SAISIE-GAGERIE—RENT.

In an action accompanied by seizure claiming a month's rent of $15 with the conclusion "that this saisie-gagerie, by the right to follow all the movables and effects found in the house described in the present writ, be declared good and valid; that it be also declared that the said movables are affected by the privilege of the plaintiff

until payment of the sum of $120, the amount of the rent due and to become due; that the said mis en cause be summoned to admit and state that the said saisie-gagerie is good and valid; and that the defendant be condemned to pay the said sum of $15 to the plaintiff, reserving to himself the right to take such other conclusions as to the right to the rent to become due," the Circuit Court and not the Superior Court has jurisdiction.

Beaudoin v. Humphreys, 18 Que. P.R. 173.

When an order of estreat of a recognizance is made by the Court of Queen's Bench, Crown side, for a breach of its condition, the subsequent entering up of a judgment by the prothonotary of the Superior Court, under article 1115 Cr. C., is not a judicial, but a purely ministerial, act of that officer, and does not vest the Superior Court with jurisdiction to inquire into, or in any wise to deal with, the order of estreat.

The King v. Hogue, 21 Que. K.B. 24.

The civil liability, in a matter of délit or quasi-délit, is subject to the rule lex loci regit actum. Therefore, workmen engaged in Quebec to work in Quebec and Ontario, who are injured through the act or fault of their employers in Ontario, have only the remedy given by the laws of that province. When the evidence shews that the foreign law does not recognize the right to the proceedings taken by the plaintiff, and upon which a verdict was found in his favour, his action should be dismissed non obstante veredicto, a new trial being useless.

G.T.R. Co. v. Maclean, 21 Que. K.B. 269, reversing 38 Que. S.C. 394.

COUNTY COURTS—SUPREME COURT JUDGE.

A Supreme Court Judge is not the proper person to exercise the powers given by s. 34 of the County Courts Act.

Stevens v. Royal Trust Co. (B.C.), [1917] 2 W.W.R. 286.

(§ II A—151)—JURISDICTION OF DISTRICT COURT—AMOUNT.

A contract to pay whatever price is being paid at a certain place or to pay the market price for goods sold furnishes the means of ascertaining the amount due and an action for that price is an action for debt. If the amount does not exceed $100, the action may be tried in the District Court under r. 4 of the District Court Rules (Sask.).

Heffer v. Kokatt, 42 D.L.R. 322, 11 S.L.R. 251, [1918] 2 W.W.R. 996.

DIVISION COURTS — JURISDICTION — CLAIM FOR CONVERSION OF GOODS — DIVISION COURTS ACT, R.S.O. 1914, c. 63, s. 62.

Re Glass v. Glass, 45 D.L.R. 767, 44 O.L.R. 236.

DIVISION COURTS—JURISDICTION—AMOUNT OF CLAIM—ACTION FOR BALANCE OF UNSETTLED ACCOUNT — ABANDONMENT IN PARTICULARS OF CLAIM OF EXCESS OVER $100 — DIVISION COURTS ACT, R.S.O. 1914, c. 63, s. 62 (1) (c), (d) (iii).

Re Canada Furniture Manufacturers v. Levine, 16 O.W.N. 125.

(§ II A—155)—APPELLATE COURT—JURISDICTION UNDER — JUDICATURE ACT (ONT.).

If the answer of the jury to a question in a negligence action requiring them to state in what the negligence consisted is that there was "negligence on the part of the foreman," and is open to the objection that the answers do not further indicate wherein the negligence of the foreman consisted, the Appellate Court may, under the Judicature Act, R.S.O. 1914, c. 56, s. 27 (2), make the omitted finding on the evidence instead of sending the case back for a new trial. [Phillips v. Canada Cement Co., 6 O.W.N. 185; Smith v. Northern Construction Co., 19 D.L.R. 380, 30 O.L.R. 494, followed.]

Turner v. East, 20 D.L.R. 332, 32 O.L.R. 375.

ORIGINAL JURISDICTION OF APPELLATE COURT—SUPERINTENDING CONTROL.

The High Court of Justice, exercising the powers of the Traditional Court of King's Bench, may by mandamus command an inferior court to hear a case within the jurisdiction of that court. Mandamus does not lie to compel an inferior court to reconsider a decision where the matter decided was within the jurisdiction of the inferior court, notwithstanding that the decision of the lower court may have been erroneous. [In re Long Point Co. v. Anderson, 18 A.R. (Ont.) 401, applied. See also Tp. of Ameliasburg v. Pitcher, 13 O.L.R. 417.]

Re McLeod v. Amiro, 8 D.L.R. 726, 27 O.L.R. 232.

CERTIORARI — POWER OF APPELLATE COURT TO REVIEW.

The Appellate Court has power to review upon certiorari after judgment the proceedings of an inferior court of civil jurisdiction, not a court of record, where the proceedings are summary in their nature, notwithstanding the existence of a right of appeal. [Re Lawler & City of Edmonton, 20 D.L.R. 710, referred to.]

Dierks v. Altermatt, 39 D.L.R. 509, 13 A.L.R. 216, [1918] 1 W.W.R. 719.

SUPERIOR COURT—INJUNCTION—DAMAGES—REVIEW.

The Superior Court is the common-law tribunal and has the sole jurisdiction to entertain an action asking that the defendant be restrained from furnishing the service of an aqueduct notwithstanding subsidiary conclusions for $50 damages. When the Superior Court instead of deciding on the merits of an action declares itself incompetent to entertain it, the Court of

Review having decided that the Superior Court had jurisdiction, cannot itself give judgment on the merits but must remit the cause to the court of first instance.

Garand v. Lacroix, 50 Que. S.C. 456.

JURISDICTION—SUPERIOR COURT—EXPROPRIATION BY RAILWAY—PLANS—APPEAL.

The Superior Court has no jurisdiction to rule that a railway company cannot expropriate because by its charter it should enter the city by the northeast or by the southwest while under the plans it enters it by the west side. The respondent's recourse would have been an appeal to the Supreme Court from the decision of the Board of Railway Commissioners approving the plans of the company petitioner, or an application to the same Board to revise its own decision.

C.N.O.R. Co. v. The Daniel J. M. McAnulty Realty Co., 15 Que. P.R. 168.

(§ II A—160)—AS DEPENDENT ON AMOUNT.

The amount of the claim of a mortgagee upon the covenant for payment in the mortgage is ascertained by the signature of the defendant within the meaning of s. 62 of the Division Courts Act, 10 Edw. VII. c. 32, in spite of the fact that, in order to establish his right to sue in his own name, the plaintiff must establish by evidence other than documentary that an alleged assignment of the mortgage, though absolute in form, was only by way of collateral security. Clause (d) of subs. 1 of s. 62 of the Division Courts Act, 10 Edw. VII. (Ont.) c. 32, has reference to cases where, after production of the document and proof of the signature, something further is necessary to shew the liability of the defendant thereunder, such as proof of the fulfilment of a condition on which the document was to take effect, and does not apply to a case in which evidence is necessary to establish the plaintiff's status with reference to the document.

Renaud v. Thibert, 6 D.L.R. 200, 27 O.L.R. 57, 22 O.W.R. 923.

DIVISION COURTS ACT — JURISDICTIONAL AMOUNT—EVIDENCE OF—GUARANTY.

In an action on a guarantee the amount due cannot be proven by the production of the guarantee solely, but "other and extrinsic evidence" must be given; therefore a Division Court has not jurisdiction in such an action under s. 62, Division Courts Act, R.S.O. 1914, c. 63.

Walsh v. Webb, 34 D.L.R. 113, 38 O.L.R. 457.

DIVISION COURTS — JURISDICTION — JURY TRIAL—IRREGULARITY—WAIVER—CLAIM FOR DAMAGES FOR CONVERSION OF GOODS —AMOUNT IN EXCESS OF JURISDICTION IN ACTIONS FOR TORT—CLAIM ACTUALLY BASED ON CONTRACT — AMENDMENT — PROHIBITION.

Cordingley v. Williamson, 8 O.W.N. 536.

DIVISION COURTS — JURISDICTION — CLAIM AGAINST GARNISHEES — AMOUNT INVOLVED — ISSUE AS TO VALIDITY OF ASSIGNMENT OF MONEYS ATTACHED—DIVISION COURTS ACT, R.S.O. 1914, c. 63, s. 146—"DEBT OWING OR ACCRUING."

Re Merchants Bank of Canada v. Neely, 9 O.W.N. 333.

DIVISION COURTS — JURISDICTION — MOTION FOR PROHIBITION — ACTION FOR COMMISSION ON SALE OF LAND — DEFENCE — SOLDIER SETTLEMENT ACT, 1919, 9 & 10 GEO. V. c. 61, s. 71 (DOM.) — APPLICATION OF — QUESTION FOR JUDGE IN INFERIOR COURT.

Re Collins v. Williams, 17 O.W.N. 101.

A claim for the loss of goods through the negligence of a servant of the Crown in the operation of the Intercolonial Railway alleging damages caused by negligence of an officer and servant of the Crown, is within the purview of the Government Railway Small Claim Act, 9-10 Edw. VII. (Can.) c. 26, and is within the jurisdiction of a Provincial County Court.

Williams v. Government Railway Managing Board, 11 E.L.R. 10.

JURISDICTIONAL AMOUNT — EXPROPRIATION AWARD — ACTION TO SET ASIDE.

An action for setting aside a decision of assessors awarding a certain indemnity for land expropriated for the purpose of building a county road, as also a third party's opposition against the judgment maintaining such an action, is governed, as far as its class is concerned, by the amount awarded by the decision attacked.

Cournoyer v. L. Corp. du Comté de Richelieu, 19 Que. P.R. 165.

JURISDICTIONAL AMOUNT — CANCELLATION OF LEASE.—DAMAGES.

An action to have a lease for $624 cancelled, and for $50 damages, is not within the jurisdiction of the Superior Court, and will be referred by the court, of its own motion, to the Circuit Court.

Saba v. Duchow, 54 Que. S.C. 53.

COUNTY COURT—JURISDICTION— COUNTERCLAIM FOR CANCELLATION OF CONTRACT —R.S.M. 1913, c. 44, s. 57 (b)—JURISDICTIONAL AMOUNT.

The jurisdiction of the County Court to entertain counterclaims for the cancellation of contracts on the ground of fraud or misrepresentation is limited to cases where the subject-matter of the contract does not exceed $500 in value. In an action for $420, being a call on shares of the par value of $600, the defendant counterclaimed for the cancellation of the allotment on the ground of fraud and misrepresentation. Dawson, Co., Ct. J., held that he had no jurisdiction to try the counterclaim, and on the application of the defendant transferred the whole proceeding to the Court of the King's Bench, under s. 125 of the County Courts Act (R.S.M. 1913, c. 44). From this decision the plaintiff appealed. The Court of Appeal dismissed the appeal, holding that

the counterclaim was, in effect, a cross-action, and that the jurisdiction of the County Court as to cancellation of contracts must be limited to cases where the subject-matter of the contract does not exceed $500 in value.

Parisian Wine Co. v. Burdette, 6 W.W.R. 1021.

(§ II A—161)—Division Courts—Jurisdictional amount—Cheque—Loan.

Renaud v. Thibert, 6 D.L.R. 200, referred to.]

Re Harty v. Grattan, 26 D.L.R. 795, 35 O.L.R. 348.

Jurisdiction—As dependent on amount—Alberta District Courts.

The jurisdiction conferred by s. 23 of the District Courts Act, Alberta Statutes, 1907, c. 4, on District Courts embracing the trial of certain cases "in relation to land or any legal or equitable interest therein," covers an action to deal with land by way of sale or foreclosure where the plaintiff's claim does not exceed $600, but the land affected exceeds in value the amount stated.

Oliver v. Laurent, 14 D.L.R. 191, 7 A.L.R. 25, 25 W.L.R. 625, 5 W.W.R. 237.

Division Courts — Jurisdiction — Jury trial — Irregularity — Waiver — Action for conversion of goods — Amount in excess of jurisdiction in action for tort — Claim based on contract—Amendment—Prohibition.

Re Cordingley v. Williamson, 9 O.W.N. 369.

County Courts Act, R.S.O. 1914, c. 59, ss. 22, 23—Excessive amount of claim—Counterclaim—Motion for transfer to Supreme Court of Ontario—Abandonment of part of claim.

Re Cooper v. Henning, 10 O.W.N. 342.

Division Court — Jurisdiction — Amount in controversy — Amendment — Prohibition—Costs.

Johnston v. Cayuga, 7 O.W.N. 751.

County Courts—Jurisdiction—Damages.

Pearce v. Toronto, 25 O.W.R. 321.

Jurisdiction of Superior Court—Amount of rent claimed.

In an action between lessor and lessee the value of the amount of the rent claimed determines the competence of the court. Thus there will be within the exclusive jurisdiction of the Circuit Court an action based on a yearly lease at a rent of $780, which demands at the time the condemnation of the defendant to pay the $30, balance of the rent due and the resiliation of the lease.

Stewart v. Jubb, 47 Que. S.C. 366, 15 Que. P.R. 124.

(§ II A—163)—County Courts—Jurisdiction — As dependent on amount — Specific performance.

An action by the purchaser of lands against the vendor for a return of money paid amounting to less than $500 upon a contract for a price exceeding that sum, and further asking that the agreement of sale be cancelled and declared void, is beyond the competence of a County Court under the County Courts Act, R.S.M. 1913, c. 44, s. 57, such an action not being within the general terms of that section, viz., "all actions for legal or equitable claims and demands of debt, account or breach of contract, or covenant or money demand."

Richards v. Trottier, 18 D.L.R. 508, 24 Man. L.R. 473, 28 W.L.R. 553, 6 W.W.R. 1123.

(§ II A—164)—Jurisdictional amount—Set-off.

The jurisdiction of a court as to the amount sued on is not affected by a reduction of the amount by set-off.

Canadian Oil Companies v. Margeson, 35 D.L.R. 298, 51 N.S.R. 331.

Jurisdiction as dependent on amount—Set-off or counterclaim.

A plaintiff cannot, by voluntarily admitting the right of the defendant to a set-off so as to reduce the balance of his claim to an amount within the competency of an inferior court, confer jurisdiction on the inferior court; and if the plaintiff has a claim not within the jurisdiction of the County Court, but against which the defendant may set up a set-off not agreed to by both parties, so as to constitute a payment in effect, the plaintiff must sue in the Superior Court, as he is not entitled to compel the defendant to plead the set-off or counterclaim. [Osterhout v. Fox, 14 O.L.R. 599, applied; Gates v. Seagram, 19 O.L.R. 216, distinguished. See also Cox v. Canadian Bank of Commerce, 8 D.L.R. 30.]

Caldwell v. Hughes, 10 D.L.R. 788, 4 O.W.N. 1192, 24 O.W.R. 498.

County Court—Plea of set-off exceeding jurisdictional amount.

The County Court of New Brunswick has no jurisdiction to entertain a set-off where the amount claimed by the defendant is in excess of the jurisdiction of the court, unless part of the claim is abandoned so as to bring the claim within the jurisdictional amount.

Windsor v. Young, 24 D.L.R. 652, 43 N.B.R. 313.

Jurisdictional amount—Counterclaim.

A counterclaim for an amount exceeding the jurisdiction of the court cannot be maintained by a County Court in New Brunswick. [Windsor v. Young, 24 D.L.R. 652, 43 N.B.R. 313, followed; English cases distinguished.]

Canadian Laundry Co. v. Ungar's Laundry, 35 D.L.R. 775, 44 N.B.R. 423.

Where a plaintiff abandons a part of his claim, in order to bring the demand within the jurisdiction of the court, a counterclaim if allowed must be set-off against the amount so demanded, not against the original claim.

Black v. McMullen, 32 D.L.R. 217, 27 Man. L.R. 310, [1917] 1 W.W.R. 933.

(§ II A—165)—Matters of title.

The court may, on a motion by one defendant, whose interest was distinct and severable from the rest of the defendants, to vacate a lis pendens filed by the plaintiff in an action against several defendants, made as upon a motion for judgment upon admissions under r. 615 of the Manitoba King's Bench Rules, 1902, render a final judgment dismissing the action as to such defendant without waiting to determine the matter as between the other parties. [Re Barker's Estate, 10 Ch. D. 162, at p. 165, specially referred to: Holmsted & Langton's Judicature Act, 3rd ed., 817.]

Cooper v. Anderson, 5 D.L.R. 218, 20 W.L.R. 347, 21 W.L.R. 902.

Jurisdiction of District Judge and Supreme Court Judge—Continues a caveat—Land Titles Act, R.S.S. 1909, c. 41, ss. 120, 130.

A judge of the Supreme Court only, and not a judge of the District Court acting as District Judge or as Local Master, can grant an order under s. 129 of the Land Titles Act continuing a caveat under s. 130, of such Act. [See also Nicholson v. Drew, 3 D.L.R. 748.]

In Re Caveat, 3 D.L.R. 590, 21 W.L.R. 575.

Under s. 357 of the Town Act, R.S.S. 1909, c. 85, a Judge of a District Court is without jurisdiction to confirm a tax sale.

Nicholson v. Drew, 3 D.L.R. 748, 5 S.L.R. 349, 21 W.L.R. 189, 2 W.W.R. 295.

Matters of title—Disputed partnership—Jurisdiction to order interim sale.

Where a purchaser from the person holding the registered title receives notice before closing the purchase that another party claims to have a partnership interest with the vendor and that the vendor is not entitled to fix the price at which the property is to be sold because of such claimant's right to one-half of the profits on the joint venture of erecting the building, the court has jurisdiction in an action in which all the interested parties are before it, to make an interim order before the trial to carry out, with the consent of the purchaser, the sale made to him by the person holding the registered title on sufficient of the purchase money being paid into court or to a receiver to answer the claimant's demand should he succeed at the trial.

Jennison v. Copeland, 3 D.L.R. 52, 3 O.W.N. 795, 21 O.W.R. 689.

Of Division Court—Title to land—Building covenant.

Section 61 of the Division Courts Act, R.S.O. 1914, c. 63, which denies a Division Court jurisdiction in actions where the title to land is involved, applies to an action for the return of a deposit on a contract for the sale of land owing to a defect in the title, because of restrictive building covenant.

Luttrell v. Kurtz, 25 D.L.R. 240, 34 O.L.R. 586.

Jurisdiction of Local Judge—Foreclosure action—Judgment as to title.

Loomis v. Abbott, 25 D.L.R. 759, 22 B.C.R. 330, 9 W.W.R. 676, 33 W.L.R. 347.

(§ II A—171)—King's Bench Act—Parties—Trustee.

Under r. 220 (2) and s. 25 (k) of the King's Bench Act, the court has power to add a party defendant at the request of a defendant trustee, who is willing to render an account of his dealings with the property but who does not know to whom the accounting should be made, where that is the real issue to be tried.

Hamelin v. Newton, 39 D.L.R. 706, 28 Man. L.R. 458, reversing 38 D.L.R. 743, [1918] 1 W.W.R. 804.

(§ II A—172)—Estates of decedents.

In the administration of estates the jurisdiction of the Supreme Court of Nova Scotia is concurrent with that of the Probate Court, and, in matters of difficulty or importance, it is desirable tht questions should be dealt with in a summary way under the procedure in the Supreme Court, but where, in the opinion of the court, the application is needless in view of the questions at issue or the smallness of the amount involved, costs will be refused.

Re De Blois Trusts (No. 2), 8 D.L.R. 68, 11 E.L.R. 578.

Construction of will — Hypothetical questions.

It is against the policy of the court to attempt to answer hypothetical questions based upon conditions which may never arise, and, therefore, the court will not, either upon an originating notice under Ont. Con. R. 938, or in an action, deal with questions as to the construction of a will relating to the devolution of the estate in events which have not yet happened.

Re Galbraith, 5 D.L.R. 174, 3 O.W.N. 869, 21 O.W.R. 446.

Jurisdiction of the Surrogate Court—Statutory powers.

The Surrogate Court is one of probate only, without inherent jurisdiction, and possesses only such powers as are conferred by the Surrogate Court Act.

Re Mercer, 4 D.L.R. 589, 26 O.L.R. 427, 22 O.W.R. 217.

Power of Judge in Chambers—Devolution of Estates Act—Relief to widow.

One James Ostrander, domiciled in Alberta, died there leaving real and personal property situate in both Alberta and Saskatchewan. His will disposed of the whole of his property, but made no provision for his widow, who was residing apart from her husband in Saskatchewan. The widow applied for relief under the provisions of the Devolution of Estates Act as amended by c. 13 of the Statutes of 1910-11. The application was made by notice of motion to a Judge in Chambers, and came before Newlands, J., who held, following Re Independent Order of Foresters, 13 W.L.R.

409, that the application should have been made to the court presided over by a single judge, and he accordingly dismissed the application. On appeal: Held, that a Judge in Chambers has power to act for the court generally unless the statute giving the authority contains words to deprive him of such jurisdiction, and there being nothing in the statutes applicable to the present case to oust such jurisdiction, the application was properly made to a Judge in Chambers.

Re Ostrander Estate, 8 S.L.R. 132, 30 W.L.R. 890, 8 W.W.R. 367.

(§ II A—174)—As to infants.

The Surrogate Court is without jurisdiction to order an administrator upon his discharge, to pay into that court money belonging to an infant, and the Trustees Act, 1 Geo. V. subs. 2, s. 36, c. 26, does not confer jurisdiction on such court to make an order of that character, but only to order it paid into the High Court, which is the only court entitled to receive money belonging to infants and lunatics.

Re Mercer, 4 D.L.R. 589, 26 O.L.R. 427, 22 O.W.R. 217.

(§ II A—175)—Summary conviction—Conviction irregular—Appellate Court may impose new sentence.

On an appeal from a summary conviction the Appellate Court is the absolute judge both of law and facts, and where the conviction appealed from is irregular in that it imposes a penalty less than that authorized by law, the Appellate Court may impose a new sentence. [The King v. Baird, 13 Can. Cr. Cas. 240, followed.]

The King v. Auerbach, 45 D.L.R. 338, 31 Can. Cr. Cas. 46.

Criminal law — Crown practice rules (Ont.) — Reorganization of court with changed name.

Rules of court regulating procedure in criminal matters and passed by the former Supreme Court of Judicature for Ontario under s. 576 of the Criminal Code, 1906, remain in effect, so far as they are within the statutory authority, as regards proceedings which may be taken in the Supreme Court of Ontario which was constituted by the Judicature Act, 3-4 Geo. V. (Ont.) c. 19, with the like powers as the former courts of superior jurisdiction in the province. The criminal rules (Ont. Crown Rules 1279-1288) as to certiorari, passed in 1908 by the Supreme Court of Judicature for Ontario under the authority of Cr. Code, s. 576, remain in effect as to the "Supreme Court of Ontario" since the reorganization of the former court so far as they are applicable, although there is no longer a "Divisional Court" to which by Crown r. 1287 an appeal is given by leave.

R. v. Titchmarsh, 22 D.L.R. 272, 24 Can. Cr. Cas. 38, 32 O.L.R. 569, affirming 19 D.L.R. 366, 22 Can. Cr. Cas. 419.

Court of appeal, B.C.

The jurisdiction of the former full Court of British Columbia is by s. 6 of the Court of Appeal Act, B.C., conferred on the Court of Appeal as of April 25, 1907, not 1897, as erroneously printed in the B.C. statutes, the correct date appearing in the original roll and being the date of the passing of the Court of Appeal Act.

R. v. Kwong Yick Tai, 22 D.L.R. 323, 24 Can. Cr. Cas. 28, 21 B.C.R. 127, 8 W.W.R. 808.

Jurisdiction—Inferior courts.

The maxim omnia praesumuntur rite esse acta does not apply to give jurisdiction to an inferior court; on the contrary, nothing is to be intended to be within the jurisdiction of an inferior court but that which is so expressly alleged. [Falkingham v. Victorian R. Com., [1900] A.C. 452, applied.]

R. v. Taylor, 15 D.L.R. 679, 7 A.L.R. 72, 22 Can. Cr. Cas. 234, 26 W.L.R. 652, 5 W.W.R. 1105.

Direction as to trial of criminal cause—Jurisdiction of judge of High Court sitting in Weekly Court.

R. v. Stair, 4 O.W.N. 1402, 24 O.W.R. 689.

Justices — Criminal law — Jurisdiction not apparent on face of conviction—B.C. Municipal Act, c. 52 of 1914, ss. 403, 404—Conditional jurisdiction of justices in cities.

As the jurisdiction of an inferior court must be shown on the face of the record, a conviction for an offence against the B.C. Prohibition Act before two justices of the peace purporting to adjudicate in a city on an offence committed in such city was held bad because it did not show on its face either that such adjudication took place because of the illness or absence or at the request of the city magistrate or else that the city had no police magistrate or else under ss. 403, 404 of the Municipal Act a justice of the peace has jurisdiction in a city.

R. v. Smith, [1919] 3 W.W.R. 311.

(§ II A—176)—Violation of by-laws.

A person charged with having sold an alimentary substance, in this case milk, which does not contain the requisite proportion of aliment, he may be summoned to appear before the police magistrate; the Recorder's Court has exclusive jurisdiction only when the offence charged is in violation of a city by-law.

Belanger v. Emard, 14 Que. P.R. 84.

(§ II A—177)—Jurisdiction—Criminal Courts — Status of police magistrate—"Sessions" Courts at Montreal.

The Court of General Sessions of the Peace at Montreal, sometimes called the Court of Quarter Sessions, has power to hear and determine all matters relating to the preservation of the peace, and its jurisdiction may be exercised by the other court known as the "Court of the Sessions of the Peace" established by art. 3259 R.S.Q.; there is in strictness no "police magistrate's

court," the acts of the magistrate are not acts of "a court," although the place of hearing is by Code, s. 714 to be deemed an open court.

R. v. Walker, 18 D.L.R. 541, 23 Can. Cr. Cas. 179.

CRIMINAL JURISDICTION—YUKON TERRITORY —R.N.W. MOUNTED POLICE.

The extended jurisdiction given by s. 777 of the Cr. Code (amendment of 1909), to city and town magistrates, does not apply to give jurisdicton in the Yukon Territory to an officer of the R.N.W. Mounted Police, although possessing all the powers of two justices by virtue of the Yukon Act, R.S.C. 1906, c. 63. [R. v. Alexander, 13 D.L.R. 385, 21 Can. Cas. 473, followed.]

R. v. Kolember, 16 D.L.R. 146, 22 Can. Cr. Cas. 341, 27 W.L.R. 37.

RECOGNIZANCE OF BAIL IN CRIMINAL COURTS —JURISDICTION ON ESTREATING.

In the Province of Quebec the bail against whom an ex parte judgment has been entered in the Superior Court on the removal thereto of the original recognizance and certificate of default (Cr. Code, s. 1113) from a Criminal Court has no remedy in revocation of such certificate in the court from which it issued; the sole jurisdiction in that regard is in the Superior Court after such removal, and may be exercised either before or after a writ of fieri facias and capias has been issued thereon. [R. v. Hogue, 21 Que. K.B. 24, dissented from.]

R. v. Edwards, 19 D.L.R. 207, 23 Can. Cr. Cas. 296.

JURISDICTION OF POLICE MAGISTRATE — BIGAMY—SUMMARY TRIAL FOR.

As bigamy is one of the offences that may, under ss. 822-842 of the Criminal Code relating to speedy trials, be tried by a Court of General Sessions of the Peace, a police magistrate of a city having not less than 2,500 population may also, under s. 777 of the Criminal Code, with the consent of an accused person, try him summarily for such offence.

The King v. Davis, 13 D.L.R. 612, 22 Can. Cr. Cas. 34.

CRIMINAL JURISDICTION OF MAGISTRATES— SUMMARY TRIAL.

The extended jurisdiction given by Cr. Code, s. 777 (2) to "police and stipendiary magistrates of cities and incorporated towns" to try, with the consent of the accused under the Summary Trial Clauses, indictable offences other than those triable by a "magistrate" under Cr. Code, s. 773 is intended to apply only to a special kind of police or stipendiary magistrate whose official capacity is designated in terms conforming to the statute, and not to magistrates for a whole province or judicial district with merely consequent jurisdiction for a city or incorporated town within the territorial limits.

R. v. Alexander; R. v. Shouldice, 13 D.L.R. 385, 21 Can. Cr. Cas. 473, 6 A.L.R. 227, 25 W.L.R. 290, 5 W.W.R. 17.

CRIMINAL LAW—SUMMARY TRIAL BY CONSENT—CR. CODE, S. 778.

A defendant's consent to summary trial by a magistrate as an alternative to a jury trial should be a specific consent in the statutory form and not a mere consent to the "jurisdiction" of the magistrate which might have reference only to the territorial jurisdiction of the magistrate as to summary convictions for minor offences apart from his special jurisdiction to try certain indictable offences with the consent of the accused. [R. v. Crooks, 17 W.L.R. 560, explained. See also Tremeear's Criminal Code, 2nd ed., p. 635.]

The King v. Mali, 1 D.L.R. 484, 19 Can. Cr. Cas. 188, 20 W.L.R. 601, 1 W.W.R. 1047.

SUMMARY TRIAL BY CONSENT.

In determining whether ss. 777 and 778 of the Cr. Code, as to conferring jurisdiction of summary trial by consent on a magistrate, has been complied with in a case in which the record does not state that the consent was given, and the consent is denied by the accused under oath, affidavits will not be received on the part of the prosecution to supplement the omission from the formal record by shewing, in contradiction of the accused, that he did in fact consent. A conviction upon summary trial for an indictable offence before a magistrate under ss. 777 and 778 of the Cr. Code, 1909, as amended, under which jurisdiction is acquired only by consent of the accused, will be quashed, with leave to the Crown to begin de novo, where the magistrate's record shews only that the accused "consented to jurisdiction" and pleaded guilty, that not being a substantial compliance with the provisions of the Criminal Code, which require that, in such respect, the record shall shew what actually transpired before the magistrate.

The King v. Crooks, 19 Can. Cr. Cas. 150, 4 S.L.R. 335.

(§ II A—178)—IN HABEAS CORPUS PROCEEDINGS.

A court sitting under the Habeas Corpus Act may, without inquiring into the justice of a sentence imposed on a person, take notice of the minutes of the proceedings against him in order to satisfy itself that the provisions of the law relating to the warrant of commitment have been observed.

Lafleur v. Vallee, 5 D.L.R. 57.

(§ II A—179)—APPEAL FROM SUMMARY CONVICTION.

A County Court Judge hearing an appeal from a summary conviction under the Liquor License Act, R.S.N.S. 1900, c. 100, s. 149, is a statutory officer and, as such, is strictly limited to the authority which the statute confers.

R. v. Ackerson, 7 D.L.R. 95, 20 Can. Cr. Cas. 245.

B. Terms; place of sitting.

(§ II B—180)—Local Master—Mortgage—Jurisdiction.

The Local Master has no jurisdiction to determine whether or not a mortgage is void under s. 40 of the Assignments Act, R.S.S. c. 142. An action must be brought in court to set aside the mortgage.

Re Union Supply Co. v. Caveat, 40 D.L.R. 282, 11 S.L.R. 157, [1918] 2 W.W.R. 305.

Terms and sessions—Power to change dates as to Criminal Courts—Constitution and organization of court.

Section 27 of the Nova Scotia Judicature Act, R.S.N.S. 1900, c. 155, is not ultra vires of the Nova Scotia Legislature in respect of the change it purports to make in the times at which fixed sessions of certain provincial courts of criminal jurisdiction are to take place.

R. v. Cook, 18 D.L.R. 706, 23 Can. Cr. Cas. 50, 48 N.S.R. 150.

London (Ont.) Weekly Court—Jurisdiction—Forum—R. 239.

Annett v. Homewood Sanitarium, Re R. v. A. B., 13 O.W.N. 364.

Hearing of motions—Thanksgiving Day.

A notice of motion having been made returnable on Thanksgiving Day, the plaintiff only being represented by counsel, the Master heard the motion on the following day. On appeal the Master's order was set aside:—Held, that the applicant was entitled to renew the motion.

Bashford v. Sask. Publishing Co. (Sask.), [1917] 2 W.W.R. 349.

Hearing of motions—Vacation—Serious damage from delay.

Bank of B.N.A. v. Edmonton Brewing & Malting Co. (Alta.), [1917] 3 W.W.R. 131.

(§ II B—181)—Adjourned sittings.

The dates fixed by the Surrogate Courts Act, 10 Edw. VII. (Ont.) c. 31, s. 29 (1), for the commencement of the four annual sittings of the court for the hearing of contentious business must be adhered to; but there is no provision that these sittings shall end on any fixed dates, and it is, therefore, not improper for the Surrogate Judge to appoint for the trial of a contentious case a day subsequent to the statutory date for the commencement of a sittings, as part of the sittings commencing on that date.

Eyers v. Rhora, 3 D.L.R. 637, 3 O.W.N. 1130.

(§ II B—183)—Recorder's Court—Place of sitting—Que. C.P. 1293.

The parties cannot suffer any prejudice by the Recorder's Court being called "of the town of Fraserville;" or "of the city of Fraserville" the words "town" and "city" being used only to indicate the place where the court sits.

National Telephone Co. v. Fraserville (City), 16 Que. P.R. 192.

C. Transfer of cause.

(§ II C—185)—Transfer of cause from County Court to Supreme Court.

In order to justify the removal of an action from a County Court to the Supreme Court under s. 29 of the Ontario Act, 10 Edw. VII. c. 30, it must appear that the action is one that ought to be tried in the High Court rather than in the County Court. [Re Aaron Erb (No. 2), 16 O.L.R. 597, specially referred to.]

Re Emmons v. Dymond, 11 D.L.R. 321, 4 O.W.N. 1363, 24 O.W.R. 657.

Transfer of cause from Surrogate Court to High Court—R.S.O. 1897, c. 59, s. 34.

Where property of the deceased exceeds $2,000 in value, and there is a fair case of difficulty made out, so that there will be a real contest, a cause should be removed from the Surrogate Court into the High Court.

Re Pattison v. Elliott, 4 D.L.R. 330, 3 O.W.N. 1327, 22 O.W.R. 232.

Surrogate—Removal of cause—Jurisdictional amount.

The amount fixed by statute (R.S.O. 1914, c. 62, s. 33) as the inferior limit for the removal of a testamentary cause from a Surrogate Court into the Supreme Court of Ontario, does not only include the value of property in Ontario, but of all property of the deceased, wherever situate, which may be affected by the result of the action.

Re Newcombe v. Evans, 31 D.L.R. 315, 37 O.L.R. 354.

Drainage cases—Transfer of action—Reference to drainage referee.

It is not a valid objection to the jurisdiction of a drainage referee in Ontario to whom an Assize Judge had ordered a transfer of the action for trial, that no question of drainage arose in the case, as by the Municipal Drainage Act, 10 Edw. VII. (Ont.) c. 90, s. 99, the court has the power, where the action is brought within two years from the occurrences of the damage, to so refer for trial, not only where proceedings for the relief sought might properly have been taken before the drainage referee but also in cases where the court is of opinion that the action might more conveniently be tried by him.

Wigle v. Tp. of Gosfield South, 2 D.L.R. 619, 25 O.L.R. 646, 21 O.W.R. 483.

Application—Grounds — Jurisdictional Amount—Counterclaim.

An application for an order transferring a County Court action to the Supreme Court on the ground that the counterclaim exceeds the jurisdiction of the County Court should be made under s. 23 of the County Court Act before the Supreme Court or a judge thereof or a County Court Judge sitting as a Local Judge of the Supreme Court. The order cannot be made upon such a ground under s. 72 by a County Court Judge sitting as such. The terms imposed on a transfer of an action from a County

Court to the Supreme Court disapproved. Sellon v. Keen, 24 B.C.R. 238, [1917] 3 W.W.R. 342.

PRACTICE—DISTRICT COURT — JURISDICTION —TRANSFERENCE OF ACTION TO KING'S BENCH.

Held, notwithstanding that under the District Courts Act, an action against a District Court Judge is required to be brought in the King's Bench, the provisions of the Act relative to the transference of causes apply, and such an action commenced in the District Court may be transferred to the King's Bench.

Flood v. Parker, 12 S.L.R. 151, [1919] 2 W.W.R. 276.

COUNTY COURTS—JURISDICTION—ACTION IN CONTRACT OR TORT—MISREPRESENTATIONS—COUNTY COURTS ACT, S. 22—MOTION FOR TRANSFER OF ACTION FROM COUNTY COURT TO SUPREME COURT OF ONTARIO.

Re Sutherland v. Beemer, 10 O.W.N. 373.

MASTER IN CHAMBERS—JURISDICTION—REMOVAL OF CAUSE FROM INFERIOR COURT —RULE 208 (14)—ORDER OF OFFICER EXERCISING JURISDICTION OF MASTER—NULLITY—APPEAL.

Brown Engineering Corp. v. Griffin Amusement Corp., 11 O.W.N. 163.

SURROGATE COURTS—ACTION TO ESTABLISH WILL—REMOVAL INTO SUPREME COURT OF ONTARIO—SURROGATE COURTS ACT, S. 33—ISSUE AS TO JURISDICTION—DISPUTE AS TO DOMICILE OF TESTATOR—TESTAMENTARY CAPACITY—UNDUE INFLUENCE—APPLICATION TO SEPARATE ISSUES FOR PURPOSES OF TRIAL.

Powers v. Terwilliger, 15 O.W.N. 430.

COUNTY COURTS ACT—APPEAL—"IF IT APPEAR TO JUDGE."

In s. 72 of the County Courts Act, R.S. B.C. 1911, c. 53, which provides that "if during the progress of any action, cause or matter it shall be made to appear to the judge that the subject-matter exceeds in amount the limit of the jurisdiction of the County Court, he shall direct the said action, cause or matter to be transferred to the Supreme Court" the words "if . . . it shall be made to appear to the judge" mean "if it appears to the judge" or "if it appears." Therefore, the lack of jurisdiction may "appear" so as to necessitate the transfer to the Supreme Court, even though the absence of jurisdiction escapes at the time the attention of the judge and counsel. Where on an appeal from a County Court Judge it appears that the case is one which should have been transferred, under s. 72 of the County Courts Act, R.S.B.C. 1911, c. 53, to the Supreme Court, the Court of Appeal should order the transfer, rather than dismiss the action.

Giannini v. Cooper (B.C.), [1918] 3 W.W.R. 642.

ACTION — COUNTERCLAIM — TRANSFER TO SUPREME COURT — COSTS — "GOOD CAUSE."

An action for damages brought in the County Court in which the defendant counterclaimed, was, at the instance of the defendant, transferred to the Supreme Court under s. 34 of the County Court Act. The Trial Judge gave judgment for the plaintiff for $40 and dismissed the counterclaim, allowing the plaintiff costs on the County Court scale in the action but no costs on the counterclaim. Held, on appeal, that in a case of both claim and counterclaim the Trial Judge must decide the question of "good cause" in each. In the case of the action there was jurisdiction, and the exercise of his discretion is not subject to review, but on the counterclaim there were no facts upon which he could found a decision that there was "good cause" for depriving the plaintiff of his costs to which he is entitled on the Supreme Court scale.

Abbott v. Gold Seal Liquor Co., 24 B.C.R. 245.

SUBSTITUTION OF PARTIES—EVOCATION.

The Circuit Court, seised of an action directed against school corporations, is competent to decide if the action commenced against them may be continued by a third corporation, praying to be substituted in their place. The case may be carried to the Superior Court, if the judgment touches the existence of the defendants and future rights which may arise.

Deschatelets v. Les Commissaires d'Ecoles Sault au Recollet, 20 Que. P.R. 108.

ACTION ON NOTE.

In an action upon a note, brought in the Circuit Court, where the defendant pleads that the note was given in partial execution of a promise to purchase, which he seeks to avoid, as well as the note itself, the plaintiff may transfer the action to the Superior Court.

Economic Realty Co. v. Ellis, 19 Que. P.R. 28.

JURISDICTION OF CIRCUIT COURT—TRANSFER OF CAUSE FROM SUPERIOR COURT.

An action within the exclusive competence of the Circuit Court, but which is brought in the Superior Court, will be referred on declinatory exception to the Circuit Court, and the plaintiff cannot by amendment change the nature of the action and thus give jurisdiction to the Superior Court which from the time of the origin of the action was incompetent ratione materiae. In such case the Superior Court has only jurisdiction over the declinatory exception, and if it finds the latter well founded it should refer the case to the Circuit Court without pronouncing upon the amendment filed by the plaintiff.

Stewart v. Jubb, 47 Que. S.C. 366.

(§ II C—186)—JURISDICTION OF SPECIAL OFFICERS—MASTER IN CHAMBERS.

Northern Trust Co. v. Gagnon, 16 D.L.R. 852, 6 W.W.R. 626.

D. OPINIONS.

(§ II D—190)—COUNTY COURT—SENIOR AND JUNIOR JUDGES—ORDERS AND OPINIONS.

The powers and duties of the junior and

senior judges of the County Court, although divided for the convenience of the public, are in respect of orders therein made identical, and neither can abdicate his powers or divide his duties in interference with the rights of litigants.

Davis Acetylene Gas Co. v. Morrison, 23 D.L.R. 871, 34 O.L.R. 155.

OPINIONS.

County Court Judges should incorporate the reasons for their conclusions in decisions which are subject to appeal.

Re St. David's & Lahey, 7 D.L.R. 84, 23 O.W.R. 12.

ALIEN LABOUR LAW—OFFENCE BY CANADIAN EMPLOYER OF SOLICITING ALIEN IMMIGRANT UNDER PROMISE OF EMPLOYMENT—LOCALITY OF OFFENCE.

The King v. Chestnut, 17 Can. Cr. Cas. 305, 37 N.B.R. 402.

JURISDICTION OF COUNTY COURT JUDGE NOT LIMITED TO CASES ARISING IN HIS COUNTY—GAME LAWS.

Re Braithwaite, 17 Can. Cr. Cas. 309, 39 N.B.R. 555.

JURISDICTION OF CRIMINAL COURTS NOTWITHSTANDING STATUTORY POWERS GRANTED TO A PUBLIC SERVICE BOARD.

The King v. Toronto Ry. Co., 18 Can. Cr. Cas. 417, 23 O.L.R. 186, 18 O.W.R. 104.

CERTIORARI JURISDICTION.

The Supreme Court of Saskatchewan has a general jurisdiction to deal with decisions of inferior Criminal Courts in that province upon certiorari.

F. v. Leschinski, 17 Can. Cr. Cas. 199.

REMOVAL OF ACTION INTO HIGH COURT—APPLICATION AFTER JUDGMENT.

Roche v. Allan, 23 O.L.R. 478, 18 O.W.R. 749.

WILL—ACTION TO ESTABLISH—JURISDICTION OF HIGH COURT—JURISDICTION OF SURROGATE COURTS.

Mutrie v. Alexander, 23 O.L.R. 396, 18 O.W.R. 836

SURROGATE COURTS—JURISDICTION—"CLAIM OR DEMAND"—CLAIM TO ESTABLISH DONATIO MORTIS CAUSA—JUDGE ADJUDICATING BY CONSENT—QUASI ARBITRATOR.

Re Graham, 25 O.L.R. 5, 20 O.W.R. 297.

PROBATE JURISDICTION—ADMINISTRATOR AD LITEM—CON. R. 195—TRUSTEE ACT.

Re Hoover & Nunn, 2 O.W.N. 1215, 19 O.W.R. 418.

PROHIBITION—MOTION FOR—FORUM—JUDGE IN CHAMBERS—WANT OF JURISDICTION.

A judge of the Court of King's Bench, sitting in Chambers, has no jurisdiction to entertain a motion for prohibition to an inferior tribunal. [Watson v. Lillico, 6 Man. L.R. 59, applied.] There is nothing in the statutes or rules of court passed since that decision to alter its effect.

Re Landsborough, 18 W.L.R. 601 (Man.).

TERRITORIAL JURISDICTION—PLACE WHERE CAUSE OF ACTION AROSE.

Re Waterman v. Howard, 18 W.L.R. 54 (Man.).

CANADA TEMPERANCE ACT—PARISH COURT COMMISSIONER—JURISDICTION TO TRY OFFENCE.

R. v. Clarkson, ex parte Hayes, 10 E. L.R. 16 (N.B.).

III. Federal Courts.

A. SUITS BY OR AGAINST GOVERNMENT OR GOVERNMENT OFFICERS.

Jurisdiction of Supreme Court of Canada, see Appeal, II A—35.

Jurisdictional amount, consolidation of actions, see Appeal, II A—35.

(§ III A—195)—EMPHYTEUTIC LEASE—SUPREME COURT ACT.

Under clause (B), s. 46, of the Supreme Court Act (R.S.C. 1906, c. 139) the court has jurisdiction to determine the proprietorship of land held under an emphyteutic lease.

City of Quebec v. Lampson, 40 D.L.R. 522, 56 Can. S.C.R. 288, reversing 49 Que. S.C. 397.

JURISDICTION OF SUPREME COURT OF CANADA—QUESTION OF PROCEDURE.

Cameron v. Cuddy, 13 D.L.R. 757, reversing 7 D.L.R. 296, 3 W.W.R. 388.

JUDGMENT OF LOCAL GOVERNMENT BOARD (SASK.)—APPEAL — JURISDICTION OF SUPREME COURT OF CANADA TO HEAR.

The Supreme Court of Canada has jurisdiction under s. 41 of the Supreme Court Act to hear an appeal from a judgment of the Local Government Board of Saskatchewan, sitting in appeal from the Court of Revision, in respect of assessments for taxation purposes. [Pearce v. Calgary, 32 D. L.R. 790, 23 D.L.R. 296, 54 Can. S.C.R. 1 followed.]

Rogers Realty Co. v. Swift Current, 44 D.L.R. 309, 57 Can. S.C.R. 534, [1918] 2 W.W.R. 214.

B. SUITS AGAINST CROWN.

(§ III B—205)—EXCHEQUER COURT—"PUBLIC WORK"—GOVERNMENT DREDGE.

Held, following the views expressed by the judges of the Supreme Court in the case of Paul v. The King, 38 Can. S.C.R. 126, that a dredge belonging to the Dominion Government is not a "public work" within the meaning of s. 20 (c) of the Exchequer Court Act.

Montgomery v. The King (No. 2), 15 Can. Ex. 374.

(§ III B—206)—IN EXPROPRIATION PROCEEDINGS.

The Exchequer Court of Canada has jurisdiction to award damages for the taking of property by the Crown for the purpose of erecting an ice pier on riparian land, by virtue of subs. (b) of s. 20 of the Exchequer Court Act (Can.), providing for claims "against the Crown for damage to property injuriously affected by the

construction of any public work," and s. 19 of the same Act, giving the court jurisdiction where "the land of the subject is in the possession of the Crown."

Pickels v. The King, 7 D.L.R. 698, 14 Can. Ex. 379.

C. Federal questions.

(§ III C—210)—Jurisdiction of Exchequer Court—Trade marks—Rectification of register.

The Exchequer Court of Canada has jurisdiction, under the Trade Mark and Design Act, R.S.C. 1906, c. 71, and s. 23 of the Exchequer Court Act, R.S.C. 1906, c. 140, to order the rectification of the register of trade marks notwithstanding that the matter has not been referred to the Court by the Minister under the provisions of the Trade Mark and Design Act.

Re Vulcan Trade Mark, 24 D.L.R. 621, 51 Can. S.C.R. 411, affirming 22 D.L.R. 214, 15 Can. Ex. 265.

D. As dependent on citizenship.

(§ III D—215)—Actions in Exchequer Court—Foreign partnership.

Under the general rules and orders regulating the practice and procedure in cases in the Exchequer Court of Canada, a foreign partnership has no right to proceed as such in the court, but must sue or petition in the names of the individual partners.

North Atlantic Trading Co. v. The King, 15 Can. Ex. 14.

E. As dependent on amount.

(§ III E—232)—Jurisdiction—Declaratory judgments.

The jurisdiction of the Ontario Courts so far as the class of subjects they can deal with is concerned is not enlarged by s. 16, subs. (b), of the Judicature Act, 1913 (Ont.), c. 19, R.S.O. 1914, c. 56, and a declaratory judgment is not authorized in respect of a claim which might or might not arise and which is not incidental to any present relief. [Bunnell v. Gordon, 20 O.R. 281; Attorney-General v. Cameron, 26 A.R. (Ont.) 103; and Barraclough v. Brown, [1897] A.C. 615, referred to.]

Hallman v. Hallman, 15 D.L.R. 842, 5 O.W.N. 976, 26 O.W.R. 1.

H. Crimes.

(§ III H—241)—Supreme Court (Can.)—Habeas corpus jurisdiction.

A judge of the Supreme Court of Canada has concurrent jurisdiction with provincial courts to grant a writ of habeas corpus under the Supreme Court Act, R.S.C. 1906, c. 139, s. 62, in respect of a commitment in a criminal case where the commitment is in respect of some act which is made a criminal offence solely by virtue of a statute of the Dominion Parliament, and not where it was already a crime at common law or under the statute law in force in the province on its admission into the Canadian Confederation and which had not been repealed by the Federal Parliament. [Re Sproule, 12 Can. S.C.R. 140, applied.]

Re Dean, 9 D.L.R. 364, 48 Can. S.C.R. 235, 20 Can. Cr. Cas. 374.

IV. Conflict of authority; relation of Province to Dominion.

A. Exclusiveness of jurisdiction first acquired.

(§ IV A—250)—Jurisdiction—Relation of Provincial to Federal—Exchequer Court—Alberta Supreme Court.

The Alberta Supreme Court has jurisdiction to entertain an application for an order for the appointment of a receiver of moneys owing by the Crown to a public officer whose remuneration is payable out of national funds, e.g., a member of the R.W.M. police force, notwithstanding the jurisdictional provisions of the Exchequer Court Act, R.S.C. 1906, c. 140, which are not exclusive.

Hobbs v. Att'y-Gen'l of Canada, 18 D.L.R. 395, 7 A.L.R. 391, 29 W.L.R. 650, 7 W.W.R. 256.

B. Interference with other courts; injunction.

(§ IV B—260)—Co-ordinate jurisdiction—Usurpation.

Where a court of co-ordinate jurisdiction usurps the jurisdiction of another court, by interfering with proceedings therein begun, the latter may treat the usurping order void ab initio and proceed with the matter until prohibited by a higher court. A court or judge of co-ordinate jurisdiction has no authority to interfere with the hearing of a motion or trial pending before another court or judge of the same jurisdiction, for the latter has exclusive cognizance of the matter, and if an order of interference is made it may be ignored by the tribunal interfered with as a document made wholly without jurisdiction and therefore absolutely null and void. It is not necessary to appeal from such an order, and the court whose jurisdiction is so invaded has inherent jurisdiction to protect itself and its suitors from such an attempted usurpation of its jurisdiction. Where a counsel gives an undertaking to a court he will not be allowed to obtain an advantage over his adversary by a breach thereof.

The Leonor, [1917] 3 W.W.R. 861.

(§ IV B—262)—Agreement to try disputes in court of another province—Foreign Court—Manitoba Arbitration Act (R.S.M. 1913, c. 9)—Enforcement of clause—Stay of proceedings.

Courts of one province are, with respect to the courts of other provinces, foreign courts, and a clause in an agreement to refer any disputes that might arise to the decision of a foreign court is a submission within the meaning of the Manitoba Arbitration Act (R.S.M. 1913, c. 9). Such clause can only be enforced by granting a stay of proceedings, where an action is

brought in the courts of another province than that specified, but, in order to succeed, the application must be made within the time specified by the Act.

Brand v. National Life Ass'ce Co., 44 D.L.R. 412, [1918] 3 W.W.R. 858.

(§ IV B—263)—Jurisdiction of Superior Court—Custody of infants— Effect of prior award by Juvenile Court.

A prior disposition of the custody of children made by the Commission of a Juvenile Court under the statute of 8 Edw. VII. (Ont.) c. 59, does not deprive the Supreme Court of Ontario of jurisdiction, subject to the limitations contained in the Act, to order on habeas corpus the return of the child to the parent.

Re Maher, 12 D.L.R. 492, 28 O.L.R. 419.

D. When provincial or Dominion jurisdiction exclusive; limitations upon.

(§ IV D—270)—Canada Supreme Court—Provincial appeals.

In order that there should be jurisdiction in the Supreme Court of Canada under s. 37, subs. (b), of the Supreme Court Act, in an appeal from the Provincial Court of Appeal where the case did not originate in a Superior Court, it is not sufficient that in respect to some part of the action, some claim made in it or some relief which may be accorded, there is concurrent jurisdiction in both the Superior and Inferior Courts; the jurisdiction to enable such appeal must be concurrent over the action as a whole.

Champion v. World Bldg., 22 D.L.R. 465, 50 Can. S.C.R. 382, 7 W.W.R. 1162, quashing 18 D.L.R. 555, 20 B.C.R. 156.

(§ IV D—274)—Jurisdiction—Admiralty—Inland water—Provincial Supreme Court.

The Supreme Court of Ontario has jurisdiction to entertain a personal action by the owner of a ship against the owner of a scow with which his own came into collision for damages for the negligent navigation of defendant's scow and of a tugboat employed by the defendant to tow the same, where the collision occurred in the inland waters of Ontario; the jurisdiction in this respect is concurrent with that of the Exchequer Court of Canada.

Shipman v. Phinn, 20 D.L.R. 596, 32 O. L.R. 329, reversing 19 D.L.R. 305, 31 O.L.R. 113.

Admiralty—Conservatory attachment of barge.

The Superior Court has concurrent jurisdiction with the Court of Admiralty to adjudicate on a conservatory attachment of a barge on the waters of the St. Lawrence River.

Girard v. Gariépy, 49 Que. S.C. 284; 17 Que. P.R. 396. [See also Beaudette v. Steamer "Ethel," 30 D.L.R. 529, 22 Rev. de Jur. 450.]

Jurisdiction — Salvage—Proceedings in rem.

The Supreme Court of Nova Scotia had no admiralty jurisdiction, it being excluded by s. 15 of the Judicature Act. A claim for salvage of a boat can be entertained only where there is a contract of employment, express or implied.

Heisler v. Connors, 10 E.L.R. 61 (N.S.).

Concurrent jurisdiction of Supreme Court with Probate Court — Con. Stat. of N.B. (1903), c. 161.

Kennedy v. Slater, 9 E.L.R. 34.

V. Rules of decision.

B. Stare decisis: previous decisions of same court.

(§ V B—295)—Stare decisis—Previous opinion on the merits by same court.

R. v. Graves (No. 4), 9 D.L.R. 589, 20 Can. Cr. Cas. 438, 47 Can. S.C.R. 568, 12 E.L.R. 332, reversing 9 D.L.R. 175, 46 N.S. R. 395.

Stare decisis — Conclusiveness of judgment.

The Court of Appeal of British Columbia will not follow decisions as to practice in habeas corpus appeals of the former full Supreme Court of British Columbia to whose appellate jurisdiction such Court of Appeal succeeded, if to do so would establish in the Province of British Columbia a practice in conflict with the practice in England and would prejudicially affect the liberty of the subject.

Re Hoessan Rahim, 4 D.L.R. 701, 19 Can. Cr. Cas. 94, 17 B.C.R. 276, 2 W.W.R. 580.

Findings of fact.

A finding of fact in one case cannot have any binding effect in any other case, except by way of estoppel.

Beament v. Foster, 26 D.L.R. 474, 35 O. L.R. 365. [See also Lloyd v. Robertson, 27 D.L.R. 745, reversed in 28 D.L.R. 192.]

Stare decisis—Dicta.

Dicta are not of binding authority unless they can be shewn to express a legal proposition which is a necessary step to the judgment pronounced by the court in the case wherein the dicta are found (per McPhillips, J.A., quoting Davidson & Co. v. Officer, [1918] A.C. 304).

Michigan Trust Co. v. Canadian Puget Sound Lumber Co. (B.C.), 25 B.C.R. 560.

Stare decisis—Nisi prius decisions.

One judge is not bound by the decision of another judge on a point of law at nisi prius: [Forster v. Baker, [1910] 2 K.B. 636 at 638.]

Rur. Mun. of Bratts Lake v. Hudson's Bay Co., 11 S.L.R. 357, [1918] 2 W.W.R. 962. [Affirmed, 44 D.L.R. 445, 12 S.L.R. 28.]

(§ V B—297)—Rules of decision—Stare decisis.

Interpretations of statutory language which have long been accepted, though

their correctness may be open to doubt, will not ordinarily be disturbed particularly where there is not an interference with a positive right. [Hamilton v. Baker, "The Sara," 58 L.J. Adm. 57, 14 App. Cas. 209, 221, 222, considered.]

Laursen v. McKinnon, 9 D.L.R. 758, 18 B.C.R. 10, 23 W.L.R. 1, 3 W.W.R. 717.

C. Construction and constitutionality of statutes or ordinances.

(§ V C—305)—Construction of Quebec Civil Code—French decisions under Code Napoleon.

The connection between the law of the Province of Quebec and the law of France dates from a time earlier than the compilation of the Code Napoleon, and neither the text of the latter nor the decisions in France thereon, are binding on the Quebec Courts, nor do they affect directly the duty of the Quebec Courts in interpreting the Quebec Civil Code.

Maclaren v. Att'y-Gen'l for Quebec, 15 D.L.R. 855, [1914] A.C. 258, 20 Rev. Leg. 248.

D. Provincial courts following Federal decisions.

(§ V D—310)—Rule of Canadian precedent.

The law as declared by the Supreme Court of Canada is the law in Canada until otherwise determined by higher authority.

Toronto v. Morson, 38 D.L.R. 224, 40 O.L.R. 227, affirming 11 O.W.N. 195.

Rule of Canadian precedent.

The Supreme Court of Canada primarily settles the law of Canada, being only subject to review by the Judicial Committee of the Privy Council, and save as aforesaid, it may, if it sees fit, disregard the opinion of any other court in the Empire, including the House of Lords, which only settles the law of the United Kingdom; where the facts are the same, it is the duty of provincial courts to give effect to the decisions of the Dominion appellate tribunal. [Trimble v. Hill, 5 App. Cas. 342, distinguished.]

Pacific Lumber Co. v. Imperial Timber & Trading Co., 31 D.L.R. 748, [1917] 1 W.W.R. 507, 23 B.C.R. 378.

Judicial decisions — Effect of — Judicature Act, s. 32 — Motion to quash conviction—Decision upon—Dictum on motion for leave to appeal — Application for discharge upon habeas corpus.

R. v. Jackson, 12 O.W.N. 191. [Affirmed at p. 315, 40 O.L.R. 173. See also 12 O.W.N. 77, 161.]

Authority of judgment of Supreme Court of Canada.

The Supreme Court of Canada primarily settles the law of Canada, being only subject to review by the Judicial Committee of the Privy Council, and its decisions should be followed even if contrary to English decisions or those of the House of Lords. [Pacific Lumber Agency v. Imperial Timber & Trading Co., 31 D.L.R. 748, 23 B.C.R. 378, [1917] 1 W.W.R. 507, and Chilewack Evaporating & Packing Co. v. Chung, 25 B.C.R. 90, [1918] 1 W.W.R. 870, referred to.]

Trumbell v. Trumbell, [1919] 1 W.W.R. 198.

E. Following decisions of courts of other province or country.

(§ V E—315)—Following decisions of courts of other provinces or countries.

Under the British Columbia Railway Act upon an appeal from the award of arbitrators fixing damages under eminent domain proceedings where the principle applicable to such an appeal has already been laid down by the Privy Council under the Canadian Railway Act, 1888, which is, so far as material, identical in language with the British Columbia Statute, that construction will be adopted. [Atlantic and North-west Ry. Co. v. Wood, [1895] A.C. 257, 64 L.J.P.C. 116, applied.]

C.N.P.R. Co. v. Dominion Pipe, 7 D.L.R. 174, 14 Can. Ry. Cas. 265, 22 W.L.R. 335, 3 W.W.R. 73.

Following decisions of English courts —Winding-up Act (Can.)—Procedure.

Upon a question of practice under the Winding-up Act, R.S.C. 1906, c. 144, English cases decided upon different conditions of practice may not be applied to frustrate the clear intent of the Act itself.

Re Baynes Carriage Co., 7 D.L.R. 257, 4 O.W.N. 30, 23 O.W.R. 10.

English decisions.

The Supreme Court of Alberta is not bound by the decisions of the English Court of Appeal.

Re Western Canada Fire Ins. Co., 22 D.L.R. 19, 8 A.L.R. 348, 7 W.W.R. 1365, 30 W.L.R. 648.

Decisions upon Criminal Code.

The Court of Criminal Appeal in one province should follow the decision of a court of like jurisdiction in another province in the interpretation of the Cr. Code unless very strong ground be shewn for a different course.

R. v. Sam Jon, 24 Can. Cr. Cas. 334, 20 B.C.R. 549.

F. Federal courts following provincial decisions.

(§ V F—322)—Superior Court of Quebec—Exchequer Court—Co-ordinate jurisdiction — Interlocutory injunction—Comity.

If the Superior Court of Quebec has dismissed a motion for an interlocutory injunction in a suit instituted with writ and declaration, the Exchequer Court, being a court of co-ordinate jurisdiction, will not entertain a similar motion. Where the

motion and application have been entertained by the Superior Court without the issue of any writ or institution of action upon counsel undertaking to do so, the Exchequer Court will refuse a similar motion on the ground of comity, although the matter is not, strictly speaking, res judicata. Comity, as applied to judicial proceedings, means nothing more than the observance of a rule of etiquette or conventional decorum between courts of co-ordinate jurisdiction. It is not a rule of law, because it is not imperative. It is a useful ultra-legal adjunct to the judicial doctrine of stare decisis. [Plimpton v. Spiller, L.R. 4 Ch. D. 286, followed; see also Marconi v. Canadian Car & Foundry Co., 43 D.L.R. 382.]

Marconi Wireless Telegraph Co. of Canada v. Canadian Car & Foundry Co., 44 D.L.R. 378, 18 Can. Ex. 241.

TERRITORIAL DECISIONS — EFFECT IN NEW PROVINCE.

The Supreme Court of Alberta is not bound by the decisions of the former Supreme Court of the North-West Territories.

R. v. Thompson (Alta.), 21 Can. Cr. Cas. 80, 4 A.L.R. 17, 19 W.L.R. 676.

COURTS MARTIAL.

See Courts; Militia, Military Law.

COVENANTS AND CONDITIONS.

I. IN GENERAL.
II. CONSTRUCTION; VALIDITY; EFFECT.
A. In general.
B. Encumbrances and assessments.
C. Warranty.
D. Restricting use or disposition of property.
III. PERFORMANCE; BREACH; ENFORCEMENT; WHO LIABLE.
A. In general.
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1. In general.
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V. EXTINGUISHMENT OF, OR DISCHARGE FROM COVENANT.

See Contracts; Deeds; Mortgage.

As to conditions in insurance policy, see Insurance.

Notice of, from record, see Registry Laws; Land Titles.

As running with land, taxes, see Landlord and Tenant, II B—10.

Annotations.

Lease—Covenants for renewal, 3 D.L.R. 12.

Restrictions on use of leased property, 11 D.L.R. 40.

I. In general.

(§ I—1)—CANCELLATION OF AGREEMENT OF SALE — FORFEITURE — REPAYMENT OF MONEYS PAID ON ACCOUNT.

Dalziel v. Homeseekers' Land & Colonization Co., 20 Man. L.R. 736.

CONTRACT TO PURCHASE ON DEFERRED PAYMENTS — CANCELLATION — EQUITABLE RELIEF AGAINST FORFEITURE.

Lormor v. Cherry, 4 S.L.R. 118.

CANCELLATION OF AGREEMENT OF SALE OF LAND FOR DEFAULT IN PAYMENT — RECOVERY BY PURCHASER OF MONEY PAID.

Miller v. Sutton, 20 Man. L.R. 269, 15 W. L.R. 632.

RESCISSION OF CONTRACT — CANCELLATION UNDER PROVISIONS OF AGREEMENT — RIGHT TO RECOVER MONEY PAID.

Kerfoot v. Yeo, 20 Man. L.R. 129, 15 W. L.R. 351.

AGREEMENT FOR SALE OF LAND — SPECULATIVE VALUE—FORFEITURE CLAUSE.

Butchart v. Maclean, 16 B.C.R. 243, 17 W.L.R. 432.

SEPARATE AND INDEPENDENT COVENANTS — SALE OF SHARES IN COMPANY—GUARANTEE OF ASSETS.

Cuddy v. Cameron, 16 B.C.R. 451, 19 W. L.R. 282.

PURCHASE MONEY PAYABLE BY INSTALMENTS —DEFAULT—NOTICE OF CANCELLATION —ABANDONMENT—RESALE.

Stewart v. Borm, 19 W.L.R. 166, 4 S.L. R. 260.

EXTENSION OF TIME—CONDITION PRECEDENT —"NEGOTIATING" A SALE.

Vancouver Coal Prospecting Co. v. Mundell, 19 W.L.R. 358 (B.C.).

BUILDING RESTRICTION — CONSTRUCTION — LIMITATION OF TIME.

Judgment of Prendergast, J., 15 W.L.R. 209, dismissing the action affirmed on appeal.

Menzies v. Van Walleghem, 16 W.L.R. 646 (Man.).

II. Construction; validity; effect.

A. IN GENERAL.

(§ II A—5)—CONSTRUCTION—VALIDITY—EFFECT.

In order to ascertain the scope and effect of covenants, regard must be had to the object which they were designed to accomplish. The language of a covenant is to be read in an ordinary or popular and not in a legal or technical sense.

Pearson v. Adams (No. 2), 7 D.L.R. 139, 27 O.L.R. 87. [Affirmed, 50 Can. S.C.R. 204, 50 Can. L.J. 586.]

CONSTRUCTION OF — WORK PRELIMINARY TO ACTUAL USE AS FOUNDATION OF BUILDING.

Piling, capping or woodwork, as well as the filling in thereof with earth or stone, placed by the lessee upon demised premises with intention of using it at some future time, but not in actual use as a

foundation of a building at the expiration of the lease, does not fall within the terms of a covenant that the lessor should compensate the lessee, at the expiration of the lease, for "building and erections placed on the premises by the lessee for manufacturing purposes."

City of St. John v. Gordon, 3 D.L.R. 1, 46 Can. S.C.R. 101, 11 E.L.R. 177.

CONSTRUCTION — VALIDITY — EFFECT — CONFLICTING "PROVISO," HOW INTERPRETED.

A proviso wholly inconsistent with a covenant is void and may be rejected where such interpretation will give effect to all the clauses of the contract. [Furnivall v. Coombs, 5 M. & G. 736; Walling v. Lewis, [1911] 1 Ch. 414, referred to.]

Hamilton v. Penner, 20 D.L.R. 429, 29 W.L.R. 552, 7 W.W.R. 242, 7 S.L.R. 273.

(§ II A—6)—COVENANT OR CONDITION.

No particular form of words is necessary to create a covenant, but it is sufficient if, from the construction of the whole deed, it appear that the party meant to bind himself, and, if that appear, it does not matter whether the words relied upon are in the recital or in any other part of the deed. If it be doubtful whether a clause in a deed be a covenant or a condition, the court will always incline to construe it as a covenant. [Rawson v. Inhabitants of School District, 89 Mass. 125, referred to and approved.]

Pearson v. Adams (No. 2), 7 D.L.R. 139, 27 O.L.R. 87. [Affirmed 50 Can. S.C.R. 204, 50 C.L.J. 586.]

LEASE—COVENANT FOR QUIET ENJOYMENT—RESERVATION OF RIGHT TO SELL DEMISED PREMISES.

A covenant for quiet enjoyment of demised premises is to be construed as subject to the termination of the tenancy on a sale of the premises where the right of cancellation in such event is reserved in the lease. Where a sale of demised premises is made under a right reserved in a lease for a term of years to terminate the lease on a sale being made, it is unnecessary that the lessor should give three months' notice of intention to terminate it as provided in such lease at the expiration of any year, such two provisions being separate and distinct and not inconsistent.

Wood v. Saunders, 3 D.L.R. 342, 21 W.L.R. 195.

LEASE OF APARTMENTS — QUIET ENJOYMENT — BREACH — RUNNING SEWING MACHINES AND NOISILY USING PRESSING IRONS IN ROOMS OVERHEAD — VACATION OF PREMISES — LIABILITY FOR RENT OF UNEXPIRED PORTION OF TERM.

Walton v. Biggs, 7 D.L.R. 843, 19 W.L.R. 895.

DEFAULT — NOTICE OF CANCELLATION — INEFFECTIVENESS.

Hicks v. Laidlaw, 19 W.L.R. 525 (Man.).

B. ENCUMBRANCES; ASSESSMENTS.

(§ II B—10)—DUTY TO DISCLOSE SERVITUDES.

Where there is a clause in a deed of sale "free from incumbrances" (franc et quitte), the vendor is bound to disclose to the purchaser the existence of a nonapparent servitude, and cannot claim that the purchaser should have searched the records and so informed himself, but he will be excused by shewing that the purchaser knew of the servitude at the time of sale.

Marcil v. Legault, 23 D.L.R. 756, 24 Que. K.B. 1.

C. WARRANTY.

(§ II C—15)—CONTRACT — WARRANTY — IMPERVIOUS TO ENTRY OF WATER — INFILTRATION OF WATER — DRAINAGE — KNOWLEDGE OF DEFECT — COST OF REPAIRS — RECOVERY OF.

Where a parcel of land and a store building in course of construction thereon in a city is the subject of an agreement of sale to be carried out on the completion of the building and the deed of sale then made contains a clause that the purchaser "reserves all legal rights he may have if the cellar be found not to be impervious to the entrance of water from without, the vendor not admitting any such rights," the purchaser may recover for the cost of repair because of the infiltration of water into the cellar due to lack of proper drainage which the vendor constructing the building should have provided in connection with the drainage system there existent where the defect remained latent until ten days after the purchaser's entry into possession; the reservation in the deed of sale did not enlarge the buyer's rights but it did not commit him to the position of a buyer who has bought with knowledge of existence of a defect and is a protestation of absence of knowledge thereof at a time when it could not be known whether the work of the vendor who had represented that he would make the cellar dry would have that effect or not.

Massé v. Fraser, 20 D.L.R. 866, 23 Que. K.B. 247.

WARRANTY — AS TO SERVITUDE.

The seller of an immoveable, "as shewn on a plan" referred to, warrants the legal existence of any servitude indicated thereon.

Dawes v. Ward, 43 Que. S.C. 456.

D. RESTRICTING USE OR DISPOSITION OF PROPERTY.

(§ II D—22)—RESTRICTIONS ON USE OF PROPERTY—HOTEL SUBJECT TO "TIED HOUSE" CLAUSE IN FAVOUR OF MORTGAGEE.

A covenant given to a mortgagee of an hotel property as collateral security to a mortgage loan, whereby the mortgagor agreed not to sell beer on the mortgaged premises other than that manufactured or sold by the mortgagee for a period of three years will be limited, as regards its en-

forcement by injunction, so as to terminate with the payment of the mortgage, if paid off within the specified time. [Noakes v. Rice, [1902] A.C. 24, referred to.]

Rudd v. Manahan, 11 D.L.R. 37, 5 A.L.R. 19, 24 W.L.R. 246, 4 W.W.R. 350.

(§ II D—23)—Land purchase contract —Restraint upon alienation.

A vendor may, in order to obtain the removal of a caveat and lis pendens filed by one claiming under an assignment from a vendee, invoke a condition of a contract of sale prohibiting its assignment without the approval of and countersigning by the vendor, and providing that in the absence of such approval, no agreement, condition or relations between the vendee and his assignee, or other person acquiring title or interests from or through the vendee, should preclude the vendor from conveying the land to the vendee on the surrender of the agreement and payment of the unpaid purchase money. [McKillop v. Alexander, 1 D.L.R. 586, 45 Can. S.C.R. 551, affirming 4 S.L.R. 111; and Shaw v. Foster, L.R. 5 H.L. 321, applied.]

Atlantic Realty Co. v. Jackson, 14 D.L.R. 552, 18 B.C.R. 657, 26 W.L.R. 15, 5 W.W.R. 535.

III. Performance; breach; enforcement; who liable.

A. In general.

(§ III A—25)—Marriage settlement—condition subsequent — After-acquired property—What constitutes.

A covenant by a woman in her marriage settlement to do all things necessary for transferring and vesting in the trustees thereof all property she may become entitled to under the will, or as one of the heirs or next of kin, of her father will bind her interest in the residue of her father's estate where no contrary direction appears, yet directions contained in the will, as to the application and investment of her interest, may overrule such covenant. [Re Bankes, [1902] 2 Ch. 333, followed; see also Re Nordheimer, 14 D.L.R. 658, construing same instruments.]

Re Nordheimer, 18 D.L.R. 591, 30 O.L.R. 327.

(§ III A—27)—Waiver of breach—Loss of right to enforce.

Where an opening had been made in a party wall of part of the demised premises by a lessee in breach of a condition in the lease, without the knowledge of the lessor, although the latter was aware that extensive alterations were contemplated, the receipt of rent eleven days subsequent to the date of making the opening, but prior to the lessor's knowledge of such fact, does not operate as a waiver of the breach of the condition or covenant of the lease. Receipt of rent with knowledge of a breach of condition in the lease by the lessee will not operate as a waiver of the breach when received under a special agreement, that such rent should be received without prejudice to the respective contentions and rights of the parties.

Holman v. Knox, 3 D.L.R. 207, 25 O.L.R. 588, 21 O.W.R. 325.

(§ III A—28)—Continuance of breach.

The cause for the rescission of a lease for breach of a covenant to repair, claimed under art. 1641 of the Civil Code (Que.), must exist at the moment when rescission is pronounced. (Per Brodeur, J.)

Consumers Cordage Co. v. Bannerman, 2 D.L.R. 419.

B. What constitutes a breach; effect.

(§ III B—30)—Conveyance of land—Grant of right-of-way over road—Covenant to keep road in repair—Excuse for nonperformance—Impossibility of performance—Act of God—Erosion by waters of lake—Covenant construed as indemnifying grantee against impossibility of repairing—Mandatory injunction—Damages.

Kerrigan v. Harrison, 17 O.W.N. 141.

(§ III B—32)—Restrictions as to use of property.

The words "to be used only as a site for a detached brick or stone dwelling house" between the description and the habendum in a deed of land constitute a covenant by the grantor to erect no building other than a building of the kind mentioned, a breach of which will be restrained by injunction.

Pearson v. Adams (No. 2), 7 D.L.R. 139, 27 O.L.R. 87. [Affirmed, 50 Can. S.C.R. 204, 50 C.L.J. 586.]

C. Who may enforce.

(§ III C—35)—Party to deed not signing—Rights and liabilities.

A party to a deed who has not executed it cannot enforce the provisions of the deed by action without performing or observing all the covenants and stipulations on his part; but, on the other hand, he is not liable to an action of covenant by the other party to the deed.

Hart v. Great West Securities & Trust Co., 42 D.L.R. 185, 11 S.L.R. 336, [1918] 2 W.W.R. 1061.

Who may enforce.

Where a lessor has made an agreement with a tenant, giving him the exclusive privilege of selling refreshments, etc., in a theatre for a fixed period, and such agreement stipulates that in case of sale, lease or transfer of the said theatre, the rights and privileges of the lessee will be protected, and the theatre is transferred by the lessor and the assigns undertake to respect all the obligations entered into by the lessor, and the assigns transfer their rights, the lessee has a direct action against the assigns first mentioned to compel the fulfilment of obligations en-

tered into in his favour by the lessor, and need not direct his suit against such lessor.

Authier v. Driscoll, 3 D.L.R. 797.

(§ III C—36)—Restriction as to use of property—Future subdivision—Location of new street when land plotted.

A covenant, entered into by the grantor in a deed of lands that upon any plotting of the remainder of the grantor's lands adjoining the land conveyed, a street shall be laid out in a specified way, but not declaring that the benefit of the covenant shall apply for the benefit of other portions of the lands abutting upon the strip so designated for a street, will confer a right to its benefit only upon the grantee and his successors in title. [Reid v. Bickerstaff, [1909] 2 Ch. 305, 78 L.J. Ch. 753, referred to.]

Peters v. Sinclair, 13 D.L.R. 468, 48 Can. S.C.R. 57.

Landlord—Restrictions as to use of demised property—Breach—Injunction.

An action by a lessor for an injunction restraining a lessee from building upon the land demised in breach of the terms of the lease may be maintained without proof of damage to the lessor.

Audet v. Jolicoeur, 5 D.L.R. 68, 22 Que. K.B. 35.

(§ III C—37)—Party preventing performance.

A party to a contract cannot take advantage of the nonfulfilment of a condition the performance of which has been hindered by himself. [See also Roberts v. Bury Commissioners, L.R. 5 C.P. 310.]

Brown v. Brown, 1 D.L.R. 228, 3 O.W.N. 543, 20 O.W.R. 986.

(§ III C—38)—Personal covenants.

A second mortgagee, releasing his security to a first mortgagee claiming for default in payments due under the first mortgage, but reserving his rights under the covenant to pay the mortgage money, has a good cause of action upon the covenant against the mortgagor. [In re Richardson, L.R. 12 Eq. 398; Bell v. Rowe, 26 Vict. L.R. 511, followed.]

Beatty v. Bailey, 3 D.L.R. 831, 26 O.L.R. 145.

Personal covenant—Land contract.

A covenant to pay the purchase money in a contract for the sale of land is a personal covenant and not a covenant running with the land. [Haywood v. Brunswick Building Society, L.R. 8 Q.B.D. 403, and Rogers v. Hosegood, [1900] 2 Ch. 388, specially referred to.]

Coté v. Olson, 2 D.L.R. 392, 5 S.L.R. 235, 20 W.L.R. 690, 2 W.W.R. 54.

(§ III C—42)—Assignees.

The assignee of a lessee, as well as the sublessee, has a right of action against the lessor for nonperformance of his obligations under the lease or agreements attached thereto.

Smith v. Rosenberg, 41 Que. S.C. 165.

D. Who liable or bound.

(§ III D—46)—On implied covenant.

Inability of a mortgagee to reconvey the mortgaged premises will not bar the mortgagee's rights of action upon the covenant if such inability arises from any default of the mortgagor. [See Coote's Law of Mortgages, 7th ed., vol. 2, page 982; and In re Burrell, Burrell v. Smith, L.R. 7 Eq. 399-466.]

Beatty v. Bailey, 3 D.L.R. 831, 26 O.L.R. 145.

(§ III D—50)—Covenants running with the land.

Covenants in a lease which touch or concern the land run with the land and are binding upon the assignee of the term demised.

Rudd v. Manahan, 5 D.L.R. 565, 5 A.L.R. 19, 21 W.L.R. 929, 2 W.W.R. 798. [Affirmed, 11 D.L.R. 37, 24 W.L.R. 246, 4 W. W.R. 350.]

Liability of grantee for observance of every condition as well as covenant to pay purchase price.

Where a transferee of rights under a promise of sale acquired these rights under a promise of sale and the transfer stipulates that the transferee shall fulfil all the charges, clauses and conditions imposed on the transferor, the transferee will not be entitled to obtain a deed of sale before he has fulfilled every condition mentioned, even though he have paid the entire purchase price; nor can he compel the vendor to sign him a complete deed of a sale unless such deed contains every clause and obligation mentioned in the promise of sale. If a transferee of rights under a promise of sale of lands has built a portion of a house on territory which was to be left free from building, such transferee is not entitled to a deed formally transferring the ownership of the immoveable, and the original vendor is entitled to have that portion of the building encroaching on the prohibited territory demolished, and this by direct action against the transferee if he so choose. [Delorme v. Cusson, 28 Can. S.C.R. 66, distinguished.]

Lapierre v. Magnan and Viens, 2 D.L.R. 544, 42 Que. S.C. 59.

Contract—Clause providing for cancellation by notice—Re-sale of property by vendor after notice of cancellation—Action by purchaser to recover money paid.

Sanders and Marshall v. Thomlinson, 2 A.L.R. 512.

Sale of land—Purchase money payable by instalments — Default — Forfeiture — Relief — Equitable jurisdiction.

Hole v. Wilson, 16 W.L.R. 352 (Sask.).

PAYMENT OF DEFERRED INSTALMENTS OF PURCHASE MONEY BY DELIVERY OF CROPS—FAILURE TO TAKE POSSESSION OR DELIVER CROPS—ACTION BY VENDORS TO RECOVER MONEY OR IN DEFAULT FOR RESCISSION OF CONTRACT.

Weiss v. Rhodes, 18 W.L.R. 194 (Sask.).

COVENANT—JOINT OBLIGATION OF TWO PERSONS FOR PURCHASE MONEY OF LAND—ACCEPTANCE OF JOINT PROMISSORY NOTE.

Schwartz v. Bielschowsky, 17 W.L.R. 616 (Man.).

CONTRACT FOR SALE OF LAND—PURCHASE MONEY PAYABLE BY INSTALMENTS—DEFAULT—TIME OF ESSENCE—FORFEITURE CLAUSE.

Stewart v. Marsh, 17 W.L.R. 522 (Alta.).

IV. Running with the land.

(§ IV—55)—COVENANTS RUNNING WITH THE LAND—ASSIGNEE OF COVENANTOR.

Where two adjoining parcels of land were bought by the same purchaser and similar building restrictions were imposed by the separate deeds of conveyance under the purchaser's covenant for himself and his assigns, a subpurchaser of one of the parcels from such covenantor has no status to enforce against the subpurchaser of the adjoining parcel the covenant entered into by their common grantor in favour of a prior owner, and his assigns, particularly where the defendant had bought without knowledge of the covenant. [Compare Rogers v. Hosegood, [1909] 2 Ch. 388, 69 L.J. Ch. 652, and Formby v. Barker, [1903] 2 Ch. 539.]

Hoodless v. Smith, 9 D.L.R. 456, 4 O.W.N. 816, 24 O.W.R. 67.

V. Extinguishment of, or discharge from covenant.

(§ V—60)—BUILDING RESTRICTION—GENERAL CHANGE IN CHARACTER OF NEIGHBOURHOOD—EXTINGUISHMENT.

Where after the entering into of a covenant restricting the use to which the land comprised in a building scheme may be put, there has been a general change in the character of the neighborhood, the court will not enforce the covenant. [Sobey v. Sainsbury, [1913] 2 Ch. 513, referred to.]

Cowan v. Ferguson, 48 D.L.R. 616, 45 O.L.R. 161.

ASSIGNMENT OF COVENANT CONTAINED IN DEED—COVENANTORS NOT EXECUTING DEED—EXCHANGE OF PROPERTIES SUBJECT TO MORTGAGES—ACTION BY ASSIGNEE TO ENFORCE COVENANT.

Polak v. Swartz, 12 O.W.N. 46, 252.

CREDITORS' ACTION.

See Assignment for Creditors; Fraudulent Conveyances.

Annotations.

Creditor's action to reach undisclosed equity of debtor; deed intended as a mortgage: 1 D.L.R. 76.

Fraudulent conveyances; right of creditors to follow profits: 1 D.L.R. 841.

EXCESS AFTER PAYMENT OF PREFERRED CLAIMS.

Where a debtor gave certain creditors an agreement for an absolute sale of his property as security with the necessary result of hindering and delaying his other creditors under circumstances which would support the preference, the judgment creditors are entitled to such order and directions from the court as will enable them to reach in the preferred creditors' hands all the property of the debtor that remains after the preferred claims are satisfied.

Beliveau v. Miller, 1 D.L.R. 819, 4 A.L.R. 108, 20 W.L.R. 96, 1 W.W.R. 588.

WHAT PROPERTY MAY BE REACHED.

Where the creditors of an insolvent debtor attack a transfer of certain personal property as fraudulent and as hindering and delaying the creditors, and where some of the property in question could never have become exigible to answer the claims of the creditors, the attack fails as to the nonexigible property.

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540.

PROCEDURE.

Under the Alberta Judicature Act it is no longer necessary for a nonjudgment creditor in order to maintain an action against the debtor to sue on behalf of all creditors. [Scane v. Duckett, 3 O.R. 370, and Pacific Investment Co. v. Swan, 3 Terr. L.R. 125, specially referred to.]

Albertson v. Secord, 1 D.L.R. 804, 4 A.L.R. 90, 20 W.L.R. 64, 1 W.W.R. 657.

CREDITORS RELIEF ACT—CLAIM TO SHARE IN FUND REALIZED BY SHERIFF—R.S.O. 1914, c. 81, s. 7—"DEBTS WHICH ARE OVERDUE" — SOLICITOR'S CLAIM FOR COSTS INCURRED BY DEBTOR—NECESSITY FOR DELIVERY OF BILLS OF COSTS—SOLICITORS ACT, R.S.O. 1914, c. 159.

Re McClemont & Grain, 16 O.W.N. 52.

CREDITORS' RELIEF ACT.

See Execution; Attachment; Garnishment; Levy and Seizure, Interpleader.

CRIMINAL CONVERSATION.

ESSENTIALS TO BE PROVED.

In an action for criminal conversation the marriage in question must be strictly proved. Evidence of marriage held insufficient. [Zdrahal v. Shatney, 7 D.L.R. 554, 22 Man. L.R. 521, distinguished.]

Monaluk v. Elaschuk (Sask.), [1917] 2 W.W.R. 994.

In an action for criminal conversation the plaintiff must establish a marriage binding upon both him and his wife and prove adultery during the continuance of the marriage. [Catherwood v. Caslon, 13 M. & W. 261, followed.] A valid marriage between the plaintiff and his wife

and improper relations between the wife and the defendant held to have been proven. Pepin v. Lamoureux, [1917] 3 W.W.R. 217.

CRIMINAL INFORMATION.

Annotation.

Functions and limits of prosecution by this process. 8 D.L.R. 571.

CRIMINAL LAW.

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Criminal trial; continuance and adjournment; Criminal Code, 1906, s. 901; 18 D.L.R. 223.

Cr. Code (Can.); granting a "view"; effect as evidence in the case; 10 D.L.R. 97.

Insanity as a defence; irresistible impulse; knowledge of wrong; 1 D.L.R. 287.

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Leave for proceedings by criminal information; 8 D.L.R. 571.

Orders for further detention on quashing convictions; Cr. Code, s. 1120; 25 D.L.R. 649.

What are criminal attempts; 25 D.L.R. 8.

Summary proceedings for obstructing peace officers; 27 D.L.R. 46.

Appeal; who may appeal as party aggrieved; 27 D.L.R. 645.

Prerequisites on appeal from summary convictions; 28 D.L.R. 153.

Master's liability under penal laws for servants' acts or defaults; 31 D.L.R. 233.

False pretences; Crim. Code, s. 404; 34 D.L.R. 521.

Prosecution for same offence after conviction or commitment quashed on certiorari; 37 D.L.R. 126.

Commutation of death sentences; 36 D.L.R. 538.

Amendment of summary convictions; 41 D.L.R. 53.

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Questioning accused person in custody; 16 D.L.R. 223.

Sparring matching distinguished from prize fights; 12 D.L.R. 786.

Vagrancy; living on the avails of prostitution; 30 D.L.R. 339.

I. Criminal liability.

A. In general.

See Forcible Entry; Assault; Disorderly House; Gaming; Sedition; Obstructing Justice; Escape; Postoffice; Perjury; Forgery; Intoxicating Liquors; Monopoly and Combinations.

Offense of wilfully killing horse, compounding crime, see Mischief, I. 15.

Offenses under War Revenue Act, see Internal Revenue; Master and Servant, III. a—289.

Fraudulently inducing people to become shareholders as crime, see Indictment, II. E—25.

(§ I A—1)—"Criminal offence"—Provincial offence.

The word "offence" in s. 35 of the Criminal Code, and the words "criminal offence" in s. 648 thereof, do not include a violation of a provincial statute for which a penalty is provided by that statute. [R. v. McMurrer, 18 Can. Cr. Cas. 385, followed; Plested v. McLeod, 3 S.L.R. 375, referred to.]

R. v. Pollard, 39 D.L.R. 111, 29 Can. Cr. Cas. 35, 13 A.L.R. 157, [1917] 3 W.W.R. 754.

Theft.

To be guilty of theft under s. 355 of the Criminal Code, the accused must have received money or valuable security or other things on terms requiring him to hand over the thing received or the proceeds thereof to some person other than the person from whom he received it, and have fraudulently converted it to his own use.

The King v. Fraser, 40 D.L.R. 691, 11 S.L.R. 209, 30 Can. Cr. Cas. 70, [1918] 2 W.W.R. 324.

HAVING IN POSSESSION MINERAL ORE SUSPECTED TO HAVE BEEN STOLEN—GROUND FOR SUSPICION — EVIDENCE — POSSESSION — LEAVE TO APPEAL — QUESTION OF LAW—VALUE OF ORE.

R. v. Karp, 30 Can. Cr. Cas. 115, 41 O.L.R. 540.

MAKING STATEMENTS TENDING TO WEAKEN EFFORT IN PROSECUTION OF WAR—"PUBLICLY EXPRESS"—WAR MEASURES ACT, 1914—ORDER IN COUNCIL OF APRIL 16, 1918 — MAGISTRATE'S CONVICTION — STATED CASE—EVIDENCE—STATEMENTS MADE IN FACTORY BY WORKMEN TO CO-WORKERS.

R. v. Watson, 15 O.W.N. 417.

MILITARY STORES—FRAUD UPON HIS MAJESTY — DEFECTIVE ARTICLES — CR. CODE, ART. 436.

It is an offence, under the Cr. Code, art. 436a, to sell to His Majesty defective military stores; and it is another distinct offence, under the second part of the same article, to commit any act of dishonesty, fraud or deception upon His Majesty in the manufacture and sales of military stores. Therefore, a person may be found guilty of the second offence without any evidence being adduced, than that the furnished articles were defective.

The King v. Rollings, 28 Que. K.B. 75.

(§ I A—3)—INTENT—MENS REA—REVENUE LAWS.

Criminal intent is not an essential element in the offence of vending a patent medicine without affixing the revenue stamp required under the War Tax Act 1915 (Can.); and the dealer is liable to conviction in respect of the failure of his salesman to affix and cancel the stamps at the time of sale as the law required and as he had been instructed to do by the defendant. [See also R. v. McAllister, 14 D.L.R. 430, 22 Can. Cr. Cas. 166.]

Patenaude v. Thivierge, 30 D.L.R. 755, 22 Can. Cr. Cas. 138.

EMPLOYEE RECEIVING SECRET COMMISSION — RAILWAY FREIGHT CONDUCTOR SPOTTING CARS—INTENT—MOTIVE—PROOF.

Where a railway conductor was charged under the Secret Commissions Act, Can., 1909, for taking money for his own use from a farmer for "spotting" cars required under the Grain Act, Can., and which it was the conductor's duty to place at a station where there was no agent, and the defence developed on cross-examination of the Crown witnesses was that the amounts paid to him by the farmer at various times were tips of gratuities made after the location of the cars and not sums bargained for, it is competent for the Crown to adduce evidence in rebuttal of the suggested defence by calling other farmers who had at approximately the same time made similar payments to him for the allocation of cars to them for an agreed consideration; such evidence, although not admissible to prove the main facts of the case, was admissible to rebut by anticipation the indicated defence of innocent motive and want of design and to shew the state of mind of the parties with regard to the facts proved, although no witnesses were called for the defence. [Makin v. A.-G. for New South Wales, [1894] A.C. 57, applied: R. v. McBerny, 3 Can. Cr. Cas. 339; R. v. Collyns, 4 Can. Cr. Cas. 572; R. v. Pollard, 15 Can. Cr. Cas. 74; R. v. Wilson, 21 Can. Cr. Cas. 105, cited.]

R. v. Howes, 20 D.L.R. 283, 23 Can. Cr. Cas. 356, 7 S.L.R. 315, 7 W.W.R. 683, 30 W.L.R. 60.

LIABILITY—INTENT—MENS REA.

In construing a statute creating an offence against public order and punishable as a crime there is a presumption that mens rea, an evil intention, or a knowledge of the wrongfulness of the act, is an essential ingredient until met by clear and definite enactment overriding such presumption. [Sherras v. De Rutzen, [1895] 1 Q.B. 918, 921 Chisholm v. Doulton, L.R. 22 Q.B.D. 736, applied.]

R. v. McAllister, 14 D.L.R. 430, 22 Can. Crim. Cas. 166.

INTENT TO DEFRAUD—INFERENCE.

Intent to defraud may be predicated from obtaining securities in a cash transaction between brokers in return for a worthless cheque on a bank in which the accused had previously closed his account; a false representation may be by conduct alone and without any oral representation as to the value of the cheque.

State of New York v. Israelowitz, 29 Can. Cr. Cas. 323, 25 B.C.R. 143.

MENS REA.

In cases of doubt the existence or absence of mens rea is a question of fact for the jury, whose decision shall not be reversed unless clearly unreasonable.

R. v. Morisset, 26 Que. K.B. 481.

B. CAPACITY TO COMMIT; IRRESPONSIBILITY; INTENT; KNOWLEDGE; INSANITY.

(§ I B—5)—TEMPORARY INSANITY—INDUCING CAUSE—EXPERT TESTIMONY ON MENTAL CONDITION.

On a charge of murder and a defence of insanity at the time of the commission of the offence, the onus is upon the accused of proving that she was at the time she committed the act in such a state of mind that she was incapable of appreciating the nature and quality of her act and of knowing that it was wrong; and whether statements made to the accused by her husband as to his acts of infidelity with the deceased and other women would have a tendency to make her temporarily insane is a question of fact as to which expert testimony must first be offered before proof of any such statements by the husband becomes relevant. [R. v. Tuckett, 1 Cox C.C. 103, applied.]

R. v. Jennie Hawkes, 25 D.L.R. 631, 25 Can. Cr. Cas. 29, 9 A.L.R. 182, 9 W.W.R. 445, 32 W.L.R. 720.

(§ I B—6)—Insanity through drink—Manslaughter.

Homicide by shooting a person unknown to the accused, done without premeditation when the latter was temporarily insane from excessive drinking is not murder but manslaughter; a sentence of fifteen years was imposed because the jury made a recommendation to mercy, but without that recommendation life imprisonment would have been the appropriate punishment. [See also R. v. Wilson, 21 Can. Cr. Cas. 448, 46 N.S.R. 59.]

R. v. Kane, 28 D.L.R. 380, 25 Can. Cr. Cas. 443.

Insanity as a defence—Degree of proof.

It is a misdirection to instruct the jury in a murder trial in which the defence is insanity, that such defence must be made out so as to satisfy the jury "beyond a reasonable doubt," the latter expression having, by long judicial usage, become associated with the idea that more is required than merely being "satisfied" that the fact of insanity is proved. [McNaghten's Case, 10 Cl. & F. 200, considered; R. v. Myshrall, 8 Can. Cr. Cas. 474, referred to.]

R. v. Anderson, 16 D.L.R. 203, 7 A.L.R. 102, 22 Can. Cr. Cas. 455, 26 W.L.R. 783, 5 W.W.R. 1052.

Insanity—Irresistible impulse.

A person is not to be acquitted of a criminal charge on the ground of his insanity unless his mind is so affected by that insanity as that he is not capable of appreciating the nature and quality of his act and of knowing that such act was forbidden by law; it is not a sufficient defence that it may be proved that, notwithstanding the existence of such appreciation and knowledge on the part of the accused, he had at the time of the offence lost the power of inhibition and had an impulse which he could not resist to commit the crime.

The King v. Jessamine, 1 D.L.R. 285, 3 O.W.N. 753, 19 Can. Cr. Cas. 214, 21 O.W.R. 392.

(§ I B—7)—Intoxication.

The prisoner was indicted, tried and convicted on an indictment charging him with the crime of murder. The evidence on trial shewed that, at the time of the commission of the act, the prisoner was under the influence of intoxicating liquor. After the jury had been charged and had retired, counsel for the prisoner requested the learned Trial Judge to recall them and instruct them that under the evidence they might find a verdict of manslaughter. This he declined to do. On a reserved case:—Held, that the question whether the accused was incapable, because of drunkenness, of forming an intention as to the nature and consequences of his act, was one that should have been submitted to the jury, and that the question whether the crime amounted to manslaughter only having been entirely withdrawn from the consideration of the jury, the conviction must be set aside and a new trial ordered.

The King v. Harry Wilson, 46 N.S.R. 59.

C. Attempts.

(§ I C—10)—Definition of.

An attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted.

R. v. Snyder, 25 D.L.R. 1, 24 Can. Cr. Cas. 101, 34 O.L.R. 318.

Bodily harm—Intent.

An attempt to do grievous bodily harm to the other occupants of an automobile may be found from evidence of reckless driving, the question of intent or no intent being one for the jury.

R. v. McCarthy, 29 Can. Cr. Cas. 448, 41 O.L.R. 153.

Attempt to commit indecent assault—Judge's charge—Misdirection.

R. v. Menary, 23 O.L.R. 323, 18 O.W.R. 379.

Doing grievous bodily harm — Verdict of guilty of "attempt"—Criminal Code, ss. 72, 949—Intent—Evidence—Instruction to jury—Refusal of Trial Judge to reserve case.

R. v. McCarthy, 41 O.L.R. 153.

D. Solicitation.

(§ I D—15)—Counselling or procuring.

A person who counsels or procures another to commit an offence is guilty of a specific offence under s. 69 of the Criminal Code, whether the person so counselled actually commits the offence or not.

Brousseau v. The King, 39 D.L.R. 114, 56 Can. S.C.R. 22, 29 Can. Cr. Cas. 207, affirming 26 Que. K.B. 164.

E. Parties to offences.

Criminal liability of master for defaults of servant under War Revenue Act, see Master and Servant, III. A–287.

Evidence of accomplice, see Evidence, XII. L–989.

(§ I E—20)—Arson—Persons jointly charged—Evidence.

A conviction of two persons jointly charged with arson will be set aside where the evidence warrants a finding that the act was committed either by one or the other of them but does not enable the court to determine which one committed the offence nor justify a finding implicating them both.

R. v. Upton, 26 D.L.R. 208, 25 Can. Cr. Cas. 28, 9 O.W.N. 74.

Accessory as such—Accomplice.

An accessory before the fact to the crime of murder is an accomplice with his principal within the rule requiring the corroboration of his testimony against the latter. (Per Newlands, and Brown, JJ.) [R. v. Tate, 21 Cox Cr. Cas. 693; and R. v. Beau-

champ, 25 T.L.R. 330, followed; R. v. Reynolds, 15 Can. Cr. Cas. 210, distinguished.]

R. v. Ratz, 12 D.L.R. 678, 21 Can. Cr. Cas. 343, 24 W.L.R. 908, 4 W.W.R. 1231.

EVIDENCE—ACCOMPLICE—CORROBORATION.

R. v. Williams, 7 O.W.N. 426.

FALSE ENTRY—PERSON NOT ABLE TO WRITE OR READ — PARTICIPATION — CR. CODE, ART. 418.

A person may make himself a party to an offence, by doing or omitting an act for the purpose of aiding any person to commit it, or by abetting or cancelling or procuring commission of it. Therefore, a person, who can neither read nor write, who might even be blind, can be guilty of falsifying books or making a false entry, but he must be shown to have identified himself in some way with the act which the Code makes a penal offence.

The King v. Lackman, 28 Que. K.B. 69.

INFANTS—THE JUVENILE DELINQUENTS ACT 1908, c. 40 (CAN.)—SECTION 29—CONTRIBUTING TO DELINQUENCY OF CHILD—"JUVENILE DELINQUENT" AS DEFINED IN S. 2 (C)—THE CHILDREN'S PROTECTION ACT 1917 (SASK.)—"NEGLECTED CHILD"—SECTIONS 8, 9, 10—INFORMATION AND COMPLAINT NOT ALLEGING ACT DONE "KNOWINGLY OR WILFULLY" AS REQUIRED UNDER SAID S. 29.

Appeal allowed from conviction for unlawfully contributing to the delinquency of a child contrary to s. 29 of the Juvenile Delinquents Act, 1908, c. 40 (Can.), on the ground that at the time the offence charged was alleged to have been committed, the child was not a "juvenile delinquent" as defined in s. 2 (c) of said act. Said definition and definition of "neglected child" under the Children's Protection Act 1917 (Sask.) and ss. 8, 9, and 10 of the latter act, considered. Information and complaint held bad as not setting forth any offence, it not containing any allegation that the act charged was done "knowingly or wilfully," as required under said s. 29.

R. v. Huffman, [1919] 1 W.W.R. 625.

(§ I E—23)—PARTIES TO OFFENCES—PRINCIPAL—LIABILITY OF—SALE OF WOOD ALCOHOL BY EMPLOYEE IN VIOLATION OF LAW.

A sale of wood alcohol in a vessel not labelled "Wood Alcohol Poison," as required by s. 372, of the Dominion Inland Revenue Act, R.S.C. 1906, c. 51, 7–8 Edw. VII. c. 34, s. 27, by a clerk in the absence of and without the knowledge of his employer, renders the latter liable for the penalty imposed by the Act; since the statute prohibits absolutely the sale of wood alcohol except in compliance with its terms. [Caldwell v. Bethell, [1913] 1 K.B. 119; Brooks v. Mason, [1902] 2 K.B. 743; Strutt v. Clift, [1911] 1 K.B. 1; Coppen v. Moore, [1898] 2 Q.B. 306, considered.]

R. v. Russill, 14 D.L.R. 792, 29 O.L.R. 367, 22 Can. Cr. Cas. 131.

PARTIES TO OFFENCES—PRINCIPAL—LIABILITY OF—SALES OF WOOD ALCOHOL BY EMPLOYEE IN VIOLATION OF LAW.

The fact that s. 111 of Part II. of the Inland Revenue Act, R.S.C., 1906, c. 51, expressly declares an employer liable for the failure of his employees to comply with the provisions of the Act with respect to keeping records of sales, which, by s. 368 of the act, as amended by 7–8 Edw. VII. c. 34, s. 27, is extended to sales of wood alcohol, while the provisions of the latter Act are silent as to the responsibility of an employer for sales of such liquid made by his employees in violation of the Act, does not shew a legislative intention to relieve the employer from liability for such illegal sales, since the two sections deal with entirely different offences. [Paul v. Hargreaves, [1908] 2 K.B. 289, distinguished.]

R. v. Russill, 14 D.L.R. 792, 29 O.L.R. 367, 22 Can. Cr. Cas. 131.

F. INSTIGATION OR CONSENT, AS DEFENCE.

(§ I F—25)—CONDONATION.

A private party cannot by condoning or forgiving a personal injury done to himself in the commission of crime, thereby condone or pardon the offence against the King so as to enable the wrongdoer to defend on that ground an indictment preferred against him by the Crown.

R. v. Strong, 26 D.L.R. 122, 24 Can. Cr. Cas. 430, 43 N.B.R. 190.

(§ I F—28)—COMPULSION AS DEFENCE.

Compulsion is not a defence when the crime is of a heinous character unless the compulsory act is such as to make the accused person a mere inert physical instrument; the making of threats of immediate death or grevious bodily harm to be inflicted upon the accused should he fail to immediately comply with the directions to commit or participate in committing a heinous crime, ex. gr. murder, does not constitute an excuse in law.

R. v. Farduto, 10 D.L.R. 669, 21 Can. Cr. Cas. 144, 19 Rev. Leg. 165.

CRIMINAL USURY—"MONEY LENDER," STATUTORY MEANING OF — EMPLOYEE OF LENDER AIDING AND ABETTING.

The King v. Smith & Luther, 17 Can. Cr. Cas. 445, 1 O.W.N. 956, 16 O.W.R. 542.

"WILFULLY AND KNOWINGLY"—RACING INFORMATION—LOCAL MANAGER OF TELEGRAPH COMPANY.

R. v. Hogarth, 18 Can. Cr. Cas. 1272, 2 O.W.N. 727, 18 O.W.R. 656.

SELLING NEWSPAPERS CONTAINING RACING INFORMATION.

R. v. Luttrell, 18 Can. Cr. Cas. 295, 2 O.W.N. 729, 18 O.W.R. 659.

II. Procedure.

A. IN GENERAL.

See Summary Convictions; Justice of the Peace; Certiorari; Costs; Evidence; Witnesses; Jury; Appeal; Habeas Corpus; Trial; New Trial.

Depositions at former trial of witness absent from Canada, Authentication, Cr. Code, s. 999, see Evidence, IV, G–420.

(s II A—30)—Procedure.

Where a prosecution for a criminal offence was instituted by a private prosecutor and he is still in charge of the prosecution, he has the same right to be heard on the trial, both as to the question of guilt and the quantum of punishment as the Attorney-General would have on a Crown prosecution. [Stephen's History of the Criminal Law, 419, 495, referred to.]

Re McMicken, 8 D.L.R. 550, 22 Man. L. R. 693, 22 W.L.R. 641, 3 W.W.R. 492.

Jurisdiction of police magistrate — Theft—Place of offence—Misappropriation of fares by railway conductor—Penalty.

R. v. Sinclair, 31 D.L.R. 265, 36 O.L.R. 510. [Appeal quashed, 11 O.W.N. 131.]

Preliminary examination—Opportunity of accused to make formal statement.

The omission of the justice of the peace on a preliminary examination to put the usual question inviting a statement by the accused under s. 684 of the Cr. Code, 1906, after the depositions have been read over, does not invalidate a commitment for trial.

The King v. Lantz, 15 D.L.R. 651, 47 N.S.R. 495, 22 Can. Cr. Cas. 212.

Right of Crown to stand jurors aside.

The provisions of the Cr. Code relating to the right of the Crown to have jurors stand aside are in force in the province of Alberta.

R. v. Murray & Mahoney, 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319, 9 W.W. R. 894.

Procedure—Statutory offense—Procedure not indicated—Indictment—Effect of Criminal Code, 1906, s. 164.

A proceeding by indictment at common law for the violation of a statute providing a penalty, but not pointing out the method of its enforcement, is not precluded by s. 164 of the Cr. Code, 1906, which declares in general terms that wilful disobedience of a statute shall be indictable, unless some penalty or other mode of punishment is expressly provided by law; the section of the Code does not go so far as the common law, and the latter remains operative in cases to which the Code does not extend.

R. v. Durocher, 13 D.L.R. 243, 28 O.L.R. 499, 21 Can. Cr. Cas. 382.

Keeping bawdy house — Police commissioner—Jurisdiction—Procedure.

A commissioner of police appointed under R.S.C. c. 92, and thereby invested with the like powers of summary trial as a city police magistrate in the province to which he is appointed, has in Alberta, under ss. 771 and 77 of the Cr. Code 1906 (Can.), as amended 1909, and the Alberta Act respecting police magistrates, absolute jurisdiction to hear and determine an information for keeping a common bawdy house in contravention of s. 228 of the Code. [R. v. Alexander, 13 D.L.R. 385, 21 Can. Cr. Cas. 473, referred to.]

R. v. Bloom, 15 D.L.R. 484, 22 Can. Cr. Cas 205, 7 A.L.R. 1, 26 W.L.R. 459, 5 W.W. R. 897.

Prosecution for adultery.

The repeal in 1886 by the Dominion Parliament of parts of certain pre-Confederation statutes of New Brunswick, which regulated procedure in prosecutions for adultery under R.S.N.B., 1854, c. 145, leaves that offence punishable in New Brunswick under the procedure applicable to indictable offences generally under the Criminal Code of Canada. [R. v. Buchanan, 8 Q.B. 883, referred to.]

R. v. Strong, 26 D.L.R. 122, 24 Can. Cr. Cas. 430, 43 N.B.R. 190.

Criminal law—Keeping room or place for practice of acts of indecency — Magistrate's conviction — Motion to quash—Evidence—Reasonable inference from facts.

R. v. Wright, 16 O.W.N. 371.

Committal of prisoner for trial on charge of manslaughter — Indictment for murder at assizes with consent of presiding judge—Criminal Code, ss. 872, 873—Depositions at preliminary inquiry not signed by deponents—Use made of depositions at trial — Supposed comment of crown counsel on failure of accused to testify—Explanation of—Canada Evidence Act, s. 4 (5)—Refusal of Trial Judge to state case for Court of Appeal.

R. v. Duncan, 15 O.W.N. 163.

Quashing conviction — Magistrate "heard" evidence.

A conviction should be quashed when it is shewn that the magistrate heard evidence bearing on the charge, otherwise than in open court or under oath; in such a case the accused is not permitted an opportunity to make a full defence nor has the Supreme Court an opportunity, on certiorari, to peruse and consider the effect of the evidence.

R. v. Calvin, [1918] 2 W.W.R. 1039.

Proceedings not made clear—Quashing conviction—Costs.

An accused has the right to have the proceedings made clear to him, and if this rule be not observed and the accused be convicted, the conviction should be quashed. Where a trial before a justice of the peace has not been fairly conducted and the conviction is therefore quashed, the justice may be ordered to pay the costs of the application to quash.

R. v. Lee Kee (Alta.), [1918] 3 W.W.R. 767.

Statement as to trial.

Section 827, Criminal Code, must be repeated to the accused word for word; a

statement by his attorney that the accused agrees to submit to trial before the Court of Sessions is not sufficient.

Miller v. Malepart, 31 Can. Cr. Cas. 203, 20 Que. P.R. 184.

EVIDENCE — TRIAL FOR MURDER — EVIDENCE OF SUBSEQUENT MURDER WHILE TRYING TO ESCAPE ARREST—EVIDENCE OF PREVIOUS SHOOTING—SUFFICIENT IDENTIFICATION OF BULLETS—ACCUSED MAKING UNSWORN STATEMENT AT TRIAL—JUDGE SHOWING TO JURY HIS OPINION AS TO EFFECT OF THE EVIDENCE.

On a trial for murder, evidence that the subsequent killing by accused, while trying to escape arrest, of another person, was murder, is admissible in evidence as evidence of conduct from which an inference as to a state of mind may be drawn of value in determinating the guilt of the accused. On a trial for murder evidence of previous shooting of a person by accused (done shortly before, and arrest for which he was trying to escape when he did the act complained of) is admissible as evidence of motive. Evidence by doctors identifying receptacles in which were certain bullets as those in which had been placed bullets similar to these and taken from the body of the one for whose murder accused was on trial, was held to have been properly admissible without better proof of identity, the jury having been carefully directed with regard to their being satisfied as to these being the original bullets. A prisoner defended by counsel has no right to make an unsworn statement. [R. v. Krafchenko, 24 Man. L.R. 652, 6 W.W.R. 836, approved.] While it is the duty of the judge to explain the law affecting the case to the jury so far as is necessary for its application and it is their duty to accept his opinion without question, it is also his duty to assist them so far as he can to arrive at a correct conclusion of fact on the evidence while making it clear to them as part of the law that that conclusion is within their province and not his. It must necessarily be a matter of discretion on the part of the judge to what extent he may allow the jury to know his own view of the effect of the evidence if he has formed one.

R. v. Campbell, [1919] 1 W.W.R. 1076.

(§ II A—31)—PRELIMINARY INQUIRY—DEFECTIVE DEPOSITIONS—STENOGRAPHER'S OATH.

In cases to which s. 683 of the Cr. Code apply the fact that the evidence is taken in shorthand by a stenographer who is not a duly sworn court stenographer and who did not before acting make oath that he would truly and faithfully report the evidence, is fatal to the conviction. [Dierkes v. Altermatt, 39 D.L.R. 509; R. v. L'Heureux, 14 Can. Cr. Cas. 100; R. v. Johnson, 19 Can. Cr. Cas. 203; R. v. Limerick, 27 Can. Cr. Cas. 309, applied.] In a summary trial under s. 774 of the Code for an indictable offence under s. 228, it is not necessary that the stenographer who takes the evidence in shorthand should be sworn before acting. [R. v. Emery, 33 D.L.R. 556, applied.]

R. v. Knight, 48 D.L.R. 577, [1919] 3 W.W.R. 529.

PRELIMINARY ENQUIRY — REPLACEMENT OF MAGISTRATE.

The justice of the peace who issues a warrant of arrest to bring the accused in custody for a preliminary enquiry has the right to order him to appear before himself or any other justice or magistrate having jurisdiction in the district, and the enquiry may, therefore, be taken in such case before another magistrate who replaces the first.

R. v. Daigle, 18 D.L.R. 56, 23 Can. Cr. Cas. 92.

PRELIMINARY INQUIRY — CAPTION TO DEPOSITION.

It is not an objection that depositions taken in a preliminary inquiry have no formal caption to indicate the case in which they were taken if such depositions returned into the Superior Court are physically attached to a document called the "statement of accused," which sets forth the charge and date of hearing and that the charge was read to the accused, and that on being given the statutory warning he made no statement, and it further appears from the depositions themselves that they refer to the charge so recited in the "statement of accused."

R. v. McClain, 23 D.L.R. 312, 23 Can. Cr. Cas. 488, 8 A.L.R. 73, 7 W.W.R. 1134, 30 W.L.R. 388.

PRELIMINARY ENQUIRIES — REGULARITY OF ARREST — CHARGES OTHER THAN THAT FOR WHICH WARRANT ISSUED.

Where a conviction made on summary trial by a magistrate for the principal offence was quashed, but an information was afterwards laid against the same defendant for an attempt to commit the principal offence, and the defendant was brought before the magistrate in pursuance of a warrant of arrest for the attempt, the magistrate's duty was to dismiss the charge for the attempt, but he was not bound to discharge the accused from custody and await his rearrest before proceeding with preliminary enquiries upon charges of other distinct offences for which informations had been laid before him. [Re Baptiste Paul (No. 1), 7 D.L.R. 24, 20 Can. Cr. Cas. 159; Re Baptiste Paul (No. 2), 7 D.L.R. 25, 20 Can. Cr. Cas. 161, and R. v. Davis, 7 D.L.R. 608, 20 Can. Cr. Cas. 293, distinguished.] Where several informations for various offences are laid against the same person, the magistrate will have jurisdiction under Cr. Code (1906), s. 668, to proceed with preliminary enquiries as to all of such charges although the accused was arrested and brought before him by virtue of a warrant of arrest issued upon one information only, subject to the right of the accused to a reasonable adjournment.

R. v. Weiss, R. v. Williams, 13 D.L.R. 633, 22 Can. Cr. Cas. 42, 6 A.L.R. 262, 25 W.L.R. 351, 5 W.W.R. 48.

PROCEDURE — PRELIMINARY EXAMINATION — MUNICIPAL CORPORATION AS DEFENDANT — LEAVE TO PREFER INDICTMENT.

A private prosecutor seeking to criminally charge a municipal corporation with maintaining a nuisance in respect of a part of the municipality's sewage system should ordinarily initiate the proceedings before a magistrate and not be granted leave by a Superior Court to prefer an indictment against the municipal corporation where no preliminary enquiry had been held by a magistrate.

Re Schofield & Toronto, 14 D.L.R. 232, 22 Can. Cr. Cas. 93, 5 O.W.N. 109, 25 O. W.R. 331.

RIGHT OF ATTORNEY-GENERAL TO REPLY — EVIDENCE OF INSANITY.

Section 944 (3) of the Cr. Code preserves to the Attorney-General the right to reply, and whether he chooses to exercise such right or not, he is not bound to sum up for the Crown at the conclusion of the evidence, before the prisoner's counsel addresses the jury. It is not proper for the Crown to call evidence of insanity, but any evidence in possession of the Crown should be placed at the disposal of the prisoner's counsel, to be used by him if he thinks fit.

The King v. Keirstead, 42 D.L.R. 193, 30 Can. Cr. Cas. 175, 45 N.B.R. 553.

PRELIMINARY INQUIRY — STENOGRAPHER'S OATH.

The omission to swear the stenographer appointed to take the evidence on a preliminary inquiry before a magistrate, as required by Criminal Code, s. 683, as amended in 1913, is a matter of jurisdiction and not a mere defect of form, and convictions made by the magistrate on such evidence will be quashed. [The King v. L'Heureux, 14 Can. Cr. Cas. 100; The King v. Johnson, 1 D.L.R. 547, 19 Can. Cr. Cas. 203, followed. See also McDonald v. The King, 26 Can. Cr. Cas. 175, 30 D.L.R. 738.]

R. v. Limerick, Ex parte Dewar, 31 D.L.R. 226, 27 Can. Cr. Cas. 309, 44 N.B.R. 233.

DEPOSITIONS IN WRITING — STENOGRAPHER SWORN.

A justice may cause the depositions of witnesses to be written down by a person other than himself, and it is only where the depositions are taken in shorthand by a stenographer that the person taking them is required to be sworn.

R. v. McKinley (Alta.), [1917] 2 W.W. R. 1069, 28 Can. Cr. Cas. 294.

JURISDICTION OF MAGISTRATE.

Where a prisoner has been illegally arrested the magistrate before whom he is brought for trial has no jurisdiction to try him, if he objects to the magistrate's jurisdiction on appearing before such magistrate. [Re Paul (No. 2), 7 D.L.R. 25, 5 A.L.R. 442; R. v. Davis, 7 D.L.R. 608, 5 A.L.R. 443; R. v. Wallace, 24 Can. Cr. Cas. 370; R. v. Miller, 25 Can. Cr. Cas. 151, followed; Re Paul (No. 1), 7 D.L.R. 24, 5 A.L.R. 440; R. v. Hurst, 20 D.L.R. 129, not followed.]

R. v. Pollard, 39 D.L.R. 111, 13 A.L.R. 157, 29 Can. Cr. Cas. 35, [1917] 3 W.W.R. 754.

APPEAL—RESERVE CASE—DISCHARGE.

Where a judge has discharged the accused on account of the insufficiency of the evidence, the Court of Appeal has no jurisdiction to grant reserved cases.

The King v. Jacobs, 26 Que. K.B. 382.

PRELIMINARY INQUIRY — IRREGULARITY — QUASHING.

The provision of s. 684 Criminal Code, that the magistrate presiding at a preliminary inquiry shall ask the accused after the witnesses have been heard if he desires that the depositions shall be read over to him, is imperative and should be followed on pain of nullity. An omission to do so renders the preliminary inquiry illegal. The accused may take advantage of this omission at the Assizes by moving to quash the indictment against him based on such inquiry.

R. v. Beaulieu, 28 Can. Cr. Cas. 336, 26 Que. K.B. 151.

TRIAL — SUBSTANTIAL MISCARRIAGE — FAILURE TO GIVE FOOD TO JURY — JOINT PROSECUTIONS — ACCOMPLICE — EVIDENCE — RESERVING CASE.

R. v. Murray (2), [1917] 1 W.W.R. 404, 25 Can. Cr. Cas. 214, 9 A.L.R. 319.

PRELIMINARY EXAMINATION.

As a justice of the peace of Saskatchewan is an officer of the whole province he may hold a preliminary examination and commit an accused person for trial, notwithstanding the offence with which he is charged was supposed to have been committed in another judicial district in which there was no gaol to which the accused could be remanded to custody.

Where there is no gaol in the judicial district in which an offence was supposed to have been committed, a justice of the peace of another district may, under s. 577 of the Criminal Code, commit an accused person to custody for trial in the latter district without an order under s. 884 of the Criminal Code from a court or judge directing trial to be held in such district. [Reg. v. Ponton, 2 Can. Cr. Cas. 192; Mallet v. The Queen, 1 B.C.R. (Part II.) 212; R. v. Smith, 1 F. & F. 36; R. v. James, 7 C. & P. 553, and Queen v. Burke, 5 Can. Cr. Cas. 29, referred to.]

The King v. Lynn (No. 2), 19 Can. Cr. Cas. 129, 4 S.L.R. 324.

PRELIMINARY ENQUIRIES — REMAND FOR MORE THAN THREE CLEAR DAYS.

Where a preliminary enquiry is being held and the prisoner is orally remanded for a time exceeding three clear days, the justice exceeds his jurisdiction, as a war-

rant of remand is required under Cr. Code s. 679, where the remand is for more than three days. [The Queen v. Halley, 4 Can. Cr. Cas. 510; Re Sarault, 9 Can. Cr. Cas. 448, referred to.]

The King v. Goulet, 20 Can. Cr. Cas. 191.

PRELIMINARY ENQUIRY — PRIMA FACIE CASE.

The magistrate holding a preliminary enquiry into a charge of an indictable offence has only to find evidence of a probable case of guilt to justify a committal for trial, and has not to deal with the preponderance of testimony.

R. v. Odell, 22 Can. Cr. Cas. 39.

(§ II A—32) — DEFENCE WITNESSES ON PRELIMINARY ENQUIRY—RIGHT TO MAKE FULL ANSWER AND DEFENCE — REMAND FOR FURTHER PROCEEDINGS UNDER HABEAS CORPUS—CR. CODE, SS. 684, 686, 1120.

An opportunity must be given to the accused at a preliminary enquiry to call witnesses on his own behalf although when interrogated prior to the statutory warning (Code, s. 684) the accused told the magistrate he did not wish to call any witnesses. The refusal to hear his witnesses is a denial of the right to make full defence and not a mere irregularity, but the court on habeas corpus may exercise its discretion under Code s. 1120 by remanding the accused to appear again before the committing magistrate, and giving a direction to the latter to reopen the enquiry, hear the defendant's witnesses and make report to the court after which the habeas corpus motion will be disposed of. [Ex parte Burke, 2 Rev. de Jur. 151, overruled.]

R. v. Payne, 30 Can. Cr. Cas. 382.

(II A—33)—LEAVE TO FILE INFORMATION.

It is within the discretion of the Manitoba Court of Appeal to order a criminal information to be exhibited against a magistrate for alleged unlawful conduct in the discharge of his duties. [As to proceedings by criminal information generally, see annotation to this case.] Though it appears that a magistrate was guilty of illegal acts in the performance of his duties, a criminal information will not be ordered to be exhibited against him unless it is made to appear that he did such acts from corrupt motives.

Re McMicken, 8 D.L.R. 550, 22 Man. L.R. 693, 22 W.L.R. 641, 3 W.W.R. 492.

CONSENT TO PROSECUTE — FIAT GRANTED BY "ACTING ATTORNEY-GENERAL" — LORD'S DAY ACT.

A fiat for the commencement of a prosecution for a violation of the Lord's Day Act, R.S.C. 1906, c. 153, signed by a member of a Provincial Executive Council as "Acting Attorney-General" is valid, and his authority need not be shewn; since it will be presumed that he was properly appointed to act in such capacity.

R. v. Thompson, R. v. Hammond, R. v. Churchill, R. v. Aherns, 14 D.L.R. 175, 22 Can. Cr. Cas. 78, 7 A.L.R. 40, 25 W.L.R. 576, 5 W.W.R. 157.

RECOGNIZANCE TO PREFER INDICTMENT — PROSECUTION ASSUMED BY CROWN — PRIVATE PROSECUTOR.

Where a private prosecutor institutes the proceedings on a criminal charge and has himself bound over to prefer an indictment at the Court of General Sessions, the Crown Attorney for the county has the statutory right in Ontario under the Crown Attorney's Act, R.S.O. 1914, c. 91, s. 8, to "assume wholly the conduct of the case where justice towards the accused seems to demand his interposition," and upon his taking charge of the prosecution after a true bill has been found, the private prosecutor has no right to take part in the proceedings at the trial, at least where the case does not present more of the features of a private injury than of a public offence. (Crown Attorney's Act, R.S.O. 1914, c. 91, s. 8 (c).)

R. v. Fraser, 19 D.L.R. 470, 30 O.L.R. 598, 23 Can. Cr. Cas. 140.

CONSENT OF ATTORNEY-GENERAL TO PROSECUTION — SUFFICIENCY OF — DUPLICITY.

Notwithstanding the fact that the fiat or consent of the Attorney-General to prosecute for a violation of the Lord's Day Act, R.S.C. 1906, c. 153, a person, upon a charge that he "provided, engaged in, or was present at" a forbidden performance on Sunday, states three separate offences, it is not bad on that account, and a prosecution may be maintained thereunder for any one of the offences mentioned.

R. v. Thompson, R. v. Hammond, R. v. Churchill, R. v. Aherns, 14 D.L.R. 175, 22 Can. Cr. Cas. 78, 25 W.L.R. 576, 7 A.L.R. 40, 5 W.W.R. 157.

(§ II A—34) — ENACTMENT PROVIDING HEAVIER PUNISHMENT FOR SECOND OFFENCE — SETTING OUT PREVIOUS CONVICTION IN INFORMATION — CONVICTION FOR FIRST OFFENCE ONLY IF NOT DONE.

Where an enactment provides that an accused shall be subject to a heavier punishment for a second or subsequent infraction of the law, the accused is entitled to know that he is being tried for a second offence and the previous conviction should be set out in the information and summons, and if this is not done the accused can only be convicted for a first offence.

R. v. Harry, 48 D.L.R. 265, 31 Can. Cr. Cas. 288, [1919] 3 W.W.R. 298.

SECOND INDICTMENT.

Notwithstanding the use of the disjunctive word "or" in s. 872 Criminal Code, counsel acting for the Crown are not, by preferring an indictment for the charge on which the accused has been committed, precluded from at the same time preferring another indictment against him for any other charge founded on the facts disclosed in the depositions.

King v. Montminy, 18 Rev. de Jur. 309.

CRIMINAL LAW — POWER OF JUSTICES TO ISSUE CERTIFICATE OF DISMISSAL — NECESSITY FOR HEARING ON THE MERITS — PRIVATE PROSECUTOR.

Held, that a private prosecutor applying for a writ of certiorari is entitled to the same privileges as the Attorney-General. That justices of the peace have no jurisdiction under s. 790 of the Cr. Code to issue a certificate of dismissal of a charge of assault unless there has first been a hearing on the merits, and that a certificate issued without such hearing is not a bar to further proceedings. [Reed v. Nutt, 24 Q.B.D. 669, 59 L.J.Q.B. 311, applied.]

R. ex rel. Vancampenhout v. Mann, 12 S.L.R. 121, [1919] 1 W.W.R. 917.

CODE SS. 873A, 962 — ATTORNEY-GENERAL DECLINING TO LAY CHARGE AGAINST ACCUSED AND OPPOSING APPLICATION OF PRIVATE PROSECUTOR FOR CONSENT TO LAY CHARGE — IF COURT'S CONSENT GIVEN STILL IN POWER OF CROWN TO STOP PROCEEDINGS — COURT THEREFORE REFUSING CONSENT — CRIMINAL LIBEL NOT EXCLUDED FROM OPERATION OF 962.

Since in Alberta a simple charge under code 873a laid by any of the persons there specified is obviously substituted for a true bill by a grand jury, the expression "after an indictment has been found" as used in code 962 must be interpreted as covering in Alberta such a charge code 873a; so that under said s. 962 the Attorney-General, after such a charge is laid under s. 873a, could direct a stay of proceedings. There is nothing to exclude the charge of criminal libel from the operation of s. 962. Where therefore the Crown declined to lay any charge against one committed for trial upon an information for criminal libel and also opposed an application by the private prosecutor for consent of the court under said s. 873a to lay a charge the court refused its consent as the Crown could, notwithstanding such consent and laying of the charge, stop all proceedings. No adjournment could be granted as, there being no indictment or charge on the record, there was nothing before the court to adjourn. If no charge were laid against the accused before the end of the sittings he would have fulfilled his recognizance and be free to go as far as his present committal was concerned.

R. v. Edwards, [1919] 2 W.W.R. 600.

(§ II A—37)—SUFFICIENCY OF INDICTMENT —SEDITIOUS LIBEL.

Section 852 of the Criminal Code provides that every count of an indictment shall contain, and shall be sufficient if it contain, a statement that the accused has committed some indictable offence therein specified; but this does not mean merely naming an offence as "murder" or "theft"—the offence itself must be described with reasonable certainty. So also s. 861, which declares that no count for publishing a seditious libel shall be deemed insufficient on the ground that it does not set out the words thereof, dispenses only with the ipsissima verba—there must be substantial references to identify the words or locate the objectionable parts.

R. v. Bainbridge, 42 D.L.R. 493, 30 Can. Cr. Cas. 214, 42 O.L.R. 203.

REGULARITY OF SUMMONS OR WARRANT.

It is only when the allegations of the complainant do not convince the magistrate that a summons should issue, that there is any need of witnesses for the complainant, and until that time there are no persons who can be termed "his witnesses" under Cr. Code (1906) s. 655, as amended in 1909, which directs the justice to hear and consider the allegations of the complainant "and the evidence of his witnesses if any," and, on a case for same being made out, to issue a summons or warrant. [Ex. p. Archambault, 16 Can. Cr. Cas. 433, approved.]

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

(§ II A—38)—READING OVER TO, AND HAVING WITNESS SIGN DEPOSITION.

The requirement of subs. 4 of s. 682 of the Cr. Code, R.S.C. 1906, c. 146, that the depositions of a witness shall be read over to him by the magistrate, and signed by him, is directory only, and the omission to comply with this requirement does not involve loss of jurisdiction.

R. v. Woodroof, 6 D.L.R. 300, 20 Can. Cr. Cas. 17, 11 E.L.R. 373.

FAILURE OF MAGISTRATE TO SIGN DEPOSITIONS — COMMITTAL FOR TRIAL — ELECTION — TRIAL BY DISTRICT COURT JUDGE — VALIDITY.

The failure of the magistrate committing an accused for trial for an indictable offence to sign the depositions does not affect the validity of the trial; the accused being admitted to bail by the district court judge, and subsequently appearing before him and electing to be tried by him.

The King v. Trefiak, 47 D.L.R. 497, 12 S.L.R. 312, [1919] 2 W.W.R. 794.

PROCEEDINGS BEFORE JUSTICE OF PEACE — SUFFICIENCY OF SIGNATURE OF JUSTICE TO DEPOSITIONS.

Where the proceedings before a justice, including the depositions appear on a number of successive pages which are fastened together, the evidence of each witness being signed by the witness, and following the signature of the last witness the following statement appears: "Having considered the above evidence I remand the accused for trial at the next court, etc.," and such statement is signed by the justice, it is a sufficient authentication of all the depositions returned into court by the justice.

The King v. Kostiuk, 47 D.L.R. 299, 31 Can. Cr. Cas. 285, [1919] 2 W.W.R. 852.

(§ II A—39)—TRIAL JUDGE — NO JURISDICTION TO GRANT NEW TRIAL — PROCEDURE.

The Trial Judge, in a criminal trial, has

no power to grant a new trial. Leave to move the Court of Appeal for a new trial is given by s. 1021 of the Cr. Code, but only on the ground that the verdict is against the weight of evidence.

[Review of authorities and practice.]

R. v. Di Francesco, 45 D.L.R. 488, 44 O. L.R. 75, 30 Can. Cr. Cas. 422.

B. Protection and rights of accused generally; electing mode of trial.

(§ II B—40)—Evidence — Admission by accused — Voluntary promise not illegal — No threats or inducements — Admissibility.

A voluntary admission by the accused in a criminal case which has not been extracted by threats or illegal promises may be admitted as evidence in his trial.

Gravel v. The King, 50 D.L.R. 648.

Electing mode of trial.

The recital of consent contained in Code form 55 is the method prescribed by law of shewing a magistrate's jurisdiction to summarily try for an indictable offence under Part 16, of the Criminal Code 1906, and where such a recital is contained in the conviction there is, in the absence of anything to impeach such record, a necessary implication that conditions precedent were observed. When the prisoner consents to be tried summarily by a magistrate under the summary trials clauses of the Cr. Code and an entry of this appears on the record it will be presumed on a habeas corpus motion, unless the contrary is shewn, that the consent of the prisoner to be tried summarily was regularly obtained and that his option to elect summary trial was exercised only after the magistrate had stated his right of election in the manner prescribed by Cr. Code, s. 778, and it is not essential that the magistrate's statement to the accused of the option in the statutory form should also be recited in the conviction or in the commitment. [R. v. Howell, 19 Man. L.R. 317; R. v. Walsh, 7 O.L.R. 149; R. v. Crooks, 17 W.L.R. 509, distinguished.]

The King v. Mali, 1 D.L.R. 256, 22 Man. L.R. 29, 20 W.L.R. 217, 1 W.W.R. 766.

Crim. Code — Trial of accused on charge other than set out in warrant — Consent necessary.

Under s. 834 Cr. Code (amendment 8-9 Edw. VII. c. 9, s. 2) an accused cannot without his consent be tried on a charge other than that specifically described in the warrant for commitment and for which the accused was committed for trial.

The King v. Trefiak, 47 D.L.R. 497, 12 S.L.R. 312, [1919] 2 W.W.R. 794.

Electing mode of trial — Re-election — "Prosecuting officer" — Meaning of in Quebec — Crim. Code, ss. 828, 823.

Though, in general, a re-election by a prisoner may be validly exercised at any time before commencement of trial, and even after an indictment has been preferred (s. 828 (2) Cr. C.) (saving the cases provided for in s. 830, where re-election must be made before the regular term of the jury court and saving the qualification indicated in The King v. Everson, 4 D.L.R. 356, 20 Can. Cr. Cas. 103), it is now a requisite, in view of 8-9 Edw. VII. c. 9, that "if an indictment has been preferred against the prisoner, the consent of the prosecuting officer shall be necessary to a re-election, and in such case the sheriff shall take no action upon being notified of the prisoner's desire to re-elect unless such consent is given in writing." In Quebec the expression "prosecuting officer" is to be given wide construction, and before indictment the notice may be given to the person to whom the name most nearly applies, viz.: the clerk of the peace, or even a high constable or counsel or a chief of police, but in prosecution after indictments have been found, there is always the Crown prosecutor, and he is the prosecuting officer whose consent to re-election is necessary. [In view of ss. 828 and 823 Cr. C. not mentioning any "prosecuting officer" for the Province of Quebec, as to the speedy trial of indictable offences the decision in this case is considered important.]

R. v. Bissonnette, 47 D.L.R. 414.

Mixed jury — Proceedings in one language only — Substantial wrong — Cr. Code, s. 1019 — Comment by judge on prisoner's evidence.

A prisoner on trial on an indictment for murder elected to be tried by a mixed jury and after the impanelling of such a mixed jury the trial proceedings were conducted in the English language and the Trial Judge summed up the case to the jury in English but not in French. The Trial Judge also had commented upon the failure of the prisoner (who was a witness on his own behalf) to testify that he had not actually committed the murder. Held, that assuming that the failure of the Trial Judge to charge the jury in both languages, French and English, brought the case within s. 1019 of the Cr. Code as "something not according to law done at the trial," the court should not interfere being of the opinion that no substantial wrong or miscarriage was occasioned thereby; also that he prisoner having testified on his own behalf, his evidence was open to comment and observation by the trial judge, in addressing the jury, the same as that of any other witness.

Veuillette v. The King, 48 D.L.R. 158, 58 Can. S.C.R. 414, affirming 32 Can. Cr. Cas. —, 28 Que. K.B. 364.

Electing speedy trial — District.

An accused person committed for trial, and who, on arraignment before a District Judge under the Speedy Trials Part of the Cr. Code, has elected to take jury trial, may be permitted to re-elect to be tried without a jury by the District Judge's Criminal Court holding speedy trials in the district in which the gaol is situated to

which he was committed and is in custody, although that is a different judicial district from that in which the alleged offence was committed.

R. v. Harrison, 41 D.L.R. 381, 10 S.L.R. 434, 29 Can. Cr. Cas. 159, [1918] 1 W.W.R. 12.

Where the offence was committed in an other judicial district and the accused was there committed for trial, the judge of another District Judge's Criminal Court taking the election of the accused to be tried without a jury may properly remand the accused for trial before the District Judge's Criminal Court of the place of the offence. [R. v. Harrison, 41 D.L.R. 381, 29 Can. Cr. Cas. 159, applied.]

R. v. Anderson & Sparks, 29 Can. Cr. Cas. 176, 10 S.L.R. 434, [1918] 1 W.W.R. 14.

TRIAL — DUTY OF CROWN PROSECUTOR — FAIRNESS TO THE DEFENCE.

Where the Crown prosecutes in a Magistrate's Court, counsel for the Crown owes a special duty both to the court and to the defence to guide the proceedings upon principles of fairness. (Per Stuart, J.)

R. v. Dominion Drug Stores (No. 2), 31 Can. Cr. Cas. 86, [1919] 2 W.W.R. 413.

A person charged with a capital offence is not entitled to examine the register of jurors in the possession of the sheriff, since such list is to be kept secret and not disclosed to anyone except under an order of a judge, granted on cause justifying it.

Trepanier v. The King, 19 Can. Cr. Cas. 290.

EVIDENCE — RECEIVING STOLEN GOODS — RECENT POSSESSION AS EVIDENCE — ONUS OF PROOF IN CRIMINAL CASES — EXTENT OF BURDEN ON ACCUSED — EXPLANATION BY ACCUSED — REASONABLENESS AS QUESTION OF FACT — TESTS OF REASONABLENESS — EFFECT OF FAILURE OF ACCUSED TO GO ON STAND.

Recent possession of stolen goods is evidence of receiving as well as of stealing them. [Reg. v. Langmead, 9 Cox C.C. 464 L. & C. 427, 10 L.T. 350, followed; R. v. Thornton, 2 Cr. App. R. 284, and R. v. Lum Man Bow, 15 B.C.R. 22, 16 Can. Cr. Cas. 274, 13 W.L.R. 345, referred to.] Since the earlier cases on the sufficiency of an explanation of the possession of stolen goods were decided when the accused had no right to give evidence they must be considered now in the light of the present conditions, and, perhaps, subject to some qualification. It should, however, still be a matter on consideration for a judge or jury that the Crown, with full knowledge of and opportunity for the investigation of an explanation reasonable on its face, has failed to make such investigation and bring the result of it before the court. [R. v. McKay, 34 N.S.R. 540, 6 Can. Cr. Cas. 151, referred to on the latter point.] While the onus of proof in criminal cases is always on the Crown, yet where the Crown has established such facts as without more will justify the jury in finding the accused guilty he is not entitled to an acquittal unless he satisfies the burden which is then cast upon him of raising in the minds of the jurors a reasonable doubt of his guilt. The reasonableness of the explanation is generally more a question of fact for the jury or the judge trying the charge than one of law open to the consideration of a Court of Appeal, and depends, not merely on the accused's statement, but also upon the time and manner of its making and the question whether his conduct was consistent with it, and a judge or jury would in most cases be properly affected by the accused's failure to support by his sworn testimony an explanation previously given, though there may be circumstances whereunder too much importance should not be attached to such failure.

R. v. Scott, 14 A.L.R. 439, [1919] 2 W.W.R. 227.

(§ II B—42)—ELECTION TO SPEEDY TRIAL —JURISDICTION.

A bill of indictment having been preferred to the grand jury under s. 873 of the Cr. Code, a true bill found, and the accused having pleaded, and a day for trial fixed, an accused may on that day elect speedy trial before the Court of Sessions of the Peace, under Part 18 of the Code.

Giroux v. The King, 39 D.L.R. 190, 56 Can. S.C.R. 63, 29 Can. Cr. Cas. 258, affirming 26 Que. K.B. 323.

(§ II B—44) — PRISONER'S STATEMENT IN COURT — INSTRUCTION TO JURY.

Where the accused person in addressing the jury on his own behalf has made statements of alleged facts outside of the sworn testimony, the Trial Judge should warn the jury against treating the statement as the equivalent of sworn testimony; such warning is not an infraction of s. 4 of the Canada Evidence Act, R.S.C. 1906, c. 145, under which the failure of the accused to testify is not to be made the subject of comment by the judge or by counsel for the prosecution.

R. v. Kelly, 34 D.L.R. 311, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282, [1917] 1 W.W.R. 463, affirming 27 Can. Cr. Cas. 94, 140, [1917] 1 W.W.R. 46.

PRISONER MAKING UNSWORN STATEMENT IN DEFENCE BEFORE JURY.

The former right of a prisoner who is defended by counsel to make an unsworn statement from the dock is displaced by the Canada Evidence Act, under which he may offer his own sworn testimony as evidence on his own behalf. [R. v. Aho, 8 Can. Cr. Cas. 453, considered.]

R. v. Krafchenko, 17 D.L.R. 244, 24 Man. L.R. 652, 22 Can. Cr. Cas. 277, 28 W.L.R. 76, 6 W.W.R. 836.

Rights of accused — Formal proceedings — Answer and defence to specific charge.

A person upon trial for a crime has a right to hear all the evidence adduced against him, and to insist, as a matter of right, that the formalities of the law as to criminal trials are complied with; and when formal proceedings are in strict law required, ex. gr., an arraignment upon a specific charge made known to the prisoner at the hearing before a magistrate, the absence of the required proceedings is a ground for setting aside the conviction without regard to the question whether or not any substantial injustice had resulted to the accused. [Martin v. Mackonachie, 3 Q.B.D. 730, 770, applied.]

R. v. Roach, 19 D.L.R. 362, 6 O.W.N. 630, 23 Can. Cr. Cas. 28.

Right to have evidence translated and to meet witnesses.

A prisoner who is ignorant of the language in which the trial proceedings are conducted has no inherent right to be furnished with a literal translation of all that takes place at the trial; where the substance of the evidence in chief of a witness called on behalf of the prisoner is explained to him, the omission to explain to him in like manner what the witness said on cross-examination is not a ground for quashing a conviction, the prisoner having been represented by counsel and having suffered no prejudice by the omission. [The King v. Meeklette, 18 O.L.R. 408, 15 Can. Cr. Cas. 17, followed.]

The King v. Sylvester, 1 D.L.R. 186, 19 Can. Cr. Cas. 302, 45 N.S.R. 525.

(§ II B—45)—Trial before magistrate—Two separate charges — Interjection of one trial into the other.

Where an accused is being tried before the same magistrate on two separate charges, the interjecting of one trial into the other so prejudices the defence as to entitle the accused to have the conviction quashed. [R. v. McBerny, 3 Can. Cr. Cas. 339; R. v. Bullock, 60 L.R. 663; R. v. Iman Din, 18 Can. Cr. Cas. 82; R. v. McManus, 30 Can. Cr. Cas. 122, referred to.]

R. v. King (2 cases) 47 D.L.R. 410, 31 Can. Cr. Cas. 297, 14 A.L.R. 481, [1919] 2 W.W.R. 877.

(§ II B—46)—Statements by accused—Admissibility.

Statements made by an accused are admissible in evidence against him although the usual warning or caution was not given, if it is shewn that such statements were voluntarily made, and were not obtained either by fear of prejudice or hope of advantage exercised or held out by a person in authority.

R. v. Rodney, 43 D.L.R. 404, 30 Can. Cr. Cas. 259, 42 O.L.R. 645.

Confession — Voluntary — Onus.

A confession in a criminal case must not be extracted by any sort of threat or promise, or by fear of any direct or implied promise. It must be entirely free and voluntary and the onus of establishing this rests on the prosecution.

The King v. Benjamin, 41 D.L.R. 388, 32 Can. Cr. Cas. —, 53 Que. S.C. 160.

(§ II B—47)—Disclosing names of witnesses against him.

While no definite rule is laid down in the Criminal Code to compel the endorsing of the names of witnesses for the prosecution on a formal charge laid by the agent of the Attorney-General under Cr. Code s. 873A (applicable in Alta. and Sask.), the presiding judge may give all necessary protection to the accused so that he may have a fair opportunity to defend himself; the name of any additional Crown witness not examined at the preliminary inquiry ought, as a matter of fairness, to be disclosed to the accused—at any rate if he asks for the information. [R. v. Gleenslade, 11 Cox C.C. 412, referred to.]

R. v. McClain, 23 D.L.R. 312, 23 Can. Cr. Cas. 488, 8 A.L.R. 73, 7 W.W.R. 1134, 30 W.L.R. 388.

Names of Crown witnesses.

The context of ss. 874 to 876 of the Cr. Code makes s. 876 (endorsing names of witnesses on bill of indictment) inapplicable to proceedings by formal charge in a province where there is no grand jury system, notwithstanding the extended meaning given to the word "indictment" by Cr. Code s. 2 (16); effect is to be given to the latter only in the event of the context being consistent therewith.

R. v. McClain, 23 D.L.R. 312, 23 Can. Cr. Cas. 488, 8 A.L.R. 73, 7 W.W.R. 1134, 30 W.L.R. 388.

(§ II B—48)—Procedure — Theft property over $10 — Accused charged before magistrate — Plea of "guilty" — No election — Jurisdiction of magistrate — Cr. Code, ss. 773, 778, 782, 783 — New trial.

A magistrate cannot accept a plea of "guilty" from accused persons brought before him charged with theft of goods over $10 in value, unless such persons have elected to be tried by him. Cr. Code ss. 773, 778, 782, and 783.

R. v. Collier, 50 D.L.R. 735, 46 O.L.R. 351.

Procedure — Waiver or loss of right — Cr. Code, 1906, s. 1010.

Section 1010 of the Cr. Code 1906, forbidding the reversal of a verdict for certain irregularities not objected to before verdict in criminal cases, is taken from the Imperial statute 7 Geo. IV. c. 64, and not from 21 James I. c. 13. [Reg. v. Feore, 3 Q.L.R. 219, corrected.]

R. v. Battista, 9 D.L.R. 138, 21 Can. Cr. Cas. 1.

Rights of accused — Waiver — Consent to admit depositions in trials of others similarly concerned.

The accused may make a minor confession

while not fully confessing his guilt, and in view of this and of Cr. Code 978, it is not error to admit either at the preliminary enquiry or at the trial depositions in similar concurrent prosecutions of others for fraudulent stock subscriptions in the same company where the same counsel acting for all of the accused signed a consent by which the evidence at the preliminary inquiry against any one of them might be used as against any other both at the several preliminary enquiries and upon the trials. [See also R. v. Brooks, 11 Can. Cr. Cas. 188, 11 O.L.R. 525.]

R. v. Daigle, 18 D.L.R. 56, 23 Can. Cr. Cas. 92.

(§ II B—49)—Speedy trial without jury — Changing option — Cr. Code, s. 826.

If the accused has regularly consented to a "speedy trial" without a jury under Part 18. of the Code, he has no right afterwards to change his option by re-electing for a jury trial. [R. v. Keefer, 5 Can. Cr. Cas. 332, referred to; and see R. v. Hebert, 10 Can. Cr. Cas. 290.]

R. v. Guay, 19 D.L.R. 820, 23 Can. Cr. Cas. 243, 21 Rev. de Jur. 253.

Trial on consent — Summary or speedy trial.

Where the depositions and the committal for trial were both ignored by the prosecution, and instead, the County Crown Attorney, under Cr. Code, s. 873, obtained the written consent of the judge to prefer the indictment on which a true bill was returned by the grand jury, and on which the petty jury returned a verdict of "guilty" and the depositions taken before the magistrate were not made a part of the case reserved for the opinion of the Court of Appeal in respect of the regularity of a refusal of a claim by the accused to be tried without a jury under the speedy trials clauses, the Court of Appeal may properly assume that the charge in the indictment is not the same as that for which the prisoner was committed, or any other charge appearing in the evidence before the magistrate, as, in either of these events, the County Crown Attorney would not, under s. 871, have needed the consent of the judge to prefer the indictment.

R. v. Sovereen, 4 D.L.R. 356, 26 O.L.R. 16, 20 Can. Cr. Cas. 103, 21 O.W.R. 618.

Summary trial — Power of justices to commit for trial.

Under the Cr. Code it is not competent for a magistrate who is holding a summary trial after hearing all the evidence on both sides to decide to commit for trial instead of disposing of the case himself; the right to commit for trial being limited as to time by the terms of Cr. Code, s. 786, directing that the magistrate may "before the accused person has made his defence" decide not to adjudicate summarily upon the case.

R. v. Roger Hicks, 7 D.L.R. 171, 5 A.L.R. 371, 22 W.L.R. 236, 2 W.W.R. 1100.

Summary trial — Absolute jurisdiction.

A person charged under ss. 227 and 228 Cr. Code, 1906, c. 146, with keeping a common betting house, may without his consent, under ss. 641, 773 and 774 of the Code, as amended by 8-9 Edw. VII., be summarily tried by a police magistrate, absolute jurisdiction to try such offence without a jury having been conferred upon such official by ss. 641, 673 and 674 of the Cr. Code, 1906. [R. v. Lee Guey, 13 Can. Cr. Cas. 80, 15 O.L.R. 235, specially referred to.]

R. v. Honan, 6 D.L.R. 276, 20 Can. Cr. Cas. 10, 26 O.L.R. 484, 20 O.W.R. 527.

Speedy trials clauses — Option of non-jury trial — Cr. Code s. 826.

An election of speedy trial without a jury under Part 18. of the Cr. Code must be a general one so as to include any judge or official who may legally preside under Cr. Code, s. 823, and must not be limited by making it a consent to be tried only by the particular judge before whom the accused is arraigned. [R. v. McDougall, 8 Can. Cr. Cas. 234; R. v. Stewart, 15 Can. Cr. Cas. 331, referred to.]

R. v. Guay, 19 D.L.R. 820, 23 Can. Cr. Cas. 243, 21 Rev. de Jur. 253.

Summary trial — Powers of two justices — Theft under $10 — Part of larger theft.

The theft of a bundle of tied letters by one act is a single offence, and where it appears by the evidence on the summary trial before two justices exercising the limited jurisdiction of s. 773 of the Cr. Code, 1906, as the theft not exceeding $10, that the cheque for $10, as to which alone the charge was laid before the magistrates, was the enclosure in one letter of the bundle stolen by the one act and that the value of the enclosure in the entire bundle of registered letters was more than $10, the justices have no jurisdiction to proceed further with a summary trial, but should proceed only with a preliminary inquiry and committal of the accused for trial before a court of competent jurisdiction.

R. v. Pope, 15 D.L.R. 664, 7 A.L.R. 169, 22 Can. Cr. Cas. 327, 26 W.L.R. 650, 5 W.W.R. 1070.

Jurisdiction of summary trial — Absence of sworn information.

The absolute jurisdiction conferred upon a police magistrate to try certain indictable offences upon summary trial without the consent of the accused is exercisable where the accused is present, whether or not an information has been sworn in respect of the offence which is the subject of the trial, if the "charge" is reduced to writing and is read to the accused and

a full opportunity is given for making defence thereto.

R. v. Crawford, 6 D.L.R. 380, 20 Can. Cr. Cas. 49, 5 A.L.R. 204, 22 W.L.R. 107, 2 W. W.R. 952.

SUMMARY TRIAL — JURISDICTION ABSOLUTE IN CERTAIN PROVINCES.

Two justices have absolute jurisdiction in Sask. under Cr. Code, s. 776, to summarily try a charge of inflicting grievous bodily harm. [R. v. Hostetter, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363, followed.]

R. v. Morton, 18 D.L.R. 553, 23 Can. Cr. Cas. 172, 7 W.W.R. 95.

SUMMARY TRIAL — EXTENDED JURISDICTION OF CITY AND TOWN MAGISTRATES.

Subsection 2 of Cr. Code, s. 777 as enacted by the Cr. Code Amendment Act, 1909, giving the extended power of summary trial to police magistrates, has equal application to police and stipendiary magistrates of cities and incorporated towns of at least 2,500 population throughout Canada; the words "in the Province of Quebec" as used in the subsection qualify only the words "district magistrates and judges of the sessions," and not the phrase "police and stipendiary magistrates" which follows. [R. v. Rahamat Ali, 16 Can. Cr. Cas. 193, approved.]

R. v. Spates, 15 D.L.R. 828, 22 Can. Cr. Cas. 69, 5 W.W.R. 1136.

SUMMARY TRIAL—CONSENT.

The jurisdiction to try summarily conferred by Code, s. 773 as to certain indictable offences, is expressly subject to the subsequent provisions of Part 16, and depends upon the consent of the accused as to all of the offences mentioned in the section, except those as to which, and the cases in which, it is expressly provided that jurisdiction does not depend upon the consent of the person charged.

R. v. Helliwell, 18 D.L.R. 550, 30 O.L.R. 594, 23 Can. Cr. Cas. 146.

SUMMARY TRIAL — ASSAULT OCCASIONING BODILY HARM — TRIAL WITHOUT CONSENT IN SASKATCHEWAN.

A charge under Code, s. 295, of assault causing actual bodily harm may be summarily tried in Sask. by two justices under s. 776 without the consent of the accused under s. 778. [R. v. Hostetter, 7 Can. Cr. Cas. 221, 5 Terr. L.R. 363; R. v. Zyla, 17 W.L.R. 258, applied.]

R. v. Prokopate, 18 D.L.R. 696, 23 Can. Cr. Cas. 189, 7 S.L.R. 95, 20 W.L.R. 88, 6 W.W.R. 405.

SPEEDY TRIAL PROCEDURE — ELECTING TRIAL WITHOUT JURY — EFFECT OF INDICTMENT.

A person sent up for trial for an indictable offence within the scope of the speedy trials clauses of the Criminal Code and against whom, while out on bail allowed by the magistrate, a true bill is found by the grand jury on the same charge, is entitled, on being taken into custody under a bench warrant in respect of such indictment, to the benefit of the speedy trials clauses and to elect thereunder for trial without a jury before the County Court Judge's Criminal Court if he has not pleaded to the indictment; and a mandamus will lie to the latter court to enforce such a right where the County Judge before whom the prisoner was brought had ruled that he had no jurisdiction because of the indictment to permit the accused to elect for trial without a jury. [R. v. Sovereen, 4 D.L.R. 356, 20 Can. Cr. Cas. 103, distinguished; R. v. Wener, 6 Can. Cr. Cas. 406, and R. v. Komiensky, 6 Can. Cr. Cas. 528, discussed; R. v. Thompson, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608, approved.]

R. v. County Judge's Criminal Court, 16 D.L.R. 500, 23 Can. Cr. Cas. 7, 48 N.S.R. 1.

ELECTION AGAINST SUMMARY TRIAL BY MAGISTRATE — SUBSEQUENT ELECTION OF SPEEDY TRIAL.

The option which under Code, s. 778, as amended 1909, is given the accused under Part 16 of the Code to be tried by the magistrate without the intervention of a jury or to remain in custody or under bail to be tried "in the ordinary way by the court having criminal jurisdiction," includes upon an election of the latter alternative the prisoner's right after having been brought before the County Court Judge or other officer under the Speedy Trials Clauses (Part 18) to decide whether he will take a "speedy trial" without a jury or be tried at the jury court; and, since the amendment of 1909, this right is not affected by Code, s. 830 as the election against summary trial by the magistrate is no longer an election "to be tried by a jury." (Code, s. 830.) [R. v. Thompson, 14 Can. Cr. Cas. 27, 17 Man. L.R. 608; R. v. Sovereen, 20 Can. Cr. Cas. 103, 4 D.L.R. 356; R. v. County Judge's Criminal Court, 23 Can. Cr. Cas. 7, 16 D.L.R. 500, considered.]

R. v. Price & Burnett, 19 D.L.R. 229, 25 Man. L.R. 26, 30 W.L.R. 1, 7 W.W.R. 621.

ELECTING TRIAL WITHOUT A JURY — ACCUSED NOT COMMITTED FOR TRIAL BUT BAILED TO ANSWER TO JURY COURT.

On the order being made under Code, s. 696 that the accused shall give bail to answer any indictment at the jury court upon the charge, in lieu of a committal for trial thereon, the accused may, without waiting for an indictment, elect speedy trial without a jury upon the charge.

R. v. Daigle, 18 D.L.R. 56, 23 Can. Cr. Cas. 92.

SUMMARY TRIAL BY CONSENT — "VIEW" BY MAGISTRATE.

Although s. 958 of the Cr. Code (1906) empowers the court to order that the jury on a criminal trial shall have a view of any place, person or thing, it is not to be inferred that a magistrate exercising a limited statutory power of summary trial without a jury in respect of certain indictable offences, may in like manner take a

view of lands which are the subject-matter of the offence charged.

R. v. Crawford, 10 D.L.R. 96, 21 Can. Cr. Cas. 70, 18 B.C.R. 20, 22 W.L.R. 969, 3 W. W.R. 731.

SUMMARY TRIAL — POLICE MAGISTRATE — JURISDICTION TO TRY WITHOUT JURY — KEEPING COMMON GAMING HOUSE.

A police magistrate has jurisdiction under ss. 641, 773 and 774 of the Cr. Code (1906), as amended 1909, and a charge of keeping a common gaming house in violation of s. 228 of the Code, to summarily try the accused without permitting him to elect whether he will go before a jury. [R. v. Honan, 6 D.L.R. 276, 26 O.L.R. 484, 20 Can. Cr. Cas. 10, followed.]

R. v. Jung Lee, 13 D.L.R. 896, 5 O.W.N. 80, 22 Can. Cr. Cas. 63, 25 O.W.R. 63.

SUMMARY TRIAL BY CONSENT — FAILURE TO INFORM PRISONER AS TO RIGHT MODE OF TRIAL—EFFECT.

The failure of a police magistrate on taking an election of a summary trial, to state to the accused conformably to s. 778 (b) of the Cr. Code, as amended by 8-9 Edw. VII. c. 9, that he has the option to be tried forthwith, or to remain in custody, or under bail as the court shall decide, to be tried in the ordinary manner by a court having criminal jurisdiction, will vitiate a conviction on the summary trial. [R. v. Howell, 16 Can. Cr. Cas. 178, 19 Man. L.R. 326, followed and applied. See also The King v. Davis, 13 D.L.R. 612.]

The King v. Fuerst, 15 D.L.R. 214, 26 W. L.R. 445, 22 Can. Cr. Cas. 183.

SUMMARY TRIAL BY CONSENT — FAILURE TO INFORM PRISONER AS TO RIGHTS OF SPEEDY TRIAL—EFFECT.

The failure of a magistrate on taking an election of a summary trial to state to the accused conformably to the provisions of s. 778 of the Cr. Code that he has the option of being tried forthwith by the magistrate without a jury, or to remain in custody or under bail as the court decides, to be tried in the ordinary way by a court having criminal jurisdiction, renders void a conviction on a plea of guilty. [R. v. Howell, 16 Can. Cr. Cas. 178, 19 Man. L.R. 326; The King v. Walsh and Lamont, 8 Can. Cr. Cas. 101, 7 O.L.R. 149; The King v. Harris, 18 Can. Cr. Cas. 392, 4 S.L.R. 31, and The King v. Crooks, 19 Can. Cr. Cas. 150, 4 S.L.R. 335, followed.]

The King v. Davis, 13 D.L.R. 612, 22 Can. Cr. Cas. 34.

SUMMARY TRIAL—CHARGE IN WRITING.

Where there is already a written information in respect of the charge of an indictable offence, which a magistrate is about to try under Part 16 of the Cr. Code, such information may be adopted as a "charge in writing," which he shall read to the accused, and it is not in such case necessary for the magistrate to again reduce the charge to writing; but if the accused were before the magistrate without any preliminary information having been laid for the offence which is to be the subject of the summary trial, it would then be the magistrate's duty to write out the charge.

R. v. James, 25 D.L.R. 476, 25 Can. Cr. Cas. 23, 9 A.L.R. 66, 9 W.W.R. 235, 32 W. L.R. 528.

SUMMARY TRIAL WITHOUT CONSENT.

The absolute jurisdiction of a police magistrate in Saskatchewan of a city having a population of over 2,500 is retained under Code, ss. 776 and 777, as to the offences specified in Code, s. 773 (including that of unlawful wounding), and the consent of the accused to summary trial is required by Code, ss. 777 and 778, only in such cases in which there is additional jurisdiction under s. 777. [R. v. Hayward, 6 Can. Cr. Cas. 399, 5 O.L.R. 65, applied.]

Re Worrell, 21 D.L.R. 519, 24 Can. Cr. Cas. 88, 8 S.L.R. 140, 8 W.W.R. 231. [Affirmed in 21 D.L.R. 522, 24 Can. Cr. Cas. 92, 8 S.L.R. 140.]

ACCUSED COMMITTED TO GAOL — REMOVED TO POLICE CELLS — ELECTION BEFORE DISTRICT JUDGE—CONSENT TO BE TRIED BY HIM — TRIAL — JURISDICTION OF COURT.

An accused who, at the preliminary hearing on an indictable offence, has been ordered to be committed to gaol for trial and has been removed to the police cells preparatory to being taken to the gaol, which is situated in another district, is "committed to gaol" and may be brought before the District Judge of the district where the offence was committed for election, and having voluntarily appeared before such judge and with his own consent and the consent of the Crown prosecutor having been tried by such District Judge, on a charge within the jurisdiction of the court, such court has jurisdiction to try the accused. It is not necessary that the accused be actually transferred to the gaol or that the election be made before the District Judge where such gaol is situated. [Giroux v. The King, 39 D.L.R. 190, 29 Can. Cr. Cas. 258, followed.]

The King v. Meyers, 47 D.L.R. 542, 31 Can. Cr. Cas. 361, [1919] 3 W.W.R. 187.

ELECTION TO SUMMARY TRIAL.

The procedure of taking the election of the accused for summary trial as enacted by Cr. Code, s. 778, applies to the offence of theft by a servant or agent under Cr. Code, s. 359, although the value is alleged to be under $10; it is not enough that the accused pleaded not guilty where his consent to summary trial was not asked in conformity with s. 778.

R. v. De la Durantaye, 34 D.L.R. 689, 18 Que. P.R. 251, 27 Can. Cr. Cas. 395.

SUMMARY TRIAL—EXTENDED JURISDICTION —CR. CODE, S. 777.

Section 777 of the Cr. Code, giving extended jurisdiction of summary trial by

consent before certain magistrates, applies only to cases which in Ontario would be triable at General Sessions other than cases listed in s. 773. [R. v. Hayward, 6 Can. Cr. Cas. 399, 5 O.L.R. 65; Ex parte McDonald, 9 Can. Cr. Cas. 368, followed. But see R. v. Archibald, 4 Can. Cr. Cas. 159; R. v. Crawford, 20 Can. Cr. Cas. 53, 6 D.L.R. 380.]

R. v. Davidson, 35 D.L.R. 94, 28 Can. Cr. Cas. 56, 11 A.L.R. 491, [1917] 2 W.W.R. 718. [See also 35 D.L.R. 82, 28 Can. Cr. Cas. 44, 11 A.L.R. 9.]

ACCUSED COMMITTED FOR TRIAL — ONE CHARGE—AT TRIAL FOUR COUNTS SUBMITTED BY CROWN—GENERAL VERDICT OF GUILTY—STATED CASE—APPEAL.

Under the Criminal Code, s. 834, as amended by 8-9 Ed. VII., c. 9, s. 2, the consent of the judge and the prisoner is necessary before the latter can be tried upon a charge other than the charge upon which he has been committed to jail for trial.

The King v. Bobyck, 49 D.L.R. 678.

ELECTION—PRESUMPTION—PLEA GUILTY.

A conviction on a "speedy trial" (Part 18 of the Cr. Code), need not recite that the presiding judge on taking the prisoner's election of trial without a jury had stated to him that he had the alternative of remaining in gaol until the jury court or being admitted to bail as the court might decide; in the absence of any proof appearing in the record that this statutory statement had been made to the prisoner in conformity with Cr. Code, s. 827 (amendment of 1909), the presumption is that the statement was regularly made. A District Judge or other official, qualified under Cr. Code, s. 823, to hold a "speedy trial" under Part 18 of the Cr. Code after a committal for trial, acquires jurisdiction to hear and determine the case if the accused has given his consent under Code, s. 827, notwithstanding that the accused had, when arraigned before a city magistrate with jurisdiction of "summary trial" under Code, s. 777, offered a plea of guilty without being put to his election under Cr. Code, s. 778 of trial before the magistrate.

R. v. Therrien: Therrien v. Malepart, (2), 28 D.L.R. 462, 26 Can. Cr. Cas. 309.

TRIAL WITHOUT JURY—SPEEDY TRIAL.

On taking the prisoner's election to be tried before a judge, without a jury, under the "speedy trials," part of the Cr. Code, it is essential under Cr. Code, s. 827, that the prisoner should be informed that he may remain in gaol or under bail if the court should so decide, in the event of his electing a jury trial, but if the conviction returned to a writ of habeas corpus recites in conformity with Code, form 60, that the prisoner, "on being brought before the judge and asked if he consented to be tried before such judge without the intervention of a jury, consented to be so tried," and the conviction further shows that the prisoner pleaded guilty of an offence, which was properly triable under Part 18 (speedy trials), it is not an objection to same on habeas corpus, that it did not further recite the giving of the statutory information; the effect of Code, form 60, and of Cr. Code, s. 1152, as to forms is to make the conviction sufficient in that respect to show jurisdiction, without reciting therein all of the requisites of jurisdiction under Code 827; the prisoner's remedy is he desired to show that the statutory information under Code, s. 827, was not given is to appeal by way of reserved or stated case under Cr. Code, s. 1014, etc. [R. v. Mali (No. 1), 1 D.L.R. 256, 19 Can. Cr. Cas. 184; R. v. Mali (No. 2), 1 D.L.R. 484, 19 Can. Cr. Cas. 188, followed; R. v. Howell, 16 Can. Cr. Cas. 178, 19 Man. L.R. 317; R. v. Crooks, 19 Can. Cr. Cas. 150, 4 S.L.R. 335, approved.]

R. v. Therrien (1), 28 D.L.R. 57, 25 Can. Cr. Cas. 275, 17 Que. P.R. 285.

TERRITORIAL JURISDICTION OF MAGISTRATE.

Cr. Code, s. 577, applies to give jurisdiction to a city police magistrate to try with the consent of the accused, under s. 777 (2) an offence committed outside of his territorial jurisdiction but within the same province, as to which the accused is found or apprehended within such territorial jurisdiction. [Re Seeley, 14 Can. Cr. Cas. 270, 41 Can. S.C.R. 5, referred to.]

R. v. Thornton, 30 D.L.R. 441, 26 Can. Cr. Cas. 120, 9 A.L.R. 163, 34 W.L.R. 178, 308, 9 W.W.R. 825, 968.

SPEEDY TRIAL ON CONSENT—JURISDICTION.

The validity of a speedy trial at a County Court Judge's Criminal Court at which counsel professed to act for the Crown is not affected by the lack of proof that he had been appointed "prosecuting officer" and was therefore entrusted with the statutory duty under Cr. Code, s. 827 (amendment of 1909), of preferring the charge on which the accused had been committed for trial; the maxim omnia præsumunter, etc., applies where the contrary does not appear; and, it is to be assumed notwithstanding the unnecessary signature of a Crown counsel to the written charge that the same is being prosecuted by the duly appointed clerk of the peace for the county whose duty it is under the provincial statute constituting the court, "to issue all process, arraign prisoners, record verdicts," etc. The jurisdiction of speedy trial under Part 18 at a County Judge's Criminal Court attaches where the defendant had been committed to goal for trial but was subsequently released on bail to appear at the County Judge's Criminal Court, if he attends and elects speedy trial under Part 18, although he may not have been formally taken into custody by the sheriff before the trial commenced. [R. v. Lawrence, 1 Can. Cr. Cas. 295, 5 B.C.R. 160; R. v. Cameron, 1 Can. Cr. Cas. 169;

R. v. Komiensky, 7 Can. Cr. Cas. 27; R. v. Day, 20 Can. Cr. Cas. 325, 16 B.C.R. 323, referred to.]

R. v. Jun Goon, 28 D.L.R. 374, 25 Can. Cr. Cas. 415, 22 B.C.R. 381, 33 W.L.R. 761, 10 W.W.R. 24.

A summary conviction by a police magistrate is not invalid where it appears that the prisoner, on being arraigned, was informed by the magistrate's clerk in the words of the statute that he might at his option be tried forthwith by such magistrate without a jury or remain in custody or under bail as the court directed, to be tried in the ordinary way by the court having criminal jurisdiction, although the date of the sitting of the latter court was not specified. A summary conviction by a police magistrate will be sustained where the prisoner was not, on the day of trial, informed in the words of the statute that he could elect to be tried forthwith by such magistrate or be held for trial in the ordinary way by the court having criminal jurisdiction if the prisoner had been duly notified of such privilege upon his arraignment on a previous date. A conviction before a police magistrate upon a summary trial is not vitiated by the fact that the clerk of the court and not the magistrate, informed the accused in the words of the statute that he might elect whether he would be forthwith tried by the magistrate or be held for trial in the ordinary way by the court having criminal jurisdiction. [R. v. Ridebaugh, 7 Can. Cr. Cas. 340, referred to.]

The King v. Barnes, 19 Can. Cr. Cas. 465, 21 Man. L.R. 357, 18 W.L.R. 630.

Where a statute expressly requires certain things to be done before a magistrate acquires the jurisdiction of summary trial, the record must shew that such things were actually done, or that the statute was substantially complied with, otherwise the conviction cannot stand.

The King v. Crooks, 19 Can. Cr. Cas. 150, 4 S.L.R. 335.

It is not necessary that a police magistrate should, when informing a prisoner that he may elect whether he will be tried summarily by the magistrate or held in custody for trial in the ordinary way by the court having criminal jurisdiction, personally address the prisoner in the words of s. 778 of the Criminal Code, 1906 (amendment of 1909); it is sufficient that the statutory words were addressed to the prisoner by the magistrate's clerk on the magistrate's behalf in open court.

The King v. Barnes, 19 Can. Cr. Cas. 465, 21 Man. L.R. 357, 18 W.L.R. 630.

JURISDICTION — SUMMARY TRIAL — THEFT UNDER $10.

The consent of the accused is essential for the summary trial by a magistrate under Cr. Code, s. 773 (a) of a charge under s. 379 of the Cr. Code (1906), of theft from the person of less than $10. [The King v. Conway, 7 Can. Cr. Cas. 129, referred to.]

The King v. Bonin, 20 Can. Cr. Cas. 180.

SUMMARY TRIALS CLAUSES—THEFT.

An information for theft of property of less value than $10 may be laid and preliminary inquiry held before a Justice of the Peace in New Brunswick in his capacity as such, although he was also a county stipendiary magistrate with power of summary trial under Part 16 of the Cr. Code (Code, s. 773), without any obligation to give the accused an opportunity to elect for a summary trial before such county stipendiary magistrate. [R. v. Wener, 6 Can. Cr. Cas. 406, cited.]

R. v. Howe, 24 Can. Cr. Cas. 215, 42 N.B.R. 378.

ACCUSED TO BE PERSONALLY PRESENT—FULL ANSWER AND DEFENCE.

For the purpose of the summary trials clauses of the Cr. Code, the accused must be personally present; and it is not competent for a magistrate to proceed with a summary trial as for an indictable offence in the absence of the accused, although his counsel is present on his behalf prepared to make option under Code, s. 778, as to mode of trial, and although the latter produces a written authority in that behalf signed and sworn to by the absent defendant. The word "answer" as used in Code, s. 786, in the phrase "full answer and defence" has no special reference to the question to be put by the magistrate to the accused in certain cases on taking an election for or against summary trial, but applies alike to summary trial cases in which there is no right of election by the accused. The words "full answer and defence" used in Code, ss. 715, 786 and 942, mean that the accused can invoke every means both in law and in fact to meet the charge; the word "answer" being specially applicable to a defence on the facts and the word "defence" applying both to matters of testimony and matters of law. Where a magistrate has jurisdiction over the particular offence either as one for which a summary conviction may be made or as one for which he has power of summary trial as for an indictable offence without the consent of the accused, it is essential to the exercise of the latter jurisdiction that the magistrate should expressly declare on commencing the trial that he will proceed under the "summary trials" clauses of the Code. [R. v. Belmont, 23 Can. Cr. Cas. 89, followed.]

R. v. Romer; R. v. Johnson; R. v. Farrell, 23 Can. Cr. Cas. 235.

SUMMARY TRIAL OF INDICTABLE OFFENCE.

A magistrate holding a summary trial for an indictable offence under Part 16 of the Code is not authorized, after hearing both sides, to adjourn the trial and to remand the accused for trial "until called on," where the evidence does not satisfy the magistrate either of the guilt or inno-

cence of the accused; the prisoner is in such case entitled to the benefit of the doubt and to an acquittal, and prohibition will be granted to restrain the magistrate from proceeding to hear further evidence alleged to have been discovered by the Crown, and in respect whereof the accused was again summoned to receive judgment upon the original charge.

R. v. White, 24 Can. Cr. Cas. 277, 34 O.L.R. 370.

SUMMARY TRIAL—ELECTION—HABEAS CORPUS.

Where a committal for trial for an offence alleged to have been committed in a city to which subs. 2 of s. 777 applies has been made by a county stipendiary not authorized to hold a summary trial in Nova Scotia under s. 777, subs. 2, the Superior Court may enable the prisoner to elect trial before the city stipendiary magistrate having the extended jurisdiction of s. 777 by granting his application for writs of habeas corpus and recipias corpus to transfer him from the gaol to the city magistrate's court.

R. v. Foley, 24 Can. Cr. Cas. 150.

RE-ELECTION FOR JURY TRIAL.

A prisoner who has duly elected in favour of a speedy trial before a County Judge without a jury has no right thereafter to re-elect in favour of a jury trial. [R. v. Keefer, 5 Can. Cr. Cas. 122, 2 O.L.R. 572, followed; R. v. Pallard, 1 Can. Cr. Cas. 96, 28 O.R. 489, and R. v. Prevost, 4 B.C.R. 326, referred to.]

R. v. Howe, 24 Can. Cr. Cas. 215, 42 N.B.R. 378.

SUMMARY TRIAL — DEPOSITIONS AND NOTES OF EVIDENCE.

Where a magistrate holds a summary trial under Part 16 of the Cr. Code for an indictable offence, and the accused pleads not guilty, it is obligatory that the depositions should be taken down in writing, and where there are no notes of the evidence the conviction will be set aside on certiorari; the absence of any notes of evidence is irreconcilable with ss. 793 and 1124, which latter section is made applicable by Cr. Code, s. 797 (2). [R. v. Harris, 18 Can. Cr. Cas. 392; Re Lacroix, 12 Can. Cr. Cas. 297, and R. v. Jung Lee, 22 Can. Cr. Cas. 63, followed.]

Perron v. Senecal, 24 Can. Cr. Cas. 358, 17 Que. P.R. 134.

SUMMARY TRIAL—CR. CODE, S. 773—LESSOR OFFENCE THAN THAT CHARGED.

On an information for inflicting grievous bodily harm by an assault, a magistrate exercising the power of summary trial under Code s. 773 (c) may convict for the lesser offence of assault occasioning actual bodily harm. In provinces where the jurisdiction under s. 773 is absolute, there is also jurisdiction under s. 951 to convict for the lesser offence without taking the consent of the accused.

R. v. Adonchuk, 30 Can. Cr. Cas. 301, [1919] 1 W.W.R. 987.

OPTION OF SUMMARY TRIAL — WAIVER BY PLEA IN JURY COURT WITHOUT CLAIM TO NONJURY TRIAL—RE-ELECTION ONLY WITH CONSENT OF PROSECUTING OFFICER —CR. CODE, R.S.C. 1906, C. 146, SS. 823, 828.

After the accused has pleaded to an indictment and a date has been fixed for his trial in the jury court, the accused cannot, without the consent of the prosecuting officer, make option for trial without a jury under the Speedy Trials Clauses of the Cr. Code (Part XVIII.). The speedy trial court at that stage of the proceedings has no jurisdiction in the absence of the consent of the officer prosecuting in the Jury Court and it is not enough in the case of a prosecution in the Court of King's Bench, Crown side, at Montreal, that a consent was given by the clerk of the Court of Sessions of the Peace, the judge of which Court would have been the tribunal for trial without jury, had the right to such mode of trial still subsisted.

R. v. Bissonnette, 31 Can. Cr. Cas. 388.

SUMMARY TRIAL—WAIVER OF ILLEGAL ARREST—RECOGNIZANCE AND PLEA.

Where a person illegally arrested on a charge triable summarily without his consent, gives a recognizance for his appearance and pleads to the charge without protest as to the illegal arrest, he thereby waives his right to object to the magistrate's jurisdiction on that ground; and such waiver is effective although the information was afterwards amended and resworn.

R. v. Kostich, 31 Can. Cr. Cas. 407, [1919] 3 W.W.R. 378.

ELECTION OF SUMMARY TRIAL — PLACE OTHER THAN THAT WHERE ALLEGED OFFENCE COMMITTED—JURISDICTION—ATTEMPTED TRANSFER TO ANOTHER MAGISTRATE—MANDAMUS.

Where an election of summary trial for an indictable offence has been taken and plea made to the charge under Code, ss. 777 and 778, the magistrate who has accepted such election has no jurisdiction to transfer the case for trial before the magistrate of another city of the same province by reason of the fact that the offence is charged to have taken place in such other city. Mandamus will lie to compel the magistrate before whom the option was made to appoint a time for the trial and to proceed therewith.

Re Bain, 31 Can. Cr. Cas. 206, [1919] 2 W.W.R. 709.

SUMMARY TRIAL—DEPOSITIONS IN WRITING —HABEAS CORPUS.

When a person charged with theft demands a summary trial before a magistrate of the district, and is found guilty, he cannot afterwards obtain a discharge

from custody through a writ of habeas corpus on the ground that the depositions of the witnesses were not reduced into writing, as s. 682 of the Cr. Code requiring these depositions to be taken in writing does not apply to summary trials.

Re Britt, 32 Can. Cr. Cas. —, 51 Que. S.C. 448, 18 Que. P.R. 388.

SUMMARY TRIAL—CONSENT TO.

If the accused has been illegally arrested without a warrant on a charge of keeping a disorderly house, and on being brought before the magistrate for summary trial takes objection to his jurisdiction, he will have no authority to proceed with the trial notwithstanding Cr. Code, s. 774, declaring the jurisdiction of the magistrate to be absolute for that offence and not dependent on the consent of the accused to summary trial.

R. v. Wilson, 24 Can. Cr. Cas. 370, 32 W.L.R. 264, 9 W.W.R. 47.

ELECTION OF SPEEDY TRIAL.

A person under an indictment preferred by leave of the judge and against whom there has been no preliminary committal for trial may even after pleading to the indictment and obtaining a continuance be permitted, with the consent of the Crown, to elect for a speedy trial without a jury (Cr. Code, s. 828); and if he does so he cannot attack the conviction in the Speedy Trial Court for want of jurisdiction. The preliminary conditions to jurisdiction is that the accused shall have consented to be tried and that an entry of such consent shall have been made (Cr. Code, s. 827). The procedure of committal and preliminary enquiry (Code, s. 825) does not go to the jurisdiction. [R. v. Walsh (R. v. County Judges Criminal Court), 16 D.L.R. 500, 23 Can. Cr. Cas. 7, referred to.]

R. v. Giroux, 30 Can. Cr. Cas. 101, 26 Que. K.B. 323. [Affirmed in 39 D.L.R. 190, 56 Can. S.C.R. 63.]

SUMMARY TRIAL—ELECTION FOR—STATEMENT OF CHARGE.

On the arraignment of an accused on a charge which cannot be tried summarily without his consent, it is imperatively essential that every word of the statement which s. 778 (2) of the Cr. Code requires the magistrate to make shall be read to the accused before his election.

R. ex. rel. Johnson v. James (Sask.), 31 Can. Cr. Cas. 4, [1918] 2 W.W.R. 994.

SUMMARY TRIAL—ASSAULT—JUSTICES.

Two justices having jurisdiction under Cr. Code, s. 773 (c), to summarily try, with the consent of the accused, a charge of unlawful wounding or inflicting grievous bodily harm (Cr. Code, s. 274), are without jurisdiction to proceed with a summary trial under Part 16, if the charge is laid for an "assault occasioning actual bodily harm" (Cr. Code, s. 295), and a conviction made by them for the lesser offence of common assault upon a charge so laid will be set aside. [R. v. Sharpe, 18 Can. Cr. Cas. 132, followed; R. v. Hostetter, 7 Can. Cr. Cas. 221, doubted.]

R. v. Law, 25 Can. Cr. Cas. 251, 33 W.L.R. 569, 7 W.W.R. 1101.

SUMMARY TRIAL—BAIL.

Where the magistrate or judge, taking the election of the prisoner for summary trial under the "Summary Trials" procedure, Part 16, of the Cr. Code, places before the accused only the option of remaining in custody until the sittings of the Jury Court and omits to inform him that he would be at liberty, in case he did not choose a summary trial, to apply for release on bail to answer the charge at the Jury Court, such omission goes to the jurisdiction of summary trial, and the subsequent proceedings and sentence, although upon a plea of guilty, will be set aside. [R. v. Howell, 16 Can. Cr. Cas. 178, 19 Man. L.R. 317, R. v. Harris, 18 Can. Cr. Cas. 392, followed.

R. v. Morgan; Morgan v. Malepart, 25 Can. Cr. Cas. 192, 20 Rev. Leg. 277.

CHARGE OF THEFT OF PROPERTY EXCEEDING $10 IN VALUE—SUMMARY TRIAL AND CONVICTION BY POLICE MAGISTRATE—PLEA OF "GUILTY"—"CONSENT"—JURISDICTION OF MAGISTRATE—NEW TRIAL CR. CODE, S. 1018 (B).

R. v. Collier, 17 O.W.N. 190.

SUMMARY CONVICTION—CASE STATED BY MAGISTRATE—FORUM—JURISDICTION.

R. v. Walker, 13 O.W.N. 217.

SUMMARY TRIAL BY MAGISTRATE UNDER S. 177 CR. CODE—CONVICTION—MOTION TO QUASH NOT ENTERTAINED—REMEDY BY APPEAL UPON STATED CASE UNDER S. 1013 ET SEQ.

R. v. Harding, 13 O.W.N. 37.

C. WARRANT; COMMITMENT.

(§ II C—50)—WARRANT OF COMMITMENT—SUFFICIENCY.

After conviction under s. 238 (i) of the Cr. Code, it is not necessary that the warrant of commitment should set out the fact that the accused was first asked to give a satisfactory account of herself; if the order sets out all the ingredients of the offence, it is within s. 723(3) of the Code. [Reg. v. Levecque, 30 U.C.Q.B. 509; Reg. v. Arscott, 9 O.R. 541; R. v. Harris, 13 Can. Cr. Cas. 393; R. v. Pepper, 15 Can. Cr. Cas. 314; R. v. Regan, 14 Can. Cr. Cas. 106, distinguished; R. v. Leconte, 11 Can. Cr. Cas. 41; Re Effie Brady, 10 D.L.R. 423, 21 Can. Cr. Cas. 123, applied.]

R. v. Jean Campbell, 28 D.L.R. 385, 26 Can. Cr. Cas. 196, 22 B.C.R. 601.

PRISONER IN GAOL ON CHARGE HEARD BY MAGISTRATE—ELECTION TO BE TRIED ON CHARGE BY JUDGE—SUBSEQUENT TRIAL—NO WARRANT OF COMMITMENT—OBJECTIONS.

The accused "being a prisoner in the gaol" upon the charge heard by a justice, and appearing before the District Judge

and electing to be tried on the said charge, which is the same as that contained in one of the counts of the charge upon which he was subsequently tried, the fact that there is no warrant of commitment on file cannot be an objection to the trial.

The King v. Kostiuk, 47 D.L.R. 299, 31 Can. Cr. Cas. 285, [1919] 2 W.W.R. 852.

COMMITMENT FOR TRIAL—SUMMARY TRIAL.

Where a person is charged before a magistrate authorized to hold a summary trial and elects to be summarily tried by such magistrate for an indictable offence, a preliminary commitment for trial is unnecessary to give the magistrate jurisdiction under Cr. Code, s. 777 (amendment of 1909).

The King v. Davis, 13 D.L.R. 612, 22 Can. Cr. Cas. 34.

EVIDENCE TO WARRANT A COMMITTAL FOR TRIAL—HABEAS CORPUS—REVIEW.

A committal for trial may be made by the justice holding a preliminary enquiry if there was some evidence from which the magistrate could infer that probable cause existed for believing the accused guilty of the crime. Only in extreme cases will his decision in that respect be reviewed on habeas corpus. [R. v. Gillespie, 1 Can. Cr. Cas. 551, and R. v. Delisle, 5 Can. Cr. Cas. 223, referred to.]

R. v. Payne, 30 Can. Cr. Cas. 382.

WARRANT—SERVICE—PROHIBITION.

The omission to serve the accused with a copy of the warrant on which he was arrested does not constitute an illegality which would justify the issue of a writ of prohibition.

Sorgius v. Bouchard, 25 Que. K.B. 242. [Appeal quashed 38 D.L.R. 59, 29 Can. Cr. Cas. 245, 55 Can. S.C.R. 324.]

DISORDERLY HOUSE—GAMING—WARRANT—UNNECESSARY WORDS IN—NOT THEREBY DEFECTIVE—CR. CODE, S. 641.

If a warrant issued under s. 641 of the Cr. Code contains the necessary essentials, i.e., "to go to the place and enter," and the statute gives the constable power to do anything contained in the warrant, it is not bad by reason of its containing the additional matter which may be looked upon as mere surplusage.

R. v. Kong Yick, 25 B.C.R. 269.

ARRESTING WITHOUT WARRANT—CODE, S. 648—THE OPIUM AND DRUG ACT, S. 4—FINDING OPIUM IN POSSESSION OF ACCUSED.

R. v. Tey Sching, [1919] 3 W.W.R. 520.

CERTIORARI — CONVICTION WITHOUT ISSUE OF WARRANT—PLEA OF NOT GUILTY—NO OBJECTION AT HEARING—WAIVER OF OBJECTION—SECTION 1130, CR. CODE.

R. v. Wong Joe, [1918] 3 W.W.R. 672.

(§ II C—51)—SUFFICIENCY OF WARRANTY OF COMMITMENT—COSTS OF CONVEYING TO GAOL.

A warrant of commitment in default of paying a fine for an offence under the Nova Scotia Liquor License Act, and which requires as a condition of release that the prisoner should pay also the costs of conveying him to gaol, should shew by endorsement or otherwise the amount of the latter costs; but, where no bona fide effort has been made to pay the fine, the omission may be cured on a habeas corpus application by giving leave to return an amended warrant. [The King v. McDonald, 16 Can. Cr. Cas. 121, applied; The Queen v. Corbett, 2 Can. Cr. Cas. 499, distinguished.]

Re Leblanc, 15 D.L.R. 572, 22 Can. Cr. Cas. 208.

COMMITMENT FOR TRIAL—ORDER FOR FURTHER DETENTION.

Where a magistrate has proceeded to convict in a case in which he had jurisdiction only to hold a preliminary inquiry and commit for trial, the court on quashing the conviction may, if the ends of justice require it, direct the further detention of the accused in custody until he can be brought up for the preliminary inquiry, although there was no habeas corpus application. [R. v. Frejd, 18 Can. Cr. Cas. 110, 22 O.L.R. 566, applied.

R. v. Manzi, 25 D.L.R. 648, 24 Can. Cr. Cas. 359, 8 O.W.N. 533.

SUFFICIENCY OF WARRANT OF COMMITMENT.

A warrant of commitment issued under s. 690 of the Cr. Code 1906, remanding the accused to prison to stand his trial before the King's Bench, is not invalid merely on the ground that the elements of the offence are not recited in the warrant, if an indictable offence be disclosed in the depositions. [R. v. Phillips, 11 Can. Cr. Cas. 89, and R. v. Brown, [1895] 1 Q.B. 119, followed.]

R. v. Beaudoin, 17 D.L.R. 273, 22 Can. Cr. Cas. 319.

SUFFICIENCY OF—SUMMARY TRIAL.

Where there is a good and valid conviction by two justices sitting together as a summary trial court under Part 16 of the Cr. Code, a warrant of commitment thereunder is validated under Cr. Code, s. 1130, although signed and sealed by one of such justices only and although it recites that the accused was convicted before the signing justice and makes no mention of the other having participated in the trial.

R. v. James, 25 D.L.R. 476, 25 Can. Cr. Cas. 23, 9 A.L.R. 66, 9 W.W.R. 235, 32 W.L.R. 528.

WARRANT OF COMMITMENT—POLICE MAGISTRATE SIGNING AS "P.M."

It is not a valid objection to a warrant of commitment that the committing magistrate in signing and sealing the warrant wrote after his name merely the letters "P.M." instead of spelling out his official designation of "police magistrate," where

his official capacity was recited in full in the body of the warrant.

Re Effie Brady, 10 D.L.R. 424, 21 Can. Cr. Cas. 123, 5 A.L.R. 400, 23 W.L.R. 333.

CONVICTION—SUFFICIENCY OF.

A conviction which accurately relates the facts should not be held to be bad simply because the description of the offence varies slightly from the language of the enactment creating it if the offence as described is really one within the meaning of such enactment.

R. v. Harry, 48 D.L.R. 265, 31 Can. Cr. Cas. 288, [1919] 3 W.W.R. 298.

SUFFICIENCY OF WARRANT OF COMMITMENT.

A warrant of commitment is not void because it does not shew that the prisoner consented to be tried summarily for an indictable offence and where the conviction, which was before the court on an application by the prisoner for his discharge from custody on habeas corpus, shewed that he consented to be so tried, the commitment is validated under s. 1121, Cr. Code, 1906, which provides that no warrant or commitment shall be held void by reason of any defect therein, if it is therein alleged that the defendant has been convicted and there is a good and valid conviction to sustain the same. [Reg. v. Sears, 17 C.L.T. 124, distinguished.]

The King v. Barnes, 19 Can. Cr. Cas. 465, 21 Man. L.R. 357, 18 W.L.R. 630.

CHAPTER 16 OF 8-9 GEO. V. (CAN.) S. 1 (4).

Where on motion to quash conviction it appeared that complainant was described in the information as "of Edmonton, Juvenile Court Probation Officer" and in the conviction (directing payment of his costs) as "Juvenile Court Probation Officer"; held sufficient to raise presumption that the prosecution (under s. 1 of c. 16 of 8-9 Geo. V. [Can.] was set on foot by one who then was, and who was known by the magistrate to be, an officer of a Juvenile Court, fulfilling requirement of subs. 4 of said section).

R. v. Sewell, [1919] 1 W.W.R. 799.

(§ II C — 52) — EXAMINATION OF WITNESSES PRIOR TO ISSUING WARRANT.

The magistrate may, under Cr. Code, s. 655, hear witnesses for his own information upon the application for a warrant. [Ex parte Coffon, 11 Can. Cr. Cas. 48, specially referred to.]

The King v. Coulombe, 6 D.L.R. 99, 20 Can. Cr. Cas. 31.

D. NECESSITY OF INDICTMENT; PRESENTMENT OR INFORMATION.

(§ II D—56)—CRIMINAL INFORMATION FOR LIBEL.—LEAVE TO FILE.

Leave to file a criminal information for libel can only be granted by the Full Court in Nova Scotia, i.e., the provincial Supreme Court, sitting en banc; a single judge, although presiding over a court for the disposal of criminal business in a county, has no jurisdiction to grant the leave. [R. v. Beale, 1 Can. Cr. Cas. 235, 11 Man. L.R. 448, and R. v. Labouchere, 12 Q.B.D. 320, 15 Cox C.C. 415 referred to.]

R. v. Burgess, 21 D.L.R. 333, 23 Can. Cr. Cas. 424, 48 N.S.R. 241.

(§ II D—58)—CHARGE ON SPEEDY TRIAL.

It is not necessary that the consent of the judge should be required by s. 834 of the Cr. Code as amended by c. 9 of 8-9 Edw. VII. (Can. 1909), should be formally expressed, either verbally or in writing before proceeding with the trial of the prisoner on a substituted charge; such consent may be inferred from the fact that the judge himself drew attention to the new charge, put the prisoner to his election, and proceeded with the trial. [The King v. Cohn, 36 N.S.R. 240; The King v. Cohon, 6 Can. Cr. Cas. 386, distinguished.]

The King v. Sylvester, 1 D.L.R. 186, 19 Can. Cr. Cas. 302, 45 N.S.R. 525.

SUMMARY TRIAL—POWER OF MAGISTRATE AS TO AMENDMENT—CR. CODE, 1906, PART 16.

The probable effect of Part 16 of the Cr. Code, R.S.C. c. 146, dealing with summary trials of indictable offences, is to give to the magistrate trying such offence without indictment the same powers of amendment as are given to the courts upon the trial of the same offence under an indictment.

R. v. Crawford, 6 D.L.R. 380, 20 Can. Cr. Cas. 49, 5 A.L.R. 204, 22 W.L.R. 107, 2 W.W.R. 952.

E. CONCURRENT PROCEEDINGS.

(§ II E—60)—CONCURRENT PROCEEDINGS, HOW DESTRAINED — PRIORITY — POLICE COMMISSIONER.

The Alberta statute, c. 13, of 1906, respecting magistrates, as amended by s. 9 of c. 5 of 1907, which vests exclusive jurisdiction in the justices first having cognizance of the fact in criminal cases triable by them, applies to an officer (for example, a commissioner of police) exercising the jurisdiction of two justices of the peace.

R. v. Bloom, 15 D.L.R. 484, 22 Can. Cr. Cas. 205, 7 A.L.R. 1, 26 W.L.R. 459, 5 W.W.R. 897.

ALTERNATIVE MODES OF PROSECUTION.

Where the statutory direction is that a penalty may be recovered or enforced either by indictment or by summary proceedings under Part XV. of the Cr. Code, the choice of tribunal rests with the prosecution; the defendant is not entitled to demand that the proceedings shall be by way of indictment under which alone he could obtain a jury trial.

R. v. Spence, 31 Can. Cr. Cas. 365.

COURTS — TRIAL — BANK CLAIMING OVERPAYMENT TO DEFENDANT IN CASHING CHEQUES — CRIMINAL CHARGE LAID — BEFORE DECISION GIVEN IN CRIMINAL TRIAL, CIVIL ACTION BEGUN—CONTENTION RAISED THAT IMMEDIATELY EVIDENCE DISCLOSES CRIMINAL OFFENCE NOT PROSECUTED TO CONVICTION OR ACQUITTAL PLAINTIFF CANNOT "PROCEED WITH CIVIL ACTION — CODE, S. 13 — WHETHER ULTRA VIRES—OFFENCE DISCLOSED NOT FELONY AT COMMON LAW—DOUBT WHETHER PRINCIPLE LAW AT PRESENT TIME.

The Standard Bank of Canada v. Shuen Wah, [1919] 1 W.W.R. 586.

F. PLEADING; MOTIONS; DEMURRER.

(§ II F—65)—PLEA OF "GUILTY"—JURISDICTION OF MAGISTRATE.

Although an accused has pleaded "guilty," yet, if before the case is closed, it clearly appears that the accused never intended to admit the truth of a fact which is an essential ingredient in his guilt and, therefore, pleaded "guilty" under a misapprehension of what constitutes guilt, it is the duty of the presiding judge or magistrate to offer to allow him to withdraw his plea, if he wishes to do so, and to enter a plea of "not guilty." If, however, the magistrate nevertheless forthwith enters a conviction he exceeds the jurisdiction to do so given him by s. 721 (2), Cr. Code.

R. v. Richmond, 39 D.L.R. 117, 29 Can. Cr. Cas. 89, 12 A.L.R. 133, [1917] 2 W.W. R. 1200.

NOLLE PROSEQUI—EFFECT.

The entry of a "nolle prosequi" may be a termination of the prosecution in favour of the accused for the purposes of his action for malicious prosecution where not entered on account of an irregularity or technicality.

Richard v. Goulet, 19 D.L.R. 371, 23 Can. Cr. Cas. 327, 45 Que. S.C. 374.

JUVENILE DELINQUENTS ACT—CONVICTION NOT AUTHORIZED ON PLEA OF "GUILTY" BY JUVENILE.

The Juvenile Delinquents Act, 1908, Can., does not permit of a conviction based upon a plea of guilty made by a juvenile charged thereunder.

R. v. Wigman, 30 Can. Cr. Cas. 362, 25 B.C.R. 350.

STATED CASE—S. 761, CR. CODE—RULES OF COURT (ALTA.)—PRELIMINARY OBJECTION.

Re Wood & Hudson's Bay Co. (Alta.), 40 D.L.R. 160, [1918] 1 W.W.R. 731.

SUMMARY CONVICTION—RIGHT TO CHANGE PLEA—GUILTY OR NOT GUILTY.

If the same principles apply to a trial under Part 15 of the Cr. Code as to a trial of an indictable offence before a judge and jury in a Superior Court, it is clear that, after judgment, it is too late to apply to change a plea of "guilty" to one of "not guilty"; [R. v. Sellie, 9 Car. & P. 346]; and even before judgment the court has a discretion in the matter; [R. v. Plummer, [1902] 2 K.B. 339, at p. 349.] If such principles do not apply, the applicant is in no better position, for there is no provision in Part 15 allowing an accused to withdraw an admission as to the truth of an information and as to the absence of sufficient cause why he should not be convicted.

R. v. O'Brien, 11 S.L.R. 484, [1918] 3 W. W.R. 848.

(§ II F—68)—MOTION TO QUASH CONVICTION—CHARGE TO JURY.

In a criminal trial where insanity is pleaded as a defense the jury should be told by the Trial Judge in his charge that every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary is proved to their satisfaction; and that to establish a defence on the ground of insanity it must be clearly proved that at the time of the committing of the act the party accused was labouring under such a defect of reason from disease of mind as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong. In considering a portion of the Trial Judge's charge objected to, such portion must be taken and construed in conjunction with the charge as a whole and will not be a ground for quashing the conviction if it is evident that the jury could not have understood otherwise than that the prisoner was entitled to an acquittal, if they were satisfied that he did not know the nature and quality of the act he was charged with committing and that it was wrong.

The King v. Keirstead, 42 D.L.R. 193, 30 Can. Cr. Cas. 175, 45 N.B.R. 553.

INDICTMENT—GRAND JURY—DELIBERATION —SIGNATURE—CR. CODE, S. 872.

There are no illegalities to justify the quashing, on motion, of an indictment for incest, for indecent assault, and for assault with bodily wounds, because (a) the Deputy Crown Attorney remained in the grand jury room during the proceedings and the grand jury's deliberations, and helped in the conduct of the inquest; (b) there was at the same time present in the room two constables sworn in to accompany the grand jurors, and also one interpreter; (c) the indictment was signed only by a deputy, no mention being made that he is the deputy of the Crown Attorney.

Gagnon v. The King, 24 Can. Cr. Cas. 51, 23 Que. K.B. 390.

INDECENT ASSAULT—CONVICTION—MOTION FOR STATED CASE.

R. v. Tansley, 19 Can. Cr. Cas. 42, 3 O.W. N. 411, 20 O.W.R. 698.

(II F—69)—Having "objectionable matter" in possession — Consolidated orders respecting censorship (May, 1918)—Orders I. and II.—Information laid on behalf of Attorney-General for Canada—Presumption—Conviction by police magistrate—Validity — Jurisdiction — Possession of prohibited publications — Certificate of magistrate—Return—Rules (of 1908) 1279 et seq.—War Measures Act, 1914.

R. v. Ollikkila, 17 O.W.N. 226.

Offence of having prohibited publications in possession—Publications in enemy language—Dominion Orders in Council—War Measures Act, 1914—Police magistrate's conviction—Amended conviction—Cr. Code, s. 1124 — Information — Sufficiency—Presumption—Plea of "guilty"—Cr. Code, ss. 852, 853, 855—Evidence taken after plea—Nature of offence—Justification of punishment imposed—Jurisdiction of magistrate—Description of offence—Authority of press censor—List of prohibited publications.

R. v. Zura, 17 O.W.N. 224.

G. Former jeopardy.

(§ II G—70)—Former jeopardy—Effect of a nolle prosequi in former prosecution for same offence.

A stay of proceedings by the Attorney-General entered of record under Cr. Code, s. 962 is in effect a nolle prosequi, and, while it puts an end to the prosecution under the indictment then before the court it is not a bar to a fresh prosecution for the same cause if the nolle prosequi was entered before the impannelling of the jury or other proceedings amounting in law to a placing of the accused in jeopardy. (Per Sutherland, J., in court below.)

R. v. Spence, 31 Can. Cr. Cas. 365.

Former jeopardy—Different counts.

In a criminal case where the formal charge contains more than one count, the accused who has pleaded not guilty may be refused leave to plead guilty to the count for the minor offence in order to base thereon a plea of autrefois convict as a defence against the other and more serious counts based on the same state of facts. [R. v. Miles, 24 Q.B.D. 423, referred to.]

R. v. Lombard, 15 D.L.R. 613, 22 Can. Cr. Cas. 232, 7 A.L.R. 270, 26 W.L.R. 647, 5 W.W.R. 1089.

Prior conviction made without jurisdiction.

A conviction for theft will not be quashed on the ground that a former conviction had been made upon the same charge, if the evidence on the later charge proves that the magistrates who had purported to make the former conviction had no jurisdiction in the matter.

R. v. Taylor, 15 D.L.R. 679, 7 A.L.R. 72, 22 Can. Cr. Cas. 234, 26 W.L.R. 652, 5 W.W.R. 1105.

Res judicata in criminal matters—Prior conviction.

Any question of res judicata under Cr. Code, s. 15, in favour of the accused, because of a prior conviction and not covered by a plea of autrefois convict, will be barred by a plea of guilty entered for the accused after the dismissal of the plea of autrefois convict.

R. v. Pope, 15 D.L.R. 664, 7 A.L.R. 169, 22 Can. Cr. Cas. 327, 26 W.L.R. 659, 5 W.W.R. 1070.

Former jeopardy.

An acquittal upon a charge of assisting a prisoner to escape from the charge of a constable is a bar upon a plea of autrefois acquit to a subsequent charge of assaulting a police officer while assisting the constable in pursuit of such escaping prisoner.

R. v. Stanhope, 22 Can. Cr. Cas. 76.

Indictment — Nolle prosequi — Cr. Code, s. 962—Entry of stay of proceedings—New information for same cause—Defendant not placed in jeopardy under indictment — Fresh prosecution not barred.

R. v. Spence, 16 O.W.N. 9. [Affirmed. 16 O.W.N. 55.]

(§ II G—71)—Former jeopardy—Prior discharge on habeas corpus.

An indictment may regularly be laid at the instance of the Attorney-General against a person who had been arrested for the same offence in proceedings before a magistrate, but who had been set at liberty on a writ of habeas corpus allowed for irregularities in essential parts of the procedure before magistrates and not on the merits as to conviction.

R. v. Dick, 15 D.L.R. 330, 15 Que. P.R. 202.

Previous conviction as bar.

The King v. McIntyre, 10 D.L.R. 816, 21 Can. Cr. Cas. 216.

(§ II G—79)—Autrefois acquit.

An order discharging the accused on habeas corpus and quashing on certiorari his conviction made by a magistrate on a summary trial upon the ground that the defendant was not properly before the magistrate as he had been arrested without warrant for keeping a disorderly house and that consequently the magistrate was entirely without jurisdiction to try him, will not constitute a bar to a subsequent prosecution for the same offence to answer which the accused was regularly brought before the magistrate by warrant. [R. v. Weiss & Williams, 22 Can. Cr. Cas. 42, 13 D.L.R. 632; Att'y-Gen'l v. Kwok-a-Sing (1873), L.R. 5 P.C. 179, referred to.]

R. v. Young Kee (Alta.), 37 D.L.R. 121, 28 Can. Cr. Cas. 236, [1917] 2 W.W.R. 654. [See also [1917] 2 W.W.R. 442.]

FORMER JEOPARDY—QUASHING OF FIRST CONVICTION ON CERTIORARI.

An accused person is to be held not to have been in former jeopardy for the same offence, where, by reason of some defect in the record in the former proceeding, he was not liable to suffer judgment for the offence charged on that proceeding. [R. v. Drury, 3 C. & K. 193, 18 L.J.M.C. 189, applied; R. v. Quinn, 10 Can. Cr. Cas. 412, 11 O.L.R. 242, considered.]

R. v. Weiss, R. v. Williams, 13 D.L.R. 166, 21 Can. Cr. Cas. 438, 25 W.L.R. 286, 4 W.W.R. 1358, 6 A.L.R. 163. [See also 13 D.L.R. 632.

(§ II G—80)—THEFT—FALSE PRETENCES—EVIDENCE—STATED CASE—FORM OF.

R. v. McBrady, 15 O.W.N. 369.

(§ II G—81)—PLEA OF AUTREFOIS ACQUIT—FORMER JEOPARDY—TWO OFFENCES FOUNDED ON ONE ACT.

Where a conviction on summary trial has been quashed in certiorari proceedings on the ground that there was no evidence upon which the magistrate could convict, the result is as if no conviction had been made, and a plea of autrefois acquit will not avail in a subsequent charge setting up another legal aspect of the same facts where the original charge could not properly have been amended to the charge for which the second prosecution was brought. (Cr. Code, 1906, s. 907.) [But see contra, R. v. Weiss (No. 2), 13 D.L.R. 633, 22 Can. Cr. Cas. 42.]

R. v. Weiss, R. v. Williams, 13 D.L.R. 166, 21 Can. Cr. Cas. 438, 6 A.L.R. 163, 25 W.L.R. 286, 4 W.W.R. 1358. [See 13 D.L.R. 632, 23 Can. Cr. Cas. 42 (per Stuart, J.).]

VARIOUS OFFENCES FOUNDED ON ONE ACT—AUTREFOIS CONVICT.

A plea of autrefois convict based on a conviction on summary trial by magistrates for theft of a cheque for $10 enclosed in a post letter is not sustainable as against subsequent charges of having stolen other letters which at the time of the taking by the accused mail clerk were tied together and with a "letter bill" comprised the bundle of registered mail which the accused mail clerk had thrown into his own valise with intent to misappropriate the contents. [R. v. Weiss, 13 D.L.R. 166, 21 Can. Cr. Cas. 438; The King v. Quinn, 10 Can. Cr. Cas. 412, and R. v. Miles, 24 Q.B.D. 423, referred to.]

R. v. Pope, 15 D.L.R. 664, 22 Can. Cr. Cas. 327, 7 A.L.R. 169, 26 W.L.R. 659, 5 W.W.R. 1070.

PLEA OF AUTREFOIS ACQUIT—PRIOR CONVICTION QUASHED ON CERTIORARI—REVIEW ON THE MERITS.

Where a prior conviction by a magistrate upon a summary trial was quashed on certiorari upon the ground that there was not sufficient evidence upon which the magistrate could properly make a conviction, the order to quash is to be viewed as having been made by the court in the exercise of its inherent jurisdiction to supervise the proceedings of inferior courts as distinct from a ground of absence of jurisdiction in the latter; the quashing of the conviction under such circumstances is equivalent to an acquittal on the merits and may under Cr. Code, 1906, s. 907, be pleaded on a plea of autrefois acquit to a second charge of an attempt to commit the same offence. [R. v. Weiss (No. 1), 13 D.L.R. 166, dissented from upon this point.]

R. v. Weiss; R. v. Williams (No. 2), 13 D.L.R. 632, 22 Can. Cr. Cas. 42, 6 A.L.R. 163, 25 W.L.R. 351, 5 W.W.R. 48.

FORMER JEOPARDY—DIFFERENT OFFENCES—CONSPIRACY AND ITS SUBJECT-MATTER.

A conspiracy to commit an indictable offence is quite distinct from the offence alleged to have been the subject of the conspiracy, and a former acquittal for the offence itself is not a bar to a subsequent prosecution for a conspiracy to commit it, although founded upon the same evidence.

R. v. Weiss, R. v. Williams (No. 2), 13 D.L.R. 632, 22 Can. Cr. Cas. 42, 6 A.L.R. 163, 25 W.L.R. 351, 5 W.W.R. 48.

TWO OFFENCES FOUNDED ON ONE ACT.

Where the defendant was convicted of begging on a charge brought under a municipal by-law, and on the same day was charged and convicted of vagrancy as being without visible means of maintenance, it will not be assumed that both convictions are for the same offence.

The King v. Munroe, 19 Can. Cr. Cas. 86, 25 O.L.R. 223.

PRIOR CONVICTION QUASHED ON CERTIORARI.

The burden of establishing a plea of autrefois convict or autrefois acquit is upon the accused; so where the quashing of a prior conviction on certiorari is relied upon as a bar to a new charge, it is error for the judge to assume in favour of the accused that the conviction had been quashed on any particular ground of those upon which the motion to quash had been based where the grounds then set up included technical objections the allowance of which would not bar a second prosecution. [R. v. Weiss & Williams (No. 1) 21 Can. Cr. Cas. 438, 13 D.L.R. 166, R. v. Weiss & Williams (No. 2) 22 Can. Cr. Cas. 42, 13 D.L.R. 633; R. v. Young Kee, 28 Can. Cr. Cas. 236, and R. v. Taylor, 22 Can. Cr. Cas. 234, 15 D.L.R. 679, 7 A.L.R. 72, referred to.]

R. v. Carver (Alta.), 29 Can. Cr. Cas. 122.

(§ II G—82)—FORMER JEOPARDY—IDENTITY OF OFFENCES.

Prohibition will be granted against a magistrate enforcing a summary conviction where the accused had been tried summarily under a previous information and, after all the evidence for the prosecution had been taken and the case closed, the magistrate improperly allowed the prosecutor to withdraw the charge and lay a new information for the same offence, on the hearing

of which he convicted the accused of the offence charged upon new evidence.

R. v. Chew Deb, 9 D.L.R. 266, 18 B.C.R. 23, 23 W.L.R. 308, 3 W.W.R. 854.

IDENTITY OF OFFENCES.

To support a plea of autrefois acquit the accused must shew that the offence for which he is on trial is the same as that for which he was convicted, and the plea will not be allowed merely on the ground that the second offence might have been proved instead of the first on the trial of the first information. [See also R. v. Sutherland, 2 O.W.N. 595; R. v. Hazen, 20 A. R. (Ont.) 633.]

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

CERTIFICATE OF DISMISSAL—SUMMARY CONVICTION.

Where a certificate of dismissal has been granted by the magistrate under Cr. Code, s. 730, in respect of a summary conviction matter brought before him in good faith and not collusively, the certificate until set aside is an answer to a subsequent charge laid before another magistrate for the same offence, although no evidence was given for the prosecution on the first charge and an adjournment was refused upon an erroneous view of the magistrate's power to adjourn.

R. v. Stokes (Man.), 29 Can. Cr. Cas. 144.

H. DETERMINING SANITY OF ACCUSED; PROCEEDING WITH TRIAL.

(§ II H—85)—DETERMINING SANITY OF ACCUSED.

Where a person was brought before a magistrate upon a written complaint for an assault upon his wife, who, in her deposition, swore that the accused had twice been confined in an insane asylum, and that since his release therefrom he had continually threatened her with death, and the magistrate remanded the accused to gaol after directing an examination to be made by experts as to his sanity, the magistrate has discretion under subs. 4 of s. 722 of the Cr. Code (1906), 8 days later, on their report not having been made, to sign another remand in the absence of the accused. [Re Sarault, 9 Can. Cr. Cas. 448, distinguished.]

R. v. Bouchard, 4 D.L.R. 317, 20 Can. Cr. Cas. 95.

CARNAL KNOWLEDGE — ADDITIONAL COUNT CHARGING LATER SEDUCTION—SECOND CHARGE DROPPED AFTER CLOSE OF EVIDENCE ON BOTH—WITHDRAWAL OF EVIDENCE OF SECOND OFFENCE.

The King v. Hughes, 17 Can. Cr. Cas. 450, 22 O.L.R. 344.

JUSTICES WITH POWER ONLY TO HOLD PRELIMINARY ENQUIRY MAKING CONVICTION ON PLEA OF GUILTY.

The King v. Frejd, 18 Can. Cr. Cas. 110, 22 O.L.R. 566.

SUMMARY TRIAL OF INDICTABLE OFFENCE—OFFER OF ELECTION MADE BY MAGISTRATE'S CLERK.

R. v. Barnes, 19 Can. Cr. Cas. 465, 21 Man. L.R. 357, 18 W.L.R. 630.

SUMMARY TRIAL OF INDICTABLE OFFENCE—LIMIT OF FINE.

R. v. Stark, 19 Can. Cr. Cas. 67, 21 Man. L.R. 345, 18 W.L.R. 419.

SUMMARY TRIAL OF INDICTABLE OFFENCE—TAKING THE EVIDENCE IN SHORTHAND.

R. v. Bond, 19 Can. Cr. Cas. 9, 21 Man. L.R. 366.

INDICTMENT FOR RAPE—DIRECTION OF ACTING ATTORNEY-GENERAL—AUTHORITY—OF CROWN COUNSEL—CR. CODE, S. 872.

R. v. Faulkner, 19 Can. Cr. Cas. 49, 16 B.C.R. 229, 18 W.L.R. 634.

ELECTING SPEEDY TRIAL—VOLUNTARY APPEARANCE.

R. v. Day, 20 Can. Cr. Cas. 325, 16 B.C. R. 323.

JURISDICTION OF POLICE MAGISTRATE NOT HAVING EXTENDED POWERS OF CITY MAGISTRATE.

The King v. Sharpe, 18 Can. Cr. Cas. 132 (Man.).

STENOGRAPHER'S OATH OF OFFICE—PRELIMINARY ENQUIRY.

The petitioner's affidavit in support of an application for habeas corpus that the stenographer who transcribed the evidence at the preliminary enquiry who had not been sworn will not be credited as against the certificate of oath signed by the magistrate and filed in the record.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

TWO PRELIMINARY ENQUIRIES AT THE SAME TIME.

That the magistrate proceeded with the hearing of the evidence on preliminary enquiries for two offences at the same time, against the same accused, is not a ground for habeas corpus in respect of his committal for trial.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

PLACE OF TRIAL—RIGHT OF ACCUSED TO BE TRIED IN DISTRICT OF THE OFFENCE.

R. v. Lynn (No. 2), 19 Can. Cr. Cas. 129, 16 W.L.R. 324 (Sask.).

KEEPING A DISORDERLY HOUSE, TO WIT, A COMMON GAMING OR BETTING HOUSE—CONVICTION—TWO OFFENCES CHARGED.

R. v. Mah Sam, 19 Can. Cr. Cas. 1, 4 S.L.R. 84, 15 W.L.R. 666.

APPLICATION FOR SUMMONS OR WARRANT—INFORMATION OR COMPLAINT UNDER OATH—HEARING "COMPLAINANT'S" WITNESSES—DIRECTORY PROVISION OF STATUTE.

The King v. Mercier, 18 Can. Cr. Cas. 363 (Que.).

CONSENT OF ACCUSED—FAILURE TO INFORM ACCUSED OF RIGHT TO BAIL.

The King v. Harris, 18 Can. Cr. Cas. 392, 4 S.L.R. 31, 16 W.L.R. 558.

POLICE MAGISTRATE—REFUSAL TO ISSUE SUMMONS—DISCRETION.

Re Broom, 18 Can. Cr. Cas. 254, 3 O.W.N. 51.

INDICTMENT—TRUE BILL—BENCH WARRANT TO BRING IN ACCUSED—BAIL ON CONTINUANCE OF TRIAL.

The King v. Keizer (No. 1), 18 Can. Cr. Cas. 32 (N.S.).

FORM OF RESERVED CASE.

The questions submitted to a Court of Appeal on a case reserved under Code, s. 1014 should be those only which actually arise in the circumstances of the particular case and not merely hypothetical or abstract questions of law.

R. v. Hogarth, 18 Can. Cr. Cas. 272, 2 O.W.N. 727.

SPEEDY TRIAL—ELECTION—COMMITTAL ON PRELIMINARY ENQUIRY—CONVEYING TO GAOL IN ANOTHER DISTRICT.

The King v. Tetreault, 17 Can. Cr. Cas. 259.

ORDERING SEPARATE TRIALS ON DIFFERENT COUNTS OF INDICTMENT.

As each count in an indictment may be treated as a separate indictment (Cr. Code, s. 857), if the jury agree upon some counts and disagree upon others, the Trial Judge may take their verdict on those upon which there is an agreement and may discharge the jury and order a separate trial as to the others before a new jury.

The King v. Toronto R. Co., 18 Can. Cr. Cas. 417, 23 O.L.R. 186, 18 O.W.R. 104.

ACCUSED AS WITNESS FOR DEFENCE.

Allen v. The King, 18 Can. Cr. Cas. 1, 44 Can. S.C.R. 331.

CUMULATIVE OFFENCE—PARTICULARS OR SEPARATE TRIAL—INSTRUCTION.

R. v. Michaud, 17 Can. Cr. Cas. 86 (N.B.)

CONCURRENT STATUTORY PROCEEDINGS.

The acquittal on a criminal trial under Cr. Code, s. 303 for unlawfully operating to procure a woman's miscarriage is not a bar to the statutory proceedings under the Ontario Medical Act, involving the same act as infamous or disgraceful conduct in a professional respect, to strike the name of the accused off the register of physicians and surgeons.

Re Stinson & Medical Council, 18 Can. Cr. Cas. 396, 22 O.L.R. 627.

RECORDER'S COURT—WRIT OF PROHIBITION—ADJOURNMENT OF MORE THAN EIGHT DAYS.

Donohue v. Recorder's Court of Quebec City, 18 Can. Cr. Cas. 182, 12 Que. P.R. 267.

PRELIMINARY ENQUIRY — POSTPONEMENT — ACCUSED ON BAIL.

The delay of 8 days which must not be exceeded between two remands upon a preliminary enquiry does not apply to the case of an accused who is held on bail. The Cr. Code (s. 679) in stating that the accused cannot be detained in prison more than 8 clear days between two adjournments ipso facto permits an adjournment until the ninth day, as the statute expressly provides that the day following the remand is to be counted as the first day.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

CRIMINAL TRIAL—SANITY OR INSANITY OF ACCUSED—INQUIRY—WHEN TO BE HELD.

R. v. Watt, 15 B.C.R. 466.

RECEIVING STOLEN PROPERTY — SUMMARY TRIAL—OPTION AS TO TRIAL.

R. v. Crooks, 19 Can. Cr. Cas. 150, 17 W.L.R. 560 (Sask.).

III. Offences against different sovereignties.

(§ III—90)—OFFENCE AGAINST "DEFENCE OF CANADA" ORDER-IN-COUNCIL, 1917—PROVISION FOR PRELIMINARY INVESTIGATION—FAILURE TO HOLD—CONVICTION QUASHED.

R. v. Auer, 13 O.W.N. 126.

(§ III—93)—DIFFERENT PROVINCES.

A railway conductor may be prosecuted in Alberta under s. 355 of the Cr. Code, for the theft of cash paid him therein by a passenger as fare, notwithstanding it was his duty to account for it in British Columbia, where, in Alberta, he denied to the railway company the receipt of the money, since such denial amounted to a refusal to account therefor in the latter province.

R. v. Martin, 4 D.L.R. 650, 19 Can. Cr. Cas. 376, 4 A.L.R. 329, 21 W.L.R. 658, 2 W.W.R. 602.

IV. Sentence and imprisonment.

A. In general.

(§ IV A—95)—SENTENCE AND IMPRISONMENT.

A sentence to a penitentiary imposed by a magistrate acting under the summary trials clauses of the Cr. Code is subject to the provisions of s. 44 of the Penitentiary Act and a duly certified copy of the sentence is a sufficient warrant of commitment, without a recital of the preliminaries of the trial. [See also Reg. v. Peterson, 6 Man. L.R. 311.]

The King v. Mali (No. 1), 1 D.L.R. 256, 48 C.L.J. 157, 22 Man. L.R. 29, 20 W.L.R. 217, 1 W.W.R. 766.

SENTENCE FOR SEVERAL OFFENCES.

In view of Cr. Code, s. 1005, it would be no objection that one sentence has been pronounced upon a charge tried under the "summary trials" procedure, Part 16 of the Cr. Code (ss. 777 and 778), for two distinct offences disclosed in the written charge on which the accused elected summary trial and pleaded guilty, provided

the sentence was warranted for one of such offences.

R. v. Morgan; Morgan v. Malepart, 25 Can. Cr. Cas. 192, 20 Rev. Leg. 277.

PENITENTIARY SENTENCE—FORMALITIES OF CERTIFIED COPY USED AS WARRANT OF COMMITMENT.

A certified copy of the sentence to a penitentiary is a sufficient warrant for detention of the convict and such certified copy, signed by the deputy clerk of the Crown when acting as clerk of the court, is sufficient under the Penitentiaries Act, R.S.C. 1906, c. 147, s. 44. It is not a ground for habeas corpus that such certificate taken from the minutes of the court which passed the sentence does not purport to include the judge's signature to the memorandum of sentence. [See also R. v. Peterson, 6 Man. L.R. 311; R. v. Mali, 1 D.L.R. 256, 19 Can. Cr. Cas. 184, 22 Man. L.R. 29; R. v. Wright 10 Can. Cr. Cas. 461; Ex parte Smitheman, 35 Can. S.C.R. 189, 490, 9 Can. Cr. Cas. 10, 17.]

Myers v. Malepart, 31 Can. Cr. Cas. 325, 20 Que. P.R. 217.

(§ IV A—99)—SENTENCE—IMPRISONMENT AND WHIPPING—ILLEGALITY OF DIRECTION AS TO TIME OF WHIPPING.

The fixing of the time or times for punishment by whipping ordered to take place during the convict's term of imprisonment is left by Cr. Code, s. 1060 in the discretion of the prison surgeon under whose supervision the whipping is to be done; and it is an excess of jurisdiction on the part of a magistrate holding a summary trial to order in the sentence that ten lashes be imposed 6 weeks after imprisonment and 10 lashes 6 weeks before expiration of the term of 6 months' imprisonment imposed; but the court hearing a habeas corpus application may amend the conviction under Cr. Code, s. 1124 by imposing the proper sentence where satisfied of the offence.

R. v. Boardman, 18 D.L.R. 698, 23 Can. Cr. Cas. 191, 9 A.L.R. 83, 29 W.L.R. 176, 6 W.W.R. 1304.

CORRECTION OF JUDGMENT—EXCESSIVE IMPRISONMENT IMPOSED ON SUMMARY TRIAL.

Where an excessive term of imprisonment has been imposed upon a plea of guilty at a summary trial of an indictable offence, the plea is not equivalent to a "deposition" for the purposes of reducing the sentence in certiorari proceedings by an amendment of the conviction; the latter must, therefore, be quashed where the punishment is excessive and there are no depositions from which the court may, in the terms of Cr. Code, s. 1124, satisfy itself that an offence of the nature described has been committed.

R. v. Alexander; R. v. Shouldice, 13 D.L.R. 385, 21 Can. Cr. Cas. 473, 6 A.L.R. 227, 25 W.L.R. 290, 5 W.W.R. 17.

CORRECTION OF JUDGMENT.

The defendant was convicted under the Speedy Trials Act, Part 18 of the Cr. Code, of fraudulently abstracting electricity to the value of some $13.40 from the St. J. Co., contrary to s. 351 of the Code, and was sentenced to 2 years' imprisonment and to pay a fine of $1,000, one-half of which was ordered to be paid to the St. J. Co. On appeal:—Held, the sentence was erroneous in law and the case was remitted to the court below with directions to impose a sentence of 6 months' imprisonment and a fine of $500.

The King v. Sperdakes, 40 N.B.R. 428.

JUSTICES—CONVICTION FOR UNLAWFUL SALE OF INTOXICATING LIQUOR QUASHED BECAUSE EVIDENCE NOT SUFFICIENT TO PROVE GUILT.

R. v. Gartshore, [1919] 1 W.W.R. 582.

(§ IV A—100)—SENTENCE—JURY TRIAL IN KING'S BENCH, QUEBEC—PERMANENT COURT — ILLNESS OF JUDGE BEFORE SENTENCE DAY AND AFTER VERDICT—JURISDICTION OF ANOTHER JUDGE OF SAME COURT TO SENTENCE.

When the judge who had presided at a criminal trial with a jury before the Court of King's Bench, Quebec, was taken ill between the date of the verdict of guilty and the date to which sentence was deferred and was unable to preside on the latter date, another judge of that court may with the concurrence of the Chief Justice take the place of the Trial Judge and pass sentence.

R. v. Bourret, 24 Can. Cr. Cas. 65.

(§ IV A—101)—IMPRISONMENT WITH HARD LABOUR.

The "imprisonment" as to which Code s. 1057 applies to authorize the addition of hard labour, is not limited to that awarded in the first instance for the offence, but includes also imprisonment in default of paying a fine. [R. v. Nelson, 22 Can. Cr. Cas. 301, 17 D.L.R. 305, 7 S.L.R. 92, approved.]

R. v. Davidson, 35 D.L.R. 82, 28 Can. Cr. Cas. 44, 11 A.L.R. 9, [1917] 2 W.W.R. 160.

FOR OFFENCE UNDER LICENSE ACT.

An accused, condemned to imprisonment without the option of a fine for a third infraction of the License Act, can be incarcerated at once notwithstanding the provision of art. 1159 of the Act (R.S. Que. 1909) that "the execution of a judgment given by the Circuit Court may take place at the expiration of two days from the date of such judgment."

Bouchard v. Prisonkeeper of Three Rivers, 32 Can. Cr. Cas. —, 52 Que. S.C. 456.

MAGISTRATE'S CONVICTION FOR VAGRANCY—SENTENCE TO IMPRISONMENT—SENTENCE SUSPENDED AND DEFENDANT LEFT AT LARGE—SUBSEQUENT DIRECTION OF MAGISTRATE FOR ENFORCEMENT OF SENTENCE—DEFENDANT NOT AGAIN BROUGHT BEFORE MAGISTRATE—WARRANT OF COMMITMENT WITHOUT FORMAL CONVICTION—DEFECTIVE WARRANT—DEFENDANT ARRESTED AND TAKEN TO GAOL—HABEAS CORPUS—MOTION FOR DISCHARGE—DISMISSAL UPON CROWN SUPPLYING CONVICTION AND AMENDED WARRANT.

R. v. Kilgore, 13 O.W.N. 287.

(§ IV A—104)—RECORD—PUNISHMENT BY WHIPPING—STATUTORY DIRECTIONS FOR MEDICAL SUPERVISION.

Failure to set out, in the record of a conviction on summary trial under which the punishment of whipping was ordered, that the whipping should take place under the supervision of a medical officer in the terms of Code, s. 1060 will not invalidate the sentence; the directions of Code, s. 1060 cannot be varied by the magistrate and, even if they should be formally stated in the record (as to which, quære), the omission is an informality only and does not affect the validity of the conviction.

R. v. Boardman, 18 D.L.R. 698, 23 Can. Cr. Cas. 191, 9 A.L.R. 83, 29 W.L.R. 176, 6 W.W.R. 1304.

B. CRUEL AND UNUSUAL PUNISHMENT.

(§ IV B—111)—IMPRISONMENT AT HARD LABOUR—DEFAULT IN PAYING FINE.

Hard labour may be imposed although the imprisonment is only in the alternative of default being made in paying the fine imposed on a summary trial (ex. gr., for aggravated assault).

R. v. Nelson, 17 D.L.R. 305, 22 Can. Cr. Cas. 301, 7 S.L.R. 92, 28 W.L.R. 102, 6 W.W.R. 706.

SENTENCE AND IMPRISONMENT—HARD LABOUR.

Where both fine and imprisonment are imposed on a summary trial for an offence within Cr. Code, s. 781 (amendment of 1913), hard labour may be imposed at the discretion of the justices as an incident to the imprisonment. [R. v. Burtress, 3 Can. Cr. Cas. 536, referred to.]

R. v. Morton, 18 D.L.R. 553, 23 Can. Cr. Cas. 172, 7 W.W.R. 95.

IMPRISONMENT AT HARD LABOUR—SUMMARY CONVICTION UNDER INDIAN ACT (CAN.).

The Indian Act, R.S.C. 1906, c. 81, does not empower an Indian agent to include hard labour in a sentence of imprisonment imposed on summary conviction under s. 139 of the Act for being drunk on an Indian reserve.

R. v. Atkinson, 18 D.L.R. 462, 23 Can. Cr. Cas. 149, 24 Man. L.R. 308, 28 W.L.R. 412, 6 W.W.R. 1055.

C. EXTENT OF PUNISHMENT GENERALLY; EXCESSIVE FINES.

(§ IV C—115)—DISORDERLY HOUSE CASES—PUNISHMENT ON SUMMARY TRIAL.

It is not necessary to impose imprisonment as well as a fine to make subs. (2) of Code, s. 781 applicable; the words "in addition to" and "a further term" in that subsection are intended to make it clear that even where imprisonment in the first instance, as well as a fine, is imposed, then further imprisonment in default of payment of the fine can be given up to 6 months.

R. v. Davidson, 35 D.L.R. 82, 28 Can. Crim. Cas. 44, 11 A.L.R. 9, [1917] 2 W.W.R. 160.

EXCESSIVE IMPRISONMENT — COMMON ASSAULT—AMENDMENT OF CONVICTION—CR. CODE, SS. 738, 1124.

R. v. Daignault (Man.), 10 W.W.R. 374.

(§ IV C—116)—IMPRISONMENT IN DEFAULT OF FINE—SUMMARY TRIAL.

The restriction of Code, ss. 739 (b), by which imprisonment "not exceeding three months" may be ordered in default of payment of a fine on summary conviction under Part XV., do not apply to a conviction made on a "summary trial" under Part XVI. for an indictable offence; the imposition of imprisonment in default is a "proceeding" within Code, s. 798, and the effect of s. 798 is, therefore, to exclude the operation of s. 739 to such a case.

R. v. Davidson (No. 1), 35 D.L.R. 82, 11 A.L.R. 9, 28 Can. Cr. Cas. 44, [1917] 2 W.W.R. 160.

IMPRISONMENT IN DEFAULT OF FINE—SUMMARY TRIAL.

Subsection 2 of Cr. Code, s. 781 (Amendment of 1913), applies to authorize a commitment in default of paying the fine imposed on a summary trial under Cr. Code, s. 773 (c) for aggravated assault, where the sole penalty in the first instance was a fine, as well as to cases where both fine and imprisonment were imposed in the first instance; and this although the imprisonment on default of paying the fine is referred to in the subs. as being for a "further term" not exceeding six months.

R. v. Nelson, 17 D.L.R. 305, 22 Can. Cr. Cas. 301, 7 S.L.R. 92, 28 W.L.R. 102, 6 W.W.R. 706.

(§ IV C—117)—EXCESSIVE FINE—MAGISTRATE'S CONSIDERATION OF EVIDENCE.

In sentencing a defendant found guilty of an offence the magistrate should not increase the severity of the sentence because he considers the defendant guilty of another offence with which he has not been charged.

R. v. Harris, 40 D.L.R. 684, 41 O.L.R. 366, 30 Can. Cr. Cas. 13.

SPECIAL STATUTORY CASES OF THEFT AND RECEIVING—PUNISHMENT ON SUMMARY CONVICTION.

Where the subject-matter of a theft is of any of the special classes for which the procedure of summary conviction is applicable

(ex. gr., stealing a dog worth less than $20), the punishment on a summary conviction for receiving is limited in like manner as for the principal offence by virtue of Cr. Code, s. 401.

R. v. Frizell, 15 D.L.R. 674, 22 Can. Cr. Cas. 214, 5 O.W.N. 801.

EXCESSIVE FINE—STATUTORY LIMITATION OF FINE.

R. v. Johnson, 10 D.L.R. 822, 24 W.L.R. 468.

EXCESSIVE FINE.

The costs imposed on a summary trial are a part of the fine and a fine of $100 without costs is not authorized under Code, s. 781, which in effect declares that the money penalty in cases to which it applies shall not exceed "with the costs $100;" but if a fine of $100 is imposed without any mention of costs it will be presumed that the costs formed a part of the sum of $100 and the conviction will be upheld.

The King v. Stark, 19 Can. Cr. Cas. 67, 18 W.L.R. 419.

SENTENCE—EXCESSIVE FINE ON SUMMARY TRIAL—CR. CODE, S. 781.

Where a penalty in excess of the statutory limit of Cr. Code, s. 781 (amendment of 1913) is imposed on a summary trial without consent (Code, ss. 773 and 774) on a charge of keeping a disorderly house, the remedy is by certiorari (Cr. Code, ss. 599, 797 (2), amendment of 1913, 1124 and 1126), and not by a motion under Cr. Code, s. 1016 (2) to the Court of Criminal Appeal to pass the proper sentence; the latter clause applied only where an appeal may be taken to the Court of Appeal under s. 1013.

R. v. Booth, 23 Can. Cr. Cas. 224, 31 O.L.R. 539.

ONE CONVICTION OF TWO SEPARATE OFFENCES—PENALTIES BULKED IN ONE SUM—SUM EXCESSIVE—THE LIQUOR ACT—POWER TO AMEND CONVICTION, SS. 62, 73—COSTS FIXED IN ONE SUM UNDER CONVICTION—NOTHING TO INDICATE AMOUNT OF COSTS IN EACH CASE—INABILITY TO AMEND.

Where defendant was convicted by justices of two separate and distinct offences (charged in the same information) of unlawfully giving liquor contrary to s. 24 of the Liquor Act in one conviction and was fined a penalty (with alternative of imprisonment) for the two offences bulked in one sum exceeding twice the maximum provided for such an offence, and a sum for costs, there being nothing in the conviction or otherwise before the judge hearing the appeal showing what the costs were in respect of each offence: An application (made on the hearing of appeal from conviction) to amend the conviction (under ss. 62 and 63 of the said act as enacted by subss. 16 and 17 of s. 55 of c. 4 of 1918) was refused and the conviction was quashed, because, even if the judge, being satisfied on the depositions that there was evidence sufficient on which to conclude that an offence against a provision of the Act had been committed, had otherwise the right to amend so as to make two good convictions and adjudge a proper penalty for each offence, he could not so amend in the absence of proper information enabling him to adjudge the proper amount of costs payable in each case. Doubt expressed of power of magistrate to make one conviction for two offences (either generally or under the Liquor Act).

R. v. Scott, [1919] 1 W.W.R. 1064.

(§ IV C—118)—CORRECTION ON APPEAL.

Where the sentence passed by the court below is declared erroneous, the court hearing the appeal under Cr. Code, s. 1018, may, on setting it aside, declare what the proper sentence should be, and remit the case with directions to pronounce the specific sentence declared by the Appellate Court.

R. v. Sperdakes, 24 Can. Cr. Cas. 210, 40 N.B.R. 428.

(§ IV C—119)—REDUCING PUNISHMENT—DISORDERLY HOUSE OFFENCE.

The rehearing on an appeal under s. 754 (summary convictions clauses), is to be "upon the merits," and this permits the District Court by which the appeal is heard to reduce the punishment if it sees fit to do so. [By the Cr. Code amendments, 1913, c. 13, appeals by way of rehearing in disorderly houses cases under Code, s. 773 (f), are now limited to trials before two justices of the peace, sitting together.]

R. v. Miller, 25 Can. Cr. Cas. 151, 25 W.L.R. 296.

D. TIME OF IMPRISONMENT: CUMULATIVE AND INDETERMINATE SENTENCES.

(§ IV D—122)—SENTENCE AND IMPRISONMENT—WHEN TIME BEGINS TO RUN.

Where a defendant on summary conviction is sentenced to imprisonment for a certain term by a magistrate, the period of imprisonment is to be calculated from the time the actual imprisonment commences. [Bowdler's Case, 17 L.J.Q.B. 243; Ex parte Foulkes, 15 M. & W. 612; Braham v. Joyce, 4 Exch. 487, followed.]

R. v. Gregg, 13 D.L.R. 770, 22 Can. Cr. Cas. 51, 6 A.L.R. 234, 25 W.L.R. 183, 4 W.W.R. 1345.

IMPRISONMENT—WHEN NINETY DAYS EXCEEDS THREE MONTHS' LIMIT.

Where the imprisonment has commenced under a sentence for ninety days and at a time of the year which would not include the month of February, and, consequently, the sentence would not in the ordinary course exceed three months which was the maximum penalty allowed for the offence, it is not a ground for discharge on habeas corpus that a ninety-day sentence may under certain contingencies exceed the statutory limit of three months. [R. v. Gabin, 1 Can. Cr. Cas. 59, distinguished.]

R. v. Governor of City Prison; Ex parte Green, 19 D.L.R. 246, 23 Can. Cr. Cas. 293, 48 N.S.R. 214.

SENTENCE AND IMPRISONMENT—RUNNING OF SENTENCE ON SUMMARY CONVICTION.

On a summary conviction awarding imprisonment for four months for a second offence against a liquor law, the defendant who had been allowed at the time of sentence to go at large upon his recognizance to appear when called upon, is not entitled to have the period for which he was so at liberty prior to arrest upon a warrant of committment counted as part of the four months' term. [R. v. Robinson, 12 Can. Cr. Cas. 447, 14 O.L.R. 519, overruled; R. v. Taylor, 12 Can. Cr. Cas. 244, referred to; applied in R. v. Rapp, 18 D.L.R. 690.]

Robinson v. Morris, 23 Can. Cr. Cas. 209.

SENTENCE AND IMPRISONMENT—RUNNING OF SENTENCE—CONVICT ALLOWED AT LIBERTY ON BAIL PENDING APPEAL — QUASHING OF APPEAL.

Where a person under sentence for an indictable offence was improperly given his liberty by taking bail for an appeal where no appeal lay, the time during which the convict was at liberty between the giving of bail and the quashing of the appeal does not run in his favour, although he had served a part of the sentence before bail was accepted; the period of the bail in such case is within s. 3 of the Prisons and Reformatories Act, R.S.C. 1906, c. 148, enacting that the time during which a convict is "out on bail" shall not be reckoned as part of his sentence; and his continuance at liberty after the quashing of the appeal constitutes an "escape" under Cr. Code, s. 196, and on being retaken he must serve the remainder of the time for which his sentence was to run. [Robinson v. Morris, 23 Can. Cr. Cas. 209, 19 O.L.R. 633, applied.]

R. v. Rapp, 18 D.L.R. 690, 31 O.L.R. 117, 23 Can. Cr. Cas. 203.

SENTENCE AND IMPRISONMENT—LIMIT FOR SPECIFIC OFFENCES.

The restriction of Cr. Code, s. 780, by which the imprisonment must not exceed a term of six months where a charge of theft not exceeding $10 is tried summarily under Cr. Code, s. 773, by a magistrate not of the class having extended jurisdiction under Cr. Code, s. 777, applied not only where the accused pleads "not guilty" (Cr. Code, s. 780), but also where he pleads "guilty" and is under s. 778 liable to "such sentence as by law may be passed in respect to such offence, etc."

R. v. Alexander, R. v. Shouldice, 13 D.L.R. 385, 21 Can. Cr. Cas. 473, 6 A.L.R. 227, 25 W.L.R. 290, 5 W.W.R. 17.

(§ IV D—124)—INDETERMINATE SENTENCES—DEDUCTIONS — INDUSTRIAL FARM — MUNICIPAL ACT, 1903, S. 549a—PRISONER CONFINED IN CENTRAL PRISON.

R. v. Gray, 5 O.W.N. 102, 25 O.W.R. 91.

E. PLACE OF IMPRISONMENT.

(§ IV E—125)—PLACE OF IMPRISONMENT—COMMON JAIL.

The "city prison" for the city of Halifax is a common jail within the Canadian Naval Service Act, 1910, c. 43, to which the commander of a ship in the Canadian Naval Service may sentence one of his seamen to be imprisoned for insubordination.

R. v. Governor of City Prison; Ex parte Green, 19 D.L.R. 246, 48 N.S.R. 214.

F. PUNISHMENT OF SECOND OFFENCES AND HABITUAL CRIMINALS.

(§ IV F—130)—CONSIDERATION OF PRIOR CONVICTIONS.

Leave may be given to the Crown after verdict to adduce evidence of previous conviction of the accused for the information of the court in determining the punishment. [See also R. v. Bonnevie, 10 Can. Cr. Cas. 376.]

R. v. Rowluk, 24 Can. Cr. Cas. 127, 8 W.W.R. 995.

G. SUSPENSION OR STAY OF SENTENCE; TIME OF IMPOSING.

(§ IV G—136)—SUSPENSION OF SENTENCE BY MAGISTRATE.

A magistrate holding a summary trial has power under Criminal Code, s. 1081 to suspend sentence in certain cases, but sentence cannot be suspended until there has been an adjudication of guilt.

R. v. White, 24 Can. Cr. Cas. 277, 34 O.L.R. 370.

POLICE MAGISTRATE—WARRANT OF COMMITMENT—HABEAS CORPUS—MINUTE OF ADJUDICATION — SUSPENDED SENTENCE — CRIMINAL CODE, SS. 242A, 1081.

R. v. Knight, 11 O.W.N. 190.

(§ IV G—139)—ALTERNATIVE OF LEAVING THE JURISDICTION—STAY.

Where a magistrate imposes a sentence of three months' imprisonment on convicting the accused tried before him under Part XVI, s. 774, for an indictable offence, and at the same time directs that the accused be given time to leave the city by staying the issue of the commitment for forty-eight hours, the accused is free from arrest under that conviction on returning to the city more than three months after the commitment might have issued, for the sentence of commitment was then spent.

R. v. Fitzpatrick, 25 D.L.R. 727, 25 Can. Cr. Cas. 42, 25 Man. L.R. 627, 9 W.W.R. 191, 32 W.L.R. 423, 441.

H. PAROLE; REPRIEVE; PARDON; TICKET OF LEAVE.

(§ IV H—150) — REPRIEVE — DEATH SENTENCE—DISCRETION OF TRIAL JUDGE—PROPOSED APPEAL TO PRIVY COUNCIL FROM PROVINCIAL COURT OF APPEAL.

The right of the Trial Judge in a capital case to grant a reprieve of the death sentence is discretionary; and where it is sought for the purpose of appealing to the Judicial Committee of the Privy Council on a point of a purely technical character, quite apart from the merits of the conviction, and after a decision by the provincial Court of Appeal against the prisoner, a reprieve will

be refused if in the judge's opinion the further appeal which could be had only by an application to the Privy Council for special leave would be a frivolous one.

R. v. Cook, 19 D.L.R. 318, 23 Can. Cr. Cas. 86

(§ IV H—153)—Partial remission of sentence for good conduct in prison—Power to revoke or forfeit.

A convict in a penitentiary may provisionally earn a remission of part of his sentence by good conduct duly certified in pursuance of the Penitentiary Regulations of November, 1898; but remissions so earned are subject to forfeiture under such rules and this without any hearing in the nature of a trial or any right of the convict to be heard.

R. v. Huckle, 19 D.L.R. 359, 23 Can. Cr. Cas. 73, 6 O.W.N. 661.

Ticket of leave.

Where a convict has been released on ticket of leave from a provincial prison, and, while still under license, is convicted and sentenced to a term in a penitentiary, the remainder of the original sentence which he must serve out on forfeiture of his ticket of leave cannot be added to his penitentiary sentence, but he must, on the expiry of the latter, be sent to the gaol or prison named in the original sentence or, if the second conviction is in another province, then to a gaol or prison of the same class.

The King v. McColl, 19 Can. Cr Cas. 59, 21 Man. L.R. 552.

Gaming house—Summary trial without consent—Limit of penalty.

The King v. Shing, 17 Can. Cr. Cas. 463, 20 Man. L.R. 214.

Punishment on plea of guilty—Fine of corporation — Carrying explosives without proper care.

The King v. Michigan Central R. Co., 17 Can. Cr. Cas. 483 (Ont.).

Summary conviction — Hard labour — Memorandum of fine and imprisonment endorsed on information not stating hard labour.

The King v. Gratton, 17 Can. Cr. Cas. 524 (Que.).

Summary trial — Keeping disorderly house—Police magistrate—Jurisdiction—Fine.

R. v. Stark, 19 Can. Cr. Cas. 67, 18 W.L.R. 419 (Man.).

Summary conviction—Quebec License Act—Hearing and evidence—Conviction—Adjournment—Fine or imprisonment—Discretion of magistrate.

Plante v. Cliche, 20 Can. Cr. Cas. 186, 20 Que. K.B. 553.

Suspended sentence—Discretionary order—Conviction on indictment—Shooting with intent.

The King v. Pettipas (No. 2), 18 Can. Cr. Cas. 74 (N.S.).

Ticket of Leave Act—Forfeiture of license to be at large by subsequent conviction — Prisoner arrested in province other than that in which first sentence imposed.

R. v. McColl, 19 Can. Cr. Cas. 59, 21 Man. L.R. 552.

Summary trial—Stating option of, to accused—Stating right to apply for bail—Record of proceedings.

The King v. Harris, 18 Can. Cr. Cas. 392, 4 S.L.R. 31, 16 W.L.R. 558.

Order of Lieutenant-Governor for detention after acquittal of crime on ground of insanity.

The King v. Trapnell, 17 Can. Cr. Cas. 346, 22 O.L.R. 219, 17 O.W.R. 274.

Attorney-General not compelled to exercise option—Meaning of the word "may"—Speedy trial.

R. v. Sperdakes, 9 E.L.R. 433 (N.B.).

V. Record.

(§ V—155)—District Judge's Criminal Court — Court of Record — Jurisdiction in certain cases—Duty to keep record of case.

R. v. Porhorliuk, 43 D.L.R. 767, 30 Can. Cr. Cas. 281.

Affidavit of magistrate—Stolen goods—Conviction quashed.

The affidavit of the magistrate cannot be looked at by the court in order to perfect or supplement a defective record. [R. v. Crooks, 4 S.L.R. 335, followed.] A conviction for receiving stolen goods, knowing them to have been stolen, quashed, and accused discharged from custody.

R. ex rel. Johnson v. James (Sask.), 31 Can. Cr. Cas. 4, [1918] 2 W.W.R. 994.

CROPS.

Rights to, see Landlord and Tenant; Mortgage; Execution; Levy and Seizure.

Rights of seed merchants and landlord Contract — Priorities — Seizure — Conversion.

An agreement by seed-merchants with the tenant of a farm that the "crop growing, and in all its conditions, should be and remain at all times their property," does not create in their favour a right superior to that of the landlord, who was entitled to one-third of the crop under the terms of his lease priorly executed; and where such share of the crop had been set apart for the landlord and later seized by the seed-merchants, they will be liable to him in conversion.

McArthur v. Niles, 48 D.L.R. 452, 45 O.L.R. 280.

Sale of crop of hay to grow during ensuing season—Subsequent sale of land to a third party—Interest in land.

Sharpe v. Dundas, 21 Man. L.R. 194, 18 W.L.R. 86.

CROSS-EXAMINATION.

See Witnesses.

CROSSINGS.

See Highways; Railways; Street Railways; Automobiles.

CROWN.

I. In general.
II. Rights, powers and liabilities of.

Annotations.

The Crown as a common carrier: 35 D.L.R. 285.

The "Crown": 40 D.L.R. 366.

I. In general.

Submission to arbitration, revocation, see Arbitration, I–15.

Specific performance against, see Specific Performance, I–1.

Exemption of Crown servants from taxation, see Taxes, I F–90.

See Constitutional Law.

(§ I—1)—Crown grants of water lots—condition precedent—Grantee as owner of adjoining land—Status of life tenant.

While the practice of the Crown Lands Department is to sell a water lot to the owner of the adjoining land, a Crown grant thereof applied for by the life tenant under the belief that he had been devised the fee will not necessarily be held by him as trustee for his children entitled to the remainder in fee of such adjoining lands.

Ontario Asphalt Block Co. v. Montreuil, 19 D.L.R. 518, 32 O.L.R. 243.

(§ I—10)—Marks—Crime of unlawfully applying mark of stamp appropriated for use of the Crown—Cr. Code, ss. 432, 433—Proof—Stated case.

R. v. Currie, 13 O.W.N. 198.

Amenable to common law.

The Crown in its business dealings with individuals is subject to the common law.

Bonhomme v. Montreal Water & Power Co., 48 Que. S.C. 486.

(§ I—11)—Lease—Order-in-council—Lease containing clause for renewal—Ultra vires—Void—Whether renewal clause severable.

In 1904, pursuant to an order-in-council recommending the granting of a lease for 21 years to the suppliant of certain fishery privileges in waters described in the order-in-council, the Minister of Marine and Fisheries executed a lease to the suppliant for the said term. The lease contained a provision that upon complying with certain terms and conditions that the suppliants would be entitled to have the option of renewing the lease for a future period of 21 years. In 1913, the deputy minister notified the suppliants that the lease was ultra vires, as not being in virtue of any statute of Canada, and as being repugnant to the common law and that the lease was ab initio void. Held, on a stated case to determine the rights of the suppliants under said lease, that the provision for the renewal of the lease was void and inoperative, and beyond the power of the minister under said order-in-council, but that the clause as to the renewal could be severed, and while that clause was void the lease itself for the term of 21 years was valid and binding. [Pickering v. Ilfracombe R. Co., L.R. 3 C.P. 235, 250; Re Burdett, 20 Q.B.D. 310, followed.]

British American Fish Co. v. The King, 44 D.L.R. 750, 18 Can. Ex. 230.

II. Rights, powers and liabilities of.

See Public Lands; Waters; Expropriation; Carriers; Contracts.

Liability for injury to employees, see Master and Servant, II D–205.

(§ II—20)—Rights, powers and liabilities—Crown-granted lands—Commissioner's power, how limited—Land titles.

Statutory authority given the Commissioner of a province to administer Crown lands cannot be extended so as to cover lands already Crown-granted, in the absence of clear and positive legislation to that effect.

Seippel Lumber Co. v. Herchmer, 18 D.L.R. 237, 19 B.C.R. 436, 28 W.L.R. 952, 7 W.W.R. 333.

Subject to orders of court.

Where the Crown invokes the jurisdiction of the court as a plaintiff, the court may make all proper orders against it.

The King v. The "Despatch," 23 D.L.R. 351, 8 W.W.R. 1253, 52 W.L.R. 13. [Reversed in 25 D.L.R. 221, 22 B.C.R. 365.]

Injury to property "on public work."

Th Exchequer Court has no jurisdiction to award damages against the Crown for injury to property not on a public work resulting from the negligence of any officer or servant of the Crown.

Olmstead v. The King, 30 D.L.R. 345, 53 Can. S.C.R. 450, affirming 16 Can. Ex. 53.

Damage to wharf—Navigable river—Trespasser.

The Crown is not liable to a person having no permission to erect a wharf in navigable and tidal waters between high and low water mark for undermining such wharf, by work done for the improvement of navigation.

Arsenault v. The King, 32 D.L.R. 622, 16 Can. Ex. 271.

Injury to "property on public work."

Except where so provided by statute, the Crown is not liable for wrongs committed by its servants; s. 20 (c) of the Exchequer Court Act (R.S.C. 1906, c. 140), imposes such liability when injury to a person or property on any public work results from negligence of any officer or servant of the Crown; when the thing injured is not on any public work, no such liability

exists, even though the injury arose out of operations connected with such a work.

Piggott & Sons v. The King, 32 D.L.R. 461, 53 Can. S.C.R. 626.

NEGLIGENCE—RAILWAY—PIER.

Negligence of a servant in the unloading of coal for the Intercolonial Railway from a ship moored to a pier is "in, on or about" the operation of the railway, within the Exchequer Court Act (R.S.C. 1906, c. 140, s. 20 (f) as amended by 9 & 10 Edw. VII. c. 19), for which the Crown is liable.

Jacob-Begin v. The King, 33 D.L.R. 203, 16 Can. Ex. 349.

RAILWAYS—FIRES—LEASED ROAD.

The Crown is liable under s. 20 (c) of the Exchequer Court Act (R.S.C. 1906, c. 140, as amended in 1910, c. 19), for an injury resulting from the negligent setting out of fires by section men on a railway track leased by the Crown and operated as part of the Intercolonial railway system.

New Brunswick R. Co. v. The King, 37 D.L.R. 366, 16 Can. Ex. 358.

TORTS—FISHING RIGHTS.

An action for having illegally occupied a fishing right, and for the revenues derived therefrom, is one in tort, and is not maintainable against the Crown except under special statutory authority.

Bouillon v. The King, 31 D.L.R. 1, 16 Can. Ex. 443.

NEGLIGENCE—PUBLIC WORK—HARBOUR OF VICTORIA — GOVERNMENT SCOW — FELLOW-SERVANT.

The harbour of Victoria, B.C., which was a public harbour before British Columbia entered into Confederation, is a public work within the meaning of s. 20 of the Exchequer Court Act. The Crown is not liable for an accident happening on a government scow in the harbour of Victoria, B.C., while engaged in work executed by the Government of Canada for the improvement of the harbour, where the negligence which caused the accident is the negligence of a fellow-servant of the suppliant. [Ryder v. The King, 36 Can. S.C.R. 462, followed; Paul v. The King, 38 Can. S.C.R. 126; Montgomery v. The King, 15 Can. Ex. 374, and La Compagnie Generale D'Entreprises Publiques v. The King, 44 D.L.R. 459 reversing 32 D.L.R. 506, distinguished. See also Desmarais v. The King, post p. 692.]

Coleman v. The King, 44 D.L.R. 675, 18 Can. Ex. 263.

NEGLIGENCE—ACTION FOR TORT—"PUBLIC WORK" — STONELIFTER — EXCHEQUER COURT ACT.

The suppliant's husband was an employee of the Crown working on a stonelifter, the property of the Crown, in the deepening of the ship-channel in the harbour at Montreal, and while so engaged in lifting a boulder from the channel was thrown overboard and drowned. Held, that the action was, in its very essence, one of tort, and apart from special statutory authority, no such action would lie against the Crown, and that the suppliant, to succeed, must bring her action within subs. (c) of s. 20 of the Exchequer Court Act before the amendment of 1917, and that the injury complained of must have occurred on a public work, and was the result of some negligence of an officer or servant of the Crown acting within the scope of his duties or employment. Held, further, following Paul v. The King, 38 Can. S.C.R. 126, that the death of the deceased did not occur on a public work within the meaning of the act, and further on the facts, even assuming that the stonelifter was a public work, that the death of suppliant was an unforeseen event which was not the result of any negligence or misconduct of an officer or servant of the Crown.

Desmarais v. The King, 44 D.L.R. 692, 18 Can. Ex. 289.

NEGLIGENCE—"PUBLIC WORK"—TUG.

A steam-tug engaged in serving government dredges employed in improving a ship channel is not a "public work" within the meaning of the Exchequer Court Act (R.S. C. c. 140, s. 20 (c)), to charge the Crown with liability for injuries resulting therefrom. [Paul v. The King, 38 Can. S.C.R. 126, followed; Chamberlin v. The King, 42 Can. S.C.R. 350; Hamburg American Packet Co. v. The King, 39 Can. S.C.R. 621; Olmstead v. The King, 30 D.L.R. 345; Piggott v. The King, 32 D.L.R. 461, referred to.]

Despins v. The King, 32 D.L.R. 448, 16 Can. Ex. 256.

NEGLIGENCE — UNCOVERED BASIN — PUBLIC BUILDING—TRESPASSER.

A pedestrian falling into an uncovered catch-basin constructed by the Crown, on property not owned by it, to protect a post office building against accumulation of surface water, at a place not used for public travel, is a trespasser, and has no redress against the Crown for injuries sustained thereby.

Northrup v. The King, 37 D.L.R. 483, 16 Can. Ex. 361.

LOSS OF GOODS IN CUSTOMS.

The Crown is not liable for the loss of goods while in the custody of customs officers.

Hodgson, Sumner & Co. v. The King, 33 D.L.R. 734, 15 Can. Ex. 487.

LIABILITY FOR NONAPPROVAL OF PLANS REQUIRED BY CHARTER.

Where the Act incorporating a company, for the purpose of constructing and operating a canal, provided that before the work of construction commenced, the plans, etc., were to be approved by the Governor-in-Council, the refusal of the Governor-in-Council to approve plans submitted does not give the company a claim for damages which could be enforced against the Crown.

Lake Champlain & St. Lawrence Ship Canal Co. v. The King, 35 D.L.R. 670, 54 Can. S.C.R. 461, affirming 16 Can. Ex. 125.

BUILDING CONTRACT—SUBCONTRACTOR—ASSIGNMENT—PRIVITY.

Under a building or construction contract the Crown is not bound to pay any claim asserted by a mere subcontractor, although the Crown has consented to the contract being sublet. Where the Crown declines to assent to any assignment, there can be no implied assignment raised upon a consent to sublet, so as to establish privity between the Crown and a third person to whom the original contractor has sublet the execution of the contract.

Pearson v. The King, 32 D.L.R. 574, 16 Can. Ex. 225.

NEGLIGENCE—PUBLIC WORK.

An action in tort does not lie against the Crown, except under special statutory authority, and the suppliant to succeed must bring the facts of his case within the ambit of subs. (c) of s. 20 of the Exchequer Court Act. (R.S.C. 1906, c. 140).

Theriault v. The King, 38 D.L.R. 705, 16 Can. Ex. 253.

NEGLIGENCE — PUBLIC WORK — POST OFFICE — ELEVATOR.

An injury sustained in the course of repairing an elevator switch in a post office building, the elevator not being for the use of the public, is one happening on a "public work," and having been occasioned by the negligence of a servant of the Crown acting within the scope of his employment, becomes a claim under s. 20 of the Exchequer Court Act, for which the Crown is liable.

Keegan v. The King, 39 D.L.R. 27, 16 Can. Ex. 412.

NEGLIGENCE — PUBLIC WORK — CANAL — FLOODING — RELEASE.

An action does not lie against the Crown for an injury to land from the overflow of a government canal, "occasioned by spring floods and freshets" within the terms of a deed releasing the Crown from liability upon such contingencies; nor does it come under s. 20 of the Exchequer Court Act (R.S.C. 1906, c. 140), subs. (a) and (b), which deals with compensation for a compulsory taking or injurious affection of land, nor under subs. (c) thereof, as an injury on a "public work," the property being situated about 25 miles from the canal route, and the injury not being shewn to have resulted from the negligence of an officer or servant of the Crown acting within the scope of his duties or employment.

Hopwood v. The King, 39 D.L.R. 95, 16 Can. Ex. 419.

INJURY — PRESCRIPTION — PUBLIC WORK — VESSEL ON LAUNCH-WAYS — NEGLIGENCE.

The prescription for filing a petition of right is interrupted by the deposit of the petition with the Secretary of State. An injury to an employee of the Crown, while taking a Crown vessel on launch-ways owned and operated by a company on lands leased from the Crown, is not an injury happening "on a public work" within the meaning of s. 20 of the Exchequer Court Act, and therefore is not actionable against the Crown; the mere fact of a chain breaking is not prima facie negligence of the Crown.

Courteau v. The King, 41 D.L.R. 415, 17 Can. Ex. 352.

RAILWAYS—OPEN SWITCH—AIR BRAKES—FELLOW SERVANT — CONTRIBUTORY NEGLIGENCE — PRESCRIPTION — INTERRUPTION.

An injury to a brakeman on a train of the Intercolonial Railway, resulting from the negligence of the employees of the railway in leaving a switch open without warning, is actionable against the Crown under s. 20 of the Exchequer Court Act. The suppliant having himself been guilty of contributory negligence in failing to have on the air brakes, as required by the rules, the doctrine of faute commune was applied and the damages assessed accordingly. The doctrine of fellow servant is not in force in the Province of Quebec. The prescription for the filing of a petition of right is interrupted by the deposit of the petition with the Secretary of State.

Dionne v. The King, 18 Can. Ex. 88.

RAILWAYS — YARD — INJURY TO TRACKMAN — SHUNTING — APPLIANCES — SIGNALS—LOOKOUT.

The Crown is not responsible for the death of a trackman run over by an engine carefully backing into a yard of the Intercolonial Railway, not occasioned by the negligence of any officer or servant of the Crown in or about the operation of the railway, within the meaning of s. 20 (f) of the Exchequer Court Act, but brought about by the negligence of the deceased in having failed to keep an especially good look-out for train signals as required by the rules. Section 35 of the Government Railway Act, requiring the stationing of a person in the rear of a train moving reversely, and the rules governing the running of trains, do not apply to shunting engines in a railway yard. The fact that the engine attending to the shunting had no sloping tender and no footboard and railing was immaterial under the circumstances.

Cantin v. The King, 18 Can. Ex. 95.

SPECIFIC PERFORMANCE—TORTS.

The court will not decree against the Crown specific performance of its contract entered into with its subjects. Observations upon the effect of s. 10 of the Interpretation Act, R.S.C. 1906, c. 1, in applying the law of the province, as it exists at the time of action brought in cases of tort. [The King v. Desrosiers, 41 Can. S.C.R. 75, referred to.]

Gauthier v. The King, 33 D.L.R. 88, 15 Can. Ex. 444. [Affirmed, 40 D.L.R. 353, 56 Can. S.C.R. 176.]

MORTGAGE — RAILWAY BRIDGE — WORK FOR GENERAL ADVANTAGE OF CANADA—SURPLUS LAND.

The F. & St. J. Bridge Co., operating a work for the general advantage of Canada, and to which the general Railway Act applies, obtained under a special Act a loan of $300,000 from the Crown, for which a mortgage was duly created under the provisions of the said Act. Subsequently the company, under the pretence of disposing of surplus land, sold some of the land so mortgage to one of the directors of the company. Held, that nothing passed under the said conveyance.

Hilyard & Grosvenor v. The King, 16 Can. Ex. 36.

RAILWAYS—INJURY TO BRAKEMAN.

A brakeman on the Intercolonial Railway has no recourse against the Crown for injuries sustained in the course of his employment in the absence of proof of any negligence on behalf of any officer or servant of the Crown giving rise to the accident.

McNeil v. The King, 16 Can. Ex. 355.

ACTIONS AGAINST CROWN MINISTER—NULLITY.

The Sovereign cannot be summoned before the tribunals except in cases and manner provided for by arts. 1011 et seq. C.P.Q. Therefore, the summons to a Minister of the Crown, through an ordinary writ, even in the absence of direct conclusions against him, is illegal and null. The exception in such case can be invoked by a motion against the form or by an "inscription en droit."

Price Bros. v. Shives Lumber Co., 49 Que. S.C. 97. [See 44 D.L.R. 390, also 58 Can. S.C.R. 142.]

(§ II—25)—RAILWAYS—LEVEL CROSSING—NEGLIGENCE—LIABILITY.

The condition of a crossing whereby tracks are allowed to project above a highway level in violation of the Government Railways Act (R.S.C. 1906, c. 36, s. 16) is negligence which will render the Crown liable for an accident caused by round sticks placed between the rails by an unknown person to assist vehicles across the tracks.

Belanger v. The King, 34 D.L.R. 221, 20 Can. Ry. Cas. 343, 25 Que. K.B. 376.

RAILWAYS SMALL CLAIMS ACT—CONSTRUCTION AND OPERATION.

The Government Railways Small Claims Act, 1910, c. 26 (Can.), as amended by Acts 1913, c. 20, 1914, c. 9, does not confer jurisdiction to hear and determine claims for damages arising out of the construction of a railway, but merely those "arising out of operation," although the damages resulting from the construction were caused during the operation of the railway.

Lewis v. General Manager of Government Rys., 33 D.L.R. 20, 50 N.S.R. 326.

GOVERNMENTAL RAILWAYS.

Where an engine driver of a train on a Government railway in the manner of moving his train at a station transgressed the regulations of the railway, and a passenger was injured in alighting from the train by reason of the wrongful conduct of the engine driver, a case of negligence was established for which the Crown was liable under the provisions of s. 20 of the Exchequer Court Act, R.S. 1906, c. 140. (2) The rule as to the preponderance of affirmative evidence over evidence of a merely negative character as laid down in Lefeunteum v. Beaudoin, 28 Can. S.C.R. 89, applied.

Hamilton v. The King, 14 Can. Ex. 1.

LIABILITY—NEGLIGENCE ON GOVERNMENT RAILWAY.

To render the Crown liable upon a petition of right for acts of negligence of servants of the Crown in the operation of a government railway within the provisions of the Exchequer Act, R.S.C. 1906, c. 140, s. 20 (f) (amendment of 1910), such negligent acts must be the proximate, determining and decisive cause of the injury.

Charlton v. The King, 8 D.L.R. 911, 14 Can. Ex. 41.

LIABILITY OF—MISPAYMENT OF MONEY BY TREASURER—RIGHT OF TRUE PAYEE TO DECLARATION.

Where, after the appointment of a receiver for and the dissolution of a partnership, a provincial treasurer made payments of money to one of the partners on behalf of a contractor who was building a railway under a contract with the province; the former is entitled to an action in which the provincial treasurer is joined as a defendant in his official capacity, to a declaration that the money was paid by the provincial government in its own wrong, and that the contractor should be reimbursed therefore, although he cannot recover a judgment against the Crown in such action. [Dyson v. Attorney-General, [1911] 1 K.B. 410, and Burghes v. Attorney-General, [1912] 81 L.J. 105, followed.]

Irvine v. Hervey, 13 D.L.R. 868, 47 N.S.R. 310, 13 E.L.R. 297.

The Crown in its operation of the Intercolonial Railway is not a common carrier, and apart from its statutory duties is not subject to the duties imposed by the common law upon common carriers. [The Queen v. McLeod, 8 Can. S.C.R. 1; The Queen v. McFarland, 7 Can. S.C.R. 216, referred to.]

Williams v. Goverment Ry. Management Board, 11 E.L.R. 10.

CROWN LANDS.

See Public Lands.

CURATOR (Que.).

See Assignment for Creditors; Companies, VI.

CURTESY.

TENANCY BY THE CURTESY—STATUTES—DEED.

Section 22 of c. 97, R.S.B.C. 1897, is repealed by subs. 5 of s. 5 of that statute, as enacted by c. 40 of the B.C. statute of 1898, first schedule; the two provisions are repugnant. Under the later enactment, a husband entitled, upon the death of his wife, to tenancy by the curtesy in her lands, takes one-third for his life; and this was the estate which the defendants acquired by a conveyance from a husband, in the circumstances of the case.

Romang v. Tamburri, 17 W.L.R. 133 (B.C.).

CUSTODY.

Of children, see Divorce and Separation, VI; Infants, I.

CUSTOMS.

(§ I—5)—PRISON-MADE GOODS.

Item 1206, Schedule C, of the Customs tariff (Can. Stat. 1907, c. 11), prohibiting the importation of "Goods manufactured in whole or in part by prison labour," applies to goods similar in character to the prison-made goods, if sought to be imported by one having at any time a contract to purchase prison-made goods.

Groendyke Co. v. The King, 35 D.L.R. 404, 16 Can. Ex. 465.

(§ I—10)—CUSTOMS AND USAGES OF A GRAIN EXCHANGE.

In option deals by a customer on a stock exchange, which, under its customs and usages employs a clearing association, between which and the customer's broker (as nominal principal) the contract stands, such customs and usages are binding on the customer unless unreasonable and beyond his knowledge. In purchases and sales of options on a grain exchange employing a clearing-house association, the usage under which the clearing-house becomes, in the ordinary course, the opposite party in each contract, is reasonable. [Murphy v. Butler, 18 Man. L.R. 111, in appeal sub nom. Butler v. Murphy, 41 Can. S.C.R. 618, specially referred to.]

Richardson v. Beamish, 13 D.L.R. 400, 23 Man. L.R. 306, 21 Can. Cr. Cas. 487, 24 W.L.R. 514, 4 W.W.R. 815.

(§ I—13)—RIGHT TO PUT MAKER'S NAME ON SIGN BOARD.

Pursuant to a custom admitted by the parties, the maker of a sign board has the right to make himself known by putting his name upon the board to indicate that he is the painter. There is no custom which permits a man who repairs a sign board to efface the name of the person who originally made it and substitute his own, even with the consent of the owner. Such original maker has an interest to see that use of his work is not made to advertise another business house, and it is acting in a disloyal manner for one to put his name upon an electric sign made by another person.

Denis Advertising Signs v. Martel Stewart Co., 47 Que. S.C. 266.

CY-PRES.

See Wills; Charities.

Annotation.

How doctrine applied as to inaccurate descriptions: 8 D.L.R. 96.

DAMAGES.

I. GENERAL PRINCIPLES; NOMINAL DAMAGES; PREVENTING UNNECESSARY AMOUNT.
II. EXEMPLARY OR PUNITIVE.
A. In general.
B. For act of servant; carrier's liability.
III. MEASURE OF COMPENSATION.
A. On contracts.
B. For telegrams.
C. Expulsion of or failure in duty to passenger.
D. In respect to freight or baggage.
E. Torts generally; breach of promise.
F. Fraud.
G. Assault; false imprisonment; malicious prosecution; abuse of process.
H. Libel or slander.
I. Personal injuries; death.
J. Injury, taking or detention of personal property.
K. Injury to real property; nuisance.
KK. Injury to business.
L. Condemnation or depreciation in value by expropriation.
M. In injunction.
N. In trade-mark, patent, and copyright cases.
O. Mental anguish.
P. Loss of profits.
Q. Time for which recoverable; prospective.
R. Counsel fees.
S. Mitigation; reduction.
T. Aggravation.
U. Apportionment.
IV. ASSESSMENT; DOUBLE OR TREBLE DAMAGES.

Annotations.

Appellate jurisdiction to reduce excessive verdict: 1 D.L.R. 386.

Architect's default on building contract; liability: 14 D.L.R. 402.

Parent's claim under fatal accidents law; Lord Campbell's Act: 15 D.L.R. 689.

Property expropriated in eminent domain proceedings, measure of compensation: 1 D.L.R. 508.

Expropriation for Dominion purposes, allowance for compulsory taking, liquor license: 27 D.L.R. 250.

Penalties and liquidated damages in contracts: 45 D.L.R. 24.

Liability of municipality for defective

highways or bridges; negligence and proximate cause: 46 D.L.R. 133.

I. General principles; nominal damages; preventing unnecessary amount.

Review of, see Appeal.

As ground for new trial, see New Trial.

As to interest, see Interest.

As "debts, liabilities and obligations," see Garnishment, I C—19.

(§ I A—1)—Sale of land—Delay—Delivery — Damages subsequent to the bringing of the action—C.C. s. 1073.

In France the doctrines of jurisprudence admit that the courts can allow future damages, and in a final manner, for delay in the execution of an obligation, on the condition that these damages have no punitive or coercive character. But it is doubtful if this doctrine is compatible with our system of procedure. Be that as it may, when once the defendant has put in a defence on the quantum of future and eventual damages, instead of denying the right to recover them, and the evidence permits the exact amount to be determined, the court has the power to allow them.

Langelier v. Cloutier, 55 Que. S.C. 119.

Remoteness of damage — Crops damaged by fire and animals after failure to thresh.

Loss of crop subsequently damaged by fire and animals held too remote as damage for breach of agreement to thresh same.

Hill v. Howie, [1919] 2 W.W.R. 392.

(§ I A—3)—Nominal damages — Encroachment and trespass.

The right of action of a riparian owner for an authorized encroachment on his lands by the increasing of the level of a river for the purpose of facilitating the driving of saw logs and for trespass on his lands in connection with the driving operations, will be maintained against the lumber company although the quantum of damages is merely nominal.

Ireson v. Holt Timber Co., 11 D.L.R. 45, 4 O.W.N. 1106, 24 O.W.R. 133.

Nominal damages—Failure to prove substantial damages.

Nominal damages only will be awarded for breach of a contract to transfer and deliver within a limited period, shares in a company thereafter to be organized and which was never organized, if no evidence is adduced to prove what the value of the shares would be if the organization were completed, having regard to issues of bonds or of preferred stock taking priority over the common stock in question.

Johnson v. Roche, 17 D.L.R. 74, 14 E.L.R. 374.

Nominal damages — Failure to install dentist's sign.

For every breach of contract which necessarily causes damage, the party breaking his contract can be condemned in nominal damages to be fixed by the court; this warrants a judgment in favour of a dentist for failure of an electric company to instal and light an electric sign advertising his business, although special damage could not be proved.

Audet v. Saraguay Electric & Water Co., 22 D.L.R. 493, 46 Que. S.C. 248.

Slander — Verdict for nominal sum — Costs.

Creed v. McCammon, 17 O.W.N. 288.

(§ I A—3a)—Substantial damages, difficulty in assessing — Deliberate wrongful act—Effect.

The law presumes damage where there is an invasion of a legal right; and a difficulty in determining with precision the amount of damage will not disentitle a plaintiff to substantial damages where the wrongful act of defendant was deliberate, persistent and highhanded, and productive of substantial inconvenience to the plaintiff. [Rainy River Nav. Co. v. Ont. & Minnesota Power Co., 12 D.L.R. 611, 4 O.W.N. 1591, followed; Chaplin v. Hicks, [1911] 2 K.B. 786, and Bell v. Midland R. Co., 10 C.B.N.S. 287, applied.]

Rainy River Navigation Co. v. Watrous Island Boom Co., 6 O.W.N. 537, reversing 12 D.L.R. 580, 4 O.W.N. 1593.

Substantial damages—Difficulty in assessing.

Substantial damages may be awarded in spite of the fact that some speculation and uncertainty is necessarily involved in the assessment thereof. [Chaplin v. Hicks, [1911] 2 K.B. 786, followed.]

Wood v. Grand Valley R. Co., 5 D.L.R. 428, 26 O.L.R. 441, 22 O.W.R. 269. [Varied, 4 O.W.N. 556.]

(§ I A—4)—Damages in lieu of injunction—Injury not committed.

Where an injury has not been actually committed, but is threatened, it is still a matter of doubt whether the court which might grant an injunction to restrain the threatened injury has any jurisdiction to award damages in lieu of an injunction which would have been preventive only and not mandatory. [Martin v. Price, [1894] 1 Ch. 276, considered.]

C.P.R. Co. v. C.N.R. Co., 7 D.L.R. 120, 5 A.L.R. 407, 22 W.L.R. 289, 3 W.W.R. 4.

II. Exemplary or punitive.

A. In general.

(§ II A—5)—Trespass to land.

Trespass to land, without malice and unaccompanied by any violence or aggravation, does not entitle the injured person to claim exemplary or punitive damages.

Bell v. Foley Bros., 34 D.L.R. 391, 51 N.S.R. 1.

(§ II A—6)—Torts or negligence generally.

Punitive damages will not be awarded a tenant for an eviction by his lessor from

demised premises, where all loss might have been avoided if the tenant had acted diligently.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

B. For act of servant; carrier's liability.

See also Carriers.

For liability of employer for act of employee, see Master and Servant.

(§ II B—25)—Liability for tort—Action by workman for injuries — Faute commune.

Jodoin v. Dominion Bridge Co., 39 Que. S.C. 103.

III. Measure of Compensation.

A. On contracts.

Quantum meruit, see Brokers, II B—14.

For landlord's breach of covenant to repair, see Landlord and Tenant, III A—43.

For breach of warranty, see Sale, II C—36.

For wrongful discharge, as affected by outside profits, see Master and Servant, I C—10.

For negligence of solicitor in professional acts, see Solicitors, II A—20.

Breach of covenant of title, compensation for deficiency, see Vendor and Purchaser, I D—20.

Compensation to mortgagee for improvements, see Mortgage, VI H—130.

(§ III A—40)—Measure of compensation on contracts generally.

Damages that may be recovered by an injured party, are only those which have been or might have been foreseen when the obligation is contracted, provided the breach is not tainted with fraud.

Belanger v. St. Louis, 8 D.L.R. 601.

Breach of contract — Failure to install elevator on time — Cost of carrying freight by hand — Contractor's knowledge of intended use.

The cost of conveying merchandise by hand, or for hiring a hoist therefor, cannot be recovered as damages for the delay in installing an elevator within the agreed time, where the contractor was not aware that the elevator was intended for uses other than for carriage of passengers.

Steven v. Pryce-Jones, 13 D.L.R. 746, 25 W.L.R. 172.

Measure of compensation — On contracts generally — Contemplation of parties.

The measure of damages for breach of contract where no special circumstances were communicated or known to the defaulting party which would enhance the loss ordinarily resulting from the breach, is the amount of injury which would arise generally, that is such as would arise according to the usual course of things from such breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. [Hadley v. Baxendale, 23 L.J. Ex., 179, applied.]

Walton v. Ferguson, 19 D.L.R. 816, 29 W.L.R. 949, 7 W.W.R. 611. [See also 16 D.L.R. 533.]

Sale of beverages for resale — Warranty as nonintoxicating—Fine on resale under liquor law.

Where a wholesale bottler and seller of table waters sells a beverage termed a nonintoxicating ale to a restaurant keeper in a local option town with warranty that it is not within the inhibition of the Liquor License Act (Ont.), a loss sustained by the buyer by his conviction and fine for infraction of the act in keeping the commodity for sale in his business is within the measure of damages recoverable as a natural consequence of the breach of warranty, but reimbursement of a similar fine imposed on a subpurchaser buying a quantity for resale is too remote as a basis for damages where such resale was not within the contemplation of the original parties.

Stephenson v. Sanitaris, 16 D.L.R. 695, 30 O.L.R. 60.

Contract — Insurance agent — Transfer of property — Liability for premiums guaranteed.

Building owners who contract for value with a fire insurance agent that he shall be entitled for 5 years to place the insurance on the building in companies he represents, are liable to him for the insurance premiums on policies renewed in the regular course, although in the meantime the property has been transferred to a trust company acting in the interests of the transferors; and, semble, the owners would have been bound to protect the insurance agent by making it a term of any sale of the property that the agent should have the insurance renewals for the period which they had guaranteed.

Kerr v. Saskatchewan Realty, 20 D.L.R. 925, 28 W.L.R. 561, 6 W.W.R. 1094.

Breach—Nondelivery.

The measure of damages for nondelivery of goods is the difference between the contract price and the full price in open market, at the date of contract, but damages for reduced output and disorganization of business on account of such nondelivery are too remote to be considered.

Dom. Textile Co. v. Diamond Whiteweat Co., 25 D.L.R. 241, 24 Que. K.B. 489.

Breach of contract for sale of company shares—Estimation of value.

Where no proof is available as to whether company shares have a market value, the damages for breach of a contract to deliver such shares may be assessed by reference to their intrinsic value ascertained

from the value of the corporate assets and the amount of the company's liability.

Johnson v. Roche, 24 D.L.R. 305, 49 N.S.R. 12.

SALE OF GASOLINE ENGINE.—FRAUD.

Although the buyer of a gasoline engine may have lost his right to rescind by keeping the engine after knowledge of the fraud of the seller's agent in misrepresenting the engine's capacity, he retains his right to counterclaim against the seller suing for the price, in respect of the loss he (the buyer) had sustained by relying upon the agent's statements; the measure of damages is the difference in price between the engine he got and an engine such as was represented.

Ont. Wind Engine v. Bunn, 21 D.L.R. 520, 8 S.L.R. 58, 8 W.W.R. 450, 31 W.L.R. 20.

LOSS TO BUSINESS—REMOTENESS.

Damages for nonperformance of the contract should comprise only what follows immediately and directly from such nonperformance; they cannot extend to the loss of the advantages which might result to the industrial establishment from the execution of a public enterprise.

Browning v. Masson Co., 24 Que. K.B. 389. [Reversed, 27 D.L.R. 360, 52 Can. S.C.R. 379.]

BREACH OF THRESHING AGREEMENT.

The measure of damages for a breach of contract to thresh wheat which causes an inferior grade is not the difference in the price of the grades at the time the wheat would have been sold except for the breach, but the difference in the price actually obtained for the inferior grade, and the price which the wheat would have brought if the breach had not occurred; the injured party is only entitled to be placed in the same position as if the breach had not occurred.

Dipple v. Wylie, 30 D.L.R. 59, 26 Man. L.R. 532, 34 W.L.R. 921, 10 W.W.R. 1062.

BREACH OF CONTRACT TO SINK WELL—COMPANY—LIABILITY.

Certain officers of the defendant, a joint stock company, employed the plaintiff on behalf of the company to sink a well on terms that if water were obtained at a certain maximum or a lessor depth his remuneration would be higher than if no water were obtained. The plaintiff entered upon his employment and proceeded to a certain depth when, owing to the default of the defendant, he was compelled to discontinue. Held, that as the sinking of the well was within the powers of the defendant company, and, as its articles of association did not put it out of the power of the officers in question to enter into such a contract, the contract was binding upon the defendant. That the damages should be assessed upon the assumption that water would have been obtained at, but not before, the specified maximum depth.

McGee v. Rosetown Elec. Light & Power Co., 11 S.L.R. 68, [1918] 1 W.W.R. 552.

BUILDING CONTRACT — BREACH — EXCAVATION OF TUNNEL

In an action by a contractor who was wrongfully prevented by the other party to the contract from completing the excavation of a tunnel, the work being completed by the other party, it was held the contractor was entitled to the difference between the amount he would have received had he completed the contract and the amount it would have cost him to compete. On the assessment of damages the defendants submitted as evidence of what it would have cost the plaintiff to complete the work, the actual cost incurred by them in so completing. Held, that it was not the actual cost incurred by the defendants in so completing the work, but the amount the plaintiffs would have expended in carrying out the work which was the proper basis from which to ascertain the difference between the contract price and the cost of the work.

McIlwee v. Foley, 24 B.C.R. 532, [1918] 1 W.W.R. 222, referred back for further enquiry by Privy Council, 44 D.L.R. 5.

QUANTUM—SALES OF SHARES—COMPANY'S REFUSAL TO PERMIT TRANSFER.

The Coalinga Syndicate was composed of three directors of the company and the wife of one of them. The Syndicate owned a fund of 250,000 shares of $1 each in the company out of which 10,000 shares were issued to plaintiff in consideration of his agreeing to become a director, and returned the 10,000 to Buck, one of the Syndicate, who handed him 2,000 shares back in consideration of services. Plaintiff subsequently had a purchaser for 1,000 of these shares. The company then demanded the 2,000 back and instructed their agents, The Trusts & Guarantee Co., not to register the transfer of any of the 2,000 shares on the ground that he had obtained them by fraud, i.e., on the representation that he would become a director of the company. The company alleged that the shares belonged to the Coalinga Syndicate. Action for a declaration as to the ownership of the shares and for damages:—Held, on the evidence that the shares were the property of plaintiff:—Held, that he was entitled to damages against the company for its refusal to permit the transfer to the extent of $1,350, being the difference between the purchase price of the sale thus blocked and the price of the shares at the date of the action:—Held, that it was immaterial that there was no binding contract between plaintiff and purchaser. Where added defendants actively defended an action costs were given against them as well as against the defendant.

Wolverton v. Black Diamond Oil Fields, and the Coalinga Syndicate, 30 W.L.R. 142.

AGREEMENT FOR SALE OF HOTEL — NEGLECT OR INABILITY OF VENDOR TO CARRY OUT —DAMAGES—RETURN OF MONEY PAID—SUM TO COVER EXPENSES—CLAIM FOR PROSPECTIVE PROFITS — INTEREST — COSTS.

Cardinal v. Proctor, 7 O.W.N. 394.

BREACH OF CONTRACT TO TAKE ELECTRIC ENERGY SUPPLIED BY POWER COMPANY —MEASURE OF DAMAGES — PECULIAR COMMODITY — MONEY DAMAGES EQUIVALENT TO STIPULATED PRICE.

Kaministiquia Power Co. v. Superior Rolling Mills Co., 8 O.W.N. 518, 9 O.W.N. 96.

BREACH OF CONTRACT TO REPAIR FARM MACHINERY.

The measure of damages for breach of a contract to repair farming machinery is, with respect to the owner's inability to use it on his own land, the extra cost he was put to in having done by others or with another engine or otherwise the work which he would have done with the farming machinery in question had the contract been performed; when no work is done on his own land at all no special damages are recoverable in respect thereto. [Walton v. Ferguson, 19 D.L.R. 816, followed.] Where, however, as a result of the breach of such a contract to repair the owner is unable to perform a contract to use the machinery on another's land the loss of the profit he would have made on such contract is recoverable. The wages which the owner would have earned or saved by acting as his own engineer cannot, however, be included in part of such loss.

Ontario Wind Engine & Pump Co. v. Jensen (Alta.), [1917] 2 W.W.R. 732.

ANIMALS—BREEDING.

Breach of a contract to breed mares to a stallion is not a ground for damages, at least in the absence of evidence upon which such damages may be estimated with reasonable certainty.

Sinclair v. Walker, [1917] 2 W.W.R. 321.

(III A—42a)—BUILDING CONTRACT.

Where a tender for the construction of work accompanied by plans and specifications has been accepted and a contract made accordingly, but the contract is not carried out through the fault of the party calling for tenders, the contractor is entitled to recover the value of the plans and specifications, especially when the opposite party has retained them and made no offer to return them.

Poutres Siegwart v. Deschambault, 5 D.L.R. 395, 41 Que. S.C. 453.

CONSTRUCTION AND ENGINEERING CONTRACTS —DELAY IN SUPPLYING MATERIALS TO CONTRACTOR.

If a municipal corporation causes the work to be done by a contractor, under a contract for an improvement, to be more expensive than it otherwise would have been under the terms of the original contract, it is liable to him, in the absence of stipulations to the contrary, for the increased cost.

MacDougall v. Penticton, 16 D.L.R. 436, 20 B.C.R. 401, 6 W.W.R. 478, 27 W.L.R. 713.

BUILDING CONTRACT — FAULTY CONSTRUCTION OF SILO — LOSS OF CROP GROWN FOR STORAGE — LIABILITY OF CONTRACTOR.

A contractor who builds a silo in so faulty a manner as to render it useless, is answerable for the loss sustained by the owner in not being able to use it for storing a crop of corn which it was in the contemplation of both parties that the silo should protect when harvested, regard being had to the means whereby the loss was or could have been minimized by the owner.

Rice v. Sockett, 12 D.L.R. 506, 4 O.W.N. 1570, 24 O.W.R. 828.

One for whom a building is constructed by a contractor, cannot recover damages for delay in completing it within the time limited by the contract, where the delay was due to changes for extra work ordered by the owner, as, under such circumstances, the contractor is required only to complete the building within a reasonable time. Money paid by a school district for teachers' salaries for the time they were unable to teach, because of the noncompletion of a schoolhouse within the time stipulated in the contract for its erection, cannot be recovered by the district, as nonliquidated damages for delay in the completion of the building, where, at the time the teachers were engaged, the school officers knew that the building would not be ready for occupancy at the beginning of the school term.

Brown v. Bannatyne School District, 5 D.L.R. 623, 21 W.L.R. 827, 2 W.W.R. 742.

CONTRACT—MUNICIPALITY—FAULTY PLANS — INSPECTION BY ENGINEER — FAULTY CONSTRUCTION—ONUS OF PROOF.

Where the plans furnished by a municipality for certain works done under contract were faulty, and the structure was built by the contractor under them, subject to an inspection of his work and materials by the municipal engineer made, by the contract, a referee whose decision was binding on both parties, the onus is upon the municipality to satisfy the court that the structure fell down through the contractor's fault and not because of the faulty design shewn on the plans, and should furnish the engineer's certificate to that effect on counterclaiming for damages.

Manders v. Moose Jaw, 20 D.L.R. 408, 7 S.L.R. 158, 28 W.L.R. 821.

BUILDING CONTRACT—FAILURE TO COMPLETE WITHIN TIME.

A contractor who undertakes to complete a building within a certain time and

in default to pay a liquidated amount as damages for each day's delay, will be held liable under the penal clause for this amount, even although the owner has suffered no prejudice on account of the delay, and has given supplementary contracts, which have caused the work to be delayed as the contractor, although free to accept such supplementary contracts was not bound to do so. [McDonald v. Hutchins, 12 Que. K.B. 499, followed.]

Damphousse v. Valiquette, 24 D.L.R. 219, 24 Que. K.B. 62.

DELAY OF PERFORMING BUILDING CONTRACT —WAGES.

A delay in the performance of a building contract does not involve a liability for wages paid to men engaged in the installation of the plant, who have come to the buildings for that purpose before the buildings were ready for them.

Canada Foundry Co. v. Edmonton Portland Cement Co., 25 D.L.R. 683, 9 W.W.R. 395, 32 W.L.R. 684. [Affirmed in 32 D.L.R. 114, [1917] 1 W.W.R. 382.]

BREACH OF DRILLING CONTRACT — COUNTERCLAIM.

The proper measure of damages, in case of an abandonment of drilling operations in breach of a contract, is the cost of completing the contract over and above the contract price; but where the plaintiff fails to complete the contract as required by the terms thereof, and adduces no evidence as to the probable cost of completion, and of his intention to complete, no damage is proven, to form any proper basis to reckon compensation for the breach.

Fidelity Oil & Gas Co. v. Janse Drilling Co., 27 D.L.R. 651, 9 A.L.R. 439, 34 W.L.R. 570, 10 W.W.R. 533.

BREACH OF CONTRACT FOR TUNNEL CONSTRUCTION.

In the event of a contractor treating a contract for the construction of a tunnel as broken, and suing at once for the breach of it, he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, taking into consideration what the plaintiff has done, or had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished.

Foley v. McIlwee, 27 D.L.R. 196, 33 W.L.R. 928, 10 W.W.R. 5, affirming 22 B.C.R. 38, 33 W.L.R. 278. [See P.C. decision No. 2 on appeal from 24 B.C.R. 532, 44 D.L.R. 5.]

HIRE OF WORK — RESPONSIBILITY OF CONTRACTOR—CEMENT SOLAGE—DRAIN CANALS—WORK OF THE MUNICIPALITY—C.C. ART. 1688.

A contractor who builds a cement "solage" according to technical rules of the art is not responsible for damages which result from an act of the municipal employees, who working at the request of the owner, in joining the drain canal from the street to the house in order to drain the cellar drilled the solage, with the result that the cement, not being sufficiently dried, was washed away by the water and seriously damaged.

Lacroix v. Rolland, 25 Rev. Leg. 236.

BUILDING CONTRACT—MITIGATION.

When a party to a building contract is liable in damages for the nonperformance of his obligations, the other party is bound to act so as to diminish these damages as far as possible. When the work of construction is stopped indefinitely by order of the owner, and the contractor proposes to demand the cancellation of his contract on account of such suspension, he should notify his subcontractors not to continue the work so as to diminish the damages which might result.

Tessier v. Notre Dame-du-Perpetual-Secours, 52 Que. S.C. 510.

HIRE OF WORK — CANCELLATION OF CONTRACT — EVIDENCE — C.C., ARTS. 1073, 1203, 1691.

Where a judgment, in granting damages, recited that the evidence was vague, indefinite and lacked precision as to detail, and did not give sufficient information to enable the court to determine, with any fair degree of certitude, the constituent elements of the loss claimed, and that the profits which the plaintiff might have made were problematical. Such judgment is founded on a wrong principle. The amount of the damages to be granted must be ascertained by the evidence.

Mills v. Smith, 28 Que. K.B. 437.

CONTRACT — BUILDING OF HOUSES — PROVISION FOR TERMINATION UPON NOTICE — RIGHT EXERCISED IN GOOD FAITH AND ON REASONABLE GROUNDS — ESTOPPEL — RES ADJUDICATA — CLAIM WHICH MIGHT AND SHOULD HAVE BEEN ASSERTED IN FORMER ACTION.

Boyer Bros. v. Doran & Devlin, 16 O.W.N. 373.

HIRE OF WORK — RESPONSIBILITY OF CONTRACTOR—CEMENT SOLAGE—DRAIN CANALS—WORK OF THE MUNICIPALITY—C. CIV. ART. 1688.

The contractor who has built a cement solage according to rules of the art is not responsible for damages which result from the fact that, at the request of the owner, the town employees, in hooping the drain canal from the street to the house have pierced the solage to drain the cellar and that the cement not being still sufficiently dried was washed away by the water and seriously damaged.

Lacroix v. Rolland, 25 Rev. Leg. 236.

(§ III A—44) — TO CONSTRUCT RAILROAD OR SIDETRACK.

Where a railway company was unable to definitely award the plaintiff a contract for constructing a portion of its road, but

agreed with him, that in order to keep his teams employed during the winter, he might put in supplies necessary for the construction of so much road as he could complete during the working portion of the following summer, and that the company would guarantee him, in the event of its being unable to award such contract, the cost of such supplies, together with 10 per cent advance thereon, the company, upon not being able to award the plaintiff such contract, is liable to him for such advance upon the total cost of the supplies, and also for the loss sustained by him on a sale thereof, after due notice to the company.

G.T.P.R. Co. v. Alfred, 5 D.L.R. 471, affirming 5 D.L.R. 154.

FAILURE TO COMPLETE BRANCH LINE — LIABILITY TO BOND PURCHASERS.

Substantial damages, in an amount determinable from the evidence as to the loss sustained, may be awarded to purchasers of railway bonds, for the breach of an agreement by a railway company to build a branch line which, if completed, would secure their township better freight facilities, and on the strength of which agreement the bonds were purchased.

Wood v. Grand Valley R. Co., 22 D.L.R. 614, 51 Can. S.C.R. 283, affirming 16 D.L.R. 361, 30 O.L.R. 44.

(§ III A—45)—ADVERTISING CONTRACTS.

Where a written contract between the plaintiffs and defendants, by which the former were to place the latter's advertising, contained nothing as to the time it was to run, though there was a verbal contract that it should continue for a year, was unjustifiably cancelled by the defendants, the plaintiffs are not entitled to the commission which would have been earned on a year's business, but may recover a reasonable allowance for the services rendered by them.

McConnell v. Vanderhoff, 2 D.L.R. 841, 3 O.W.N. 800, 21 O.W.R. 653.

While the policy of the law is against making actionable certain classes of slight omissions, yet where a publishing firm contracts to publish, in a city directory issued by it from year to year, the name and calling and office address of a business man in the city, the publishing firm will be answerable in damages for the omission, although it was entirely unintentional and furthermore was against the firm's own general business interests, where the omission by its very nature must have caused loss to the other party to the contract, and that without proof of specific damages.

Archambault v. Lovell, 8 D.L.R. 611, 42 Que. S.C. 344.

(§ III A—47)—SUPPLY OF GAS PREVENTED BY PURCHASER.

The supply of gas at an agreed pressure, which is prevented by the wrongful placing and use of a regulator by the purchaser, entitles the vendor to be compensated for the amount he would have received but for such interference. [Mackay v. Dick, 6 App. Cas. 251; Burchell v. Gowrie Collieries, [1910] A.C. 614; Wilson v. Northampton R. Co., 9 Ch. App. 279, applied.]

Kohler v. Thorold Natural Gas Co., 27 D.L.R. 319, 52 Can. S.C.R. 514, reversing 16 D.L.P. 862. [Leave to appeal to P.C. refused, 52 Can. S.C.R. memo.]

(§ III A—51)—BY AGENT.

The damages recoverable for the breach of an agreement by which an exclusive right of sale of property was given for 30 days, cannot be based upon the conjecture that the agent would have made a sale within that time; and the fact that he had money of a client in his hands and that he might have induced him to purchase the property, will not change the rule.

Cadwell v. Stephenson, 3 D.L.R. 759, 5 S.L.R. 308, 21 W.L.R. 199, 2 W.W.R. 291.

BREACH OF CONTRACT — EXCLUSIVE SALES AGENCY—MEASURE.

Nominal damages only can be recovered for the breach of an agreement for the exclusive sale of automobiles within a county, which did not entitle the agent to commissions on sales made by his principal, where the former in no way promoted the sales made by the principal; and it was not shewn that the agent would have made such sales if the defendant had not done so. [Roberts v. Minneapolis Threshing Machine Co., 8 South Dakota 579, followed.]

Curry v. E.M.F. Co. of Canada, 12 D.L.R. 613, 28 O.L.R. 427.

WRONGFUL CLOSING OF MARGINS — STOCK-BROKER.

Damages for the wrongful closing out of a margin account with grain brokers need not be fixed at the highest or "peak" price on exchange at which the plaintiff on a bought order might have sold during the period for which the transaction should have run.

Nelson v. Baird, 22 D.L.R. 132, 25 Man. L.R. 244, 8 W.W.R. 144, 30 W.L.R. 822.

MEASURE OF DAMAGES—ON CONTRACTS BY AGENTS—REAL ESTATE BROKER—WARRANTY OF FUTURE SALES.

Under an exclusive agency contract for the subdividing and sale, by a real estate agent, of a tract of suburban land, under which the agent stipulates to sell quarterly at a fixed price, a fixed number of lots, the principal may recover damages measured by the agreed price and terms provided the agent's sales fall short of the stipulated minimum, regard being had to the probable number of lapsations which would have occurred had sales actually been made up to the number contemplated by the the contract.

Inland Investment Co. v. Campbell, 16 D.L.R. 410, 24 Man. L.R. 703, 27 W.L.R. 740, 6 W.W.R. 409. [Varied in 18 D.L.R. 177.]

AGENT ISSUING POLICY UNDER UNAUTHORIZED RATE—LIABILITY FOR LOSS.

In an action by an insurance company against its agent for issuing a policy under an unauthorized rate, the proper measure of damages is the loss the company is obliged to pay and not the difference between the premiums at which the policy was issued and the rate at which the risk would have been accepted.

Globe & Rutgers Fire Ins. Co. v. Wetmore, 23 D.L.R. 33, 49 N.S.R. 55.

(§ III A—55)—SALE—BONDS.

Where the seller of bonds does not deliver them as agreed, the buyer who had resold them to a third party, and is threatened with legal proceedings, is entitled to claim, from the seller, the difference between the contract price and the market price of the bonds at the date of the breach.

Thompson v. Provincial Trust Co., 54 Que. S.C. 218.

(§ III A—60)—SALE OF LAND—AGENT'S AUTHORITY.

A memorandum of agreement for the sale of land, drawn up and executed in Alberta will, in the absence of evidence to the contrary, be presumed to refer to land in that province, although the number of the meridian is omitted from the description, especially where the vendor owns lands which answer the description. A clause in the memorandum that, "In the event of your disposing of the said land at the price above stated, I agree to pay you $1 per acre commission," is sufficient consideration. The agent must not go beyond the authority given him, but the vendor must not unreasonably entirely refuse to negotiate.

McIntyre v. Law, 40 D.L.R. 231, 13 A.L.R. 273, [1918] 2 W.W.R. 358.

SALE OF LANDS—DEFECT IN TITLE.

In the absence of fraud, damages are not recoverable where the contract for sale of lands goes off for defect in title which the vendor cannot remove.

Lobel v. Williams, 22 D.L.R. 127, 25 Man. L.R. 161, 7 W.W.R. 1042, 30 W.L.R. 352.

AGREEMENT FOR SALE OF LAND—REFUSAL TO EXECUTE—DAMAGES—FORMAL DEMAND—ACTUAL TENDER — QUE. C.C. 1067, 1162.

Where one party to an agreement for sale of land refuses to execute his contract, if the other party asks for its execution he ought to have previously made a formal demand and an actual tender, but if he asks only damages it is not necessary for him to make either a formal demand or an actual tender.

Versailles v. Paquin, 23 Que. K.B. 432.

ARBITRATION—VALUATION OF HOTEL PROPERTY — "OPEN MARKET" — CONCLUSIVENESS OF FINDINGS.

C. P. R. Co. v. Windebank (Can.), [1917] 3 W.W.R. 99, reversing 31 D.L.R. 568, [1917] 1 W.W.R. 447, 10 W.W.R. 773. [See also 25 D.L.R. 225, 26 Man. L.R. 1.]

(§ III A—61)—WARRANTY OF AUTHORITY—BREACH OF—PERSONAL LIABILITY OF AGENT—PURCHASER IN GOOD FAITH.

If a person purporting to make a contract as agent for another has in fact no such authority, he renders himself personally liable to one who contracts with him in good faith in reliance upon the warranty of authority, and who by so contracting has suffered loss in consequence of the absence of authority. [Oliver v. Bank of England, [1902] 1 Ch. 619 applied.]

Duncan v. Beck, 20 D.L.R. 682, 7 S.L.R. 163, 28 W.L.R. 571, 6 W.W.R. 1149.

(§ III A—62)—BREACH OF CONTRACT TO CONVEY.

A vendor who, after making a valid contract for the sale of land and receiving part payment, sells the land to a third person, is liable to the original vendee for the amount paid on account with interest, and in addition thereto damages for the breach of the contract.

Smart v. McIntosh, 8 D.L.R. 871, 22 W.L.R. 883, 3 W.W.R. 609.

MEASURE OF COMPENSATION — BREACH OF CONTRACT TO PURCHASE LANDS.

In awarding damages on a breach of contract to purchase realty, the quantum is the difference between the contract price and the value of the land at the time of the breach.

O'Kelly v. Downie, 15 D.L.R. 158, 26 W.L.R. 413, 5 W.W.R. 859.

BREACH OF CONTRACT TO SELL LAND.

For breach of a contract to sell land, a purchaser is not entitled to damages based upon the difference between the contract price and the value at the time of the breach, but the damages are limited to the return of the purchase money, if any, and interest and expenses to which he has been put in connection with the making of the contract or incurred on the strength of it, unless he has been guilty of fraud or like improper conduct, or unless having it in his power to obtain title, he does not do his best to do so; he is obliged to take and incur all reasonable trouble and expense in that behalf, but is not obliged to purchase any outstanding interest at an outlay of any substantial sum.

Maitland v. Mathews, 23 D.L.R. 19, 8 A.L.R. 269, 8 W.W.R. 274, 31 W.L.R. 163.

BREACH OF CONTRACT TO SELL LAND—OUTSTANDING TAX LIEN—LOSS OF BARGAIN.

Where the vendor of land held under a contract of purchase from another at a tax sale allowed the tax title to lapse by failure to register the transfer within 2 months from the order confirming the tax sale, as required by the Land Titles Act, Alta., 1906, c. 24, s. 60, the right of the purchaser will not, in the absence of any stipulation to the contrary, extend to the recovery of substantial damages for the loss of the bar-

gain, but will be limited to the recovery of the amount he has paid and interest and his costs and expenses in connection with the agreement. [Bain v. Fothergill, L.R. 7 H.L. 158, applied.]

Maitland v. Mathews, 23 D.L.R. 19, 8 A.L.R. 269, 8 W.W.R. 274, 31 W.L.R. 163.

BREACH OF CONTRACT TO CONVEY—LOSS OF PROFITS.

The inability of a vendor to perform a contract for the sale of land because of the objections by one who conveyed the land as security for a debt entitles the purchaser to a refund of the money paid thereon, but not to any loss of profit by reason of the increase of value since the purchase.

Hetherington v. Sinclair, 23 D.L.R. 630, 34 O.L.R. 61.

BREACH OF CONTRACT TO CONVEY—OPTION BY HUSBAND ON WIFE'S PROPERTY—NOMINAL DAMAGES.

An option to purchase inserted in a lease executed by the husband on land owned by the wife, which cannot be carried out because of the wife's disapproval, entitles the lessee, who had knowledge of the wife's ownership, to nominal damages as against the husband only, and not the ordinary damages such as the expense incurred in searching the title or for loss of profit on a resale.

McCune v. Good, 23 D.L.R. 662, 34 O.L.R. 51.

EXPENSES OF RESALE OF LAND.

Where vendor and purchaser of property have come to an agreement that the vendor shall resell the property on the purchaser's account, the rights of the parties to be adjusted on the basis of the first agreement, the vendor is entitled upon such resale, in addition to his loss in price, to claim the expenses of the resale, insurance, tax and mortgage interest adjustments, and a proper allowance for interim interest on the unpaid purchase money over the amount of the mortgages.

Evans v. Farah, 31 D.L.R. 470, 37 O.L.R. 79.

AGREEMENT FOR SALE OF LAND—PREVIOUS OPTION TO THIRD PARTY—EXERCISED BY HIM—EFFECT OF DOWER ACT, 7 GEO. V. (ALTA.) 1917, C. 14—NO CONSENT OF WIFE—DAMAGES.

Actual damages will be awarded to a purchaser of land under an agreement for purchase who is unable to complete his purchase because of the owner having given a previous option to a third party which he might have cancelled by notice, but did not do so, the option being exercised by the party holding it. The wife of the owner did not consent to the agreement with the purchaser, but as the land in question was not the "residence" or "homestead" of the owner, the Dower Act, 7 Geo. V., Alta., 1917, c. 14, had no application. [Bain v. Fothergill, 31 L.T. 387, distinguished.]

Morrow v. Langton, 49 D.L.R. 513, [1919] 3 W.W.R. 897.

BREACH OF CONTRACT TO CONVEY LAND.

The measure of damages for breach of contract to convey land is the difference between the price agreed on and the actual value of the land at the time when the conveyance should have been made.

Bennett v. Stodgell, 28 D.L.R. 639, 36 O.L.R. 45.

LESSEE'S OPTION TO PURCHASE LAND—INABILITY TO MAKE TITLE.

Where under a lease the lessee is given an option to purchase the land in fee at the end of the term, and the lessor in good faith and without fault is unable to give title to the fee by reason of having only a life estate in the property, the lessee, in an action for specific performance of the option, is entitled only to an abatement in the purchase price based upon the value of the interest in the lands which could be conveyed, but not for money expended on improvements or any other kind of damages resulting from the breach. [Bain v. Fothergill, L.R. 7 H.L. 158, applied; Day v. Singleton, [1899] 2 Ch. 320, distinguished.]

Ontario Asphalt Block Co. v. Montreuil, 27 D.L.R. 514, 52 Can. S.C.R. 541, affirming 15 D.L.R. 703, 19 D.L.R. 518, 29 O.L.R. 534, 32 O.L.R. 243, which varied 12 D.L.R. 223, 29 O.L.R. 534. [Leave to appeal to P.C. refused, 52 Can. S.C.R. memo.]

BREACH OF CONTRACT TO CONVEY—MUTUAL MISTAKE—LARGE DEFICIENCY IN QUANTITY.

Jackson v. Irwin (No. 2), 12 D.L.R. 573, reversing 11 D.L.R. 188, 18 B.C.R. 225.

BREACH OF CONTRACT TO PURCHASE.

The damages which a vendor can claim from a purchaser who refuses to execute the sale, is the difference between what the plaintiff could get for the property on the market at the time when the purchaser refused to buy, and the sum which he offered to give; and not the difference between what the vendor paid for the property and the actual price of sale.

Canadian European Land Co. v. Lalanne, 49 Que. S.C. 37.

There is no understanding that a contract for the sale of real estate may fail because the vendor does not choose to go to the trouble or expense of obtaining title, and in such case the usual rule as to the measure of damages does not apply. [See Bain v. Fothergill, 7 H.L. 158.] And if the purchaser has entered into an agreement to resell he may recover the loss of profit on such resale and the reasonable costs of defending his purchaser's action for rescission. [Maitland v. Matthews, 23 D.L.R. 19, and Lobel v. Williams, 22 D.L.R. 127, approved.]

McEachren v. Corey, 34 W.L.R. 1196. [Reversed in 34 D.L.R. 165, 10 A.L.R. 478, [1917] 1 W.W.R. 1047.]

(§ III A—63)—BREACH OF IMPLIED COVENANT TO HEAT APARTMENTS.

A breach of covenant by a lessor to furnish adequate heat will entitle the lessee to

recover damages in respect of the loss of time of men employed by him and the extra cost of attempting to heat the leased premises, and also damages for the general loss and inconvenience resulting from the breach.

Brymer v. Thompson, 23 D.L.R. 840, 34 O.L.R. 194. [Affirmed in 25 D.L.R. 831, 34 O.L.R. 543.]

BREACH OF COVENANTS.

Where a conveyance of land is made in part consideration for the support for life of the grantor by the grantee at the latter's place of residence, and the grantee, by his conduct, makes it impossible for the parties to live in the same house, the grantor is entitled to such damages as will compensate him once for all, that is for the future as well as for the past, for the breach of the contract. [Schell v. Plumb, 55 N.Y. 592; Amos v. Oakley, 131 Mass. 413; Parker v. Russell, 133 Mass. 74, applied.]

Zdan v. Hruden (No. 2), 4 D.L.R. 255, 22 Man. L.R. 387, 21 W.L.R. 620, 2 W.W.R. 665.

BREACH OF COVENANT FOR RAILWAY STATION —COSTS OF SURVEY—LOSS OF PROFITS.

In an action for breach of covenant to establish a railway station in furtherance of an arrangement to subdivide lands as a townsite, a claim for half the costs of the survey and the increased amount of taxes paid as a result of the subdivision, also the loss of profit on a sale of lots therein as ascertained from the evidence, may be properly allowed in the assessment of damages.

Norquay v. G.T.P. Town & Dev. Co., 25 D.L.R. 59, 9 A.L.R. 190, 9 W.W.R. 347, 32 W.L.R. 756.

DAMAGES FOR BREACH OF COVENANT FOR TITLE.

A judgment should not be given which is not supported by the pleadings, even though leave were given to amend pleadings, the case would have to go back for rehearing, as the damages should have been assessed for breach of the covenant for title in the conveyance, and not on the ground of breach of contract, and the measure of damages is the difference, if any, between the value of the land at the time of the exchange, and its value at the time that the title was put in order by the delivery of the reconveyance.

Ellam v. Acadia Trust Co., 6 W.W.R. 1083.

(§ III A—64)—BREACH OF LESSOR'S CONTRACT.

Upon the refusal of a lessor to deliver possession of demised premises at the commencement of a term that was subsequently terminated, under a power reserved in the lease, by a sale of the premises, the lessee can recover damages for deprivation of possession from the commencement of the term to the date of such sale only, and not for the whole term.

Wood v. Saunders, 3 D.L.R. 342, 21 W.L.R. 195.

Where the plaintiff in an action for breach of an agreement to lease a hotel and sell its furniture and fixtures does not shew that his bargain was a good one, or the amount he lost by the defendant's refusal to fulfil his agreement, $75 damages only was awarded.

Dulmage v. Lepard, 3 D.L.R. 542, 3 O.W.N. 986.

A lessor is not liable in damages for failing to supply a tenant with a team for working demised premises, where the lessor required them for working other land, which use was justified by an exception or reservation for that purpose provided by the terms of the lease. The measure of damages for the breach of a lessor's covenant to furnish a lessee with a horse for working demised premises, is the cost of supplying another, and not the value of crops lost by reason of such default.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

LANDLORD AND TENANT—RE-ENTRY BY LANDLORD—CONVERSION OF CROPS.

Where, after a tenant removed from demised premises before the expiration of his term, under a crop-sharing lease, leaving a servant in possession to work the land, the landlord re-entered and took possession of, harvested and threshed the growing grain, he is answerable to the tenant for the conversion of his share of the crop, including grain killed by the frost and not harvested, which had some value for feed, less the damages suffered by the landlord for the tenant's failure to summer fallow in the manner required by his lease.

Lamb v. Thompson, 11 D.L.R. 612, 24 W.L.R. 404.

BREACH OF COVENANT BY LESSOR TO ERECT SUITABLE BUILDING.

The proper measure of damages for breach of covenant by a lessor to erect a building suitable for the lessees' purposes is the actual damage sustained as the consequence of defects arising before the time when the defects, if discovered, could have been remedied, and in addition, if any damage was sustained after that time, either what it would have cost the lessee to have repaired the defects, or the amount of his actual damages, whichever is the least.

Tarrabain v. Ferring, 35 D.L.R. 632, 12 A.L.R. 47, [1917] 2 W.W.R. 381.

LEASE OF SHOP—DEFECT IN TITLE OF LESSORS—REFUSAL TO GIVE LESSEE POSSESSION — ACTUAL EXPENSE — NOMINAL SUM AWARDED—COSTS.

Johnson v. Stephens, 12 O.W.N. 206, [Reversed in 13 O.W.N. 30.]

(§ III A—70)—SELLER'S FAILURE TO DELIVER.

The measure of damages for the unwarranted refusal of a vendor to carry out the terms of an agreement to sell a hotel property, includes the expenses to which the purchaser was put in endeavoring to induce the vendor to carry out his contract

or to refund the money paid on account of the purchase-price and the purchaser may be allowed his traveling expenses from his place of residence to the place where the property was situate in the same province.

Blomquist v. Tymchorak, 6 D.L.R. 337, 22 W.L.R. 205. [Affirmed, 10 D.L.R. 822.]

MEASURE — FAILURE TO DELIVER CHATTELS SOLD—MISTAKE AS TO LOCATION.

Where a purchaser failed to promptly notify the seller of the whereabouts of the chattels sold, as to the location of which both he and the seller were mutually mistaken, and of his inability to obtain possession because of their wrongful removal by a third person, from whom the purchaser refused to attempt to recover them or to aid the seller in doing so, the former cannot recover damages for nondelivery of the chattels; his remedy, in the absence of an express agreement by the seller to make delivery, being limited to the recovery of the purchase money paid.

Hamilton v. Smyth, 13 D.L.R. 55, 4 O.W.N. 1572, 24 O.W.R. 809.

QUANTUM—SALES OF PERSONALTY—SELLER'S FAILURE TO DELIVER—NATURAL CONSEQUENCES OF BREACH — CONTEMPLATION OF PARTIES—REMOTENESS.

For delay in delivery of goods under a contract only such damages as were the natural consequences of the breach, or such as might reasonably be supposed to have been in the contemplation of both parties at the time the contract was made, can be awarded, unless the special circumstances which would enhance the damages were communicated to or known to the other party. [Hadley v. Baxendale, 9 Ex. 341, 23 L.J. Ex. 179, applied.]

Vancouver Machinery Co. v. Vancouver Timber & Trading Co., 18 D.L.R. 491, 29 W.L.R. 93, 6 W.W.R. 1523, reversing 17 D.L.R. 575.

SALE OF LOGS—FAILURE TO DELIVER.

In assessing damages for breach of contract to deliver logs, the resort to market value, though one of the commonest, is not a conclusive test, but merely an aid; and where there is no market value the buyer is entitled to estimate the loss as that which is directly and naturally resulting in the ordinary course of events from the seller's breach of contract; nor is it necessary that the buyer purchase other logs elsewhere and thus establish his loss. [Graham v. Bigelow, 3 D.L.R. 404, 46 N.S.R. 116, affirmed in 15 D.L.R. 294, 48 Can. S.C.R. 512, applied.]

Boehner v. Smith, 26 D.L.R. 511, 49 N.S.R. 435.

SALE—DEFAULT OF DELIVERY—DAMAGES—MARKET-PRICE—C.C. ARTS. 1065, 1073, 1074.

The damages which a buyer has the right of claiming in default of execution of a contract, if the case in question is one of salable articles for which there is a commercial and current price, will be the value which the article would have had for the purchaser at the time and place where the delivery should have been made less purchase price and incidental expenses of transportation and others.

Corteau v. Metal Shingle & Siding Co., 25 Rev. Leg. 201.

SALE OF GOODS—BREACH.

The measure of damages for breach of a contract for the sale of goods to be delivered on a day certain is the difference between the contract price and the market price on that day.

Tainter v. McKinnon, 39 D.L.R. 483, 13 A.L.R. 54, [1918] 1 W.W.R. 776.

SALE OF GOODS — DAMAGES — ASCERTAINMENT — DIFFERENCE BETWEEN CONTRACT PRICE AND ACTUAL VALUE OF GOODS, WITHOUT REGARD TO WHETHER WHOLE PRICE ACTUALLY PAID — CHATTEL MORTGAGE—ACCOUNT—METHOD OF TAKING—"PROTRACTED AND VEXATIOUS LITIGATION."

Peppiatt v. Reeder, 14 O.W.N. 278.

SALE.

The damages recoverable for breach of contract of sale are the difference between the price fixed by the contract and that of the open market, the duty of the buyer, in such case, being to act prudently and to pay the lowest price possible.

Hankin v. John Morrow Screw & Nut Co., 54 Que. S.C. 208. [Affirmed, 45 D.L.R. 635, 58 Can. S.C.R. 74.]

(§ III A—71)—MANUFACTURED ARTICLE.

Where a dredge was not delivered within the time specified in a contract of sale the net earnings thereof for the time delivery was delayed may be awarded the purchaser as general damages, notwithstanding that the plaintiff's pleading claimed only special damage, if such loss was included in the items of special damage claimed, although not allowed under that heading. The nondelivery of a dredge within the time stipulated therefor does not entitle the purchaser to recover as damages a sum of money paid by him as a bonus to ensure the completion of scows, necessary for use with the dredge, before the date fixed for delivery of the dredge, as such loss was not within the contemplation of the parties at the time the contract of purchase was entered into.

Brown v. Hope, 2 D.L.R. 615, 17 B.C.R. 220, 20 W.L.R. 907, 2 W.W.R. 153.

SALE OF GOODS—MANUFACTURED ARTICLES—REFUSAL OF PURCHASER TO ACCEPT—ABSENCE OF GENERAL MARKET—PROFITS.

Brunswick Balke Collender Co. v. Falsetto, 25 D.L.R. 848, 34 O.L.R. 386.

(§ III A—75)—BUYER'S FAILURE TO COMPLETE PURCHASE.

Whether a stipulated liability for default in keeping alive an option is a penalty or liquidated damages may depend upon whether the damages though inevitable (1) are an enigma and incapable of

exact calculation, or (2) are such that proof of them is extremely complex, difficult, and expensive, or (3) are such that the very thing intended to be provided against by the stipulation is to preclude the necessity of the minute, difficult, and complex proof. [McManus v. Rothschild, 25 O.L.R. 138, applied.]

Kennedy v. Harris, 7 D.L.R. 291, 4 O.W.N. 183, 23 O.W.R. 179.

SALE—FUTURE DELIVERY—NONACCEPTANCE—BUYER'S FAILURE TO COMPLETE PURCHASE—QUANTUM.

The damages for nonacceptance of steers on a sale contract for future delivery and under which the seller was meanwhile to feed the steers, is properly estimated on the basis of the difference in the price fixed by the bargain and the market price at the time of the breach.

Cadzow v. Fraser, 18 D.L.R. 489.

SALE OF GOODS—SHIPPED BY BOAT—NONDELIVERY — BILL OF LADING TO BE SIGNED.

In an action by the buyer against the seller for nondelivery of goods which were to have been shipped by boat, it is incumbent upon the seller to shew that there was a signed bill of lading, or to prove the delivery itself to the carrier; an unsigned bill of lading is not enough.

Peter v. Laba, 20 D.L.R. 786, 48 N.S.R. 202.

SALE OF GOODS—CONTRACT—CANCELLATION — REPUDIATION — OPTION — CORRESPONDENCE—DAMAGES FOR NONACCEPTANCE.

Geddes Bros. v. American National Red Cross, 17 O.W.N. 43.

SALE OF FUTURE CROP—FAILURE TO ACCEPT.

A potato factor contracted to purchase for himself or his nominees the whole of a farmer's crop at a certain price (i.e., September prices), the future yield being estimated by the farmer at 600 tons more or less. The factor disposed of 1140 tons out of an actual crop slightly in excess of 1200 tons, and then notified the farmer to cease shipping potatoes. Held, that (in consideration of the fact that the farmer might have disposed of the potatoes left on his hands at a certain price and was bound to take advantage of any reasonable opportunity to minimize his loss) the proper measure of damages was the contract price less the amount that would have been received upon the acceptance of such offer, no evidence having been adduced to shew the market price at the date of the breach of contract.

Hammond v. Daykin et al., 8 W.W.R. 512.

(§ III A—76)—MANUFACTURED ARTICLE—BREACH BY BUYER—MEASURE OF COMPENSATION—ATTEMPTED CANCELLATION.

Somervell v. Trotter, 7 D.L.R. 813, 21 W.L.R. 143.

Where the seller under a conditional sale lien for the balance of the purchase price of personal property retakes and resells the goods, and on the trial of his action for damages against the original purchaser for neglect and refusal to accept and pay for the goods, introduces no evidence as to the amount of the purchase price upon the resale, it will be presumed against him that they brought the same price on resale as at the original sale. In an action by the seller under a conditional sale contract, after the retaking and resale of the goods, the measure of damages for which the conditional purchaser is liable in respect of his breach of contract where there is an available market for the goods, is, prima facie, the difference between the contract price and the price realized on the resale.

Corey v. American-Abell Co., 6 D.L.R. 103, 21 W.L.R. 940.

Under a contract for the sale of goods giving the purchasers no right to cancel the same, an attempt at cancellation by them before the date fixed for shipping the goods, does not deprive the vendors of the right to carry out their part of the contract and, if they afterwards shipped the goods, they are entitled to recover damages for their nonacceptance.

Sawyer Massey Co. v. Szlachetka, 4 D.L.R. 442, 5 S.L.R. 224, 21 W.L.R. 580, 2 W.W.R. 751.

(§ III A—80)—BREACH OF WARRANTY.

The measure of damages for the breach of warranty on the sale of a stallion that he was a 60 per cent foal-getter, is the service charges the purchaser lost by reason of a large number of mares served by the horse not proving to be in foal.

Braithwaite v. Bayham, 4 D.L.R. 498, 21 W.L.R. 839.

Where the evidence shewed that the buyer of fruit could have realized a higher price at the time he discovered the fraudulent packing and labelling of grades and in consequence had to repack and grade the fruit, the loss necessarily caused by the delay is properly taken into consideration in assessing damages.

Graham v. Bigelow, 3 D.L.R. 404, 46 N.S.R. 116, 11 E.L.R 114 [Affirmed 15 D.L.R. 294, 48 Can. S.C.R. 512.]

In awarding damages for breach of warranty as to fitness of an engine for certain work a loss of additional profits which the plaintiff anticipates he would have made had the engine been available for his work by reason of certain competing firms going out of business subsequent to the date of the contract of sale, will not be presumed to have been in the contemplation of the parties and will not be allowed.

Alabastine Co. (Paris) v. Canada Producer & Gas Engine Co., 8 D.L.R. 405, 30 O.L.R. 394.

BREACH OF IMPLIED WARRANTY—MERCHANTABLE GOODS.

The measure of damages for breach of implied warranty that the perishable goods sold were merchantable, whereas by deteri-

oration they had become valueless, is the return of the money paid the seller and the excess which the buyer had to pay to replace the shipment.

White v. Donkin, 16 D.L.R. 446, 19 B.C.R. 565, 6 W.W.R. 508, 27 W.L.R. 789.

BREACH OF WARRANTY—FITNESS FOR BREEDING.

The buyer suing for damages for breach of warranty that a stallion was fit for breeding purposes may recover as damages a sum made up of the price and interest, transportation expenses, and cost of keeping the horse a reasonable time until he could be sold, where there had been an offer to return him, but less the actual value of the horse.

Wood v. Anderson, 21 D.L.R. 247, 33 O.L.R. 143.

BREACH OF WARRANTY—TONNAGE CAPACITY.

In an action for breach of warranty as to the tonnage capacity of a motor truck, the true measure of damages is not the difference in price between the truck sold and the standard of one it warranted to be, but the difference between the price paid for and its market value at the date of sale, together with the costs of repairs incurred in its consequent overloading under the mistaken belief as to its true capacity.

Victoria Saanich Co. v. Wood Motor Co., 23 D.L.R. 79, 21 B.C.R. 515, 8 W.W.R. 1124, 31 W.L.R. 853.

BREACH OF WARRANTY—DECEIT.

Damages awarded by a jury in an action for breach of warranty cannot be sustained on the mere ground that the jury might have been justified in assessing that amount had the action been based on fraud and deceit.

Gallant v. Lounsbury Co., 31 D.L.R. 145, 44 N.B.R. 225.

AS TO FITNESS FOR BREEDING.

The measure of damages for breach of warranty as to fitness for breeding, sought as a set-off against the purchase price, is not only the loss of service fees the purchaser would have received, but in addition, if claimed, under s. 51 of the Sale of Goods Act (R.S.S. 1909, c. 147), the difference between what the animal would have been worth had the warranty been fulfilled and the actual value of the animal at the time it was purchased. [Braithwaite v. Bayham, 4 D.L.R. 498, distinguished.]

McPhail v. Abbott, 27 D.L.R. 71, 9 S.L.R. 130, 34 W.L.R. 134, 10 W.W.R. 347.

CONTRACT—WARRANTY—BREACH—MEASURE OF DAMAGES.

The measure of damages for breach of warranty is determined by the knowledge, actual or constructive, which the parties had of the probable consequences of the breach. Knowledge of the circumstances under which the contract was made is the decisive consideration. If the parties contemplated or ought to have contemplated loss of profits as a proximate consequence of the breach, damages may be recovered accordingly. [Hadley v. Baxendale, 9 Ex. 341, 156 E.R. 145, applied.]

Rivers v. George White & Sons Co., 46 D.L.R. 145, 12 S.L.R. 366, [1919] 2 W.W.R. 189, affirming [1918] 3 W.W.R. 61.

BREACH OF IMPLIED CONDITION OR WARRANTY — PLEADING — JUDGMENT — SCOPE OF REFERENCE—MASTER'S REPORT—APPEAL.

Maple Leaf Portland Cement Co. v. Owen Sound Iron Works Co., 9 O.W.N. 269.

(§ III A—82)—FAILURE OF SEED TO GROW.

The damages recoverable for breach of warranty where grain is sold as "seed flax" and it was at the time of sale contaminated with noxious mustard seed, and was in consequence not reasonably fit for the purpose for which it was intended, include deterioration of the lands in which the seed was sown, as well as the wages of the help employed in pulling out the wild mustard.

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 209, 4 A.L.R. 366, 21 W.L.R. 433, 2 W.W.R. 404.

(§ III A—83)—DEFECTS CAUSING LOSS OF USE OF PROPERTY.

A stipulation in a contract for the sale of machinery that the vendor should not be liable for damages on account of delays or defects of design, material, or workmanship, other than to furnish, without charge, repairs or new parts therefor, does not preclude the recovering of damages by the vendee for delay in operating a mill, due to the vendor's failure to install an engine complying with a guaranty that its speed should not vary more than 2 per cent under varying load conditions.

Canada Producer & Gas Engine Co. v. Hatley Dairy, Light & Power Co., 4 D.L.R. 599, 22 Que. K.B. 12.

BREACH OF WARRANTY—DEFECTIVE TRACTION ENGINE—COSTS—REPAIRS.

Amounts paid to experts in an endeavour to make a traction engine work properly and for extra oil and gasoline consumed by the engine above the normal consumption, as well as the cost of securing the ploughing to be done by some one else owing to its defective working, are recoverable by way of damages for a breach of warranty of the fitness of the engine. [Walton v. Ferguson, 19 D.L.R. 816, followed; Hadley v. Baxendale, 23 L.J. Ex. 179, applied.]

Chapin v. Matthews, 24 D.L.R. 457, 9 A.L.R. 209, 9 W.W.R. 301, 32 W.L.R. 663, reversing 22 D.L.R. 95.

Damages may be recovered upon a vendor's agreement made after the completion of a contract of sale upon the discovery that a portion of the goods sold were defective, to compensate the vendee for any loss resulting therefrom.

Schrader Mitchell & Weir v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

(§ III A—85)—OF EMPLOYMENT.

Under an employment "at the rate of" a stated sum per annum, the salary is apportionable, and upon the discharge of the

employee before the expiration of the year, he is entitled only to such proportionate part of his salary as he has actually earned.

The King v. McLeod, 4 D.L.R. 491, 17 B.C.R. 189, 21 W.L.R. 517 and 804, 2 W.W. R. 578.

OF EMPLOYMENT.

The plaintiff, who was employed "as a draughtsman and generally in survey work for three months or until the drafting and survey work in connection with a certain contract" was completed, at $165 per month and thereafter at $125 per month, on being told by his employer that the contract was completed and that thereafter he would receive compensation at the latter rate, refused to complete the drafting at the new rate and was discharged:—Held, that he could recover $165 per month from the date of his discharge until the time of his new employment.

Pos v. Johnston, 14 D.L.R. 447, 18 B.C. R. 159.

FOR WRONGFUL DISCHARGE.

In estimating the damages for wrongful discharge from employment regard must be had to the life of the servant and the reasonable probabilities of securing other employment for the unexpired term.

Goldie v. Cross Fertilizer Co., 37 D.L.R. 16, reversing 28 D.L.R. 477, 49 N.S.R. 540.

HIRE SERVICE—UNJUST DISMISSAL—DAMAGES — NULLITY OF CONTRACT — C.C. ARTS. 1624, 1670.

When an employer unjustly discharges an employee from his service he puts an end to the contract which exists between the two; and the employee can sue him for damages without asking to nullify the contract.

Fortier v. Felson Co., 25 Rev. Leg. 14.

OF EMPLOYMENT—EXCLUSIVE AGENCY FOR SALE OF GOODS FOR DEFINITE PERIOD—BREACH OF AGREEMENT — DAMAGES — NET PROFITS.

Rogers v. National Portland Cement Co., 5 O.W.N. 349, 25 O.W.R. 298.

CONTRACTS — MUNICIPAL CORPORATION — EMPLOYMENT OF SERVANT — DAMAGES FOR BREACH.

Cyr v. Fort Frances, 9 O.W.N. 7.

(§ III A—87)—WRONGFUL DISMISSAL—SEEKING OTHER EMPLOYMENT.

An engineer who is engaged to superintend a mine and who is also as incidental to his employment housed by the company employing him, is also entitled to damages in lieu of housing expenses for the balance of such contract. A professional man (e.g., an engineer with managerial functions) is not obliged to seek for menial work if he cannot find a position equal in importance to that from which he has been dismissed unjustly, and the employer in that event is responsible for the payment of the salary for the entire period of the contract up to the date of its expiry.

Silver v. Standard Gold Mines, 3 D.L.R. 103.

WRONGFUL DISMISSAL — FAILURE TO SEEK OTHER EMPLOYMENT—MITIGATION.

The failure of a servant to seek other employment may be set up in mitigation of damages against a claim for wages for the unexpired term. [Andrews v. Pac. Coast Coal Mines, 15 B.C.R. 56, applied.]

Pratt v. Idsardi, 23 D.L.R. 257, 21 B.C.R. 497, 31 W.L.R. 541.

(§ III A—95)—LIQUIDATED DAMAGES.

Where a contract contains a provision that either party to it may terminate it on payment of $500 to the other party, said amount may be either a penalty or liquidated damages; such question is one of law to be determined by taking into consideration the intention of the parties from the language used and the circumstances of the case taken as a whole as at the time the contract was made.

Ellis v. Frughtman, 8 D.L.R. 353, 5 A. L.R. 456, 22 W.L.R. 776, 3 W.W.R. 558.

LIQUIDATED DAMAGES—TESTED BY THE PURPOSES CONTEMPLATED IN THE CONTRACT.

Where a sum is stipulated to be paid as liquidated damages and is payable not on one single event but on a number of events some of which might result in inconsiderable damages, the court may decline to construe the words according to their ordinary effect and may treat the sum as a penalty, but aliter when it is made payable upon only one event; and the clearing away of a number of old buildings from land in furtherance of a suburban subdivision scheme involving the landscape appearance for purposes of sale and contemplated by both parties to the contract may be a single event so as to justify the enforcement of the clause where the buildings were only partly pulled down within the time.

St. Catharines Improvement Co. v. Rutherford, 19 D.L.R. 662, 31 O.L.R. 574.

(§ III A—96)—LIQUIDATED DAMAGES—FOR QUITTING SERVICE.

A stipulation in a contract of employment for the payment of liquidated damages if a servant quits before the expiration of his term of service, is enforceable.

Ashmore v. Bank of B.N.A., 13 D.L.R. 73, 18 B.C.R. 257, 24 W.L.R. 840, 4 W.W.R. 1014.

(§ III A—97)—LIQUIDATED DAMAGES—DELAY IN COMPLETING BUILDING CONTRACT.

A stipulation in a building contract for the payment by the builder to the property owner of a fixed sum per day as liquidated damages for delay in completion of the building after the time limited for completing the work will be presumed to apply only where the work of building has been entered upon, not where there has been a total failure to perform the contract.

Lembke v. Chin Wing, 4 D.L.R. 431, 17 B.C.R. 218, 21 W.L.R. 895, 2 W.W.R. 897.

DELAY—PENALTY OR LIQUIDATED DAMAGES—INTENTION.

The words "liquidated damages" and "forfeit or penalty" have a like understood

meaning in English and French law, and the effect of a proviso in a contract, that in case of failure to deliver various parts of the machinery as therein provided the sum of $25 should be deducted from the contract price as liquidated damages and not as forfeit for every day's delay, is that the parties intended to so pre-estimate a reasonable indemnity as liquidated damages for the delay in the performance of the contract, which need not be specially pleaded as a cross-demand to the action for the contract price, nor actual damages sustained in consequence of the delay alleged or proved. [Arts. 1013, 1076, 1131, C.C. (Que.); Art. 217, C.C.P.; Dunlop Pneumatic Tire Co. v. New Garage & Motor Co., [1915] A.C. 79; Clydebank Engineering Co. v. Yzquierda, [1905] A.C. 6; Webster v. Bosanquet, [1912] A.C. 394; Hamlyn v. Talisker Distillery Co., [1894] A.C. 202; Sainter v. Ferguson, 7 C.B. 716 at 730; The "Industrie," [1894] P. 58; Ottawa North. & West. R. Co. v. Dom. Bridge Co., 36 Can. S.C.R. 347, applied.]

Can. General Electric Co. v. Can. Rubber Co., 27 D.L.R. 294, 52 Can. S.C.R. 349, affirming 47 Que. S.C. 24.

A contractor for the construction of a work cannot be held liable under a contract for a penalty thereby provided for delay in finishing the work, if a settlement has already been made with him in full for the work as far as it has proceeded, without deduction for the delay, as the failure to deduct this penalty operates as a waiver of the right to the same.

Municipal Construction Co. v. Regina, 2 D.L.R. 690, 5 S.L.R. 78, 20 W.L.R. 405, 1 W.W.R. 958.

A stipulation for liquidated damages for delay in the completion of a schoolhouse by a contractor, applies only to the completion of the building as a whole and not to the finishing of 2 rooms therein, as required by the contract, at a date earlier than that fixed for the completion of the entire building. Liquidated damages stipulated for in a contract for the building of a schoolhouse, for delay in completing it, cannot be awarded where the school district secured the use of rooms therein sufficient to accommodate all of the pupils of the district, which were finished before the time fixed by the contract for the completion of the entire building.

Brown v. Bannatyne School District, 5 D.L.R. 623, 21 W.L.R. 827, 2 W.W.R. 742.

A stipulation in a construction contract for liquidated damages for delay beyond a certain day, is not applicable where the delay was caused by the performance of extra work ordered by the owner of the building.

Hamilton v. Vineberg (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

LIQUIDATED DAMAGES—FOR DELAY IN COMPLETING CONTRACT — AMOUNT STIPULATED OWING TO "DIFFICULTY OF PROVING SPECIAL DAMAGE."

An agreement by the contractor to pay a fixed sum per diem as liquidated damages for delay in completion beyond the stipulated date may be enforceable although special damages were not proved, if the fixing of the amount can be taken as due to the difficulty of proving special damage foreseen as incident to the circumstances when the contract was made.

St. Catharines Improvement Co. v. Rutherford, 19 D.L.R. 662, 31 O.L.R. 574.

A provision in a contract fixing a per diem amount of $20 as liquidated damages, in the event of a failure to erect a building and to lease same when completed, is reasonable and cannot be considered a penalty.

Canadian Fairbanks Morse v. U.S. Fidelity & Guaranty, 26 D.L.R. 12, 22 B.C.R. 157, 32 W.L.R. 316, 9 W.W.R. 48.

A provision in a contract, which gives a party thereto the right to retain 10 per cent of the contract price of the ties supplied, by reason of noncompletion of the contract to supply them, is not to be treated in the nature of a penalty, but as security for any damages sustainable by reason of the nonperformance of the contract.

Giese v. Bell et al., 26 D.L.R. 28, 9 A.L.R. 427, 33 W.L.R. 300, 9 W.W.R. 826.

HYPOTHEC.

A stipulation in an hypothecary obligation "that in the event of the borrower failing to pay the sum within 30 days from June next, together with all interest due thereon, the property shall immediately be vested in and become the absolute property of the lenders without any notice, mise en demeure, or any formality whatsoever, and all sums paid on account thereof shall be forfeited and held as liquidated damages by the lenders," is penal.

Halcro v. Gray, 50 Que. S.C. 350.

C. EXPULSION OF OR FAILURE IN DUTY TO PASSENGER.

(§ III C—110)—INJURY TO PASSENGER BY ACCIDENTAL FALLING OF SIGNBOARD—SHOCK—LIABILITY OF STREET RAILWAY COMPANY IN RESPECT OF INJURIES OTHER THAN THOSE CAUSED BY DIRECT IMPACT—PROXIMATE CAUSE OF ADDITIONAL INJURY.

McLaughlin v. Toronto R. Co., 10 O.W.N. 135.

D. IN RESPECT TO FREIGHT OR BAGGAGE.

(§ III D—126)—FAILURE TO FURNISH CARS—HORSE SHOW—LOSS OF PRIZES.

Where the plaintiff, on discovering the lack of efficient action in supplying a car to carry horses for exhibition at a winter fair, he was justified in treating it as a breach of contract sufficient to relieve him from bringing the horses forward for shipment, and is entitled to damages for entry fees paid to enter the horses for exhibition; extra labour in fitting horses for exhibition; extra blacksmithing; extra feed, grain and hay; loss of profits in selling horses after exhibition; extra expenses of carrying the horses until the following spring; but not

for prospective prizes which might have been won at the Fair, or for loss of advertising through not being shewn thereat.

Mancell v. Michigan Central R. Co., 19 Can. Ry. Cas. 246.

(§ III D—129)—Loss or conversion—Liability of carriers—Assessment of damages—Value of goods.

Pagliai v. C.P.R. Co., 4 O.W.N. 1271, 24 O.W.R. 518.

Value of goods damaged by carrier—Refund of freight charges.

When a carrier is condemned to pay to a consignee the full value of the goods damaged, it should also reimburse him for the amount of the freight that he paid upon the goods.

Dechêne v. C.P.R. Co., 47 Que. S.C. 431.

E. Torts generally; breach of promise.

Compensation by way of damages for filing or continuing caveat without cause, see Land Titles, IV—40.

(§ III E—135)—Measure of compensation—Torts—False statements in company prospectus — Contribution between joint tortfeasors.

In an action by a director of a company in respect of a judgment obtained against him (which he paid) by one induced to subscribe for shares by reason of false statements in the prospectus, against his co-directors for contribution under s. 92 (4) of the Companies Act, B.C. Stats. 1910, c. 7, R.S.B.C. 1911, c. 39, s. 93, rendering all directors jointly and severally liable to those subscribing for shares in reliance on false statements in the prospectus for all damages sustained therefrom, the measure of damages, where the subscriber does not retain his shares, is the amount he paid for them. [Frankenburg v. Great Horseless Carriage Co., [1900] 1 Q.B. 504, followed; McConnell v. Wright, [1903] 1 Ch. 546, and Shepheard v. Broome, [1904] A.C. 342, distinguished.]

Johnson v. Johnson, 14 D.L.R. 756, 18 B.C.R. 563, 26 W.L.R. 3, 5 W.W.R. 525.

Automobile operation.

Where a motor collides with a waggon and in a negligence action against the motorist, the jury assess damages against him taking into consideration upon the evidence (1) repairs to the waggon; (2) necessary painting and that it would still be a patched-up waggon; (3) a valuable horse made lame and still lame; a verdict of $100 will not be disturbed as excessive. [See Vanhorn v. Verral, 4 D.L.R. 624, upon the quantum and increasing of damages.]

Campbell v. Pugsley, 7 D.L.R. 177, 11 E. L.R. 561.

Measure of compensation — Wrongful sale of shares by broker.

The liability of a stock broker who wrongfully sells shares of stock purchased for a client on the refusal of the latter to pay for them, is limited to the market value of the stock when sold, although such was less than their value at the time of purchase.

Buchan v. Newell, 15 D.L.R. 437, 29 O.L. R. 508.

Alienation of wife's affections—Enticement—Measure of damages.

Where separate claims were submitted to the jury, firstly as to enticing away the plaintiff's wife and, secondly, as to alienating her affections, and damages were awarded separately for each, the verdict will stand only as to the larger sum awarded on the second claim if the whole damages were included in its submission and there was nothing to justify a further damage award on the first claim.

Bannister v. Thomson, 20 D.L.R. 512, 32 O.L.R. 34.

Torts — Riparian owner — Dam above — Accumulated water—Flooding land.

A lower riparian proprietor may recover damages against the upper proprietor who dams up the water of the river and then releases the accumulated water in large volumes whereby the plaintiff's land is overflowed and crops damaged. [McDougall v. Snider, 15 D.L.R. 111, 29 O.L.R. 448, and Hudson v. Napanee, 31 O.L.R. 47, distinguished.]

James v. Bridgewater, 20 D.L.R. 799.

Damages claimed by workman, under common law—Engagement in Montreal—Accident in Amherstberg, Ontario—C.C. (Que.) 1053.

Where an action is a claim for damages based purely and simply on a tort; and that tort was wholly committed within the limits of the Province of Ontario, a foreign jurisdiction, the law of the Province of Ontario must govern. By the law of the Province of Ontario in such matters no common-law action lies.

Fullum v. Foundation Co., 25 Rev. de Jur. 114.

(§ III E—140)—Negligence in building.

A contractor who negligently misplaces a window in the building of a house is liable in damages therefor.

Iredale v. Drewey, 4 D.L.R. 868, 19 W. L.R. 931.

(§ III E—142)—Breach of promise.

Where the judge trying an action for breach of promise of marriage without a jury finds in favour of plaintiff, but also finds that the defendant's refusal to marry the plaintiff caused her no anxiety or suffering, the damages will on that account be assessed at a lower figure than otherwise.

Chizek v. Tripp, 4 D.L.R. 369, 20 W.L.R. 648.

Seduction—Measure of damages for.

A new trial will not be granted where the trial jury awarded $5,000 damages to the plaintiff in an action for damages for assaulting and ravishing plaintiff without her consent, on the ground of excessive damages, where, by reason of the outrage, plaintiff became pregnant. Where, in such ac-

tion the plaintiff's counsel, without objection, was allowed to urge upon the jury large damages on account of the expense plaintiff would be put to for the bringing up of a then unborn infant, while as a matter of fact the infant when born lived only a day, a new trial will not be granted, since the jury must have had in mind the possible contingency of an early death.

Dunn v. Gibson, 8 D.L.R. 297, 4 O.W.N. 329, 20 Can. Cr. Cas. 195, 23 O.W.R. 356.

BREACH OF PROMISE.

The damages for a breach of promise to marry should bear relation to the social standing and fortune of the parties and should cover moral suffering, the humiliation to the person and the depressing effect that it has had upon her health and energy.

Poirier v. Trudeau, 52 Que. S.C. 405.

(§ III E—143)—MARINE TORTS—OBSTRUCTING NAVIGATION—DISCREDIT TO BOAT LINE—INABILITY TO MAKE TRIPS—REMOTENESS.

Damages for discredit to the reputation of a boat line because of interference with the regular operation of boats, is too remote to be considered in an action for damages resulting from the diminution of the natural flow of the waters of a stream as the result of the building of a dam.

Rainy River Navigation Co. v. Ontario & Minnesota Power Co., 12 D.L.R. 611, 4 O.W.N. 1591, 24 O.W.R. 897.

MARINE TORTS—INJURY TO SCOW.

McLean v. Downey, 3 D.L.R. 893, 3 O. W.N. 1592, 22 O.W.R. 782.

(§ III E—144)—WRONGFUL SEIZURE.

Where the lien note of a buyer of horses was transferred to a bank by the payee thereof as security for money borrowed for him from the bank endorsing thereon an assignment of all his interest in the horses which was invalid and an agent of the bank seized an old crippled team for the horses covered by the note and the plaintiff admitted that he was willing that the bank should take such team in place of the one covered by the note, he is not entitled to damages for the illegal detention of that team.

Thien v. Bank of B.N.A., 4 D.L.R. 388, 4 A.L.R. 228, 21 W.L.R. 192, 1 W.W.R. 795.

WRONGFUL EVICTION.

A tenant who was wrongfully evicted by his landlord, and suing for damages must prove the value of the unexpired portion of his term, if damage is claimed in respect of the latter for the excess in the value thereof over the share of rent from payment of which the tenant was absolved by the eviction.

Shepherd v. Ross, 4 D.L.R. 432, 21 W.L.R. 259.

F. Fraud.

(§ III F—145)—SALE OF LAND—DECEIT—MISREPRESENTATION—RECKLESS STATEMENTS—INTENTION.

Where the claim is not for rescission of a sale of land, but for damages for deceit, brought after conveyance has been made, based on misrepresentations as to quantity and yield of the land sold, it must be shewn that the defendant knew his representation was false or that the defendant made the statements recklessly and without any belief, knowledge or care as to its truth or falsity, with the intention that the purchaser should act on them.

Banks v. Pearson, 20 D.L.R. 734.

ACTION FOR DECEIT.

In an action for deceit on the sale of lands, a proper measure of damages is the amount paid over by the plaintiff in consequence of his dealings with the defendant with interest and a reasonable sum for time, labour and wages expended by the plaintiff on the property which was practically worthless for the purpose for which it was sold.

Anderson v. Fuller, 22 D.L.R. 66. [Reversed in 21 B.C.R. 509.]

DECEIT—MEASURE OF DAMAGES—PROFITS—SERVICES — REFERENCE — APPEAL — COSTS.

Peppiatt v. Reeder, 9 O.W.N. 121, 263, 10 O.W.N. 263, 11 O.W.N. 100.

(§ III F—146)—ON RESCINDING SALE OF LAND FOR FRAUD—PROMISED EQUIVALENT OF PRIOR INCOME.

On assessing damages for fraud and deceit in inducing the plaintiff to withdraw money from an investment where it earned 10 per cent in order to make the land purchase which was set aside, the court may award, in addition to the return of the purchase money and the statutory interest thereon, the additional income which the plaintiff had previously obtained on it, where the defendant is shewn to have misrepresented that as large a return would be yielded by the land purchase as the plaintiff was previously receiving.

Stocks v. Boulter, 15 D.L.R. 750, 5 O. W.N. 863, varying 5 O.W.N. 129. [See 10 D.L.R. 316, 47 Can. S.C.R. 440.]

SALE OF REALTY—FRAUD AND MISREPRESENTATION—SALE OF FARM—INDUCEMENT TO PURCHASE—FALSE REPRESENTATION AS TO AMOUNT OF DRAINAGE TAXES CHARGED ON LAND—EVIDENCE—FINDING OF FACT OF TRIAL JUDGE—DAMAGES, MEASURE OF—COMPENSATION FOR EXISTING LOSS—ANTICIPATED RELIEF FROM TAXES BY CROWN OR MUNICIPALITY—PROVISION FOR BENEFIT OF VENDOR.

Ladue v. Tinkess, 7 O.W.N. 31.

SALE OF FARM—ACTION FOR DECEIT—DAMAGES.

Webster v. Henderson, 5 O.W.N. 373.

(§ III F—147)—IN EXCHANGE OF PROPERTY.

Where a plaintiff has entered into an exchange of property by reason of fraudulent misrepresentations, the measure of his damages is the value of the property he parted with on the strength of such repre-

sentations, less the value of the equivalent he got for it.

Kelly v. Bradley, 33 W.L.R. 747.

(§ III F—148)—Sale of shares.

The measure of damages, in an action to set aside a sale of shares, on the ground of fraud, is the difference in value of the shares with all their incidents, at the time of discovery of the deceit, and what was paid for them.

Allan v. McLennan, 31 D.L.R. 617, [1917] 1 W.W.R. 513, reversing 23 B.C.R. 515, 10 W.W.R. 941.

G. Assault; false imprisonment; malicious prosecution; abuse of process.

(§ III G—150)—Civil action—Mitigation or aggravation of.

Slater v. Watts, 16 B.C.R. 36, 16 W.L.R. 234.

(§ III G—152) — False imprisonment; Malicious prosecution.

Upon the quantum of damages, in an action for false imprisonment, where the person and character are injured, it is difficult to fix the limit, and a new trial will only be granted on the ground of excessive damages where the verdict of a jury is so large as to be perverse and the result of gross error or there were undue motives or misconception. The jury may take into consideration as to the quantum of damages, the following elements: time lost, business interrupted, physical and mental suffering, the indignity, circumstances of family, and condition of gaol, cost of release as well as the illegal restraint itself as distinct from all else.

Markey v. Sloat, 6 D.L.R. 827, 41 N.B. R. 234, 11 E.L.R. 295.

When it is proven that the defendant acted under an improper motive and with a spirit of revenge in causing plaintiff's arrest, the plaintiff suing for false arrest in the Province of Quebec should be awarded an amount sufficient to carry costs on the scale of the Superior Court of that province and not merely the costs on the scale of the Circuit Court.

Kalmanovitch v. Muller, 1 D.L.R. 628, 18 Rev. de Jur. 159.

Malicious prosecution — Rival candidates at election.

An award of $1,200 damages in an action for malicious prosecution of a candidate for election to the legislature, on a charge of forgery, prosecuted by a rival candidate, is not excessive.

Rudyk v. Shandro, 24 D.L.R. 330, 9 A. L.R. 87, 8 W.W.R. 889, affirming 18 D.L.R. 641.

H. Libel or slander.

(§ III H—155)—Excessiveness.

An award by a jury of $500 damages, for libeling a legislative officer, will not be interfered with on the grounds of excessiveness.

Culligan v. The Graphic, 37 D.L.R. 134, 44 N.B.R. 481.

Conclusiveness as to amount—Appeal.

Damages of $11,500 awarded in an action for libel held not excessive. Even in an action for libel where the damages awarded exceed what any jury could reasonably have given under all the circumstances, a Court of Appeal has jurisdiction to set aside the verdict, but such jurisdicton must be exercised with the greatest caution and only in exceptional cases and keeping in mind that in libel the assessment of damages does not depend upon any definite rule.

Knott v. Telegram Printing Co., 39 D.L.R. 762, 55 Can. S.C.R. 631, [1917] 3 W.W.R. 335, affirming 32 D.L.R. 409, 27 Man. L.R. 336, [1917] 1 W.W.R. 974.

Libel or slander.

Where an elector, during a municipal election, enters a polling booth on two occasions and publicly in a loud voice reproaches the returning officer for allowing his name as a voter to be entered in the roll of voters as having voted the previous day in favour of a certain candidate, and alleges that he did not so vote; such conduct constitutes a wrongful act and is intended to convey to persons then present the charge that the returning officer had failed in his duty as such, and in the circumstances, without proof of special damage, the court will grant exemplary damages.

Avon v. Hamelin, 18 Rev. de Jur. 510.

(§ III H—162)—Subsequent action.

Apart from statements advanced maliciously or with knowledge of their falsity, the only penalty which the court may impose on a party for making unfounded allegations in his pleading is the payment of costs of the suit which is dismissed as a result of the allegations being unproven; and a subsequent suit in damages for defamation and libel resulting from such allegations should be dismissed with costs, as otherwise the party who had a right to allege such facts would be twice punished therefor.

Martin v. Madore, 3 D.L.R. 441, 731, 18 Rev. de Jur. 781.

I. Personal injuries; death.

(§ III I—165)—Measure of compensation —Personal injury—Statutory infraction.

Where a statute prohibits unsafe scaffolding on buildings in course of erection or repair, for the benefit of workmen thereon, such provision entitles a workman who suffers special damage from its contravention to an action to recover such damages. [Watkins v. Naval Colliery Co., [1912] A. C. 699, applied.]

Hunt v. Webb, 13 D.L.R. 235, 28 O.L.R. 589.

Elements—Fatal Accidents Act—Funeral expenses.

The amount paid for the funeral expenses of a child cannot be taken into considera-

tion as an element of damage in an action by his parents, for his death, under the Ontario Fatal Accidents Act, 1 Geo. V. c. 3.

Beahan v. Nevin, 11 D.L.R. 679, 4 O.W.N. 1399, 24 O.W.R. 712.

MEASURE — TORTS — PERSONAL INJURY — AMOUNT RECOVERABLE.

$300 is reasonable compensation for negligent injury to a taxicab passenger, sustained by being thrown against the glass separating the driver from the passenger's compartment, where his pecuniary loss aggregated $173, though he was permanently scarred to a slight extent, measuring on the basis of the substantial injury suffered.

Hughes v. Exchange Taxicab & Auto Livery, 11 D.L.R. 314, 24 W.L.R. 174, 4 W.W.R. 556.

PERSONAL INJURIES—DEATH.

A jury should not be asked to assess separately damages resulting from shock caused by blows and those resulting from bodily injury independently of nervous shock. Remarks as to cases in which the damages were so assessed. In this case a new trial was ordered on the ground that the damages awarded were excessive. [Victorian Railways Commissioners v. Coultas (1888), 13 App. Cas. 222, followed.]

Taylor v. B.C.R. Co., 13 Can. Ry. Cas. 400, 16 B.C.R. 109.

The plaintiff's damages for personal injury by the negligence of the defendants having been assessed by a judge at $10,000, the Court of Appeal reduced the amount to $7,000, evidence having been received by the court to shew that a large sum paid to the plaintiff, and said by her to be part of her earnings, was in fact paid upon another account. In estimating damages recoverable for personal injury by negligence, the jury must not attempt to award the full amount of a perfect compensation for the pecuniary injury, but must take a reasonable view of the case and give what they consider, in all the circumstances, a fair compensation: and the same rule applies to a judge.

Sheahen v. Toronto R. Co., 13 Can. Ry. Cas. 270, 25 O.L.R. 310.

NEGLIGENCE—PERSONAL INJURY TO PLAINTIFF.

Poizner v. Cottier, 8 O.W.N. 51.

FATAL ACCIDENTS ACTS, R.S. SASK. C. 135—EXPECTATION OF PECUNIARY BENEFIT—MOTHER AND SISTER OF DECEASED — MEASURE OF DAMAGES—ASSESSMENT.

In an action under the Fatal Accidents Act, R.S.S. c. 135, which provides that "the judge or jury may give such damages as he or they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action had been brought" it is not necessary that such "parties" should have actually received aid from the deceased, but they must have had a well-founded expectation of benefit from the continuance of his life. [McKeown v. Toronto Ry. Co., 19 O.L.R. 361, and Moffitt v. C.P. R. Co., 13 D.L.R. 244, followed.] The court should not award a sum which would purchase an annuity on the lives of those entitled equal to the income which they had received or had reasonable expectation of receiving but should take into consideration the probable duration of the life of the deceased and that of each of the beneficiaries, estimating the pecuniary benefit received or likely to be received by each. [Rowley v. London and North Western R. Co., L.R. 8 Ex. 221, followed.] In this case, where the death of a young man was caused by the negligence of the defendant company's servants, it was considered that his mother and elder sister had a well-founded expectation of pecuniary benefit from the continuance of his life, and damages for the mother were assessed at $1,000, and for the sister at $1,500.

Powell v. C.N.R. Co., 7 S.L.R. 43, 28 W.L.R. 433, 6 W.W.R. 1085.

IMPAIRING HEALTH—CATARRH—PROXIMATE CAUSE.

Where a plaintiff in an action for damages alleges that, as a result of the accident, his health had been impaired and that he had lost the sense of smell, it is proper and legal for him to prove that he had since the accident, and was still, suffering from catarrh, and that such impairment was due to the accident.

Orr v. Montreal Tramways Co., 48 Que. S.C. 17.

PERSONAL INJURIES—PAIN AND SUFFERING —LOSS OF EARNINGS—EXPENSES—DISABLEMENT FOR FUTURE—INDEMNITY—ASSESSMENT OF DAMAGES BY TRIAL JUDGE.

McIlmurray v. Toronto & York Radial R. Co., 15 O.W.N. 55.

PERSONAL INJURIES — PRINCIPLES OF ASSESSMENT—PROBABLE EARNING CAPACITY.

An injured workman may shew that if he had not been injured he might, at the time of action, be in receipt of larger wages than he was then getting, and should be allowed a fair amount of compensation for being deprived of the reasonable prospects he had of improving his condition in life. In an action for damages for personal injuries a jury should not award punitive or vindictive damages, and should take into account the accidents of life and other matters, including the fact that the plaintiff has not been completely disabled. They should not give the plaintiff the full amount of a perfect compensation for the pecuniary injury he has suffered, but only what they consider, under the circumstances, a fair compensation for his loss.

Anderson v. Forrester, 7 W.W.R. 1039.

EXPENSES—LOSS OF TIME—FUTURE EARNINGS—SUFFERING.

A plaintiff in an action for personal injuries is entitled to (1) the expenses reasonably incurred in consequence of the injury sustained; (2) the value of his time

in whole or in part up to the time of his trial; (3) a fair compensation for the reduction of his probable future earnings, having regard to his health, habits, occupation, to the fact that they will not be as great in later years, to the fact that he may voluntarily retire from his profession, or may be overtaken by sickness or other inevitable accident; (4) a reasonable sum by way of compensation for his bodily or mental sufferings.

Morgan v. Edmonton, [1917] 2 W.W.R. 591.

PERSONAL INJURIES—REFUSAL TO SUBMIT TO OPERATION — REASONABLENESS — NEURASTHENIA.

Bateman v. County of Middlesex, 24 O.L.R. 84, 19 O.W.R. 442.

PERSONAL INJURY BY NEGLIGENCE—ASSESSMENT BY JUDGE—NEW EVIDENCE ON APPEAL—REDUCTION OF DAMAGES—PRINCIPLE OF ASSESSMENT.

Sheahen v. Toronto R. Co., 25 O.L.R. 310.

(§ III I—166)—LOSS OF BUSINESS.

Where damages are allowed for personal injury the following are among the proper tests as to the quantum: (a) Was the business interrupted thereby a paying or a losing concern; (b) amount of doctor and hospital bills; (c) amount of personal inconvenience, pain, and suffering.

Touhey v. Medicine Hat, 7 D.L.R. 759, 5 A.L.R. 116, 2 W.W.R. 715. [Affirmed, 10 D.L.R. 691.]

MEDICAL SERVICES—NURSES—LOSS OF TIME —EXPENSES OF CURE.

Damages to the amount of $1,750 are not excessive in an action under the Employers' Liability Act (B.C.) where the plaintiff, a stevedore, was struck between the shoulders by the fall of a "sling board" and traumatic neurasthenia resulted, the medical treatment of which is particularly expensive.

Snell v. Victoria & Vancouver Stevedoring Co., 8 D.L.R. 32, 1 W.W.R. 985.

In an action by an employee against his employer for personal injury resulting from an accident in the course of his employment and constituting partial permanent disability to the plaintiff, he is entitled to a yearly allowance by way of compensation equal to half of the abatement of his wages resulting from the accident; and in the case of an employee having worked less than 12 months before the accident, at piece work, his yearly wages should be based on the mean yearly wages of fellow workmen of the same category receiving the smallest remuneration from the defendant company, and such wages, in the present case, are 50 cents per day; and the fact that such employee may since such accident occasionally have earned wages in excess of 50 cents per day at employment with another company does not estop him from claiming his indemnity according to the impairment of his ability to work.

Carrier v. Standard Bedstead Co., 18 Rev. de Jur. 374.

(§ III I—168)—MEASURE OF COMPENSATION—DEATH—CLAIM BY PARENT—REMOTE BENEFITS.

The basis for the recovery of damages under Lord Campbell's Act for death caused by negligence is not for injured feelings or on the ground of sentiment but compensation for a pecuniary loss; the parent's claim in respect of the death of a child of tender years must be based upon a reasonable expectation of pecuniary benefit.

Pedlar v. Toronto Power Co., 15 D.L.R. 684, 29 O.L.R. 527.

(§ III I—169)—PERSONAL INJURIES—RECOVERY BY INFANT—INCOME—ACCIDENTS OF LIFE.

In awarding damages for injuries sustained by a child eight and one-half years old by reason of a collision with a street railway car, whereby the child's right arm had to be amputated below the elbow, the jury ought not to give the plaintiff such a sum as, if invested, would produce the full amount of income which he might be expected to earn if he had not been injured, but they should take into account the accidents of life and other matters, and give to the plaintiff what they consider, under all the circumstances, a fair compensation for the loss.

Schwartz v. Winnipeg Electric R. Co., 12 D.L.R. 56, 23 Man. L.R. 483, 24 W.L.R. 5, 4 W.W.R. 319.

(§ III I—171)— PERSONAL INJURIES — WRONG MEDICAL TREATMENT, HOW NEGATIVED—ASSESSMENT OF DAMAGES—EXPERT EVIDENCE.

Sawyer v. C.P.R. Co., 18 D.L.R. 799, 7 O.W.N. 166.

(§ III I—173)—IMPAIRMENT OF EARNING CAPACITY—MISDIRECTION.

In a negligence action for damages for permanent personal injury to the plaintiff, a railroad man, impairing his earning capacity, it is misdirection for the Trial Judge to charge the jury by suggesting that the jurymen put themselves in the plaintiff's place and consider for themselves whether, in similar circumstances, any of them would be willing to undergo such suffering and loss, and to seek employment in industrial fields other than railroading.

Pickering v. G.T.P.R. Co., 14 D.L.R. 584, 23 Man. L.R. 723, 26 W.L.R. 77, 5 W.W.R. 660.

LOSS OF EYE.

A workman who has met with an accident in the course of his employment is deemed to have been subjected to an incapacity, not temporary, but partial and permanent, within the terms of the Workmen's Compensation Act, when the accident, while leaving him capable of labour, has resulted in diminishing his capacity for

the future. The loss of an eye must be considered to be a partial incapacity which is permanent. In this case the plaintiff, who usually worked as a ship labourer and made $500 a year was given an annuity of $100 for loss of an eye.

Gagné v. Metallurgical Co., 14 Que. P.R. 274.

DIMINUTION OF EARNING CAPACITY.

In estimating the damages in a case within par. 2. of art. 7328 R.S.Q. 1909, the court should base them on the actual remuneration received from the employment at the time of the accident. It should not take into account a more lucrative employment which the victim had formerly had during the year nor the times during the period of his engagement when he was not at work. The workman who absents himself is presumed to do so voluntarily and it is for him to prove the contrary.

Ledoux v. Lucas, 43 Que. S.C. 427.

(§ III I—180)—FOR CAUSING DEATH—DEDUCTION OF MONEY PAID BEFORE DEATH.

In an action brought by the widow and children of a decedent under the Families Compensation Act, R.S.B.C. c. 82, for damages for injuries sustained through the alleged negligence of the defendants resulting in the death of the decedent, where it appears that prior to the death of the deceased the latter received a sum of money for the injuries sustained and executed a release of the cause of action to the defendants, it is not necessary for the plaintiffs to return the sum of money received by the deceased, or to offer to return it, as a condition precedent to their right to have the release set aside on the ground that it was obtained from the deceased by fraud, but such money is to be taken into consideration on the assessment of damages and the amount treated as a payment on account. [Lee v. Lancashire, L.R. 6 Ch. 527, distinguished.]

Trawford v. B.C. Electric R. Co. (No. 2), 9 D.L.R. 817, 18 B.C.R. 132, 15 Can. Ry. Cas. 39, 23 W.L.R. 175, 4 W.W.R. 150, reversing 8 D.L.R. 1026.

FOR DEATH.

In an action to recover for death by negligent act, the plaintiffs are entitled to such damages as will compensate them for the pecuniary loss sustained thereby, together with the pecuniary benefits reasonably expectant from the continuation of life, taking into account the age of the deceased, his state of health, his expectation of life, his earnings and his future prospects. Insurance money received or about to be received by plaintiffs should also be taken into consideration when making the assessment.

Jacob Begin v. The King, 33 D.L.R. 203, 16 Can. Ex. 349.

ACTION UNDER LORD CAMPBELL'S ACT—EFFECT OF INSURANCE.

In assessing damages the moneys paid to the suppliant under the sick allowance insurance should be taken into consideration, but the moneys paid under the provident fund should not be so considered in view of s. 20 of 6–7 Edw. VII. c. 22. In general, in considering the question as to whether insurance money should be taken in account in assessing compensation in cases of accident, a distinction must be made between the case where a party himself is suing for injury either to his person or his property, and the case under Lord Campbell's Act and art. 1056, C.C.P., where the action is for the pecuniary loss caused by the death to the survivors. In the former case he has two distinct causes of action, one on contract with the insurance company and the other in tort against the wrongdoer. In the latter case it is the pecuniary loss caused by the death which forms the basis of the action and the measure of damages, and in this case alone the insurance money is to be taken into consideration.

Saindon v. The King, 15 Can. Ex. 305.

RESPONSIBILITY UNDER ART. 1056 C.C. (QUE.) — DEATH — JURY TRIAL — ASSIGNMENT OF FACTS—C.C.P. ARTS. 424, 427.

In an action under art. 1056 C.C. (Que.), the defendant's suggestion of facts submitted to the jury, to wit: "Did the plaintiff suffer damages as the result of the said accident, and if so, in what amount?" adopted by the judge, is preferable to that of the plaintiff, which reads as follows: "At what sum do you fix the damages occasioned by the death of the said Robert Young?"

Miller v. Canadian Vickers, 25 Rev. Leg. 25.

SUIT FOR DAMAGES FOR DEATH OF WIFE AND CHILD—NECESSITY OF SHOWING PECUNIARY LOSS.

A husband suing for damages for the death of his wife and child must show by actual evidence some pecuniary interest in their lives.

Walker v. Portage la Prairie et al., [1919] 2 W.W.R. 888.

(§ III I—186)—DEATH—PAIN AND SUFFERING—ACCIDENTAL DEATH—RECOVERY BY DECEDENT'S FAMILY—ELEMENTS.

In an action by the widow and administratrix of the deceased for damages under the Manitoba Act, for compensation to families of persons killed by accident (R.S. M. 1902, c. 31), the measure should be for the widow's pecuniary loss sustained because of the death, in a sum that will give her the physical comfort which she had at the time of her husband's death out of his labour and earnings to be continued during the expectancy of life, subject to the accidents of health and employment; but not covering the physical nor mental suffering of the deceased nor the mental sufferings of the plaintiff for the loss of her husband.

Pettit v. C.N.R. Co., 11 D.L.R. 316, 23 Man. L.R. 213, 15 Can. Ry. Cas. 272, 24 W.L.R. 196, 4 W.W.R. 566, varying 7 D.L.R. 645.

(§ III I—187)—Loss of services—Earning power—Probable accumulations.

In an action for the death of a minor servant due to the negligence of the master, his father's and mother's right to recover must be limited in amount to the pecuniary loss which it could be fairly and reasonably found they had suffered by their son's death. [Stephen v. Toronto R. Co., 11 O.L.R. 19; London & Western Trust Co. v. G.T.R. Co., 22 O.L.R. 262, applied.]

Delyea v. White Pine Lumber Co., 2 D.L.R. 863, 3 O.W.N. 823, 21 O.W.R. 665.

Death — Loss of services — Accidental death—Recovery by decedent's family—Excessiveness.

$5,000 is an excessive recovery by a surviving wife, 57 years old, under the Manitoba Act (R.S.M. c. 31) for accidental death of her husband, and the recovery should be reduced to $3,000, where he was 65 years old and earned only $45 monthly, though he was apparently a strong, healthy man.

Pettit v. C.N.R. Co., 11 D.L.R. 316, 15 Can. Ry. Cas. 272, 23 Man. L.R. 213, 24 W.L.R. 196, 4 W.W.R. 566, varying 7 D.L.R. 645.

The assessment of damages for negligence causing death must be confined to the pecuniary loss based on the reasonable expectation of pecuniary advantage to the beneficiaries under the statute known as Lord Campbell's Act.

McDonald v. Sydney, 8 D.L.R. 99, 46 N.S.R. 438.

Measure of compensation — Death of parent—Probable accumulations—Present value.

The measure of damages under the Fatal Injuries Act, 1 Geo. V. c. 33, R.S.O. 1914, c. 151, where it appears that the deceased would have saved the annual income from his property for the remainder of his life for the benefit of his children, is not the full amount thereof for the probable duration of his life, but the present value of the annual payments thereof capitalized at 5 per cent.

Goodwin v. Michigan Central R. Co., 14 D.L.R. 411, 29 O.L.R. 422, 25 O.W.R. 182.

Under Lord Campbell's Act.

An award of $3,500 for the death of a son 16 years old and earning $45 a month, upon whom the plaintiffs were dependent for support, is not excessive.

Armstrong v. C.N.R. Co., 35 D.L.R. 568, 28 Man. L.R. 147, [1917] 3 W.W.R. 219.

Action by parents for death of child—Loss of services—Effect of insurance.

In an action for damages by a father under art. 1054 C.C. (Que.), for the death of his son, when it is proved that the son, 20 years of age, lived with his father, and was to live there for at least 5 years further, and that he earned $600, which he gave to his father to assist him, the court fixed the damages suffered by the father at $1,200. A defendant sued under art. 1056 C.C. (Que.) cannot have the damages awarded by the court reduced by the amount of an insurance policy received by the plaintiff without special allegation in his defence.

Laflamme v. Levis Ferry, 47 Que. S.C. 291.

Death — Damages — Parties entitled — Widow — Infant — Measure — Excessiveness—Reduction.

Where the defendants were held liable for causing death because of a contractor's negligence in not perfectly sealing up an opening in the floor through which, in all probability, poisonous gas escaped into a basement, the Trial Judge, who tried the action without a jury, awarded the adult plaintiff, the widow of the deceased, $5,000 damages and the infant plaintiff, his daughter, $1,000; but the Court of Appeal thought the amount awarded to the the adult plaintiff excessive and ordered that it should be reduced to $3,500.

Skubiniuk v. Hartmann, 24 Man. L.R. 836, 29 W.L.R. 765, 7 W.W.R. 392.

(§ III I—188)—For death of employee — Workmen's Compensation Act (Sask.)—Assessment.

In estimating the compensation recoverable under s. 15 of the Workmen's Compensation Act, Sask. 1910–1911, c. 9, of such sum as is found to be equivalent to the estimated earnings during the 3 years preceding the injury in like employment, a shewing of $182 for one and three-quarter months is not of itself under the principle of the Act, sufficient to base a finding in excess of $1,800 for the 3 years. [Uhlenburgh v. Prince Albert Lumber Co., 9 D.L.R. 639, applied.]

Kennedy v. G.T.P.R. Co., 15 D.L.R. 172, 6 S.L.R. 286, 26 W.L.R. 120, 5 W.W.R. 733, 747.

Death of plaintiff's son—Power of Appellate Court to assess damages.

There is no reason why an application should not be made to the Trial Court to assess damages for negligently causing death, under s. 6 of the subs. 4 of the Workmen's Compensation Act (B.C.), after the Court of Appeal has reversed a judgment in favour of the plaintiff based upon Lord Campbell's Act and the Employers' Liability Act as well, on the ground that the negligence of the employer had not been shewn.

McCormick v. Kelliher, 9 D.L.R. 392, 18 B.C.R. 57, 23 W.L.R. 10, 3 W.W.R. 722, affirming 7 D.L.R. 732.

(§ III I—190)—Instance of amount—Personal injuries—Actual suffering—Loss of earnings.

Hickle v. C.P.R. Co., 7 D.L.R. 805.

Under the Workmen's Compensation Act, Quebec, an employer is responsible for a larger indemnity than the maximum of $2,000 when the accident is due to inexcusable fault, whether such inexcusable

fault is that of the employer personally or that of his foreman or other representatives.

Houle v. Asbestos & Asbestic Co., 3 D.L.R. 466, 42 Que. S.C. 176.

AMOUNT—SPINAL INJURY—MECHANIC.

Damages of $4,500, and an extra allowance for medical expenses, may be fairly allowed for a spinal injury to an electrician, incapacitating him, at the age of 27, from pursuing his avocation.

Keegan v. The King, 39 D.L.R. 27, 16 Can. Ex. 412.

AMOUNT—SCHOOL GIRL.

Because of the nonrepair of a sidewalk, a school girl, 16 years old, fell and broke her wrist. She was earning little, if anything, and was prevented from attending school for a few days at the most. The damages were reduced from $325 to $175.

Johnstone v. Medicine Hat, 11 A.L.R. 22, [1917] 1 W.W.R. 1068.

AGGRAVATION OF DISEASE.

The aggravation of a disease caused by an accident from a tramcar is a question of fact to be decided by a jury in determining the amount of damages to be awarded to the plaintiff.

Schiller v. Tramways Co. of Montreal, 52 Que. S.C. 385.

PERSONAL INJURIES IN AUTOMOBILE ACCIDENT — NEGLIGENCE OF DEFENDANT — ASSESSMENT OF PLAINTIFF'S DAMAGES — LOSS OF PROFITS OF BUSINESS — OTHER ELEMENTS OF DAMAGE.

Brigman v. Rubin, 16 O.W.N. 118.

(§ III I—192)—PERMANENT INJURY.

In an action for damages for injuries sustained in being struck by an automobile, a judgment of a Trial Court for $300 was, on appeal, increased to $700, $200 being awarded for loss of time, $400 for physical suffering, and $100 for expense incurred, where the plaintiff, a strong, healthy man, 62 years of age, was, as the result of his injuries, confined to his bed for 4 weeks, underwent severe physical suffering, sustained displacement and impaired action of the heart, serious injury to his nervous system, great weakness and inability to do heavy work for a long time after the accident, and was thus prevented from superintending his farm work at a season when his services were greatly needed.

Vanhorn v. Verral, 4 D.L.R. 624, 3 O.W.N. 1567, 22 O.W.R. 860.

$5,500, as general and special damages, is fair and reasonable for injuries sustained through a master's negligence by a bricklayer 27 years of age, capable of earning $1,200 to $1,500 per annum, where his injuries would undoubtedly prevent him ever again following his trade, as one foot was injured, his head cut, nose broken, two teeth knocked out, and his back hurt so as to prevent his doing any working involving stooping or lifting.

Scotney v. Smith Bros. et al., 4 D.L.R. 134, 5 S.L.R. 131, 21 W.L.R. 287, 2 W.W.R. 383. [Affirmed, 1 D.L.R. 786, 6 S.L.R. 390.]

Where a young man, 27 years old, in good health, and capable of earning $3.50 a day, is so injured that the hearing in one ear is seriously affected, and his eyesight is injured so as to cause him to see double, and it seems probable that the injury will be permanent, and his occupation requires the use of his natural sight, so that his earning power is seriously depreciated and probably will remain so during his life, $1,100 is a reasonable sum to be awarded to him as damages.

Magnussen v. L'Abbe, 4 D.L.R. 857, 23 O.W.R. 376.

A verdict for $4,000 damages is not excessive for injuries received by a bricklayer 25 years of age, who was capable of earning $1,200 to $1,500 per year, where his injuries resulted in a weak back and neurasthenia, and he had been unable to do much work since receiving such injuries, except some at his trade, which he did with great difficulty and limitations, and, while the chances for complete recovery were not very hopeful, yet it seemed probable that in a reasonable time he would be able to resume work at his trade and to earn a fair livelihood. [Scotney v. Smith Bros. & Wilson, 4 D.L.R. 134, followed and applied.]

Lloyd v. Smith Bros. et al., 4 D.L.R. 143, 21 W.L.R. 298.

A workman entitled to a permanent disability claim under the Quebec Workmen's Compensation Act has the option of accepting the annual income specified in the said Act or of demanding that the capitalization thereof be handed over to an insurance company in order to purchase an annuity therewith, but such capitalization may never exceed $2,000. Under the said act the annual payment for permanent disability is one-half of the average yearly wage of which the injured party is deprived by reason of such incapacity.

G.T.R. Co. v. McDonnell, 5 D.L.R. 65, 18 Rev. de Jur. 369, 21 Que. K.B. 532.

A workman entitled to a permanent disability claim under the Quebec Workmen's Compensation Act has the option of accepting the annual income specified in the said Act, or of demanding that the capitalization thereof (not exceeding $2,000) be handed over to an insurance company in order to purchase an annuity therewith, but no similar option is available to the employer to confess judgment for $2,000 or for the annuity which that sum would purchase, as in satisfaction of his liability. [G.T.R. Co. v. McDonnell, 5 D.L.R. 65, followed.] Under the said Act the annual payment to be made for permanent disability is one-half of the average yearly wage of which the injured party is deprived by reason of such incapacity.

McDonnell v. C.P.R. Co., 7 D.L.R. 138, 22 Que. K.B. 207.

PERMANENT INCAPACITY — AMOUNT — REVIEW.

A verdict in the sum of $27,000 awarded to a railway engineer aged 32, whose yearly

earnings were about $2,100, for injuries permanently incapacitating him and based upon the pain and suffering of the person and the pecuniary loss for the duration of life, will not be set aside on appeal or a new trial directed merely because the amount of damages awarded appears to be excessive.

C.P.R. v. Jackson, 27 D.L.R. 86, 52 Can. S.C.R. 281, 9 W.W.R. 649, affirming 24 D. L.R. 380, 9 A.L.R. 137, 31 W.L.R. 726, 8 W.W.R. 1043.

ASSESSMENT OF—INSTANCES OF AMOUNT—PERMANENT PERSONAL INJURY.

A verdict for $5,000 damages is not excessive for permanent personal injury resulting from the defendant's negligence, whereby the plaintiff, a young labouring man, was so seriously injured that he would be a cripple for life.

Smith v. Alberta Clay Products Co., 14 D.L.R. 296, 5 W.W.R. 405.

PERMANENT PERSONAL INJURIES — EXCESSIVENESS.

$6,532 damages for injuries resulting from negligence, is not excessive for a man 34 years of age, capable of earning $700 a year, where his injuries were found to have resulted in a life-long loss of earning power.

C.P.R. Co. v. Quinn, 11 D.L.R. 600, 22 Que. K.B. 428, 19 Rev. de Jur. 543.

(§ III I—193)—IMPAIRMENT OF SIGHT.

An award of $5,200 damages to a man 29 years old for the loss of an eye and the impairment of sight in the other, caused by explosion in a mine, while liberal, is not excessive.

Doyle v. Foley-O'Brien, 22 D.L.R. 872, 34 O.L.R. 42. [Affirmed by Canada Supreme Court, 9 O.W.N. 494.]

(§ III I—195)—DEATH.

In an action under the Fatal Accidents Act (Ont.), 1 George V, c. 33, for damages for the death of a son the following are proper matters of consideration upon the quantum of damages: (a) The age of deceased; (b) his length of absence from home; (c) what help he had given his parents during that absence; (d) what interest he had shewn in his parents; (e) his wages and habits as to economy.

Johnston v. Clark & Son, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

(§ III I—196)—MEASURE OF—DEATH OF CHILD—RECOVERY BY PARENTS.

$300 to the father and $230 to the mother was awarded as damages under the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, for the death of a bright, clever boy 7 years of age, as the result of the negligent operation of a motorcycle.

Beahan v. Nevin, 11 D.L.R. 679, 4 O.W. N. 1399, 24 O.W.R. 712.

DEATH OF CHILD CAUSED BY FLOODING CELLAR—REMOTENESS.

Even where a city may be responsible for the flooding of a cellar, it is only liable for damages which are the direct and necessary consequence of the break in the pipe. It cannot be held liable for the remote and indirect damages such as those resulting in the death of the plaintiff's child caused by the neglect of defendants to close the opening of their cellar.

Darragh v. Coté, 48 Que. S.C. 478.

J. INJURY; TAKING OR DETENTION OF PERSONAL PROPERTY.

Measure of damages in action against sheriff for negligence and breach of duty, see Levy and Seizure, III A—40.

(§ III J—200)—MEASURE OF COMPENSATION—TAKING OR DETENTION OF PERSONAL PROPERTY—NOMINAL DAMAGES.

An administrator is entitled to nominal damages for the deprivation from and after his appointment, of the use and possession of goods belonging to his intestate which had been wrongfully taken from her during her life time, but which had been returned in good condition to the administrator, where no special damage had been sustained by the deceased in her lifetime or afterwards by her estate by reason of the wrongful detention.

Day v. Horton, 14 D.L.R. 763, 23 Man. L.R. 623, 26 W.L.R. 72, 5 W.W.R. 751.

DETENTION OF PERSONAL PROPERTY—VINDICTIVE AND SPECIAL DAMAGES — RIGHT TO.

In an action of detinue the plaintiff, though successful on the main issue, is not entitled to vindictive damages; nor can he recover special damages unless claimed by his pleadings.

Campbell v. Northern Crown Bank, 18 D. L.R. 187, 24 Man. L.R. 725, 29 W.L.R. 551, 7 W.W.R. 321.

CLAIM FOR USE AND OCCUPATION.

A claim for compensation for use and occupation, not under a contract affording a basis of compensation, is not for a debt, within the meaning of the rules of the District Courts as to costs, but sounds in damages.

Noble v. Lashbrook, 40 D.L.R. 93, 11 S.L.R. 98, [1918] 1 W.W.R. 918.

ACTION TO RECOVER POSSESSION OR VALUE OF CHATTELS — ASCERTAINMENT OF VALUE—JUDGMENT FOR SMALL SUM—COSTS — COUNTERCLAIM — MALICIOUS PROSECUTION—ASSESSMENT OF DAMAGES—SET-OFF—COSTS.

Reid v. Miller, 14 O.W.N. 91. [Varied 15 O.W.N. 340.]

TRESPASS.

In an action for trespass to goods the fact that they cannot be made as good as they were before the trespass is not a ground for holding them worthless; in such a case, if the goods still exist, the damages to which the plaintiff is entitled are measured by the extent to which the goods have been depreciated. [Dick v. East Coast R. Co., 3 Dig. Eng. Case Law, p. 2213, distinguished.]

Smith v. Standard Trusts Co., [1918] 3 W.W.R. 762.

INJURY TO AUTOMOBILE.

The damages recoverable for injury to an automobile is not limited to repairs that are apparent, but include also the expense of a thorough examination of the car.

Sears v. Gourre, 52 Que. S.C. 186.

(§ III J—201)—QUANTUM—INJURY OR DESTRUCTION OF ARCHITECT'S BUILDING PLANS—TEST.

The damages which an architect should receive for the wrongful destruction of building plans he had prepared in a competition but which had been rejected are properly allowed at what they would be worth to display as an illustration of the architect's professional skill, and not the entire cost of reproduction, where they would not be available for another building because of the peculiar shape of the parcel of land for which they were designed.

Nicolais v. Dom. Express Co., 18 D.L.R. 464, 20 B.C.R. 8, 28 W.L.R. 754, 6 W.W.R. 1202, varying 6 W.W.R. 1.

NEGLIGENCE OF STREET RAILWAY—INJURY TO PROPERTY—MONEYS RECEIVED FROM INSURANCE COMPANY—EFFECT ON MEASURE OF DAMAGES.

At the trial of an action for damages for injury to the plaintiff's vehicle by a collision with a car of the defendants, the plaintiff, testifying on his own behalf, was asked by the defendants' counsel, on cross-examination, in regard to the quantum of damages, whether he had received money from an insurance company for the damage to his vehicle:—Held, that the Trial Judge properly refused to allow the question to be answered; the wrongdoers (the defendants) were not entitled to have any advantage from an insurance effected by the plaintiff; with the rights of the plaintiff and the insurance company inter se the defendants had no concern. Aliter, in cases under the Fatal Accidents Act, where the amount to be recovered is the actual pecuniary loss sustained by those entitled under the statute. Review of the authorities.

Millard v. Toronto R. Co., 31 O.L.R. 526, 6 O.W.N. 519.

INJURY OR DESTRUCTION—QUANTUM—INJURY TO MOTORCAR IN COLLISION.

Macdonald v. Toronto R. Co., 4 O.W.N. 947, 24 O.W.R. 281.

INJURY TO MOTOR CAR—QUANTUM OF DAMAGES—EVIDENCE—ESTIMATE OF COST OF REPAIRS—ASSESSMENT BY JURY—APPEAL—OPTION GIVEN TO DEFENDANT TO TAKE PLAINTIFF'S INJURED CAR—PAYMENT OF INCREASED AMOUNT—COSTS.

Laird v. Taxicabs, 7 O.W.N. 736.

(§ III J—202)—DETENTION OF PERSONAL PROPERTY—RENTAL VALUE.

In fixing damages for the mere detention or nondelivery to the owner of an engine which the defendant did not use, the full rental value which the owner could have obtained for its use may properly be reduced by an allowance for wear and tear.

Vancouver Machinery Co. v. Vancouver Timber & Trading Co., 17 D.L.R. 575, 27 W.L.R. 883. [Reversed 18 D.L.R. 491.]

TAKING OR DETENTION OF PERSONAL PROPERTY—MEASURE OF DAMAGES.

Where the seller of a piano on deferred payments unlawfully seized and retook possession of the piano under the mistaken impression that the contract of sale authorized him so to do on default, the measure of damages for the wrongful detention of same for some months under such seizure and until the return of the piano to the purchaser, is the amount for which the plaintiff could have rented another piano of the kind during the period, and a claim for "damage to credit and reputation" because of the seizure cannot be allowed.

Matthews v. Heintzman & Co., 16 D.L.R. 522, 7 S.L.R. 101, 27 W.L.R. 675.

NEGOTIORUM GESTOR—RUNAWAY HORSE—QUE. C.C. 1043, 1046, 1055, 1385.

When a person, by his free and voluntary act, acting as a negotiorum gestor, takes care of something belonging to another in his absence and without his knowledge, but for his benefit, such person can recover losses he has sustained in looking after the others interest; e.g. one who sees a runaway horse coming, throws himself in the way and stops it, is entitled, if he be hurt, to claim from the owner of the horse the damages he suffers.

Lortie v. Adelstein, 46 Que. S.C. 543.

(§ III J—203)—CONVERSION.

Where an automobile was delivered to the defendants with authority to make all repairs thereon at a cost not to exceed a specified sum and they put a greater amount of repairs on it and then converted it to their own use they must answer for its value at the time of its conversion and cannot reduce their liability by any increased selling value attributable to the unauthorized repair. [Greer v. Faulkner, 40 Can. S.C.R. 399, applied.]

Gallagher v. Ketchum & Co., 2 D.L.R. 871, 3 O.W.N. 843, 21 O.W.R. 696.

Where the plaintiff in an action for trover, has repossessed himself of the goods and chattels alleged to have been converted, without it appearing that he had suffered any appreciable damages, he is entitled to nominal damages only.

Delbridge v. Pickersgill, 3 D.L.R. 786, 21 W.L.R. 285, 2 W.W.R. 393.

MEASURE OF — TROVER AND CONVERSION — GOOD FAITH — DEALING AS OWNER WITH GOODS OF ANOTHER.

Nominal damages only will be awarded for a conversion where one deals as owner with goods of another under a mistaken but honest and reasonable supposition of being lawfully entitled thereto.

MacKenzie v. Scotia Lumber Co., 11 D.L.R. 729, 47 N.S.R. 115, 12 E.L.R. 464, reversing in part 7 D.L.R. 409.

CONVERSION—RETURN OF GOODS.

It is none the less a conversion of goods

that they were taken by mistake, but their return, on discovery of the mistake, will minimize the damages to be awarded, if the owner is placed in such a position that he can use the goods.

Campbell v. McMillan, 22 D.L.R. 608.

CONVERSION—SET-OFF.

The measure of damages in an action for conversion is the value of the thing converted and any special damages which the plaintiff can prove; in such assessment the unpaid purchase money due the defendant on the article converted cannot be considered, but the same may be claimed by way of counterclaim or set-off.

Mellis v. Blair, 27 D.L.R. 165, 22 B.C.R. 150, 10 W.W.R. 241.

MISAPPLICATION OF BANK FUNDS.

Where the plaintiff's agent and the defendant bank have, by collusion, deflected money deposited by the plaintiff to be used for a particular purpose, the measure of damages is the actual amount of the loss sustained because of the wrongful deflection, and if none is proved then merely nominal damages.

British America Elevator Co. v. Bank of B.N.A., 26 D.L.R. 587, 32 D.L.R. 181, 33 W.L.R. 625, 9 W.W.R. 1368, varying 20 D.L.R. 944, 29 W.L.R. 214. [Reversed by Privy Council, 46 D.L.R. 326.]

CONVERSION — REMOVAL OF BUILDING FROM MINING CLAIM — TITLE TO BUILDINGS — BILL OF SALE — "PLANT" — LIABILITY OF WRONGDOER FOR ACTS OF SERVANTS — ASSESSMENT OF DAMAGES — COSTS.

Silverman v. White, 9 O.W.N. 110.

RELIEF AGAINST DAMAGES ON RETURNING GOODS.

Notwithstanding that there may have been a technical conversion of the plaintiff's goods by the defendant, the court has power to relieve the defendant from payment of damages for the conversion on terms whereby the goods are returned.

Duryea v. Kaufman, 2 D.L.R. 468, 3 O.W.N. 651, 21 O.W.R. 141.

REPLEVIN—NOMINAL DAMAGES.

If, in an action for the replevin of goods wrongfully seized, it appears that the plaintiff has suffered no special damage he is entitled to recover nominal damages.

Hart v. Johnston, 27 D.L.R. 450, 9 S.L.R. 201, 34 W.L.R. 225, 10 W.W.R. 244.

(§ III J—204) — DESTRUCTION OF PROPERTY—KILLING DOGS.

The sum of $125 is not an excessive sum to award as damages for the loss of a half-bred collie dog, which is shewn to have been of more than ordinary intelligence, kind and affectionate, a good watchdog, useful about the farm, and well trained to herd and attend to cattle.

McNair v. Collins, 6 D.L.R. 510, 27 O.L.R. 44, 22 O.W.R. 891.

K. INJURY TO REAL PROPERTY; NUISANCE.

Negligence causing fires, see Negligence, I B—16.

(§ III K—205)—MEASURE OF — INJURY TO REAL PROPERTY — ABANDONMENT OF EXPROPRIATION PROCEEDINGS — DERIVATION OF USE OF LAND — LOSS OF RENTALS — INJURY TO PROPERTY DURING VACANCY BY THIEVES.

A city, which was required by s. 52 (20) of 3 Edw. VII. (Que.) c. 62, to expropriate land for public use, on the abandonment of the proceedings after notice to the landowner, the appointment of commissioners and the hearing of evidence, is answerable to the landowner for the expenses of his useless removal from the property; and also, under s. 428 of the Montreal Incorporation Act, 62 Vict. c. 58, for the loss of the rental from his property as the result of the imminence of the expropriation, subject to the limitations thereby provided, had the expropriation been carried out. On the abandonment by a city of a proceeding to expropriate land, although it is liable to the landowner for the loss of rentals while his property by reason of the imminence of the expropriation was lying idle, it is not answerable for injuries caused to the property by the acts of thieves or criminals.

Robillard v. Montreal, 13 D.L.R. 680.

DRAINAGE WORKS — CONSTRUCTION — NEGLIGENCE — COMPENSATION — REASONABLE EXERCISE OF POWERS — ADJOINING LANDOWNER — RAILWAY ACT, S. 250 (1).

Where no negligence has been shewn on the part of the railway company in carrying out the construction of drainage works, and the damage, if any, is due solely to reasonable exercise by the company of the powers conferred upon it, the owner of adjoining lands cannot recover compensation. Such an injury should have been foreseen and compensation claimed for it under the statute at the time the railway was constructed. Under the circumstances, the cost of lowering a railway culvert after construction to provide better drainage should be borne by the adjoining landowner. [Wallace v. G.T.R. Co., 16 U.C.R. 551; Knapp v. Great Western R. Co., 6 U.C.C.P. 187; Nicol v. Canada Southern R. Co., 40 U.C.R. 583; L'Esperance v. Great Western R., 14 U.C.R. 173, followed; Denholm v. Guelph & Goderich R. Co., 17 Can. Ry. Cas 318, distinguished.]

Department of Agriculture v. G.T.R. Co., 23 Can. Ry. Cas. 77.

TRESPASS.

Where an act of trespass is not accompanied by circumstances of aggravation and where there has been a pecuniary loss in consequence of the trespass, the proper measure of damages is the actual pecuniary loss sustained.

Nagy v. Venne, 9 S.L.R. 186, 34 W.L.R. 413.

RIGHTS UNDER POSSESSORY TITLE — FLOODING FROM DRAINS.

A person holding a lot under a possessory title is entitled to damages from persons who permit water to escape from their drains on to and to the injury of the lot.

Kilby v. Point Grey, 24 B.C.R. 107, [1917] 2 W.W.R. 206.

OVERHOLDING TENANT — USE AND OCCUPATION — VALUE — COSTS — REVIEW.

Although, in principle, the punishment of a presumptuous litigant be the payment of the costs, yet a tenant who contests a legitimate demand of expulsion of the premises he occupies against the will of the landlord, must, besides paying the costs, also pay the damages resulting from such an illegal occupation; but if there be no deceit nor malice on the part of the tenant, the damages can include only that which may have been foreseen when sustained, and which directly and immediately follow the cause which has produced them, that is, the value of occupation of the premises. The Court of King's Bench will not interfere with the judgment of the trial court as to evidence fixing the value of the occupation of the premises, claimed as damages, unless a gross error or a serious injustice is evident.

Friedman v. St. Charles, 27 Que. K.B. 563.

RESPONSIBILITY — CHANGING LEVEL — CITY OF MONTREAL — DAMAGES — C.C. ART. 1053.

If a municipality changes the level of a street, it should indemnify the owner of a house situated in the street, if the value of the house is depreciated. The indemnity should be founded on the following principles: If after the work is done the house has no real value whatever, the municipality should pay the total value; if the property can still be used, but to a less degree, the municipality should pay the difference between its value before the work and that which it has after the work. It is a wrong principle to pretend that the owner in this case has the right to pull down his house, to raise his land to the new level of the street, and to rebuild his house as it was in the first place. It is more practical to build a house with a basement. However if the owner has not the necessary means to build according to the exigencies of the new land, he necessarily suffers a diminution in the enjoyment of his property and the property is decreased in value, for which he should be indemnified.

Gallagher v. Montreal, 56 Que. S.C. 139. [See 20 Que. P.R. 264.]

WATERCOURSE — WORKING — VALUATION — REPORT OF VALUATORS — COST — DENIAL — ACQUIESCENCE — FORMALITIES — S. REF. [1909] ARTS. 7295, 7296.

The valuators named to value the damages caused by the owner of a mill situated on a water course, by virtue of R.S.Q. [1909] arts. 7295–7296, are not bound to limit themselves to damages suffered at the date of the valuation; they can allow a fixed sum, as much for the past as for the future, or an annual sum. These valuators have the right to determine who should pay the cost. In any case even if they have not this right, their report is not void for this reason. If one of the valuators is subject to challenge, the complaining party should repudiate him "in limine litis," and not after their report is made, and he has acquiesced in it. The valuators have not the right, under the Act, to examine witnesses under oath; they are not even obliged to hear the parties; no rule is fixed by the Act for their valuation.

Giroux v. Viger & Tourangeau, 55 Que. S.C. 363.

CONSTRUCTION BY VILLAGE CORPORATION OF SEWER THROUGH LANDS OF PLAINTIFF — ABSENCE OF EXPROPRIATING BY-LAW — ACTION FOR TRESPASS AND OTHER RELIEF — PLEADING — STATEMENT OF DEFENCE — ALLEGATIONS THAT BY-LAW PASSED SINCE ACTION AND MONEY PAID INTO COURT TO ANSWER COMPENSATION, TRESPASS, AND COSTS — MOTION TO STRIKE OUT ALLEGATIONS — ADVANTAGE OF HAVING COMPENSATION UNDER BY-LAW AND DAMAGES FOR TRESPASS ASCERTAINED BY SAME TRIBUNAL — CONSENT JUDGMENT.

Fair v. New Toronto, 17 O.W.N. 175.

TRESPASS — TIMBER — CONVERSION — COUNTERCLAIM.

Mylam v. Rat Portage Lumber Co. et al., 11 O.W.N. 165.

INJURY BY OPERATIONS ON NEIGHBOURING LAND—WATER LOTS.

Jessop v. Cadwell Sand & Gravel Co., 10 O.W.N. 392, 11 O.W.N. 110.

(§ III K—206)—FORCIBLE ENTRY OR POSSESSION—TRESPASS.

The extension by the owner of land of an existing pig corral is not such a peculiar and unusual use of the land as will relieve a trespasser from the duty of anticipating the probability of it, and being charged in damages for the interference with the owner's intended exercise of his right in that respect. The rental value of land is not to be adopted as the measure of damages for a trespass thereon if special damage is alleged and proved, and the trespasser will be liable for loss shewn to have been suffered by the owner by reason of his being deprived of an actually intended and natural and probable use of his land. [France v. Gaudet, L.R. 6 Q.B. 199, followed.]

Marson v. G.T.P.R. Co., 1 D.L.R. 850, 20 W.L.R. 161, 4 A.L.R. 167, 1 W.W.R. 693.

Where several animals, belonging to different owners, have at various times trespassed upon the plaintiff's land, and the whole damage done by all of them can be ascertained, but the defendant's animal has sometimes been among those trespassing

and sometimes not, and there is no proof that any particular damage was done by any particular one of the animals, the court will, nevertheless, assess the damages against the defendant as best it can.

Broderick v. Forbes, 5 D.L.R. 508.

MEASURE OF — INJURY TO REAL PROPERTY — TRESPASS TO LAND — CUTTING TIMBER — MISTAKE AS TO BOUNDARY — EFFECT.

The damages for cutting timber over the boundary of defendant's timber limit will be assessed on the basis of the value of same as standing timber, where the defendant acted under a bona fide supposition of right and without intending to commit a deliberate trespass.

Chew Lumber Co. v. Howe Sound Co., 13 D.L.R. 735, 18 B.C.R. 312, 25 W.L.R. 105, 4 W.W.R. 1308.

TRESPASS TO LAND — ENTRY "UNDER CLAIM OF RIGHT" — QUANTUM.

If a trespasser enters on another's land "under a claim of right" the damages should be moderate, especially where coupled with an injunction and where the actual damages are trifling and this, although the entry was made with a high hand.

McMenemy v. Grant, 9 D.L.R. 319, 4 O.W.N. 802, 24 O.W.R. 100.

ANIMALS TRESPASSING.

Where several animals belonging to different owners have at various times trespassed on plaintiff's land, but where the evidence does not establish that animals belonging to any other owner than the defendant did any damage to the plaintiff's grain, the court is justified in assessing the full amount of the damages against the defendant.

Pixley v. Bedford, 42 D.L.R. 560, 11 S.L.R. 345, [1918] 2 W.W.R. 1055.

MINING LAW — COAL — TRESPASS — REMOVAL OF COAL — SINISTER INTENTION — MEASURE OF DAMAGES.

Where a company in working its mine enters upon and works the coal on adjoining property without the consent or knowledge of the owners, and takes it for the purposes of sale, the proper estimate of damages is the value of the coal without deducting any of the necessary expenses of working and taking it out.

Wellington Colliery Co., 26 B.C.R. 315.

(§ III K—207)—SUBWAY — CONSTRUCTION — REMOVAL OF APPROACH TO PROPERTY — INJURY — COMPENSATION — BUSINESS PROFITS.

Where land is injuriously affected by the removal of the approach to the premises by the construction of a subway by a railway company, the owner is not entitled to compensation for loss of business profits resulting therefrom where no part of the land is taken. Section 155 of the Canadian R. Act (R.S.C. 1906, c. 37) is taken from s. 16 of the English Railways Clauses Consolidation Act, 1845, and the English decisions are applicable thereto.

C.P.R. Co. v. Albin, 49 D.L.R. 618, [1919] 3 W.W.R. 873, reversing 47 D.L.R. 587, 45 O.L.R. 1, 24 Can. Ry. Cas. 398.

(§ III K—210)—ILLEGAL DISTRESS.

The measure of damages for illegal seizure is not only the value of the goods distrained and sold, but also damages for being deprived of the use of them, if thereby the tenant is thrown out of employment or is prevented from engaging in his ordinary business; the value of the goods is the "fair value to the tenant."

Jarvis v. Hall, 8 D.L.R. 412, 4 O.W.N. 232, 23 O.W.R. 282.

ILLEGAL DISTRESS — QUANTUM.

The damages assessable to a debtor whose chattels are wrongfully seized and sold are based, not upon the price obtained at the forced sale, but upon the actual value of the property so taken.

Dornian v. Crapper, 17 D.L.R. 121, 7 S.L.R. 229, 27 W.L.R. 599, 6 W.W.R. 551.

(§ III K—211)—SERVITUDE — AGGRAVATION — DRAINAGE — FURROWS — QUARRY — QUE. C.C. 501, 558.

Although in the interest of agriculture an owner may plough in his field the necessary furrows to cultivate his land, even if such furrows increase the servitude of the draining of the higher lands into the lower ones, yet such is not the case where a person operates a quarry and, as a consequence of such works, concentrates all the water and then drains it off into the servient land. He thereby aggravates the servitude which that land owes, and he must therefore compensate the owner.

Lachance v. Gravel, 23 Que. K.B. 442.

(§ III K—212)—WRONGFUL REMOVAL OF CORPSE FROM BURIAL LOT — PUNITIVE DAMAGES.

Punitive damages will be awarded in an action for the wrongful removal of a human body from a burial lot, where the boxes containing two bodies were enclosed in rough lumber boxes and reinterred elsewhere, one above the other, in a common grave, and the place of reburial of the body of a child is left uncertain.

O'Connor v. Victoria, 11 D.L.R. 577, 4 W.W.R. 4.

(§ III K—214)—OPENING UP DITCH.

A municipality is answerable in damages for its wrongful act in casting water into a ravine on the land of the plaintiff, the result of which was to cause a more rapid erosion of the land at the mouth of the ravine, and to keep the land about it wet and impassible for a longer period than formerly.

Lamontagne v. Woodlands, 5 D.L.R. 524, 22 Man. L.R. 495, 21 W.L.R. 881.

WASTEFUL METHOD OF WORKING LAND.

Upon denying a vendee rescission of a contract for the purchase of timber lands

where the price to be paid was based upon the number of feet of lumber cut, the vendor's counterclaim for loss occasioned by the wasteful method adopted by the vendee for working the lands, will also be denied in the absence of some obligation on the part of the latter as to the method of operation, since, in any event, under the contract of purchase, the land belonged to the vendee.

Eaton v. Dunn, 5 D.L.R. 604, 46 N.S.R. 156, 11 E.L.R. 52. [Affirmed, 9 D.L.R. 303, 47 Can. S.C.R. 205.]

LIABILITY — DAMAGES — RAILWAY — PRESCRIPTION — LEGAL CONNECTION — CITY OF MONTREAL.

A claim for damages against the city of Montreal and a railway company for damages to property, owing to the construction of a tunnel under a public street for the advantage of the railway company, and even authorized to that effect by the Railway Board, cannot be prescribed under s. 537 of the city's charter, or under s. 306 of the Railway Act, 1906, because such an action is not the result of an offence, a quasi-offence, or an illegality, mentioned in those sections, but is rather the result of a statutory obligation forcing those who exercise rights conferred by statute to pay a compensation to those who suffer some harm through the exercise of such rights. In the present case the railway company (C.P.R. Co.) having itself done the works for its own advantage and under the operation of the Railway Act, there was a legal connection between the said company and the plaintiff.

Daoust v. Montreal, 46 Que. S.C. 252, affirmed in 51 Que. S.C. 241.

(§ III K—215)—INJURY TO TIMBER—FIRE SPREADING FROM RAILWAY.

The persistent failure of a railway company to remove from its right-of-way, as required by statute, growing combustible material likely to catch fire from sparks from the locomotives and to spread to adjoining owners' property is an element to be considered in favour of awarding liberal damages in that contingency.

Westhaver v. Halifax & South Western R. Co., 14 D.L.R. 633, 47 N.S.R. 439, 13 E. L.R. 515.

INJURY TO CROPS — FIRE — MEASURE OF DAMAGES — GENERAL DAMAGES.

Where the negligence of the defendant in spreading fire contrary to the Prairie Fires Act, R.S.S. 1909, c. 129, destroyed a certain acreage of wheat which would have yielded a certain quantity of which the value is proved, the special damages allowable therefor should not be supplemented by an additional sum as general damages.

Bettger v. Turner, 16 D.L.R. 484, 7 S.L.R. 228, 27 W.L.R. 625.

REMOVING PROPERTY — INJURY TO POSSESSION.

The plaintiff in a possessory action cannot demand damages as compensation for the value of the things which have been taken away; he can obtain only such damages as may have resulted from disturbing his possession, if any such there may have been.

Veilleux v. Murray-Gregory Co., 50 Que. S.C. 154.

WATER — WRONGFUL DIVERSION OF WATER AND ICE FROM STREAM INTO CANAL — INTERFERENCE WITH NATURAL COURSE — INJURY TO BOATHOUSE ON BANK OF CANAL — CAUSE OF INJURY — FINDING OF TRIAL JUDGE—APPEAL.

Reynolds v. Hamilton & Dundas Street R. Co., 16 O.W.N. 4.

FIRE — SHIP ON FIRE PLACED CLOSE TO ANOTHER SHIP — INJURY TO LATTER BY FIRE ESCAPING FROM FORMER — DIRECTIONS GIVEN BY OWNERS OF FORMER SHIP — RESPONSIBILITY FOR ESCAPE OF DANGEROUS ELEMENT — EMPLOYMENT OF TUG BUT NOT SO AS TO CONSTITUTE OWNER OF TUG AN INDEPENDENT CONTRACTOR — ABANDONMENT OF FIRST SHIP TO UNDERWRITERS — EVIDENCE — INTERVENTION OF OWNERS — CONTROL — LIABILITY FOR LOSS — ASSESSMENT OF DAMAGES.

McGibbon v. Northern Navigation Co., 16 O.W.N. 89.

TRESPASS TO LAND — CUTTING AND REMOVING PULPWOOD — ASCERTAINMENT OF QUANTITY TAKEN — DAMAGES LIMITED TO VALUE OF WOOD — NEGLIGENT BUT NOT WILFUL TRESPASS — REPLEVIN ORDER — SECURITY — PLEADING — PAYMENT INTO COURT — AMENDMENT — COSTS.

Central Contracting Co. v. Horrigan, 15 O.W.N. 400.

(§ III K—216)—CUTTING TIMBER.

The measure of damages in an action by a patentee of mining lands in Ontario for trespass in cutting and removing pine timber is the full value of the timber so cut and removed.

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45. [Reversed on different points, 15 D.L.R. 755, [1914] A.C. 197.]

The measure of damages for a wilful and deliberate trespass in cutting and removing timber from the timber limits of another, where the evidence does not warrant the application of any other rule, is the value of the timber after it was severed and manufactured while on the plaintiff's land.

Laursen v. McKinnon, 4 D.L.R. 718, 18 B.C.R. 682, 20 W.L.R. 384.

CUTTING TIMBER — STUMPAGE.

As against the unsuccessful claimant of woodlands who had entered and cut down growing trees after notice of plaintiff's superior title, the damages for trespass need

not be restricted to a recovery upon a stumpage basis.

Dickie v. Atlantic Lumber Co., 16 D.L.R. 46, 14 E.L.R. 8.

CUTTING TIMBER — TRESPASS OVER MARKED BOUNDARY.

The quantum of damages for trespass in cutting and removing timber from the plaintiff's limits where the boundary line was clearly marked and deliberately crossed, will be the value of the cut timber less only the cost of felling the trees and fitting them for removal, and without any reduction in respect of the cost of moving the logs. [Last Chance v. American Boy, 2 Martin's Mining Cases (B.C.), 151, applied.]

Adams Powell River Co. v. Canadian Puget Sound Co., 17 D.L.R. 691, 19 B.C.R. 575, 28 W.L.R. 13.

CUTTING TIMBER.

In assessing damages against a lumber company for entering and cutting timber on lands of another company there may be allowed, in addition to the stumpage valuation, damages for the occupation of the land while the lumbering operations were going on, the consequent construction of roads through the woods and the felling of trees for that purpose, and damages because of the trees having been young and unmatured, which would have been of more value to the landowner had they been left standing.

Dom. Lumber Co. v. Halifax Power Co., 23 D.L.R. 187, 48 N.S.R. 364. [Appeal to Canada Supreme Court dismissed, October 12, 1915.]

TRESPASS — CUTTING OF TIMBER — PLAN OF LEAVE AND LICENSE — NOT PROVEN — EXEMPLARY DAMAGES NOT NECESSARILY JUSTIFIED.

In an action for damages for trespass on lands, for the taking of timber and injury to the soil, where the defendants are unable to substantiate a plea of leave and license, they may not necessarily be assessed in exemplary damages.

Wilson et al. v. Keystone Logging & Mercantile Co., 25 B.C.R. 569.

(III K—218)—FALL OF WATER TANK.

A subcontractor who constructed a steel support for a water tank that was erected on the roof of a building, which fell, by reason of the defective construction of the supports, must indemnify the principal contractor to whom he supplied it for all damages the latter may be condemned to pay by reason of the fall of the tank.

Wilson v. The H. G. Vogel Co.; The H. G. Vogel Co. v. Gardiner; Gardiner v. Locomotive & Machine Co., 4 D.L.R. 196.

(III K—220)—DITCHES AND WATERCOURSES — NEGLIGENT CONSTRUCTION OF DRAIN — FLOODING LAND — DAMAGES — INJUNCTION — APPEAL — COSTS.

Blacklock v. Shearer, 15 O.W.N. 405.

(§ III K—221)—OBSTRUCTION OF NAVIGATION—DIRECT AND REMOTE LOSSES.

In an action for unlawfully obstructing a private right of navigation, the losses in respect of a warehouse and wharf and the wood piled thereon for steamer use, as well as the loss of business and profits are recoverable as elements of damage; but a depreciation in the value of the steamer is too remote and not a special damage as distinguished from the damage occurring to the others of the public plying on such waters. [Rainy River Navigation Co. v. Ont. & Minn. Power Co., 17 D.L.R. 850, applied.]

B.C. Express Co. v. G.T.P. R. Co., 27 D. L.R. 497, 34 W.L.R. 361, 459, 10 W.W.R. 477, 583. [Reversed 38 D.L.R. 29, 55 Can. S.C.R. 328, 44 D.L.R. 1.]

OBSTRUCTION OF ACCESS TO SEA — RAILWAY ACT.

The obstruction of a right of access to the sea by reason of the construction of a railway is within the meaning of s. 306 of the Railway Act, 1906, and an action for damages occasioned thereby must be brought within one year of the placing of the obstruction.

Westholme Lumber Co. v. G.T.P. R. Co. (B.C.), 41 D.L.R. 42, 25 B.C.R. 343, [1918] 2 W.W.R. 551.

CLOSING UP DITCH — WATER OVERFLOWING.

One who by artificial means causes water to be collected on his land and discharged onto his neighbour's land thereby causing damage, is liable for the damage caused.

Messenger v. Miller, 40 D.L.R. 35, 52 N. S.R. 142.

GRAVEL LANDS — DIVERSION OF STREAM — INCREASE OF FLOW — CONSEQUENTIAL DAMAGES.

Cadwell et al. v. C.P.R. Co., 28 D.L.R. 190, 37 O.L.R. 412.

INUNDATION OF LANDS — VALUE — PERMANENCY OF LOSS.

In an action claiming damages for inundation of land, the court cannot award the total value of the land inundated if this inundation is not permanent. It should, if the evidence justifies it, admit only the loss suffered from being deprived of the enjoyment of the property. In default of such evidence, the Court of Review will remit the cause to the Superior Court to allow the parties to complete the proof.

Fortier v. Can. L. & P. Co., 48 Que. S.C. 483.

(§ III K—225)—NUISANCE — INDUSTRIAL WORKS — INTERFERING WITH PHYSICAL COMFORT.

An action for damages in respect of the nuisance caused to a neighbouring owner by reason of smoke, dust and noise from industrial works, may be maintained if the plaintiff has suffered damages different in character and distinct from any injury, inconvenience, or annoyance occasioned to the public generally, and the nuisance is of such

a character as to interfere with the ordinary physical comfort of human existence.

Taylor v. Mullen Coal Co., 21 D.L.R. 841, 8 O.W.N. 445.

(§ III K—229)—Injury to business — Measure — Collapse of water tank — Liability of landlords.

The difference between the amount of insurance received by a tenant and the actual loss sustained from the collapsing of a water tank on a demised building, may be recovered by the tenant from the landlord.

Wolff v. Mackay, 12 D.L.R. 750.

Failure of town to rebuild bridge — Interruption of mill business — Effect of nonrepair of mill.

The owner of a mill cannot recover damages for the interruption of his business by reason of the neglect of a town to replace a bridge leading to his mill, where, at the time the bridge was swept away, the mill was out of repair, and it was not shewn when it was ready to resume operations.

Strang v. Tp. of Arran, 12 D.L.R. 42, 28 O.L.R. 106.

L. Condemnation or depreciation in value: expropriation.

See also Expropriation.

(§ III L—230) — Measure of compensation — Condemnation or depreciation by eminent domain — Taking land for railway purposes — Underlying minerals.

The effect of the Railway Act of Canada, R.S.C. 1906, c. 37, with regard to the expropriation of land by a railway company differs from that of The Railways Clauses Consolidation Act, 1845, in that under the former Act the company acquiring the surface has a right of support from minerals subjacent and adjacent to the line. Under the Canadian Act the owner of minerals is entitled to compensation for the loss arising from the restriction of his rights, without waiting until he wishes to work the minerals; this compensation is to be ascertained as at the date of the deposit of plans, and once for all.

Davies v. James Bay Ry. Co., 26 D.L.R. 450, [1914] A.C. 1043, 19 Can. Ry. Cas. 86, varying 13 D.L.R. 915, 28 O.L.R. 544.

Eminent domain — Riparian proprietor — Permanency of injury — Damages once for all.

Where the result of the erection of a dam for a power house under the statutory authority of R.S.Q. 1909, arts. 7295-7296, is to destroy the water power of the upper riparian proprietor and some of his property, and there is no suggestion that the power house dam and its method of user is to be otherwise than permanent, damages may be assessed once for all in an action taken by the upper proprietor, in default of the appointment of experts under the statute, on the basis of a continuing injury to the full extent to which experts might award compensation in expertise proceedings.

Dorchester Electric Co. v. Roy, 20 D.L.R. 32, 49 Can. S.C.R. 344, affirming 12 D.L.R. 767.

Railway building and operating line across land — Depreciation in value — Equitable owner — Right to bring action.

The equitable title of a purchaser of lands of which his vendor is the registered owner and in respect of which the purchaser has registered a caveat, is sufficient to sustain an action by him for damages against a railway company for building and operating its line across his land. [Johnson v. Ontario S. & H. Ry. Co., 11 U.C.R. 246, applied.]

Holmested v. C.N.R. Co., 20 D.L.R. 577, 19 Can. Ry. Cas. 102, 7 S.L.R. 201, 29 W.L.R. 108, 7 W.W.R. 69.

Arbitration — Application for — Owner of land — Temporary road through land — Municipalities — Rights of — Rural Municipalities Act (Alta.).

Blomfield v. Starland, 21 D.L.R. 859, 31 W.L.R. 573. [Affirmed 25 D.L.R. 43, 9 A.L.R. 203, 9 W.W.R. 552, 32 W.L.R. 905.]

Railway — Construction of subway — Injury to property — Action maintainable.

Clavir v. C.N.R. Co., 22 D.L.R. 913, 7 O.W.N. 695.

Eminent domain — Railways — Right-of-way through farm — Measure of damages.

Gray v. G.T.P. Branch Lines Co., 11 D.L.R. 861, 24 W.L.R. 45.

Railway — Expropriation — Taking part of farm — Compensation — Value of land taken — Damages for severance and injurious affection of land not taken — Award of arbitrators — Appeal — Reasons for award prepared after award made — Benefit to land by railway — Evidence to sustain award — Refusal to interfere.

Re Russell & Toronto Suburban R. Co., 16 O.W.N. 352. [See 17 O.W.N. 219.]

(§ III L—231)—Extent of property affected.

Where the Crown erects an ice pier on land of a riparian owner, the measure of damages, under the Expropriation Act, R.S.C., 1906, c. 143, in addition to the value of the land taken, is compensation for injurious affection to the remainder of the property. Where such owner becomes entitled to compensation, the damages that he is entitled to recover are such as are inherent to the land and not to the person or to the business of the owner.

Pickels v. The King, 7 D.L.R. 698, 14 Can. Ex. 379.

(§ III L—232) — Expropriation — Condemnation or depreciation in value — Injury to business — Compensation — Based on capitalization of profits — Goodwill — Municipal corporation.

On the expropriation of lands and buildings by a city for park purposes, the owner who has carried on a profitable restaurant, and boat house business there which, because of the peculiar situation of the property, is not capable of being transferred to other premises in the neighbourhood, is not entitled to demand that compensation for the land value shall be fixed by capitalization at 4 per cent the net annual revenue, as on the loss of a definite and fixed income; the business being one in which the absolute continuity of the profits is doubtful, an award is properly based upon three factors; (1) the value of the land (2) the buildings, plant and stock in trade (3) damages for disturbance; and where the land value had been fixed with regard to its special adaptability for the business, an allowance of 3 years' profits for disturbance amounting to an extinguishment of the good will pertaining to the location was affirmed.

Re Meyer & Toronto, 19 D.L.R. 785, 30 O.L.R. 426.

Injury to business—Logging.

The suppliants alleged that their business of driving logs on the La Croche river was interfered with by the piers of a bridge constructed across the river by the National Transcontinental Railway, and they asked to be reimbursed a sum which they claimed they had been obliged to pay to break a jamb of logs caused by the alleged faulty construction of the piers as regards using the river for driving logs. The court having found that the railway had statutory authority for the construction of the bridge, held, that the suppliants were not entitled to compensation. While, under art. 7298, R.S.Q., 1909, any person, firm or company has the privilege of floating and driving timber down rivers, such privilege is not a predial servitude, as it is shared in common with the rest of the public, and is not derived from any title or fee in the land.

Laurentide Paper Co. v. The King, 15 Can. Ex. 499.

(§ III L—235)—Percentage for compulsory taking.

In addition to the damage for expropriation of lands by the Crown for harbour improvements, 10 per cent may be added by the Exchequer Court for the compulsory taking.

The King v. Kendall, 8 D.L.R. 909, 14 Can. Ex. 71.

(§ III L—236)—Municipal expropriation of land — Owner, lessee, and sublessee — Severance — Incidental damages.

Re O'Neil & Toronto, 32 D.L.R. 775, 37 O.L.R. 446.

(§ III L—237) — Expropriation of land — Compensation — Damages in lieu of interest.

Interest on the amount awarded dates only from the making of the award, but the arbitrators can award an indemnity for the use and occupation of the land during the expropriation proceedings.

Baril v. Grand Trunk Ry. Co., 46 Que. S.C. 295.

(§ III L—240) — Measure of compensation—Valuation.

The principle upon which compensation and damages should be awarded upon an expropriation of land is the market value, including the potential value of the land taken, at the time of the filing of the plans, without taking into consideration the values and elements of compensation incident to the property at the time of the award.

St. John & Quebec R. Co. v. Fraser, 24 D.L.R. 339, 19 Can. Ry. Cas. 177, 43 N.B.R. 388.

The value of lands expropriated for a public work is to be determined prima facie upon the basis of the market price, but the prospective capabilities of the property have to be taken into account in ascertaining the market price, and an additional allowance made for compulsory expropriation.

The King v. Moncton Land Co., 1 D.L.R. 279, 13 Can. Ex. 521.

Estimation of value — Reconveyance of part taken.

Though an owner cannot be compelled to take back land after it has been found unsuitable for the purposes for which it was taken by a railway company, the fact that, by accepting a reconveyance, the value of the remaining land would be materially increased, should be taken into consideration when awarding compensation therefor.

Re Hannah & Campbellford L.O. & W.R. Co., 25 D.L.R. 234, 34 O.L.R. 615, 21 Can. Ry. Cas. 326.

Compensation—Values.

In expropriation proceedings the arbitrators should take into consideration any special advantages, such as position or location, and should award the value of the land with all its present or future advantages, but must consider the actual and not any uncertain or hypothetical values.

C.N.O. R. Co. v. Perrault, 24 D.L.R. 295, 24 Que. K.B. 78.

Land for military camp—Compensation —Values.

Where land is expropriated by the Crown for a military camp, the proper compensation to be paid is the market value of the land as a whole, as it stood at the date of the expropriation, the compensation not to be assessed at the bare market value, but on a liberal basis.

The King v. McLaughlin, 26 D.L.R. 373, 15 Can. Ex. 417.

MARKET PLACE—LOSS OF VALUE BY ABANDONMENT OF WORK.

An expropriation by the Crown of property which is subsequently returned to the owner, does not entitle the latter to damages for depreciation in the value of the property arising from the destruction of a market place suffered in common by all property owners in the neighborhood, nor for the loss of enhanced value by reason of the subsequent abandonment of the projected public work by the government.

Gibb v. The King, 27 D.L.R. 262, 52 Can. S.C.R. 402, affirming 15 Can. Ex. 157.

TRAINING CAMP — COMPENSATION — FARM — TIMBER — VALUATION — OFFSET — USE AND OCCUPATION.

The basis of compensation for the expropriation of farm or timber lands by the Crown for training camp purposes is the market value of the property as a whole, at the date of expropriation, as shewn by the prices other farms had brought in the neighbourhood when acquired for similar purposes, the benefits derived by the owner from the use and occupation of the land after the expropriation to go as an offset against his claim for damages.

The King v. King, 41 D.L.R. 374, 17 Can. Ex. 471. [Affirmed by Supreme Court of Canada, Dec. 11, 1916.]

COMPENSATION FOR LANDS COMPULSORILY TAKEN.

The possibility of an added utility for an expropriated property due to existing possibilities of development is, subject to limits, a right and proper subject for consideration in awarding compensation on expropriation; the value to be ascertained is the value to the seller of the property at the time of the expropriation, with all its existing advantages and all its possibilities, excluding any advantage due to the carrying out of the scheme for which the property is compulsorily acquired. [Cedars Rapids Mfg. Co. v. Lacoste, 16 D.L.R. 168, [1914] A.C. 569; Sidney v. North Eastern R. Co., [1914] 3 K.B. 629; Lucas v. Chesterfield Gas, [1909] 1 K.B. 16, followed.]

Fraser v. Fraserville, 34 D.L.R. 211, [1917] A.C. 187, 23 Rev. de Jur. 446, affirming 25 Que. K.B. 106.

VALUATION OF PROPERTY—INTEREST—COSTS.

In fixing compensation for land taken, the value of the property must be assessed as of the date of expropriation, at its market value, in respect of the best uses to which it can be put, taking into consideration any prospective capabilities that the property may have for utilization in a reasonably near future; the "quantity survey method," while disclosing the intrinsic value, does not necessarily establish the market value. Intrinsic value is that which does not depend upon any exterior or surrounding circumstances. Where there has been no tender of compensation, interest and costs will be allowed in addition.

The King v. Carslake Hotel Co., 34 D.L.R. 273, 16 Can. Ex. 24.

VALUE—10 PER CENT ALLOWANCE.

In fixing the compensation to be paid for property expropriated under statutory powers, it is proper and customary in ordinary cases to add 10 per cent to the fair market value in order to fully compensate the owner for contingent losses and inconveniences caused by the compulsory taking.

The King v. Hunting, Barrow and Bell, 32 D.L.R. 331. [See 18 Can. Ex. 442.]

VALUE OF LAND—SPECIAL ADAPTABILITY.

The compensation awarded for expropriated lands should in no case exceed the price that legitimate competition of purchasers would force it up to. Special adaptability for any purpose is an element in considering the true market value.

The King v. Roy, 33 D.L.R. 52, 15 Can. Ex. 472.

VALUE OF BUILDING.

Where the expropriation of land results in the demolition of a substantial portion of a building on the land the remaining portion of that building is worth nothing, as such, and the full market value, estimated at what it would cost to put up new buildings, should be paid.

The King v. Peters, 32 D.L.R. 692, 15 Can. Ex. 462.

VALUE OF FARM.

In fixing the amount of compensation for a farm expropriated for public purposes, all elements which tend to make it especially valuable to the owner as a farm should be taken into consideration.

The King v. Woodlock, 32 D.L.R. 664, 15 Can. Ex. 429. [See also The King v. McLaughlin, 26 D.L.R. 373.]

RAILWAY EXPROPRIATION.

A railway company ran its line of railway diagonally through the claimant's half section of land, taking 12.5 acres for the right-of-way. The claimant and an agent of the company made an agreement, on a Sunday, whereby the company was to pay the claimant and the claimant agreed to accept $130 per acre for the land actually taken and $13 per acre as damages for the loss of crop. This agreement was put in writing and was tendered in evidence upon an arbitration to fix the claimant's compensation:—Held, that it was admissible as evidence tending to shew what amount was claimed as damages before any proceedings were taken. The agreement was silent as to how much, if any, of the $130 per acre was intended to cover damage for the land injuriously affected by the construction of the railway. Held, that the value of the land to be estimated is the value it has in the hands of the owner, at the time of the expropriation, subject to such restrictions upon its use as may exist. [Abinger (Lord) v. Ashton, L.R. 17

Eq. 358, 373; Thorn v. Worthing Skating Rink Co., 6 Ch. D. 415n., 416n., and William Hamilton Mfg. Co. v. Victoria Lumber and Mfg. Co., 26 Can. S.C.R. 96, 108, followed.] Held, also, that the claimant was entitled to $240 for 4 acres of land not taken, but left by the railway in such a position as to be useless for farming purposes. Held, also, that the claimant was entitled to compensation for the cutting off of his access to his pasture by the construction of the railway. [Metropolitan Board of Works v. McCarthy, L.R. 7 H.L. 243, 253, followed.] Held, also, that the claimant was not entitled to damages for inconvenience in working the land. [Ricket v. Metropolitan R. Co., L.R. 2 H. L. 175, 198, and Powell v. T.H. & B. R. Co., 25 A.R. (Ont.) 209, followed.]

Re Tveit and C.N.R. Co., 25 W.L.R. 188.

MUNICIPAL CORPORATIONS — EXPROPRIATION OF LAND — COMPENSATION — ARBITRATION AND AWARD — VALUE OF LAND — PROSPECTIVE USE — DEDUCTIONS FROM VALUE — APPEAL.

Re Casci and Toronto, 8 O.W.N. 588.

RAILWAY EXPROPRIATION — REDUCTION OF AMOUNT ALLOWED FOR SEVERANCE OF LAND — COSTS.

Re Lee and Lake Erie and North. R. Co., 10 O.W.N. 31.

ARBITRATION — BASIS OF AWARD.

In an expropriation under the Railway Act of Canada, the arbitrators, in giving their award, may grant a total sum for the value of the land and for all damages without giving the grounds upon which they base it. In giving their award, the arbitrators should consider the value of the land expropriated not at the time of the hearing, but at the date of the deposit of the plan in the Registry Office and of the offer by the expropriating party. Nevertheless, at the hearing before the arbitrators, it is permissible to prove the value of the immoveable at the time of the enquête by witnesses, but this value can only be considered as a circumstance aiding to establish the value of the property at the time of the deposit of the plan and of the offer. The law of Canada, in matter of expropriation, as regards the principles upon which compensation for the land taken is to be awarded, is the same as the law of England. The indemnity to be paid for land is the value to the owner as it existed at the date of the taking, not the value to the taker. The value to the owner consists of all advantages which the land possesses, present or future, but it is the present value, along with such advantages that fall to be determined. When there is a special value over the bare value of the ground, consisting in a prospective value on account of certain undertaking, the value is not a proportional part of the assessed value of the whole undertaking, but is merely the price enhanced above the bare value of the ground which possible intending undertakers would give. The price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects, which made the undertaking, as a whole, a realized possibility.

Lachine, Jacques Cartier, etc., Ry. Co. v. Mitcheson, 47 Que. S.C. 3.

VALUE — ESTIMATE OF.

The expenses incurred in an expropriation of land for the purposes of public utility form part of the proper indemnity payable to the owner.

Saint-Ours v. Marchessault, 42 Que. S.C. 375.

WOOD AND AGRICULTURAL LANDS — WATER ADVANTAGES.

Compensation for the expropriation of a woodlot is to be arrived at by seeking the market value of the same as a whole and as it stood at the date of the expropriation; not by calculating the profits which might be realized out of the sale of the timber upon the land. In assessing compensation in the case of agricultural land, the fact that there is a small lake on the property, suitable for watering cattle and other general purposes, will be taken into consideration as an additional element of value in respect of its use for agriculture.

The King v. Woodlock, 15 Can. Ex. 429.

(§ III L—241) — ESTIMATED AS OF WHAT TIME.

Compensation for the expropriation of lands for the purpose of a public work is to be measured by the market value of the lands as a whole at the time of expropriation, in respect of the best uses to which it can be put, taking into consideration any prospective capabilities and any inherent value it may have, and the damage to the remainder of the property held in unity therewith.

The King v. Kendall, 8 D.L.R. 900, 14 Can. Ex. 71.

EMINENT DOMAIN — ESTIMATE AS OF WHAT TIME — LAND TAKEN BY RAILWAY TO OBTAIN GRAVEL.

Compensation for land taken by a railway company under s. 180 of the Railway Act, 1906, to obtain a supply of material for the construction, maintenance or operation of a railway is to be made as of the time when the company takes possession of the land.

Sask. Land & Homestead Co. v. Calgary & Edmonton R. Co., 14 D.L.R. 193, 16 Can. Ry. Cas. 114, 6 A.L.R. 471, 25 W.L.R. 925, 5 W.W.R. 268.

EMINENT DOMAIN — VALUE AT DATE OF TAKING — RAILWAY ACT.

In expropriation for railway purposes under the Railway Act, 1906, the landowner's compensation is to be fixed according to the value at the date of expropriation taking into account the future potentialities of the property, only as they affect

the present market value. [Cedars Rapids v. Lacoste, 16 D.L.R. 168, 30 T.L.R. 293; Re Lucas & Chesterfield, [1909] 1 K. B. 16, followed.]

The King v. Trudel et al., 19 D.L.R. 270, 49 Can. S.C.R. 501.

EMINENT DOMAIN—VALUE TO OWNER AT DATE OF TAKING.

The value to be paid for on the compulsory expropriation is the value to the owner as it existed at the date of the taking, not the value to the taker.

Cedars Rapids Mfg. & Power Co. v. Lacoste, 16 D.L.R. 168, 110 L.T. 873, 6 W.W.R. 62, 30 T.L.R. 293, [1914] A.C. 569, reversing 43 Que. S.C. 410.

ESTIMATION OF VALUE—TIME.

The intention of the Railway Act, Alta., 1907, c. 8, is to fix the last convenient date as that in reference to which the value of property expropriated shall be determined; if there is an agreement of sale the date of that agreement is taken or if there is a judge's order appointing an arbitrator, the date of that order is taken, but if no such order is required by reason of the parties agreeing on the third arbitrator, the value is fixed as of the date of the service of the notice to treat under s. 101.

C.N.W.R. Co. v. Moore, 23 D.L.R. 646, 8 A.L.R. 379, 7 W.W.R. 1327, 30 W.L.R. 676.

AS TO ENHANCED VALUE—TIME.

Where land was taken for the purpose of a gravel pit for a government railway, the price paid on the sale of the land some three years after the expropriation of the right-of-way when the land had been enhanced in value by the operation of the railway, was held to be the best test and starting-point for ascertaining the market value of the land.

Demers v. The King, 15 Can. Ex. 492.

(§ III L—243)—EXPROPRIATION BY—INJURIES TO BUSINESS — COMPENSATION — MEASURE OF.

In enacting that compensation be paid to persons whose lands are injuriously affected by the construction of a railway, Parliament must be taken to have contemplated not only such damages as result from the actual construction of the embankments, tracks and buildings of the railway, but also damages arising from the maintenance and operation of the railway when completed. In assessing compensation for real property expropriated by the Crown primarily only such damages may be allowed as were referable to the land itself and not such as purely and simply affect the person or business of the owner; but where the whole of the owner's property upon which he has been carrying on business, is taken and the property has a special value for the purposes of his business, then its special value as a business site becomes an element in the market value of the land and must be considered in assessing the value.

The King v. Richards, 14 Can. Ex. 365.

(§ III L—244)—CUTTING OFF TERMINAL FACILITIES.

The measure of damages for the wrongful removal by a railway company of a spur track adjacent to a coal and lumber yard, from which track, at small expense, coal and lumber could be unloaded from cars directly into such yard, is the additional cost of handling and hauling of such commodities from the freight yards of the company to the coal and lumber yard.

Robinson v. C.N.R. Co., 5 D.L.R. 716, 21 W.L.R. 916, 14 Can. Ry. Cas. 281.

DISUSED SHIPYARD—BASIS OF COMPENSATION.

Where an old shipyard, not used as such at the time of expropriation, has been taken for the purposes of a public work, compensation should not be assessed on the basis of separating the various factors or component parts of the shipyard and estimating their several values, but the yard must be regarded as a whole and its market value as such assessed as of the time of the expropriation.

The King v. Loggie, 15 Can. Ex. 80.

(§ III L—250)—VALUE FOR SPECIAL USE.

The market price of lands expropriated by the Crown for public works is prima facie the basis of valuation in eminent domain proceedings, but where a use for a special purpose is shewn on the part of the owner a reasonable allowance must be added in respect thereof. [Dodge v. The Queen, 38 Can. S.C.R. 149, applied.]

The King v. Rivers, 1 D.L.R. 505.

MARKET AND INTRINSIC VALUES.

Under s. 3 of the Expropriation Act, R.S.C., 1906, c. 143, when land is expropriated for the purposes of the government, the owner is entitled to have it assessed as of the date of expropriation, at its market value, taking into consideration the best uses to which it can be put, and not on the basis of its intrinsic value.

The King v. Manuel, 25 D.L.R. 626, 15 Can. Ex. 381. [Affirmed, 18 Can. Ex. 53.]

LAND—SPECIAL VALUE—ADAPTABILITY FOR BUSINESS.

Where its location and adaptability make land worth more to the owner than its intrinsic value, those circumstances should not be taken into consideration in fixing the compensation after expropriation; what a prudent man in the owner's place would pay is the proper measure of value.

Lake Erie & Northern R. v. Schooley, 30 D.L.R. 289, 53 Can. S.C.R. 416, varying 25 D.L.R. 537.

ABANDONED INDUSTRIAL SITE—COMMERCIAL ADAPTABILITY.

Certain land taken for a public work was the site of a discarded industrial enterprise with no hope of revival at the time of the taking. The unused building and plant connected with the enterprise gave no added value, but on the other hand the land had potential capabilities in a

general way for commercial purposes by reason of its propinquity to rail and waterside. Held, that damages ought not to be assessed on the basis of the former use of the property being restored, but in view of the general adaptability of the property for commercial purposes.

The King v. Peters, 15 Can. Ex. 462.

SPECIAL ADAPTABILITY—PRIOR EXPROPRIATION.

Special adaptability for railway purposes is nothing more than an element in the general market value of the property. The owner of property over which one railway has already obtained a right-of-way is entitled to other and different damages for a second railway expropriating lands alongside the first, the property having already adjusted itself to the first expropriation.

The King v. Roy, 15 Can. Ex. 472.

EXPROPRIATION BY MUNICIPAL CORPORATION —SPECIAL ADAPTABILITY—ALLOWANCE FOR.

Meyer v. Toronto, 25 O.W.R. 1.

EMINENT DOMAIN—POSSIBILITIES OF SPECIAL USE.

The value to the owner which the taker must pay on a compulsory expropriation consists in all advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. Of a compulsory expropriation under statutory powers, if the element of value over and above the bare value of the ground itself commonly spoken of as the agricultural value consists in its adaptability for a certain undertaking which necessarily would include other properties, the value to be assessed by the arbitrators is not a proportional part of the assumed value of the whole undertaking, but is merely the price, enhanced above the bare value of the ground which possible intending undertakers would give; and that price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers, or acquired the other subjects which made the undertaking as a whole a realized possibility.

Cedars Rapids Mfg. & Power Co. v. Lacoste, 16 D.L.R. 168, 110 L.T. 873, 6 W.W.R. 62, 30 Times L.R. 293, [1914] A.C. 569, reversing 43 Que. S.C. 410.

(§ III L—251)—WATER LOTS—ABANDONMENT—RIPARIAN RIGHTS—SAW MILL.

The value of a water lot, expropriated for the purpose of a public work, must be assessed in view of such riparian rights as are actually enjoyed by the owner at the time of the taking; and where property used in connection with a saw mill, is taken by the Crown and subsequently abandoned under s. 23 of the Expropriation Act, the owner is entitled to be compensated for what the property would have been worth to him if used for that business during the time he was ousted from its possession by the Crown.

The King v. C.P. Lumber, 26 D.L.R. 80, 15 Can. Ex. 350.

LEASEHOLD—ADVANTAGE AND OFFSETS.

Where a municipality expropriates the unexpired term of a lease it had made, with the water rights in connection therewith, it cannot set off the probable losses of the lessee, nor can the lessee claim the expected profits, if the lease were continued; the proper basis of compensation is the value of the water power and of the use and occupation for the unexpired term, and reasonable expenses for removing the business to another location.

Re Perram and Hanover, 31 D.L.R. 142, 36 O.L.R. 582.

(§ III L—255)—CONSEQUENTIAL INJURIES.

In fixing compensation for lands expropriated under the Ontario Railway Act, the date for valuation is that of the service of notice to the owner under s. 68. Benefit to other lands not taken should not be considered when fixing compensation for the land taken. Where the land expropriated forms an important part of one holding, as in the case of subdivision lands, compensation must be made for consequential injuries resulting from severance, and of loss of access hampering the use and disposal of the remainder.

Toronto Suburban R. Co. v. Everson, 34 D.L.R. 421, 54 Can. S.C.R. 395.

COMPENSATION FOR INJURIOUS AFFECTION—CITY ACT, SASK.

The owner of property injuriously affected by the building of a subway is entitled to damages under s. 247 of the City Act (R.S.S. 1909, c. 84) although no land has been actually taken. The compensation to be awarded is to be determined by the depreciation in value of the property as of the date of publication of the notice of completion of the work. The fact that during the construction of the works the claimant recovered some insurance for injury to his buildings by fire, and with the insurance money recovered, built other buildings, does not affect the issue.

McCarthy v. Regina, 46 D.L.R. 74, 58 Can. S.C.R. 349, [1919] 1 W.W.R. 814, reversing 42 D.L.R. 792, which varied 38 D.L.R. 336.

INJURY FROM CONSTRUCTION OF RAILWAY BRIDGE—WORK AUTHORIZED BY STATUTE —INTERFERENCE WITH LOGGING.

Where any right of property is injuriously affected by a railway company in the exercise of powers conferred upon it by Act of Parliament, the company is not liable in damages for such injury unless Parliament has made provision therefor. 2. The suppliants alleged that their business of driving logs on the La Croche river was interfered with by the piers of a bridge constructed across the river by the National Transcontinental Railway and they asked to be reimbursed a sum which they claimed

they had been obliged to pay to break a jam of logs caused by the alleged faulty construction of the piers as regards using the river for driving logs. The court having found that the railway had statutory authority for the construction of the bridge:—Held, that the suppliants were not entitled to compensation. 3. While, under the provisions of art. 7298, R.S.Q., 1909, any person, firm or company has the privilege of floating and driving timber down rivers, such privilege is not a predial servitude, as it is shared in common with the rest of the public, and is not derived from any title of fee in the land.

Laurentide Paper Co. v. The King, 15 Can. Ex. 499.

RAILWAYS—EXPROPRIATION OF LAND—COMPENSATION—AWARD—VALUE OF LAND TAKEN AND INJURIOUS AFFECTION OF LAND NOT TAKEN—APPEAL—INCREASE IN AMOUNT AWARDED.

Re Ruddy & Toronto Eastern R. Co., 7 O.W.N. 796.

MUNICIPAL ACT, R.S.O. 1914, c. 192, s. 325—MANUFACTURING BUSINESS CARRIED ON UPON LAND—REARRANGEMENT OF BUILDINGS—COMPENSATION BASED ON COST OF REARRANGEMENT, VALUE OF LAND TAKEN, AND INJURIOUS EFFECT ON LANDS NOT TAKEN.

Re Logan and Toronto, 10 O.W.N. 319.

(§ III L—258)—EMINENT DOMAIN PROCEEDINGS—RAILWAY RIGHT-OF-WAY ACROSS FARM.

The loss of time and inconvenience of transporting the crop from the part of the farm separated from the buildings by the construction of the railway on a compulsory taking of a strip of land for the right-of-way, is proper to be considered in estimating the damages only in so far as it effects a depreciation of the market value of the land not taken. [Idaho & W.R. Co. v. Coey, 131 Pac. Rep. 810, approved.]

Re Ketcheson and C.N.O.R. Co., 13 D.L.R. 854, 29 O.L.R. 339, 5 O.W.N. 36, 25 O.W.R. 20, 49 C.L.J. 697.

(§ III L—259)—EMINENT DOMAIN—INCONVENIENCE AND ADDITIONAL COST OF CULTIVATING FARM CROSSED BY RAILWAY.

In awarding damages against a railway company in eminent domain proceedings in respect of its right-of-way across a farm, the inconvenience of transferring machinery and farm implements, and the like, from one part of the farm to another and the inconvenience in farming and cultivating the land, occasioned by the construction of the railway, are not separate items to be capitalized on an ascertainment of a prospective annual loss to the owner whose farm is divided, but are to be considered only as factors in fixing the depreciation of the market value of the remaining parts of the farm.

Re Ketcheson and C.N.O.R. Co., 13 D.L.R. 854, 29 O.L.R. 339, 25 O.W.R. 20.

(§ III L—260)—ABUTTING OWNERS—RIGHTS IN FORESHORE.

The contingency that owners of lots abutting a river might acquire from the municipality additional ground in the foreshore to extend the depth of those lots in lieu of what had been taken from them in front in a street widening operation, or the owners' chances of getting leave from the Crown to extend some works or pier-head over the foreshore not belonging to the Crown, are too remote and speculative as elements of compensation for the taking of the foreshore for reclamation purposes, and an award based on such valuation is invalid and will be set aside.

Re False Creek Reclamation Act, 22 D.L.R. 117, 113 L.T. 795, 8 W.W.R. 1191, 31 W.L.R. 678, affirming 22 D.L.R. 103.

"INJURIOUS AFFECTION"—ABUTTING OWNERS—PUBLIC LAVATORIES.

An owner of land abutting a highway is entitled to compensation for depreciation of the value of the land by the construction and maintenance of public lavatories on a highway by a municipal corporation.

Toronto v. J.F. Brown Co., 37 D.L.R. 532, 55 Can. S.C.R. 153, affirming 29 D.L.R. 618.

COMPENSATION FOR INJURIES TO PROPERTY—PUBLIC LAVATORIES—AWARD OF ARBITRATORS—REVIEW.

The award of arbitrators fixing the amount of compensation to which an owner of land abutting on a highway is entitled, owing to the construction and maintenance of a public lavatory on the highway opposite his property, must be based on the actual depreciation in the value of the property according to the evidence submitted.

Ripstein v. Winnipeg, 44 D.L.R. 60, [1918] 3 W.W.R. 965, [1919] 3 W.W.R. 130.

DRAINAGE—LANDS—CONVEYANCE—RAILWAY ACT, S. 250 (2), (B.).

A general clause of release from damages in a conveyance of lands taken for railway purposes does not relieve the railway company from the obligation imposed on it by s. 250 (2) (b) of the Railway Act, 1906, to provide means of drainage under the railway for the adjacent lands.

Denholm v. Guelph & Goderich R. Co., 17 Can. Ry. Cas. 318.

(§ III L—265)—RAILROADS AND STREET RAILROADS IN STREETS.

A contractor who constructs a railway is responsible for the damages caused to the adjoining proprietors by the works, even though these latter are indispensable and are provided for in the plans and specifications.

Marcotte v. Davis, 3 D.L.R. 851.

LAND ABUTTING ON RAILWAY—COMPENSATION—RAILWAY ACT (CAN.).

The owner of land adjacent to or abutting upon the street over which a railway

subject to the Railway Act (Can.), is to be constructed may be awarded compensation by the Railway Board under 1 & 2 Geo. V., c. 22, s. 6, for consequent injury to such land, although damages of that character cannot be awarded in an arbitration under the Railway Act.

C.N.O.R. Co. v. Holditch, 20 D.L.R. 557, 19 Can. Ry. Cas. 112, 50 Can. S.C.R. 265.

(§ III L—267) — RECLAMATION OF FORESHORE—RIPARIAN RIGHTS OF ACCESS.

The rights of riparian owners of going over the foreshore as a means of access to the sea are elements of valuation in awarding compensation for the taking of the foreshore for reclamation purposes.

Re False Creek Reclamation Act, 22 D.L.R. 117, 31 W.L.R. 678, 113 L.T. 795, 8 W.W.R. 1191, affirming 22 D.L.R. 103.

(§ III L—275) — INJURIOUS AFFECTION — IN HIGHWAY CASES.

The Crown, having substituted for a level crossing a permanent subway resulting in a material change in the level of the street, is liable to an owner for special damage to his property, but not for personal damage or loss of business.

Le Blanc v. The King, 38 D.L.R. 632, 16 Can. Ex. 219.

LOSS OF ACCESS — CLOSING HIGHWAY — MUNICIPAL LAW.

Loss of direct access to one's house or land, occasioned by the closing of a highway, under s. 599 of the City Act (Sask.), entitles the owner to compensation under the statute.

Cassidy v. Moose Jaw, 33 D.L.R. 86, 10 S.L.R. 51, [1917] 1 W.W.R. 1085.

(§ III L—276) — ESTABLISHMENT OF STREETS.

The fact that upon the opening of a public street across the plaintiff's property, a small triangular piece of land, left on one side of the street, was reduced in value, does not entitle him to special compensation over and above the general damage awarded for the injury sustained by the whole tract of land. In a proceeding to take land for a public street, special damages cannot be awarded for shortening the remaining land between the street and a river bank, thereby injuring it for subdivision into city lots, where the street was laid out in the best possible manner in view of the topographical surroundings of the land. Where it was impossible to open a public street across a tract of land without leaving a small triangular piece separated from the remainder, or without the street crossing diagonally on one side of the land so as to leave it in bad shape to be divided into city lots, substantial damages cannot be awarded in addition to the general damages awarded for injury to the entire tract of land. A provision of a city charter that arbitrators in awarding damages for land taken for public streets should determine "(1) the intrinsic value of the property taken; (2) the increased value of the residue, and (3) the damage to the residue; and (that) the difference between (1) and (2) or (1) and (3) shall constitute the compensation" to which the landowner shall be entitled, amounts to a limitation as to the damages that may be awarded, and there cannot be included in an award the portion of the cost of opening a public street which would be assessed against the landowner. [Christie v. Toronto, 25 Can. S.C.R. 551; Pryce v. Toronto, 20 A.R. (Ont.) 16; Richardson v. Toronto, 17 O.R. 491, distinguished.]

McNichol v. Winnipeg, 4 D.L.R. 379, 22 Man. L.R. 305, 21 W.L.R. 351, 2 W.W.R. 470.

SUBWAY—DEPRECIATION OF PROPERTY.

Passmore v. Edmonton, 33 W.L.R. 470.

(§ III L—279) — PROPERTY AFFECTED BY CHANGING STREET GRADE.

The compensation for damages to property caused by lowering the grade of a street must not be limited to the present use but to the present value. [Cedars Rapids v. Lacoste, 16 D.L.R. 168, followed.]

Secord v. Edmonton, 32 D.L.R. 698, 10 A.L.R. 463, [1917] 1 W.W.R. 819.

ASSESSMENT BY ARBITRATOR—WRONG PRINCIPLE—MATTER REMITTED BACK TO ARBITRATOR.

In assessing damages to property by reason of the construction of a concrete sidewalk lower than the property in question —the principle to follow in estimating these damages is how much (if any) has the property decreased in value by reason of the lowering of the sidewalk. [Green v. C.N.R., 22 D.L.R. 15, followed.]

Radisson v. Amson, 49 D.L.R. 517, 12 S.L.R. 406, [1919] 3 W.W.R. 580, reversing 45 D.L.R. 597.

ESTABLISHING OR CHANGING STREET GRADE.

A municipality that changes the level of a street or sidewalk, under statutory authority conferred on condition that those injured shall be indemnified, is bound to pay riparian proprietors the actual loss from suspension of, or greater difficulty in carrying on, their business during the progress of the work, and the cost of restoring their property to its previous use, and no more.

Deniss v. Quebec, 43 Que. S.C. 1.

(§ III L—280)—PUBLIC PARKS — PROBABLE ADVANTAGES.

What is likely to be the value of lands if certain local improvements are made, which may or may not follow the acquisition of such lands for park purposes, if in their existing conditions the lands are practically unsalable, is not to be regarded in their valuation upon an expropriation of such lands for public parks.

Re Hislop & Stratford Park Board, 23 D.L.R. 753, 34 O.L.R. 97.

MUNICIPAL ACT—COMPENSATION FOR LAND INJURIOUSLY AFFECTED—OFFSETS—ADVANTAGES—LOCAL IMPROVEMENTS.

Hanna v. Victoria, 35 D.L.R. 798, 24 B.C.R. 110, [1917] 3 W.W.R. 245.

ADVANTAGES—PRESENT OR FUTURE.

In eminent domain proceedings what is to be ascertained is the value to the owner as it existed at the date of the taking, not to the taker; such value consists in all the advantages which the land possesses, present or future, but it is the present value alone of such advantages that falls to be determined. [Cedars Rapids Co. v. Lacoste, 16 D.L.R. 168, [1914] A.C. 569, followed.]

C.N.R. v. Billings, 31 D.L.R. 687, 19 Can. Ry. Cas. 193, reversing 19 D.L.R. 841, 31 O.L.R. 329, restoring 15 D.L.R. 918, 16 Can. Ry. Cas. 375, 29 O.L.R. 608.

EXPROPRIATION—TIMBER LIMITS—COMPENSATION—SET-OFF AS REGARDS ADVANTAGE.

For the purposes of the National Transcontinental Railway a portion of certain lands consisting of timber limits was expropriated. Owing to the railway the remaining portion of the limits was enhanced in value by reason of the following facts: —The lumber could be taken from the limits at all seasons and in summer more expeditiously than by water; less capital was required in working the limits; the loss of logs incidental to the practice of driving was saved; if desired the logs could be shipped by rail to distant mills without being cut, while portable mills could be used on the limits; and lastly, lumbering supplies could be taken to the limits more cheaply by reason of the easier and quicker means of access provided by the railway. Held, that under s. 50 of the Exchequer Court Act these advantages should be set-off against the damages to the owner of the limits arising from the interference by the railway with the logging roads and landings on the river front, the possible interference of the railway culvert with the work of driving in the spring, and the additional risks of fire arising from the operation of the railway.

The King v. New Brunswick R. Co., 14 Can. Ex. 491.

EXPROPRIATION—PUBLIC HARBOUR—WATER LOTS—INCREASED VALUE OF REMAINING LANDS BY REASON OF PUBLIC WORK.

Proceedings by the Crown for the expropriation of certain lands bordering on the Kaministiquia River at Fort William, Ont., were taken with a view to the widening of the channel of the river. In carrying out the works, a road allowance which intervened between the lands taken and the water of the river was expropriated leaving the lands with a frontage on the river subsequently widened:—Held, that the advantage to the balance of the lands equalized any damage to the land owners over and above the amounts offered as compensation by the government. Water lots had been granted after Confederation in the river by the province of Ontario. The question arose as to the compensation to be paid for these water lots:—Held, that the waters of the river were navigable waters within the statute, R.S.C. 1906, c. 115, from bank to bank, and that these water lots could not be built upon by the owners thereof without the assent of the Dominion authorities. The waters in question do not form part of a public harbour as defined by the B.N.A. Act.

R. v. Bradburn & Webb, 14 Can. Ex. 419.

SETTING OFF OF INCREASED VALUE.

Upon expropriation by a railway company, notwithstanding the vagueness of the words "inconvenience, loss, or damage" in s. 57 of the Railway Act, the general rule of damages covering the part taken and the injury to the remaining land is that the owner is entitled to the difference between the market value of the whole lot or tract before the taking and the market value of what remains to him after such taking. The effect of s. 57 is to direct a setting off of the increased value to the remainder of the land not taken by the railway company as against damages that may be allowed through severance.

Pacific Great East R. Co. v. Larsen, 22 B.C.R. 4, 8 W.W.R. 1.

RAILWAYS — COMPENSATION — SET-OFF — USE AND OCCUPATION.

An application for payment out of court of moneys paid in by a railway company for lands taken by it, held that the applicant was entitled to the sum unpaid of the amount awarded by the arbitrators with interest at 5 per cent. [Green v. C.N. R., 33 D.L.R. 609, followed]; and that the company was not entitled on such application to a set-off for the value of the use and occupation of the land by the applicant.

Re G.T.P. Branch Lines Co. & Law; Re Railway Act (Alta.), [1917] 2 W.W.R. 1011.

(§ III L—284) — CONSTRUCTION OF RAILROAD.

Upon an arbitration in eminent domain proceedings in reference to damage to land by railway construction, in cases in which s. 198 of the Railway Act (Can.) requires the amount of benefit to be "set-off" against the amount of damage, it is necessary that the arbitrators should specify the amount of each in their award.

Re False Creek Flats Arbitration, 1 D.L.R. 363, 20 W.L.R. 587, 17 B.C.R. 282. [Affirmed, 8 D.L.R. 422, 21 W.L.R. 761.]

(§ III L—288)—CHANGE OF STREET GRADE.

The increased value acquired by property by the change of level of a street or sidewalk under municipal authority conferred on consideration that those injured shall be indemnified, cannot be set-off against claims of riparian proprietors for actual loss sustained from suspension of, or greater diffi-

culty in carrying on their business during the progress of the work, and the cost of restoring their property to its previous use. Deniss v. Quebec, 43 Que. S.C. 1.

M. In injunction cases.

(§ III M—290)—In injunction cases.

Where, in an action for specific performance there is a counterclaim for damages caused by the plaintiff's injunction restraining the defendant from using the land during the pendency of the action, and the plaintiff's action is dismissed, the proper practice is to apply in chambers for a determination of damages on the counterclaim.

Evans v. Norris, 8 D.L.R. 652, 5 A.L.R. 329, 22 W.L.R. 818, 3 W.W.R. 532.

Injunction — Wrongful issuance.

On an injunction undertaking damages will not be awarded in relation to matters not within the scope of the injunction order, i.e., loss of time incident to the litigation generally, and not specially to the injunction.

Douglass v. Bullen, 12 D.L.R. 652, 4 O.W.N. 1587, 24 O.W.R. 890.

(§ III M—292)—Upon undertaking or bond.

Where the plaintiff in an injunction suit had reasonable grounds for instituting his action but the injunction was dissolved without reference to the merits because improperly launched, no damages should be awarded upon the usual undertaking given upon its issue.

Albertson v. Secord, 1 D.L.R. 804, 20 W.L.R. 64, 4 A.L.R. 90, 1 W.W.R. 657.

Injunction undertaking — Wrongful issuance — Triviality — Remoteness.

An inquiry as to damages sustained by the wrongful issuance of an injunction will not be granted where the injuries claimed are trivial or remote, and not such as could have been within the contemplation of the parties when the writ was issued.

Douglass v. Bullen, 12 D.L.R. 652, 4 O.W.N. 1587, 24 O.W.R. 890.

N. In trade-mark, patent, and copyright cases.

See Patents; Trademark; Copyright.

(§ III N—298)—Copyright cases.

Cartwright v. Wharton (No. 2), 6 D.L.R. 876, 4 O.W.N. 248, 23 O.W.R. 218.

O. Mental anguish.

(§ III O—300)—Solatium doloris.

Notwithstanding the general principle that damages cannot be given as solatium doloris, a father has a right to compensation for the damage caused to him by the death of his child.

Montreal v. Turgeon, 26 Que. K.B. 496.

(§ III O—306)—To passengers.

Where, as a result of a collision between a railway train and a street car due to negligent operation of the train, a passenger on the street car was thrown into a subway, a verdict for substantial damages may be given against the railway company whose negligence caused the injury, although the only substantial injury proved was that the plaintiff had in consequence suffered from traumatic neurasthenia and caused the plaintiff to be subject to insomnia and nerve troubles incapacitating him for his usual occupation, although such result is attributable to the mental shock as well as to the physical.

Ham v. C.N.R. Co., 1 D.L.R. 377, 20 W.L.R. 359, 1 W.W.R. 897. [Varied by disallowing claim for interest, 7 D.L.R. 812, 22 Man. L.R. 480.]

(§ III O—312)—As to corpse.

Damages for mental suffering are not recoverable in an action against a railway for its negligence causing delay in the carriage of the dead body of a relative of the plaintiff. Expenses incurred in such a case for telegrams, conveyances, hotel bills, etc., may however be recovered as special damages. Damages which have been awarded on one ground on the trial will not be sustained on a different ground on appeal. Appeal from Beck, J., allowed and judgment reduced to the amount of the special damages. There may be property in a corpse, a property, subject on the one hand, to the obligations of proper care and prima facie of decent burial, appropriate to its condition and the condition of the individual in his lifetime, and to the restraints upon its voluntary and involuntary disposal and use provided by law or arising out of the fact that the thing in question is a corpse; and, on the other hand, the nature and extent of the right or obligation of the person for the time being claiming property, e.g., executor, husband, wife, next of kin, medical institute, etc. [Victorian Railways Commissioners v. Coultas, 13 App. Cas. 222, 57 L.J.P.C. 69, 58 L.T. 390, 52 J.P. 500, followed.]

Miner v. C.P.R. Co., 3 A.L.R. 408.

P. Loss of profits.

(§ III P—330)—Loss of profits as element of damage—Unreasonable delay in having repairs made.

Where a chattel has been injured owing to a negligent act, the cost of repairing it, the difference in value between the former worth and that of the chattel when repaired, and the damage sustained owing to the loss of use of the chattel while being repaired, are all recoverable, as damages, but damages are not recoverable for loss of the use of the chattel during the period of an unreasonable delay on the part of the owner in having the repairs made.

Armstrong Cartage Co. v. Peel, 10 D.L.R. 169, 4 O.W.N. 1031, 24 O.W.R. 372.

Mesne profits—Eviction.

Mesne profits include not only compensation for the use and occupation of premises, but compensation for any special loss which the plaintiff has incurred, such as wages,

house rent and storage of furniture, during the period of wrongful dispossession.

Vivian v. Tizard, 11 S.L.R. 217, [1918] 2 W.W.R. 765.

LAYING UP OF SHIP.

The loss of profit resulting from the laying up of a tug while her master and engineer were in attendance at the Wreck Commissioner's Court of Investigation, held not to be an item which should be allowed on the assessment of damages arising out of a collision between the tug and another vessel.

The Cleeve v. The Prince Rupert, [1918] 1 W.W.R. 345.

(§ III P—331)—DUE TO PERSONAL INJURIES.

A reduction in wage earning capacity is to be established according to the ordinary rules, and the employer cannot, by offering a higher wage or a new employment at the old figures, prevent the workman from obtaining compensation under the Workmen's Compensation Act (Que.).

G.T.R. Co. v. McDonnell, 5 D.L.R. 65, 18 Rev. de Jur. 369.

(§ III P—333)—DEFECTIVE INSTALLATION OF BINDER—LOSS OF CROP.

The destruction of a crop resulting from the delay in harvesting it because of physical disability occasioned by an improper setting up of a binder is too remote an element of damage to be considered in an action against the seller of such machine. [Walton v. Ferguson, 19 D.L.R. 816, followed.]

Price v. International Harvester Co., 23 D.L.R. 266, 8 W.W.R. 712, 31 W.L.R. 216.

(§ III P—334)—EXCLUSION FROM LAND.

Where excavations and other trespasses by a railway company prevented the land owner from extending his pig corral so as to keep the increase of the pigs and the corral thereby became crowded and unhealthy, resulting in the death of some of the pigs and the depreciation of others in value, the owner will be limited to such damages as would have resulted had he reduced the number of his pigs to what he had theretofore safely kept, and he cannot recover as special damage more than the difference in the selling value, at the time of the trespass of the pigs he should have removed and sold for lack of accommodation to keep them and their value at the time when they would have been the most fit to sell less the saving in feed and labour by reason of the reduced number.

Marson v. G.T.P.R. Co., 1 D.L.R. 850, 4 A.L.R. 167, 20 W.L.R. 161, 1 W.W.R. 693.

EXCLUSION FROM LAND—TENANT HOLDING OVER.

The measure of damages for the refusal of a tenant to surrender possession of a hotel at the end of his term is the profits therefrom during the time of overholding.

Simons v. Mulhall, 11 D.L.R. 781, 4 O.W.N. 1424, 24 O.W.R. 736.

(§ III P—340)—FROM BREACH OF CONTRACT.

Where one who has agreed to cut and deliver at a given point a certain quantity of hay belonging to another fails to deliver all the hay agreed upon, the owner may recover the profit which he would have made by a sale of the hay not delivered.

Webber v. Copeman, 7 D.L.R. 58, 5 S.L.R. 262, 21 W.L.R. 961, 2 W.W.R. 882.

FROM BREACH OF CONTRACT—GENERAL RULE—CONTEMPLATION OF PARTIES.

The general rule as to damages recoverable by one party against the other for breach of contract imposes such damages as might arise naturally from such breach of contract itself or from such breach committed under circumstances in the contemplation of both parties at the time of the contract.

Inland Investment Co. v. Campbell, 18 D.L.R. 177, 24 Man. L.R. 703, affirming on this principal, 16 D.L.R. 410, 29 W.L.R. 561, 7 W.W.R. 375.

BREACH OF CONTRACT.

Ordinarily the measure of damages for breach of contract is the loss of profits that would have been made if the contract had been carried out; the party damaged must, however, do what is practicable to minimize the loss.

Consolidated Plate Glass Co. v. McKinnon Dash Co., 40 D.L.R. 47, 41 O.L.R. 188.

BUILDING CONTRACT—DELAY—CONCLUSIVENESS OF AWARD.

For delay in completion of a contract for the construction of a building plant, beyond what would be considered a reasonable time for performance (no time of completion being stipulated clearly in the contract) the owners of the building are entitled to claim from the contractors damages for the delay resulting in loss of profits, it being established that it was clearly within the contemplation of both parties that loss of profits would result from such delay. [Hadley v. Baxendale (1854), 9 Exch. 341, 156 E.R. 145, applied.]

Canada Foundry v. Edmonton Portland Cement (P.C.), 43 D.L.R. 583, [1918] 3 W.W.R. 866, affirming 32 D.L.R. 114, 25 D.L.R. 683.

CONTRACT — BREACH — FUTURE PROFITS — ESTIMATION OF PRESENT LOSS OF.

The measure of damages for loss of future profits arising out of breach of contract must be assessed as being the loss or injury sustained at the date of the breach. But for the purpose of estimating the present loss, probable future events must be considered, and if the bringing of the action be delayed evidence as to actual subsequent consequential damage or subsequent relevant facts in mitigation of damage may be given. [Cockburn v. Trusts & Guarantee Co., 37 D.L.R. 701; Wood v. Grand Valley, 22 D.L.R. 614, followed.]

Findlay v. Howard, 47 D.L.R. 441, 58 Can. S.C.R. 516, reversing 27 Que. K.B. 375.

Breach of contract—Sale of goods—Previous arrangement through an agent—Plaintiffs ready and willing to complete—Goods taken by third party—Repudiation.

Where one party to a contract is ready and willing to fulfil his part, and the other party is unable to do his part owing to a previous arrangement, the former is entitled to damages for breach of the contract. The measure of damages will be the difference between the price under the contract, and the price which has to be paid for other goods in a similar condition.

Porter v. Butt, 49 D.L.R. 525, [1920] 1 W.W.R. 48.

Contract — Repudiation — Breach — Measure of damages.

Where there has been a repudiation of a contract for the sale and purchase of goods, which has been treated as a breach, the measure of damages is the difference between the contract price and the market price, on the date of the breach. Where, however, the breach occurs before the date of delivery, the party treating the repudiation as a breach is not required to take the risk of purchasing other goods before the date of delivery at a higher price than that named in the contract and so exposing himself to loss should the price decline before the date of delivery, although he must do what is reasonable to decrease the damage.

Morrow Cereal Co. v. Ogilvie Flour Mills Co., 44 D.L.R. 557, 57 Can. S.C.R. 403, affirming 39 D.L.R. 465.

Measure of—Ploughing—Loss of crop—Remoteness.

Loss of an alleged crop is too remote to be the basis of an action for damages for breach of an agreement to plough land.

Patton v. Forrest, 12 S.L.R. 347, [1919] 2 W.W.R. 275.

Contract—Sawing timber—Termination of agreement by owner of timber—Recovery by saw-mill owner for work done and moneys expended—Damages for wrongful termination—Counterclaim.

Bigras v. O'Connor, 17 O.W.N. 113.

Municipal work.

In an action brought by an owner against the City of Montreal, claiming damages for injury caused to his property in the construction of public works, the Superior Court, in estimating the damages according to the evidence, acts as an arbitrator in an expropriation case; a Court of Appeal will not interfere with the amount of the damages awarded. The court has no right to award damages for loss in the future caused by the diminution of business which these public works may have occasioned to the plaintiff. [Appealed to the Supreme Court of Canada.]

Montreal v. Berman, 26 Que. K.B. 423.

Nonfulfilment of contract—Damages — Loss of clientele — Special obligation—Conclusions.

Any nonfulfilment of contract gives rise to an action in damages. In such an action the special allegation of a fixed amount of damages for the loss of future clientele, with a general conclusion praying for that sum, is sufficient to allow the court to grant nominal damages according to its finding.

Audet v. Saraguay Electric & Water Co., 46 Que. S.C. 248.

(§ III P—342)—Breach of contract—Sale of goods—Delay in delivery—Purpose of purchase known.

Where the seller of a boiler and attachments agrees to deliver at a certain time, and at the time of the agreement of sale knows the purpose for which the buyer is purchasing and that prompt delivery is essential and subsequently before the date for delivery is warned by the buyer of the necessity for prompt delivery, and where the goods are shipped 20 days later than the date agreed upon and there is additional delay because one of the essential attachments had not been shipped at all and another of them was a misfit, the seller is liable in damages, but such damages must not exceed a reasonable assessment.

Leonard v. Kremer (No. 2), 11 D.L.R. 491, 48 Can. S.C.R. 518, 26 W.L.R. 568, 4 W.W.R. 332, varying 7 D.L.R. 244.

Sale—Repudiation—Reasonable time.

The measure of damages for breach of a contract to deliver goods, by repudiating the contract before a reasonable time has elapsed, on the ground of impossibility of delivery, is the difference between the contract price and the market price at the place of delivery at the time the breach occurred.

Brenner v. Consumers Metal Co., 41 D.L.R. 339, 41 O.L.R. 534.

By seller.

Where one agrees for good consideration with the owner of securities to sell the securities for him within a limited time for a certain price, and fails to fulfil his agreement, the owner of the securities is entitled to recover the agreed price less the amount for which the securities can be sold, and a statement of the last mentioned amount in a letter from the owner's solicitor to the registrar of the court may be accepted as sufficient evidence thereof.

Martin v. Munns, 3 D.L.R. 435, 3 O.W.N. 1055.

Profits of land options—Remoteness.

The holder of an option to land has no recourse against a purchaser for loss of his profits, such damages being too remote and not being those that the parties could have foreseen.

Rivet v. Anctil, 47 Que. S.C. 240.

(§ III P—343)—By purchaser.

Loss of probable rentals from houses in course of construction because of the contractor's delay in completing can be allowed to the owner in abatement of the price only when a time has been specified for doing the work or after the owner has given notice to proceed with it.

Elford v. Thompson, 1 D.L.R. 1, 5 S.L.R. 96, 19 W.L.R. 809, 1 W.W.R. 409.

Sale of goods to be manufactured—Loss of profits—Special order for unmarketable goods—Conditional sale on rental agreement.

On the refusal to accept goods manufactured to order and not of a marketable class, the damages may be assessed at the amount of profit which the manufacturer would have made on the order, although the goods were by the terms of the order to remain after delivery the property of the manufacturer on a rental to be applied on the purchase price under the conditional sale contract. [Re Vic Mill, [1913] 1 Ch. 183, [1913] 1 Ch. 465, applied; Sawyer v. Pringle, 18 A.R. (Ont.) 218, and Arnold v. Playter, 22 O.R. 608, distinguished.]

Union Machinery Co. v. Thompson River Lumber Co., 16 D.L.R. 849, 6 W.W.R. 485.

Loss of profits—Breach of contract—Failure to install elevator on time.

Contingent and speculative damages may be recovered when arising for loss of business resulting from the failure of a contractor to install a passenger elevator within the time stipulated by contract.

Steven v. Pryce-Jones, 13 D.L.R. 746, 25 W.L.R. 172.

Supposed or estimated profits that might have been made had the defendant performed his agreement to lease a hotel and sell its furniture and fixtures, are too uncertain to be made the basis for a recovery of damages for the breach of the agreement.

Dulmage v. Lepard, 3 D.L.R. 542, 3 O.W.N. 986.

Where it would have been necessary for the plaintiff to have sent a man from Scotland to Canada in order to have purchased goods similar to those the defendant failed to deliver under a contract of sale, the expenses of such trip will be awarded as damages in an action for breach of the contract. The damages for breach of warranty on the sale of goods which were not returned, is the difference between their value and the value which they would have borne without the defect warranted against; and it is no answer to shew that by reason of advantageous resales the purchaser made a profit on the transaction, notwithstanding the defect. Damages for the failure to deliver goods sold in Canada for shipment to Scotland, the purchasers paying the transportation charges, will be based on the Canadian market price, and not on the prices ruling in Scotland.

Schrader Mitchell et al. v. Robson Leather Co., 3 D.L.R. 838, 3 O.W.N. 962.

The measure of damages for misinformation contained in a list of property listed for sale with a real estate exchange, which was sold by it to the plaintiff, a real estate broker, who secured a purchaser for property improperly listed by the defendant, is the commissions the latter would have earned had the sale been completed. [Spedding v. Nevell, L.R. 4 C.P. 212; Meek v. Wendt & Co., 21 Q.B.D. 126, followed.]

Austin v. Real Estate Exchange, 2 D.L.R. 324, 17 B.C.R. 177, 20 W.L.R. 921, 2 W.W.R. 88.

(§ III P—344)—By contractor for work on dismissal.

Where a contractor claims damages for being prevented from completing his contract where time is not of the essence, after being in default for not completing within the contract time, and without being allowed a reasonable time within which to complete subsequent to notice fixing a fresh date for completion, the measure of damages is the difference between the contract price of the unfinished portion of the work, and the cost of completing it within the period of time which would have been a reasonable time for completion after default.

Municipal Construction Co. v. Regina, 2 D.L.R. 690, 5 S.L.R. 78, 20 W.L.R. 405, 1 W.W.R. 958.

Q. Time for which recoverable; prospective.

(§ III Q—345)—Past, present and future.

An owner is not entitled to claim an amount, en bloc, for damages past, present and future; he can only recover damages which have been actually sustained and are ascertained, direct and immediate.

Sevigny v. St. David, 30 Que. S.C. 291.

S. Mitigation; reduction.

(§ III S—355)—Injury to mill from floatage of logs—Partial obstruction of stream by mill.

Full damages will not be awarded for injuries to a mill as the result of the defendant's negligence in permitting a log jam to form in a stream above it where the mill itself partly obstructed the stream.

Pepin v. Villeneuve, 12 D.L.R. 327, 22 Que. K.B. 520.

Excessiveness—Reduction on appeal.

Where the amount of damages awarded appears excessive the Court of Appeal will reduce the amount even where there is no cross-appeal.

Chiniquy v. Begin, 24 D.L.R. 687, 24 Que. K.B. 294, reversing 20 D.L.R. 347 and varying 7 D.L.R. 65.

Excessiveness.

The rule of art. 503, C.C.P., permitting the court to reduce the amount granted by the verdict when there is no other reason for sending the case back to the jury, should only be applied when the amount is greatly

excessive. In this case the amount awarded was reduced from $12,000 to $6,000.

Montreal Street R. Co. v. Normandin, 26 Que. K.B. 167.

SPECIAL DAMAGES—REDUCTION—POWER OF COURT EN BANC.

The court en banc has the right to reduce special damages to the amount proved at the trial. [Staats v. C.P.R., 17 D.L.R. 309, followed.]

Brown v. Moose Jaw Electric Ry. Co., 7 S.L.R. 355, 7 W.W.R. 695.

TRESPASS—EXCESSIVE DAMAGES.

In an action for trespass to land where the court is of the opinion that the Trial Judge exceeded the limit in assessing damages, the judgment with respect to the trespass complained of will be affirmed, but the damages awarded will be reduced to such amount as will, in the opinion of the court, do full justice to the plaintiffs.

Crowell v. Nickerson, 52 N.S.R. 54.

NEGLIGENCE—EXCESSIVE VERDICT — APPEAL.

Where the plaintiff has obtained a verdict in an action for damages by reason of the defendant's negligence the Court of Appeal will not interfere on the ground of excessive damages, unless they think that, having regard to all the circumstances of the case, the damages are so large that no jury could reasonably have given them.

Panetta v. C.P.R. Co., 24 B.C.R. 249.

REDUCTION OF APPEAL.

A Court of Appeal will not reduce the amount of damages granted by the Trial Court when nothing indicates that the judgment was rendered through improper motives or by error.

Larivière v. Lachapelle, 53 Que. S.C. 374.

AMOUNT — EXCESSIVENESS — ITEM WRONGLY INCLUDED BY JURY—DEDUCTED ON APPEAL.

$16,000 damages awarded by a jury for injury to a boy run over by a waggon and very seriously hurt was held not excessive. The total amount awarded by the jury was $18,000, from which the Court of Appeal deducted $2,000 allowed for doctor's and hospital fees incurred by plaintiff's father who was not a party to the action, except as next friend of plaintiff. As such sum was separable from the rest it could be deleted without affecting the judgment for the balance. The amounts awarded for damages for injuries in some former cases are no longer a safe guide owing to the unprecedented advance in the high cost of living, and juries must deal with the state of the times in which they are called upon to act, taking such a reasonable view of future prospects as is humanely possible.

Ward v. Mainland Transfer Co., [1919] 3 W.W.R. 193.

PERSONAL INJURIES TO SERVANT—MEASURE OF DAMAGES—REDUCTION OF DAMAGES ON APPEAL.

Hyde v. G.T.P.R., 34 W.L.R. 176.

(§ III S—357)—EFFECT OF INSURANCE.

Where the widow or heirs of a person killed as the result of an accident sue the person responsible for such death in damages the defendant is entitled to have the amount of damages suffered diminished by whatever sums the heirs may have received under the terms of accident policies carried by the deceased.

Can. Northern Quebec R. Co. v. Johnston, 7 D.L.R. 243, 22 Que. K.B. 19.

(§ III S—358)—MITIGATION OR REDUCTION OF DAMAGES — MINIMIZING LOSS OF PROFITS.

A tenant sustaining damage by the landlord's failure to give him the water supply needed for his business as a photographer, in accordance with the lease, must do whatever he reasonably can to minimize the damages, as by installing a tank system at slight expense to keep his business going, and so claiming the expense of such installation instead of the much larger loss of profits through the practical suspension of the business.

Howell v. Armour & Co., 9 D.L.R. 125, 6 S.L.R. 25, 23 W.L.R. 68, 3 W.W.R. 832.

T. AGGRAVATION.

(§ III T—360)—WRONGFUL REMOVAL OF CORPSE FROM BURIAL LOT—AGGRAVATION OF DAMAGES—TENDER OF SMALL SUM.

The tender into court of $40 as satisfaction for the unlawful removal of human remains from a burial lot, where the liability of the defendant is unquestionable, amounts to an aggravation of the wrongful act.

O'Connor v. Victoria, 11 D.L.R. 577, 4 W.W.R. 4.

F. APPORTIONMENT.

See Negligence, II. A-75.

(§ III U—365)—APPORTIONMENT.

Where a municipality and a power company have been jointly condemned to pay damages to the heirs of a person who was drowned in a river owing to a defective guard rail, the court will, as between the codefendants, condemn the company to pay the entire amount so found to the corporation, plaintiff in warranty, when it is established that the municipality has for years been protesting that the company failed to take proper precautionary measures to ensure the safety of the highway and of banks of the river, and where the power company was under a legal duty in that regard the neglect of which was the cause of the death.

Richelieu v. Montreal & St. Lawrence Light & Power Co., 3 D.L.R. 145.

APPORTIONMENT—BREACH OF PROMISE AND SEDUCTION.

In an action for breach of promise of marriage and for seduction under promise of marriage the jury in finding for the

plaintiff need not apportion damages between the two causes of action.

Collard v. Armstrong, 12 D.L.R. 368, 24 W.L.R. 742, 4 W.W.R. 879.

APPORTIONMENT OF—DEFENDANT—BREACH OF DUTY—LIABILITY OF MUNICIPALITY—MUNICIPAL ACT, 1904 (MAN.).

Dunn v. St. Ann, 20 D.L.R. 987, 6 W.W.R. 1415, 29 W.L.R. 197.

PERSONAL CLAIM OF WIDOW AND CHILDREN NOT AFFECTED BY INSURANCE.

The claim of the widow and children of the deceased, under art. 156 C.C. (Que.), cannot be affected, nor its amount reduced, by an insurance obtained by the deceased and paid after his death. [Miller v. G.T.R. Co., 15 Que. K.B., p. 118, followed.]

Johnson v. Can. Northern Quebec R. Co., 39 Que. S.C. 263.

BREACH OF CONTRACT—LATE DELIVERY OF GOODS SOLD—MEASURE OF DAMAGES.

Wertheim v. Chicoutimi Pulp Co., [1911] A.C. 301.

ACTION BY WIDOW UNDER FATAL ACCIDENTS ACT—PECUNIARY LOSS—WORKMEN'S COMPENSATION FOR INJURIES ACT—PROCEEDS OF ACCIDENT INSURANCE POLICY.

Dawson v. Niagara, St. Catharines & Toronto R. Co., 23 O.L.R. 670, 12 Can. Ry. Cas. 411, 19 O.W.R. 242.

LOSS BY FIRE CAUSED BY SPARKS FROM LOCOMOTIVE—RIGHT OF COMPANY TO BENEFIT OF INSURANCE AGAINST SAME LOSS—ACTION BY INSURED AGAINST INSURER.

Banting v. Western Ass'ce Co., 21 Man. L.R. 142.

EVIDENCE OF EXPECTATION OF PECUNIARY BENEFIT.

Moffit v. C.P.R. Co., 2 A.L.R. 483.

MEASURE OF DAMAGES—QUANTUM MERUIT.

Vanscoyoc v. Simons, 3 A.L.R. 49, 13 W.L.R. 125.

PROPERTY NOT PASSING UNTIL PAYMENT IN FULL—GENERAL DAMAGES—SPECIAL DAMAGES—LOSS OF PROFITS.

New Hamburg Mfg. Co. v. Webb, 23 O.L.R. 44, 18 O.W.R. 216.

DAMAGES—ASSESSMENT OF UNDER SEPARATE HEADS.

Taylor v. B.C. Electric R. Co., 16 B.C.R. 109, 17 W.L.R. 470.

MEASURE OF DAMAGES—NATURAL GAS LEASES—RESERVATION.

Erie County Natural Gas & Fuel Co. v. Carroll, [1911], A.C. 105.

EXPROPRIATION OF LAND—VALUE AT TIME OF MAKING AWARD OR AT DATE OF BY-LAW TO EXPROPRIATE—WINNIPEG CHARTER.

Re Byerley & Winnipeg, 20 Man. L.R. 438, 17 W.L.R. 192.

NEGLIGENCE—PHYSICAL INJURIES—MENTAL SHOCK—SEVERANCE OF DAMAGES.

Toronto Ry. Co. v. Toms, 44 Can. S.C.R. 268.

ACTION FOR DAMAGES—BREACH OF CONTRACT—ALLOWANCE FOR LOSS OF PROFITS—SPECULATIVE OR CONTINGENT—INCAPABLE OF CALCULATION.

Pullan v. Hones, 3 O.W.N. 361, 20 O.W.R. 617.

FALSE ARREST—MITIGATION OF DAMAGES.

Sam Chak v. Campbell, 45 N.S.R. 1.

BUILDING CONTRACT—DEFECTS INCIDENT TO SEVERE WEATHER DURING WORK.

Cockshutt Plow Co. v. Alberta Bldg. Co., 2 A.L.R. 472.

SUPERINTENDENT GUILTY OF GROSS NEGLIGENCE — WORKMEN'S COMPENSATION ACT S. 3, SUBS. 2—DAMAGES, HOW COMPUTED.

Quinto v. Bishop, 2 O.W.N. 1152, 19 O.W.R. 313.

CONVERSION OF MINING SHARES—SHARES OF NO MARKET VALUE—MEASURE OF DAMAGES.

Goodall v. Clarke, 2 O.W.N. 567, 18 O.W.R. 185. (See also, 44 Can. S.C.R. 284.)

PROMOTERS—CONTRACT TO DELIVER SHARES AND BONDS—DAMAGES—REPORT—VARIATION ON APPEAL.

Nelles v. Hesseltine, 2 O.W.N. 643, 18 O.W.R. 196 (See also Windsor v. Nelles, 1 D.L.R. 156.)

MEASURE OF—FRAUDULENT MISREPRESENTATIONS INDUCING PURCHASE OF CREAMERIES—LOSS INCURRED IN OPERATING.

Lamont v. Wenger, 2 O.W.N. 519, 18 O.W.R. 170.

CONTRACT TO TAKE AND PAY FOR SHARES—MEASURE OF DAMAGES.

Sharpe v. White, 25 O.L.R. 298.

CONTRACT TO SUPPLY SLOP FOOD FOR CATTLE—BREACH—AVERAGES.

Dean v. Corby Distillery Co., 2 O.W.N. 832, 18 O.W.R. 681.

CONTRACT TO SUPPLY NATURAL GAS—BREACH OF CONTRACT—FAILURE OF GAS WELLS.

Essex v. Leamington, 2 O.W.N. 751, 18 O.W.R. 692.

CONTRACT—SALE OF HAY—DELIVERY OF PART—REFUSAL TO DELIVER REMAINDER—BREACH OF CONTRACT—DAMAGES.

Thompson v. Wilson, 18 W.L.R. 606.

GOVERNMENT RAILWAY—INJURY TO PASSENGER—NEGLIGENCE—LIABILITY OF CROWN—MEASURE OF DAMAGES.

Hamilton v. The King, 9 E.L.R. 435.

AGREEMENT TO CONVEY LANDS—CONSIDERATION—PRICE SPECIFIED IN MONEY—RECOVERY FOR "MONEY HAD AND RECEIVED"—SALE OR EXCHANGE—DAMAGES.

Webster v. Snider, 45 Can. S.C.R. 296.

BREACH OF PROMISE—SEDUCTION.

Cameron v. Sparks, 9 E.L.R. 564.

DEFERRED DELIVERY ON SALE OF GOODS—TIME AT WHICH DAMAGES TO BE DETERMINED.

Glenn v. Schaefer, 4 S.L.R. 166, 17 W.L.R. 273. [Varied in 18 W.L.R. 671.]

CONTRACT TO BUY MINING SHARES—BREACH—ASCERTAINMENT AS OF DATE CONTRACT SHOULD HAVE BEEN PERFORMED.

Sharpe v. White, 2 O.W.N. 849, 18 O.W.R. 801.

NEGLIGENCE—BRUSH FIRES SET DURING PROHIBITED SEASON — DESTRUCTION OF PROPERTY.

Pelletier v. Saint-Laurent, 20 Que. K.B. 500.

NEGLIGENCE—INJURY CAUSING DEATH—ASSESSMENT OF DAMAGES — LIFE INSURANCE.

Bouchard v. Gauthier, 20 Que. K.B. 487.

DAMAGES TO GRAIN ELEVATOR — LOSS OF PROFIT.

Meaford Elevator Co. v. Playfair, 2 O.W.N. 803, 18 O.W.R. 773.

WRONGFUL DISMISSAL—PARTICULARS AS TO DAMAGES TO BE FURNISHED—DECISIONS OF HOUSE OF LORDS.

Rutherford v. Murray-Kay, 19 O.W.R. 975, 3 O.W.N. 29.

EXTRA JUDICIAL SEIZURES—CHATTEL MORTGAGE—SALE THROUGH BAILIFFS—REMOVAL OF MORTGAGED PROPERTY—NEGLIGENCE—MEASURE OF DAMAGES.

Union Bank v. McHugh, 44 Can. S.C.R. 473.

IV. Assessment; double or treble damages.

(§ IV—370)—The maker of a lien note cannot recover treble the amount taken by the holder of the note for costs and expenses of a seizure of the chattels for which the note was given, as provided by R.S.S. 1909, c. 51, where the note provided that the maker would pay "all reasonable costs of collection, including court costs and bailiff's fees;" such agreement is a waiver of the benefit of the statute. [Union Bank v. McHugh, 14 Can. S.C.R. 473, applied.]

Braithwaite v. Bayham, 4 D.L.R. 498, 21 W.L.R. 839, 2 W.W.R. 778.

TREBLE DAMAGES—WEIGHTS AND MEASURES ACT, R.S.C. 1906, c. 52, s. 83—INTERPRETATION OF SS. 78-80—"PROCEDURE"—SECTIONS 81-83—"GENERAL"—DISTINCTION.

There is a clear distinction between penalties imposed by the Weights and Measures Act, R.S.C. 1906, c. 52, ss. 78-80, and the damages which may be recovered by the party grieved under the same statute (ss. 81-83). An action is maintainable for damages according to the provisions of the statute.

Swift Canadian Co. v. Innisfail Agricultural Society, 50 D.L.R. 102, [1919] 3 W.W.R. 983.

CONSPIRACY — SEVERAL DEFENDANTS — ASSESSMENT OF DAMAGES AGAINST EACH SEPARATELY—DIRECTION TO JURY—ACQUIESCENCE IN—VERDICT OF JURY—EVIDENCE TO SUPPORT.

McLean v. Wokes, 7 O.W.N. 490.

V. Division of damages.

(§ V—371)—JOINT TORTFEASORS—DIVISION OF DAMAGES—NEGLIGENCE.

The obligation of tortfeasors in respect of negligence is joint and several as between them and the person injured but as between themselves the damages is apportionable under Quebec law so where three parties were equally in fault but only one is sued by the injured person that one on bringing in the others to answer as defendants in warranty is entitled to indemnity for two-thirds of the amount, one-third against each of the other tortfeasors.

Legault v. Montreal Terra Cotta Co., 20 D.L.R. 388.

LIABILITY FOR TORT—JOINT FAULT AND NEGLIGENCE OF THE PARTIES.

Vallee v. Shedden Forwarding Co., 40 Que. S.C. 454.

DEATH.

I. IN GENERAL.
II. RIGHT OF ACTION FOR CAUSING.
A. In general.
B. Who may maintain and for whom.
III. WHO LIABLE FOR CAUSING.
IV. DEFENSES.
V. AUTHORITY TO COMPROMISE CLAIM FOR.
VI. EFFECT OF.

Negligence causing death, remedy, see Master and Servant, II A—80.

Measure of damages, see Damages, III—187.

Annotations.

Parents claim under Fatal Accidents Law; Lord Campbell's Act: 15 D.L.R. 689.

Effect of war on recovery by alien enemy beneficiaries or dependants: 23 D.L.R. 375, 380.

I. In general.

(§ I—1)—FATAL ACCIDENTS ACT—DEATH OF PLAINTIFF'S HUSBAND—ACTION FOR DAMAGES—SETTLEMENT—APPROVAL OF COURT ON BEHALF OF INFANTS—APPORTIONMENT OF DAMAGES—MAINTENANCE AND EDUCATION OF INFANTS.

Castonguay v. Hull Electric Co., 17 O.W.N. 218.

(§ I—2)—LIMITATION OF LIABILITY FOR CAUSING.

The test of the right of a legal representative or dependent of a deceased person to sue under Lord Campbell's Act is whether an action could have been maintained by the deceased in respect of his injuries.

Trawford v. B.C. Electric R. Co. (No. 2), 9 D.L.R. 817, 18 B.C.R. 132, 15 Can. Ry. Cas. 39, 23 W.L.R. 175, 4 W.W.R. 150.

II. Right of action for causing.

A. In general.

(§ II A—5)—RIGHT OF ACTION FOR CAUSING—PECUNIARY INJURY SUFFICIENT TO SUSTAIN—LORD CAMPBELL'S ACT.

In order to sustain an action under Lord

Campbell's Act, it is necessary to establish only a reasonable expectation of a pecuniary benefit on the part of those interested in the life of the deceased had death not occurred.

Toronto General Trusts Corp. v. Municipal Construction Co., 15 D.L.R. 66, 6 S.L.R. 317, 26 W.L.R. 130, 5 W.W.R. 659-717.

RIGHT OF ACTION—WORKMEN'S COMPENSATION.

Under the Ontario Workmen's Compensation for Injuries enactments giving any person entitled in case of death "the same right of compensation as if the workman had not been a workman," the "same right of compensation" means that which is conferred by the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33.

Brown v. G.T.R. Co., 11 D.L.R. 97, 28 O.L.R. 354, 24 O.W.R. 255.

LORD CAMPBELL'S ACT—AWARD TO DECEASED'S SISTER—"EXPECTATION OF PECUNIARY BENEFIT"—SUFFICIENCY OF—EVIDENCE BY COMMISSION.

An allowance to an unmarried adult sister abroad is not warranted on the assessment of damages for negligently causing death, merely from the circumstances that the sister lives with the mother, who had received financial assistance from the deceased, and the award to whom was not contested; to justify an award also to the sister evidence must be given of a reasonable expectation of pecuniary benefit from her brother. [Toronto General Trusts v. Municipal Construction Co., 15 D.L.R. 66, applied.]

Powell v. C.N.R. Co., 20 D.L.R. 140, 7 S.L.R. 347, 30 W.L.R. 189, 7 W.W.R. 701.

RIGHT OF ACTION FOR—LIABILITY OF OWNERS OF SHIP—DECEASED FALLING OVER BOARD—DEFENCE.

Under Ontario law there is no duty on shipowners in navigating their ships to use all reasonable means to rescue a sailor on their ship who had fallen into the water because of his own negligence in voluntarily putting himself in a position of danger while off duty, upon which an action could be brought under Lord Campbell's Act for his death. [Melhado v. Poughkeepsie Trans. Co., 27 Hun. (N.Y.) 99; Connolly v. Grenier, 42 Can. S.C.R. 242, distinguished.]

Vanvalkenburg v. Northern Navigation Co., 19 D.L.R. 649, 30 O.L.R. 142.

RIGHT OF ACTION FOR CAUSING—FAMILIES COMPENSATION ACT—TOTALLY NEW ACTION ARISING FROM—ACTION ARISES WHEN—PUNCTUM TEMPORIS.

A suit brought under the Families Compensation Act, R.S.B.C. 911, c. 82, is not an ordinary action of indemnity for negligence but a totally new action under the Act although conditions precedent are (a) the death was caused by the wrongful act, neglect or default of the defendant and (b) that the default was such "as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof." In determining when the right of action arises under Families Compensation Act, R.S.B.C. 1911, c. 82, the punctum temporis at which the test is to be taken is at the moment of death, so that if the deceased could, had he survived that moment, have maintained his action, then the action under the act may arise.

B.C. Electric R. Co. v. Gentile, 18 D.L.R. 264, [1914] A.C. 1034, 111 L.T. 682, 18 Can. Ry. Cas. 217, 28 W.L.R. 795, 6 W.W.R. 1342.

CIVIL ACTION FOR CAUSING.

Except as provided by statute, there is no right of civil action for the death of a human being. [Baker v. Bolton, 1 Camp. 493; Osborn v. Gillett, L.R. 8 Ex. 88; Makarsky v. C.P.R. Co., 15 Man. L.R. 53, followed.]

Thomas v. Winnipeg Electric R. Co. (Man.), 33 D.L.R. 59, [1917] 1 W.W.R. 1346.

REMEDIES FOR—QUE. C.C.

Article 1056 (Que. C.C.) confers an independent and personal right of action upon the consort and ascendant and descendant relatives of a person who dies in consequence of an offence or quasi-offence, not on the representatives (as Lord Campbell's Act does), but the offence of quasi-offence must occur in Quebec.

C.P.R. v. Parent, 33 D.L.R. 12, 20 Can. Ry. Cas. 141, [1917] A.C. 195, 23 Rev. Leg. 292, reversing 21 D.L.R. 681, 51 Can. S.C.R. 234, which affirmed 24 Que. K.B. 193.

(§ II A—6)—DEATH RESULTING FROM EMPLOYMENT WORK (WORKMEN'S COMPENSATION).

The death of a servant is due to the negligence of the Master where, for the purpose of lumbering operations, the servant is furnished with a pole and a fellow-servant with an inch board for the purpose of supporting a derrick which the servants were engaged in raising, during the construction of a "log jammer," of which the derrick was a part, and which, in the course of the operation, it was necessary to support for a time by placing the pole and the board under it upon frozen ground, snow and ice, if the superintendent in charge of the work should have known that the board and pole were insufficient supports without proper spikes to prevent slipping, and by reason of their insufficiency the derrick fell when it came on the supports and fatally injured the servant while holding the pole.

Delyea v. White Pine Lumber Co., 2 D.L.R. 863, 3 O.W.N. 823, 21 O.W.R. 665.

Where a workman received an injury in the course of his employment which resulted in hernia and he underwent an operation therefor and at the same time he was operated on for an old hernia on the opposite side from the new one, which had nothing to do with the injury complained of or with the operation necessitated there-

by, and after the operations had been apparently successfully performed blood poisoning was found in both wounds and caused death a few days later and there was nothing to shew where the infection originated, the operating surgeon being of the opinion that it began in both at the same time, a finding of the Trial Judge under a Workmen's Compensation statute, that the death resulted from the injury received in the "course of employment," will not be disturbed. [Dunham v. Clare, [1902] 2 K.B. 292; Ystradowen v. Griffiths, [1909] 2 K.B. 533, followed.]

Re Eddles & School District No. 1 of Winnipeg, 2 D.L.R. 696, 22 Man. L.R. 240, 21 W.L.R. 214, 2 W.W.R. 265.

DEATH WHILE OPERATING ELEVATOR—RIGHT TO WORKMEN'S COMPENSATION—OFFICE BUILDING—"FACTORY."

The representative of an elevator operator who was killed in the course of his employment is entitled to recover compensation under the Workmen's Compensation Act, Sask., although the building in which the electric elevator was operated was not used for manufacturing purposes, but for offices and apartments, such building being within the statutory definition given in that Act to the word "factory."

Western Trust Co. v. Duncan, 21 D.L.R. 461, 8 S.L.R. 7, 30 W.L.R. 921, 8 W.W.R. 334.

DERRICK — NEGLIGENCE OF OWNER — NEGLIGENCE OF HIRER — CONTRIBUTORY — DAMAGES.

Dube v. Algoma Steel Corp., 21 D.L.R. 857, 8 O.W.N. 513. [Affirmed, 31 D.L.R. 178, 53 Can. S.C.R. 481.]

DEATH RESULTING FROM EMPLOYMENT (WORKMEN'S COMPENSATION).

The Workmen's Compensation Act, where it may be said to apply, has supplanted the common law as between the employer and the employee and his representatives and done away entirely with the common law recourse under the provisions of C.C. art. 1053 et seq.

Tremblay v. Simoneau, 15 Que. P.R. 28.

B WHO MAY MAINTAIN AND FOR WHOM.

(§ II B—10)—WHO MAY MAINTAIN AND FOR WHOM.

If the declaration does not say whether the deceased was the sole support of the plaintiff or not, the Workmen's Compensation Act is inapplicable, as common law still exists with respect to all cases which are not specially provided for by said Act.

Tremblay v. Simoneau, 15 Que. P.R. 28.

ACTION FOR CAUSING—RIGHT OF DEPENDENTS.

The widow and children of a deceased person, who, it is alleged, died of injuries caused by the defendants' negligence, bringing an action under the Families Compensation Act, R.S.B.C. 1911, c. 82, which provides that, where there is no executor or administrator, such action may be brought by the person for whose benefit such action would have been brought by the executor or administrator, are entitled to all the rights and privileges with respect to everything appertaining to the action as would be the executor or administrator.

Trawford v. B.C. Electric R. Co. (No. 2), 9 D.L.R. 817, 15 Can. Ry. Cas. 39, 18 B.C.R. 132, 23 W.L.R. 175, 4 W.W.R. 150.

WHO MAY MAINTAIN ACTION — APPORTIONING CLAIMANTS' LOSS.

In apportioning money recovered under the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, and under the Ontario Workmen's Compensation for Injuries enactments, the true guide must be the actual pecuniary loss of each of the claimants, and the statute as to distribution of decedents' estates furnishes no satisfactory guide. Money recovered under the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, or the Ontario Workmen's Compensation for Injuries enactments, may properly be apportioned by the court in one of two ways: (1) By finding the amount of pecuniary damages which each of the claimants has really sustained, and if the whole be more or less than the fixed sums, awarding to each his proper proportion; or (2) by finding the proportion which the right of each bears to the others, and dividing the amount available accordingly.

Brown v. G.T.R. Co., 11 D.L.R. 97, 15 Can. Ry. Cas. 350, 28 O.L.R. 354, 24 O.W.R. 255.

RIGHT OF ACTION — "ASCENDANT" RELATIVE —STEPMOTHER.

A stepmother is not an "ascendant" relative within the meaning of art. 1056 C.C. (Que.), so as to entitle her to a right of action for the death of a stepson killed while in the discharge of his duties in a shipyard of the Crown.

Bonin v. The King, 42 D.L.R. 510, 18 Can. Ex. 150.

(§ II B—11)—NONRESIDENT ALIENS.

An alien nonresident dependent of a workman who lost his life as the result of an accident arising out of and in the course of his employment while resident in the province, is entitled to compensation under the B.C. Workmen's Compensation Act, 1902, 2 Edw. VII. (B.C.) c. 74, now R.S.B.C. 1911, c. 244.

Krzus v. Crow's Nest Pass Coal Co., 8 D.L.R. 264, [1912] A.C. 590, 2 W.W.R. 726.

(§ II B—12)—DAMAGES FOR CAUSING — CLAIM OF WIFE LIVING SEPARATE — LIABILITY OF DECEASED FOR WIFE'S MAINTENANCE.

The basis of apportionment, on an application by a widow of a deceased person, under ss. 4 and 9 of the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, for apportionment between her and the mother of the deceased of a sum of money paid over as damages for the death of the deceased, is not affected by the fact that the widow was separated from her husband, inasmuch as

he still continued to be liable for her support, and the amount the husband contributed to his mother's support is immaterial, the only question being, on such an application, what the wife and mother would relatively have had a right to expect if the deceased had continued to live.

Scarlett v. C.I.R. Co., 9 D.L.R. 780, 15 Can. Ry. Cas. 184, 4 O.W.N. 718, 23 O.W.R. 948.

(§ II B—13)—Where the death of a child is alleged to have been caused by the wrongful act, neglect, or default of the defendant, and where compensation in damages for negligence causing death is given by statute to certain relatives for their financial loss but with a provision that the action for same shall be brought by the executor or administrator of the deceased child suing in a representative capacity, and where the action is limited by the Act to a certain period after the death, and an action was brought before the expiry of the limitation period, by the parent as such, a motion on his behalf after the limitation period had expired, to amend by suing in the alternative as the personal representative of the deceased child will not be granted, as its allowance would operate to defeat the statute. Where the parent of a deceased child, whose death was alleged to have been caused by certain wrongful acts (which would not be grounds for an action at common law) is given a certain right of action therefor by statute, and where the statutory provision requires any such action to be brought by and in the name of the executor or administrator of the deceased child; an action of that class instituted by the parent as such, instead of as such executor or administrator, cannot be maintained. [Monaghan v. Horn, 7 Can. S.C.R. 409, followed.]

McKerral v. The City of Edmonton, 7 D.L.R. 661, 5 A.L.R. 219.

The mother has a pecuniary interest in the life of a son who is killed giving her the right to sue in damages those responsible for his death even though at the time of such death her own husband be quite able to support her.

Dube v. Montreal, 7 D.L.R. 87, 42 Que. S.C. 533, 19 Rev. Leg. 181.

RIGHT OF ACTION FOR CAUSING — STREET RAILWAYS — CHILD RUN OVER BY CAR AND KILLED — HEIGHT OF FENDER — APPROVAL OF ONTARIO RAILWAY AND MUNICIPAL BOARD — NEGLIGENCE — FINDING OF JURY — EVIDENCE TO SUPPORT — ACTION UNDER FATAL ACCIDENTS ACT — PARENTS OF CHILD OF SIX — REASONABLE EXPECTATION OF PECUNIARY BENEFIT FROM CONTINUANCE OF LIFE.

La Fortune v. City of Port Arthur, 7 O. W.N. 329.

ACTION FOR CAUSING SON'S DEATH — FATHER AND MOTHER AS COPLAINTIFFS.

A wife common as to property may be coplaintiff with her husband in an action under the Workmen's Compensation Act, to recover damages caused by their son's death, and such an action will not be dismissed, as far as she is concerned, on an exception to the form.

Sullivan v. Furness Withy & Co., 16 Que. P.R. 268.

PARENTS.

The right of action given to the mother of a minor, killed by accident, by art. 1056 C.C. is personal to her and does not come from the deceased nor from the succession.

Richard v. C.P.R. Co., 13 Que. P.R. 268.

(§ II B—14)—RIGHT OF ACTION — STEP-CHILDREN—APPORTIONMENT.

Infant step-children of the deceased who were dependent upon him for support have a right to share in the distribution of the proceeds of money collected under the Ontario Workmen's Compensation for Injuries Enactments or the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, as damages for his death through the negligence of another, though in the apportionment of the fund they would not be entitled to as large a sum as would be children of deceased's own.

Brown v. G.T.R. Co., 11 D.L.R. 97, 15 Can. Ry. Cas. 350, 28 O.L.R. 354, 24 O.W.R. 255.

RIGHT OF ACTION FOR CAUSING — WHO MAY MAINTAIN — CHILDREN.

That the premature death of an aged parent caused an acceleration of the enjoyment of his estate by his children is not such a benefit as will prevent them recovering under the Fatal Injuries Act, 1 Geo. V. c. 33, R.S.O. 1914, c. 151, where there is a reasonable probability that had the parent lived he would have saved all of his income for the benefit of his children.

Goodwin v. Michigan Central R. Co., 14 D.L.R. 411, 29 O.L.R. 422, 25 O.W.R. 182.

WORKMEN'S COMPENSATION ACT (QUE.) — ACCIDENT CAUSING DEATH — COMPENSATION TO CHILDREN.

Notwithstanding the provision in art. 7323, R.S.Q. 1909, that compensation is payable to children "to assist them to provide for themselves until they reach the full age of 16 years," the child of a workman killed in an accident, whatever his age may be, however near to that of 16 years, is not debarred from recovering from the employer a sum equal to four times the average yearly wages of the deceased under the Quebec laws.

Palmiero v. G.T.R. Co., 15 Can. Ry. Cas. 354, 42 Que. S.C. 435.

(§ II B—17)—PERSONAL REPRESENTATIVE — TWO ACTIONS BROUGHT ON ACCOUNT OF DEATH OF SAME PERSON — ORDER STAYING ONE — ACTIONS BY MOTHER AND WIDOW AS ADMINISTRATRIX.

Scarlett v. C.P.R. Co., 2 D.L.R. 891, 3 O. W.N. 1006.

DAMAGES FOR CAUSING — APPORTIONMENT OF SUM PAID IN SETTLEMENT.

On an application by a widow of a de-

ceased for apportionment, under ss. 4 and 9 of the Fatal Accidents Act, 1 Geo. V. (Ont.) c. 33, between her and the mother of the deceased of a sum of money paid over as damages for the death of the deceased, the apportionment should be made in proportion to the damages sustained by each of them and the analogy of the Statute of Distributions does not apply. [Sanderson v. Sanderson, 36 L.T.N.S. 847, disapproved; Bulmer v. Bulmer, 25 Ch. D. 409, and Burkholder v. G.T.R., 5 O.L.R. 428, followed.]

Scarlett v. C.P.R. Co., 9 D.L.R. 780, 4 O.W.N. 718, 15 Can. Ry. Cas. 184, 23 O.W.R. 948.

PERSONAL REPRESENTATIVE—INFANT.

Where defendants are liable, under the Fatal Accidents Act 1 Geo. V. (Ont.) c. 33, at the suit of an administrator only, or in certain circumstances at the suit of the persons beneficially interested, as prescribed by ss. 4 and 8 of the Act, and were sued by an infant who is not an administrator, and who is not the person prima facie entitled to the grant, the action cannot be stayed until the infant attains his majority and takes out letters of administration, but will be dismissed on motion. [See Scarlett v. C.P.R. Co., 2 D.L.R. 891; as to actions for causing death. See also Trawford v. B.C. Electric R. Co., 9 D.L.R. 817.]

Luciani v. Toronto Construction Co., 10 D.L.R. 551, 4 O.W.N. 1073, 24 O.W.R. 381.

LORD CAMPBELL'S ACT — WIDOW SUING AS ADMINISTRATRIX—LIMITATIONS.

It must be assumed that the Fatal Accidents Act, R.S.S. c. 135, containing legislation with regard to the same subject-matter as Lord Campbell's Act (Imp.), is exhaustive of the whole subject. Where an action under the Fatal Accidents Act was not commenced by the executor or administrator, but by the widow, leave was given at the trial to amend by having the widow sue alternatively as administratrix on condition that the defendant should be entitled to object that the action already begun by her and so continued was already barred by s. 512 of the City Act. Held, also, that the amendment having been applied for more than three months after the death the action was barred.

Macpherson v. City of Prince Albert, 34 W.L.R. 715.

EXCESSIVE DRINKING IN HOTEL — DEATH FROM EXPOSURE TO COLD—LIABILITY OF OWNER OF HOTEL AND BARTENDER.

De Struve v. McGuire, 25 O.L.R. 87, 20 O.W.R. 374.

NEGLIGENCE—FINDINGS OF JURY IMPOSSIBLE OF RECONCILIATION—NEW TRIAL.

Miller v. Kaufman, 2 O.W.N. 1493, 19 O.W.R. 881, reversing 2 O.W.N. 925.

HUSBAND KILLED — WORKMEN'S COMPENSATION FOR INJURIES ACT — REDUCTION OF DAMAGES ON APPEAL.

Kirby v. Briggs, 2 O.W.N. 1511, 19 O.W.R. 917.

NEGLIGENCE — SECTIONMAN KILLED ON DUTY — ACTION BY INFANT CHILDREN FOR DAMAGES — FINDINGS OF JURY.

Dell v. Michigan Central R. Co., 20 O.W.R. 154.

NEGLIGENCE OF FELLOW-SERVANT NOT IN SUPERINTENDENCE.

Davies v. Badger Mines Co., 2 O.W.N. 559, 18 O.W.R. 348.

ENGINEER KILLED — ACTION BY WIDOW FOR DAMAGES — DECEASED KNEW SEMAPHORE WAS UP — EQUALLY RESPONSIBLE WITH CONDUCTOR.

Smith v. G.T.R. Co., 3 O.W.N. 379, 20 O.W.R. 654.

ACTION BY FOREIGN ADMINISTRATOR — APPLICATION FOR LEAVE TO SUE IN FORMA PAUPERIS.

Walker v. Allan Line Steamship Co., 44 N.S.R. 410.

INJURIES CAUSING DEATH — EVIDENCE OF NEGLIGENCE.

Beck v. C.N.R. Co., 2 A.L.R. 549.

III. Who liable for causing.

(§ III—20)—WHO LIABLE FOR CAUSING.

An employer is liable for the death of an employee, caused by the negligence of another employee, where it appears that it being the duty of an electrical expert engineer in the employ of an electric company to make a test of an electric generator, which had been just set up by the workmen of the company's mechanical department, and he, before making the test, informed the foreman of the mechanical department that he did not think the generator was properly secured to the floor, and such foreman ordered two of the men in his department to be present at the time the test was made for the purpose of doing all necessary mechanical work to the machine, and the workmen were of the same opinion as the expert as to the insecurity of the generator and suggested to him that they would tighten up certain bolts, fastening the machine to the floor, to which he assented and they proceeded to do so without any further orders from him, and shortly after the electrical expert saw one of the servants standing up near the machine as if through with the work he had undertaken to do, and, taking it for granted that all was clear, turned on the power, causing the death of the other servant who was still working at the bolts.

Darke v. Canadian General Electric Co., 4 D.L.R. 259, 28 O.L.R. 240, 21 O.W.R. 583. [Affirmed, 12 D.L.R. 705.]

UNPROTECTED HATCH — EMPLOYEE TO COMMENCE WORK AT FUTURE DATE — WORK SUSPENDED — PAYMENT OF WAGES TO EMPLOYEE WHILE UNEMPLOYED.

A navigation company is not liable in an action under the Ontario Fatal Accidents Act brought by the plaintiff on behalf of herself and her infant children, to recover damages for the death of her husband, whose body was found in the hold of one

of the defendant's vessels which was laid up alongside of a wharf, for the winter, where, from the evidence, it is clear that the deceased had met his death by falling through an open hatch but was not upon the boat in which his remains were found by reason of any business which concerned the defendants nor upon any invitation express or implied of the defendants but merely out of curiosity or interest he had by reason of having formerly been employed upon the vessel and of his anticipation of being employed there at a later date, where the defendants were not guilty of any act of active negligence and had not deceived the deceased by means of a trap, whether the deceased was to be considered as a bare licensee or as a trespasser upon the boat.

King v. Northern Navigation Co., 6 D.L.R. 69, 27 O.L.R. 79, 22 O.W.R. 697, affirming 24 O.L.R. 643.

Where a pole erected by a telephone company upon a street of a municipality has decayed to some extent, but would nevertheless have stood for some time without falling by its own weight, and was still fit to be used for the purpose for which it was erected, and one passing along the street, in a frolic, jumps up and catches a guy wire attached to the pole, and pulls the pole down upon his companion and injures him, neither the telephone company nor the municipality is responsible for such injuries. [Nordheimer v. Alexander, 19 Can. S.C.R. 248; Englehart v. Farrant, [1897] 1 Q.B. 240, distinguished.]

Johnson v. Montreal & The Merchants' Telephone Co., 7 D.L.R. 233, 42 Que. S.C. 450.

Even if it were shewn that a street railway company, as well as a railway company, might also be liable for the consequences of an accident which resulted in the death of one of the railway's employees because of the negligence of the motorman, an employee of the street railway company, that would not prevent the recovery of full damages from the railway company. ["The Bernina," 13 App. Cas. 1, Burrows v. The March Gas & Coke Co., L.R. 5 Ex. 67, followed.]

Pettit v. C.N.R. Co., 7 D.L.R. 645, 14 Can. Ry. Cas. 293, 23 Man. L.R. 213, 22 W.L.R. 265, 3 W.W.R. 74. [Varied, 11 D.L.R. 316, 15 Can. Ry. Cas. 272.]

RAILWAY FIREMAN — LIABILITY OF RAILWAY — NEGLIGENCE OF ENGINEER — ABSENCE OF SIGNALS — COMMON LAW.

Jones v. C.P.R. Co., 13 D.L.R. 900, 30 O.L.R. 331, 24 O.W.R. 917, reversing 5 D. L.R. 332.

LIABILITY FOR CAUSING — ASPHYXIATION BY GASES — LIABILITY OF CONTRACTOR.

The owner of a tenement block, occupied by different tenants, whose agent employs a contractor to take measures to destroy the vermin with which the different rooms are infested, knowing that the contractor will use poisonous gas for that purpose, will be liable in damages equally with the contractor for the death of a person caused by the escape of such poisonous gas from the rooms that are being fumigated into the basement of the block where such person happens to be at the time. The agent who employed the contractor to do the work will also be liable for such damages. In this case the contractor was employed to perform a dangerous work in the very performance of which the accident happened, and it was not merely a casual or collateral act of negligence of the contractor which caused the death, and it was not shewn that the accident occurred through the conscious act of another's volition so that not only the contractor but also the owner and his agent should be held liable. [Fletcher v. Rylands, L.R. 1 Ex. 265, L.R. 3 H.L. 330; Baker v. Snell, [1908] 2 K.B. 825; Dalton v. Angus, 6 App. Cas. 831; Dominion Natural Gas Co. v. Collins, [1909] A.C. 640; Hole v. Sittingbourne, 6 H.L.& N. 488; Black v. Christchurch, [1894] A.C. 48; Penny v. Wimbledon, [1899] 2 Q.B. 72; Ballentine v. Ontario Pipe Line Co., 16 O.L.R. 654, and Charing Cross v. London Hydraulic, [1913] 3 K.B. 442, followed.]

Skubiniuk v. Hartmann, 24 Man. L.R. 836, 29 W.L.R. 765, 7 W.W.R. 392.

DEATH FROM CONTACT WITH TRAIN — ABSENCE OF EYE-WITNESS — NO WARNING AT CROSSING — BALANCE OF PROBABILITIES.

G.T.R. Co. v. Griffith, 45 Can. S.C.R. 380.

FOREMAN — NOT SEEING DERRICK SAFE — PIN OR KEY ABSENT — PERSON KILLED — NO CONTRIBUTORY NEGLIGENCE.

Walberg v. A. C. Stewart & Co., 3 O.W. N. 402, 20 O.W.R. 677.

IV. Defenses.

(§ IV—26)—ASSUMPTION OF RISK.

A master is not liable for the death of a servant, notwithstanding the jury found that the use of a certain appliance would have prevented it, although unable to agree that its absence amounted to a defect, where, at the time the servant was killed, he was in a place where his work did not take him, and he had been warned as to, and knew, the danger he ran, and had been expressly warned to keep away therefrom. [Moore v. Moore, 4 O.L.R. 167, distinguished.]

Mercantile Trust Co. v. Canada Steel Co., 5 D.L.R. 55, 3 O.W.N. 1467, 22 O.W.R. 568, affirming 3 D.L.R. 518, 3 O.W.N. 980.

DEATH OF PERSON FROM INJURY RECEIVED ON DEFENDANTS' PREMISES — ACTION BY WIDOW UNDER FATAL ACCIDENTS ACT — DECEASED IN POSITION OF LICENSEE OR INVITEE — DUTY OF OWNER OF PREMISES — FAILURE OF PLAINTIFF TO SHEW TRAP OR HIDDEN DANGER — NONSUIT — CONTRIBUTORY NEGLIGENCE — ADMISSION OF DECEASED.

Parker v. Dyment-Baker Lumber Co., 6 O.W.N. 559.

DEATH BY DROWNING OF PERSON ATTEMPTING TO CROSS RIVER — BROKEN DAM — VOLUNTARY ASSUMPTION OF RISK — NEGLIGENCE OF DECEASED.

Hudson v. Napanee River Improvement Co., 5 O.W.N. 467.

(§ IV—27) — DEFENCE — CONTRIBUTORY NEGLIGENCE OF BENEFICIARY.

To permit a 2 year old child to go about unattended knowing that he may wander upon a narrow foot-bridge over deep water, is such contributory negligence as would prevent the parent from recovering damages for the child's death from drowning by falling from such bridge.

Pedlar v. Toronto Power Co., 15 D.L.R. 684, 29 O.L.R. 527. [Affirmed, 19 D.L.R. 441, 30 O.L.R. 581.]

(§ IV—28)—FAMILIES COMPENSATION ACT — RELEASE OBTAINED BY FRAUD — EFFECT.

The raisers of the action under Families Compensation Act, R.S.B.C. 1911, c. 82, have a title to set aside a release obtained by fraud from the deceased.

B.C. Electric R. Co. v. Gentile, 18 D.L.R. 264, 18 Can. Ry. Cas. 217, [1914] A.C. 1034, 111 L.T. 682, 28 W.L.R. 795, 6 W.W.R. 1342.

FAMILIES COMPENSATION ACT — RELEASE OBTAINED BY FRAUD — EFFECT.

In an action by the dependants of the deceased under Families Compensation Act, R.S.B.C. 1911, c. 82, a release set up in defence may be attacked on the ground of fraud if the right so to attack it rested with the deceased himself at the time of his death and the dependants have such right of attack without adding the personal representatives of the deceased for that purpose.

B.C. Electric R. Co. v. Turner & Trawford, 18 D.L.R. 430, 18 Can. Ry. Cas. 430, 49 Can. S.C.R. 470, 6 W.W.R. 288, affirming 9 D.L.R. 817.

COMPROMISE OF CLAIM — SUFFICIENCY — PROXIMATE CAUSE.

An unconcluded settlement by a plaintiff with a party sued cannot be set up as a defence by another defendant in an action by the same plaintiff. In an action for negligence, in the absence of positive evidence as to the cause of the mishap, the verdict of a jury will be upheld, if there is no other reasonable explanation than the negligence charged and found. [McArthur v. Dominion Cartridge Co., [1905] A.C. 72, applied.]

St. Denis v. E. Ont. Live Stock & Poultry Ass'ce 30 D.L.R. 647, 36 O.L.R. 640.

DEFENCES — RELEASE BY CONTRIBUTING TO EMPLOYEES' RELIEF ASSOCIATION — ACCORD AND SATISFACTION — ACTION BY WIDOW.

Where the death of a person is caused by the wrongful act, neglect or default of another an action for damages does not lie under Lord Campbell's Act unless the deceased could have maintained an action if death had not ensued. C. was a temporary employee on the Intercolonial Railway and, as such, a member of the "Employees Relief and Insurance Association." By the rules of the association the object of the Temporary Employees Accident Fund was to provide for members suffering from bodily injury and for the family or relatives of deceased members. Each member had to contribute to the fund and the Railway Department gave the annual sum of $8,000 in consideration of which it was to be "relieved of all claims for compensation for injury or death of any member." C. was killed by a railway train and his widow was paid $250 out of this fund. She then brought an action under Lord Campbell's Act:—Held, that as by his contract with the Association C. could not have maintained an action had he lived, the widow's right of action was barred.

Conrod v. The King, 49 Can. S.C.R. 577, affirming 14 Can. Ex. 472.

(§ IV—29) — WORKMEN'S COMPENSATION ACT (ALTA.)

An award of $1,000 as damages for the death of a workman, cannot be based by an arbitrator under the Workman's Compensation Act (Alta.) 1908, upon the facts that the manager of the company informed the claimant that her claim would be settled, and that the solicitors for the company wrote the solicitors for the claimant that they thought the matter should be settled, and that an assurance company, which was liable to indemnify the company in respect of such claim, sent a letter to the claimant making her an offer of one thousand dollars, in settlement of her claim, which did not appear to have been authorized by the company with whom the workman had been employed and against which the award was made.

Re Reid & The Leitch Collieries, 5 D.L.R. 50, 4 A.L.R. 338, 21 W.L.R. 689, 2 W.W.R. 385.

V. Authority to compromise claim for.

(§ V—30)—DEATH ON GOVERNMENT RAILWAY — RELEASE TO BENEFIT ASSOCIATION — LIABILITY OF CROWN.

The suppliant, having been injured on a government railway, was paid sick allowances by an insurance association for nearly 26 weeks, and when the sick and accident pay-rolls were presented to him for signature, and when he signed them, there was in small print at the head of the column to which he affixed his signature as a receipt for such moneys, the following: "In consideration of the receipt by us of the sums set opposite our respective names, we do hereby release and discharge the Intercolonial Railway, etc., from all claims for damages, indemnity or other forms of compensation on account of said disablement." Held, that, as no notice was given to the suppliant of such condition, and as his attention was never called to it, and that he

signed the receipt without being aware of the same, it could not now be set up as a bar to his recovering. Under a by-law (113) of such association, by the payment of $10,000 annually by the Railway Department to the association, it was provided that the Railway Department "shall be relieved of all claims for compensation for injuring or death of any member." But in the case of death or total disablement the Crown did not, under the rules of the association, contribute to the amount paid in respect thereof, such fund being made up by special assessment among the members. Held, that, as the Crown did not contribute to the indemnity in the case of death or total disablement, it could not avail itself of the immunity provided by the by-law in question.

Saindon v. The King, 15 Can. Ex. 305.

DEATH ON GOVERNMENT RAILWAY — RELEASE BY WIDOW — ERROR — RIGHT TO INDEPENDENT ACTION.

Suppliant's husband was killed in an accident on the Intercolonial Railway. Suppliant gave a receipt for the insurance money payable on his death to the Intercolonial and Prince Edward Island Railway Employees' Relief and Insurance Association and in full satisfaction and discharge of all her claims against the said association and against His Majesty the King, arising out of the death of her husband. Her attention was not called to this discharge embodied in the receipt, and the letter transmitting the form of receipt for signature did not mention it. Moreover, it was in the English language, which she did not understand and could not read when signing it. Held, that suppliant could not be taken to have assented to such condition; and it could not be set up as a bar to her recovery. Held, that suppliant's right of action in this case under art. 1056 C.C.P.Q. was a personal one and independent from that of her husband; and that any immunity from damages or condition that might have been available as a defence to an action by her husband because of his being a member of an insurance and provident society, was no bar to the suppliant's action after his death. [Miller v. G.T.R. Co., [1906] A.C. 187 applied.]

Hudon v. The King, 15 Can. Ex. 320.

VI. Effect of.

(§ VI—35) — DEATH PENDING ACTION — RIGHT OF HEIRS TO CONTINUE.

Where a person has been injured and has commenced an action for damages, but dies pending the action, his claim becomes an asset, transmissible by succession, and his heirs have a right to continue the action.

Montreal St. R. Co. v. Chevandier, 24 D.L.R. 349, 24 Que. K.B. 48.

DEBENTURES.

Statutory requirements, see Schools, IV—70.

DEBT.

Arrest for, see Arrest.

Assignment of, see Assignment.

Attachment of, see Garnishment, Attachment.

Liability of heirs for debt of ancestor, see Descent and Distribution.

Power of executors to create, see Executors and Administrators.

(§ I—1)—LIFE INSURANCE GIFT TO CREDITOR — EFFECT ON RIGHT OF ACTION FOR CREDITOR'S DEBT.

The intention with which the life insurance was effected and made payable to the assured's mother is to be considered in deciding whether or not the insurance money is applicable in reduction of a debt from the assured to his mother; the mother's estate is entitled to both the debt and the insurance where the debt was payable only at her death and where this and other circumstances, having regard to the sufficiency of the estate, rebut any presumption of intention that the insurance money should apply on the debt.

Northern Trust Co. v. Coldwell, 18 D.L.R. 512, 25 Man. L.R. 120, 28 W.L.R. 625, 6 W.W.R. 1165. [Affirmed, 20 D.L.R. 986, 25 Man. L.R. 120.]

DEBTOR AND CREDITOR.

Arrest for debt, see Arrest.

Insolvency of debtor, see Assignment for Creditors; Banks, IV; Corporations and Companies, VI; Insolvency; Partnership.

As to remedies of creditors, see Execution; Attachment; Fraudulent Conveyances; Garnishment.

Creditors of decedent's estates, see Executors and Administrators.

Protection of creditors under recording Acts, see Registry Laws; Land Titles; Bills of Sale; Chattel Mortgage.

PROMISSORY NOTE — AGREEMENT TO ACCEPT — MISREPRESENTATION — REFUSAL TO ACCEPT — PROMISE OF EXTENSION.

The creditor who has agreed to accept on the following day the debtor's promissory note for 2 months for a debt past due on his representation that he had never been sued may refuse to accept such note or to grant the extension if the representation were untrue. The promise of an extension for payment of a debt is a nudum factum, and not binding on the promisor unless there was a consideration for same.

Commercial Plate Glass Ass'ce Co. v. Robillard, 20 D.L.R. 499.

ACKNOWLEDGMENT OF DEBT — ERROR — AVOIDANCE OF LITIGATION — RELIEF.

Imbault v. Crevier, 39 Que. S.C. 509.

DECEIT.

See Fraud and Deceit.

DECLARATION OF RIGHT.

See Judgment, VI—255; Companies, I D—15.

DECREE.

See Judgment; Foreclosure Decree, see Mortgage; Vendor and Purchaser.

DEDICATION.

I. Mode and effect.
  A. In general.
  B. By map or plat.
  C. Who may dedicate.
II. Acceptance.
III. Revocation.

Establishment of highways by, see Highways, I—7.

I. Mode and effect.

A. In general.

(§ I A—3)—Highways — Maintenance of gates—Effect.

Proof of maintenance of gates across a road is not controlling on the question as to whether it was dedicated as a public highway, where the evidence of intent to dedicate is clear, and it does not appear that the dedicating owner or his grantee maintained or sanctioned the gates, while it is shewn that there was never any interruption of user of the road, since time does not run and obstructions do not count against the Crown. An owner of land is bound by his acts, both before and after issuance of a patent, shewing an intent to dedicate it as a public highway. That a patentee of land, in subdividing it, agreed to open a public road along a given line, that a road was opened and its limits defined by a fence, and that the patentee and his grantee performed statute labour on the road for several years, shews an intention to dedicate the road as a public highway.

Larcher v. Town of Sudbury, 11 D.L.R. 111, 24 O.W.R. 659, 4 O.W.N. 1289.

Shewn by use—Intention.

A dedication of land to public purposes must be made with the intention to dedicate, and the mere acting so as to lead persons into the supposition that a way was dedicated to the public does not of itself amount to dedication. [Simpson v. Attorney-General, [1904] A.C. 476, at p. 493, followed.]

C.N.R. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504, 22 O.W.R. 659.

Highways—Intention.

Dedication of land for a highway cannot be inferred from user where it clearly appears that such was not the intention of the landowner.

Rideout v. Howlett, 13 D.L.R. 293, 12 E.L.R. 527.

Animus dedicandi—Public user.

In order to constitute a valid dedication to the public of a highway by the owner of the soil there must be an animus dedicandi of which the use by the public is merely some evidence; public user does not create a presumption of grant or dedication. [Mann v. Brodie, 10 App. Cas. 378, 386, applied.]

Rowland v. Edmonton, 21 D.L.R. 33, 50 Can. S.C.R. 520, 31 W.L.R. 33, 8 W.W.R. 20, reversing 20 D.L.R. 36.

Public street — Intention of owner.

There is no donation of streets to the public, unless it is expressly formulated or unless certain actions indicate the intention of the owner to destine them to the use of the public.

Chars Urbains v. Commissaires du Havre, 24 Que. K.B. 503.

B. By map or plat.

(§ I B—10)—By map or plan.

The registration with a deed of land of a sketch of the land attached to the deed, without the formalities required by the Registry Act in the registration of a plan, does not constitute a dedication as public highways of those parts of the land which are shewn in the sketch as streets or roads.

Sinclair v. Peters, 8 D.L.R. 575, 4 O.W.N. 338, 23 O.W.R. 441, affirming 3 D.L.R. 664.

(§ I B—12)—Selling lots with respect to plat or map — Right of common — Covenant for access to — Effect.

A conveyance of a lot by number to a registered plan of a summer resort park, with a covenant that the grantee, his heirs, administrators and assigns, shall have free access to all streets, terraces and commons of the park, confers on the latter the right to have an open space in the centre of the park as shewn on the registered plan, kept open for use as a common.

Re Lorne Park, 18 D.L.R. 595, 30 O.L.R. 289.

Selling lots with respect to — Subdivisions.

The vendor of six acres of land sold en bloc has no right afterwards to register a subdivision of the land with its incidental concession of lanes and streets through it against the will of the purchaser, although the contract contained a clause "plan to be similar to City View addition adjoining."

Magrath-Holgate v. Countryman, 22 D.L.R. 684.

C. Who may dedicate.

(§ I C—15) — Municipality — Presumptions—Highway.

The spending of a sum of money by the government and the municipality on the plaintiff's land by building a highway wider than the authorized or reserved width and so encroaching on the plaintiff's land does not create a presumption juris et de jure in favour of dedication, even if acquiesced in by the owner.

Rowland v. Edmonton, 21 D.L.R. 33, 50 Can. S.C.R. 520, 8 W.W.R. 20, 31 W.L.R. 33, reversing 20 D.L.R. 36.

II. Acceptance.

(§ II—20)—Widening street — Conditional acceptance — Death of donor —Effect.

A conditional offer by an owner to donate a strip of land to a corporation for the purpose of enabling a street to be widened must be accepted (with the condition attached) during the lifetime of the person making the offer; if not accepted before his death, the offer cannot be given effect to and the estate is under no obligation to the corporation.

Montreal v. O'Flaherty, 28 D.L.R. 713, 49 Que. S.C. 521.

Highway — Intention of owner — Public user — Absence of municipal action — Easement — Lost grant — Limitations Act.

A lane 12 feet wide, between buildings on the north side of King St. Toronto, running from King St. north to Pearl St. was held, not to be a public highway, the defendants failing to establish a dedication of it by the owner of the land of which it formed part; and, if dedication were shewn, the evidence of acceptance thereof being insufficient. The onus of proving dedication and acceptance was on the defendants; proof of the owner's intention to dedicate was essential, and was entirely lacking; and such user of the lane by the public as was shewn must be ascribed to tolerance rather than to right. There was no municipal action in regard to the paving, repairing, lighting, etc., of the lane, such as might constitute an acceptance by the municipal corporation. The effect of a judgment, pronounced in 1877, in an action between two tenants for years, finding the lane in question to be a public lane, discussed. The judgment was regarded as evidence in the defendants' favour, but not as an estoppel in whole or in part. [Neill v. Duke of Devonshire, 8 App. Cas. 135, distinguished.] Judgment of Middleton, J., finding that there was a dedication before the year 1834, reversed. Held, also, that the alternative claim of the defendants to a right-of-way over the lane with access to their land, under a devise, or a lost grant, or by virtue of s. 35 of the Limitations Act, R.S.O. 1914, c. 75, was not maintainable.

Baldwin v. O'Brien, 10 O.L.R. 24, reversing 10 O.W.N. 304.

Intention — "Park for athletic sports" —Acceptance.

Before an owner of land can be deprived of it on the ground of a dedication by him to a public use there must be clear and satisfactory evidence of an intention to dedicate. Where the owner of land leases it for a long term of years, before any user by the public has been established amounting to an acceptance of an alleged dedication, he evinces an intention against dedication sufficiently strong to override any intent to be inferred in favour of dedication from the use of words such as "park for athletic sports" on a registered plan. It is doubtful also, whether from the use of the particular words in question dedication to the public generally should be presumed to have been intended.

Jackson v. Town of Stonewall, [1917] 3 W.W.R. 1.

(§ II—23) — What constitutes acceptance of.

Where a strip of land used as a street but privately owned was treated by the assessor of the municipality as a street and was not assessed for nine years, but there was no direct assertion by the municipality of any claim to dedication of the land, nor were any municipal improvements made thereon, such facts do not establish a dedication thereof as a highway.

Sinclair v. Peters, 8 D.L.R. 575, 4 O.W.N. 338, 23 O.W.R. 441, affirming 3 D.L.R. 664.

Highway — Acceptance — What constitutes.

Open and unobstructed user of a way by the public for a substantial time is evidence from which a jury may infer both dedication and acceptance; and where there has been established, for a number of years a traveled track with a fence on one side and a gutter on the other, passing over the lands of others, over which statute labour is performed under municipal supervision and is otherwise used for municipal purposes, dedication and acceptance of a public highway is thereby established. [R. v. United Kingdom Elec. Tel. Co., 3 F. & F. 73, applied.]

De Young v. Giles, 26 D.L.R. 5, 49 N.S.R. 398.

Highway—Acceptance—Sale of land including portion dedicated—Acquiescence of purchasers.

Hislop v. Stratford, 10 O.W.N. 430.

DEEDS.

I. Form and requisites.
- A. In general; execution.
- B. Delivery.

II. Construction; effect; validity.
- A. In general; construction.
- B. Description of parties.
- C. Description of property conveyed.
- D. What property passes.
- E. Estate or interest created.
- F. Revocation; setting aside.
- G. Failure of consideration.

See Records and Registry Laws.

Annotations.

Construction; meaning of "half" of a lot: 2 D.L.R. 143.

Discharge of mortgage as reconveyance: 31 D.L.R. 225.

Conveyance absolute in form; creditor's action to reach undisclosed; equity of debtor: 1 D.L.R. 76.

Deed intended as a mortgage: 29 D.L.R. 125.

Discharge of mortgage as reconveyance: 31 D.L.R. 225.

Estates for life: 31 D.L.R. 390.

I. Form and requisites.

Delivery, registration, see Husband and Wife, II G—100.

Quitclaim deed, see Vendor and Purchaser, III—35.

Tax sale deeds, see Taxes.

A. In general; execution.

(§ I A—1)—Corporation—Duty of registrar.

Parties dealing with a company must be taken to have read the general Act under which the company is incorporated and also to have read the articles of association, so if the articles have not been complied with and such noncompliance appears on the face of the instrument, the registrar examining the title is bound to consider its effect.

Re Land Registry Act, 28 D.L.R. 354, 22 B.C.R. 507, 34 W.L.R. 466, 10 W.W.R. 634.

Acknowledgment—Notary officer of purchasing company.

The execution of a deed before a notary who at the time of its execution is the president of the company assuming to purchase the lands, renders the deed invalid as an authentic conveyance.

Prevost v. Bédard, 24 D.L.R. 153, 51 Can. S.C.R. 149, affirming 8 D.L.R. 686, 43 Que. S.C. 50. [See also 24 D.L.R. 862, 51 Can. S.C.R. 629.]

In general—Execution.

A deed of land made by the grantor to a daughter and son-in-law in consideration of an agreement on their part to support the grantor during his lifetime will not be set aside on the grounds of improvidence, mental incapacity, etc., where it appears that the grantor although of a peculiar and excitable disposition had sufficient mental capacity to understand what he was doing, and that no undue influence was exercised and that there was sufficient consideration.

Maddern v. McNeil, 45 N.S.R. 407.

Notarial form in Quebec.

A transfer and assignment of all rights in an immovable and which is really a donation must, on pain of nullity, be executed in notarial form, and not in a writing sous seing privé, even if this writing is afterwards deposited with a notary by one of the witnesses to the deed.

Westmount v. Evans, 15 Que. P.R. 96.

Execution of—Acknowledgment of—Territorial jurisdiction of justice taken.

An acknowledgment of a deed of land in the county of Restigouche, headed "Restigouche SS.," and purporting to have been taken before Donald McAllister, Esq., one of her Majesty's Justices of the Peace, in and for the county of Restigouche," and subscribed "Dond. McAllister, J.P.," is a good acknowledgment under the statute and the deed was properly received in evidence as a registered conveyance.

Gooden v. Doyle, 42 N.B.R. 435.

Essential formalities for registration.

The memorial for registration of a deed which transfers ownership must, under penalty of being void, always mention each of the following circumstances: the date and nature of the deed, the place where it was passed, the quality and rights of the parties, the object of the sale, the essential allegations of the transfer of ownership, and also the signatures of the parties and of the public or official witnesses appearing thereon.

Bercovitz v. Pearson, 23 Que. K.B. 323.

Sale—Foreign deed—Registration.

Where a deed of sale is made and signed in another province than Quebec, without the legal formalities required in the latter, which for that reason cannot be registered in Quebec, the sale between the parties will be valid, and it is the purchaser's duty to prepare a deed in accordance with the agreement, in a form which conforms with the law.

Lamothe v. Hebert, 24 Rev. Leg. 182.

Authentic deed — Notary — Signature —Falsity—Ratification—Evidence.

A deed, to be authentic, must be signed by all the parties before the acting notary: and if the words "have appeared before us," written in the deed by the notary, are untruthful, the deed is false and any interested party may have it declared unauthentic. A deed of ratification which does not mention the cause of nullity which it purports to rectify, and does not shew the intention of correcting that nullity, is not evidence.

Fyfe v. Birchenough, 53 Que. S.C. 466.

False entry—Notarial deed—Lost minute—Presumption—C.C., art. 1211-C. C.P., art. 230.

A copy of an notarial deed cannot be declared false and set aside when a false entry is entered by a pretended signature of the deed. It has been held that the copy of the deed which bears the same number as another deed on the notary's list cannot be recovered. The falsity of a notarial act is not readily presumed, but should be clearly established.

Sylvestre v. Boucher, 25 Rev. Leg. 220.

(§ I A—2)—Witnesses.

The rule of law that in establishing a gift during a decedent's lifetime to the recipient, the gift must be established by separate and independent evidence without taking into account the evidence of the recipient himself, is satisfied, where in an action by an administrator to set aside a conveyance as invalid it appears that the deceased donor and recipient were mother and daughter, respectively, that the mother had lived with the daughter some years before the deed in question was made, that the mother had sent for a solicitor to draw up the conveyance which was done without the recipient being present and without the recipient taking part herein, that the instructions were given to the solicitor by

the mother herself, and it is obvious from the evidence that the mother intended to compensate the daughter for her trouble and care and the amount which the daughter received was no more than a reasonable compensation. [Walker v. Smith, 29 Beav. 396, distinguished.]

Taylor v. Yeandle, 8 D.L.R. 733, 27 O.L.R. 531.

(§ I A—3)—NOTARIAL DEED — SIGNATURE BY PARTIES ON DIFFERENT DAYS — DATE OF DEED—WITNESS UNDER AGE.

It is not necessary, as a condition of the authenticity of a notarial deed in which there are two parties who agree thereto and sign it on different days, that the dates of their signing should be stated: and the deed may be validly terminated and signed by the notary after the latter of the two dates. The ground of an attack upon a notarial deed, that the witness to the instrument was not 21 years of age, ought to be established according to the usual rules of evidence. It is not sufficient that the description of such person, in the heading of his deposition as a witness in the cause, gives his age as 16 years.

Cauchon v. Cauchon, 23 Que. K.B. 365.

(§ I A—4)—REQUISITES OF FOR REGISTRATION.

All contracts are not susceptible of registration but only those which transfer, especially the ownership of real estate, always in view of protecting third parties but not the parties themselves. A promise of sale which does not transfer the ownership in connection with third parties, need not therefore be published in the registry office.

Bercovitz v. Pearson, 23 Que. K.B. 323.

ILLITERATE PERSON — GRANT OF MINING RIGHTS — BURDEN UPON GRANTEE TO PROVE GOOD FAITH.

McKinnon v. McPherson, 44 N.S.R. 402.

B. DELIVERY.

(§ I B—6)—NECESSITY—DEATH OF GRANTOR.

The mere fact of the grantor retaining possession of the deed does not render the grant inoperative, particularly where the grant contained a reservation of a life estate to the grantor. The efficacy of a deed depends on its being sealed and delivered, and delivery may be inferred of a deed of gift notwithstanding the retention of possession of the document by the grantor, if it appears that it was executed in the presence of the grantor's legal adviser as an attesting witness with a full knowledge of its contents after the whole deed including the attestation clause had been read over to the grantor and that the deed was drawn at the grantor's request in furtherance of a previously expressed intention to make the gift evidenced by it. [Zwicker v. Zwicker, 29 Can. S.C.R. 527, applied.]

O'Callaghan v. Condy, 8 D.L.R. 316, 11 E.L.R. 63.

(§ I B—7) — DELIVERY — NOTARIES ACT — R.S.Q. 4588, 4637, 4638—QUE. C.P. 1320.

The filing of a copy of a deed in the registry office is delivery within the meaning of 4588, R.S.Q., and the notary may be required to furnish any subsequent copy.

Fortin v. Paquin, 16 Que. P.R. 256.

(§ I B—10)—WHAT AMOUNTS TO—MAP SHEWING STREETS ATTACHED TO REGISTERED DEED — NONCOMPLIANCE WITH REGISTRY ACT.

Peters v. Sinclair, 13 D.L.R. 468, 48 Can. S.C.R. 57, affirming 8 D.L.R. 575.

II. Construction; effect; validity.

A. IN GENERAL.

Tax sale deeds, see TAXES.

(§ II A—15)—COVENANT—"COMMONS"—RECREATION GROUNDS.

The ball grounds, the reservoir, and the picnic grounds of a summer resort, used for general recreation, are "commons" within the meaning of a covenant in a deed entitling the lot owners to free access to the "commons" of the park, and are appurtenances running with the land that cannot be encroached upon by subsequent purchasers or assigns of the vendors of the grounds.

Re Lorne Park, 22 D.L.R. 350, 33 O.L.R. 51.

"CEDE"—"TRANSFER."

All the language in a deed must be taken into consideration for the purpose of discovering the intention of the parties, and words are to be given their natural meaning unless inconsistent with other provisions in the deed; the words "cede" and "transfer" may be perfectly consistent with the intention of giving the property as a pledge and not a complete transfer.

Cuddy v. Brodeur et al., 39 D.L.R. 134, 24 Rev. Leg. 39.

POWER OF APPOINTMENT—EXERCISE BY WILL — VALIDITY — WILLS ACT, S. 30 — CLAIM TO DOWER—APPLICATION UNDER VENDOR AND PURCHASER'S ACT—SERVICE ON DOWERESS—RULE 602—TITLE TO LAND.

Re Osborne and Campbell, 15 O.W.N. 48.

EASEMENT—PASSAGE—"WITHOUT CAUSING DAMAGE."

The words "without causing damage," in a deed creating a servitude of passage, mean that the grantee of way over a property to the advantage of his own must exercise his right in a reasonable and prudent manner so as to cause as little damage as possible.

Thibault v. Coulombe, 32 D.L.R. 765, 50 Que. S.C. 461.

MATTERS ALIUNDE.

A court interpreting a deed cannot consider matters foreign to the deed and their accompanying incidents.

Montpetit v. Brault, 26 Que. K.B. 263.

Inscription en faux—Deed to property of another—Rights of third party in good faith.

A deed of sale or of exchange of an immovable which does not belong to the vendor is absolutely void. This nullity, as well as that which results from a deed of sale declared false and radically null, can be set up by third parties in good faith as affecting their rights. In an action for a decree of nullity of a deed of sale, it is not necessary to make a tender; such is only required in the demand to be restored to possession.

Villemaire v. Caron, 47 Que. S.C. 103.

Validity — Settlement by mother in favour of son—Action by executrix of mother to set aside — Acquiescence—Estoppel—Mental capacity of seller — Improvidence — Security for advances—Evidence — Admissions of son—Statements of mother.

Jones v. Neil, 7 O.W.N. 359.

Construction of trust deed settling share of beneficiary under will—Effect as to restraint upon anticipation—Judgment in former proceeding—Effect of—Reasons for judgment — Master's report not appealed against—Binding effect on parties—Stay of judgment.

Re Hamilton, 9 O.W.N. 264.

Conveyance of land—Cutting down to mortgage security — Redemption — Mortgagee in possession—Lease of premises — Negligence in not obtaining adequate rental — Failure to prove—Findings of fact of Trial Judge—Interest—Costs.

Williams v. Brayley, 12 O.W.N. 129.

Construction—Conveyance of land under Short Forms of Conveyances Act, C.S.U.C. c. 92—Release clause—Effect of — Release of interest under executory devise over in will of father of grantor—Special proviso in deed—Application and effect of — Trust — Evidence — Statute of Frauds.

A father devised to his son E. the east half of his farm (subject to the payment of legacies to daughters) and to his son J. the west half (subject to the payment of legacies to daughters)—"And if either of my two sons E. and J. should die without heirs direct then his portion shall go to the other his heirs and assigns." These devises were also subject to a life estate devised to the testator's wife. The testator died in 1866; his wife died in 1884. In 1873 J. by deed quitclaimed to E. all his (J.'s) right, title, interest, claim and demand in and to the west half. By a conveyance, made in pursuance of the Short Forms of Conveyances Act, C.S.U.C. c. 92, E., in 1877, conveyed the west half back to J., for an expressed consideration of $2,000. This conveyance contained the usual release clause, and the following special proviso: "Subject also to the terms, conditions, and charges and legacies concerning the same expressed in the will"—that is, the will of the father. In 1885 the legacies were paid and the lands released therefrom. J. died in 1918, unmarried, and by his will devised the west half to the defendant. Two days after J.'s death, E., claiming to be entitled under the devise over to him in the will of his father, assumed to convey the west half to the plaintiff:—Held, that the words of the release clause in the conveyance of 1877, as expanded in the Short Forms Act, were ample to release to J. all and every interest which E. then had or might thereafter attain in the west half, and that the words of the special proviso should be treated as applicable to the life estate of the widow (she being then still alive) and to the charges and legacies in favour of the daughters, which were then in force and unpaid; and therefore J. acquired, by virtue of the deed from E., a fee simple in the west half, free from the effect of the devise over to E. in the event of the death of J. "without heirs direct;" and the defendant, under the devise from J., was entitled to possession of the west half. The Statute of Frauds precluded the establishment of a trust in E. and a mere reconveyance from him to J.; and, if oral evidence was admissible for such a purpose, the evidence adduced failed to prove a trust.

Birdsill v. Birdsill, 45 O.L.R. 307. [Affirmed, 17 O.W.N. 188.]

(§ II A—16)—Deed or bill of sale.

A so-called deed of lease made for a period of 6 years whereby the so-called lessee binds himself to pay to the so-called lessor $100 a year, with interest on a named capital sum, containing a stipulation that the lessee may at any time purchase the property for a fixed sum (e.g., $610) or the balance of such sum, credit being given for the instalments of $100 paid in, is a deed of sale and not a contract of lease, and failure to pay one or more of the annual instalments does not give the creditors the right to take an action in cancellation of contract before the expiry of the term (e.g., 6 years), and in no case may such action be accompanied by a saisie-gagerie to seize the furniture or the crops.

Carey v. Carey, 8 D.L.R. 854, 42 Que. S.C. 471.

(§ II A—19)—"Maintain."

A provision in a deed of gift that the donee municipality was to "maintain" a city hall on the site does not mean "maintain for all time."

Powell v. Vancouver, 8 D.L.R. 24, 17 B.C. R. 379, 23 W.L.R. 104, 8 W.W.R. 108, 161.

In arriving at the construction which is to be placed on the words of a deed relied

upon as creating a trust the same rule of interpretation applies upon the question of intention to be gathered from the deed and the circumstances surrounding the making of such deed, as would apply in the case of a will.

Wolfe v. Croft, 6 D.L.R. 61, 46 N.S.R. 106.

Where there is no rent mentioned but only a fixed and determinate price, the sale will be held to be that of the immoveable property, especially if there be no restriction as to time and duration. All the terms of a deed of sale must be examined in order to arrive at the true import thereof, and such words as "from now on and forever" will not be held to be mere surplusage.

Houle v. Quebec Bank et al., 4 D.L.R. 614, 41 Que. S.C. 521.

Where a penal clause in a deed of sale is ambiguous, such clause will be interpreted restrictively and against the creditor of the obligation.

Ledoux v. Hill, 8 D.L.R. 894, 19 Rev. de Jur. 350.

NOTARIAL ACT—FALSE—SALE—GIFT INTER VIVOS—FORGERY—MISTAKE—C.C., ARTS. 944, 949, 992, 1065, 1211, 1535.

We must distinguish in a notarial deed, between the proving force of writing and the judicial operation which it carries out, just as there is a distinction between the form and the substance of a deed. Thus a false inscription does not arise when the deed recites exactly that which the parties have wished and have declared, whatever be the truth, regularity and legality of the judicial operation which the parties have had in view and have desired to do. A pretended deed of a gift inter vivos of land, made by the donor to his brother to avoid the estate tail which burdened the land and in order to effect a sale to a third party, is void, even when the third party knows of the existence of the estate tail, if the person who has created the estate tail has not named in this latter the brothers and sisters of the encumbrancer who will take in default of children of the latter. There is then an error in the substance of the thing sold.

Beuneau v. Livernois; Livernois v. Bonneau, 55 Que. S.C. 445.

(§ II A—20)—ACCEPTANCE—HIGHWAY—PROPOSED DEDICATION — REFUSAL OF MUNICIPAL CORPORATION TO ACCEPT—AGREEMENT BETWEEN LANDOWNERS.

Pigott v. Bell, 5 O.W.N. 314, 25 O.W.R. 265.

(§ II A—23)—WHAT CONSTITUTES ACCEPTANCE—ASSESSMENT OF LAND AS STREET.

Peters v. Sinclair, 13 D.L.R. 468, 48 Can. S.C.R. 57, affirming 8 D.L.R. 575.

DEED—DESCRIPTION—AMBIGUITY.

Reddy v. Strople, 44 Can. S.C.R. 246.

B. DESCRIPTION OF PARTIES.

(§ II B—25)—DEFECT IN FORM—PARTIES—OMISSION OF WORDS—GRANTOR AND GRANTEE—DOWER CLAUSE—SUFFICIENCY TO PASS TITLE—VENDORS AND PURCHASERS ACT.

Re Galbraith and Kerrigen, 37 D.L.R. 782, 39 O.L.R. 519.

NAME OF CORPORATION.

A corporation's name in a grant, even if there is a variance, will be sufficient if it is substantially correct and it is what the corporation intended.

Picton v. Town of New Glasgow, 23 D.L.R. 600, 48 N.S.R. 424.

(§ II B—27)—DEEDS TO "CHILDREN," "ISSUE," OR "HEIRS."

The word "family" as used in a deed of settlement to the effect that upon the death of the beneficiary the principal should go to such persons, who might be members of the settler's family, as he should by will appoint, prima facie means "children."

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

C. DESCRIPTION OF PROPERTY CONVEYED.

Description of land, see Adverse Possession, I B—5.

Modern description, see Vendor and Purchaser, I C—10.

(§ II C—30)—SIZE AND DIMENSIONS—WARRANTY.

A description of a lot in a deed of sale as containing "26 ft. in width by 100 ft. in depth," and giving the boundaries of the lot, is a sale of the lot as a whole, and not a warranty as to the exact size of the lot.

Gingras v. Gariépy, 32 D.L.R. 337, 50 Que. S.C. 88.

BOUNDARIES—ROAD RESERVATION.

Where the descriptions in the plaintiff's chain of deeds prior to the defendant's title from the common grantor clearly pointed to a road reservation 50 feet in width as a boundary, such may be shown to be the true boundary rather than another and intermediate road reserve not corresponding to same in width, although in one of the deeds in the plaintiff's chain of title the two road allowances were erroneously treated as identical, particularly where neither of them were in actual use as roads.

McDonald v. Gallagher, 21 D.L.R. 746, 48 N.S.R. 332.

COURSES AND DISTANCES—MONUMENTS.

When in a description of land there is a variance between the monuments and the courses and distances, the latter will be rejected as false description, in favour of the monuments.

Blackadar v. Hart, 35 D.L.R. 489, 51 N. S.R. 449.

COMMON LAW OF ENGLAND NOT APPLICABLE TO GREAT LAKES OF ONTARIO—BED OF NAVIGABLE WATERS ACT (ONT.)—"THE BANK OF LAKE ERIE"—MEANING OF.

The common law of England is not ap-

plicable to the Great Lakes of Ontario, and the presumption of the common law that lands bordering on an inland lake extend to the middle of the lake if there be any such presumption is, in the case of the Great Lakes, rebutted. Any doubt that there might have been on the point is removed by the Bed of Navigable Waters Act, R.S.O. 1914, c. 31. The bed of Lake Erie extends only to low water mark. The south boundary of a lot, described as "the bank of Lake Erie," held to be the water's edge or low water mark. [Williams v. Pickard, 17 O.L.R. 547, followed.]

Carroll v. Empire Limestone Co., 48 D.L.R. 44, 45 O.L.R. 121. [Appeal to Supreme Court of Canada pending.]

OMISSION OF LOT FROM DEED PURPORTING TO CONVEY WHOLE PROPERTY—PRESCRIPTIVE TITLE.

A deed of gift of a farm consisting of the two registered lots 649 and 651, but described in the deed as consisting of one only (viz., 651), no matter what may be the defect, or even the nullity, of the registration respecting the lot which has been omitted (viz. 649), constitutes, nevertheless, a title to the whole property, and the donee who has had possession for 10 years acquires the ownership by prescription under art. 2251 C.C. (Que.).

Gravel v. Paré, 45 Que. S.C. 173. [Varied in 51 Que. S.C. 430.]

SALE OF LAND — AREA OR MEASUREMENT — SALE EN BLOC—QUE. C.C. 1000, 1106, 1501, 1503.

A sale of land described in the deed of sale as containing 39 arpents, "according to the vendor's title," when the latter declares before the notary at the signing of the deed that he sells en bloc, without regard to the quantity, is not a sale by measurement; it is a sale en bloc, which does not come under art. 1501, C.C. (Que.) and is subject rather to the application of art. 1503.

Stuart v. Rheaume, 23 Que. K.B. 518.

MISDESCRIPTION BY NOTARY—EFFECT.

A notary who received instructions from the parties to a deed of sale, to procure from the previous title deeds and certificate of search the exact description of the property sold, and who puts in the deed another description of a larger area, does not execute his mandate and the deed of sale so signed by the parties and by himself is subject to improbation.

Smith v. Davidson, 50 Que. S.C. 77.

CONVEYANCE OF LAND — DESCRIPTION — FALSA DEMONSTRATIO — INTENTION OF GRANTOR—EVIDENCE—COSTS.

Crow v. Crow, 16 O.W.N. 129.

(§ II C—31)—DESCRIPTION OF PROPERTY CONVEYED—INACCURACY IN PLAN.

An inaccuracy in a plan does not control the dimensions of the parcels as set out in a conveyance of land.

Halifax Graving Dock v. Evans, 17 D.L.R. 536, 48 N.S.R. 56.

DESCRIPTION — BOUNDARIES — NATURAL MONUMENTS — TREE — RIVER — BLAZED LINE—ANNEXED PLAN—FALSE DESCRIPTION—ONUS.

Ettinger v. Atlantic Lumber Co., 36 D.L.R. 788, 51 N.S.R. 523. [Affirmed by Supreme Court of Canada, 59 Can. S.C.R. 649.]

REFERENCE TO PLAN.

The description in the conveyance for some time after the original allotment was by number, which would only be ascertained and located by reference to the plan of allotment, the only evidence of which at the time of action was the township plan. Held, that such plan, which was the foundation of the allotment, must be resorted to and regarded; also, that the finding of the Trial Judge in favour of the line as run by a surveyor who followed the township plan as against the line as run by a surveyor who did not regard such plan, must be supported.

Gibson v. Clinkworth, 51 N.S.R. 341.

ERROR.

Notwithstanding the fact that a deed of donation inter vivos from a father to his son contains the mention of one lot of land only, No. 651 of the cadastre, as the object of the donation, the court taking into consideration the statements in the deed, the possession of the parties, the interpretation that the interested parties have themselves given to the deed and all the other circumstances, may decide that the donation comprises also another lot, No. 649 of the cadastre, and that it was by error that the notary had omitted to mention this last lot in the deed.

Gravel v. Paré, 51 Que. S.C. 430, varying 45 Que. S.C. 173.

(§ II C—33)—AMBIGUITY AND VAGUENESS.

Where a deed of conveyance is made of the "west half" of a lot on a registered plan without further description thereof and the plan shews that the whole lot has a uniform width for a part only of its depth from the street on which it fronts and that the west boundary line of the lot is much longer than the east boundary and that the northerly boundary thereof runs diagonally in a south-easterly direction, the conveyance of the "west half" carries with it only one half of the superficial area of the whole lot: the rectangular area is to be first divided equally from a point in the centre of the frontage and the triangular portion in rear is to be divided by a straight line running diagonally from the termination of the division line of the rectangular portion so as to give an equal area thereof to each. [Skull v. Glenister, 16 C.B.N.S. 81; Herrick v. Sixby, L.R. 1 P.C. 436, applied.] Where a lot of irregular shape has its principal frontage on the north side of a street, and a conveyance is made of the "west half" thereof without further description, the grantee is entitled to the west half of the frontage on that street upon which the lot fronts but not necessarily to one half of

another frontage which it has upon another street shewn on the registered plan (in this case at the north-easterly side of the lot).

Hoocy v. Tripp, 2 D.L.R. 136, 25 O.L.R. 578, 21 O.W.R. 493.

In construing a deed purporting to assure a property, if there be a description of the property sufficient to render certain what is intended, the addition of a wrong name, or erroneous statement as to quantity, occupancy, locality, or an erroneous enumeration of particulars, will have no effect. [Cowen v. Truefitt, [1899] 2 Ch. 309, followed.]

Sinclair v. Peters, 8 D.L.R. 575, 4 O.W.N. 338, affirming 3 D.L.R. 664. [Affirmed, 13 D.L.R. 468, 48 Can. S.C.R. 57.]

AMBIGUITY AND VAGUENESS OF DESCRIPTION —SURPLUS FRONTAGE—APPORTIONMENT.

Re Liesmer and Philp, 2 D.L.R. 881, 3 O.W.N. 878.

(§ II C—34)—"COAST LINE."

When a conveyance describes one of the boundaries of land as the "coast line," that boundary is to be found at high water mark.

Esquimalt & Nanaimo R. Co. v. Treat, 43 D.L.R. 653, 26 B.C.R. 275, [1918] 3 W.W.R. 685. [Affirmed, 48 D.L.R. 139, [1919] 3 W.W.R. 356.]

VARIANCE BETWEEN GRANT AND HABENDUM —ESTATE—SURVIVORSHIP.

Re Fingerhut and Barnick, 2 O.W.N. 372, 17 O.W.R. 730.

RESERVATION OF LIFE ESTATE — MONEY CHARGE—INTENTION.

Pratt v. Balcom, 45 N.S.R. 123.

CONSTRUCTION OF DESCRIPTIONS — METES AND BOUNDS—GENERAL TERMS—PARTICULAR DESCRIPTION.

Attrill v. Platt, 10 Can. S.C.R. 425, followed.

Davy v. Foley, 2 O.W.N. 1284, 19 O.W.R. 531.

DEED OF LANDS — DESCRIPTION — FRAUD — DELAY—LACHES—STATUTE OF FRAUDS —REFORMING CONTRACT.

Brookes v. Brookes, 9 E.L.R. 44.

DESCRIPTION.

Where, in a deed of sale of an immovable, the description indicates the superficial area but designates the land under its cadastral number, and mentions the situation and boundaries in a manner which clearly identifies it the purchaser cannot claim a reduction in the price because the area is less than that indicated.

Bessette v. Séguin, 39 Que. S.C. 473.

DEED—CONDITION—CONVEYANCE FOR MAINTENANCE—MORTGAGE BY VENDOR—FORECLOSURE—SHERIFF'S DEED TO MORTGAGEE.

Wolfe v. Croft, 9 E.L.R. 402.

D. WHAT PROPERTY PASSES.

(§ II D—35)—EASEMENTS OR PRIVILEGES—"WAY."

A deed which specifically and reasonably describes the lot, together with the buildings and all easements or privileges appertaining thereto, includes a way in the rear of the house which need not be specifically described.

Ennis v. Bell, 40 D.L.R. 3, 52 N.S.R. 31.

(§ II D—36)—APPURTENANCES—RESERVATION OF BARN.

A sale of land with messuages and appurtenances transfers the ownership of buildings erected upon the land, which, being used in working it, are its appurtenances. Reservation by the vendor of part of a building, such as a barn, erected upon the land that he conveys "for his use of the other part of the lot" preserves to him only an active servitude on the immovable sold, and not a right of property in it. Nor do such terms constitute a commencement of proof in writing permitting the vendor to establish by evidence that he had effectively reserved the property in the whole barn.

Doyle v. Couture, 48 Que. S.C. 124.

(§ II D—37)—WHAT PASSES UNDER—AMOUNT OF LAND — CONVEYANCE OF LAND BUILDING STANDS ON—WIDTH AT EAVES OR AT FOUNDATION.

The extreme dimensions of the building at the eaves or other projection, such as an outside stairway, will constitute the boundary under a conveyance expressed to be of "that piece of land on which the present house now stands, 12 or 30 feet . . . or the size of the present building as it now stands" although the distances so expressed in feet were approximately those of the foundation walls only, the rule being that monuments control courses and distances.

Cox v. Day, 13 D.L.R. 290, 12 E.L.R. 524.

(§ II D—38)—WHAT PROPERTY PASSES—RIPARIAN RIGHTS ON NON-NAVIGABLE AND NONFLOATABLE RIVER.

In construing a grant of land, the law treats the parties as describing the land of which the full use and enjoyment is to pass to the grantee, and in cases where the possession of the parcel so described would raise a presumption of ownership of the land in front of it ad medium filum aquæor viæ, it is the exclusion of the latter and not its inclusion which must be evidenced by the terms of the grant where the grantor had power to include it; and such exclusion is not shewn merely by a verbal or graphic description specifying only the land that abuts on the stream or highway without indicating in any way that it includes the land underneath. [London Land Tax Com. v. Central London R., [1913] A.C. 364, applied.]

Maclaren v. Att'y-Gen'l for Quebec, 15 D.L.R. 855, [1914] A.C. 258, 6 W.W.R. 62, 20 Rev. Leg. 248, reversing 8 D.L.R. 800, 46 Can. S.C.R. 656.

(§ II D—40)—RESERVATION OF LIFE ESTATE —UNDUE INFLUENCE—CANCELLATION.

Burge v. Burge, 24 D.L.R. 912.

CONVEYANCE BY PARENTS IN CONSIDERATION OF SUPPORT FOR LIFE—RESERVATIONS AND EXCEPTIONS — HOUSEHOLD AND FARMING EFFECTS.

Clarke v. Clarke, 25 D.L.R. 737, 50 N.S.R. 293.

RESERVATIONS AND EXCEPTIONS — EASEMENTS—REGISTRATION.

Reservations in a conveyance of land of "all coal, coal oil, petroleum, etc., within upon or under the same" are exceptions and reservations from the grant and not easements, and should not be registered as charges, a certificate of indefeasible title may issue subject to these reservations a memorandum of which should be endorsed on the certificate. The incorporeal rights, such as rights of entry and rights of way, are easements, and not subject to reservation, but if they are easements of necessity incidental to the getting of the minerals there is no need to register them as a charge.

Alberni Land Co. v. Registrar-General of Titles, 40 D.L.R. 142, 25 B.C.R. 273, [1918] 2 W.W.R. 537.

RESERVATIONS—OWNERSHIP.

A gift of real estate made in a marriage contract, with reservations, not fixing the time, by the donor, "of half of the maple syrup and maple sugar; of half of the apples; all the firewood," must be construed as unlimited, and the things therein mentioned as having remained among the donor's assets.

Legault v. Brisson, 53 Que. S.C. 251.

SETTLEMENT ACT B.C.—CROWN GRANT—INDIAN RESERVES EXCEPTED—WHAT INCLUDED IN TERM.

By the Settlement Act, 47 Vict., c. 14, the Province of British Columbia granted to the Dominion a tract of land in Vancouver Island to aid in the construction of a railway. The plaintiffs undertook to build the railway, and the Dominion in consideration thereof granted the lands to them by way of subsidy. The grant did not include Indian Reserves or settlements, nor Naval or Military Reserves. The court held that only de facto Indian Reserves assigned to the Crown in right of the Dominion for the use of the Indians were excepted; the fact that lands were available or suitable for Indian Reserves did not make them reserves within the meaning of the grant.

E. and N.R. Co. v. McLellan, 44 D.L.R. 697, 26 B.C.R. 104, [1918] 3 W.W.R. 645, affirming 37 D.L.R. 803.

"EXCEPT PART EXPROPRIATED FOR STREET."

When a donor declares that he donates a lot of land "except the part expropriated for the widening of a street" and such expropriation has not yet taken place, this clause is void and the whole lot passes to the donee. The words should be taken in their grammatical sense, i.e., as relating to the past, and not to the future in the sense of "to be expropriated."

Vautelet v. Montreal, 49 Que. S.C. 160.

RESERVATION—DISSEISIN.

A donation of a sum of money to be taken from the property which the testator shall leave at his death, should be considered as a donation inter vivos of present property, if it appears from the terms of the deed or from the circumstances that the donation had been accompanied with actual disseisin. A hypothec given as security for payment of the sum donated, the donor undertaking to use it in the interests of the donee or the reserve of the usufruct or the right to receive it back, are circumstances indicating disseisin.

Bank of Montreal v. Roy, 26 Que. K.B. 549.

RESERVATION—RIGHT-OF-WAY—RAILWAY.

A reservation by a vendor in a deed of sale of land for a race track of "the right in respect of the remainder of said lots if he decides to make use of such remainder to use the railway line that the purchaser may establish upon the lot sold, for the purposes of such use of the land only, without other charge than that of contributing to the maintenance of the line, all such maintenance being at his exclusive charge if the purchaser does not himself operate the line of railway," confers on the vendor the right to use the whole line of railway constructed by the purchaser, outside of as well as upon the land sold up to the intersection of the main line, and not only that portion which is upon the lot sold.

La Belle v. Bellefleur, 26 Que. K. B. 70.

(§ II D—41)—OF MINERAL.

In the case of reprise d'instance by the heir of the deceased plaintiff his incapacity, due to nonpayment of succession duties under par. 6 of art. 1380, R.S.Q. 1909, should be set up in answer to his demand for reprise and the defendant cannot proceed to a hearing on the merits. The service of an action brought by the assignee of a debt against the debtor takes the place of signification of the transfer provided for by art. 1571 C.C. (Que.). When the vendor of an immovable reserves the right to make excavations in prospecting for mines on condition of paying the damages thereby caused a clause in the deed in these words, "such damage to be fixed by experts in case of disagreement" is an arbitration clause and, therefore, void.

Robertson Asbestos Mining Co. v. Houle, 21 Que. K.B. 176.

(§ II D—42)—OF RIGHT TO BUILD DAM OR FLOOD LANDS.

Natural gas is not within the exception of a deed reserving to the grantor all mines and quarries of metals and minerals, as well as all springs of oil discovered, or undiscovered, on the land conveyed, together with the right to search for, work, win, and carry the same away, where such deed was executed at a time when natural gas was

regarded as a dangerous nuisance and long before it became a commercial product, since it was the clear intent of the parties to reserve only the products expressly mentioned in the deed.

Barnard-Argue, etc., Gas Cos. v. Farquharson, 5 D.L.R. 297, 23 O.W.R. 90, [1912] A. C. 864, affirming 25 O.L.R. 93.

CONVEYANCE OF HALF INTEREST IN LAND—COVENANT TO CONVEY OTHER LAND.

Snider v. Webster, 16 W.L.R. 397.

E. ESTATE OR INTEREST CREATED.

(§ II E—45)—ESTATE OR INTEREST CREATED—WANT OF EXPRESSION "HIS HEIRS"—MORTGAGE.

Apart from any question of rectification, a mortgage by way of grant containing the words "has sold and by these presents doth grant and convey," and further stating that such grant is intended as security for a specified payment which "if duly made will render this conveyance void," passes only an estate for the life of the grantee for want of the expression "and his heirs."

Millard v. Gregorie, 11 D.L.R. 539, 47 N. S.R. 78, 12 E.L.R. 401.

ESTATE CREATED—"IN FEE SIMPLE" WITHOUT USE OF WORD "HEIRS," EFFECT OF—REAL PROPERTY—CONSTRUCTION.

The mere use of the words "in fee simple" without the use of the words "heirs" in some part of the deed by a tenant in tail is ineffective to bar the entail and pass the fee. A deed of land by a person having an estate tail purporting to convey the fee simple and aided by an habendum clause in the following form, "to have and to hold unto the said party of the second part, her heirs and assigns, to and for her and their sole and only use forever," is sufficient to bar the entail.

Re Gold & Rowe, 9 D.L.R. 26, 4 O.W.N. 642, 23 O.W.R. 794.

CONSTRUCTION—CONVEYANCE OF LAND—RECONVEYANCE—LIFE ESTATE OF WIDOW—ESTATE TAIL IN REMAINDER—BAR OF ENTAIL—ESTATE IN FEE SIMPLE—ESTATES TAIL ACT, R.S.O. 1914, c. 113, ss. 9 & 19.

A widow who is protector of a settlement must give her consent to a deed of the lands in which she has a life estate in order to give this deed a disentailing effect. If her consent is not given the estate tail "quod" remains and reversions is not destroyed. But the issue in tail being barred and there remaining over only the estate to one person in default of issue to another, the latter had the whole fee; and his conveyance to a third party conveyed the fee which he took which was a fee simple.

Birdsill v. Birdsill, 50 D.L.R. 708, 46 O. L.R. 345.

CONVEYANCE OF LAND — CONSTRUCTION — GRANT—HABENDUM—LIFE-ESTATE COMMENCING FROM DATE OF DEATH OF GRANTOR—REMAINDER IN FEE SIMPLE TO TRUSTEE "FOR THE PURPOSES OF MY WILL"—ESTATE COMMENCING IN FUTURO—SUBSEQUENT CONVEYANCE BY GRANTOR AND LIFE-TENANT WITHOUT CONCURRENCE OF TRUSTEE OF REMAINDER—BENEFICIAL INTEREST—POWER OF APPOINTMENT BY WILL—TITLE TO LAND—APPLICATION UNDER VENDORS AND PURCHASERS ACT—NOTICE—RULE 602—ESTOPPEL.

Re Smith and Dale, 17 O.W.N. 231.

(§ II E—50)—CONVEYANCE IN CONTEMPLATION OF MARRIAGE—TRUST TO USES OF WIFE—"HEIRS AND ASSIGNS FOR EVER"—FEE SIMPLE—STATUTE OF USES—VENDORS AND PURCHASERS ACT.

Re Bayliss & Balfe, 35 D.L.R. 350, 38 O.L.R. 437.

CONVEYANCE OF LAND—COVENANT TO MAINTAIN GRANTOR—CONDITION—BREACH—FORFEITURE — RELIEF AGAINST — WAIVER.

An aged widow, owning land with a house upon it, made an arrangement with the plaintiff to convey the land to him, subject to a life estate in her; he and his wife to live with the widow in the house and maintain her for her life. She conveyed the land to him in fee, subject to a life estate in herself; and, by a concurrent instrument under seal, he covenanted for her maintenance, payment of debts, and other things, and further that, if any default should be made in any of the covenants contained in that instrument, the conveyance of the land should become null and void and the property should revert to the grantor. What was proposed was carried out, and all went well for some time; but, circumstances changing, the widow went into a Home, the plaintiff and his wife left the house, which was rented, the widow receiving the rents; and the widow died in the Home, after conveying her house and land to the defendant, but without having intimated that she intended to exercise the right of forfeiture conferred by the instrument: Held, in an action to set aside the conveyance to the defendant, that the plaintiff had failed to comply with the terms of his covenant for maintenance, but that the widow had waived performance of it, and there was no forfeiture during her life, and no entry by her, because her possession was by virtue of her life estate. On the death of the widow, the defendant, by virtue of her deed, took possession: the deed operated upon the possibility of reverter and the right of entry; and the taking of possession afforded an excuse for the nonpayment by the plaintiff of the debts of the widow, which he had covenanted to pay at her decease. And held, that the defendant's covenant as to default was not a condition in the strict sense of the term; and, if a con-

dition, was dependent upon a breach of covenant: if there was any technical breach, the court could relieve against the forfeiture resulting therefrom. The breach (if any) did not ipso facto avoid the estate, but only made it liable to be avoided by the entry of the person entitled to the possibility of reverter. And in the result, the plaintiff's title prevailed.

Burdick v. Stathan, 38 O.L.R. 227, 11 O. W.N. 213, affirmed in 11 O.W.N. 360.

(§ H E—55)—Estates tail—Use of word "in fee simple" read with habendum clause—Construction—Bar of entail.

The use of the words "in fee simple" in a deed by a tenant in tail though ineffective to convey a fee absolute under R.S.O. 1897, c. 122, s. 29, is, however, suggestive of the estate intended to be conveyed, and where the habendum clause contains sufficient words to satisfy the statute shews that the intention of the grantor was to grant an estate in fee simple absolute, the two together will be held to bar the entail.

Re Gold and Rowe, 9 D.L.R. 26, 4 O.W.N. 642, 23 O.W.R. 794.

F. Revocation; setting aside.

(§ H F—65)—Destruction, etc.—Action to set aside—Parent and child.

Cumming v. Cumming, 5 D.L.R. 884, 4 O. W.N. 91, 23 O.W.R. 47.

Voluntary conveyance — Undue influence—Onus.

If a gift be made by one who is aged and infirm, and dependent on the one to whom the gift is made, equity casts upon the donee the burden of proving that the transaction was fairly conducted as though between strangers, and that the weaker was not unduly influenced by the stronger.

Vanzant v. Coates, 39 D.L.R. 485, 40 O. L.R. 556, affirming 37 D.L.R. 471, 39 O.L.R. 557.

Third party—Title—Heirs—Hypothec—Misrepresentation.

A private writing cannot be opposed to a third party in good faith if the latter is the heir by particular title of one of the signatories of the deed. One who has bought and paid for, in good faith, a claim resulting from an hypothecary loan, cannot be affected by an action to set aside taken by the borrower and attacking the deed of obligation as null on the ground of false representations, when that borrower has voluntarily signed the deed.

Limoges v. Jones, 53 Que. S.C. 70.

Rectification of—Mutual mistake—Cannot be rectified against the protest of one of the parties.

The principle of rectifying or reforming a conveyance rests upon the idea that the document as written is not evidential of the contract as made, and if both parties agree upon that point the court will proceed to reform the deed or writing in accordance with the common intent, but a deed or writing cannot be reformed or rectified against the protest of one of the parties who contends that it is already right.

Lee v. Arthurs, 48 D.L.R. 78.

Conveyance of land—Agreement of grantee to maintain grantor—Covenant — Breach — Forfeiture — Relief against—Waiver.

Burdick v. Stratham, 11 O.W.N. 213.

Action to set aside—Agreement—Quit-claim deed — Conveyance of land — Evidence — Corroboration —Lunatic —Lunacy Act, R.S.O. 1914, c. 68, s. 37.

Jenner v. Bere, 11 O.W.N. 390.

Action by administrators of estate of grantor to set aside—Evidence—Mental incapacity—Undue influence—Lack of independent advice.

Capital Trust Corp. v. Teskey, 11 O.W.N. 336.

Conveyance of land to daughter—Action to set aside—Absence of fraud—Improvidence—Lack of independent advice—Bill of sale—Lease—Rent—Mortgage—Interest.

Angus v. Maitre, 11 O.W.N. 335, 12 O. W.N. 312.

G. Failure of consideration.

(§ H G—70)—Voluntary conveyance—Undue influence—Drunkenness.

A voluntary conveyance, intended as a gift, cannot be set aside on the ground that it was made under the influence of a woman with whom the grantor lived in sexual intimacy, or that he was addicted to drink, without the grantor having independent advice, if it appears that the grantor intelligently understood the nature of the transaction.

Cripps v. Woessner, 36 D.L.R. 80, 28 Man. L.R. 74, [1917] 2 W.W.R. 1072, affirming 10 W.W.R. 1220.

Voluntary conveyance—Ex post facto consideration — Subsequent purchaser.

Eggerston v. Nicastro, 18 W.L.R. 250, affirming 15 W.L.R. 106.

Voluntary conveyance of three lots of land—Subsequent conveyance for value of one of the lots—Improvements by the first grantee on the lots not comprised in the subsequent conveyance—Ex post facto consideration.

Balcom v. Balcom, 9 E.L.R. 405.

DEFAMATION.

See Libel and Slander.

Annotations.

Discovery; examination and interrogations in defamation cases: 2 D.L.R. 563.

Repetition of libel or slander; liability: 9 D.L.R. 73.

Repetition of slanderous statement; acts of plaintiff to induce repetition; privilege and publication: 4 D.L.R. 572.

DEFENCE.

To action generally, see Pleading; Action.

To action on negotiable paper, see Bills and Notes.

To liability on contract, see Contracts.

Against liability as stockholder, see Companies.

Of probable cause, see False Imprisonment; Malicious Prosecution; Arrest.

Of justification, see Libel and Slander.

DEFENDANTS.

See Parties, II.

DEFINITIONS.

See Words and Phrases.

Annotation.

Meaning of "half" of a lot: 2 D.L.R. 143.

OF "VERDICT."

The word "verdict" in s. 1021 of the Cr. Code is confined to the findings of a jury.

R. v. Murray and Fairbairn, 8 D.L.R. 208, 4 O.W.N. 368, 23 O.W.R. 492.

OF "FAMILY."

The word "family" as used in a deed of settlement to the effect that upon the death of the beneficiary the principal should go to such persons who might be members of the settlor's family, as he should by will appoint, is elastic enough and the context broad enough to include grandchildren who, at the death of the beneficiary, resided with and were a part of the settlor's recognized family.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

OF "UNPATENTED LANDS."

The term "unpatented lands" in s. 31 of the Municipal Assessment Act, is used in the special sense of lands vested in the Crown, in which a purchaser takes merely such interest as the Crown or its officers may be willing to recognize in the particular case.

Minto v. Morrice, 4 D.L.R. 435, 22 Man. L.R. 391, 21 W.L.R. 255, 617, 2 W.W.R. 374.

OF "NECESSARIES."

"Necessaries" for failing to provide which for his wife or children, a husband is liable under s. 242 of the Cr. Code, are such things as are essential to preserve life, since such word is not used in its ordinary legal sense, and what will constitute necessaries must be determined in view of the circumstances of each particular case. [R. v. Brooks, 5 Can. Cr. Cas. 372, approved.]

The King v. Sidney, 5 D.L.R. 256, 20 Can. Cr. Cas. 376, 5 S.L.R. 392, 21 W.L.R. 853, 2 W.W.R. 761.

OF WORD "SCAB."

The term "scab" as applied to one who takes the place of a striking workman, is one of opprobrium, meaning a very mean, low man, or one to be despised. For a sympathizer with a body of striking workmen, while on a public street during the progress of a strike wherein it had been necessary to call troops to maintain peace and order, to call one who takes the place of a striker a "scab" or "a born scab" is a violation of a municipal by-law imposing a fine upon one who shall, while on a public street, use abusive, insulting and provoking language to any person thereon, since such language tended to incite disorder and public disturbance.

The King v. Elderman, 19 Can. Cr. Cas. 445.

WORDS AND PHRASES—MAINTENANCE—NECESSARY FURNITURE—QUE. C.C. ARTS. 165, 166, 169; QUE. C.P. ART. 549.

The word "maintenance" (aliment) comprises personal property (meubles) necessary for furnishing a residence, but does not extend to that which is used to ornament the house.

Labbe v. Donohue, 46 Que. S.C. 390.

OF "PREJUDICE"—"ON PAIN OF FORFEITURE."

Prejudice is a question of law; there is necessarily prejudice when a party does not do something which the law directs him to do "on pain of forfeiture." The words "on pain of forfeiture" in art. 4278 R.S.Q. 1888, requiring a copy of the petition against the return at a municipal election, mean "on pain of nullity."

Pichet v. Lemay, 14 Que. P.R. 282.

DELIVERY.

See Bills and Notes; Carriers; Deeds; Gifts; Sale.

DEMURRER.

See Pleading, VII.

Defence in lieu of—Objections in point of law: 16 D.L.R. 173.

DENTISTS.

See Physicians and Surgeons.

RIGHT TO PRACTICE—ADMISSION TO DENTAL COLLEGE—REQUIREMENTS OF COUNCIL—VALIDITY.

The fact that subs. (d) of s. 3 of the Dental Profession Act, R.S.S. 1909, c. 108, relating to the admission to the College of Dental Surgeons of graduates of recognized dental colleges of the United States, prescribes that applicants shall satisfy the college council as to their qualifications and pass the final examination prescribed by the college for registration under the act, does not prevent the council from adopting a by-law requiring such applicants to submit, as part of the final examination, a certificate shewing an educational standing equal to the junior matriculation, or to pass an examination before the president of the University of Saskatchewan in respect thereto.

Hodgson v. Cowan, 15 D.L.R. 236, 6 S. L.R. 377, 26 W.L.R. 407, 5 W.W.R. 907.

PRACTISING WITHOUT LICENCE—HABITUAL ACTS.

College of Dental Surgeons v. Gagnon, 14 D.L.R. 398, 44 Que. S.C. 216.

PRACTISING WITHOUT LICENCE.

That an unqualified person is doing dental practice and is seemingly in full charge of the business carried on under the name of another person resident in a distant city for his own benefit may constitute a prima facie case of practising in contravention of the Dental Profession Act, R.S.S. c. 108.

R. v. Schilling; Cowan v. Schilling, 21 D.L.R. 60, 23 Can. Cr. Cas. 380, 8 S.L.R. 70, 7 W.W.R. 1112.

UNLAWFUL PRACTICE—FEES NOT RECOVERABLE, WHEN.

Dental work done in violation of the Dentistry Act, R.S.B.C. 1911, c. 64, cannot constitute ground for an action for fees for such work, and moneys already paid in relation thereto may be recovered back.

Burgess v. Zimmerli, 17 D.L.R. 708, 19 B.C.R. 428, 27 W.L.R. 875, 6 W.W.R. 908.

UNLAWFUL PRACTICE — MECHANICAL DENTISTRY—LICENSE.

Taking impressions of the gums and filling teeth as a business, constitutes a practice of dentistry which, in Alberta, can be done for hire and gain only by a licentiate under the Dental Association Act, Alta., 1906, c. 22.

R. v. Cruikshanks, 16 D.L.R. 536, 7 A.L.R. 92, 23 Can. Cr. Cas. 23, 27 W.L.R. 759, 6 W.W.R. 524.

UNLAWFUL PRACTICE — SEVERAL ATTENDANCES ON ONE PERSON.

While a single act does not constitute a "practising" of a profession of trade, the practice of the profession of dentistry is shewn by services for only one customer on different dates, ex. gr. the taking impressions of the gums and fitting the plates for artificial teeth. [As to proving more than a single act in infringement of licensing statutes against "practising" a profession, see also R. v. Lee, 4 Can. Cr. Cas. 416; R. v. Whelan, 4 Can. Cr. Cas. 277; R. v. Raffenberg, 15 Can. Cr. Cas. 297; R. v. Armstrong, 18 Can. Cr. Cas. 72.]

R. v. Cruikshanks, 16 D.L.R. 536, 23 Can. Cr. Cas. 23, 7 A.L.R. 92, 27 W.L.R. 759, 6 W.W.R. 524.

UNLAWFUL PRACTICE — MECHANICAL DENTISTRY.

Taking an impression of the gums and fitting a dental plate constitutes the practice of dentistry, and if done for gain the person doing such work must be registered under the Dental Association Act, R.S.M. 1913, c. 53, and in default may be summarily convicted under that Act. [See R. v. Cruikshanks, 16 D.L.R. 536, 23 Can. Cr. Cas. 23, 7 A.L.R. 92.]

R. v. Austin, 25 Can. Cr. Cas. 446, 33 W.L.R. 758.

EMPLOYEE OF REGISTERED DENTIST.

A salaried employee of a licensed dentist is liable, if not himself registered as a student of dentistry, to summary conviction under the Dental Profession Act, R.S.S., c. 108, s. 50, for illegally practising dentistry in doing general dentistry work for his employer's customers although his personal gain is limited to his salary.

R. v. Manning, 25 Can. Cr. Cas. 227, 8 S.L.R. 333.

PRACTICE OF DENTISTRY—LICENCE.

A medical surgeon who does not publicly advertise himself as a surgeon dentist may, nevertheless, in his medical practice exercise the art of dentistry even in its mechanical and operative features, such as the extraction of teeth, lead work, plates, bridges and crowns. He is not obliged in such case to first obtain a licence from the college of surgeon dentists of the province.

Veilleux v. Roy, 48 Que. S.C. 134.

COLLEGE OF DENTAL SURGEONS — "PROFESSION OF DENTISTRY"—"GUIDANCE, DISCIPLINE, AND REGULATION" — PROHIBITION OF EMPLOYMENT OF LICENSED DENTISTS AS SERVANTS OF UNLICENSED PERSON.

Gordon v. Royal College of Dental Surgeons, 23 O.L.R. 223, 18 Can. Cr. Cas. 224, 18 O.W.R. 149.

DEPORTATION.

See Aliens, I—3.

Of fugitives, see Extradition.

Annotation.

Exclusion from Canada of British subjects of Oriental origin: 15 D.L.R. 191.

(§ I—2)—IMMIGRANT FROM UNITED KINGDOM — LACK OF FUNDS — MONEY ADVANCED BY EMPLOYER.

Money advanced to an immigrant by a person for whom he had contracted to labour and which is to be deducted from his wages, is possessed "in his own right" within the meaning of the Immigration Act, 9–10 Edw. VII. (Can.) c. 27, and the order-in-council made thereunder.

Re Walsh, Collier and Filsell, 13 D.L.R. 288, 22 Can. Cr. Cas. 60, 13 E.L.R. 132.

(§ I—4) — JURISDICTION — ORDER MADE WITHOUT JURISDICTION — POWER OF COURT TO REVIEW.

An order for the deportation of an immigrant from the United Kingdom when made without jurisdiction, or not in accordance with the provisions of the Immigration Act, 9–10 Edw. VII. (Can.) c. 27, may be reviewed by the court, notwithstanding s. 23 of the Act, restricting the power of the court to review, quash, restrain or otherwise interfere with the enforcement of orders made by the immigration authorities; such restriction does not apply where the order made was outside of the authority conferred by the statute.

Re Walsh, Collier and Filsell, 13 D.L.R. 288, 22 Can. Cr. Cas. 60, 13 E.L.R. 132.

IMMIGRATION RESTRICTIONS—ASIATICS FROM BRITISH TERRITORY—ASIATIC "ORIGIN" OR ASIATIC "RACE."

Where a statute authorizes the regulation of the immigration of persons of the "Asiatic race" by orders-in-council, an order in-council purporting to regulate the immigration of persons of "Asiatic origin" is ultra vires as exceeding the statutory authority, the word "Asiatic origin" being wide enough to include persons of the British race born in Asia who would not be within the words "Asiatic race" used in the statute.

Re Thirty-nine Hindus, 15 D.L.R. 189, 18 B.C.R. 506, 26 W.L.R. 319, 5 W.W.R. 686.

(§ I—5)—JURISDICTION—ORDER TO SHEW GROUND OF EXCLUSION—IMMIGRATION LAW—FIXED SUM OF MONEY TO BE POSSESSED BY IMMIGRANT AT TIME OF ENTRY.

When a person is ordered to be deported out of the country, the reason for the deportation should be clearly stated in the order, and it is not a compliance merely to refer, under the heading of "reasons," to the section number of the statute under which the order purported to be made. A requirement under an immigration law that the immigrant shall have, on arrival, a stated sum in his own right, does not alone demand that the money shall be in his actual and personal possession, and would be satisfied by his having the money on deposit in a Canadian bank.

Re Thirty-nine Hindus, 15 D.L.R. 189, 26 W.L.R. 319, 18 B.C.R. 506, 5 W.W.R. 686.

DEPOSITIONS.

I. IN GENERAL.
II. TAKING AND RETURNING.
III. OBJECTIONS.
IV. USE ON TRIAL.
V. EXAMINATION OF TRANSFEREES.

As to discovery, production of documents, see Discovery.

In Criminal trials, see Certiorari, I A—9; Indictment, III—65.

Depositions at former trial of witness absent from Canada, authentication, Cr. Code, s. 999, see Evidence, IV G—420.

Annotation.

Foreign commission; taking evidence ex juris: 13 D.L.R. 338.

I. In general.

(§ I—1)—INVOLVED ISSUES OF FACT WILL NOT ORDINARILY BE DETERMINED BY AFFIDAVIT EVIDENCE.

McGreevy v. Murray, 1 D.L.R. 285, 22 Man. L.R. 78, 19 W.L.R. 947, 1 W.W.R. 758.

SEPARATION ACTION—QUEBEC.

The enquête in an action for separation should be held outside of court by means of depositions before the judge or prothonotary who alone can swear the witnesses pursuant to the provisions of art. 418, C. C.P. A commissioner of the Superior Court has no authority to swear witnesses in such case. Semble, in actions en séparation de corps it is preferable that the witnesses should be examined during the term before the court.

Landry v. Rivard, 14 Que. P.R. 375.

(§ I—2)—RIGHT TO TAKE—PRELIMINARIES.

On a reference to determine who is entitled to the property of a deceased intestate, a claimant may have a commission issued to take evidence abroad, unless it be perfectly plain that the alleged evidence will not be available, or, if it be available, will be wholly useless, and unless the rights of some other party would suffer, but he will be required to pay into court a sum sufficient to cover the costs of the commission in case he fails to prove his claim.

Re Corr, 5 D.L.R. 367, 3 O.W.N. 1442, 22 O.W.R. 539, varying 3 D.L.R. 367, 3 O.W.N. 1177.

A person is entitled as a matter of absolute right to the appointment of a commissioner to take depositions of witnesses in another country for use in Canada in a summary proceeding under Part XV., Cr. Code. Security cannot be required of an applicant for a commission to take depositions of witnesses in another country for use in Canada in a summary proceeding, in the absence of a formal text of law authorizing it, under Part XV.

Barsky v. Serling, 5 D.L.R. 638, 19 Can Cr. Cas. 468.

MOTION FOR COMMISSION—SUGGESTED TERM—PREMATURE APPLICATION.

MacMahon v. R. Passengers Ass'ce Co. (No. 1), 2 D.L.R. 912, 3 O.W.N. 1238.

EXAMINATION OF OFFICER OF COMPANY.

Service of an appointment and subpœna under K.B. r. 389 (Man.), on an officer of a defendant company for examination for discovery, is not the proper procedure, but an order is necessary under r. 425. [Connolly v. Dowd, 18 P.R. (Ont.) 38, applied.]

Macdonald v. Domestic Utilities Mfg. Co., 10 D.L.R. 429, 23 Man. L.R. 512, 23 W.L.R. 268, 4 W.W.R. 121. [Affirmed 11 D.L.R. 812, 23 Man. L.R. 512.]

APPLICATION FOR FOREIGN COMMISSION—HOW MADE.

Motion for a foreign commission to take testimony must, under order 30, r. 5, be brought up on notice of motion under the summons for directions; such a motion is irregular if brought up on an ordinary summons for an interlocutory application. [Cluff v. Brown, 7 D.L.R. 688, followed.]

Orman v. Hollins, 13 D.L.R. 335, 12 E.L.R. 520.

The same particularity is not required as to the proof to be adduced on an application for a foreign commission in a criminal case under Cr. Code, s. 716, which authorizes the making of the order in aid of a preliminary inquiry to take the deposition of a witness out of Canada who is "stated to be" able to give material information relating to the offence as would be required upon an application under Cr. Code, s. 997, to take evi-

dence for use at the trial, in which case it must be "made to appear" that the evidence of the absent witness is material.

The King v. Murray, 2 D.L.R. 113, 3 O.W.N. 734, 22 Can. Cr. Cas. 119, 21 O.W.R. 544.

OF PARTY TO ACTION INVOLVING FRAUD—SHEWING SUFFICIENT TO JUSTIFY TAKING.

An order for the examination in the United States, under r. 365, Sask. Rules 1911, of a party to an action involving fraud, will be refused where the court was satisfied that the purposes of justice would very likely be defeated if he were not produced as a witness on the trial so as to be subjected to an effectual cross-examination, and confronted by witnesses fully acquainted with the circumstances of the case.

Murray v. Plummer, 11 D.L.R. 764, 6 S.L.R. 84, 24 W.L.R. 371, 4 W.W.R. 717.

REQUIREMENTS.

In an application by the plaintiff, under r. 365 (Sask.), for an order for the examination of the plaintiff and one of her witnesses before a special examiner in another province, it must be shewn, among other things, by the applicant: (1) that it is necessary "for the purposes of justice" that the witnesses be examined away from the jurisdiction; (2) that there is some good reason why they cannot be examined before the court in which the venue is laid, or that the witnesses cannot be brought or will not come to the place of trial; and mere saving of expense would not be a sufficient ground.

McGowan v. Hunter, 9 D.L.R. 532, 23 W.L.R. 139, 3 W.W.R. 860.

COMMISSION AT INSTANCE OF PLAINTIFF.

A defendant is prima facie entitled to have the plaintiff and plaintiff's witnesses before the court in order that they may be orally cross-examined, and that their demeanour in giving their evidence may be observed by the court or jury. In some respects the same general rules as to granting an order for the examination of witnesses outside of the jurisdiction on the application of the plaintiff, under r. 365 (Sask.), apply in regard to his own examination on commission, but such rules will be more strictly applied, where the person to be examined is the plaintiff himself.

McGowan v. Hunter, 9 D.L.R. 532, 23 W.L.R. 139, 3 W.W.R. 860.

FOREIGN COMMISSION—CRIMINAL CASE.

A commission to take evidence ex juris in a criminal case may be ordered in respect of an expert witness if the court is satisfied that his evidence is material and that it is improbable that he would voluntarily attend within the jurisdiction.

R. v. Roblin, 31 D.L.R. 724, 26 Can. Cr. Cas. 222, 26 Man. L. R. 97.

COMMISSION—DISCRETION AS TO ISSUING.

The making of an order for a commission to take evidence ex juris is a matter of judicial discretion to be exercised according to the particular circumstances of each case. [Coristine v. Haddad, 21 D.L.R. 350, distinguished.]

First National Bank of Palo Alto v. Kruse, 23 D.L.R. 684, 8 S.L.R. 168, 8 W.W.R. 556.

FOREIGN COMMISSION—ORDER FOR—TERMS—PAYMENT OF DISBURSEMENTS—HUSBAND AND WIFE.

Jordan v. Jordan, 4 O.W.N. 1222, 24 O.W.R. 615.

FOREIGN COMMISSION — EXAMINATION OF A DEFENDANT ON BEHALF OF PLAINTIFFS—SECURITY FOR COSTS OF COMMISSION.

Carter v. Foley-O'Brien Co., 4 O.W.N. 835, 24 O.W.R. 114.

FOREIGN COMMISSION—APPLICATION BY DEFENDANT — DELAY OF TRIAL — REASONABLE FACILITIES FOR MAKING OUT DEFENCE.

Antiseptic Bedding Co. v. Gurofsky, 4 O.W.N. 1309, 1552, 24 O.W.R. 613 and 881.

COMMISSION—DISCRETION OF COURT—CONDITIONS—ACTION ON POLICY—DEFENCE OF FRAUD.

In an action on a life insurance policy for $2,000 wherein the defence of fraud was raised, held, on the application of the defendant, that a commission should be granted for the examination of a physician who had attended the deceased (the expense of bringing the physician to the trial, would have been, it was alleged, $700); but the court imposed the condition that a judge should have discretion, on application by the plaintiff before trial, to refuse to permit the depositions to be used.

Lang v. Northern Life Ass'ce Co., [1918] 3 W.W.R. 1016.

COMMISSIONS—PRINCIPLES GOVERNING.

The principles applicable to the case of a plaintiff asking for a commission to examine himself should not be applied to the case of a defendant. [New v. Burn, 64 L.J.Q.B. 104, followed.] The Alberta Courts will not direct a defendant obtaining an order for his own examination on commission to deposit any sum to apply on expenses where the plaintiff has sworn that he is unable to provide for the expenses of employing counsel to attend upon the taking of the examination. [Ferguson v. Millican, 11 O.L.R. 36, not applied.]

Walker v. Booth, 32 W.L.R. 210, 8 W.W.R. 633.

(§ 1—4)—PRELIMINARY EXAMINATION OF PARTY—OF OFFICER OF A CORPORATION.

It is not competent for the plaintiff in an action against a railway company for personal injuries to use the examination for discovery of an officer of the company for the purpose of contradicting an affidavit filed by such officer in his examination on a motion to require the production of certain reports to the company as to the happening of the accident which gave rise to the action made by its officials who had investigated the same, which affidavit was to

the effect that such reports were made for the information of the company's solicitor and his advice thereon.

Swaisland v. G.T.R. Co., 5 D.L.R. 750, 3 O.W.N. 960.

PRELIMINARY EXAMINATION OF PARTY—EX PARTE ORDER.

An order for the preliminary examination of the plaintiff in an action cannot, under Sask. r. 381 or 408, be made upon an ex parte application except, under r. 589, where delay may work serious or irreparable mischief.

Sanitary Water Still Co. v. Tripure Water Co., 13 D.L.R. 354, 24 W.L.R. 866, 4 W.W.R. 1122.

FOREIGN COMMISSION — PRELIMINARIES — AFFIDAVIT.

A commission to take testimony under commission out of the jurisdiction, may be ordered on an affidavit swearing positively that a nonresident physician (whom the deponent employed to attend his wife in respect to the injuries sustained in respect of which the action was brought), was a necessary and material witness, and that the physician was unwilling to come into the province to attend the trial of the action.

Brown v. Bartlett, 13 D.L.R. 355, 42 N.B.R. 222.

OF PARTY RESIDING ABROAD—GIVING SECURITY FOR COSTS AS GROUND FOR ISSUING COMMISSION—SAVING EXPENSES.

That a nonresident plaintiff has given security for the costs in the action is not a ground for granting a foreign commission to take his testimony abroad. The mere fact that it would be cheaper to take the testimony of a nonresident plaintiff at his place of residence abroad than for him to attend the trial is not sufficient to justify the granting of a foreign commisson.

Orman v. Hollins, 13 D.L.R. 335, 12 E.L.R. 520.

PARTY RESIDING ABROAD—WORKMAN'S COMPENSATION CLAIM.

An applicant claiming as "a dependent wholly dependent upon the earnings of the deceased," under the Alberta Workmen's Compensation Act, 1908, c. 12, should be granted a commission for the taking in Italy of his own evidence and that of his witnesses as to who are dependents where it appears (a) that such evidence is material and necessary to establish the fact and extent of the dependency, and (b) that the expense of bringing the witnesses from Italy to Alberta would be prohibitory and unnecessary.

Tripodi v. West Canadian Collieries, 16 D.L.R. 449, 7 A.L.R. 167, 27 W.L.R. 766, 6 W.W.R. 520.

DE BENE ESSE IN CRIMINAL CASE.

It is the duty of the Trial Judge at a criminal trial to allow only admissible evidence to go to the jury, and he may exclude testimony taken de bene esse before a commissioner for use at the trial subject to all proper exceptions, if the testimony be not properly admissible although no exception was taken before the commissioner and the objection was first raised on the tender of the depositions at the trial.

R. v. Jennie Hawkes, 25 D.L.R. 631, 25 Can. Cr. Cas. 29, 9 A.L.R. 183, 32 W.L.R. 729, 9 W.W.R. 445.

COMMISSION—OFFICERS OF COMPANIES.

An order to take evidence of officers of the applicant company ex juris upon commission should not be made without proof of facts shewing that the taking of the evidence in that way is "necessary for the purposes of justice" (Alta. r. 395); and where it is sought on a motion for direction, leave should be given to both parties to file affidavits. [Park v. Schneider, 6 D.L.R. 451, 5 A.L.R. 423, explained.]

McQuaid v. Prudential Trust Co., 22 D.L.R. 877, 30 W.L.R. 394, 7 W.W.R. 1177.

FOREIGN COMMISSIONS — ABSENCE BECAUSE OF WAR.

In an action for the cancellation of shares on the ground of misrepresentations, the evidence of plaintiffs unable to be present at the trial because engaged in the country's war may be taken on commission, particularly where the proposed evidence is within the defendant's knowledge and which may be met by his fullest preparation. [Park v. Schneider, 6 D.L.R. 451, distinguished.]

Kaye v. Burnsland Addition, 24 D.L.R. 232, 8 W.W.R. 1064, 31 W.L.R. 689.

MATERIAL WITNESSES IN OTHER PROVINCE.

Where material witnesses are resident in another province and cannot be compelled to leave that province to give testimony at the trial, the fact that such witnesses are in the employ of the plaintiff company on whose behalf the application is being made to take their evidence under commission will not disentitle the company to an order to take the evidence where the court is satisfied that the application is bona fide, that the witnesses can give material evidence, and that the examination will be effectual. [Murray v. Plummer, 11 D.L.R. 764; Fidelity Trust Co. v. Schneider, 14 D.L.R. 224, distinguished.]

Corristine v. Haddad, 21 D.L.R. 350, 8 S.L.R. 3, 30 W.L.R. 849, 8 W.W.R. 455.

DE BENE ESSE—CREDIBILITY—REVIEW ON APPEAL.

The Court of Appeal stands in as good position as the Trial Judge to weigh the value of evidence taken de bene esse and estimate the credibility to be attached to it.

Chalmers v. Machray, 26 D.L.R. 529, 26 Man. L.R. 105, 33 W.L.R. 656, reversing 21 D.L.R. 635, 30 W.L.R. 836. [Affirmed, 39 D.L.R. 396, 55 Can. S.C.R. 612, [1917] 3 W.W.R. 361.]

FOREIGN COMMISSION—RETURN.

Depositions under a rogatory commission, on the return of the commissioner, need not be received or homologated by the court, before they can be read at the trial: under art. 387, C.P., the return is to be sealed,

and may be opened and published by an order of the judge.

Montreal Tramways Co. v. McAllister, 34 D.L.R. 565, 26 Que. K.B. 174. [Affirmed by Privy Council, 51 D.L.R. 429.]

DEPOSITION DE BENE ESSE—USE OF INTERPRETER—ADMIRALTY PRACTICE.

Donkin Creeden v. The "Chicago Maru" (No. 1), 28 D.L.R. 804, 16 Can. Ex. 501, 22 B.C.R. 529.

FOREIGN COMMISSION—CRIMINAL CASE.

R. v. Rispa, 26 Can. Cr. Cas. 94, 9 O.W.N. 50.

FOREIGN COMMISSION TO TAKE EVIDENCE FOR THE CROWN ON CRIMINAL TRIAL.

Where the Crown is granted an order under Cr. Code, s. 997 to take depositions in the United States in rebuttal of the testimony given by the accused in his own behalf, and it appears that such testimony cannot well be taken on interrogatories, there should be a recommendation with such order that the Crown pay the fees and expenses of defendant's counsel in attending on the foreign commission.

R. v. Guilmette, 30 Can. Cr. Cas. 276.

FOREIGN COMMISSION—RELEVANCY OF PROPOSED TESTIMONY—ADMISSIONS—DISCRETION.

Clary v. Mond Nickel Co., 9 O.W.N. 241.

DISCOVERY—EXAMINATION OF DEFENDANT RESIDENT OUT OF ONTARIO—PLACE OF EXAMINATION—RULES 328, 331.

Trusts and Guarantee Co. v. Boal, 8 O.W.N. 476.

MOTION FOR FOREIGN COMMISSION—EXAMINATION OF PLAINTIFFS ABROAD — NATURE OF ACTION.

Stewart v. Battery Light Co., 5 O.W.N. 195, 287, 25 O.W.R. 189.

DISCOVERY—EXAMINATION OF PLAINTIFF—REFUSAL TO ANSWER—MENTAL WEAKNESS.

Shantz v. Clarkson, 4 O.W.N. 878, 24 O.W.R. 145.

DE BENE ESSE—SUFFICIENCY OF GROUNDS.

Where a plaintiff has selected British Columbia as the place where the action should be brought, it is his duty prima facie to bring his witnesses to this province or to shew that it would not be in the interest of justice that he should be compelled to do so. Where a plaintiff seeks to have a material witness examined abroad and the nature of the case is such that it is important he should be examined here, the party asking must shew that he cannot bring him to this province to be examined on the trial. The principal officer of the plaintiff company, who is a material witness, cannot be examined on the plaintiff's behalf under cover of a general leave given by an order for a commission to examine "other persons."

Stewart Iron Works Co. v. B.C. Iron, Wire & Fence Co., 20 B.C.R. 515.

FOREIGN COMMISSION — PARTY RESIDING ABROAD—SUFFICIENCY OF CERTIFICATE.

It will be presumed that a witness whose evidence was taken abroad under a commission is out of the province at the time of the trial and such deposition may be given in evidence under O. XXXVII, r. 18, of the Rules of the Supreme Court, 1909, without proof that the deponent is dead, or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the trial. [Burpee v. Carvill, 16 N.B.R. 141, followed.] A certificate of a stenographer, signed and dated and attached to the depositions, certifying that he took faithful and accurate notes of the examination of the witnesses, and that the writing on the sheets of paper annexed is a faithful and accurate transcript made by him of his notes, is a sufficient compliance with the requirements of the order that the stenographer shall certify the transcript as correct. A certificate signed by a commissioner, certifying that the sheets of paper annexed were furnished to him by the stenographer as containing a transcript of his notes of evidence, followed by the typewritten evidence, is a sufficient compliance with r. 16, requiring the deposition to be authenticated by the signature of the commissioner and with the commission requiring the depositions to be signed by the commissioner.

Simpson v. Malcolm, 43 N.B.R. 79.

COMMISSION TO EXAMINE WITNESSES—EXAMINATION OF PARTY—QUE. C.P. 380, 381.

The party himself cannot invoke in his favour, the provisions of art. 380 C.C.P. for the purpose of obtaining a commission to receive his own evidence.

Moore v. Gagnon, 15 Que. P.R. 394.

WITNESS RESIDING ABROAD—REFUSAL TO ANSWER QUESTIONS OF COMMISSION—LETTER OF INQUIRY (LETTRE ROGATOIRE) TO FOREIGN TRIBUNAL.

When a witness residing abroad refuses to answer interrogations annexed to a judicial commission in the ordinary course, the Superior Court, on application by the interested party, can issue a request or letter of enquiry (lettre rogatoire), addressed to the proper tribunal of the place, praying it to force the refractory witness to answer. This request or letter of enquiry is transmitted to its destination through diplomatic channels, at the suit of the party who has obtained its issue.

Edwards v. Petit Seminaire de Sainte-Marie de Monnoir, 45 Que. S.C. 178.

FOREIGN COMMISSIONS—CROSS-EXAMINATION—GOVERNMENTAL DOCUMENTS—COPIES.

Even where there is likely to be a conflict of evidence between a witness for the plaintiff and an officer of the defendant company whose evidence is sought to be taken on commission in the United States, the desirability of examining such witnesses before the court is not a sufficient reason to com-

pel the defendants to bring their witness, at great expense, to a forum not chosen by them, and a commission should issue. The fact that certain documents written by the defendant to the Provincial Government are said to be necessary for use in cross-examining and cannot be removed from the province, is not an objection, as copies can be obtained and used.

Western Iron Co. v. Reedy Co., 33 W.L.R. 915.

WITNESS OUT OF JURISDICTION—WHEN DEPOSITION SET ASIDE.

Where the defendant obtained an order for the examination of a witness out of the jurisdiction on the day following the date of the order, leave was granted to the plaintiffs by the order to apply in Chambers to set aside the depositions upon proof that it was impossible for the plaintiffs to prepare for such examination, and that they would in consequence be seriously prejudiced if the depositions were admitted at the trial.

Gowans Kent v. Assiniboia Club, 31 W.L.R. 196.

EXAMINATION OF WITNESS OUTSIDE JURISDICTION.

An order to examine a witness outside the jurisdiction may issue when to a court or judge "it shall appear necessary for the purposes of justice." There must be some good reason shewn why the witness cannot be examined before the court, or that he cannot be brought or will not come. Consequently an affidavit by a solicitor in the words, "I am not sure that he will be present," is insufficient to found an order upon. In Lawson v. Vacuum Brake Co., 27 Ch. D. 137, at 143, 54 L.J. Ch. 16, Cotton, L.J., says: "A heavy burden lies on the party who wishes to examine a witness abroad to shew clearly that he cannot be brought here or that he will not come." In Armour v. Walker, 25 Ch. D. 673, 53 L.J. Ch. 413, it was necessary to take the evidence of four witnesses in addition to that of several experts to prove foreign law, all of whom were living abroad. In Coch v. Allcock, 21 Q.B.D. 178, 57 L.J.Q.B. 489, there were several witnesses to be examined abroad also, and the question of expenses in bringing the witnesses to court was considered. In this case, Lord Esher, M.R., at 181, says: "It is clear that according to the established practice, it is a matter of judicial discretion and the commission ought only to be granted on reasonable grounds being shewn for its issue. The matter being one of discretion it is absolutely impossible to lay down any general rules as to when a commission will be granted, it must depend on the circumstances of the particular case."

Ridley, Whiteley & Co. v. Chicago Outfitting Co., 6 W.W.R. 1121.

ORDER FOR ATTENDANCE OF WITNESSES—INQUIRY BY FOREIGN TRIBUNAL—COMMISSIONERS APPOINTED BY THE GOVERNMENT OF ANOTHER PROVINCE.

Re Alberta & Great Waterways R. Co., 20 Man. L.R. 697.

CAPIAS—AFFIDAVIT—BELIEF OF DEPONENT—REASONS FOR BELIEF.

Blanchette v. Paris, 40 Que. S.C. 481.

COMMISSION TO TAKE EVIDENCE OF PLAINTIFF'S CHIEF WITNESS.

Toronto Carpet Mfg.Co. v. Ideal House Furnishers, 20 Man. L.R. 571, 17 W.L.R. 621.

COMMISSION TO TAKE EVIDENCE EX JURIS—RIGHT OF PLAINTIFF—SPECIAL CIRCUMSTANCES.

Bellivcau Co. v. Tyreman, 4 S.L.R. 39.

II. Taking and returning.

(§ II—5)—FOREIGN COMMISSION—MOTION FOR—AFFIDAVIT IN SUPPORT.

McAlpine v. Proctor, 4 O.W.N. 769, 23 O.W.R. 952.

The court may require the parties to have the depositions transcribed and filed within a certain delay.

Gagnon v. Pilote, 14 Que. P.R. 175.

COMMISSION—WITNESS OUTSIDE OF PROVINCE.

The jurisdiction of the Superior Court of Quebec not extending to persons and things outside of the province, the court has neither power nor jurisdiction to appoint a commissioner to take evidence outside of the province or to confer on him power to obtain legal and effective proof.

Vachon v. Montreal Abattoirs, 20 Que. P.R. 134.

LEAVE TO TAKE EVIDENCE ABROAD—PROMISSORY NOTE—EVIDENCE OF MANAGER OF ASSIGNING BANK.

The assignee of a promissory note from a bank who has already sued thereon and discontinued should not in an action upon the note be granted leave to have the evidence of the manager of the assignor taken abroad.

Jamieson v. Etty, 7 W.W.R. 99.

(§ II—6)—TIME TO TAKE—FOREIGN COMMISSION.

To obtain a commission to take the depositions of foreign witnesses to be used as evidence, it is not necessary to set out explicitly the nature of the evidence nor the facts intended to be proved by the witnesses sought to be examined, if the court is satisfied that the application is bona fide and that the evidence is material and cannot be obtained within the jurisdiction.

Smith v. Murray, 1 D.L.R. 363, 20 W.L.R. 9, 1 W.W.R. 764.

Where the court is not satisfied that a foreign commission is necessary, the applicant may be ordered to elect between giving security for the costs of the commission, and a refusal of the commission with liberty to obtain a commission at the

trial if it appears necessary to the Trial Judge, the party opposing the commission to be bound in that event to consent to a postponement of the trial for that purpose. [Macdonald v. Sovereign Bank, 3 O.W.N. 1006, followed.]

Hawes, Gibson & Co. v. Hawes, 3 D.L.R. 396, 3 O.W.N. 1229, 22 O.W.R. 46.

FOREIGN COMMISSION—TERMS—PRIOR EXAMINATION OF OFFICERS OF DEFENDANT BANK.

Campbell v. Sovereign Bank, 2 D.L.R. 913, 3 O.W.N. 1285.

FOREIGN COMMISSION—APPLICATION FOR—INFORMATION AND BELIEF—RULE 518—UNNECESSARY TESTIMONY—ADMISSION.

Macdonald v. Sovereign Bank, 1 D.L.R. 921, 3 O.W.N. 849, 21 O.W.R. 702. [Varied 2 D.L.R. 892, 3 O.W.N. 1006.]

(§ II—8)—INTERROGATORIES.

An order may be made under Ont. Con. r. 472 to withhold the right of discovery upon oath from the opposite party in respect of matters which relate only to consequential relief to be given in the event of the plaintiff succeeding on the main issue if the enforcement of discovery before the trial of that issue would be of an oppressive character.

Patterson v. Neill, 1 D.L.R. 22, 3 O.W.N. 516, 20 O.W.R. 887.

An open commission under art. 385a, C. C.P., will issue to take the depositions of witnesses in a foreign country for use in a summary proceeding under Part XV., Crim. Code, where the parties to the application agreed there should be but one commissioner appointed, but did not agree in the first instance that they would not furnish interrogatories and cross-interrogatories, and it was alleged that the petitioner had caused the departure of the witnesses from Canada in order to prevent their testifying.

Barsky v. Serling, 5 D.L.R. 638, 19 Can. Cr. Cas. 468.

LETTERS ROGATORY—TESTIMONY FOR USE IN FRENCH COURT — CRIMINATING EVIDENCE.

Re Isler, 25 D.L.R. 845, 34 O.L.R. 375.

INTERROGATORIES—APPLICATION TO STRIKE OUT—RELEVANCY OF—THE JUDICATURE ACT, 1909, O. 31, R. 6.

Relevant interrogatories will not be set aside. Applications to strike out interrogatories are extremely rare, as under O. 31, r. 6, of the Judicature Act, 1909, objection to interrogatories may be taken in affidavit in answer, even though no application has been made to set them aside.

Leveque v. Lambert, 42 N.B.R. 336.

INTERROGATORIES — ARTICULATED FACTS — ANSWERS — DEFINITENESS — QUE. C.P. 367.

To articulated facts it is necessary for the interrogated party to answer affirmatively or negatively to each question: It is sufficient to give answers that are not either vague, equivocal or ambiguous. The interrogated party may answer thus: "The sum has not yet been paid, some delay having been granted."

Ives v. Moisan, 16 Que. P.R. 147.

(§ II—9)—RETURN — CERTIFICATE—OATH —SUPPLEMENTARY.

The return of a commission to take evidence should contain a certificate that the commissioner took the oath required by law: if it does not, the return will be rejected. However, the party in charge of the commission may have a supplementary return of the oath prepared. An application to strike out the answer to an interrogation in the commission will not be granted at the receipt of the return but should be reserved for the judge at the trial to deal with.

Cameron v. Montreal Tramways, 15 Que. P.R. 82.

PRELIMINARY ENQUIRY — READING DEPOSITIONS.

The King v. Rouleau, 17 Can. Cr. Cas. 281.

AFFIDAVIT FOT THE PROVINCE OF QUEBEC TAKEN ELSEWHERE.

A notary public in British Columbia has no authority to take the affidavits of a commissioner and clerk acting in a rogatory commission issued in the Province of Quebec.

Lariviere v. Royal Trust Co., 12 Que. P. R. 404.

UNDER COMMISSION—EXAMINATION OF WITNESSES ABROAD.

Graham v. Bigelow, 45 N.S.R. 118.

III. Objections.

(§ III—10)—The right of examination for discovery extends not only to the knowledge and recollection of the adverse party, but also to his information and belief. [Vanhorn v. Verral, 3 O.W.N. 337, 439, followed.]

Lindsey v. Le Sueur, 1 D.L.R. 61, 3 O. W.N. 486, 20 O.W.R. 851.

OPPOSITION AFIN D'ANNULER — EXAMINATION OF OPPOSANT.

The deposition of an opposant given under art. 651 C.C.P. can only avail for the purposes of the motion demanding the rejection of the opposition. This evidence, contrary to that produced under art. 286 C.C.P., cannot be used upon the merits of the opposition.

Kaine etc. Transportation v. Morgan, 48 Que. S.C. 421.

(§ III—11)—SUFFICIENCY—AFFIDAVIT ON PRODUCTION—CLAIM OF PRIVILEGE—REPORTS FOR INFORMATION OF SOLICITOR—ABSENCE OF SPECIAL DIRECTION—REPORTS MADE TO BOARD OF RAILWAY COMMISSIONERS — EXAMINATION OF SERVANTS OF COMPANY.

Shapter v. G.T.R. Co., 3 D.L.R. 877, 3 O.W.N. 1334, 22 O.W.R. 252.

(§ III—12)—Objection as to regularity — Time to take — Inscription in shorthand.

Where evidence taken under commission outside of the jurisdiction has been inscribed in shorthand without authority therefor in the commission order or otherwise, an objection on that ground alone will be overruled, where no such objection was raised upon the examination but is taken for the first time at the trial.

Minot Grocery Co. v. Durick, 10 D.L.R. 126, 6 S.L.R. 44, 23 W.L.R. 270, 3 W.W.R. 904.

Irregularities—Delay.

Two months' delay in moving to suppress a deposition for harmless irregularities in taking is fatal.

Decrean v. Vancanneyt, 12 D.L.R. 412, 6 A.L.R. 384, 25 W.L.R. 27, 4 W.W.R. 1235.

(§ III—14)—It is a good ground for quashing a summary conviction that the stenographer who took down the depositions was not sworn as required by Cr. Code, s. 683. [The King v. L'Heureux, 14 Can. Cr. Cas. 100, followed.]

The King v. Johnson, 1 D.L.R. 548, 22 Man. L.R. 426, 19 Can. Cr. Cas. 203, 1 W. W.R. 1045.

Authentication — Preliminary inquiry —Stenographer's notes.

It is not necessary that the deposition of each witness on a preliminary enquiry should be separately certified; all may be included in one certificate. The reading of the depositions on the part of the prosecution to the accused on the preliminary inquiry, in conformity with Cr. Code, s. 684, may be proceeded with from the shorthand notes without the delay incident to transcribing them. The fact that the stenographer appointed by the justice to take down the depositions on a preliminary inquiry was duly sworn (Cr. Code, s. 683, as amended 1913), may be proved by the justice's certificate, although the stenographer did not sign the oath.

McDonald v. The King, 30 D.L.R. 738, 26 Can. Cr. Cas. 175, 25 Que. K.B. 322. [See also R. v. Limerick, 31 D.L.R. 226.]

Unsworn stenographer.

The petitioner's affidavit in support of an application for habeas corpus that the stenographer who transcribed the evidence at the preliminary inquiry had not been sworn will not be credited as against the certificate of oath signed by the magistrate and filed in the record.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

IV. Use on trial.

(§ IV—15)—Officer of a corporation.

The testimony adduced from an examination of an officer of a corporation residing out of the jurisdiction, under Con. r. 1321 (Ont.), may be used by the adverse party as evidence at the trial of the action, saving all just exceptions.

Grocock v. Edgar Allen & Co. (No. 2), 10 D.L.R. 147, 4 O.W.N. 660, 23 O.W.R. 788.

Refusing leave to use on trial — Grounds.

Leave to use a deposition of the president of the plaintiff company, taken in the United States, for use on the trial "unless a judge shall otherwise order," will be denied, where to permit its use would work an injustice to the defendant, as it appeared that the plaintiff to the action was a mere nominal party, while the real plaintiff was guilty of fraud in the transaction in relation to which the note sued upon was given; and that the cross-examination of the witness, by reason of foreign counsel being retained to take it, and the difficulty of giving him adequate instructions, was not conducted so as to properly develop such phase of the case. [Union Investment Co. v. Perras, 2 A.L.R. 357; and Park v. Schneider, 6 D.L.R. 451, followed.]

Fidelity Trust Co. v. Schneider, 14 D.L. R. 224, 6 A.L.R. 446, 25 W.L.R. 611, 5 W.W.R. 237.

(§ IV—17)—Of absent witness.

The admission in evidence for the Crown of the depositions of an absent witness taken on the preliminary enquiry without the proof of absence required by Cr. Code, s. 978 will not entitle the accused to a new trial where he, through his counsel, expressly requested at the trial that such depositions should be put in.

R. v. Hogue, 39 D.L.R. 99, 39 O.L.R. 427, 28 Can. Cr. Cas. 419.

Authentication—Certificate.

A deposition taken before a magistrate on a summary trial for keeping a bawdy house is admissible on the hearing of an appeal from the conviction taken under Cr. Code, s. 797 only in case the personal presence of the witness cannot be obtained by any reasonable efforts, and in case the deposition is certified by the magistrate; the magistrate cannot be called as a witness to give viva voce proof of the regularity of the deposition in lieu of the certificate.

The King v. Hornstein, 19 Can. Cr. Cas. 127.

Where, upon a charge of an indictable offence, the evidence in the preliminary inquiry before the justice was taken down in shorthand, and it appeared that at the close of the taking of the evidence the accused party consented that the reading of the depositions should be dispensed with, that the accused was thereupon committed for trial and an indictment was afterwards returned against him by the grand jury for the offence recited in the commitment, but it did not appear that the transcript of evidence transmitted to the clerk of the Trial Court was accompanied by an affidavit of the stenographer to the effect that

it was a true report of the evidence:—Held, that the defendant was not entitled to have the indictment quashed on the ground that the charge therein was not founded on facts disclosed in any depositions regularly taken before the justice.

The King v. Montminy, 18 Rev. de Jur. 309.

EVIDENCE TAKEN UNDER COMMISSION—USE BY JURY.

Miles v. Bell, 40 N.B.R. 158.

DEPOSITIONS DE BENE ESSE.

The party on whose behalf an examination of a witness de bene esse has been taken, is not bound to read it at the trial, but the opposing party may be allowed the costs of the examination if it is not used.

Atkinson v. Casserley, 22 O.L.R. 52.

DEPOSITIONS OF WITNESSES AT PRELIMINARY INQUIRY—QUASHING COMMITMENT AND INDICTMENT WHERE DEPOSITIONS NOT AUTHENTICATED.

The King v. Robert (No. 1), 17 Can. Cr. Cas. 194.

V. Examination of transferees.

(§ V—25)—EXAMINATION OF TRANSFEREES.

Under the summary power conferred by Ont. Con. r. 903 for discovery in aid of execution, an examination under oath may be ordered of a person to whom the judgment debtor has made a transfer of his property or effects "exigible under execution" but the rule is not to be interpreted as extending to an examination of the transferee as to a conveyance made by the debtor to him of lands situate in another province although such lands may be exigible under execution in that province.

Crucible Steel Co. v. Ffolkes, 1 D.L.R. 381, 3 O.W.N. 750, 21 O.W.R. 302.

JUDGMENT DEBTOR—EXAMINATION OF TRANSFEREES—ACTION PENDING TO SET ASIDE TRANSFERS.

Crucible Steel Co. v. Ffolkes, 4 O.W.N. 1561, 24 O.W.R. 791.

DEPOT.

Establishment and maintenance of, see Carriers.

DESCENT AND DISTRIBUTION.

I. Right to inherit.
  A. Who entitled generally.
  B. Effect of alienage.
  C. Effect of illegitimacy.
  D. Effect of adoption.
  E. Rights of husband and wife.
II. Property subject to.
III. Nature and incidents of estate.

Succession duties, see Taxes, V.

As to devise or bequest of property, see Wills.

Devolution of lands to Crown upon failure of heirs, and next of kin, see Escheat.

Devolution of Estates Act, see Partition.

Annotation.

Effect of war on inheritance rights of alien enemies: 23 D.L.R. 375, 380.

I. Right to inherit.

A. Who entitled generally.

(§ I A—1)—The real estate in Ontario of an infant who died in the year 1882, leaving no brother or sister, devolves in accordance with the statute then in force in regard to real property (R.S.O. 1877, c. 105, s. 22), and goes altogether to the father surviving to the exclusion of the mother.

Re Brennan and Waldman, 7 D.L.R. 295, 4 O.W.N. 161.

K. died intestate, leaving no widow, one son, three daughters, and one granddaughter, daughter of a deceased daughter. Held, the word "children" in the clause beginning "and if there be no widow," in s. 2 of the Intestates' Estates Act, C.S. 1903, c. 161, includes grand-children, and that K's granddaughter was entitled to the share of the personal estate which her mother would have received if living.

Re Estate of David Kennedy, 40 N.B.R. 437.

A release of actions, etc., given by plaintiff to defendant had the effect of an absolute release notwithstanding it contained words limiting the release to the interest claimed by plaintiff in respect to one relationship only. The computation of relationship is made under the rules of the civil law by going back to the common ancestor, in this case the grandfather, and by adding together the degrees of kinship between the parties and the common ancestor, instead of under the canon law, by which the degree of kinship of the parties is that of the one furthest removed from the common ancestor. For this reason plaintiff and other cousins of the deceased stood in the same degree of consanguinity. The qualification as to persons taking by representation is only a device to change the general rule by which it may be varied, and is restricted to the case of brothers' and sisters' children. Such children would be one degree further removed from the deceased than brothers and sisters, but would take by representation the shares that would have been taken by their deceased parents if living, but where there are no children of deceased brothers and sisters the rule has no application.

Troop v. Robinson, 45 N.S.R. 145, 8 E.L.R. 366.

DISTRIBUTION OF ESTATE—INTESTATE SUCCESSION—ABSENTEE NEXT OF KIN—PRESUMPTION OF DEATH—EVIDENCE.

Re Moore, 9 O.W.N. 282.

DISTRIBUTION OF ESTATE—INTESTATE SUCCESSION—ABSENTEE NEXT OF KIN—PRESUMPTION OF DEATH—EVIDENCE.

Re Peacock, 9 O.W.N. 175.

DISTRIBUTION OF ESTATES—INTESTATE SUCCESSION—ABSENTEE NEXT OF KIN—PRESUMPTION OF DEATH—INQUIRY—REFERENCE—LIABILITY.

Re Duncan, 8 O.W.N. 568.

FIRST COUSINS—RIGHTS OF CHILDREN OF DECEASED FIRST COUSINS—REPRESENTATION—DEVOLUTION OF ESTATES ACT, R.S.O. 1914 c. 119, s. 30.

Re Hale, 10 O.W.N. 376.

DEVOLUTION OF ESTATES ACT, R.S.O. 1914, c. 119—PERSONS ENTITLED TO SHARE IN ESTATE OF INTESTATE DECEASED—NEPHEWS AND NIECES—EXCLUSION OF GRAND NEPHEWS AND GRAND NIECES—DISTRIBUTION PER CAPITA AND NOT PER STIRPES.

Re Carscallen, 13 O.W.N. 80.

ABSENTEE SUBSTITUTES.

If the succession is opened and the substitute is an absentee, it goes to those to whom he would have the right to convey it or those who would have succeeded to him.

Picard v. Picard, 48 Que. S.C. 316.

RENUNCIATION BY SUBSTITUTE—NEPHEWS AND NIECES.

Renunciation of a universal legacy before its acceptance in case of substitution is governed by the same rules as one made after the acceptance. Thus, in case of a universal legacy given by a testator to his brother with the obligation of preserving the property and delivering it to his children born or to be born, and on failure of children to his nephews and nieces, if the substitute renounces his universal legacy it is the nephews and nieces who have a right to enjoy the proceeds and revenues on the failure of children of the substitute and not the heirs of the testator, the renunciation by the substitute having the effect of opening the substitution in favour of the institutes.

Robert v. Martin, 48 Que. S.C. 27.

(§ I A—3)—HOMICIDE—INSANITY.

The principle that no one can profit by his own wrong or criminal act does not apply so as to prevent an insane person who commits homicide, or her heirs, from taking an inheritance, under the provisions of the Inheritance Act (R.S.B.C. 1911, c. 108) from the person killed.

Re Estate of Maude Mason, 31 D.L.R. 305, 23 B.C.R. 329, [1917] 1 W.W.R. 329.

(§ I A—4)—DEVOLUTION OF ESTATES ACT, R.S.M. 1913, c. 54—INTESTACY—ONLY NEPHEWS AND NIECES SURVIVING—NO PROVISION IN ACT—DISTRIBUTION.

The Devolution of Estates Act, R.S.M. 1913, c. 54, makes no provision for the case of an intestate who dies leaving neither widow nor parents, nor lineal descendents, nor brothers nor sisters surviving, but only children of deceased brothers or sisters. The Act did not intend to change the law as it previously stood and the position of the estate as to which there is an intestacy should be distributed amongst the nephews and nieces of the intestate per capita and not per stirpes.

Re Smith Estate, 48 D.L.R. 434, [1919] 3 W.W.R. 745.

C. EFFECT OF ILLEGITIMACY.

(§ I C—10)—Relationship in the direct line exists between a father and his natural children even if they are the fruits of adultery. Hence, if he bequeaths to them his succession it will only be subject to the taxes imposable under par. 1 of art. 1375 R.S. Q. 1909.

McLaren v. Fortier, 41 Que. S.C. 315.

D. EFFECT OF ADOPTION.

(§ I D—16)—RIGHT TO INHERIT—BY ADOPTED CHILD—ADOPTION DECREE UNDER FOREIGN LAW.

The status of a person as next of kin of another is sufficiently established if recognized by the law of the foreign domicile of the deceased; and this principle applies to support the right and claim of an adopted son as next of kin, to personal property in Canada belonging to the estate of the mother by adoption, who, although resident in Canada at the time of her death, had acquired a domicile of choice in the state of Massachusetts, and while there domiciled, had, under the laws of that state, obtained a decree of adoption giving the adopted child the like claim upon her estate as if he had been her own child.

Robertson v. Ives, 15 D.L.R. 122, 13 E. L.R. 387.

E. RIGHTS OF HUSBAND AND WIFE.

(§ I E—20)—WIDOW—ELECTION TO TAKE LAND SUBJECT TO MORTGAGE—EFFECT.

A widow, who, under the Devolution of Estates Act, R.S.O. 1897, c. 127, as amended by 10 Edw. VII. c. 56, takes, in lieu of dower, one-third of land encumbered by a mortgage, takes her interest in the land subject to one-third of the mortgage; and will be chargeable with such one-third on an accounting with the estate, on the executor paying off the whole mortgage with estate funds.

Re Mackenzie, 11 D.L.R. 818, 4 O.W.N. 1392, 24 O.W.R. 678.

WILL—RIGHTS OF WIDOW FOR LIFE OR UNTIL REMARRIAGE—RIGHTS OF CHILDREN—PROVISION FOR WIDOW LESS THAN IF TESTATOR HAD DIED INTESTATE—RIGHT TO RELIEF—DEVOLUTION OF ESTATES ACT, R.S.S. 1909, c. 43 AND AMENDMENTS.

The provisions of the Devolution of Estates Act, R.S.S. 1909, c. 43 as amended by 1 Geo. V. 1910-1911 c. 13 must be strictly interpreted. A widow may obtain relief against the provisions of a will by which she is left a lesser share of her late husband's property than she would have received had he died intestate.

Devolution of Estates Act; Re Baker Estate, 50 D.L.R. 422, [1920] 1 W.W.R. 259.

DEVOLUTION OF ESTATES ACT (SASK.)—RIGHT OF WIDOW TO RELIEF—FROM WHAT SOURCE PAYABLE—JURISDICTION OF JUDGE.

On an application by the widow for relief under c. 13 of the Stats. of Sask. 1910-11 (the Devolution of Estates Act), the judge has no jurisdiction to make an order providing from what source, as between the different persons interested in the estate of the deceased, the share of the widow should be payable. The order giving the widow a share in the estate is of the same effect as though the testator had made a codicil to his will giving his widow such share in priority to all other gifts, and such share takes priority over the residuary legatee.

Re Estate of Joseph Davidson, 46 D.L.R. 239, [1919] 2 W.W.R. 100, reversing [1919] 1 W.W.R. 497.

MARRIED WOMAN'S RELIEF ACT—DEFENCES.

A wife's separation from her husband, unjustifiable by her, and such as would be a complete defence to an action for alimony, disentitles her to any allowance out of her husband's estate under the Alberta Married Women's Relief Act (1910, 2nd Sess., c. 18).

Drewry v. Drewry, 30 D.L.R. 581, [1916] 2 A.C. 631, [1917] 1 W.W.R. 266, reversing 27 D.L.R. 716, 9 A.L.R. 363, 34 W.L.R. 103.

RIGHTS OF WIDOW IN HUSBAND'S ESTATE—DEFENCES — SAME AS IN ACTION FOR ALIMONY — DEVOLUTION OF ESTATES ACT, R.S.S. 1909, C. 43, AMENDED BY C. 13, 1910-11.

Re Estate of Souply, 31 D.L.R. 797.

DEVOLUTIONS OF ESTATES ACT—ELECTION OF WIDOW TO TAKE DISTRIBUTIVE SHARE OF ESTATE OF INTESTATE—LANDS SOLD UNDER MORTGAGE—SURPLUS PROCEEDS OF SALE—AGREEMENT — OPTION — ESTOPPEL.

Re Adair, 9 O.W.N. 289.

The scheme of the Married Women's Relief Act (Alta.) is to place a widow, at the best, in as good a position as she would have been if there had been no will.

Re Matheson Estate, 33 W.L.R. 621.

(§ I E—22)—TENANCY BY CURTESY.

Where a wife dies intestate leaving her surviving husband and children, the husband is not entitled to tenancy by the curtesy in the wife's real estate where the circumstances are such that s. 5, subs. 5, of British Columbia Statutes 1898, c. 40, can be applied, although the effect of its application may be to cut down the husband's interest from a life estate in the whole of his deceased wife's lands as tenant by the curtesy to a life estate in one-third thereof.

Romang v. Tamourni, 2 D.L.R. 295, 20 W.L.R. 825, 1 W.W.R. 1109, affirming 17 W.L.R. 133.

(§ I E—24)—WILL BY HUSBAND—RELIEF CLAIMED BY WIFE — DISCRETION OF COURT — MARRIED WOMAN'S RELIEF ACT, 1 GEO. V., 1910, 2ND SESS. C. 18, SS. 2 AND 8.

The discretion of the court in granting relief to a widow under the Married Women's Relief Act is restricted, by implication, to the amount that the widow would have received had her husband died intestate.

McBratney v. McBratney, 50 D.L.R. 132, 59 Can. S.C.R. 550, [1919] 3 W.W.R. 1000, reversing 48 D.L.R. 29, which affirmed 45 D.L.R. 738.

III. Nature and incidents of estate.

(§ III—30)—ENTRY TO POSSESSION UPON DEATH OF ANCESTOR—DUTY AS TO—ADVERSE POSSESSION.

An heir at law is not on the death of his ancestor bound to do any act to vest both the title and possession of the lands which he inherits, and he is not barred of his right of entry under C.S. 1903, c. 139, ss. 3, 4, on any part of such lands not held against him by adverse possession for twenty years.

Gooden v. Doyle, 42 N.B.R. 435.

PERSONAL LIABILITY OF BENEFICIAL HEIR—DEFENCES.

The admission of the heir to the benefit of inventory does not confer upon him a double personality. He can be sued personally subject to his right to plead his capacity to obtain an order that the judgment shall be executed only upon the patrimony of the de cujus. A beneficial heir sued personally for the purpose of causing him to shew by a quittance the payment to his auteur is without interest to set up this capacity as a bar to the action.

Furois v. Grace, 38 Que. S.C. 89.

COMMUNITY—RENUNCIATION.

In so far as the parties to a community are interested the renunciation or abandonment thereto may be made by any kind of agreement. But the abandonment by an heir of all the rights and claims that he has against the succession of his father and against his father's heirs cannot be considered as an abandonment of the community as to property which had existed between his father and his father's wife.

Montpetit v. Brault, 26 Que. K.B. 263.

SUCCESSION — SUBSTITUTION — REMUNERATION BY INSTITUTE—HEIRS—CONSERVATION ACTS.

Those called to a substitution may, before the opening of the substitution, perform any acts necessary to conserve their rights. In the case of a universal legacy given by a testator to his brother with the obligation of preserving the property and of giving it, on his death, to his children born or to be born, and on failure of children to his nephews and nieces, if the institute renounces his universal legacy before acceptance, it is not the nephews and nieces who have the right to enjoy the proceeds and revenues on the failure of children of the institute, but

the heirs ab intesta of the testator until the death of the institute, on the same conditions as the first institute. Such renunciation has had the effect of making void the universal legacy given to the brother of the testator, but not the trust which was imposed upon him. In this case, the nephews and nieces of the testator have no other rights than those which they had before the renunciation of the institute, namely, any right in being present, but only contingent rights which will be brought into being only upon the death of the first institute if he dies without children.

Robert v. Martin, 27 Que. K.B. 54.

(§ III—31)—Proceedings to prove heirship.

Where a reference is ordered to inquire and report who is or are the next of kin of a deceased intestate, it is the duty of the officer conducting the reference to allow any claimants to present their respective claims as best they can, and at their own risk as to costs, and, if no claims be established, the estate goes to the Crown. An inquiry at the expense of the estate for the purpose of discovering the next of kin will not be allowed.

Re Corr, 3 D.L.R. 367, 3 O.W.N. 1177, 21 O.W.R. 798.

Devolution of Estates Act—Caution—Application by administrator for leave to register after expiry of statutory period—Infants—Official guardian—R.S.O. 1914, c. 119, s. 15.

Re Mahler, 7 O.W.N. 752.

Money in court—Payment out—Persons entitled—Absentee—Proof of death—Intestacy.

Re Fitzgerald, 10 O.W.N. 368.

Acceptance of heirship—Possession of effects belonging to succession.

The fact that a son has the custody, public and open, of things belonging to the succession of his father and that he refuses to deliver them to his coheirs, is not an act of acceptance of heirship nor a diversion of these effects which prevents him from abandoning the succession and oblige him to accept it.

Brulotte v. Brulotte, 24 Que. K.B. 398.

Possession of succession—Partnership—Right to judicial abandonment.

A demand for judicial abandonment of property cannot be made to a universal legatee of one of the partners of a commercial firm, if this universal legatee has accepted the estate under the benefit of inventory only, while the delay to make inventory has not yet elapsed. The taking of possession of the property of the succession by means of a "Saisie-conservatoire" by universal legatee does not submit him to a demand of abandonment of property.

Lemesurier v. Mahoney, 47 Que. S.C. 94.

(§ III—32)—Debts of decedent — Payment of debts—Resort to undisposed of personalty.

Re Piper (No. 2), 3 D.L.R. 882, 3 O.W.N. 1377.

Death of son in lifetime of father—Son owing father on promissory note at time of death—Right to deduct amount of note from share of son's children in their grandfather's estate.

A son died in the lifetime of his father leaving children; at the time of his death he owed the father on a promissory note:—Held, that as the son was never entitled to a share in his father's estate because he died before his father, he never had in his hands a part of his father's estate, he only owed his father a debt. His children were not liable for that debt. [Re Akerman v. Akerman, [1891] 3 Ch. 212, distinguished.]

Re Robert Bells Estate, 47 D.L.R. 549, 12 S.L.R. 343, [1919] 2 W.W.R. 924, affirming [1919] 2 W.W.R. 553.

Sale before partition — Redemption — Conditions—Donation.

Taillefer v. Langevin, 39 Que. S.C. 274.

Partition—Hypothec by one co-owner—Implied condition.

Owens v. Chopin, 39 Que. S.C. 213.

Possession of property—Account—Right of action.

Vandry v. Bélanger, 39 Que. S.C. 55.

DESCRIPTION.

See Deeds; Bills of Sale; Chattel Mortgage; Vendor and Purchaser; Specific Performance; Wills.

In policy, see Insurance.

In notice of accident, see Municipal Corporations, 11 G—260.

DESERTION.

See also Militia, Military law.

Annotation.

Desertion from military unit: 31 D.L.R. 17.

From military unit—Evidence.

Under the order-in-council of January 6, 1916, the proof of engagement for overseas service by the soldier charged with being absent without leave is complete on production of the signed enlistment paper and proof that the accused had been passed as fit for military service and that the military unit had been regularly established; and prima facie proof of absence without leave may be made by the production of a letter to that effect from the officer commanding the Military District; it is no answer for the accused to shew at the trial that the age he gave at enlistment as under 45 was incorrect and that he was over that age.

R. v. Poulin, 31 D.L.R. 14, 26 Can. Cr. Cas. 216.

DESTRUCTION OF PROPERTY.

Of deeds, see Deeds.
Of property, see Nuisance.

UNDER STATUTORY AUTHORITY.

No order for destruction of property under the Public Utilities Act is valid unless the interested party has been notified of the application and has been afforded an opportunity of making a defence.

La Compagnie Electrique & Grand'mere v. Public Utilities Commission, 6 D.L.R. 92, 22 Que. K.B. 25.

DETAINER.

See Forcible Entry and Detainer.

DETINUE.

As remedy, see Sale, III A—50.

DEVISE.

See Wills.

DISCHARGE.

Of indorser, see Bills and Notes, III.
Of surety, see Principal and Surety; Guaranty, II.; Bonds.
On habeas corpus, see Habeas Corpus.
Of servant, see Master and Servant, I.
Of mortgage, see Mortgage.

DISCOVERY AND INSPECTION.

I. IN GENERAL; OF DOCUMENTS.
II. PHYSICAL EXAMINATION.
III. SUBMITTING PERSON TO.
IV. BY INTERROGATORIES OR DEPOSITIONS.

Annotation.

Examination and interrogatories in defamation cases: 2 D.L.R. 563.

I. In general; of documents.

See also Depositions.

(§ I—1)—DOCUMENT—LEDGER.

A ledger or other book of account containing accounts relating to transactions between the parties to an action and also other accounts between one of the parties and many other individuals not connected with the issues is not a "document" within the meaning of rr. 364-366 relating to orders for discovery and the affidavit thereon. The person making the affidavit must specify either by existing page numbers or by identification marks placed thereon specially for the purpose the particular pages wherein entries can be found relevant to the matters in issue.

Royal Bank v. Wallis, 41 D.L.R. 383, 13 A.L.R. 416, [1918] 2 W.W.R. 620.

NEGOTIATIONS FOR SETTLEMENT—RIGHT TO DISCLOSURE.

Where fraud is alleged, a party is entitled to disclosure of what took place at negotiations for settlement made "without prejudice" only where the negotiations were for the purpose of committing or furthering fraud, but not where they were innocent. When statements or admissions would, if unqualified, have been pertinent to the issue and the question of their admissibility in evidence turns on the fact that they were made "without prejudice" in negotiations for compromise, they will be ordered disclosed on discovery at the instance of a party who was not a party in the negotiations, but they may not necessarily be allowed in evidence at the trial.

Schetky et al. v. Cochrane, 24 B.C.R. 498, [1918] 1 W.W.R. 821.

PRODUCTION OF DOCUMENTS—MEMORANDUM BOOK OF EMPLOYEE.

In an action for the recovery of the price of wheat alleged to have been delivered by the plaintiff into an elevator belonging to the defendant company held that the manager of the company must produce on examination for discovery a private memorandum book kept by the official in charge of the elevator which contained entries of the receipt of some of the grain in question. [Anderson v. Bank of British Columbia, 2 Ch. D. 644; Jones v. Great Central R. Co., [1910] A.C. 4; Pavitt v. North Metropolitan Tramways Co., 48 L.T. 730, applied.]

Campbell v. Dom. Elevator Co. (Man.), [1918] 1 W.W.R. 938.

Where the pleadings shew that there is no defense to the principal action except by way of counterclaim, the defendant is not entitled to be relieved from making discovery pending the disposal of the counterclaim.

Patterson v. Neill, 1 D.L.R. 22, 3 O.W.N. 516, 20 O.W.R. 887.

SUBPOENA TO COMPEL ATTENDANCE.

Under the Sask. Practice Rules (r. 503), before the person to be examined can be required to attend he must be served with a subpoena; not having been thus served he cannot be committed for a failure to attend.

Proby v. Erratt Co., 31 D.L.R. 342, 9 S.L.R. 378, [1917] 1 W.W.R. 161.

PRODUCTION OF DOCUMENTS BY STRANGER TO ACTION—RULE 350.

An order obtained by the plaintiff, under r. 350, requiring a company (not a party to the action) to produce documents for inspection by the plaintiff before the trial, was set aside. Purpose and scope of the rule explained.

McCurdy v. Oak Tire & Rubber Co., 44 O.L.R. 235.

IN GENERAL—OF DOCUMENTS.

Where a party, having asked for and obtained particulars, and the order was reversed on appeal, and then applied for discovery by interrogatories, the judge at Chambers dismissed the application on the ground that the application was an attempt to gain by another means that which had already been refused:—Held, that the judge was right.

Turner v. Surrey, 16 B.C.R. 349.

EXAMINATION OF DEFENDANT—POSTPONEMENT OF, UNTIL RIGHT TO PARTICIPATE ESTABLISHED—PARTNERSHIP.

Haynes v. VanSickle, 5 O.W.N. 553.

DISCOVERY OF DOCUMENTS—SASK. R. 273 (3)—REQUIREMENT TO GIVE APPLICANT PRIMA FACIE CASE.

In an application under r. 273 (3) a reference to documents in question as "various letters between the plaintiff and the provincial hail commissioner" does not satisfy the requirements of the rule as to the documents being "specified." The applicant has done all that said rule requires, in order to make out a prima facie case, when on oath he pledges his belief that the opposite party at some time had the specified document in his possession and that the same is relevant.

Northern Crown Bank v. Etter, [1919] 1 W.W.R. 140.

(S. I—2)—PRODUCTION OR INSPECTION OF DOCUMENTS.

Under the Con. rr. 1897 (Ont.), it is the duty of a person under examination for discovery to produce, if called upon, all books, papers and documents which he would be bound to produce at the trial.

Re Baynes Carriage Co. (No. 2), 8 D.L.R. 309, 27 O.L.R. 244.

When an affidavit on production of documents has been filed but the correctness of the schedule of documents produced is impeached by the opposite party, an order will be made for a further and better affidavit only when from the first affidavit itself or from the documents therein referred to or from an admission in the pleadings of the party from whom discovery is sought, the court is of opinion that the first affidavit is insufficient. [Jones v. Monte Video Gas Co., 5 Q.B.D. 556, followed. And see Ross on Discovery, 1912, Can. ed., p. 164.]

Irwin v. Jung, 1 D.L.R. 153, 17 B.C.R. 69, 19 W.L.R. 901, 1 W.W.R. 524.

In an action to restrain the author of a biography not yet published from making use of certain literary material, on the ground that the author obtained it from plaintiff by misrepresenting that the views he would propound in the book would not be in adverse criticism of the subject of the biography and on the ground that the work had been so adverse that it had been rejected by the publisher at whose instance it was written, the defendant may be ordered on discovery to deposit in court all extracts and copies of material supplied to him by the plaintiff and to answer interrogatories in regard thereto. [See Ross on Discovery, 1912 ed., pp. 152, 176.]

Lindsey v. LeSueur, 1 D.L.R. 61, 3 O.W.N. 486, 20 O.W.R. 851.

A company examined in discovery by a plaintiff injured in a railway accident will be compelled to produce and file a report of such accident prepared by the company's employees (e.g., motorman or conductor) at the time of the accident when such report is required from them in the ordinary course of their duties; such report being a "document" within the meaning of C.C.P. 289. [Southwark v. Quick, 9 Ruling Cases 587, approved.]

Feigleman v. Montreal Street Ry. Co., 3 D.L.R. 125, 13 Que. P.R. 353.

PRODUCTION OR INSPECTION OF DOCUMENTS CLAIM OF PRIVILEGE—CONFIDENTIAL DOCUMENTS—PREPARATION FOR PURPOSES OF OBTAINING SOLICITOR'S ADVICE.

Imrie v. Wilson (No. 2), 2 D.L.R. 886, 3 O.W.N. 929, 21 O.W.R. 513.

PRODUCTION OR INSPECTION OF DOCUMENTS —ACTION OF LIFE INSURANCE POLICY—ISSUE AS TO AGE OF ASSURED—PRODUCTION OF MARRIAGE CERTIFICATE—RELEVANCY—AFFIDAVIT ON PRODUCTION.

MacMahon v. Ry. Passengers' Ass'ce Co. (No. 2), 2 D.L.R. 912, 3 O.W.N. 1239.

PRODUCTION OR INSPECTION OF DOCUMENTS —ACTION ON JUDGMENT—INQUIRY AS TO PROPERTY OF JUDGMENT DEBTORS—COMPANY—PRODUCTION OF MINUTE BOOKS AND ACCOUNTS.

Carry v. Toronto Belt Line R. Co., 1 D.L.R. 908, 3 O.W.N. 751, 21 O.W.R. 348.

PRODUCTION OR INSPECTION OF DOCUMENTS —EXAMINATION OF OFFICER OF DEFENDANT—SCOPE OF EXAMINATION—PRODUCTION OF BOOKS—EVIDENCE—ADMISSIBILITY.

Canadian Knowles Co. v. Lovell-McConnell, 1 D.L.R. 906, 3 O.W.N. 690.

Information which would otherwise be compellable on an examination for discovery does not become privileged because an affidavit on production has been made, and the information sought would contradict the affidavit, or form a basis for a motion for a better affidavit.

MacMahon v. Ry. Passengers' Ass'ce Co., 5 D.L.R. 423, 26 O.L.R. 430, 22 O.W.R. 196.

In an examination of an officer of a railway company for discovery in an action against the company for personal injuries where a motion was made by the plaintiff to require the production by such officer of certain reports to the company as to the happening of the accident which gave rise to the action, made by its officials who investigated the same, an affidavit as to the privilege of the reports filed by the officer being examined, must clearly and specifically state that they were provided solely for the purpose of being used by the company's solicitor in any litigation which might arise out of such accident and in the absence of such clear and specific statement a further and better affidavit will be directed to be filed.

Swaisland v. G.T.R. Co., 5 D.L.R. 750, 3 O.W.N. 960.

A document or statement of facts prepared by the employees of a company (e.g., conductors and motormen) at the request of the company and ostensibly for the use of the solicitors of the company in case

of litigation is a privileged communication of which the adverse party cannot compel the production at an examination on discovery, notwithstanding that such report was made at a time when no litigation was contemplated and that it was only communicated to the solicitors of the company ten months after the accident. [Feigleman v. Montreal Street R. Co., 3 D.L.R. 125, reversed.] The report is privileged when it appears that the persons making the report prepared it under the impression that it was to be treated as confidential. [Southwark and Vauxhall Water Co. v. Quick, L.R. 3 Q.B.D. 315; Anderson v. Bank of British Columbia, L.R. 2 Ch. D. 644; Bondy v. Valois, 15 Rev. Leg. 63; Hunter v. G.T.R., 16 Ont. P.R. 385, referred to; Collins v. London General Omnibus Co., 68 L.T. 831, followed. See also Swaisland v. G.T.R., 5 D.L.R. 750.]

Montreal Street Ry. v. Feigleman, 7 D.L.R. 6, 14 Que. P.R. 108, 19 Rev. Leg. 45.

An affidavit on production is conclusive, and must be accepted as true by the opposite party, not only as regards the documents that are or have been in the possession of the party making production, and their relevancy, but also as to the grounds stated in support of any claim for privilege from the production, subject, however, to the provisions of a rule of court whereby the court is authorized to judicially determine the question of privilege upon inspection of the document. The object of the provision in the Alberta Supreme Court Rules, permitting the court to inspect any document, for which privilege is claimed upon an application for an order for inspection, is to get rid of the fetters imposed by the old practice, and to give power to determine at once whether the objection sought to be raised is well founded. Where, on an application for an order for inspection of documents, privilege is claimed for any document, the judge applied to should not order the inspection of such document without first exercising his power under the Supreme Court Rules to inspect it himself, in order to see whether the claim for privilege is well founded.

Stapley v. C.P.R. Co., 6 D.L.R. 180, 5 A.L.R. 341, 22 W.L.R. 85, 2 W.W.R. 1010, varying 6 D.L.R. 97.

PRODUCTION — AFFIDAVIT — DEFAULT THROUGH ILLNESS—MOTION TO STRIKE OUT DEFENCE.

The default of a party defendant to make and file his affidavit on production is excused upon a shewing of incapacity through illness, and where the plaintiff, moving to strike out the statement of defence on the ground of such default, suggests no person other than the defendant himself capable of giving the discovery, the motion fails on proof of such incapacitating illness.

Colonial Investment Co. v. Smith, 17 D.L.R. 574, 28 W.L.R. 419.

PRODUCTION OF DOCUMENTS—ACCOUNTING—CONDITION PRECEDENT TO COMPELLING.

Parties suing for alleged breach of fiduciary relationship in a syndicate agreement must establish the alleged breach before they can obtain discovery from the defendants by way of accounting for the reinvestment or profits alleged to have been made by them through the alleged diversion of the trust funds.

Shirk v. Bates, 19 D.L.R. 706, 30 W.L.R. 165, 7 W.W.R. 925.

DOCUMENTS — PRODUCTION OF — ENFORCEMENT—DEFENDANT IMPROPERLY JOINED.

Production of documents will not ordinarily be enforced against a defendant objecting that he is improperly joined as a party until that question is determined.

Lumber Manufacturers' Yards v. Moose Jaw Flour Mills, 20 D.L.R. 781, 7 S.L.R. 437, 30 W.L.R. 580, 7 W.W.R. 876.

DOCUMENTS—PRODUCTION OF—PLACE—DISCRETION OF JUDGE—MAY BE OUTSIDE JURISDICTION.

The place at which documents referred to in an affidavit on production are to be produced for inspection is within the discretion of the judge of first instance, and may, under special circumstances, be a place outside of the jurisdiction. [Bustros v. Bustros, 30 W.R. 374, followed.]

Lumber Manufacturers' Yards v. Moose Jaw Flour Mills, 20 D.L.R. 781, 7 S.L.R. 437, 30 W.L.R. 580, 7 W.W.R. 876.

PARTY RESISTING — RESTRICTIONS — INSUFFICIENCY OF GROUNDS—COSTS.

The party resisting discovery is not restricted to the grounds set forth in his affidavit of documents when an application is made to force him to produce, but the insufficiency of the grounds alleged will be considered on the question of costs.

Lumber Manufacturers' Yards v. Moose Jaw Flour Mills, 20 D.L.R. 781, 7 S.L.R. 437, 30 W.L.R. 580, 7 W.W.R. 876.

ACTION AGAINST COMPANY DIRECTORS FOR FRAUD—PRODUCTION OF AUDITORS' REPORTS—WHEN ORDERED—RELEVANCY—PRIVILEGED COMMUNICATIONS.

London Guarantee v. Henderson, 25 D.L.R. 754, 25 Man. L.R. 726, 9 W.W.R. 268. [See also 23 D.L.R. 38.]

DOCUMENTS—BETTER AFFIDAVIT—IDENTIFICATION—ISSUE AS TO RELEASE—ACCOUNT—RELEVANCY OF DOCUMENTS.

Rundle v. Trusts & Guarantee Co., 11 D.L.R. 845, 4 O.W.N. 1438, 24 O.W.R. 733.

BETTER AFFIDAVIT ON PRODUCTION—PRIVILEGE—REPORTS OBTAINED FOR INFORMATION OF SOLICITOR.

St. Clair v. Stair, 14 D.L.R. 919, 5 O.W.N. 269, affirming 12 D.L.R. 840.

PRODUCTION OF DOCUMENTS—LETTERS WRITTEN "WITHOUT PREJUDICE"—BREACHES OF CONTRACT—SCOPE OF EXAMINATION.

Pearlman v. National Life Ass'ce Co., 39 O.L.R. 141.

PRODUCTION OF DOCUMENTS—COPY CONTAINING LIBEL.

A plaintiff suing for libel alleged to be contained in a letter sent by defendant to plaintiff's employers, which he alleges they have allowed him to see but not to copy, and setting out the letter in his statement of claim as well as he can remember it, cannot under rr. 489, 490, 491 of the King's Bench Act, upon a motion made prior to the trial, to amend the statement of claim by substituting an exact copy of the letter, compel the production of the document before the referee by a witness subpoenaed to attend on such motion and to produce such document, although such witness admits on oath that he is an officer of the employer and that as such he has in his possession a letter or writing referring to the plaintiff and signed by the defendant. So held by the Court of Appeal but without prejudice to the right of the plaintiff to apply at the trial to amend.

Poppitt v. Bowes, 27 Man. L.R. 616, [1917] 2 W.W.R. 194.

PRODUCTION OF DOCUMENTS—PLACE.

The discretion of a local Master in ordering a place for production ought not to be lightly interfered with. Held, upon the facts, that the proper place for inspection of documents in an action pending in the judicial district of Moose Jaw was at the office of the solicitor on the record in Regina.

Port Huron v. Gwin, 10 S.L.R. 60, [1917] 1 W.W.R. 1310.

PRODUCTION OF DOCUMENTS AND EXAMINATION OF PARTIES—ACTION FOR POSSESSION AND MESNE PROFITS — PRELIMINARY ISSUE AS TO RIGHT OF POSSESION —POSTPONEMENT OF DISCOVERY AS TO MEASURE OF MESNE PROFITS—RULE 352 —COSTS.

Jarvis v. Keith, 9 O.W.N. 138.

PRODUCTION OF DOCUMENTS—EXAMINATION OF DEFENDANT—POSTPONEMENT OF DISCOVERY UNTIL LIABILITY TO ACCOUNT ESTABLISHED.

Foster v. Ryckman, 7 O.W.N. 665.

FURTHER PRODUCTION AND EXAMINATION—NOT RELEVANT TO ISSUE.

Davison v. Thompson, 4 O.W.N. 396, 23 O.W.R. 888.

MOTION FOR BETTER AFFIDAVIT—GROUNDS FOR.

Hay v. Coste, 4 O.W.N. 831, 24 O.W.R. 116.

EXAMINATION OF OFFICERS OF PLAINTIFF COMPANY — PRODUCTION OF BOOKS — AFFIDAVIT ON PRODUCTION—PRACTICE.

North American Exploration Co. v. Greene, 4 O.W.N. 1142, 24 O.W.R. 449.

MOTION FOR BETTER AFFIDAVIT FROM DEFENDANT COMPANY—DEALING IN SHARES—CONTRACT.

Jarvis v. Lamb, 4 O.W.N. 945, 24 O.W.R. 220.

PRODUCTION SOUGHT OF DOCUMENTS NOT RELEVANT TO CASE MADE ON PLEADINGS — LEAVE TO AMEND — FURTHER DISCOVERY.

Antiseptic Bedding Co. v. Gurofsky, 4 O.W.N. 1221, 24 O.W.R. 493.

IMPEACHING AFFIDAVIT OF DOCUMENTS — EXAMINATION FOR DISCOVERY — FURTHER AND BETTER AFFIDAVITS.

Phillips v. Lawson, 23 O.W.R. 965.

PRODUCTION OF DOCUMENTS — AFFIDAVITS — INFORMATION OBTAINABLE ON EXAMINATION OF PARTIES.

Kennedy v. Kennedy, 4 O.W.N. 1560, 24 O.W.R. 875.

DEPOSIT OF DOCUMENTS — PRODUCTION.

Grills v. Canadian General Securities Co., 4 O.W.N. 982, 1223, 24 O.W.R. 547.

PRODUCTION OF DOCUMENTS — AFFIDAVIT ON PRODUCTION — RIGHT TO CONTRADICT.

Forbes v. Davison, 11 O.W.N. 61, 86.

PRODUCTION OF DOCUMENTS — PLANS — ACCOUNTING FOR DOCUMENTS WHICH HAVE PASSED OUT OF POSSESSION OF PARTY — DOCUMENTS IN HANDS OF PARTY SEEKING PRODUCTION.

Wardlaw v. West Rydal; Pearson v. West Rydal, 10 O.W.N. 385.

ALIMONY — PRODUCTION OF DOCUMENTS BY DEFENDANT TO SHEW ASSETS — PRELIMINARY QUESTION OF LIABILITY — TRIAL OF, BEFORE QUANTUM OF ALIMONY ASCERTAINED — REFERENCE.

Whimbey v. Whimbey, 12 O.W.N. 229.

EXAMINATION OF DOCUMENTS — CROSS-EXAMINATION OF BY GARNISHEE—C.P. 591.

If a garnishee has, in his examination, referred to certain documents, the court may order the production of such documents that the seizing party may examine them.

Major v. Birchenough, 16 Que. P.R. 239.

PRODUCTION OF DOCUMENTS — AFFIDAVIT — PRESUMPTION OF POSSESSION.

A party who has made an affidavit of documents cannot be ordered to make a further affidavit, unless there is upon the face of the affidavit itself or of the documents referred to in it or in his pleadings or by his admission something raising a presumption that he has in his possession other relevant documents in addition to those of which he has admitted possession.

Farrer v. Kelso, [1917] 2 W.W.R. 1024.

PRODUCTION OF DOCUMENTS — DESCRIPTION.

The least description of a bundle of documents for which privilege is claimed which would be sufficient for the purposes of an affidavit on production of documents should give the number of the documents and every one of them should be stated to be initialed by the deponent or, in the case of a company, by some person connected with the office of the company.

Wortman v. C.N.R., 35 W.L.R. 428.

DOCUMENTS — AFFIDAVIT — DESCRIPTION.

An affidavit on production of document is

insufficient if it describes them a "bundle," etc., and not by separate description.

Morse v. Moore Bros., 10 W.W.R. 966.

PRODUCTION OF DOCUMENTS RETAINED IN SOLICITOR'S OFFICE — INCRIMINATION —PROTECTION—AFFIDAVITS.

A custom for solicitors to retain in their own offices the documents produced by their clients and there to permit inspection of such documents is insufficient to warrant a disregarding of the express terms of r. 425 directing a deposit with the proper officer. An order for production omitting the direction to deposit is insufficient whereon to ground an application for attachment or the striking out of a defence. A man is entitled to protect himself by refusing to answer questions, or to produce documents which might tend to incriminate him, but must in doing so satisfy the court or judge that under the circumstances of the particular case an answer of production might have that tendency. On a motion for production of documents disclosed in the affidavit of documents and for which the party has insufficiently claimed protection, he is, as a rule, allowed to file further affidavits for the purpose of shewing that they ought to be protected.

Att'y-Gen'l v. Kelly (No. 2), 9 W.W.R. 863, 33 W.L.R. 233. [Appeal dismissed March 16, 1916.]

ACCIDENT REPORTS IN RAILWAY CASES — PRIVILEGE.

An affidavit of documents objecting to produce "all reports, letters, documents, or plans prepared or written for the city solicitor for the purpose of assisting him in defending the action," is insufficient. The reports should be specified together with the names of the officers who made them, so as to enable the court to decide whether they should be produced or whether they are privileged. Where reports of an accident are made by railway employees in the regular course of their duty, such reports are not privileged, but where they are made for the information of the solicitor of the railway company, for his advice thereon, or to enable him to defend an action, either actually brought or contemplated, they are privileged.

United Motor Co. v. Regina, 8 W.W.R. 185.

(§ I—3)—OF REALTY — INSPECTION OF MINE — RELEVANCY — PLEADING.

Jackman v. Worth, 4 O.W.N. 1220, 24 O.W.R. 506.

SERVICE OF WRIT OF SUMMONS — CON. RR. 223 AND 224 — PRESUMPTION THAT PARTY SERVED A PARTNER — PARTNERSHIP DENIED — EXAMINATION FOR DISCOVERY.

Telfer v. Dun, 2 O.W.N. 1146, 19 O.W.R. 298, reversing 2 O.W.N. 1126.

EXAMINATION OF DEFENDANT — NEGOTIATIONS CAUSED ADJOURNMENT SINE DIE—DUTY OF DEFENDANT.

Horton v. Maclean, 2 O.W.N. 1493, 19 O.W.R. 891.

APPLICATION TO COMPEL PRODUCTION OF REPORT OF AN ACCIDENT MADE IMMEDIATELY AFTER ITS OCCURRENCE.

[Betts v. G.T.R. Co., 12 P.R. 86, 634, distinguished.]

Yonhocus v. Canada Foundry Co., 3 O.W.N. 44, 19 O.W.R. 966.

FURTHER EXAMINATION OF DEFENDANT—OBJECTION TO PRODUCE DOCUMENTS AS PRIVILEGED—ASSIGNMENT—COMMISSION IN LIEU OF COSTS.

Clarke v. Bartram & O'Kelly Mines, 19 O.W.R. 153, 2 O.W.N. 1056.

HUSBAND AND WIFE—ORDER FOR DISCOVERY —INABILITY TO SERVE ON FEMALE DEFENDANT—DEFAULT.

Langhan v. Isaacson, 16 B.C.R. 321.

EXAMINATION OF DEFENDANT — NO CASE MADE AGAINST DEFENDANT ON STATEMENT OF CLAIM—REFUSAL TO ANSWER QUESTIONS.

Winnipeg Granite and Marble Co. v. Bennetto, 19 W.L.R. 567, 21 Man. L.R. 743.

INSPECTION OF BUILDING—SHORT NOTICE—PRACTICE — JURISDICTION OF DEPUTY COUNTY COURT JUDGE.

Keyes v. McKeon, 23 O.L.R. 529, 18 O.W.R. 593.

EXAMINATION OF PLAINTIFF FOR DISCOVERY —PRIVILEGE — MALICE — SCOPE OF QUESTIONS.

Klenman v. Schmidt, 18 W.L.R. 393.

REPORTS OF EMPLOYEE TO THE COMPANY AND ITS ATTORNEY CONCERNING AN ACCIDENT—PRIVILEGED COMMUNICATIONS.

Beardsell v. Montreal Str. Ry. Co., 13 Que. P.R. 152.

II. Physical examination.

(§ II—5)—NUISANCE—GLUE AND FERTILIZER FACTORY—INSPECTION BY WITNESSES AND EXPERTS.

The plaintiffs alleged that the business carried on by the defendants in their glue and fertilizer factory constituted a nuisance, and that the defendants were negligent in the operation of their factory and plant; and the plaintiffs claimed an injunction and damages: Held, that the plaintiffs were entitled to an order, under rr. 266, 370, for the inspection (before the trial of the action) of the defendants' factory by the plaintiffs' witnesses and experts. [Barlow v. Baley, 18 W.R. 783, distinguished.]

Danforth Glebe Estate v. Harris & Co., 39 O.L.R. 553. [See 12 O.W.N. 189.]

(§ II—7)—GROUNDS FOR REFUSING—POSTPONEMENT OF TRIAL—ACTION FOR DAMAGES FOR PERSONAL INJURIES.

Barber v. Sandwich, Windsor & Amherstburg R. Co., 1 D.L.R. 919, 3 O.W.N. 809.

MOTION FOR MEDICAL EXAMINATION OF PLAINTIFF—CON. RR. 442, 462.

Kippen v. Baldwin, 3 O.W.N. 121, 20 O. W.R. 263.

IV. By interrogatories or depositions.

(§ IV—20)—Where the issue raised is whether, as charged by the plaintiff, a purchase contract for land had been assigned by way of loan to enable the assignee to pledge the same to a third party, such assignee concurrently transferring to the assignor of the land contract certain company shares as security for the return of the purchase contract, or whether, as claimed by defendant, the transfer of the latter was made absolutely in exchange for the shares, but no concealment, misrepresentation or fraud is charged against the defendant, the value of the shares as known to the parties at the time of the transaction may be relevant so as to form a subject of examination of defendant for discovery, but the fact of whether or not the shares were fully paid up and whether the defendant had paid anything on the shares is not relevant and the defendant will not be compelled to answer on discovery in regard to the latter points, although his pleading described the shares as "fully paid up." On examination for discovery under the Manitoba King's Bench Rules of 1902, rr. 387, 395, the plaintiff may question the defendant under oath not only as to facts which would go to prove the plaintiff's case, but by way of cross-examination to obtain statements or admissions from the defendant which would tend to displace the defence pleaded.

Morrison v. Rutledge, 8 D.L.R. 325, 22 Man. L.R. 645, 22 W.L.R. 364, 3 W.W.R. 121.

The opposite party may, upon an examination for discovery, be asked as to what relevant documents are in his custody or power, notwithstanding that his affidavit of documents already filed contains no reference to the documents forming the object of the examination. [MacMahon v. R. Passenger Ins. Co., 5 D.L.R. 423, approved.]

Stapley v. C.P.R. Co., 6 D.L.R. 97, 5 A.L.R. 391, 22 W.L.R. 1, 2 W.W.R. 894.

PERSONS FOR WHOSE IMMEDIATE BENEFIT ACTION PROSECUTED—CON. R. 440—AFFIDAVIT—INSUFFICIENCY.

Aikens v. McQuire, 6 D.L.R. 864, 4 O.W. N. 132, 23 O.W.R. 98.

Where plaintiff has put in evidence certain questions and answers from the defendant's examination for discovery, and defendant's counsel asks to read and does read certain other questions and answers which he says are explanatory, these questions can only become evidence if they are explanatory of what has already been put in, and if the Trial Judge, finding that they are not explanatory, does not direct that they be read in evidence, they are not before the court on appeal and cannot be looked at.

Washburn v. Robertson, 8 D.L.R. 183, 3 W.W.R. 209.

BY INTERROGATORIES OR DEPOSITIONS — ACTION FOR PRICE OF GOODS—COUNTERCLAIM—INFERIOR QUALITY OF GOODS — PARTICULARS OF SALES AND RETURN OF GOODS BY CUSTOMERS.

Canadian Oil Co. v. Clarkson, 3 D.L.R. 873, 3 O.W.N. 1331, 22 O.W.R. 230.

Upon a motion to compel answers upon an examination for discovery the pleadings and particulars are to be treated as the basis of the inquiry to be made as to whether the questions asked are relevant to the issues, and if objection is to be taken to the particulars or pleadings it must be done by substantive motion. In an action for slander upon a member of the governing body of a municipality in respect of his fitness for such membership, questions upon the examination of the plaintiff for discovery touching his general character, competence, capacity and ability are relevant and must be answered.

Brown v. Orde, 2 D.L.R. 562, 3 O.W.N. 1230.

BY DEPOSITION—ADMISSIBILITY—BY WHOM INTRODUCED—AFTER DEPONENT'S DEATH.

Where the original plaintiff to an action was examined before trial by the defendant for discovery, the plaintiff's executors continuing the action on his death cannot give such depositions in evidence on their behalf unless the defendant has first used them.

Cartwright v. Toronto, 20 D.L.R. 189, 50 Can. S.C.R. 215, 50 C.L.J. 585, affirming 13 D.L.R. 604, 29 O.L.R. 73.

WILL CONTEST—INTERROGATORIES AND DEPOSITIONS—EXAMINATION BEFORE TRIAL.

An executor who has obtained probate in the Surrogate Court will not be compelled in an action brought in a Superior Court to set aside the will and probate thereof on the ground of the testator's mental incapacity to answer questions on an examination for discovery relating solely to a possible accounting in case the will and probate should be set aside; the plaintiff must establish that the will is invalid before he is entitled to discovery upon an accounting, in which otherwise he would have no interest. The examination of the opposite party for discovery before trial must be limited to matter relevant to the issues raised by the pleadings but subject thereto it has the same scope as a cross-examination at the trial.

Carney v. Carney, 15 D.L.R. 267, 6 S.L. R. 373, 26 W.L.R. 398, 5 W.W.R. 849.

RELEVANCY OF INTERROGATIONS UNDER PLEADINGS.

The right to discovery is limited to matters relevant to the case set up in the

pleadings. [Hennessy v. Wright, 24 Q.B.D. 445, followed.]

Playfair v. Cormack, 9 D.L.R. 455, 4 O.W.N. 817, 24 O.W.R. 56, reversing 4 O.W.N. 647, 23 O.W.R. 783.

Refusal to be sworn — Objection on ground of privilege from answering.

An objection by defendant to being examined for discovery in an action upon the forfeiture clause in a land contract claiming the cancellation of the contract and forfeiture of the money paid thereunder, is prematurely taken when the defendant refused to be sworn on the ground that the action was one to enforce a penalty or forfeiture; the objection of privilege, if available upon the facts, is to be raised not by refusing to be sworn, but by afterwards taking objection to any particular question put to him and obtaining a ruling thereon as provided by r. 294 of the Saskatchewan Con. r. 1911.

Bartleman v. Moretti, 9 D.L.R. 805, 23 W.L.R. 533, 4 W.W.R. 132.

Interrogatories and oral examination.

The rights of discovery by interrogatories and by oral examination, given by the Manitoba rules, are cumulative. [Timmons v. National Life Assurance Co., 19 Man. L.R. 139, and 227, applied.]

Baskin v. Linden, 17 D.L.R. 21, 24 Man. L.R. 352, 28 W.L.R. 130.

Beneficial parties — Examination of beneficiaries and distributees.

A person entitled to a distributive share as a beneficiary of the estate of an intestate is not a person for whose "immediate benefit" an action is prosecuted by the administrator to recover from a third party funds alleged to be the property of the estate, and such beneficiary therefore cannot be examined for discovery under r. 334, Ont. C.R. 1913. [Stow v. Currie, 14 O.W.R. 223, followed; Macdonald v. Norwich Union Ins. Co., 10 P.R. (Ont.) 462; Garland v. Clarkson, 9 O.L.R. 281, distinguished.]

Trusts and Guarantee Co. v. Smith, 21 D.L.R. 711, 33 O.L.R. 155.

Definiteness of persons named — Employees.

Under the Alberta Practice Rules (rr. 225, 234) an order for examination for discovery must plainly designate the person to be examined. The words "any person who is or has been employed by the defendant company" are too general and should be struck out.

McLean v. C.P.R., 28 D.L.R. 550, 12 A.L.R. 61, 34 W.L.R. 843, 10 W.W.R. 949.

Corporation — Mistake — Amendment — New trial.

An answer to an interrogatory by a defendant, as long as it remains unamended, is an admission of fact binding on him; answers to interrogatories by corporations are to be made after full inquiries and investigation as required by the rules; where a jury is misled in its verdict by a mistake of the defendant in answering an interrogatory, a new trial will be ordered to enable the defendant to amend and reframe the answers.

Pyne v. C.P.R. Co., 37 D.L.R. 751, 28 Man. L.R. 266, [1917] 3 W.W.R. 836.

Order for further examination — Stay of proceedings until plaintiff's return from abroad.

MacMahon v. R. Passengers' Ass'ce Co., 3 D.L.R. 892, 3 O.W.N. 1514.

In an action upon an accident insurance policy upon the life of the plaintiff's mother, where one of the defences is misrepresentation as to the age of the deceased, the plaintiff, on his examination for discovery, must answer questions as to the marriage certificate of his parents, which may be material in determining the age of the deceased, notwithstanding the fact that no mention of any marriage certificate has been made in his affidavit on production. [Dryden v. Smith, 17 P.R. 500, distinguished.]

MacMahon v. R. Passengers' Ass'ce Co. (No. 2), 5 D.L.R. 423, 26 O.L.R. 430, 22 O.W.R. 196.

Discovery is in aid of the case as pleaded, and the examining party has no right to interrogate for the purpose of finding out something of which he knows nothing now, and which may enable him to present a case of which he has no knowledge, and which he has not set up in his pleadings.

Carter v. Foley-O'Brien Co., 5 D.L.R. 28, 3 O.W.N. 888.

One, who, subject to the approval of a company, solicits orders and sells machinery for it, and receives a commission on all sales effected by him, is an "officer" of the company, within the meaning of Sask. r. 201, which permits the examination of the officers of a company for discovery, since the word "officer" must receive a wide interpretation. [Powell v. Edmonton, Y. & P.R. Co., 2 A.L.R. 339, followed.]

Nichols & Shepard Co. v. Skedanuk, 4 D.L.R. 450, 5 A.L.R. 110, 21 W.L.R. 401, 2 W.W.R. 359.

Where relevant information for discovery to the opposite party in a damage action is specially within the knowledge of the plaintiff company's former agent and not of their present manager, the court may direct that the plaintiffs shall either produce the former agent for discovery or, in the alternative, that the plaintiff company's manager attend for further examination for discovery after having applied to the former agent for the information and thereupon disclose the information so obtained. [Bolckow v. Fisher, 10 Q.B.D. 161, distinguished.]

Ont. & Western Co-operative Fruit Co. v. Hamilton, G. & B. R. Co., 1 D.L.R. 485, 21 O.W.R. 82.

Under the Sask. rr. 278, 279 (1911), a

person who is or has been an officer of a company may be examined for discovery in an action against that company, but a former foreman or employee not being an officer cannot be examined after the employment has terminated.

Toronto General Trusts v. Municipal Construction Co., 1 D.L.R. 552, 5 S.L.R. 126.

EXAMINATION OF DEFENDANT — LIBEL — QUESTIONS AS TO SIMILAR STATEMENTS —PRIVILEGE.

Meyer v. Clarke, 1 D.L.R. 927, 3 O.W.N. 893.

EXAMINATION OF FOREIGN DEFENDANT ON COMMISSION—ONT. R. 477—PAYMENT OF CONDUCT MONEY TO BRING DEFENDANT TO ONTARIO.

Allen v. Grand Valley R. Co., 1 D.L.R. 903, 3 O.W.N. 687.

DEFAULT — FAILURE TO JUSTIFY—ONT. R. 454—ORDER FOR PLAINTIFF TO ATTEND AT HIS OWN EXPENSE.

Rogers v. National Portland Cement Co., 6 D.L.R. 858 and 909, 4 O.W.N. 217 and 299, 23 O.W.R. 218.

RELEVANCY OF QUESTIONS—SCOPE OF EXAMINATION—PRODUCTION OF DOCUMENT.

Stewart v. Henderson, 6 D.L.R. 862, 4 O.W.N. 166, 23 O.W.R. 135.

OBJECTION TO BE SWORN—PRESENCE OF OPPOSITE PARTY.

Loper v. Cairns, 7 D.L.R. 913, 3 W.W.R. 37.

SALE OF WHEAT—DESTRUCTION BY FIRE—LOSS, BY WHOM BORNE—PROPERTY PASSING—SCOPE OF EXAMINATION—RELEVANCY OF QUESTIONS—FORMER DEALINGS BETWEEN PARTIES.

Inglis v. Richardson, 5 D.L.R. 880, 4 O.W.N. 23, 22 O.W.R. 977.

PLACE FOR EXAMINATION—RESIDENCE OF DEFENDANT—ONT. RR. 447, 477.

Denneen v. Wallbert, 3 D.L.R. 891, 3 O. W.N. 1511.

DEPOSITIONS—EXAMINATION BEFORE TRIAL —DISCRETION OF COURT.

Coxall v. Parsons Bldg. Co., 10 D.L.R. 805, 23 W.L.R. 529.

REFUSAL TO ANSWER QUESTIONS—IRRELEVANCY—NOTICE OF MOTION TO DISMISS ACTION—FAILURE TO SPECIFY QUESTIONS.

Clark v. Robinet, 10 D.L.R. 826, 4 O.W. N. 1092, 24 O.W.R. 399.

EXAMINATION OF CODEFENDANT—"PARTY ADVERSE IN INTEREST"—ACTION TO ESTABLISH WILL—BENEFICIARIES.

Menzies v. McLeod, 25 D.L.R. 777, 34 O.L.R. 572.

EMPLOYEES—OFFICER OF CORPORATION.

An employee or officer of a corporation examined for discovery, cannot be compelled to give information acquired by him outside of his employment; the fact that an official has no personal knowledge of matters upon which information is desired is no ground for substituting another who has no knowledge acquired in a way which would make it available for the plaintiff on discovery.

Lea v. Medicine Hat, 35 D.L.R. 109, 11 A.L.R. 380, [1917] 2 W.W.R. 789. [See also 37 D.L.R. 1.]

PARTY RESIDENT OUT OF PROVINCE—COUNTERCLAIM—PERSON FOR WHOSE BENEFIT ACTION BROUGHT—ASSIGNOR.

An order for the examination in Ontario of a person resident out of Ontario who was not a party to the action, but made a defendant by counterclaim, was varied so as to confine it to examination for discovery as to the counterclaim. The only cases in which an examination for discovery of a person resident out of Ontario may be had are those specifically provided for by rr. 328, 329. Examination for discovery of a person for whose benefit an action is brought and of the assignor of a chose in action, can be had only when the person is in Ontario and can be served with a subpoena: Rule 345 (2).

Stockbridge v. McMartin, 38 O.L.R. 95.

PRACTICE—DIVORCE—APPLICATION FOR SECURITY FOR COSTS—AFFIDAVIT IN SUPPORT—APPLICATION TO CROSS-EXAMINE ON.

On a petition for dissolution of marriage where there is a charge of adultery, neither the respondent, corespondent nor the petitioner, even where there is a counter charge, is bound to answer any question tending to prove him or her guilty of adultery.

Rogers v. Rogers, 25 B.C.R. 439.

COMMISSION TO EXAMINE PLAINTIFF—NECESSARY AND MATERIAL WITNESS—MATERIALITY OF EVIDENCE—TERMS ON WHICH ORDER WILL BE MADE—SECURITY FOR COSTS.

Stewart v. Henderson, 4 O.W.N. 355, 23 O.W.R. 414.

DISCOVERY—FURTHER AFFIDAVIT ON PRODUCTION — INSUFFICIENT MATERIAL—INSPECTION OF CAR.

Ramsay v. Toronto R. Co., 4 O.W.N. 420, 23 O.W.R. 513.

EXAMINATION OF DEFENDANTS—RELEVANCY OF QUESTIONS — PLEADING — AMENDMENT.

Gascoyne v. Dinnick, 4 O.W.N. 1563, 24 O.W.R. 865.

EXAMINATION OF DEFENDANT—AMENDMENT OF STATEMENT OF CLAIM—FURTHER EXAMINATION.

Becher v. Ryckman, 4 O.W.N. 848, 24 O. W.R. 108.

EXAMINATION OF DEFENDANT—OFFICER OF COURT—PLACE OF EXAMINATION—EXPENSE.

Jordan v. Jordan, 4 O.W.N. 1484, 24 O. W.R. 842.

EXAMINATION OF PLAINTIFF—ACTION TO SET ASIDE AGREEMENTS — ALLEGATION OF PHYSICAL AND MENTAL INCAPACITY OF PLAINTIFF—ORDER FOR ATTENDANCE OF PLAINTIFF AT HIS OWN HOUSE—PRESENCE OF MEDICAL ADVISER.

Smith v. Stanley Mills Co., 4 O.W.N. 1269, 24 O.W.R. 510.

EXAMINATION OF PLAINTIFF — GENERAL QUESTIONS—RELEVANCY.

Wilson v. Suburban Estate Co., 4 O.W.N. 679, 23 O.W.R. 968.

JUDGMENT DEBTOR — EXAMINATION OF — SCOPE OF INQUIRY — REFUSAL TO ANSWER AS TO ASSETS REMOVED TO ANOTHER PROVINCE—RULES 580, 587—ORDER FOR FURTHER EXAMINATION—REFUSAL OF LEAVE TO APPEAL.

McGuinty v. Hamer, 8 O.W.N. 228.

EXAMINATION OF PARTIES—SCOPE OF—LIMITATION OF CASE MADE ON PLEADINGS—FOUNDATION FOR AMENDMENT.

Clarke v. Robinet, 8 O.W.N. 263.

EXAMINATION OF PERSON FOR WHOSE BENEFIT ACTION PROSECUTED—RULE 334—ACTION BY TRUSTEE FOR CREDITORS—EXAMINATION OF MEMBER OF CREDITOR FIRM.

Argles v. Pollock, 12 O.W.N. 158.

EXAMINATION OF DEFENDANT—REFUSAL TO ANSWER QUESTIONS — VALIDITY OF AGREEMENT SET UP BY AGENT AND TRUSTEE—REFUSAL OF APPLICATION FOR TRIAL OF PRELIMINARY ISSUE AND POSTPONEMENT OF DISCOVERY.

Imperial Trusts Co. v. Jackson, 12 O.W.N. 126, 127.

EXAMINATION OF DEFENDANT—REFUSAL TO ANSWER QUESTIONS—ORDER STRIKING OUT DEFENCE.

Link v. Thompson, 11 O.W.N. 282, 390. [See also 12 O.W.N. 338.]

EXAMINATION OF DEFENDANT—SCOPE OF—INFORMATION OBTAINABLE FROM STRANGERS TO ACTION—EXAMINATION OF PERSONS FOR WHOSE BENEFIT ACTION SAID TO BE DEFENDED—RULE 334—PERSONS LIVING OUT OF ONTARIO.

Jarvis v. Jaffray, 16 O.W.N. 97.

PRACTICE—ORDER FOR ATTENDANCE OF EXAMINATION FOR DISCOVERY—DEFAULT—DISMISSAL OF ACTION—PLAINTIFF ABSENT OUT OF THE JURISDICTION—SOLICITOR FOR PLAINTIFF UNABLE TO FIND HIM—RULES 328, 337.

Campbell v. Lennox, 17 O.W.N. 179.

EXAMINATION FOR DISCOVERY—EXTRA-TERRITORIAL SERVICE—REGULARITY—WAIVER.

The omission to serve upon the party to be examined a copy of the order for examination for discovery outside the jurisdiction and, upon his solicitor, a copy of the appointment, are irregularities which would justify the party to be examined in refusing to attend on the examination. [Senn v. Hewett, 8 P.R. 70, applied.] Attendance by such party at the examination for the purpose of objecting to the proceedings, together with the fact that he was sworn (but not until after he had objected to the proceedings), does not amount to a waiver of the irregularities. Where it is very inconvenient to serve the appointment on the solicitor of the party to be examined, the order should provide that such solicitor should furnish the solicitor of the other party with the name and address of his agent at the place where the examination is to be conducted and that such agent should be served with the appointment. If a party resides outside the jurisdiction and comes temporarily within Saskatchewan his attendance for examination can only be obtained by an order under r. 285, and not by appointment under r. 283. If a party resides within Saskatchewan, he can only be examined at the office of the local registrar nearest to the place where he resides, unless special reasons are shewn why he should not be. A second examination for discovery can only be held by leave of the court.

Dickson v. Gibbons, 6 W.W.R. 517, 27 W. L.R. 731.

The defendant had answered interrogatories sur faits et articles. He refused to sign his answers and wished to substitute a document prepared by his attorney. This was rejected and he appeared again to answer. Some of his replies contradicted those he had formally given:—Held, that this was not a sufficient reason to allow the plaintiff's attorney to put supplementary questions.

Riordan v. McLeod, 13 Que. P.R. 266.

A party summoned to answer interrogatories sur faits et articles may make use of written answers which he prepared beforehand.

Phelan v. Coutlee, 13 Que. P.R. 239.

OFFICER OF CORPORATION.

The party who summons his opponent, or the latter's manager if it is a company, for examination on discovery should give notice thereof to the adversary's attorney. Permission of the court is necessary for examination of a party or his representative on discovery more than once, and special reasons should be given for obtaining it. Quære, is it permissible to examine on discovery the general manager of a company who resides in Ontario after having examined the local or provincial manager who resides in Quebec?

Durand v. Excelsior Life Ins. Co., 14 Que. P.R. 243.

The party who summons his opponent to be examined on discovery should give notice of such summons to the latter's attorney.

Ottawa Wine Vaults Co. v. Larche, 15 Que. P.R. 21.

BY INTERROGATORIES OR DEPOSITIONS.

A party will be allowed to answer interrogatories sur faits et articles even after an

order to enter judgment if the delay is justified.

O'Brien v. Quebec & Saguenay R. Co., 14 Que. P.R. 177.

COMPANY EMPLOYEE—PRODUCTION OF DOCUMENTS.

In an action against a corporation the employee most fitted to give information may be examined on discovery, whatever his title. The production of a report prepared by the employees of a corporation for the use of its attorneys cannot be demanded.

Savignac v. Montreal Tramways Co., 18 Que. P.R. 360.

PLAINTIFF RESIDING ABROAD—PLACE FOR EXAMINATION—"JUST AND CONVENIENT."

One of the paintiffs, in an action brought in the Supreme Court of Ontario, resided in New York, and an order was made, under r. 328, requiring him to attend in Toronto for examination for discovery at the instance of the defendants. On appeal the order was varied so as to provide for the examination taking place in New York. Ordinarily the place of residence of the person to be examined is the proper place for his examination; in this case no special circumstances were suggested; and it seemed "just and convenient" (r. 328) that the examination should take place in New York.

Duell v. Oxford Knitting Co., 42 O.L.R. 408.

EXAMINATION OF DEFENDANT—DISCLOSURE OF NAME OF PERSON TO WHOM PRINTED COPIES OF LIBELOUS DOCUMENT GIVEN—RE-EXAMINATION OF DEFENDANT—REFUSAL TO ANSWER—MOTION TO COMMIT—FORUM—ORDER FOR FURTHER ATTENDANCE—COSTS.

Hays v. Weiland, 14 O.W.N. 189. [See 43 D.L.R. 137, 42 O.L.R. 637.]

EXAMINATION OF PERSONS FOR WHOSE BENEFIT ACTION DEFENDED—RULE 334.

Patterson v. Toronto General Trusts Corporation, 15 O.W.N. 42.

RIGHT OF DEFENDANT—LEAVE.

Until the defence has been delivered the defendant is not entitled to examine for discovery without leave.

Mitchell v. Renfrew, [1918] 1 W.W.R. 942.

DEMAND OF NOTICE—ISSUE OF DAMAGES.

An examination for discovery may be ordered in an action wherein no defence, but only a demand of notice, has been delivered, and the only issue to be determined is the amount of damages.

Bowen v. C.N.R., [1918] 1 W.W.R. 417.

INFORMATION BY EMPLOYEE—RIGHT TO COMPEL ANSWERS.

In an action by a purchaser to set aside an agreement for sale, held that the defendant must answer an examination for discovery certain questions in regard to information obtained by him from his employee who conducted the transaction with the plaintiff.

Burns v. Henderson, [1918] 1 W.W.R. 885.

DUTY OF EXAMINEE—INFORMATION—DISCLOSURE.

A party on examination for discovery is bound to make reasonable efforts to inform himself of all matters material to the issue, and to disclose such information.

Bondar v. Usinovitch, 11 S.L.R. 64, [1918] 1 W.W.R. 557.

MORTGAGE—DISCOVERY AFTER JUDGMENT.

Where judgment is obtained on a mortgage the mortgagor may be required under r. 634, to attend for examination, notwithstanding the fact that, because of subs. 2 of s. 62 of the Land Titles Act, execution of the judgment is stayed.

Franco Belgium Investment Co. v. McNamara, [1918] 2 W.W.R. 929.

EXAMINATION OF WITNESS ABOUT TO LEAVE PROVINCE.

A witness who is ill, or about to leave the province, may be examined any time after the service of the summons and before the return of the writ.

Forest v. Montreal Tramways Co., 19 Que. P.R. 257.

FOREMAN—WORKMEN'S COMPENSATION ACT.

In an action under the Workmen's Compensation Act, the employer's foreman may be examined for discovery.

Stychlinsky v. Can. Steel Foundries, 20 Que. P.R. 131.

EXAMINATION AFTER JUDGMENT.

A creditor has a right to interrogate his debtor from time to time as to his property, and the latter cannot escape from the order by saying that he has already been interrogated, or that other means of execution have been taken against him.

Tracey v. Pariseau, 19 Que. P.R. 18.

EXAMINATION AFTER JUDGMENT—ILLNESS OF DEBTOR.

An attorney for a party to an action is functus officio as soon as judgment has been given. An attorney, who appears on a rule nisi issued against his client, is not entitled to a notice, if his client is later examined under art. 590 C.C.P. An application may be made to examine, after judgment, a debtor sick at his home, without being bound to notify him of such application. Even if such examination disturbs the debtor, the creditor exercising the right is not liable for damages.

Asselin v. Ducharme, 19 Que. P.R. 374.

DISCOVERY—SECURITY TO DEFENDANT ATTACKED AS FRAUDULENT AGAINST CREDITORS—REFUSAL OF DEFENDANT ON EXAMINATION TO STATE WHAT SECURITIES RECEIVED—RIGHT TO DISCOVERY.

The greatest latitude should be allowed to a party who is examining an adverse party for discovery so that the fullest inquiry may be made as to all matters which can possibly affect the issues between the par-

ties. In examination for discovery in an action alleging execution of an assignment and power of attorney in favour of defendant in fraud of plaintiff and other creditors, defendant was asked, "You state that you did receive some securities at that time; will you tell us what those securities were?" which defendant refused to answer except as to the documents specifically attacked in the statement of claim. Plaintiff did not know, when he instructed action, what securities were assigned to defendant nor the nature of such assignment. Held defendant should answer the question and give information relating to the securities.

Mount Hope v. Findlay, [1919] 1 W.W.R. 397.

DISCOVERY—EXAMINATION—LATITUDE AND RELEVANCY OF QUESTIONS.

Where plaintiff claimed that a certain option for purchase of land was taken by defendant W. for plaintiff's benefit, and that defendant bank and defendant S. Co. had notice of such claim, and that to secure an indebtedness of W. to the bank the option was assigned by W. to S. Co., the purchase completed in its name and financed by the bank and the S. Co. and its business was owned and controlled by the bank, and alternatively that the transaction was an acquiring of land by the bank contrary to the Bank Act; the plaintiff was allowed on examination for discovery of officers of the bank and of S. Co. and the bank, not limited to the matter of the purchase of the particular land in question.

Johnson v. Walch Land Co., [1919] 2 W.W.R. 713.

SECOND EXAMINATION OF PARTY—WHERE SUCH MAY BE ALLOWED.

It is a proper practice to allow a second examination of a party liable to examination for discovery where special circumstances are shown sufficient to satisfy the court that such is in the interests of justice. Where pleadings were amended raising new issues, an order for such second examination was made, limited to such new issues.

Graham v. Shannon, [1919] 2 W.W.R. 30.

ACTION FOR CRIMINAL CONVERSATION—NO RIGHT TO EXAMINE DEFENDANT FOR DISCOVERY — STATUTES — PARTICULAR ENACTMENT — SUBSEQUENT GENERAL ENACTMENT.

In an action for criminal conversation which is an action instituted in consequence of adultery, the defendant cannot be compelled to be examined for discovery, although r. 398 of the King's Bench Act makes no exception to the right of examination for discovery there generally given, the particular enactment of the Imperial Act, 32 and 33 Vict., c. 68, has not been repealed by necessary implication and is still in force. If defendant cannot be compelled to answer questions on an examination for discovery he should not be compelled to attend.

Warmbein v. Ulrich, [1919] 3 W.W.R. 959.

EXAMINATION—OFFICER OF COMPANY—LOCOMOTIVE FOREMAN — DUTY TO ACQUAINT HIMSELF WITH FACTS.

It is the duty of an officer of a defendant company examined for discovery to acquaint himself with the facts which are within the knowledge of other officers, servants or agents of the company who personally have knowledge of the facts or circumstances in question, which knowledge they acquire in that capacity. In an action for damages for the death of plaintiff's husband by being crushed between two cars in defendant's yards, a locomotive foreman of defendant company is an officer for purposes of such examination.

Giddings v. C.N.R. Co., [1919] 3 W.W.R. 15, affirming [1919] 1 W.W.R. 909.

PRACTICE — DISCOVERY — EXECUTION — EXAMINATION OF JUDGMENT DEBTOR—NECESSITY OF RETURN OF NULLA BONA ON WRIT OF EXECUTION BEFORE ORDER FOR EXAMINATION.

In re The Prudential Life Ins. Co. [1919] 3 W.W.R. 428.

PRACTICE—DISCOVERY IN ACTION FOR CRIMINAL CONVERSATION.

Rule 278 providing for examination for discovery is applicable to an action for criminal conversation.

Hunt v. Smith, [1919] 3 W.W.R. 586.

TWO DEFENDANTS—ONE DEFENDANT NOT DEFENDING BY DEMANDING NOTICE—EXAMINABLE FOR DISCOVERY.

In an action against two defendants for damages resulting from an automobile accident it was held that a defendant who had not defended but demanded notice of proceedings might be examined for discovery.

McCallum v. Mosher, [1919] 3 W.W.R. 537.

EXAMINATION FOR DISCOVERY—ISSUE OF NEW APPOINTMENT AND SUBPOENA—JURISDICTION OF COURT.

There is no power under the K.B. rules to serve a second subpoena and appointment for examination for discovery after one had already been served, but perhaps under such circumstances the court has power under its inherent jurisdiction to give leave for the service of a second subpoena and appointment.

McGibbon v. McNeil, 5 W.W.R. 1011.

GARNISHMENT—PARTIES AT BENEFIT.

The defendant is not a person "for whose immediate benefit" a garnishee issue in the action is being prosecuted to permit him to be examined for discovery by the garnishee. [Woodley v. Harker, 7 Terr. L.R. 334, 6 W.L.R. 102, followed; MacDonald v. Norwich Union, 10 P.R. 462, distinguished.]

U.S. Fidelity v. Gouin, 31 W.L.R. 912, 8 S.L.R. 182, 8 W.W.R. 1198.

SEVERAL DEFENDANTS—PARTNERSHIP.

In an action against two or more defendants in respect to a transaction which was entered into by them, in fact, though not nominally, as a partnership, the examination for discovery of each defendant may be used against the other or others.

Dominion Meat Co. v. Jamieson, [1917] 3 W.W.R. 929, 12 A.L.R. 353.

AS AGAINST CODEFENDANT.

Where there is no issue between plaintiffs and one of several defendants, that defendant is not bound to make discovery.

Welch v. McArthur, [1917] 1 W.W.R. 1343, reversing 24 B.C.R. 267, [1917] 1 W. W.R. 1081.

INTERROGATORIES ON ARTICULATED FACTS—NOTICE.

Differing from the examination on discovery, which is of English origin, the interrogation upon articulated facts is of French origin. Nothing in the law obliges the party who wishes to examine his adversary upon articulated facts, to give notice of the examination to his adversary's attorney.

Guillemette Co. v. Magnan, 17 Que. P.R. 461.

NOTICE.

Interrogatories upon articulated facts will be struck out if notice of service has not been given to the attorney of the party whom it is desired to interrogate.

Jago Co. v. Raymond Cement Products Co., 17 Que. P.R. 413.

EXAMINATION OF DEFENDANT—SECRET PROCESS—DISCLOSURE.

Ware v. Henderson, 11 O.W.N. 167.

MORTGAGE ACTION—AGENCY.

In a mortgage action A. the mortgagor, and R. the registered owner, of certain lands, A. pleaded that he had executed the mortgage as agent for R. to the knowledge of the plaintiff. When examined for discovery the plaintiff denies such knowledge Held, that A. was not entitled to issue interrogatories to R., who had not defended.

Rutherford v. Mode, 34 W.L.R. 521.

(§ IV—31)—OFFICER OF CORPORATION—OFFICER OUT OF ONTARIO—PROOF OF OFFICIAL POSITION.

Con. r. 1321 (Ont.), providing for the making of an order for the examination for discovery "of an officer residing out of Ontario of any corporation party to any action," does not apply where a motion is made by the plaintiff for an order for the examination for discovery of the Canadian manager of an English company, with head offices in England, though the plaintiff swears this manager is conversant with the matters in issue in the action, but where the exact nature and duties of this manager's position are not shewn, it not appearing clearly that he is an "officer" of the company.

Grocock v. Edgar Allen & Co. (No. 2), 10 D.L.R. 147, 4 O.W.N. 660, 23 O.W.R. 788.

OFFICER OR "SERVANT" OF CORPORATION—SALES AGENT.

The selling agent for a trading company who is held out as the company's "representative" and who assumed the right to sign the company's letters relied upon as constituting the contract in question is a "servant" of the company, examinable as such under r. 1250 (Ont. C.R. 1897), although paid only by commissions.

Clarke & Monds v. Provincial Steel Co., 9 D.L.R. 803, 4 O.W.N. 991, 24 O.W.R. 287.

RAILWAY EMPLOYEES—OFFICER OF CORPORATION.

One purpose of the Alberta Practice Rules (r. 234) is to enable a party to examine the opposite party, or such of his employees, as were directly connected with the transaction or occurrence, not merely as witnesses, but by reason of the character of their employment. Present or past employees who appear to have some knowledge touching the question in issue may be examined for discovery only.

McLean v. C.P.R., 28 D.L.R. 550, 12 A. L.R. 61, 34 W.L.R. 843, 10 W.W.R. 949.

Whether or not a person is an "officer" of a corporation for the purpose of being examined for discovery depends upon the circumstances of each particular case, and apart from any official designation given to him, may include an employee in a position of authority and responsibility to whom reports would be made by his assistants in the course of their duties.

King Lumber Mills v. C.P.R. Co., 2 D.L.R. 345, 17 B.C.R. 26, 19 W.L.R. 950.

A member of a firm, a part only of the business of which is to effect sales of the wares of an incorporated company on commission, who has no authority to close such sales or to bind the company by contract, and has no other connection with the company, cannot be examined for discovery as an officer of the company under the Alberta Supreme Court Rules. [Morrison v. G.T.R. Co., 5 O.L.R. 38, followed.] One who is examined for discovery as an officer of a corporation under the said rules must not only answer as to his individual knowledge, but must also obtain such further information from other officers, servants and agents of the corporation as will enable him to answer all proper questions, or must shew sufficient reason for not doing so. [Southwark Water Co v. Quick, 3 Q.B.D. 315, and Berkeley v. Standard Discount Co., 13 Ch.D. 97, followed.]

Nichols v. Skedanuk (No. 2), 6 D.L.R. 115, 22 W.L.R. 114, 5 A.L.R. 110, 2 W.W.R. 1002, reversing 4 D.L.R. 450.

In an examination of an officer of a railway company for discovery in an action against the company for personal injuries, a motion to require the company to produce reports of its employees as to the accident which gave rise to the action, is answered by an affidavit made by another officer that such reports stated on their face that

they were made only for the information of the company's solicitor and his advice thereon, and such affidavit is conclusive on the question of privilege as far as the motion proceedings are concerned, unless it can be shewn from the documents produced or from the admissions in the pleadings or by the party himself that the affidavit is either untrue or has been made under a misapprehension of the legal position. There is no right under the practice established in discovery proceedings to cross-examine upon an affidavit filed by the officer being examined if such reports were made for the information of the company's solicitor and his advice thereon.

Swaisland v. G. T. R. Co., 5 D.L.R. 750, 3 O.W.N. 960.

A person in the employ of a railway company as a fire warden having superintendence over subordinates who patroled a large territory to protect railway property from forest fires is an officer of the railway company for the purposes of discovery and not merely a servant.

King Lumber Mills v. C.P.R. Co., 2 D.L.R. 345, 17 B.C.R. 26, 19 W.L.R. 950.

FAILURE OF COMPANY'S OFFICER TO ATTEND EXAMINATION — IRREGULARITY IN PROCESS.

A defendant company cannot be penalized under K.B. r. 398 (Man.) on the ground that one of their officers had failed to attend an examination for discovery, when the officer was not properly subpœnaed.

Macdonald v. Domestic Utilities Manufacturing Co., 11 D.L.R. 812, 23 Man. L.R. 512, 24 W.L.R. 544, 4 W.W.R. 844, affirming 10 D.L.R. 429, 23 Man. L.R. 512.

EXAMINATION OF OFFICERS OF PLAINTIFF COMPANY—CON. R. 439 (A)—PRODUCTION OF DOCUMENTS—BETTER AFFIDAVIT.

Ontario & Minnesota Power Co. v. Rat Portage Lumber Co., 3 D.L.R. 866, 3 O.W.N. 1284, 22 O.W.R. 129.

EXAMINATION OF OFFICER OF COMPANY—MANAGING DIRECTOR — EMPLOYEES OR SERVANTS AS DISTINGUISHED FROM OFFICIALS.

Elliott v. Holmwood, 25 D.L.R. 765, 22 B.C.R. 335, 9 W.W.R. 490.

"PERSONS" EMPLOYED—OFFICER OF CORPORATION—KNOWLEDGE.

Magrath v. Collins, 31 D.L.R. 785, 12 A.L.R. 236, [1917] 1 W.W.R. 462, reversing 28 D.L.R. 723, 33 W.L.R. 907, 10 W.W.R. 19.

EXAMINATION OF OFFICER OF DEFENDANT TRUST COMPANY — STATUS OF SHAREHOLDER AS PLAINTIFF — BREACHES OF TRUST — ULTRA VIRES OR FRAUDULENT ACTS—SCOPE OF DISCOVERY.

Shaw v. Union Trust Co., 26 D.L.R. 757, 35 O.L.R. 146.

INQUISITORIAL POWER OF LIQUIDATOR — WINDING-UP BANK—RIGHT OF PERSONS CHARGED AS CONTRIBUTORIES TO EXAMINE FORMER BANK MANAGER.

Re Sovereign Bank; Newman's Case, 27 D.L.R. 760, 34 O.L.R. 577.

OFFICER OF CORPORATION—CITY SOLICITOR.

A city solicitor, the appointed head of the city's legal department, serving exclusively in that capacity, is examinable for discovery as an "officer" of the corporation.

Duncan v. Vancouver (B. C.), 36 D.L.R. 218, 24 B.C.R. 267, [1917] 3 W.W.R. 18.

MORTGAGEE OF CHATTELS ON MORTGAGED LANDS — BANK MANAGER — EXAMINATION OF—PRACTICE—DIRECTIONS.

McDougall v. Merchants Bank, 46 D.L.R. 672, [1919] 1 W.W.R. 830.

OF OFFICER—SECOND EXAMINATION—COSTS.

Under r. 279 (Sask. Rules of Practice) the defendant is entitled to examine any officer or servant of the plaintiff corporation without an order, but having examined one officer, he is not entitled to examine another without an order of the court, and will not be allowed the costs of a useless examination unless the plaintiffs have refused to furnish him with the name of the proper officer to be examined.

Canadian Bank of Commerce v. Eye, 43 D.L.R. 464, 11 S.L.R. 468, [1918] 3 W.W.R. 823.

FORECLOSURE ACTION — AFFIDAVIT OF DEFAULT — EXAMINATION ON — PERSONAL KNOWLEDGE.

Great West Permanent Loan Co. v. McEvers, 40 D.L.R. 755, [1918] 2 W.W.R. 396.

OFFICER OF COMPANY—INTEREST ADVERSE TO COMPANY.

A court or judge may name a new officer of a company to be examined for discovery under r. 250, substitutionally or additionally to one already selected by the company. Where, however, a company defendant had selected one of its officers for examination for discovery it was held that the court should not grant an order for the examination of another officer in lieu of the one selected, where such other officer, who was also an individual defendant, had defended in the name of a solicitor who was not the solicitor for the company, and had made admissions in his defence which the company contended would be prejudicial to it if made by him on examination as the company's representative.

Pelican Oil & Gas Co. v. Northern Alberta Natural Gas Co., [1918] 1 W.W.R. 957.

"OTHER OFFICER OR SERVANT" OF CORPORATION—AGENT OF INSURANCE COMPANY.

A local agent of an insurance company may be examined for discovery as an "other officer or servant" under subr. 2 of r. 370, C. of O. 31a.

Yamashita v. Hudson Bay Ins. Co., [1918] 3 W.W.R. 671.

OFFICER—MASTER OF GOVERNMENT DREDGE.

Upon an application being made in Chambers for an order to examine the master of a government dredge for the purposes of discovery, in a proceeding by petition of right for damages arising out of an accident to an oiler employed on such dredge:—Held, that the master of the dredge was not an "officer" within the meaning of the rule in question.

Montgomery v. The King (No. 1.), 15 Can. Ex. 372.

PAST OFFICER OF CORPORATION.

Under r. 441 of the King's Bench Act, R.S.M. 1913, c. 46, it is not entirely in the discretion of the court or judge whether or not an order should be made for the examination for discovery of a past officer of a body corporate, party to the action, when the officer is out of the jurisdiction, and, if there are suspicious circumstances in relation to the conduct of such past officer in connection with the transactions in question and discovery is offered by an existing officer of the corporation who is within the jurisdiction, the order should be refused until it is shown that the opposite party cannot get all the discovery to which he is entitled by examining the officer or officers of the corporation who are within the jurisdiction.

Great West Wire Fence Co. v. Judson, 26 Man. L.R. 425, 10 W.W.R. 926.

OFFICER OF SERVANT OF CORPORATION—SUBSIDIARY COMPANY.

A person, not an officer or servant of a company party to an action, but who is an officer in a company to which the first company is subsidiary, holding all its shares and having full control of its affairs, is not subject to examination for discovery under marginal rr. 370c, 370d, notwithstanding his having negotiated and his being the only person in authority to negotiate, the proceedings over which the action arose.

Wellington Colliery v. Pacific Coast Coal Mines, 23 B.C.R. 138.

OFFICER OF CORPORATION — MINING CASE — DISCOVERY—FURTHER EXAMINATION OF ENGINEER—PRODUCTION OF TIME SHEETS.

Curry v. Wettlaufer Mining Co., 4 O.W.N. 500, 23 O.W.R. 623.

PRACTICE — EXAMINATION FOR DISCOVERY — OFFICER OF CORPORATION—DUTY TO ASCERTAIN FACTS PRIOR TO EXAMINATION —LOCOMOTIVE FOREMAN.

An officer of a company attending to be examined for discovery must acquaint himself with the facts that are not within his personal knowledge by enquiring from other officers, servants or agents who have in their respective capacities acquired such knowledge. A locomotive foreman of a railway company is an officer for the purpose of examination.

Giddings v. C.N.R. Co., 12 S.L.R. 381, [1919] 3 W.W.R. 15.

EXAMINATION OF PLAINTIFF — DIRECTOR — MISFEASANCE—INFORMATION OBTAINED FROM SOLICITOR.

Moodie v. Hawkins, 4 O.W.N. 683, 24 O. W.R. 10.

EXAMINATION OF OFFICER OF DEFENDANT CORPORATION — APPOINTMENT FOR, AFTER TRIAL BEGUN AND ADJOURNED—PREVIOUS EXAMINATION OF TWO OFFICERS—UNDERTAKING TO PRODUCE CORRESPONDENCE.

Schofield-Holden v. Toronto, 4 O.W.N. 1040, 24 O.W.R. 377.

COMPANY OFFICER—DISCOVERY—EXAMINATION OF SERVANT OF DEFENDANT RAILWAY COMPANY—INJURY TO PASSENGER ON STREET CAR—EXAMINATION OF CONDUCTOR.

Lange v. Toronto & York Radial R. Co., 5 O.W.N. 64, 25 O.W.R. 27.

EXAMINATION OF OFFICER OF CORPORATION—PARTY—PLACE OF EXAMINATION—DISCRETION OF JUDICIAL OFFICER — RULE 329—APPEAL.

Anglo-American Fire Ins. Co. v. International Steel Corp., 9 O.W.N. 287.

EXAMINATION OF OFFICER OF PLAINTIFF COMPANY REFUSAL TO ANSWER QUESTIONS — AMENDMENT OF PLEADINGS — DIRECTION TO ANSWER CERTAIN QUESTIONS—ATTENDANCE FOR RE-EXAMINATION—COSTS.

Mullen Co. v. Pulling, 17 O.W.N. 210.

EXAMINATION OF OFFICER OF DEFENDANT COMPANY — ACTION FOR NUISANCE — QUESTIONS DIRECTED TO ACTS OF DEFENDANT COMPANY SINCE ACTION BROUGHT — IRRELEVANCE — RULES 260, 327, 339.

Hamilton v. Quaker Oats Co., 17 O.W.N. 206.

EXAMINATION OF PARTIES—COMPANY DIRECTORS—BREACHES OF TRUST—FRAUD—QUESTIONS AS TO SUMS PAID OUT OF TREASURY OF COMPANY TO DIRECTORS—GENERAL MANAGER OF COMPANY BOUND TO ANSWER.

Moody v. Hawkins, 7 O.W.N. 775.

EXAMINATION OF A DEFENDANT AS A PARTY AND AS AN OFFICER OF DEFENDANT COMPANIES — DISCLAIMER OF INTEREST — SCOPE OF EXAMINATION — PERSONAL KNOWLEDGE OBTAINED IN ANY CAPACITY —SINGLE EXAMINATION.

Kennedy v. Suydam, 8 O.W.N. 65.

EXAMINATION OF OFFICERS.

In an action against the defendant company, the plaintiff examined the train conductor for discovery, as an officer thereof, and afterwards took out an appointment for the examination of the roadmaster, an officer superior to the conductor. Upon an application to strike out the company's defence by reason of the failure of the roadmaster to attend for examination for discovery:—Held, by the referee, that the roadmaster was an examinable officer and that more than one officer could be examined under King's Bench r. 398. [Dill v.

Dominion Bank, 17 P.R. 488, followed: Brown v. London Fence, 19 Man. L.R. 138, distinguished.]

Houghton v. C.N.R. Co., 6 W.W.R. 160.

Misfeasance summons under Winding-up Act—Directors.

Appeal from the settlement by the district registrar of terms for an order under a misfeasance summons pursuant to s. 123 of the Dominion Winding-up Act, R.S.C. 1906, c. 144, against certain directors of the company for alleged misapplication of trust funds. The directors asked for a term in the order by which they should have the same rights of discovery by viva voce examination, delivery of interrogatories and discovery of documents as if the application had been an action in the Supreme Court. Sections 134, 135 of the Act were quoted by the applicant and directors. Held that the order should contain a term giving discovery as asked, and that the appeal should be allowed.

Re Traders Trust & Kory, 8 W.W.R. 1080.

Discovery, r. 234—Person "employed"—Bank president.

A bank president is examinable for discovery as a person "employed" by the bank within r. 234.

Carter v. Great West Lumber Co., [1919] 3 W.W.R. 901.

(§ IV—32)—Examination in libel cases—Vague charge — Justification — Right to interrogate plaintiff.

On an examination for discovery of plaintiff before trial, in an action for libel, the plaintiff is not bound to answer questions which are directed to questions of fact as to which there was no specific allegation of fact in the alleged libel, if the alleged libellous words constituted merely a vague charge to which the defendant pleaded truth in justification without giving particulars. Zierenberg v. Labouchere, [1893] 2 Q.B. 183; Walker & Son v. Hodgson, [1909] 1 K.B. 239; Yorkshire Provident Life Assurance Co. v. Gilbert & Rivington, [1895] 2 Q.B. 148, followed.]

Reid v. Albertan Publishing Co., 10 D.L.R. 495, 5 A.L.R. 486, 23 W.L.R. 330, 3 W.W.R. 919.

Defamation, relevancy of evidence.

In an action for slander, where the defence raises pleas of justification and of fair comment, the following questions are admissible upon examination for discovery: Will you say you didn't intend to include C. (the plaintiff)? Such questions are admissible, even when the above defences are not raised. As a matter of discretion, discovery in aid of an action of tort should not even now be allowed where the sole object is to lay a basis for punitive damages, and particularly where there is danger that the answer would be improperly used to establish legal liability. In an action for slander, where both the meaning of the statements complained of, and the person to whom they referred, have to be established by innuendo, the defendant cannot properly be compelled to answer on discovery if the statements referred to plaintiff; where the defendant, however, has pleaded fair comment, such questions are proper, and must be directly answered.

Clarke v. Stewart, 32 D.L.R. 366, 10 A.L.R. 393, [1917] 1 W.W.R. 845.

Libel—Disclosure of name of author.

On an examination for discovery in an action for libel based on a printed pamphlet, the defendant can be compelled to disclose the name of the author of the pamphlet as being a relevant fact in the case, although it involves the disclosure of the name of a witness.

Hays v. Weiland, 43 D.L.R. 137, 42 O.L.R. 637. [See 14 O.W.N. 180.]

Examination for discovery—Refusal to answer questions — Delay — Action for libel—Foreign newspapers.

Arsenych v. West Canada Pub. Co., 23 D.L.R. 896, 8 W.W.R. 920, 31 W.L.R. 604.

Execution debtor—Examination of wife.

Killops v. Porter, 24 D.L.R. 888, 9 W.W.R. 181, 32 W.L.R. 469.

Libel—Examination of plaintiff—Time r. 336—Statement of defence delivered—Particulars.

Foster v. Maclean, 10 O.W.N. 457. [See also 31 D.L.R. 250, 37 O.L.R. 68.]

(§ IV—33)—Examination of employees of individual partner.

The employee of one of the partners of a firm, though he is not the employee of all the partners, is the employee of a party to the action, and therefore examinable on discovery under the provisions of r. 234 of the Alberta Judicature Act.

Medicine Hat Wheat Co. v. Norris Commission Co., 29 D.L.R. 379, 10 A.L.R. 19, 34 W.L.R. 1019, 10 W.W.R. 1092.

Of witnesses.

On a motion for particulars of the statement of defence, a witness cannot be examined by the plaintiff as to matters not relevant to the motion but which will be in issue at the trial, where it is plain that the ulterior purpose of the questions is to obtain discovery of the evidence which the defendant will produce at the trial.

D. v. W., 3 D.L.R. 293, 3 O.W.N. 993, 21 O.W.R. 853.

The production of the books and records of a trade union cannot be required, nor can witnesses be examined as to the organization and conduct of such union, where it abundantly appeared from the evidence of the plaintiffs that their design was to embark, under colour of such motion, on a preliminary cross-examination of persons who might be hostile witnesses at the trial, or upon an enquiry to obtain discovery greater than that permitted, which testimony might afterwards be used in a contest not only

with the defendant in the action, but with the union as well.

Rickard v. Britton Mfg. Co., 4 D.L.R. 366, 3 O.W.N. 1272, 22 O.W.R. 81.

(§ IV—34)—Privilege.

In an action for damages in a railway accident, reports made by officials of defendant railway company relative to the accident admitted by a district superintendent of the company upon his examination for discovery to be in its custody or power, such reports being made in regular routine as in all such accidents and not for the purpose of the defence of the action at bar nor with reference to any particular action, though perhaps in anticipation of possible future actions, must be produced for inspection upon an examination for discovery, under Alberta rr. 207, 212, 215, and Eng. O. 31, r. 19a (2) of 1893 in force in Alberta. [Cook v. North Metropolitan Tramway Co., 6 T.L.R. 22, followed.]

Stapley v. C.P.R. Co., 6 D.L.R. 97, 5 A.L.R. 341, 22 W.L.R. 1, 2 W.W.R. 894.

Affidavit of protection—"Might criminate"—Description of documents.

An affidavit to a claim for protection against the production of documents, on the ground that the same "might" tend to criminate the deponent, which fails to furnish a sufficient description of the documents sought by the discovery, is insufficient and will not be received. [Canada Evidence Act, R.S.C. 1906, c. 145, s. 5; Manitoba Evidence Act, R.S.M. 1913, c. 65, s. 5, considered.]

Attorney-General v. Kelly, 28 D.L.R. 409, 33 W.L.R. 963, 10 W.W.R. 131.

Privilege—Examination of plaintiff—Privilege — Solicitor — Will — Representatives of testator—Waiver.

Langworthy v. McVicar, 5 O.W.N. 345, 25 O.W.R. 297.

Motions for further examination of parties — Information and belief — Solicitor and client.

Phillips v. Lawson, 4 O.W.N. 390, 23 O. W.R. 646.

Discovery—Interrogatories—Action for penalties.

Bowser v. McCutcheon Bros., 25 W.L.R. 608.

(§ IV—35)—Divorce proceedings.

Harsh and oppressive interrogatories.

M. v. M., 8 D.L.R. 1040, 17 B.C.R. 336.

Action for alimony — Examination of husband—Relevancy of questions as to estate and effects.

Allin v. Allin, 9 O.W.N. 411.

Officer or servant of defendant municipal corporation—Superintendent of works.

Young v. Gravenhurst, 2 O.W.N. 118, 167.

Production of documents—Examination for discovery—Costs.

Anderson v. Imperial Development Co., 20 Man. L.R. 275, 16 W.L.R. 51.

Company—Examination of officer.

After the close of an examination for discovery, an officer of a company, being examined under Order 31A. may not be ordered to inform himself of the knowledge of his fellow servants or agents touching matters in question in an action, and to reattend for further examination.

Brydone-Jack v. Vancouver Printing, etc., Co., 16 B.C.R. 55, 16 W.L.R. 262.

Examination—Notice—Witness.

Lalonde v. Mackay, 12 Que. P.R. 142.

Questions relating to assignment of claims in matter at suit—Appeal to Master in Chambers.

Clarke v. Bartram, 3 O.W.N. 335, 20 O. W.R. 530.

Examination of plaintiff—Place for—Residence of parties.

Ferris v. McMurrich, 2 O.W.N. 770, 18 O.W.R. 399.

Examination of arbitrator — For purpose of an appeal — Appointment and subpoena issued for—Motion by plaintiff to set them aside — No leave—Order granted.

Myles v. G.T.R. Co., 3 O.W.N. 176, 259, 20 O.W.R. 241, 445.

Re-examination of defendant—Name of chauffeur — Automobile accident—Dismissal of chauffeur from master's employment — Reasons as to dismissal.

Van Horn v. Verrall, 3 O.W.N. 439, 337, 20 O.W.R. 773, 545.

Motion by defendant to set aside two orders — Order for particulars after discovery.

Crinkley v. Mooney, 3 O.W.N. 105, 20 O. W.R. 118.

Examination of defendant — Discretion of registrar—Review.

Pratt v. Pipe, 3 O.W.N. 214, 20 O.W.R. 320.

Examination of member of partnership—Motion to set aside application for — Technical form under Con. r. 439—Must not work injustice.

Hawes, Gibson & Co. v. Hawes, 3 O.W.N. 312, 20 O.W.R. 517.

Examination of plaintiff — Action for damages for injuries by runaway team—Information for use at trial —Privilege.

Southwell v. Shedden Forwarding Co., 2 O.W.N. 562, 18 O.W.R. 342.

Examination adjourned — Negotiations for settlement — Renewed motion for further examination.

Horton v. Maclean, 2 O.W.N. 804, 18 O. W.R. 619.

Examination of defendant — Adjourned sine die to obtain information—Default in reattendance.

McIntosh v. Robertson, 2 O.W.N. 869, 18 O.W.R. 636.

DISCRETION.

Review on appeal, see Appeal, VII.

Mandamus to compel exercise of discretionary power, see Mandamus.

As to awarding costs, see Costs, I.

DISMISSAL AND DISCONTINUANCE.

See Pleading.

Costs on, see Costs.

In Quebec, see Peremption.

(§ I—1)—VOLUNTARY.

It should be only where there is absolutely no doubt, that a party litigant, invoking the aid of the court to get rid of a conviction, should, after going a certain length, and being likely to fail, be permitted to stop short and deny the right of the court to go further.

R. v. Hamlink, 5 D.L.R. 733, 26 O.L.R. 381, 22 O.W.R. 107.

CON. R. 430—PROCEEDINGS TAKEN AFTER DELIVERY OF STATEMENT OF DEFENCE—ORDER TO PRODUCE AND APPOINTMENT FOR EXAMINATION OF DEFENDANT.

Christie, Brown & Co. v. Woodhouse, 5 D.L.R. 886, 4 O.W.N. 93, 23 O.W.R. 55.

ACTION—AFTER TRIAL AND JUDGMENT, HOW LIMITED.

After trial and judgment in a county court (Man.) action, the filing of a notice of discontinuance is not authorized, either by the County Courts Act, R.S.M. 1902, c. 38, or King's Bench Act, R.S.M. 1902, c. 40, or rules thereunder.

McInnes v. Nordquist, 13 D.L.R. 725, 23 Man. L.R. 815, 25 W.L.R. 422, 5 W.W.R. 95.

AGREEMENT TO WITHDRAW ACTION AND PAY COSTS.

When a plaintiff undertakes by a notarial act, to withdraw his action and pay the costs of the proceedings, and makes default in doing so, the defendant has the right to a judgment giving effect to the agreement, especially as to the question of costs.

Lapointe v. Dufour, 16 Que. P.R. 14.

DISCONTINUANCE—COSTS—QUE. C.P. 275, 685.

A discontinuance made without costs is void, and will be struck from the record.

Letang v. Lacroix, 16 Que. P.R. 207.

If the the plaintiff pays to the defendant's attorney the costs of an action which he discontinues the latter cannot set up litem pendens to a second action even though no formal abandonment of the first is on record. In such case the defendant may withdraw the deposit which he made in the first action and tender anew in pleading to the merits of the second.

Maccarone v. Zanga, 14 Que. P.R. 59.

The demand by a plaintiff that his action be discontinued "without costs" cannot be granted.

Legaré v. Verret, 13 Que. P.R. 298.

NOTICE OF DISCONTINUANCE — NO PERSONAL SERVICE NECESSARY—EFFECT ON MONEY IN COURT — ASSIGNMENT OF SUCH MONEY.

Schmidt v. Giffen, 34 W.L.R. 1229.

(§ I—2)—INVOLUNTARY.

The court cannot of its own motion supply the defence resulting from prescription under C.C. 1049, and when such defence is not raised the court cannot, therefore, base its reason for dismissal on such prescription.

Banque Nationale v. Godbout, 8 D.L.R. 668.

NO REASONABLE CAUSE OF ACTION PLEADED.

A motion under r. 261 of the Con. Practice Rules 1898 (Ont.) to strike out a statement of claim and dismiss the action on the ground that no reasonable cause of action is disclosed must be made in court and not to a Judge in Chambers. [Knapp v. Carley, 7 O.L.R. 409, followed.]

Harris v. Elliott, 12 D.L.R. 533, 28 O.L.R. 349.

FOR WANT OF PROSECUTION — WANT OF GOOD FAITH.

An action for criminal conversation is properly dismissed for want of prosecution, where plaintiff's counsel, after an undue delay, moved to postpone the hearing after the case had been reached for trial, on the ground that he was not prepared to proceed, and where he did not have witnesses ready who could prove a case, but desired to procure the evidence of plaintiff's wife, who was then in an insane asylum, but who, as it appeared by evidence of medical men from the asylum, was incurably insane and could never give credible evidence on the subject, and where the whole course of the plaintiff was indicative of want of good faith.

Haines v. MacKay, 10 D.L.R. 103, 4 O. W. N. 651, 24 O.W.R. 1.

WANT OF PROSECUTION—UNREASONABLE DELAY.

Even if still in force, s. 4 of the old Statute of Limitations, 21 James I., c. 16, which provides that the plaintiff must bring any new action not later than one year after the reversal either on error or by way of arrest of judgment, of a verdict in his favour, does not apply to limit the time within which he must bring his action on for retrial after the setting aside of a verdict in his favour and the ordering of a new trial by the Court of Appeal; since such order does not work a termination of the action. An order to dismiss an action for want of prosecution may be made after a verdict at the first trial had been set aside and a new trial ordered, if the plaintiff allows two months to elapse before the sittings at which he might have proceeded to a second trial and he fails to do so without any reasonable excuse. [Spawn v. Nelles, 1 Ch. Cham. (Ont.) 270, approved; Diamond Harrow v. Stone 7 O.W.R. 685, distinguished.]

Davis v. Wright, 16 D.L.R. 736, 24 Man. L.R. 205, 27 W.L.R. 772, 6 W.W.R. 491, affirming 15 D.L.R. 385, 26 W.L.R. 517.

WANT OF PROSECUTION—DELAY—COUNTERCLAIM—TERMS—COSTS.

McNaughton v. Molloy, 2 D.L.R. 888, 3 O.W.N. 970.

Irregularity in inscription for judgment ex parte is not a reason for the dismissal of the action.

Serling v. Levine, 7 D.L.R. 265, 47 Can. S.C.R. 103, 12 E.L.R. 216.

STATEMENT OF CLAIM—SUFFICIENCY OF INFORMATION ALREADY GIVEN—DELAY IN MOVING.

Stuart v. Bank of Montreal, 6 D.L.R. 870, 4 O.W.N. 218, 23 O.W.R. 205.

WANT OF PROSECUTION.

Fowler & Wolfe Mfg. Co. v. Gurney Foundry Co., 14 D.L.R. 398, 14 Can. Ex. 336.

The court refused a motion for judgment quasi nonsuit upon a first default, where the plaintiff produced an affidavit shewing absence of a material witness—although the affidavit did not state the residence of the witness or what had been done to procure his attendance upon an undertaking by the plaintiff to go down to trial at the next Circuit and upon payment by him of costs of the day and costs of the motion.

Rourke v. Tompkins, 40 N.B.R. 288.

ADMISSIONS OF PLAINTIFF ON EXAMINATION FOR DISCOVERY — MENTAL INCOMPETENCE.

Angevine v. Goold, 4 O.W.N. 1041, 24 O.W.R. 376.

An action must not be dismissed on account of plaintiff's default to produce some documents, if the motion of defendant merely asked that he be relieved from pleading during plaintiff's default to file said documents.

Legaré v. Verret, 13 Que. P.R. 298.

DISMISSAL OF ACTION.

Upon proof of noncompliance by the plaintiff with a præcipe order for security for costs obtained under King's Bench, r. 978, the defendant is entitled to obtain ex parte an order dismissing the action.

Moore v. Victel, 5 W.W.R. 1226.

(§ 1—3)—OF PARTY.

Where one of two defendants has appeared and pleaded, but the other defendant has not been served within the time limited for service, the appearing defendant is not entitled to treat the action as having been abandoned as against his co-defendant and to himself serve notice of trial; he should first inquire of the plaintiff as to the intention to proceed against the unserved defendant, and if it appears that the action is being informally abandoned as to the unserved defendant without service of a discontinuance, the appearing defendant may make an interlocutory application to strike out the name of his codefendant. [Foley v. Lee, 12 P.R. (Ont.) 371, applied; Vandusen v. Johnson, 3 C.L.T. 505, distinguished.]

Selkirk v. Selkirk, 1 D.L.R. 607, 22 Man. L.R. 323, 1 W.W.R. 1090.

SUBSTITUTION OF PARTIES — RIGHT TO DISCONTINUE ACTION — PLAINTIFF SUING ON BEHALF OF HIMSELF AND DEBENTURE HOLDERS.

Service v. Milne & Central Okanagan Lands, 27 D.L.R. 725, 22 B.C.R. 469, 34 W.L.R. 60, 10 W.W.R. 336.

A motion by a plaintiff that a coplaintiff be eliminated from the proceedings cannot be granted unless the motion be served on that coplaintiff.

Legaré v. Verret, 13 Que. P.R. 298.

CODEFENDANTS—PLEA OF ONE ONLY—MOTION TO DISMISS—INSCRIPTION IN LAW.

If, in an action against several defendants, one only appears, pleads personal means and prays for the dismissal of the action, the context shews clearly that such a request applies only to him, and his conclusions will not be set aside by way of an inscription in law.

Rachette v. Bouchard, 16 Que. P.R. 253.

(§ 1—4)—The court will hesitate to dismiss an action for want of prosecution although the plaintiff is in default in not proceeding with the cause within the time limited by rules of court, if the action is not a frivolous one and the plaintiff evinces a desire to proceed to trial.

Evans v. Evans, 5 D.L.R. 546, 5 A.L.R. 4, 21 W.L.R. 925, 2 W.W.R. 795.

DELAY IN PROSECUTION—REINSTATEMENT.

An action should not be dismissed merely for a delay in prosecution not seriously prejudicial to the interests of anyone; the party should be given time to proceed with the next step upon paying the costs of the application for dismissal; if this be not permitted, the action will be reinstated on appeal.

Laberge v. Merchants Bank, 30 D.L.R. 144, 27 Man. L.R. 84, [1917] 1 W.W.R. 115.

DISCONTINUANCE OF ACTION AND JUDGMENT — ACCEPTANCE BY DEFENDANT — REINSCRIPTION—QUE. C.P. 277.

The discontinuance, by the plaintiff, of his action and of the judgment founded upon it, accepted by the defendant (in the present case an action to nullify a marriage) puts an end to the suit between the parties. The defendant cannot reinscribe for judgment and such last judgment obtained by default, will be quashed and annulled.

Hebert v. Cloutre, 16 Que. P.R. 29.

REINSTATEMENT.

A judgment dismissing the action for a foreign plaintiff because the power of attorney was not filed in time, although security for costs had been given, will be set aside on a requête civile, if it is proven that the delays were due to consular cor-

respondence, equivalent to a case of force majeure. The joinder and trial on a petition in revocation of judgment and on the dilatory exception for the production of a power of attorney must take place summarily; written pleadings and examination of witnesses can only be allowed on permission of the judge and the allegations in support of the petition can be proven by affidavits.

Malcolm v. Galloro, 13 Que. P.R. 314.

REINSTATEMENT — DELAY IN PROCEEDING WITH ACTION — ADDITION OF PARTY PLAINTIFF—LEAVE TO AMEND.

Browne v. Timmins, 4 O.W.N. 897, 24 O.W.R. 187.

(§ I—5)—STATUTORY DEFENCE — CHANGE OF SOLICITORS—NEW PLAINTIFF.

Land Owners v. Boland (No. 2), 6 D.L.R. 903, 4 O.W.N. 305.

STATUTORY DENIAL OF RIGHT OF ACTION—SUPPLYING DEFENCE.

Where the law denies a right of action, the court must of its own motion supply this defence and dismiss the action, although the defendants have not raised it. [Montreal v. McGee, 30 Can. S.C.R. 582, applied.]

Allard v. Beauharnois, 9 D.L.R. 162.

(§ I—6)—DISCONTINUANCE OF PRINCIPAL ACTION—CROSS-DEMAND TO A CROSS-DEMAND.

If a plaintiff discontinues his principal action, and if acte is granted of his discontinuance, the cross-demand becomes the principal action; the plaintiff may plead thereto and even lodge a cross-demand to the said cross-demand.

Lair v. Michigan Buggy Co., 16 Que. P.R. 319.

DISORDERLY HOUSE.

(§ I—1)—MAN AS INMATE OF.

A man cannot be convicted, under ss. 225, 228, 238, Cr. Code, of being an inmate of a bawdy-hose, since such sections apply to female inmates only.

The King v. Knowles, 12 D.L.R. 639, 21 Can. Cr. Cas. 321, 6 A.L.R. 221, 25 W.L.R. 294, 4 W.W.R. 1341.

WHAT ARE.

In a prosecution for keeping a disorderly house where there was no evidence of disorderly conduct except on one single occasion but there was evidence of the bad reputation of the house, there was evidence upon which the magistrate could convict and as he was the judge of the weight to be attached to it, his conviction will not be disturbed. [Reg. v. St. Clair, 3 Can. Cr. Cas. 551, 27 A.R. (Ont.) 308, at p. 310, followed.]

R. v. Marcinko, 4 D.L.R. 687, 19 Can. Cr. Cas. 388, 3 O.W.N. 1626, 22 O.W.R. 846.

BAWDY HOUSE—PROSTITUTE—EVIDENCE OF GENERAL REPUTATION.

Reputation or mere hearsay is insufficient evidence upon which a court can hold that a woman has been proved to be a prostitute. Evidence that a known prostitute occupies a house, arranged with two men on different occasions that she would with each of them on a future occasion at that house commit acts of prostitution, nothing being done pursuant to these arrangements, and no act of prostitution in the house having been proved to have taken place at any time, is insufficient to sustain a charge of keeping a bawdy-house. [R. v. McNamara, 20 O.R. 489, applied.] Evidence of the general reputation of a house taken alone is insufficient whereon to convict a person of keeping a bawdy-house. [Reg. v. St. Clair, 27 A.R. 308, applied.]

R. v. Sands, 9 W.W.R. 496, 25 Can. Cr. Cas. 120, 25 Man. L.R. 690.

SUFFICIENCY OF CONVICTION—VAGABONDAGE.

A person can be found guilty of having kept a disorderly house without mention of the fact that he has rendered himself guilty of vagabondage.

Ex parte Evans, 48 Que. S.C. 469.

(§ I—5)—KEEPER OF BAWDY-HOUSE.

The offence, under Cr. Code, s. 228, of keeping a bawdy-house being punishable upon indictment, there is no limitation of time for commencement of a prosecution for it by indictment, although the keeper is also declared by s. 239 to be a loose, idle or disorderly person or vagrant, punishable in this character upon summary conviction, subject to the six months' limitation of s. 1142.

R. v. Sovereen, 4 D.L.R. 356, 26 O.L.R. 16, 20 Can. Cr. Cas. 103, 21 O.W.R. 618.

OFFENCE OF KEEPING—STATING PLACE OF OFFENCE.

A conviction made by a magistrate for keeping a bawdy-house will not be quashed because it is not expressly shewn in the depositions that the street address referred to in the depositions was in fact in the city which was named as the place of the offence in both the information and the formal conviction, although the magistrate's jurisdiction was limited to that city. [R. v. C.P.R. Co., 14 Can. Cr. Cas. 1, 1 A.L.R. 341, applied.]

R. v. Marceau, 22 D.L.R. 336, 8 A.L.R. 510, 23 Can. Cr. Cas. 456, 30 W.L.R. 418, 7 W.W.R. 1174.

CRIMINAL LAW—SUMMARY TRIAL AND CONVICTION BY POLICE MAGISTRATE—PROCEDURE—DEFECTS AND IRREGULARITIES—SENTENCE—IMPRISONMENT FOR ONE YEAR IN REFORMATORY — POWER OF MAGISTRATE EXCEEDED — CONVICTION AND WARRANT OF COMMITMENT ADJUDGED BAD—HABEAS CORPUS—PROCEEDINGS IN MAGISTRATE'S COURT NOT BROUGHT UP ON CERTIORARI—POWER TO AMEND CONVICTION AND WARRANT BY REDUCING TERM AND CHANGING PLACE OF IMPRISONMENT — CRIM. CODE, SS. 1124, 754—DIRECTION TO MAGISTRATE UNDER S. 1120.

The order of Middleton, J., in Chambers,

45 O.L.R. 383, directing an amendment of the conviction of the defendant so as to make it proper in form and so as to reduce the sentence imposed to imprisonment in the common gaol for six months, and directing that a proper warrant be issued in accordance with the amended conviction and placed in the hands of the gaoler, was reversed; and an order was made by the court directing the discharge out of custody of the defendant. Held, by Meredith, C.J.C.P., and Magee, J.A., that, the warrant and conviction not being properly before the Judge in Chambers and not having been removed by certiorari, he had no power, under ss. 1124, 754, of the Cr. Code, or otherwise, to change the warrant or conviction; without the change the warrant was bad, and the conviction also, the sentence being illegal; and, having regard to the manner in which the defendant was tried and convicted, the court should not act under s. 1120 and direct the magistrate to impose a proper punishment. Per Meredith, C.J.C.P.:—The latter part of s. 1124 permits a correction of excess of punishment only by one who has really tried the case. That section gives only the power conferred by s. 754 upon a court of appeal on an appeal from a summary conviction under s. 749; and that power is to impose punishment after trial only—a new trial upon the appeal. Per Riddell, J.:—The power, if any, to amend the warrant, comes from s. 1124, and that section has been held not to cover a case of summary trial: R. v. Shing, 17 Can. Cr. Cas. 463, 20 Man. L.R. 214; and, in any event, the power of amendment is given only where the conviction or warrant has been removed by certiorari. Certiorari could not be allowed at this stage. The defects and irregularities in the proceedings before the magistrate discussed.

R. v. Avon, 45 O.L.R. 633.

CHARGE OF KEEPING — SUMMARY TRIAL WITHOUT OPTION.

Where a police magistrate proceeds with a charge of keeping a disorderly house or common betting house (Cr. Code, s. 228, as amended 1909 and 1913), without taking the defendant's election, it is to be assumed that the magistrate is proceeding under Cr. Code, ss. 773 (f), 774, 781, under which the defendant's election is not required on a summary trial for keeping a disorderly house, but the amount of the fine must not exceed, with the costs of the case, $200, by virtue of s. 781 as amended 1913.

R. v. Booth, 23 Can. Cr. Cas. 224, 31 O.L.R. 539.

(§ I—6)—KEEPING GAMING HOUSE FOR GAIN —PAY FOR REFRESHMENTS.

A conviction for keeping a common gaming house is justified against the proprietor of a pool-room where he and others played poker for money in the room although only after the pool-room was closed, if a part of the money contributed in the course of the game was to pay the proprietor for refreshments. [See amendment to Cr. Code, 1918, Can., c. 16, adding a new clause (i a) to para. (b) of s. 226, subsequent to above decision.]

R. v. Bertrand, 31 Can. Cr. Cas. 2.

HOUSEHOLDER PERMITTING DEFILEMENT.

The effect of Cr. Code, s. 217, in making it an offence for a householder to permit a girl under 18 to be upon the premises for the purpose of illicit intercourse with any man "whether with any particular man or generally," is to exclude from its operation the case of the girl coming to the house for the purpose of illicit intercourse with the householder himself. [R. v. Sam Sing, 17 Can. Cr. Cas. 361, 22 O.L.R. 613, followed.]

R. v. Sam Jon, 24 Can. Cr. Cas. 334, 20 B.C.R. 549.

(§ I—10)—FINE — IMPRISONMENT WITH HARD LABOUR.

The magistrate summarily trying a charge for keeping a disorderly house under Cr. Code, s. 773 (f), and imposing a fine may under s. 781, subs. (2), order imprisonment up to six months in default of payment, and this imprisonment may under s. 1057 be ordered to be "with hard labour."

R. v. Davidson (No. 1), 35 D.L.R. 82, 28 Can. Cr. Cas. 44, 11 A.L.R. 9, [1917] 2 W.W.R. 160.

EXCESSIVE PENALTY—REDUCING.

A conviction upon summary trial before a police magistrate for keeping a disorderly house may be amended in certiorari proceedings, if the court is satisfied as to the proof, by reducing the illegal fine of $100 and costs to the limit provided by Cr. Code, s. 781 of $100 including costs; the amount of the costs in such case remaining in the amended conviction but the $100 penalty being reduced by the amount of the costs so that the total shall not exceed $100. [R. v. Shing, 17 Can. Cr. Cas. 463, disapproved.]

R. v. Crawford, 6 D.L.R. 380, 20 Can. Cr. Cas. 49, 5 A.L.R. 204, 24 W.L.R. 107, 2 W.W.R. 952.

KEEPING "HOUSE OF ILL-FAME" — MAGISTRATE'S JURISDICTION — AMENDMENT OF CONVICTION.

Section 774, Cr. Code, gave absolute jurisdiction to a magistrate in case of a person charged with keeping a disorderly house, house of ill fame, or bawdy-house. By 8 & 9 Edw. VII. c. 9, s. 774 was amended, and the jurisdiction was declared to be as to one charged with keeping a disorderly house or being an inmate of a common bawdy-house — "house of ill-fame" being dropped. A magistrate's conviction in 1916, ignoring the change in the statute, was for that the defendant "did keep a certain house of ill-fame." The evidence amply supported the charge that the place in question was kept and used by the defendant for purposes of prostitution:—

Held, that the conviction was in substance good, and the form should be amended by describing the offence as "keeping a disorderly house, to wit, a house of ill-fame:" ss. 701, 852, 1124 of the Code. The promiscuous use in Canadian statutes of the various synonymous terms descriptive of a house of prostitution, exemplified. [R. v. Hayes, 5 O.L.R. 198, 6 Can. Cr. Cas. 357, distinguished.]

R. v. Darroch, 32 D.L.R. 793, 27 Can. Cr. Cas. 402, 37 O.L.R. 27.

CLUB—GAMING—"KEEPER."

A place in respect of which the conviction was made—a club-house where "poker" was played for money—is a house kept by the club for gain (s. 226 Cr. Code); it was, therefore, a disorderly house (s. 228), and the keeper was guilty of an indictable offence. Although the defendants were not the real owners, and might not be the real keepers, they assisted in the care and management, and must be considered the real keepers (s. 228 (2)). [R. v. Jung Lee, 13 D.L.R. 896, 22 Can. Cr. Cas. 63; R. v. Hung Gee, 13 D.L.R. 44, 21 Can. Cr. Cas. 404, distinguished. A motion to quash the conviction was refused.]

R. v. Merker et al., 37 O.L.R. 582.

(§ I—12)—RIGHT TO SEARCH — ARREST — EXAMINATION OF PERSONS.

Section 641 Cr. Code, as amended by 1913, c. 13, s. 21, gives authority to search, in the case of suspicion of the existence of a "disorderly house" as defined in s. 228. The arrest of all persons found in such house is consequently authorized, but no change having been made in s. 642, such persons cannot be examined under oath for evidence that the place was being kept as a bawdy-house, but may be held pending the laying of a charge against them.

R. v. Shaak, 43 D.L.R. 608, 14 A.L.R. 76, [1918] 3 W.W.R. 889.

(§ I—15)—OFFENCE OF KEEPING.

A charge of keeping a bawdy-house is cumulative, and evidence of particular acts and the particular time of doing them is admissible, although the charge is in general terms only.

R. v. Johnson, 19 D.L.R. 301, 23 Can. Cr. Cas. 136.

EVIDENCE.

The intention of Cr. Code s. 225 in defining a common bawdy-house as applied to the letting of rooms in a hotel is that it should appear that rooms were habitually let with knowledge that they would be used for purposes of prostitution; the fact of such habitual letting may be proved by direct evidence or may be inferred where the circumstances surrounding the letting on a single occasion for use by a known prostitute would prima facie shew the existence of a habit or custom in that regard and no attempt is made at explanation or excuse on the part of the accused.

R. v. Davidson (No. 1), 35 D.L.R. 82, 28 Can. Cr. Cas. 44, 11 A.L.R. 9, [1917] 2 W.W.R. 160. [See also 35 D.L.R. 94, 28 Can. Cr. Cas. 56, [1917] 2 W.W.R. 718.]

Evidence that the woman keeping the house and another woman living with her had together offered to have illicit sexual intercourse with two men for a consideration, will support a magistrate's conviction against the former for keeping a bawdy-house, although there was no other evidence of bad repute.

R. v. Emery, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 A.L.R. 139, [1917] 1 W.W.R. 337.

JURISDICTION — ILLEGAL ARREST — CERTIORARI.

It is not a ground for quashing a conviction on summary trial for keeping a disorderly house that the accused was arrested without warrant, if he pleaded to the charge without raising the objection, and, semble, had he objected and had the objection been overruled, it could not be raised on certiorari. [R. v. Hurst, 20 D.L.R. 129, 23 Can. Cr. Cas. 389, followed. But see R. v. Miller, 25 Can. Cr. Cas. 151.]

R. v. Pudwell, 26 Can. Cr. Cas. 47. [Followed in R. v. Carter, 28 D.L.R. 606.]

KEEPING BAWDY-HOUSE.

A man who knowingly permits prostitutes to resort to his house for the purpose of prostitution may be convicted of keeping a bawdy-house although he made no charge for the use of his rooms.

R. v. Fabri, 28 Can. Cr. Cas. 6.

KEEPING — EVIDENCE — QUASHING CONVICTION.

The court on certiorari will look at the evidence given at a summary trial before a police magistrate for keeping a disorderly house, and if there is no evidence of the offence, will quash the conviction.

R. v. Cross, 29 Can. Cr. Cas. 349, 14 O.W.N. 7.

COMMON BAWDY-HOUSE.

A conviction for having kept a bawdy-house is illegal, if the word "common" (publique) is not mentioned herein, and will be quashed on habeas corpus.

The King v. O'Brien, 19 Que. P.R. 204.

KEEPING DISORDERLY HOUSE — CONVICTED PERSON VISITING TEMPORARILY OUT OF CANADA — IMMIGRATION ACT, 1910 (CAN.).

Re Margaret Murphy, 17 Can. Cr. Cas. 103, 15 B.C.R. 401.

KEEPING DISORDERLY HOUSE—GAMING HOUSE —SUMMARY TRIAL WITHOUT CONSENT —LIMIT OF PENALTY.

The King v. Shing, 17 Can. Cr. Cas. 463, 20 Man. L.R. 214.

DISQUALIFICATION.

Of candidates for election, see Elections.
Of public officer, see Officers.

DISTRESS.

For rent, see Landlord and Tenant, III.

See also Mortgage; Chattel Mortgage, Levy and Seizure.

DISTRIBUTION.

Of decedent's estate, see Executors and Administrators, IV; Descent and Distribution; Wills.

DISTRICT COURT.

See Courts.

DIVORCE AND SEPARATION.

I. In general.
II. Suit for annulment and jurisdiction thereof.
III. Grounds.
  A. Cruelty; ill-treatment.
  B. Desertion.
  C. Drunkenness; use of morphine.
  D. Imprisonment; miscellaneous.
  E. Adultery.
IV. Defences; connivance; recrimination.
V. Alimony.
  A. In general; grounds for granting or refusing.
  B. Temporary alimony; suit money.
  C. Permanent allowance.
  D. Subsequent change.
VI. Other property rights.
VII. Custody and support of children.
VIII. Agreements for support and maintenance.
  A. In general.
  B. Validity of.

Annotations.

Validity of foreign divorce: domicile: 33 D.L.R. 146, 156.

Validity of common law marriage: 3 D.L.R. 247.

Power of legislature to confer jurisdiction on Provincial Courts to declare the nullity of void and voidable marriages: 39 D.L.R. 14.

Divorce law in Canada: 48 D.L.R. 7.

I. In general.

Annulment of marriage, see Marriage.

Divorce a mensa et thoro—Cruelty.

Currey v. Currey, 40 N.B.R. 96, 8 E.L.R. 487.

Domicile—Divorce by foreign court.

Gregory v. Odell, 39 Que. S.C. 291.

Separation de corps—Insanity.

Insanity or idiocy of a married man is not ground for an application en separation de corps by his wife.

Hervian v. Benoit, 12 Que. P.R. 97.

Separation de corps — Action against husband — Domicile pendente lite.

Jones v. Warman, 39 Que. S.C. 174, 12 Que. P.R. 187.

II. Suit for annulment and jurisdiction thereof.

Validity of foreign divorce, remarriage, see Conflict of Laws, I C—65.

(§ II—5) — Jurisdiction — Annulment of marriage.

The courts in Ontario have no general power to annul a marriage.

Prowd v. Spence, 10 D.L.R. 215, 4 O.W.N. 998, 24 O.W.R. 329.

Jurisdiction — Annulment of marriage.

The courts in Ontario have no general power to annul a marriage. [Prowd v. Spence, 10 D.L.R. 215, 4 O.W.N. 998; Malot v. Malot, 4 O.W.N. 1405, 1577, followed. See as to limited statutory powers R.S.O. 1914, c. 148.]

Hallman v. Hallman, 15 D.L.R. 842, 5 O.W.N. 976.

Married Women's Protection Act (Man.).

The provisions of ss. 2, 6 of the Married Women's Protection Act, R.S.M. 1902, c. 107, limiting the jurisdiction in a separation proceeding by a wife against her husband to the judicial district (a) in which the husband was in a collateral proceeding convicted of an assault upon her, or (b) in which the cause of the wife's separation complaint wholly or partially arose, import that such jurisdiction lies in respect of offences originating within the prescribed territory, although those offences may have been condoned, where subsequent offences in another district have had the effect of reviving the first offences as acts of cruelty and of nullifying the condonation thereof.

Brizard v. Brizard, 16 D.L.R. 55, 24 Man. L.R. 119, 26 W.L.R. 734, 5 W.W.R. 1160.

Imperial statute in force in Manitoba — Dominion legislation — Provincial legislation — Jurisdiction of Court of King's Bench to entertain divorce actions.

The Dominion Act of 1888, which was passed to remove certain doubts as to the application of certain laws to the Province of Manitoba so far as it extended to the subject of marriage and divorce, was within the exclusive power of legislation conferred on the Dominion Parliament by s. 91 of the B.N.A. Act. This act provided that the laws of England relating to matters within the jurisdiction of the Parliament of Canada so far as the same existed on July 15, 1870, had been as from that date and were in force in Manitoba insofar as applicable to the Province, and unrepealed by Imperial or Dominion legislation. Their Lordships held, following the Watts v. Watts case ([1908] A.C. 573), that this act was sufficient to make the provisions of the English Divorce and Matrimonial Causes Act of 1857 part of the substantive law of Manitoba. The English Act of 1857 not only set up a new court, but introduced new substantive law and gave to the court it constituted not only the jurisdiction over matrimonial questions which the old Ecclesiastical Tribunals possessed, but a jurisdiction arising out of the principle then for the first time introduced into the law of England of the right to divorce a vinculo matrimonii for certain matrimonial

offences. The Court of King's Bench Act, passed by the Legislature of Manitoba in 1913, was sufficient to give the Court of King's Bench jurisdiction to entertain petitions for divorce, and in respect of matrimonial offences. [Review of Acts and authorities.]

Walker v. Walker, 48 D.L.R. 1, [1919] A.C. 947, [1919] 2 W.W.R. 935, affirming 39 D.L.R. 731, 28 Man. L.R. 495, which reversed 35 D.L.R. 207.

JURISDICTION OF COURT OF KING'S BENCH —EFFECT OF 20-21 VICT. 1857 (IMP.) C. 85.

The law of England as established by the Divorce Act, 20-21 Vict. 1857 (Imp.) c. 85, forms part of the substantive law of Saskatchewan, and all rights arising under this Act may be dealt with by the Court of King's Bench. [Board v. Board, 48 D.L.R. 13, [1919] A.C. 956, applied.]

Fletcher v. Fletcher, 50 D.L.R. 23, [1920] 1 W.W.R. 5, reversing 42 D.L.R. 733, 11 S.L.R. 391.

IMPERIAL STATUTE IN FORCE IN ALBERTA—DOMINION LEGISLATION — PROVINCIAL LEGISLATION — JURISDICTION OF SUPREME COURT TO ENTERTAIN DIVORCE ACTIONS.

For the reasons given in Walker v. Walker, 48 D.L.R. 1, their Lordships held that the effect of the Dominion Act of 1886 was to make the English law of divorce as established by the Divorce Act of 1857 apply to the Territories as well as to Alberta. The Supreme Court Act passed by the Legislature of Alberta in 1907 gave the court jurisdiction to entertain petitions for divorce.

Board v. Board, 48 D.L.R. 13, [1919] A.C. 956, [1919] 2 W.W.R. 940, affirming 41 D.L.R. 286, 13 A.L.R. 362.

JURY — PROVINCIAL COURT — B.N.A. ACT — PROVINCIAL LEGISLATION — VALIDITY OF.

The procedure in the Court of Divorce and Matrimonial Causes is civil rather than criminal and the court is in the category of a Provincial Court; under s. 92 (14) of the B.N.A. Act the regulation of such court is within the jurisdiction of the provincial legislature, and ss. 26 to 30 of c. 115 C.S. N.B., 1903, which provide for the summoning of a jury in divorce cases are intra vires, although not contained in the original act creating the court, and passed since Confederation.

Fitz Randolph v. Fitz Randolph, 45 D.L.R. 529, 46 N.B.R. 259. [See also 41 D.L.R. 739, 52 D.L.R. —.]

There is no provision, under the divorce law in force in British Columbia, for granting a decree nisi in the first place.

Purdy v. Purdy, 16 B.C.R. 493.

PRACTICE — GARNISHEE — JUDGMENT — DAMAGES ASSESSED AGAINST CORESPONDENT — PROCEDURE — R.S.B.C. 1911, CC. 14, AND 67, S. 36 — 1 & 2 VICT., C. 110, S. 18 (IMP.).

A judgment in an action under the Divorce and Matrimonial Causes Act is, by s. 18 of the Judgments Act, 1838 (Imp.), enforceable by an attaching order issued under the Attachment of Debts Act.

McLeod v. McLeod, 25 B.C.R. 430.

SEPARATION FROM BED AND BOARD — INQUIRY EX PARTE — TESTIMONY — COMMISSIONER OF SUPERIOR COURT, QUE. C.P. 23, 418, 532.

In an action for separation from bed and board, heard ex parte, the oaths of witnesses cannot be taken by a commissioner of the Superior Court.

Roy v. Belair, 15 Que. P.R. 294.

PLEADING — ALLEGATIONS — EVIDENCE — CROSS-DEMAND — COSTS.

Article 190 C.C. (Que.) enacts the doctrine of the old law, by which mutual wrongs of the husband or wife suing for separation may, according to their gravity and sufficiency, to be weighed by the court, be considered as a circumstance attenuating the complaints on which the action is based and such as to have the action dismissed as ill founded. Consequently the court before deciding should order evidence on the allegations of the plea tending to shew the grievances of which the plaintiff complains in his action. The compensation resulting from the plaintiff's wrongs may be raised by a plea to the merits; the cross-demand is necessary only in a case where the defendant asks that separation be granted from his husband or wife. The maxim of the old jurisprudence "Le criminel tient le civil en etat," is still a rule of our laws. An allegation made for the sole purpose of insulting the opponent party must be struck out. If the plaintiff fails in most of his contentions, the costs will be set off.

Gouin v. Rene, 19 Que. P.R. 68.

CROSS-DEMAND—SIMILAR CONCLUSIONS.

Where a husband sues his wife for separation from bed and board, the wife may, without any special authorization, reply to the demand by a defence and cross-demand with similar conclusions to those of plaintiff's action.

Flood v. Sparling, 54 Que. S.C. 509.

SERVICE OF PETITION.

Unless a judge so orders, there is nothing to require service upon the husband of the wife's petition asking to sue for separation from bed and board.

Frechette v. Patenaude, 20 Que. P.R. 234.

ADVERTISING.

One suing for separation from bed and board, who by mistake has not done all the advertisements required by law, may obtain permission to complete them instead of beginning them over again.

Contant v. Pion, 19 Que. P.R. 233.

DOMICILE AND CUSTODY OF CHILDREN — CONCLUSIONS.

In an action for separation as to bed and board taken under advisement, in which the plaintiff has made a petition to change her domicile during the suit and to keep her young children, the court may, notwithstanding such restricted conclusions, go beyond and order a modus vivendi for the husband and wife until the case is decided by a final judgment.

Coutlée v. Hétu, 27 Que. K.B. 442.

ANNULLING DECREE—DOMICILE.

Article 96, C.C.P., does not apply to actions for annulling a decree of separation from bed and board, which can be taken before the court of the domicile of the defendant.

Dupuis v. Malo, 19 Que. P.R. 22.

JURISDICTION — DOMICILE — WIFE SUING FOR DIVORCE — HUSBAND'S CHANGE OF RESIDENCE — DOMICILE OF ORIGIN — PRESUMPTION — PRIMA FACIE CASE OF JURISDICTION.

A domicile of origin continues unless a fixed and settled intention of abandoning it and acquiring another as the sole domicile is clearly shown; and where a domicile of origin is proved it lies upon one asserting a change of domicile to establish it; no presumption of change of domicile arises from mere change of residence. In an undefended action by a wife for divorce, where it was clear that the husband's domicile of origin was Alberta where he had lived all his life until he left his wife there five years ago and all that was heard of him since was that he was living sometimes in another province, at other times in different parts of the United States, it was held the wife had made out a prima facie case of jurisdiction upon which the court was justified in action; the fact that there was no one to lay before the court any facts to show that a new domicile had been acquired should not throw upon her the onus of providing a negative, namely, that her husband had not acquired a new domicile.

Coleman v. Coleman, [1919] 3 W.W.R. 490.

HUSBAND AND WIFE — DECLARATION OF NULLITY OF MARRIAGE — SUFFICIENCY OF RESIDENCE TO FOUND JURISDICTION.

While residence only is sufficient to found jurisdiction in nullity actions, as distinguished from divorce actions, such residence must be bona fide. Where a petition setting up grounds for a declaration of nullity was dismissed on the erroneous ground of lack of jurisdiction because of want of a British Columbia domicile, the court declined to reinstate the petition, it appearing on the evidence that the petitioner was merely a casual visitor, although his wife was a resident, in British Columbia, other cases referred to in the judgment and the peculiar condition of divorce jurisdiction in British Columbia.

Purdy v. Purdy, [1919] 2 W.W.R. 551.

(§ II—6)—DOMICILE OF TRAVELING SALESMAN—PLACE OF ADULTEROUS ACTS.

The residence of a traveling salesman for the period of one year and a month, coupled with his affidavit of his intention as to permanent residence, does not establish a sufficient change of domicile for jurisdictional purposes in a divorce proceedings on grounds of adultery committed in another province.

Walcott v. Walcott, 23 D.L.R. 261, 48 N.S.R. 322.

RESIDENCE OF PLAINTIFF FOR JURISDICTIONAL PURPOSES.

A decree of divorce granted in a foreign country at the suit of the husband will not absolve him in Canada from criminal responsibility under s. 242 Cr. Code for neglect to provide necessaries for the wife whom he had deserted in Canada, if the husband had not in fact changed his domicile from Canada to the foreign country but had gone there merely for the purpose of living there long enough to enable him to obtain the divorce and of then returning to Canada.

The King v. Wood, 19 Can. Cr. Cas. 15, 20 O.W.R. 576.

JURISDICTION — RESIDENCE — DOMICILE OF WIFE AFTER DESERTING HUSBAND.

The domicile of the husband is also that of the wife; and the plaintiff, having acquired a domicile in British Columbia, was held entitled to a decree of divorce from the Supreme Court of that province, although the marriage had taken place in England, the wife's misconduct and her desertion of him in Manitoba, he himself had not left Manitoba till after her desertion, had never invited her to join him in British Columbia, and she had never been in British Columbia. [Le Mesurier v. Le Mesurier, [1895] A.C. 517, followed; Adams v. Adams, 14 B.C.R. 301, and Wilson v. Wilson, L.R. 2 P. & D. 435, explained.]

Cutler v. Cutler, 20 B.C.R. 34, 28 W.L.R. 569, 6 W.W.R. 1231.

JURISDICTION—DOMICILE

The question of jurisdiction of the court, other than that of the domicile of the husband, or of the last common domicile, to entertain an action on a separation de corps, being ratione materiae can be raised at any state of the cause and by any proper procedure. If, however, it is raised otherwise than by declinatory exception the court will not grant any costs.

Irwin v. Gagnon, 17 Que. P.R. 402.

(§ II—7)—RESIDENCE OF DEFENDANT FOR PURPOSE OF JURISDICTION.

In an action for separation from bed and board, or for separation of property only, the defendant must be summoned either before the court of the domicile of the husband, or, if he has left his domicile, before that of the last common domicile of the consorts; and an action for separation from bed and board, instituted before a

court other than that so prescribed will be dismissed even though the husband as defendant has not entered any appearance, the provisions of art. 96 C.C.P. being jurisdictional.

Bonin v. Bergeron, 18 Rev. de Jur. 355.

(§ II—9)—Particulars.

Acts of cruelty alleged in support of a petition for divorce should be specifically set out in the petition so that the respondent may know what charges he has to meet.

Edmonds v. Edmonds, 1 D.L.R. 550, 17 B.C.R. 28, 20 W.L.R. 541.

Foreign decree—Effect of—Domicile.

R. v. Wood, 25 O.L.R. 63, 20 O.W.R. 399.

Marriage of lunatic — Declaration of nullity of marriage—Jurisdiction.

Caine v. Birmen, 2 O.W.N. 796, 18 O.W.R. 627.

Particulars.

An action for separation from bed and board, as any other action, must state with precision the place, the day, and all the circumstances of the facts of which the plaintiff complains, so as to put the defendant in a position to oppose the action.

Drolet v. Cousineau, 20 Que. P.R. 40.

III. Grounds.

A. Cruelty; ill-treatment.

(§ III A—10)—Grounds for—Fraud.

No marriage shall be declared void merely because it has been contracted upon fraud, unless the party imposed upon has been deceived as to the person, in which case there is no consent.

Hallman v. Hallman, 15 D.L.R. 842, 5 O.W.N. 976.

Adultery — Cruelty — Desertion — Dismissal of action—Costs—Rule 388.

Frind v. Frind, 12 O.W.N. 245.

Misconduct of wife — Departure from husband's house—Offer to return —Refusal of husband to receive her back — Nominal sum allowed to wife—Costs.

Wiles v. Wiles, 13 O.W.N. 359.

Failure of plaintiff to shew reasonable cause for leaving defendant—Evidence — Cruelty — Dismissal of action—Costs—Rule 388.

Heller v. Heller, 13 O.W.N. 148.

(§ III A—15)—Cruelty—Ill-treatment.

The cruelty charged in a suit for divorce in British Columbia must be such as would cause danger to life, limb, or health, or a reasonable apprehension of it. [Russell v. Russell, [1895] P. 315, and Tomkins v. Tomkins, 1 Sw. & Tr. 168, followed.]

Edmonds v. Edmonds, 1 D.L.R. 550, 17 B.C.R. 28, 20 W.L.R. 541, 1 W.W.R. 989.

Legal cruelty.

Legal cruelty sufficient to support an action for alimony where the husband is willing to take his wife back, is not shewn unless the husband's conduct has been such as to render future cohabitation dangerous to her mental or bodily health.

Lloyd v. Lloyd, 15 D.L.R. 892, 26 W.L.R. 722, 5 W.W.R. 1173. [Reversed in part 19 D.L.R. 502, 7 A.L.R. 307.]

The keeping of a razor and sharp knife underneath his pillow by a husband is insufficient to support a charge of cruelty, at any rate where the wife merely states that she became nervous through this action, but does not state that she feared acts of violence on the part of the husband, or that the weapons referred to were kept by him for that purpose.

Walsh v. Walsh, 7 W.W.R. 620, 20 B.C.R. 482.

Legal cruelty.

A charge made by a husband against the chastity of his wife without a shadow of foundation in fact, does not constitute legal cruelty justifying an action for alimony on the part of the wife, though the charge was made by the husband in the presence of his wife and their little girl and as a result thereof they left the husband's house and remained away up to the time of bringing the action, the husband in the meantime expressing a willingness to take them back, but not retracting or apologizing for making the charge, but, on the other hand, persisting in denying that he said it. [Russell v. Russell, [1897] A.C. 395, followed.]

Moon v. Moon, 9 D.L.R. 679, 6 S.L.R. 41, 23 W.L.R. 153, 3 W.W.R. 856.

Legal cruelty.

Abusive language held sufficient to constitute legal cruelty, as reviving former matrimonial offences.

Cherrington v. Cherrington, 9 A.L.R. 181, 32 W.L.R. 438, 9 W.W.R. 146.

B. Desertion.

(§ III B — 25) — Living with another woman—Assault—Alimony.

The fact that a man leaves his wife and children and lives with another woman, in a house which is manifestly disreputable, and where she has the reputation of being his wife, that he has assaulted his wife and ordered her and her children out of the house and that he has called her vile names —is sufficient ground for maintaining an action for judicial separation and for alimony.

Desautels v. Mailloux, 42 D.L.R. 267, 24 Rev. Leg. 392.

E. Adultery.

(§ III E—38)—In a suit for divorce on the ground of adultery, corroboration of the fact will be required in addition to proof of an admission of adultery made by the defendant unless the admission is entirely free from suspicion.

Edmonds v. Edmonds, 1 D.L.R. 550, 17 B.C.R. 28, 20 W.L.R. 541, 1 W.W.R. 989.

Adultery—"Cruelty."

The fact that on one occasion a husband came home drunk and called his wife terrible names before people held not to constitute legal cruelty sufficient together with acts of adultery to entitle her to divorce,

his adultery alone not entitling her to divorce.

B. v. B., [1919] 3 W.W.R. 894.

Grounds for — Adultery of wife — Evidence — Admissions — Corroboration — Jurisdiction of court.

C. v. C., 46 D.L.R. 666, [1919] 1 W.W.R. 982.

Action by husband—Adultery by wife—No direct evidence of offence — Proof required—No other reasonable conclusion.

Fitz Randolph v. Fitz Randolph, 41 D.L.R. 739, 45 N.B.R. 505. [See 45 D.L.R. 529, 52 D.L.R. —.]

Alimony — Evidence — Adultery — Cruelty — Desertion — Dismissal of action — Appeal — Costs.

Frind v. Frind, 14 O.W.N. 133, affirming 12 O.W.N. 245.

Separation deed—Allowance to wife—Cesser—Act "entitling" husband to divorce — Adultery — Appeal — Authority of previous decision.

Gordon v. Gordon, 14 O.W.N. 343.

Adultery — Evidence — Presumption — Domicile—Change.

Adultery may be proved by any kind of proof, even by simple presumption, the law leaving all discretion to the judge in such matters. In order that there may be flagrante delicto, it is not necessary that the delinquents should have been seen in the accomplishment of the guilty act, it is sufficient that they have been heard in the consummation of the adultery. In an action for separation from bed and board the wife condemned on account of adultery nevertheless retains the right of watching over the maintenance and education of her children. When the husband and wife have not made any marriage covenants, the rule of law which applies is that they are presumed to rely upon the law of the country in which the husband has his domicile at the time of the marriage, and if the latter is domiciled in the Province of Quebec, there is community of property between the husband and wife. A change of residence is not sufficient to transfer the domicile: Such change must be accompanied by an intention of definitely abandoning his last domicile, in order to establish permanently his residence in another place. If the law of the new place of residence is contrary to that of the original domicile, and recognizes the separation of property, while that of the former residence establishes the community of property, when there was no contract of marriage between the husband and wife, the intention to change the domicile is not presumed from the fact that the husband is described as separate as to property, in legal proceedings or various written agreements. The wife's adultery does not make her lose her rights in the community.

Malloch v. Graham, 27 Que. K.B. 446.

Evidence to establish.

In the Province of Nova Scotia where a dissolution of marriage on the ground of adultery is sought, the petitioner cannot give direct evidence of the respondents' guilt, but may establish the same by circumstantial evidence.

Wood v. Wood, 10 E.L.R. 275.

IV. Defences; connivance; recrimination.

As affecting validity of foreign divorce, see Conflict of Laws, I C—65.

(§ IV—40)—Separation agreement—Release from all prior claims—Adultery prior to agreement.

A release in a separation agreement made between husband and wife, whereby each of the parties released and discharged the other from all claims and demands whatsoever incurred or accrued up to the day of the date thereof, cannot avail the husband as a defence in an action by the wife for dissolution of the marriage, based on cruelty, and adultery committed by the husband prior to the date of the agreement but of which the wife had no knowledge until shortly before the proceedings for dissolution were commenced.

Holland v. Holland, 48 D.L.R. 26, [1919] 2 W.W.R. 966.

Defences.

The husband, defendant in an action en séparation de corps, can set up, in answer to an allegation of ill-treatment, provocation induced by the misconduct and disobedience of his wife.

O'Callaghan v. Ahern, 21 Que. K.B. 83.

(§ IV — 41) — Matrimonial offences — Condonation—Subsequent cruelty.

Unless it appears that there is a specific arrangement to the contrary, the presumption of cohabitation between husband and wife will operate as a condonation of prior matrimonial offences subject to the forgiveness being cancelled and the old cause of complaint being revived should a subsequent offence arise.

Brizard v. Brizard, 16 D.L.R. 55, 24 Man. L.R. 119, 26 W.L.R. 734, 5 W.W.R. 1160.

V. Alimony.

A. In general.

(§ V A—45)—The conduct of the husband in removing and taking up his residence with some of his own relatives with whom his wife is not on good terms and cannot reasonably be expected to reside, amounts to desertion on his part sufficient to found an independent action for alimony if he fails to provide for her maintenance. [See also Eversley on Domestic Relations, 3rd ed., p. 466.]

Goodfriend v. Goodfriend, 1 D.L.R. 368, 3 O.W.N. 784, 21 O.W.R. 637.

Action for — Adultery unsuccessfully pleaded as defence—Not a ground for granting.

Pleading adultery of the wife as an answer to an action for alimony, and attempt-

ing unsuccessfully to support this plea by evidence does not in itself constitute a ground for awarding alimony. [Russell v. Russell, [1897] A.C. 395, followed: Lovell v. Lovell, 13 O.L.R. 569, distinguished.]

Whimbey v. Whimbey, 48 D.L.R. 190, 45 O.L.R. 228.

LEGAL CRUELTY.

Imperiousness and meanness and insisting on running his household on an efficiency method, although extremely maddening to the wife, is not cruelty which justifies her in leaving her husband, or which entitles her to alimony.

Forget v. Forget, 40 D.L.R. 662.

DESERTION—WIFE'S ANTENUPTIAL CHASTITY.

A husband is not entitled to be relieved from liability to alimony to the wife whom he has deserted by setting up in defence to an alimony action that the child born shortly after the marriage was not his by reason of the wife's alleged intercourse with another before the marriage, although he further claims that at the time of the marriage he believed himself to be the father of the child of which she was then enciente.

Hogg v. Hogg, 20 D.L.R. 85, 28 W.L.R. 635, 6 W.W.R. 1201. [Affirmed, 21 D.L.R. 862, 25 Man. L.R. 226.]

CRUELTY—ASSAULT.

In the absence of cruelty amounting to a reasonable apprehension of danger to the life, limb or health of the wife as rendering cohabitation unsafe and impossible, an assault and battery is not sufficient ground for awarding alimony under the provisions of s. 34 of the Judicature Act, R.S.O. 1914, c. 51.

McIlwain v. McIlwain, 28 D.L.R. 167, 35 O.L.R. 532.

PROCEEDINGS UNDER DESERTED WIVES MAINTENANCE ACT, R.S.O. 1914, C. 152—ORDER—DEFAULT—ACTION IN SUPREME COURT.

A woman who has taken proceedings under Deserted Wives Maintenance Act, R.S.O. 1914, c. 152, and been granted alimony, and who subsequently brings an action in the Supreme Court for alimony which fails, cannot succeed in new proceedings under the statute, as these proceedings must be deemed abandoned or superseded by reason of her Supreme Court action. [Craxton v. Craxton, 23 T.L.R. 527, applied and followed.]

Re Wiley and Wiley, 49 D.L.R. 643, 46 O.L.R. 176.

WIFE LEAVING HUSBAND ON ACCOUNT OF CRUELTY—ACTS OF VIOLENCE—APPREHENSION OF FUTURE DANGER—OFFER TO RECEIVE BACK.

Bailey v. Bailey, 48 D.L.R. 750, affirming 35 O.W.N. 356.

ALIMONY — DESERTION — SUFFICIENT CAUSE—DUTY TO TESTIFY IN PERSON—PROPERTY AND INCOMES.

Batt v. Batt, 27 D.L.R. 718, 33 W.L.R. 550, 9 W.W.R. 1040.

In case the wife is living apart from her husband without a judicial separation, she is not entitled to an allowance or provision from her husband unless she be able to prove such a condition of things as would constitute the husband the guilty consort and would justify a judicial separation, being granted to her.

Gladstone v. Slayton, 3 D.L.R. 27, 21 Que. K.B. 440.

FAILURE OF DEFENDANT TO DELIVER STATEMENT OF DEFENCE—MOTION FOR JUDGMENT ON STATEMENT OF CLAIM—RULE 354—ADMISSION OF FACTS—QUANTUM OF ALIMONY SETTLED BY COURT IN LIEU OF DIRECTING REFERENCE.

Hargrave v. Hargrave, 11 O.W.N. 54, 130.

ALIMONY — DESERTION — QUANTUM OF ALLOWANCE—LEAVE TO APPLY—COSTS.

Belisle v. Belisle, 8 O.W.N. 296.

QUANTUM — REFERENCE — FINDING OF NOMINAL SUM—APPEAL—MAINTENANCE OF INFANT CHILD OF PARTIES—COSTS.

Evans v. Evans, 12 O.W.N. 182.

PROPERTY TO WIFE—LIS PENDENS—QUANTUM OF INTERIM ALLOWANCE.

Upon an application for interim alimony the defendant set up that the plaintiff was able to maintain herself out of land which he had conveyed to her and out of moneys which her children might allow her. It appeared, however, that, although the plaintiff lived in the house upon the land conveyed to her, the land was tied up by the registration of a certificate of lis pendens, and the allowances from the children would, if made, be no more than compassionate gifts:—Held, that what was thus alleged was no ground for setting aside an order for the payment of $4 a week as interim alimony. [Eaton v. Eaton, L.R. 2 P. & D. 51; Knapp v. Knapp, 12 P.R. 105, distinguished.] Held, also, that the defendant's statement on oath that he had no means out of which payment could be compelled, was no ground for setting aside the order—the plaintiff had the right to test the truth of the statement by an execution.

Peel v. Peel, 42 O.L.R. 165.

JUDGMENT — ARREARS — COSTS — DEATH OF PLAINTIFF.

In an action for alimony the defendant did not appear or defend, and judgment for the plaintiff was pronounced, on motion therefor, allowing her alimony from the date of issue of the writ of summons, but not before that date, though it was contended that "six years' back alimony" should be allowed. [Robinson v. Robinson, 2 Lee Eccl. r. 593 (appx.); Soules v. Soules, 3 Gr. 113, followed.] The plaintiff was allowed full costs of suit. The motion for judgment was heard on the 8th April. The

plaintiff died on the 11th April; and the judge, having been advised of her death, directed that the judgment should be entered as of the 8th April: See p. 304.

McFadden v. McFadden, 42 O.L.R. 599.

DEFENCE—AWARD OF ALIMONY BY ARBITRATORS — ACCEPTANCE OF ALIMONY PAYMENTS BY WIFE—WAIVER—BAR TO ACTION—OBJECTION TO AWARD—RIGHT OF WIFE TO CONTRACT.

Harrison v. Harrison, 42 O.L.R. 43, affirming 41 O.L.R. 195.

HUSBAND AND WIFE—ALIMONY—FAILURE OF WIFE TO PROVE ALLEGATIONS MADE AGAINST HUSBAND—DISMISSAL OF ACTION—EFFECT OF, ON MATRIMONIAL OBLIGATION OF HUSBAND—COSTS—CASH DISBURSEMENTS.

Kingsley v. Kingsley, 14 O.W.N. 181.

REFERENCE — REPORTS — CORPORATION — PAYMENT OUT OF MONEY IN COURT—ALIMONY—COSTS.

Karch v. Edgar, 14 O.W.N. 284.

INTERIM ALLOWANCE—EARNINGS OF WIFE—MEANS OF HUSBAND—ASSIGNMENT BY HUSBAND FOR BENEFIT OF CREDITORS—QUANTUM OF ALLOWANCE — DATE OF COMMENCEMENT OF PAYMENTS—DELAY IN DELIVERY OF STATEMENT OF CLAIM—INTERIM DISBURSEMENTS.

Campbell v. Campbell, 14 O.W.N. 350.

PERMANENT ALLOWANCE—HOW PAYABLE—LUMP SUM—ANNUAL PAYMENTS.

Conway v. Conway, 15 O.W.N. 106.

SECURITY OF COSTS—FOREIGN DIVORCE.

In an action for alimony the fact that the wife has obtained, of her own volition, a divorce in another jurisdiction is not a ground entitling the husband to security for costs. [Lloyd v. Lloyd, 19 D.L.R. 502, applied.] The decisions which hold that a wife who, of her own volition, has obtained in another jurisdiction a divorce which is not recognized by our courts cannot set up, as the lawful wife of her divorced husband, any claim to his property, do not apply to a claim for alimony or for maintenance for the period between the date of desertion and the date of the divorce.

Ackerman v. Ackerman, [1918] 2 W.W.R. 759.

LIABILITY OF FATHER-IN-LAW.

When a husband has left the country and is no more under the jurisdiction of the court, his wife, in need of the necessaries of life, is not bound to address herself to him before suing her father-in-law for an alimentary pension.

Racine v. Dansereau, 27 Rev. Leg. 294.

MOTHER-IN-LAW—EVIDENCE—INSURANCE.

Although a wife who needs to be provided for must first apply to her husband, yet it is sufficient, in order for her to have the right to claim alimony from her mother-in-law, that her husband should be unable to provide for her, or that being able to work to support his family he refuses to do so. It is not necessary for the wife to have that fact declared by the court in a distinct and separate action; it is only a matter of evidence. Alimony cannot be refused to a wife who has abandoned her husband when she has been forced to do so owing to his ill-treatment and to his refusal to provide for her and her children. A wife, to whom and her children the husband, by marriage contract, has given life insurance, is not bound to realize the amount of that policy before she can claim alimony from her mother-in-law, who is bound, in virtue of the marriage contract, to pay the premium.

Aubry v. Allard, 27 Que. K.B. 416.

The payment of alimony due under a decree for divorce may be enforced in the Court of Divorce and Matrimonial Causes by writ of execution issued out of such court. Semble: That imprisonment in default of payment of money due under decree of the said court is not abolished by the Nova Scotia Judgment Debtor's Act.

Halliday v. Halliday, 10 E.L.R. 293.

SALE OF PROPERTY TO SATISFY A JUDGMENT FOR ALIMONY.

Ferguson v. Ferguson, 29 D.L.R. 364; 26 Man. L.R. 269, 34 W.L.R. 804, 33 W.L.R. 923, 10 W.W.R. 113.

DECREE FOR ALIMONY IN ANOTHER PROVINCE.

A widow, in whose favour a decree was made in the Chancery Division of the High Court of Justice, in Ontario, allowing her alimony to be paid by her husband, as long as they should live separate, to the amount, and in such a manner as should be settled on reference to a master in chancery, who never proceeded any further, nor took any steps whatever, for more than thirty years, to enforce the decree and obtain payment from the husband living in this province and at all times well able to pay, has no action, after his death, against his universal testamentary legatee, to recover from him a sum alleged to represent arrears of the alimony to which she would have been entitled under the aforesaid decree.

Hill v. Johnson, 44 Que. S.C. 160.

The wife séparée de corps by judicial decree, even for adultery on her part, preserves the right to alimony from her husband.

Duval v. Joubert, 42 Que. S.C. 208.

ALIMONY—REAL ESTATE IN LIEU OF—QUE. C.C. 1592.

A judge may authorize a husband to give certain real properties to his wife in payment of alimony he owes her in principal and interest, and may authorize the wife to accept the same in payment.

Ex part Gagnon, 16 Que. P.R. 204.

HUSBAND AND WIFE—ALIMONY—EVIDENCE—ADULTERY — CRUELTY — PARTIES ASSAULTING EACH OTHER—QUARREL PROVOKED BY WIFE.

Correll v. Correll, 16 O.W.N. 358.

DESERTION—EVIDENCE.

Gatfield v. Gatfield, 17 O.W.N. 289.

ALIMONY—FAILURE TO PROVE MARRIAGE TO DEFENDANT — FORMER HUSBAND LIVING WHEN FORM OF MARRIAGE GONE THROUGH —ALTERNATIVE CLAIM TO PAYMENT FOR SERVICES AS HOUSEKEEPER — MONEY LENT—MONEY PAID FOR INSURANCE PREMIUMS IN RESPECT OF POLICIES ON LIFE OF DEFENDANT—MONEY TO BE RETURNED IF BENEFIT DIVERTED FROM PLAINTIFF—INTERIM ALIMONY—EXISTING ORDER FOR —RIGHT OF PLAINTIFF TO ARREARS—COSTS.

Currie v. Currie, 16 O.W.N. 244.

ALIMONY — HUSBAND LEAVING WIFE — ALLEGATIONS OF ACTS OF CRUELTY BY WIFE —EVIDENCE — JUDICATURE ACT, R.S.O. 1897, c. 51, s. 34.

Peel v. Peel, 16 O.W.N. 79.

PLAINTIFF LEAVING DEFENDANT'S HOUSE WITHOUT CAUSE—REFUSAL TO RETURN —UNFOUNDED CHARGE AGAINST DEFENDANT—DISMISSAL OF ACTION—COSTS—CASH DISBURSEMENTS—RULE 388.

Lambert v. Lambert, 16 O.W.N. 30.

ALIMENTARY ALLOWANCES—INCREASE.

It is not necessary to bring an action to have an alimentary allowance increased; the right to it can be exercised by means of a petition.

Hainault v. Guy, 48 Que. S.C. 209.

HUSBAND AND WIFE — ALIMONY — EVIDENCE — CRUELTY — FAILURE TO ESTABLISH — DISMISSAL OF ACTION — COSTS — RULE 388.

McPhadan v. McPhadan, 16 O.W.N. 269.

HUSBAND AND WIFE — CRUELTY — FINDINGS OF FACT OF TRIAL JUDGE—RATE OF MONTHLY PAYMENTS FIXED IN JUDGMENT—LEAVE TO APPLY.

Riopelle v. Riopelle, 15 O.W.N. 420.

(§ V A—46)—JUDGMENT — ENFORCEMENT BY SALE — EXECUTIONS.

Cowie v. Cowie, 3 D.L.R. 887, 3 O.W.N. 1310.

INDEPENDENT SUIT FOR.

On an application by a wife to enforce the statutory charge for arrears due on a judgment for alimony, an order will not be made for a sale of the lands free from her dower, nor to provide for payment to her of a lump sum in lieu of this right. [Forrester v. Forrester (unreported), distinguished.]

Abbott v. Abbott, 1 D.L.R. 697, 3 O.W.N. 683, 21 O.W.R. 281.

ACTION FOR ALIMONY — SEPARATION — UNPROVED INFIDELITY CHARGES.

An offer on the part of the wife to return to her husband whom she had left voluntarily is dispensed with for the purposes of her action for alimony by the fact of the husband making and persisting in allegations of infidelity against her unsupported by any testimony at the trial.

Ney v. Ney, 11 D.L.R. 100, 24 O.W.R. 193, 4 O.W.N. 935. [Affirmed, 12 D.L.R. 248.]

JUDGMENT EN SÉPARATION DE CORPS — ADULTERY OF WIFE.

Even though the husband has obtained, on the ground of adultery on the part of the wife, a judgment on séparation de corps, the wife, according to the law of Quebec, is entitled to a decree for alimony, but the court should consider the means of the husband and the conduct of the wife in fixing the amount.

Hamilton v. Church, 24 D.L.R. 266, 24 Que. K.B. 26, varying 20 D.L.R. 639.

APPLICABILITY OF DIVORCE COURT PROCEDURE, N.S., TO ACTION FOR ALIMONY.

The provision and procedure of the Divorce Court in Nova Scotia are not applicable to actions for alimony in the Supreme Court of Nova Scotia.

Dorey v. Dorey, 9 D.L.R. 150, 46 N.S.R. 469, 49 C.L.J. 75.

ALIMONY — INDEPENDENT SUIT FOR — NECESSITY FOR DECREE — R.S.S. c. 52, s. 23.

In the statutory action for alimony, where the question of divorce is not involved, a plaintiff must obtain a decree after trial before any alimony can be awarded her. [Dorey v. Dorey, 46 N.S.R. 469, followed.]

Sunderland v. Sunderland, 6 W.W.R. 40.

(§ V A—49)—COHABITATION AFTER ACTION — ALIMONY — COSTS.

Ruttle v. Ruttle, 4 O.W.N. 457, 23 O.W.R. 575.

B. TEMPORARY ALIMONY; SUIT MONEY.

(§ V B—50)—INTERIM ALIMONY.

An allegation in a husband's affidavit and defence to a wife's claim for alimony on the ground of desertion, that he is ready and willing to support and maintain his children is insufficient to defeat the wife's application for interim alimony in which she charges cruelty on his part. Interim alimony will be granted, although desertion only is charged by a wife, where the husband does not shew by his defence or affidavit that he is willing to resume cohabitation with her. Where desertion only is charged by a wife who is residing in her husband's house, interim alimony will not be granted where the husband, by his defence and affidavit, offers to resume cohabitation with her.

Karch v. Karch (No. 1), 3 D.L.R. 658, 3 O.W.N. 1032, 21 O.W.R. 883.

Where a wife without any means and unable to earn anything on account of the state of her health is entitled to interim alimony, an allowance of eight dollars per week as such is reasonable, notwithstanding that her husband asserts on oath that he is not the owner of any property within the province.

Secrest v. Secrest, 5 D.L.R. 833, 5 A.L.R. 389, 22 W.L.R. 51, 2 W.W.R. 928.

INTERIM — NO APPLICATION FOR — COURT CANNOT GRANT PERMANENT ALIMONY PRIOR TO THE DATE OF THE DECREE.

Where no application has been made for interim alimony, the court cannot carry the permanent alimony back to a date before the decree. [Nicholson v. Nicholson, 31 L.J.P. 165, Cooke v. Cooke, 2 Phillimore 40, followed.]

Dewitt v. Dewitt, 46 D.L.R. 242, 12 S.L.R. 213. [1919] 2 W.W.R. 181.

ALIMONY ACTION IN DEFAULT UNDER SEPARATION AGREEMENT — INTERIM ALIMONY AND DISBURSEMENTS.

An order for interim alimony and disbursements may be made, although the plaintiff sets up in her statement of claim a separation agreement and defendant's default in making the stipulated payments for her support and claims, in addition to future alimony, arrears due her under the agreement.

Riddell v. Riddell, 14 D.L.R. 222, 7 A.L.R. 4, 25 W.L.R. 656, 5 W.W.R. 241.

The fact that the wife has left the husband and refuses to return to him although he is willing to take her back to live with him, is no answer, in an alimony action, to her application for an order directing the husband to pay her interim alimony until the trial. [Wilson v. Wilson, 6 P.R. (Ont.) 129, approved.] A prima facie case is made out for an order directing payment of interim alimony in an alimony action, by proving the marriage. [Karch v. Karch, 3 D.L.R. 658, applied.]

Moon v. Moon, 6 D.L.R. 46, 22 W.L.R. 179, 2 W.W.R. 1071.

Interim alimony will not be ordered if it appears that the defendant has no ability to pay. [Pherrill v. Pherrill, 6 O.L.R. 612, applied.] Upon an application by plaintiff for interim alimony, the court will consider the following questions: (a) Dilatory course of plaintiff in going to trial; (b) her own earning capacity; (c) her sources of income from her adult children; but on the other hand will take into consideration the expense to which the applicant is put in supporting the five dependent children. Upon a motion for interim alimony resisted by the defendant upon the ground that he had offered to resume cohabitation with the plaintiff, such an offer where cruelty and desertion were set up in the statement of claim is not a bar to the application, although, in the absence of the allegation of cruelty, it would be otherwise.

Standall v. Standall, 7 D.L.R. 671, 22 Man. L.R. 591, 3 W.W.R. 402.

Where an application for interim alimony was not made in an alimony action until long after the delivery of plaintiff's statement of claim the court may refuse to order interim alimony computed from the delivery of the statement of claim and direct payment to be made only from the date of the order until the trial. An order for interim alimony will not be refused nor its operation stayed upon the ground that the plaintiff should first return to the defendant the child and certain chattels alleged to have been wrongfully taken away by her where the matter of the objection should properly be determined at the trial. [Karch v. Karch, 3 D.L.R. 658, 3 O.W.N. 1032, followed.]

Parish v. Parish, 6 D.L.R. 494, 4 O.W.N. 105, 23 O.W.R. 79.

INTERIM ALIMONY — REFUSAL — ORDER FOR PAYMENT OF DISBURSEMENTS.

White v. White, 2 D.L.R. 885, 21 O.W.R. 515.

INTERIM ORDER — HUSBAND WITHOUT MEANS.

McNair v. McNair, 10 D.L.R. 829, 4 O. W.N. 1093, 24 O.W.R. 390.

ALIMONY—WHEN DUE.

In an action for separation from bed and board, the alimony due to the wife begins from the moment it is asked for at law, and is payable in advance. Alimony exists by virtue of the law, and not by virtue of the judgment which grants it. A defendant cannot ask for the dismissal of the plaintiff's petition for alimony on the ground that the allowance is not a debt actually due.

Trahan v. Boutet, 15 Que. P.R. 315.

SEPARATION FROM BED AND BOARD — PROVISIONAL ALIMONY — RIGHTS AS TO MOVEABLE EFFECTS — QUE. C.P. 1100.

During a trial of separation from bed and board, the wife must receive suitable provisional alimony, according to the husband's means. The defendant wife may keep the conjugal bed with its appurtenances, her bureau and dressing table with its chair which should be in the conjugal room, and also the child's bed with its appurtenances.

Geoffrion v. Mongeon, 16 Que. P.R. 227.

PROVISIONAL ALLOWANCE.

A wife cannot obtain a provisional allowance from her husband to defray her expenses pending an action for the separation from bed and board, until she obtains permission to live apart from husband.

Roy v. Girouard, 20 Que. P.R. 21.

No provision in the law permits an application for a provisional allowance during an action for an alimentary pension.

Reuttenberg v. Reuttenberg, 19 Que. P.R. 248.

INTERIM ALIMONY — AGREEMENT AS TO SUBSEQUENT TO COMMENCEMENT OF PROCEEDINGS — EFFECT.

In an application for interim alimony, no notice is to be taken of a subsequent agreement entered into by the parties to the suit, and almost entirely unperformed by one party. An agreement which is almost entirely unperformed is no agreement at all, but merely a subterfuge on the part of the husband. Moon v. Moon, 2 W.W.R. 1071, followed, as laying down that the merits of the case on such an application cannot be

gone into, and that practically the only subjects for consideration are the financial standing of the parties, particularly of the husband, and the proof of marriage. Application for interim alimony granted.
Crooks v. Crooks, 6 W.W.R. 1307.

Interim alimony — Separation agreement as bar—Costs.

The Supreme Court of Alberta has power to grant interim alimony. A deed of separation executed by a wife at the persuasion of a husband and without independent advice is not a bar to interim alimony. The plaintiff in alimony actions is entitled to have her costs paid upon taxation subject to the right of the husband to dispute the same on the grounds of the wife having separate estate or sufficient means to pay her own costs. [Riddell v. Riddell, 5 W.W.R. 241, followed.]
East v. East, 7 W.W.R. 1239.

(§ V B—52)—Suit money — Counsel fees — Costs — Just cause.

In actions for alimony the general rule is that the plaintiff although unsuccessful is entitled to her costs unless in the opinion of the Trial Judge her solicitor had not reasonable and probable grounds for believing that he was prosecuting a just cause.
Lloyd v. Lloyd, 19 D.L.R. 502, 7 A.L.R. 307, 28 W.L.R. 806, 6 W.W.R. 1387.

Counsel fees.

Upon an application for interim alimony counsel fees will not be included unless it is affirmatively shewn that the employment of counsel was necessary.
Standall v. Standall, 7 D.L.R. 671, 22 Man. L.R. 591, 3 W.W.R. 402.

Alimony — Costs — Usual rule — Variation of — Discretion of court.

In actions for alimony the usual rule is that the husband pays the wife's costs, whether she is successful in her action or not, but in order to obtain such costs she must apply for the same before bringing on her action to trial; otherwise if the case is lost, she is not entitled to costs.
Sewell v. Sewell, 49 D.L.R. 594, [1920] 1 W.W.R. 10.

Alimony — Action — Suit money.

In an action by a wife against her husband for alimony, the court will, upon application before trial, order the defendant to furnish security for plaintiff's costs, in order that she may have her case heard, but where no such application has been made and the plaintiff has brought her case to a hearing and has failed the husband will not be made liable for her costs. [Sewell v. Sewell, 49 D.L.R. 594, followed.]
Gilbert v. Gilbert, 50 D.L.R. 416.

Action for alimony—Interim disbursements—Counsel fee—Agency fees—Undertaking of plaintiff's solicitors—Practice.

Foord v. Foord, 9 O.W.N. 139.

Alimony—Evidence—Dismissal of action—Costs—Disbursements—Rule 388.

May v. May, 9 O.W.N. 476.

Suit money—Costs—Counsel fees.

Where a suit for a divorce is taken by a wife against a husband and the charges therein made have substance and the costs are reasonably incurred, then even though the wife proves unsuccessful it is just that the costs of her solicitor and counsel should be paid by the husband.
Vernon v. Vernon, 6 W.W.R. 1047.

Solicitors' fees—Community.

If an action in separation from bed and board is maintained, and the community heretofore existing thereby dissolved, the defendant's solicitors have no right to have their fees and disbursements for unsuccessfully defending the action paid out of the property of the community.
Conroy v. Carroll, 19 Que. P.R. 159.

(§ V B—53)—Suit money—When refused—Independent means of support.

An application for interim alimony may be refused in an alimony action if the defendant satisfies the court or judge that the plaintiff has ample means of support without any allowance by way of interim alimony or that he, the defendant husband, has neither property nor earning power wherewith to provide interim alimony.
Moon v. Moon, 6 D.L.R. 46, 22 W.L.R. 179.

The court will refuse to grant an order for interim alimony pendente lite, when a wife is in receipt of rents from the real estate owned by her sufficent, after providing for the costs of carrying the property, to produce an adequate income for her maintenance until the trial of the action. [Coombs v. Coombs, L.R. 1 P. & D. 218, followed.]
Allison v. Allison, 9 D.L.R. 418, 6 A.L.R. 127, 23 W.L.R. 570, 3 W.W.R. 1082.

Alimony — When refused — Husband's want of income or earnings — Unproductive property.

A wife is not justified in leaving her husband, and is therefore not entitled to alimony merely because there were occasional quarrels between the parties in which intemperate language may have been used by each of them. A wife is not entitled to alimony where, although the husband has property of some value, he derives no income from it nor from any other source.
Gilbert v. Gilbert, 29 W.L.R. 714.

C. Permanent allowance.

(§ V C—55)—Permanent alimony.

The general rule in fixing permanent alimony in an alimony action is that the wife is entitled to one-third of the husband's income subject to deduction in respect of any independent separate in-

come the wife may have apart from her own earnings.

Goodfriend v. Goodfriend, 1 D.L.R. 368, 3 O.W.N. 784, 21 O.W.R. 637.

AMOUNT OF—HUSBAND'S INCOME.

Where the husband liable to pay alimony has no income but his wages of approximately $80 per month, $20 per month is a proper allowance to the wife, but the order may provide for changing the amount by future order on proof of altered circumstances.

Nurse v. Nurse, 20 D.L.R. 863.

CRUELTY — DESERTION — QUANTUM OF ALLOWANCE.

Tanner v. Tanner, 2 D.L.R. 907, 3 O.W.N. 1157.

REFERENCE TO FIX PERMANENT ALIMONY——SCOPE OF INQUIRY AS TO INCOME AND PROPERTY OF DEFENDANT.

C. v. C., 15 O.W.N. 332.

REPORT OF MASTER FIXING AMOUNT OF PERMANENT ALLOWANCE — ASCERTAINMENT OF INCOME OF HUSBAND—INTEREST IN INDUSTRIAL COMPANY AS PRINCIPAL SHAREHOLDER—SALARY AS MANAGER — EARNINGS OF COMPANY — ABSENCE OF FIXED RULE AS TO PROPORTION OF INCOME TO BE ALLOWED AS ALIMONY — CIRCUMSTANCES OF CASE — DISCRETION.

Malcolm v. Malcolm, 17 O.W.N. 93.

(§ V C—56)—EFFECT OF PREVIOUS AGREEMENT AS TO.

An agreement for the settlement of an action for alimony, providing for the transfer to the wife of an undivided half interest in certain lands and chattels, but containing no provision for her maintenance by means thereof, nor any other arrangement to maintain her beyond a covenant by the husband to do so, is not a bar to a subsequent action for alimony, though regard will be had thereto in fixing the amount of alimony to be awarded. [Gandy v. Gandy, 7 P.D. 168, and Atwood v. Atwood, 15 P.R. (Ont.) 425, distinguished.] The rule often followed in England of allotting to the wife as alimony one-third of the joint income will not usually be satisfactory in Ontario, but the court will look to what is just and reasonable, having regard to the amount and yearly value of the property of both husband and wife.

Morgan v. Morgan, 3 D.L.R. 802, 3 O.W.N. 1220, 22 O.W.R. 25.

PRIOR SEPARATION AGREEMENT — SUBSEQUENT GROSS MISCONDUCT.

If a state of facts is proved to exist which was not in contemplation of the parties when the agreement of separation was executed, as where the husband subsequently contracted a bigamous alliance with another woman, the wife instituting divorce proceedings on the latter ground may be granted the alimony appropriate to the case without being limited to the amount specified in the separation deed where the latter merely contemplated that the parties would live apart and contained no covenant that she would not apply for alimony if legal grounds therefor should arise.

Miller v. Miller, 16 D.L.R. 557, 19 B.C.R. 563, 27 W.L.R. 607, 6 W.W.R. 168.

(§ V C—58) — INSTANCES OF AMOUNT — PROPORTION OF HUSBAND'S INCOME.

Where the husband is incapacitated by illness from earning anything, the wife's right of action for alimony is not to be based upon his former increased income which included earnings during health, but upon his present income from any source; nor can the corpus of his estate be charged with the deficiency required for the wife's maintenance.

Goodfriend v. Goodfriend, 1 D.L.R. 368, 3 O.W.N. 784, 21 O.W.R. 637.

A wife will be granted some alimony notwithstanding her husband, who had properly provided for her, had suffered from her neglect of her household duties, and had finally left her because of her neglect of him and her continued nagging and scolding, as her conduct was not such as to disentitle her to alimony upon the defendant refusing to live with her.

Karch v. Karch (No. 2), 4 D.L.R. 250, 3 O.W.N. 1446, 22 O.W.R. 534.

GROSS SUM IN LIEU OF PERIODICAL PAYMENTS—PUBLIC POLICY.

Derby v. Derby, 31 D.L.R. 248, 26 Man. L.R. 320.

UNDERTAKING OF HUSBAND TO RECEIVE WIFE BACK — REFUSAL EXCEPT ON CONDITION —CONTEMPT OF COURT—ORDER TO COMMIT—LOCUS PŒNITENTIÆ.

Evans v. Evans, 10 O.W.N. 77, 11 O.W.N. 34.

AMOUNT—CIRCUMSTANCES.

To determine the amount of the allowance to be granted to a deserted married woman, the court may take into consideration the condition of fortune not only of the father-in-law, but also of the mother, who is bound, as he is himself, to supply such allowance, even if she has not been made a party to the action.

Phaneuf v. Prévost, 49 Que. S.C. 189.

(§ V C—59) — ALIMONY ACTION — ENFORCEMENT OF DECREE.

Cowie v. Cowie, 6 D.L.R. 886, 4 O.W.N. 224, 23 O.W.R. 237.

HUSBAND AND WIFE — DEFAULT IN PAYMENT UNDER ORDER — REALIZATION BY SALE OF DEFENDANT'S LAND.

Ancelle v. Ancelle, [1919] 1 W.W.R. 875.

D. Subsequent change.

(§ V D—60)—Separation agreement—Alimentary allowance made to wife—Provision for decrease or increase—Application to judge—Appointment of arbitrator—Arbitration Act, R.S.O. 1914, c. 65, s. 9.

Re Gordon and Gordon, 17 O.W.N. 76.

Wife capable of self-support.

Where, in an action for separation from bed and board, a husband was ordered to pay an alimentary pension to his wife, he may, by petition, be relieved of his obligation, if his wife has become capable of providing for herself by her work and industry.

Martel v. Page, 20 Que. P.R. 139.

(§ V D—66)—Effect of husband's death.

The obligation of a husband to pay alimony to his wife, is personal to himself and does not pass to his heirs, from whom the wife cannot recover.

Hill v. Johnson, 44 Que. S.C. 160.

Foreign divorce—Fraud—Alimony.

Maday v. Maday, 4 S.L.R. 18, 16 W.L.R. 701.

Alimony — Separation deed — Setting aside deed of wife.

Ditch v. Ditch, 21 Man. L.R. 507, 19 W.L.R. 497.

Alimony—Application for cancellation of judgment.

Mellor v. Mellor, 16 B.C.R. 1.

Separation de corps—Collusion.

The intention of the legislature, evidenced by Art. 186, C.C. (Que.) and Art. 1100, C.C.P., to prevent collusion between consorts in order to obtain a decree for separation de corps imposes on the court the duty, in adjudicating upon an application for such decree, where the only evidence tendered is that of the wife who brings the action, to demand corroboration as soon as it appears, that it is possible to obtain it.

Cameron v. Watson, 40 Que. S.C. 350.

Alimony—Liability for—Father-in-law.

Alimony is due without distinction from all those liable to furnish it, and recourse need not be had in the first place to the one primarily liable. Thus, a married woman can recover it from her father-in-law without first applying to her husband.

Paradis v. Letourneau, 40 Que. S.C. 24.

Father-in-law — Supplementary allowance.

Ex parte Allard, 12 Que. P.R. 213.

VI. Other property rights.

See Husband and Wife.

VII. Custody and support of children.

See also Infants; Parent and Child.

(§ VII—75)—Child's welfare.

The court in making an order for the custody of infant children will first consider the welfare of the children rather than the punishment of the guilty parent and where the father's common-law right to their custody conflicts with this interest it will not prevail.

Tuxford v. Tuxford, 28 D.L.R. 239, 9 S.L.R. 251, 34 W.L.R. 419, 10 W.W.R. 598. [See also 12 D.L.R. 380, 6 S.L.R. 96.]

Agreement as to—Access to child.

A separation agreement providing the custody and control of a child with the wife and its maintenance and education by the husband with a privilege to the husband of access to the child entitles the husband to access to the child only while in the mother's custody and control, and unless it is otherwise stipulated he cannot object to the mother's presence in the room during his visits to see the child.

Re M., an Infant, 22 D.L.R. 435, 33 O.L.R. 515.

Agreement for custody of children—Action to set aside—Undue influence — Misrepresentation — Concealment of facts—Public policy—Alimony—Adultery—Condonation.

Schmidt v. Schmidt, 11 O.W.N. 405.

Custody of children—Decree of separation from bed and board—Que. C.P. 214, 215.

A motion by a wife to obtain the custody of her child will be refused if a separation judgment has already been granted to the husband.

Gravel v. Champagne, 16 Que. P.R. 31.

Judgment giving mother custody — Habeas corpus—Res judicata.

A child of eleven has not the right to choose for himself, at his will, a domicile different from that of his mother, when the custody of the child has been given to the mother by the court which has definitely adjudged on the consorts' application for separation from bed and board. A mother, who is deprived of a child's custody given her by the court, may claim him back by way of habeas corpus. The matter is res judicata when the judgment on the application for separation, and a previous writ of habeas corpus have been upheld in favour of the mother. So long as the orders giving the child to the mother have not been rescinded by the court's discretionary power, both the father and child are bound to obey such orders.

Kastel v. Hampton, 20 Que. P.R. 198.

(§ VII—78) — Custody of children — Change of decree as to — Evidence of husband's character—Relevancy.

Where the claims made by the wife in an alimony action include one for the custody of the children, evidence of the defendant husband's character becomes admissible in respect of such claim.

Lloyd v. Lloyd, 19 D.L.R. 502, 7 A.L.R. 307, 28 W.L.R. 806, 6 W.W.R. 1387.

(§ VII—79)—Alimony action—Custody of children.

On the trial of an action by the wife for alimony and the custody of the children,

the defendant husband against whom alimony is decreed, may be ordered not to visit or see the children at the plaintiff's house where such visits would interfere with plaintiff's business as a boardinghouse keeper, but the court will direct that any periodical interviews to which it considers the father entitled with his children shall be held elsewhere.

Fitchett v. Fitchett, 10 D.L.R. 367, 4 O. W. N. 844, 24 O.W.R. 109.

UNLAWFUL TAKING OR ENTICEMENT OF CHILD—OFFENCE COMMITTED BY FATHER—DECREE OF FOREIGN COURT AWARDING CUSTODY TO MOTHER—VALIDITY.

R. v. Hamilton, 22 O.L.R. 484, 17 Can. Cr. Cas. 410.

SÉPARATION DE CORPS—CARE OF CHILD.

The wife, defendant to an action en séparation de corps retains pendente lite the provisional custody of a child two and a half years old and too young to be deprived of his mother's care.

Beaulieu v. Larivee, 12 Que. P.R. 163.

MAINTENANCE OF CHILDREN—COVENANT IN MARRIAGE CONTRACT—SEPARATION.

Gregory v. Odell, 39 Que. S.C. 291.

VIII. Agreements for support and maintenance.

See also Husband and Wife.

A. In general.

(§ VIII A—80)—AGREEMENTS FOR SUPPORT AND MAINTENANCE.

Upon a separation of husband and wife, the wife is competent to make her own terms and her agreement to accept a stipulated allowance for her maintenance will be deemed valid in the absence of any shewing that fraud or duress was practised upon her.

Frémont v. Frémont, 6 D.L.R. 465, 26 O.L.R. 6, 21 O.W.R. 644.

EFFECT OF ADULTERY.

An admission by the defendant on examination for discovery that he has been living in adultery is a new circumstance, not in contemplation of the parties at the time of entering into a separation agreement, sufficient to entitle the plaintiff to the custody of the infant children and to such increase in alimony as the court may think proper under the circumstances.

Tuxford v. Tuxford, 28 D.L.R. 239, 9 S. L.R. 251, 34 W.L.R. 419, 10 W.W.R. 598. [See also 12 D.L.R. 380, 6 S.L.R. 96.]

SEPARATION DEED—ADULTERY—"ENTITLING TO DIVORCE."

Adultery does not, in Ontario, entitle to divorce, which can only be granted by the Parliament of Canada; therefore a separation allowance under deed is receivable by a wife guilty of adultery subsequent to the execution thereof despite a condition therein that it shall cease if she be guilty of any act which would "entitle" the husband to obtain a dissolution of marriage.

Gordon v. Gordon, 32 D.L.R. 626, 38 O. L.R. 167. [See also 13 O.W.N. 172.]

ANNUITY—"DURING HER LIFE."

Although it is provided by a separation deed that an annuity is to be paid to the wife "during her life" for her maintenance, it may be held in view of another provision in the deed for the payment to her of a lump sum on the husband's death, that the annuity was to be payable during their joint lives only.

Rissmuller v. Balcom, 24 B.C.R. 353, [1917] 3 W.W.R. 535.

SEPARATION AGREEMENTS — RELEASE OF DOWER — REGISTRATION — RESUMPTION OF COHABITATAION—DECLARATION OF CANCELLATION OF AGREEMENTS AND RELEASE — ACTION AGAINST ADMINISTRATRIX.

Wardhaugh v. Wiseman, 5 O.W.N. 456.

(§ VIII A—81)—ENFORCEMENT OF.

Where an alimony action has been settled and the husband and wife resumed cohabitation under an agreement stipulating that in the event of his wife being at any time "compelled for good cause to leave and live separate and apart from him" certain monetary benefits should be charged on his landed property in her favour, the charge will be enforced as upon a breach of the condition if the husband leaves the wife under circumstances which justify her in refusing to go where he is living and in refusing to cohabit with him further.

Nargang v. Nargang, 1 D.L.R. 323, 20 W.L.R. 206, 1 W.W.R. 865.

AGREEMENT FOR SUPPORT AND MAINTENANCE—SEPARATION—ENFORCEMENT OF—ARREARS OF ALIMONY.

Notwithstanding that ordinarily an agreement between husband and wife for a separation without sufficient cause, is prima facie a defence to an alimony action, yet where the breaches of the agreement are substantial, such as the refusal of the husband to make payments to a substantial amount thereunder so as to virtually amount to a repudiation of his obligation to pay, the agreement will not be recognized as a defence to the action.

Riddell v. Riddell, 14 D.L.R. 222, 7 A. L.R. 4, 25 W.L.R. 656, 5 W.W.R. 241.

(§ VIII A—82)—DEED OF SEPARATION—SETTING ASIDE—INADEQUACY OF WIFE'S ALLOWANCE—FAILURE OF WIFE TO OBSERVE COVENANTS—EFFECT.

A deed of separation between husband and wife will not be set aside on account of the inadequacy of the provision for the wife's support, where the latter, who deserted her husband in the first instance, after accepting such payments for six years, violated her covenant not to molest her husband or attempt to set aside the deed and be restored to her conjugal rights.

A deed of separation between husband and wife cannot be attacked by the latter six years after its execution, on the ground that she signed it by reason of undue influence and without independent advice, where before executing it, she had the draft deed in her possession for some time and made suggestions as to alterations, and also consulted her solicitor and the bishop of her church regarding it.

Tuxford v. Tuxford, 12 D.L.R. 380, 6 S.L.R. 96, 24 W.L.R. 611, 4 W.W.R. 894. [See also 28 D.L.R. 239, 9 S.L.R. 251.]

(§ VIII A—83) — AGREEMENT FOR ALLOWANCE TO WIFE HAVING CARE OF CHILDREN.

When a husband and wife differ greatly as to the amount that the husband ought to pay as a provisional allowance to the wife who has the care of the children, the court, upon inquiry, will fix the amount. This allowance is payable to the wife who has the care of the children, when the father has so bound himself in writing.

Gauthier v. Labelle, 16 Que. P.R. 25.

B. VALIDITY OF.

(§ VIII B—85) — DEED OF SEPARATION — RELINQUISHMENT BY A FATHER OF CUSTODY OF CHILD—ENFORCEMENT OF VALID PORTION.

Since the enactment of the Imperial Statute, 36 Vict. 1873, c. 12, deeds of separation between husband and wife are not invalidated by a provision whereby a father surrenders control of his children, since the valid portion of the agreement will be enforced.

Tuxford v. Tuxford, 12 D.L.R. 380, 6 S.L.R. 96, 24 W.L.R. 611, 4 W.W.R. 894. [See also 28 D.L.R. 239, 9 S.L.R. 251.]

TERMINATION BY DEATH.

The obligation of a provision in a separation deed for the payment of a monthly amount "thereafter" to the wife, who covenants that out of the said money she will maintain the children of the marriage, is terminated by the death of the husband, where the object of the deed appears to have been to provide for a separation merely and not to operate as a post nuptial settlement.

Re McDougall Estate, 28 D.L.R. 520, 27 Man. L.R. 62, 34 W.L.R. 924, 10 W.W.R. 1001.

(§ VIII B—88)—SEPARATION AS TO PROPERTY — EFFECT OF — SIMPLE ADMINISTRATION.

A wife separated as to property, who rents a house to occupy it herself, with her children, does an act of simple administration.

Lachance v. Leboeuf, 46 Que. S.C. 421.

DOCKS.

See Wharfs; Waters.

DOCUMENTS.

Order for production, see Discovery.

Documentary evidence, see Evidence, IV.

Annotation.

Questioned documents and proof of handwriting: 44 D.L.R. 170.

DOGS.

See Animals.

DOMICILE.

See Conflict of Laws; Divorce; Aliens, I—3; Taxes, I F—90; V C—193.

(§ I—1)—CONFLICT OF LAWS — FOREIGN DIVORCE.

An absolute decree of divorce granted by a foreign court, confessedly obtained on an untrue statement of facts, and for a cause not recognized by Canadian law, to one who had at the time no bona fide domicile in the foreign state, is not effectual in Canada.

Cox v. Cox, 40 D.L.R. 195, 13 A.L.R. 285, [1918] 2 W.W.R. 422.

DOMICILE OF CHOICE — RESIDENCE — MARRIAGE AND DIVORCE — DEVOLUTION OF ESTATES.

In the absence of evidence of a contrary intention, the acquirement of a domicile of choice may be inferred from the circumstances under which a person left his domicile of origin and the length of his residence in the jurisdiction where the domicile of choice is alleged to have been acquired. On an application under the Devolution of Estates Act, R.S.S. 1909, c. 43, for a direction from the court as to the person or persons entitled to the estate of the deceased, John Seilo, who married the applicant in Finland in 1888, deserted her and came to the state of Michigan in 1889, and obtained a divorce there in 1900. Held, that, in the absence of evidence to the contrary, the court should conclude from the circumstances under which the deceased left Finland and the length of his residence in Michigan that he had acquired a domicile there at the time of the decree of divorce.

Re Seilo Estate, [1918] 1 W.W.R. 441.

ELECTION OF DOMICILE—SUBSEQUENT LAW.

An election of domicile made in a contract or note cannot be affected by a law subsequently passed.

La Cie d'Assurance Mutuelle du Commerce contre L'incendie v. Lalancette, 20 Que. P.R. 142.

(I—4)—CHANGE OF — INTENTION — RESIDENCE.

An intention to make an abandonment or change of domicile must be proved by satisfactory evidence; domicile may be changed by the choice of another domicile evidenced by residence within the territorial limits to which the jurisdicton of the new domicile extends. [Re Martin, [1900] P. 211, followed; Udny v. Udny,

L.R. 1 Sc. App. 441; Huntly v. Gaskell, [1906] A.C. 56; Winans v. Att'y-Gen'l, [1904] A.C. 287, applied.]

Seifert v. Seifert, 23 D.L.R. 440, 32 O.L.R. 433.

CHANGE OF.

There is a change of domicile when a person, after disposing of all his property, both real and personal, in a locality, removes to another locality, where he resides for some years at a hotel.

Moffat v. Montgomery, 14 Que. P.R. 353.

(§ I—5)—HUSBAND AND WIFE—CONJUGAL DOMICILE—LAW GOVERNING PROPERTY RIGHTS.

When a man and woman living in different countries are married, the domicile of the husband becomes their conjugal domicile, the laws of which govern their property rights and relations during marriage.

Putnam v. Young, 45 Que. S.C. 161.

HUSBAND AND WIFE—CHANGE OF DOMICILE—PROOF.

An authentic certificate, of a marriage celebrated in a foreign country, is no proof that at the time of the marriage the spouses were domiciled in that state. A husband's domicile of origin being in the Province of Quebec, where he was born, is supposed to be the one he had at the time of his marriage; by virtue of the presumption of art. 1260, C.C. (Que.), the spouses must be considered as possessing in common. The domicile of origin can be changed by habitation in another place with intention to make such place his residence and his main establishment sine animo revertendi. That proof of intention may result from the circumstances accompanying the change of residence and from legally proved judicial declarations, which show a well-determined will to change the birth domicile.

O'Meara v. O'Meara, 49 Que. S.C. 334.

SUCCESSION DUTY—DEPOSIT IN BANK—DEPOSITOR DOMICILED IN ANOTHER PROVINCE.

The King v. Lovitt, [1912] A.C. 212.

DONATIO MORTIS CAUSA.

See Gift; Evidence, XII—965.

DONATION.

See Gift.

Annotation.

Necessity for delivery and acceptance of chattel: 1 D.L.R. 306.

DOWER.

I. RIGHT OF.
- A. Nature and extent.
- B. In what property.
- C. How barred.

II. RIGHTS AND REMEDIES OF WIDOW.

See also, Husband and Wife; Descent and Distribution; Partition.

Dower clause in deeds, see Deeds, II B—25.

I. Right to.

A. NATURE AND EXTENT.

(§ I A—5)—A widow who is a devisee of the freehold in lands cannot have dower in the same lands.

Re Allen, 7 D.L.R. 494, 4 O.W.N. 240.

RIGHT TO—NATURE AND EXTENT—DOWER ACT—CRITERION.

The object of s. 23 of the Dower Act, 9 Edw. VII Ont. c. 39, was to place the widow as nearly as possible as to the amount she should receive in gross in lieu of an assignment of dower in the same position as she would have been were it possible to make an assignment by metes and bounds; subject to the qualification that she shall not have the benefit of permanent improvements made after the alienation by or death of the husband; it does not make one-third of the rental value at that time an absolute criterion nor enlarge her right in respect to dower.

McNally v. Anderson, 19 D.L.R. 775, 31 O.L.R. 561.

DOCTRINE OF ELECTION—INTENTION OF TESTATOR TO EXCLUDE.

Re Wadsworth, 19 O.W.R. 32, 2 O.W.N. 999.

APPLICATION FOR ORDER TO CONVEY LAND FREE FROM DOWER OF WIFE OF MORTGAGOR—DOWER ACT, R.S.O. 1914, c. 70, ss. 14 (2), 17—PROOF THAT MORTGAGOR ALIVE—NECESSITY FOR ASCERTAINMENT OF VALUE OF DOWER WHERE WIFE NOT DISENTITLED.

Re Haycock, 11 O.W.N. 291.

LUMP SUM IN LIEU OF—CALCULATION UPON VALUE OF LAND—DEDUCTING AMOUNT OF MORTGAGE—ARREARS OF DOWER—COSTS.

Jaynes v. Jaynes, 14 O.W.N. 193.

ELECTION BY WIDOW—EVIDENCE—NOTICE OF ELECTION—PRESUMPTION OF ELECTION IN FAVOUR OF WILL—JURISDICTION OF THE COURT IN AN ACTION NOT BROUGHT BY WIDOW.

Hurry v. Hurry, 9 E.L.R. 123.

B. IN WHAT PROPERTY.

(§ I B—11)—IN MORTGAGE LANDS.

The wife of a purchaser of land, who has joined, to bar her dower, in a mortgage to secure unpaid purchase money, is not entitled to dower in the whole value of the land, but only in the value of his land after deducting the amount of the mortgage debt. [Campbell v. Royal Canadian Bank, 19 Gr. 334, followed; Lindsay v. Lindsay, 23 Gr. 210, and Robertson v. Robertson, 25 Gr. 486, distinguished.] A wife who has joined, to bar her dower, in a mortgage by her husband which was not given to secure unpaid purchase money, is entitled, subject to the rights of the mortgagee, to dower in the whole value of the mortgaged land.

Re Auger, 5 D.L.R. 680, 26 O.L.R. 402, 22 O.W.R. 118, reversing 3 O.W.N. 377.

C. How barred.

(§ I C—18)—Bar by mortgage—Limited effect.

Where the wife joins in a mortgage under the Short Forms of Mortgages Act (Ont.), for the purpose of barring her inchoate right of dower, and her husband is at such time seized in fee of the lands, her bar of dower will operate only to the extent necessary to give effect to the rights of the mortgagee; so where the mortgage had been paid off prior to the husband's assignment for creditors whereby his interest in the lands was conveyed to the assignee, but without any bar of dower by the wife, the wife's dower will accrue on her husband's death, although a statutory discharge of the mortgage was not registered until after the making of such assignment for creditors and although the husband died seized of no estate either legal or equitable in the lands.

McNally v. Anderson, 9 D.L.R. 449, 4 O. W.N. 901, 24 O.W.R. 182.

Joining in mortgage—Foreclosure.

Where a married woman joined with her husband in a mortgage of his freehold property, and the husband afterwards gave a second mortgage on the property in which the wife did not join, on motion for foreclosure and sale:—Held, that the wife's dower was barred on the ground that she had not appeared and defended the action. Quaere: Under the circumstances would the wife's dower be completely barred by the ordinary order for foreclosure and sale?

Vaughan v. Parker, 43 N.B.R. 442.

(§ I C—27)—By adultery or divorce—R.S.O. 1897, c. 164, s. 12.

Re S., 3 D.L.R. 896, 3 O.W.N. 1573.

II. Rights and remedies of widows.

(§ II—34)—Assignment for creditors—Unassigned dower.

Where a mill and machinery and plant belonging to the debtor had been removed in his lifetime by parties claiming under his assignment for creditors, in which his wife had not joined to bar dower, and under circumstances which at most would amount to permissive waste for which equity does not readily interfere, and which the wife would have no locus standi to prevent, she is not entitled to have the value of the building so removed taken into account on an award in gross in lieu of dower.

McNally v. Anderson, 19 D.L.R. 775, 31 O.L.R. 561.

Basis upon which dower should be allowed—Lands purchased—Mortgage given as part payment—Wife joined mortgage to bar dower.

Re Auger, 3 O.W.N. 377, 20 O.W.R. 656.

DRAINS AND SEWERS.

I. In general; establishment; repairs; statutes.

II. Procedure.

III. Assessments.

Natural drainage, see Waters, II G—125.

Municipal contracts as to construction of, see Contracts, IV A—321.

Liability for damage resulting from, see Waters, II G—125.

Annotation.

Cost of work; power of referee: 21 D. L.R. 286.

I. In general; establishment; repairs; statutes.

(§ I—1)—Retroactiveness of statute—Remedies for injuries to land.

The Act of 1913, c. 18, amending the Drainage, Dyking and Irrigation Act, R. S.B.C. (1911), c. 69, is not retroactive operation, and the remedy as to arbitration provided by s. 58 of the amending Act for an injurious affection to land has no application to injuries arising before the passage of the amending Act.

Hemphill v. McKinney, 27 D.L.R. 345, 21 B.C.R. 561, 33 W.L.R. 688.

Construction—New and existing drains.

Under s. 3 of the Municipal Drainage Act, R.S.O. 1914, c. 198, the construction of a drain may be authorized even though it follows in the main the course of an existing drain.

Re Gosfield South & Gosfield North, 35 D.L.R. 119, 39 O.L.R. 93.

(§ I—6)—Private drains—Highway repair—Interference.

Where water which is the drainage of the plaintiff's own land, augmented by some slight flow of surface water from adjacent streets, is collected in a ditch constructed by the plaintiff and thence discharged on to a public highway, the defendant municipality responsible for the repair of the highway is not responsible for damages resulting to the plaintiff's lands by reason of its repairing the road and diverting the flow of surface water into the channel in which it would naturally flow.

Ollman v. Hamilton, 11 D.L.R. 1, 24 O. W.R. 454, 4 O.W.N. 1122.

Pipe across street—Injunction restraining — Damages — Local rights of municipality — Water decreasing rather than increasing.

Yelland v. Oliver, 3 O.W.N. 370, 20 O. W.R. 667.

Drainage—Flooding private property—Leave to connect private drain with corporation drain—Negligence in construction—Neglect to repair.

Woodward v. Vancouver, 16 B.C.R. 457, 19 W.L.R. 297.

Repairs and improvements—Report of engineer—Practically a new scheme—Mandate of engineer under s. 77 of the Act.

Gibson v. West Luther, 20 W.L.R. 405.

COMPULSORY POWERS—CONSTRUING STATUTE—IRRIGATION WORKS—NUISANCE—OBSTRUCTION OF HIGHWAYS—DUTY TO BUILD AND MAINTAIN BRIDGES.

Alberta R. & Irrigation Co. v. The King, 44 Can. S.C.R. 505.

II. Procedure.

(§ II—10)—DITCHES AND WATERCOURSES ACT—APPEAL FROM AWARD.

An appeal to a County Judge, under s. 21 of the Ditches and Watercourses Act, R.S.O. 1914, c. 260, is a rehearing, and all objections as to the regularity of the award should be made then; if no appeal has been taken within the time limited, the award is valid and binding under s. 23 of the Act.

Otto v. Roger, 38 D.L.R. 668, 40 O.L.R. 381, affirming 35 D.L.R. 339, 39 O.L.R. 127.

AWARD—REGISTRATION.

The effect of an award under the Ditches and Watercourses Act, R.S.O. 1914, c. 260, is to subject the lands affected by it to an easement: it is therefore an instrument affecting the land within the meaning of the Registry Act, R.S.O. 1914, c. 124, s. 71, and should be registered; it does not bind a bona fide purchaser for value without notice.

Delbridge v. Brantford, 38 D.L.R. 677, 40 O.L.R. 443.

DITCHES AND WATERCOURSES—PROCEDURE—INFANT'S LAND—NOTICE—GUARDIAN.

The guardian intended by the interpretation clause (s. 3) of the Ditches and Watercourses Act, R.S.O. 1897, c. 285, is such as has by law the management and control of the infant's land, and not merely the guardian of his person; and notice of proceedings under the act, given to the father of an infant whose land was affected by the proceedings—the father not having been appointed guardian of the infant's estate—is insufficient to satisfy s. 8 of the Act, which requires notice to be given to every "owner;" and the infant so improperly made a party to the proceedings is not bound by the award therein rendered, and all proceedings had thereunder are invalid.

Healy v. Ross, 22 D.L.R. 408, 33 O.L.R. 368, reversing 32 O.L.R. 184.

(§ II—12)—PETITION—NECESSITY OF.

Where what is proposed is not the construction of a new drainage work, but merely the repair and improvement of an existing system, which experience has proved is defective in that it provides no adequate outlet, the work falls within s. 77 of the Municipal Drainage Act, 10 Edw. VII. (Ont.), c. 90, and can be performed without a petition. [Oxford v. Howard, 27 A.R. (Ont.), 223, followed; Sutherland-Innes Co. v. Romney, 30 Can. S.C.R. 495, distinguished.]

Re Orford & Aldborough, 7 D.L.R. 217, 27 O.L.R. 107, 22 O.W.R. 853.

HEARING OF APPEAL TO COUNTY COURT JUDGE—TIME FOR DELIVERING JUDGMENT—PROHIBITION.

Re Rowland & McCallum, 22 O.L.R. 418, 17 O.W.R. 735.

INJUNCTION RESTRAINING PUBLIC CORPORATION FROM PERFORMING ITS WORKS—INTERFERENCE WITH DRAINAGE WORKS OF A MUNICIPALITY.

Maisonneuve v. Harbour Commissioners of Montreal, 39 Que. S.C. 36.

III. Assessments.

(§ III—15)—CREATION OF DISTRICTS—PRESUMPTION—ASSESSMENTS — JURISDICTION OF COMMISSIONERS—MAJORITY.

Where certain marsh lands appear to have been recognized as a district within the jurisdiction of the Commissioners of Sewers acting under the provisions of c. 159, C.S. N.B. 1903, the fact that no record can be found to shew the creation of the district will not rebut the prima facie presumption that it was legally constituted as such [Ex parte Dixon, 41 N.B.R. 133, followed]; if owing to resignation or refusal to act, or a refusal of the proprietors to elect, the Board of Commissioners is without a majority, a commissioner acting alone has the power to carry out the work as that of the majority, and to make valid assessments therefor, which are a lien upon the lands and enforceable as such.

Downey v. Hopewell Comm. of Sewers, 36 D.L.R. 644, 45 N.B.R. 90 at 139.

INDEPENDENT JUDGMENT OF ENGINEER—INCLUSION OF EXPENSES AND FEES OF SOLICITORS AND ENGINEER.

Re Bright and Sarnia: Re Wilson & Sarnia, 12 D.L.R. 848, 4 O.W.N. 1535, 24 O.W.R. 817.

(§ III—16)—RULE FOR MAKING ASSESSMENT.

The test in determining outlet liability under the Municipal Drainage Act, 10 Edw. VII. (Ont.), c. 90, is whether the drainage work is necessary in fact or in law to enable or improve the cultivation or drainage of the land proposed to be assessed, and where lands can be more effectively drained after the construction of the drainage work than before, because they will then have an outlet which they did not have before, or where they are effectively drained, but their waters are not taken to they have no outlet at all, and the drainage work will give them a sufficient outlet, they are assessable for outlet liability. (Per Henderson, Drainage Referee.)

Re Orford & Aldborough, 7 D.L.R. 217, 27 O.L.R. 107.

TOWNSHIP BY-LAW AUTHORIZING RAISING OF MONEY—ABSENCE OF ENGINEER'S REPORT—CONDITION PRECEDENT.

Re Johnson & Tilbury East, 25 O.L.R. 242, 20 O.W.R. 747.

CUMBERLAND SEWERS ACT—THE MARSH ACT — CONSTRUCTION OF DYKE AND ABOITEAUX — PRESCRIPTION — LOST GRANT.

Corbett v. Pipes, 9 E.L.R. 127, 532.

DRUGS AND DRUGGISTS.

For unlawful sales of intoxicating liquors by druggists, see Intoxicating Liquors.

LIABILITY FOR UNLAWFUL SALE.

A druggist who sells medicine for promoting dog breeding, composed of dangerous drugs, without consulting a veterinary and without possessing the necessary knowledge for the purpose, is liable for damages suffered by the owner of the dog if the latter dies on account of this medicine.

Van Camp v. Freeman, 48 Que. S.C. 410.

OPERATING DRUGS BUSINESS UNDER ANOTHER'S LICENSE—PENALTY.

One who, being neither a physician nor a licensed chemist, operates a pharmacy or drug store in the name of other licensed persons is liable for the penalty imposed by art. 5023, R.S.Q. 1909, even when the latter have made and registered a declaration to the effect that they themselves carry on the business of pharmacy, and that the defendant had given them absolute control of the sale of drugs and poisons, reserving only to himself a financial share.

Pharmaceutique Ass'n of Quebec v. Bergeron, 47 Que. S.C. 175.

QUALIFICATION—CERTIFICATE—PENALTY.

Where a satute provides penalties for keeping open a drug store without a qualifying certificate, only one penalty is incurred up to the time when proceedings are commenced for the infraction of the statute unless there be express provision for a separate penalty for separate periods. [Garrett v. Messenger, L.R. 2 C.P. 583; Marks v. Benjamin, 5 M. & W. 565, applied.]

Nova Scotia Pharmaceutical Society v. Riordan, 36 D.L.R. 652, 28 Can. Cr. Cas. 194, 51 N.S.R. 142.

JOINT STOCK COMPANY—VIOLATION OF ACT—SEVERAL OFFENCES—PENALTIES.

Pharmaceutical Ass'n of Quebec v. Modern Pharmacy, 20 Que. K.B. 212.

CIGARS NOT SOLD AS DRUGS—SUNDAY LAWS.

R. v. Wells, 24 O.L.R. 77, 19 O.W.R. 452.

DRUNKENNESS.

Regulation of intoxicants, see Intoxicating Liquors.

As rendering contract void or voidable, see Contracts. I D—45; Deeds II G—70.

DURESS.

As affecting validity of documents, see Deeds; Wills; Contracts.

Threat of criminal prosecution, see Compromise and Settlement, I—4.

(§ I—1)—IN GENERAL—DEED OF LAND—ACTION TO SET ASIDE—DURESS AND UNDUE INFLUENCE — WANT OF PARTIES — REFUSAL OF COSTS.

Pigden v. Pigden, 4 O.W.N. 391, 23 O.W.R. 694.

SETTING ASIDE CONVEYANCE OF LAND—DURESS—SALE AT UNDERVALUE—IGNORANCE OF VENDOR.

Kolp v. Hunter, 19 W.L.R. 709.

(§ I—7)—ACTION ON CHEQUE GIVEN IN ORDER TO OBTAIN RELEASE FROM CUSTODY—ARREST IN MASSACHUSETTS OF RESIDENT OF ONTARIO—LAW OF MASSACHUSETTS — CAPIAS — FRAUD — DEFENCE TO ACTION.

There being a dispute between the defendant, doing business in Ontario, and a trading company in Boston, Mass., as to the liability to pay for or to pay damages for the nonacceptance of certain machines which had been sent by the company to Ontario, the defendant wrote to the manager of the company stating that he (the defendant) would call on the company in Boston and endeavour to make an amicable settlement. This was at once assented to by the manager, who, as advised by the plaintiff, the company's attorney, intended to allow the defendant to come into Massachusetts at his own instance, and without being procured to come by the company, and that he should then be arrested under a capias for the claim asserted by the company. The defendant went to Boston, called on the manager, and found that no arrangement could be made. He was then arrested upon process obtained earlier in the day, upon an affidavit sworn by the manager, before any meeting had taken place. The defendant failing to obtain bail, sent for the manager and offered to pay for the machines, and proceeded to draw a cheque upon a bank in Ontario for the amount, but the manager refused to accept the cheque. The plaintiff then intervened and offered to take the defendant's cheque and give his own cheque to the company for the amount, less his fee. The defendant gave his cheque, and was released. The plaintiff gave the defendant a receipt for the cheque, "which when paid will be in full settlement and discharge" of the claim of the company. The defendant stopped payment of his cheque. The plaintiff gave his cheque to the company, but it was not cashed by the company until after the dishonour of the defendant's cheque was known:—Held, upon consideration of the law of Massachusetts, that the manager of the company acted fraudulently when he formed the plan to arrest, and, concealing this, permitted the defendant to walk into the net spread for him, and swore to all that was necessary to accomplish the arrest before he entered upon any discussion. The fraud was the procuring of the defendant's attornment to the jurisdiction of the courts of Massachusetts; and the intent to secure arrest while arranging an interview to nego-

tiate a settlement was the gist of the fraud. [Stein v. Valkenhuysen, E.B. & E. 65; Grainger v. Hill, 4 Bing. N.C. 212, and Duke de Cadaval v. Collins, 4 A. & E. 858, followed.] Held, also that the duress afforded the defendant an ample defence to the plaintiff's action upon the cheque.

Blanchard v. Jacobi, 43 O.L.R. 442.

(§ I—14)—Waiver and repudiation of.

The voluntary acting under an agreement for five months after knowledge of facts afterwards set up to prove that the agreement was obtained by fraud, duress, undue influence or extortion, is such an unequivocal affirmation of the contract as to amount to a waiver of the complainant's right to rescind the contract upon these grounds even if proved.

Brandon Electric Light Co. v. Brandon, 1 D.L.R. 793, 22 Man. L.R. 500, 20 W.L.R. 658, 2 W.W.R. 22.

DUTIES.

Succession duties, see Taxes.

Custom duties, see Internal Revenue.

(§ I—1)—Customs duties.

Under the customs tariff (Can.), 1907, the lumber of wood sawn, split or cut and dressed on one side only, but not "further manufactured," is entitled to free entry into Canada and this applies where the lumber is in the first place sawn on four sides in the sawmill and is subsequently sized on one side by a saw in a planing mill where it was in the same process also dressed on one side; the sizing affected by the second sawing does not constitute a "further manufacture" within the meaning of the provision.

Foss Lumber Co. v. King, and The B.C. Lumber, etc., Co., 8 D.L.R. 437, 17 Can. S.C. R. 130, 3 W.W.R. 110.

Action to recover—Rule of customs house prohibiting making of change for more than fifty cents.

An internal rule of a customs house prohibiting the cashier from furnishing change beyond fifty cents, is not a limitation of his authority sufficient to relieve a company from liability for unpaid duties on goods entered fraudulently by its duly appointed customs agent, where the company furnished cheques for the correct amount of duties and the cashier returned to the agent, who converted it to his own use, the difference between the amount of the cheque and the duties actually paid, since the agent's authority was broad enough to include the receipt of such moneys.

The King v. C.P.R. Co., 11 D.L.R. 681, 12 E.L.R. 309, 14 Can. Ex. 150.

Remission of tolls — Subsidy — Exemptions—Validity of contract affecting.

The Audit Act (62 & 63 Viet. c. 34, s. 79) which enables the Governor-in-Council to remit any duty or toll payable to the Crown does not authorize a provision in a contract for years granting an annual subsidy and freedom from customs duties on certain imports: the statute grants a remission, the contract aims at exemption. Under responsibile government all grants of public money direct or by prospective remission of duties are in the discretion of the legislature, and no contract is binding unless that discretion has been exercised in some sufficient fashion.

Commercial Cable Co. v. Government of Newfoundland, 29 D.L.R. 7, [1916] 2 A.C. 610.

(§ I—12)—Customs Act—Smuggling—Seizure of goods—Release.

Where jewellery not dutiable is mixed with dutiable jewellery which is being smuggled into Canada and all are seized for infraction of the Customs Act, the seizure is justified as to both dutiable and nondutiable goods, but as to any of the latter shewn to the satisfaction of the Exchequer Court (Can.) to be the separate property of the wife of the party against whom the seizure was made, the seizure may be released under the power conferred on the court to decide "according to the right of the matter" (Customs Act, s. 180).

Burm v. The King, 22 D.L.R. 483, 15 Can. Ex. 91.

(§ I—16)—Customs—Crown information to recover duties.

Section 264 of the Customs Act, R.S.O. 1906, c. 48, does not apply to shift to the defendant the onus of proving compliance with the customs laws when sued for customs duties claimed on the trial of an information laid by the Crown charging a smuggling scheme, if no goods were found upon which to make seizure nor was proof made by the Crown of their actual introduction into Canada: evidence of suspicious circumstances accompanying the shipment of the goods in question in the foreign country to a frontier point therein, and payment made therefor by the defendant, a merchant carrying on business in Canada, is insufficient, in a customs prosecution, to raise a presumption of their further transportation into Canada.

The King v. Racicot, 11 D.L.R. 149, 14 Can. Ex. 214.

(§ I—18)—Vessels liable for customs duties.

A ship or vessel and its equipment built in a foreign country for show purposes only is not subject to customs duty under items 589 or 590, sch. A, Customs Tariff Act (Can. 1907, c. 11); it may be sold or disposed of within Canada, so long as it is not to be used in Canadian waters.

Nelville Canneries v. S.S. "Santa Maria," 41 D.L.R. 32. [See also 36 D.L.R. 619, 16 Can. Ex. 481.]

Smuggling—Evidence—Failure to prove majority of charges laid—Costs.

R. v. Lawande, 8 E.L.R. 136.

CUSTOMS ACT—PAYMENT OF DUTY—CONFUSION OF ONE BALE OF GOODS WITH ANOTHER—ALLEGED LOSS OF BALE—DELIVERY TO CARTER FOR CONSIGNEE.
Morris v. The King, 9 E.L.R. 430.

EASEMENTS.

I. WHAT CONSTITUTES; NATURE; KIND.
II. CREATION; HOW ACQUIRED.
A. In general; by express terms.
B. By prescription.
C. As appurtenant; by necessity.
III. EXTENT OF RIGHTS.
IV. HOW LOST.

Annotations.

Easement by implication; servient and dominant tenements: 32 D.L.R. 114.

Right of profit à prendre: 40 D.L.R. 144.

Of way, how arising or lost: 45 D.L.R. 14.

Dedication of highway to public use; reservations: 46 D.L.R. 517.

I. What constitutes; nature; kind.

Right of passage "without causing damage," see Deeds, II A—15.

Negative covenant or registration, easement, building restriction, see Vendor and Purchaser, I C—13.

Raceway, servient and dominant tenements, see Waters, II C—80.

Cesser, union of dominant and servient tenements, see Vendor and Purchaser, I C—10.

(§ I—1)—DEED—INTERPRETATION.

In construing an easement, guaranteed by a duly registered deed, where the meaning of the same is doubtful, the common intention of the contracting parties must be sought and determined by interpretation rather than by an adherence to the literal meaning of the words of the contract.

Lemieux v. The King, 38 D.L.R. 711, 16 Can. Ex. 246.

THOROUGHFARE—CONTRIBUTION TO COSTS OF.

Since no servitude can be established without title, an understanding between certain farmers and the owners of a dairy, under which the farmers, by contributing a little towards the construction of a road over the owner's land, had obtained permission to go on in order to reach the dairy, does not constitute a title creating a servitude of thoroughfare, even if the municipality had contributed a small sum to purchase the wire for the fences on each side of the road.

Germain v. Hébert, 27 Que. K.B. 532.

RIGHT-OF-WAY — DESCRIPTION — WIDTH — ESTOPPEL — OBSTRUCTION — FENCE —JUSTIFICATION FOR REMOVAL.

McLennan v. Hutchins, 50 N.S.R. 358.

(§ I—2)—PERMISSION TO USE SPRING.

An agreement by an owner of land granting a privilege, to an adjoining owner, for a term of years, to draw water from a spring on his land, is a personal license by the grantor, not an easement, and does not run with the land.

Naegele v. Oke, 31 D.L.R. 501, 37 O.L R. 61.

ACTION FOR INTERFERENCE — LAND REGISTRY ACT, 1906, S. 74—AGREEMENTS—REGISTRATION AT DIFFERENT TIMES.

Goddard v. Slingerland, 16 B.C.R. 329.

SERVITUDE OF PASSAGE—PROJECTED STREET.

Laboute v. Carrier, 20 Que. K.B. 280.

PREDIAL SERVITUDE—TITLE—PAROL AGREEMENT—EVIDENCE—BURDEN OF PROOF—CONSTRUCTION OF AGREEMENT.

Dubeau v. Ducharme, 40 Que. S.C. 538.

RAILWAY—SEVERANCE OF FARM—UNDERGRADE CROSSING—USER FOR 20 YEARS—PRESCRIPTION.

Leslie v. Pere Marquette R. Co., 25 O. L.R. 326, affirming 24 O.L.R. 206.

RIGHT OF OWNER OF RIGHT-OF-WAY TO FENCE WITH GATES AT EACH END — LANE DEFINED.

Ross v. McLaren, 2 O.W.N. 1156, 19 O. W.R. 460, affirming 2 O.W.N. 86, 18 O.W.R. 818.

PRIVATE—INJUNCTION RESTRAINING USE AS PUBLIC STREET—NO EVIDENCE OF DEDICATION—PRESCRIPTION.

Plummer v. Davies, 20 O.W.R. 806.

RIGHT OF PRIVATE WAY — WHAT IS NECESSARY TO ACQUIRE BY PRESCRIPTION.

McLachlin v. Schlievert, 2 O.W.N. 649, 18 O.W.R. 457.

II. Creation; how acquired.

A. IN GENERAL; BY EXPRESS TERMS.

(§ II A—5)—RIGHT-OF-WAY—BY EXPRESS TERMS — IMPLICATION — APPURTENANT LAND.

A right-of-way will not pass by implication as appurtenant to the land specifically conveyed under the general words of conveyance which under the Transfer of Property Act (Ont.) include all ways, easements and appurtenances belonging to or appertaining to the land where the strip over which the way is claimed adjoins the parcel specifically conveyed, and the fee thereof was in the grantor, if the strip had not been in use as a way de facto to the specific parcel, although a right-of-way over it had been expressly granted to purchasers from the same grantor of lands on the other side of the strip and at the end of same.

Peters v. Sinclair, 18 D.L.R. 754, affirming 13 D.L.R. 468, 48 Can. S.C.R. 97.

PASSAGEWAY FOR CATTLE—INTERFERENCE —MINING.

A conveyance of land for mining purposes does not confer upon the grantee the right to carry on the excavations in derogation of a right to a passageway for cattle reserved in the deed.

Can. Cement Co. v. Fitzgerald, 29 D.L. R. 703, 53 Can. S.C.R. 263, affirming 9 O.W.N. 79, 7 O.W.N. 321.

LANDS APPURTENANT—RIGHT-OF-WAY.

In a conveyance of a house and lot were these words: "Together with a right-of-way for the purpose only of getting in . . . fuel and for the passage of an automobile over the 6 ft. adjoining the premises hereby conveyed to the north to a depth of 76 ft. . . . and subject to a right-of-way for the party of the first part and the owners or occupants of the adjacent premises to the north over the northerly 2 ft. 6 inches to a depth of 76 ft." The court held that upon a proper construction of the words quoted, the right-of-way over the 2 ft. 6 inches was limited to the owners or occupants of the parcel on which the house to the north stood and to which the easement was appurtenant. A colourable use could not be made of such right-of-way for the real purpose of reaching a different adjoining close.

Miller v. Tipling, 43 D.L.R. 469, 43 O.L.R. 88.

BUILDING PLAN — PASSAGEWAY — PARTY WALL.

Where adjoining owners construct their buildings according to a party wall plan and one is given a passageway to his building by means of a communicating door through the party wall, a valid easement is created to the stairways and passageways necessary for the proper user of his building, which is coextensive with the duration of the building. As a condition precedent to the relief being granted, the party seeking such relief must himself do equity by paying his share of the cost of the party wall.

Smith v. Curry, 42 D.L.R. 225, 29 Man. L.R. 97, [1918] 2 W.W.R. 848, varying 36 D.L.R. 400.

RESERVATION OF CATTLE-PASS UNDER HIGHWAY—COVENANT TO REPAIR—DEVISE OF DOMINANT TENEMENT—SEVERANCE.

Land for a highway, laid out in 1857, was granted by M. to the defendant township corporation, and the right to a cattle-pass under the highway, to be made and maintained and repaired by the defendant corporation, was reserved to M. Held, that there was a grant, subject to an easement; it was a case of a separate and independent convenant imposing a duty on the defendant corporation in favour of M. [Austerberry v. Oldham, 29 Ch. D. 750, distinguished.] Held, also, that the easement, including the obligation to maintain and repair, passed by M.'s will with the land which remained to M., the dominant tenement; and was not destroyed by the severance in title (by the will) of the north and south halves of the dominant tenement.

Freeman v. Tp. of Camden, 41 O.L.R. 179.

RIGHT TO BURY IN ANOTHER'S FREEHOLD — ADMINISTRATION OF JUSTICE ACT — RULES OF EQUITY.

The right to bury in another's freehold is an easement which formerly could be conveyed only by deed, but since the passing of the Administration of Justice Act and the Judicature Act, the rules of equity prevail, and an agreement for valuable consideration, though not under seal, is sufficient to create a right to such easement, and for the purpose of lawful user is as good as a deed. Part performance by buying a tombstone and placing it upon the plot removes any objection under the Statute of Frauds. Refraining from buying another plot is in itself sufficient consideration.

Hubbs v. Black, 46 D.L.R. 583, 44 O.L.R. 545.

WAY — EXPRESS GRANT — LOST GRANT — LIMITATIONS ACT, R.S.O. 1914, c. 75.

An easement to use an existing and well-marked lane or roadway over another's land, the only means of access to a farm and constantly used as such for a half a century, is acquired by express grant under a conveyance of the farm together with "all ways, easements and appurtenances, belonging or appertaining, or used, occupied and enjoyed;" and title thereto would also be presumed from the doctrine of lost grant, or would arise under the Limitations Act, where there was no actual unity of possession of the dominant and servient tenements during the period of 20 years preceding the commencement of the action.

Robson v. Wilson, 48 D.L.R. 437, 45 O.L.R. 296.

RIGHT-OF-WAY — PARTITION AGREEMENT — PLAN ON PARTITION DEED — SUBSEQUENT PURCHASERS WITH NOTICE.

A right to go on abutting land to draw water from a well there situate may be the subject of an easement created by a partition agreement and evidenced by indicating the well and path to same running from the house on the adjoining lands on the plan accompanying the partition deeds; and such easement will be binding on parties subsequently acquiring the parcel on which the well is situate with notice of such plan and partition agreement.

Publicover v. Power, 20 D.L.R. 310.

PRIVATE WAY — GRANT OF RIGHT-OF-WAY BY DEED — PROVISO — CONSTRUCTION — TERMINI A QUO AND AD QUEM — USER — MEANS OF ACCESS TO LOT OTHER THAN LOT TO WHICH EASEMENT APPURTENANT.

Grant v. Lerner, 7 O.W.N. 564.

CREATION OF — STATUTORY COMPLIANCE.

An easement must be created in the method directed by s. 48 of the Land Titles Act.

MacDonald v. McLean, 7 W.W.R. 997.

SERVITUDE BY DESTINATION.

The writing required in the case of a servitude created by the destination made by the proprietor (art. 551 C.C. Que.), is not in the nature of a formal title; it is not even necessary that the intention to create the servitude be expressed in it. Any document put forth or subscribed by the proprietor, attesting the existence of

the servitude, as if, in a sale of the servient tenement, he reserves the servitude in favour of the dominant one left to him, or vice versa, will answer the requirements of the article.

Dawes v. Ward, 43 Que. S.C. 456.

Title — Evidence — Draining of water — Trimming trees — Prescription — Prejudice — Costs — C.C. art. 528, 529, 531, 539, 549, 562, 549, 2242.

A title to create an easement need not necessarily involve verification by writing or by a contract under seal; this term should be taken in its broader meaning of an agreement whose existence can be proved in the terms of common law. An easement can even arise tacitly. The court can consequently, without violating art. 549 C.C. Que., deduce from the circumstances of the case, and well verified acts, the existence of an easement. The assistance given to a neighbor to place a dairy beside the separation line, is an act which constitutes a consent or an acquiescence; and which can be regarded, according to the above rules, as an understanding, an agreement, a title to the easement of draining off the roof of the said dairy. Such a consent, given without reserve, and legally established must produce its judicial effect. The neighbor who has thus given this consent cannot after seven or eight years, demand either the removal of the dairy or its demolition, if it encroaches on his land, as long as it is in good repair and not on the point of decay. The defence of planting trees along the separation line, although only constituting a restriction of the right of property, according to the majority of jurists is reckoned among the number of real easements; the duty of the court is then to apply this in spite of everything. The 30 years prescription applies to trees (but not to branches) planted along the separation line. The disposition of art. 529 is general; it applies then to all trees which extend over the property of a neighbor and at less than the legal distance. The right to cut the branches is, however, subordinated to the prejudice which the neighbor must suffer. Art. 531 endorses the principle that the prejudice caused to a neighbor is the basis of the right to trim the branches. The neighbor has no right to trim the branches except when his land is in a state of cultivation and adjacent to one which is not cleared. The request for trimming the branches should then be dismissed when the land of the claimant is not even susceptible to cultivation by reason of its sterility.

Bonin v. Champagne, 55 Que. S.C. 153.

(§ II A—6)—Passageway — Possessory action — Demolition — Interest in action — Warranty — Obstruction of passage — C.C., arts. 557, 558; C.P. arts. 77, 1064.

A vendor who has obliged himself to give a clear and free passage over a piece of land, and never to sell it and never to allow it to be used for any other purpose than a public street as a passageway, has a sufficient interest in it to bring an action against any person obstructing that passage without right. A proprietor of a lot of land who has a title containing the following clause, "with the right of passage in common with others having titles thereto on this avenue," has no right to erect any building on that street and to obstruct the passageway of the adjoining proprietors who are entitled to it.

Gouin v. Javelle, 47 Que. S.C. 79.

(§ II A—7)—Pollution of stream—Lost grant.

In an action for the pollution of the waters of a stream a defence of a right to do so under a lost grant cannot prevail in the face of testimony from the defendant that he had made annual payments for a number of years in respect to the damages occasioned by the fouling of the stream.

Hunter v. Richards, 12 D.L.R. 503, 28 O.L.R. 267, affirming 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432.

B. By prescription.

(§ II B—10) — Prescription against Crown.

Before 1903 (C.S.N.B. 1903, c. 156) there existed no laws in New Brunswick whereby a subject could prescribe an easement as against the Crown.

The King v. Tweedie, 22 D.L.R. 498, 15 Can. Ex. 177. [Reversed, 27 D.L.R. 53, 52 Can. S.C.R. 197.]

Winter road—Sufficiency of user.

A communicating path used by the families of adjoining owners habitually visiting each other; a way of access to wood land used for hauling wood during winter months while the snow is on the ground; a gateway used as a short cut for hauling hay during the winter months and by children going to school, without any visible formation of a road to indicate its course and bounds, are not sufficient acts of user as establishing private rights-of-way by prescription.

McLean v. McRae, 33 D.L.R. 128, 50 N.S. R. 536.

"Ways, rights, privileges and appurtenances"—Tacking.

The general words "ways, rights, privileges and appurtenances," in deeds of land, do not include the inchoate enjoyment of a prescriptive right-of-way until the statutory period has run; but the periods of user, by predecessors in title, may be tacked, if the period before commencement of the action is not connected with any parol license.

McLean v. McRae, 33 D.L.R. 128, 50 N.S.R. 536.

Settling limits — Boundaries — Adjacent owners — Prescription — Possession — Common original owner — C.C. arts. 504, 2200, 2242.

Although there is no question of bound-

aries when two properties are separated by a natural and visible limit such as a stream, it is not so where on one side there is a 40 foot strip of land which is in question between the owners. When two owners hold their respective titles from the same owner, one of them, to complete his 30 years possession necessary for prescription cannot, in regard to a strip of land joining part of the original property and situated between the two lots, join to his possession that of the common vendor.

Plante v. Ouellette, 28 Que. K.B. 236.

RIGHT TO USE VACANT LAND FOR TURNING VEHICLES — PRESCRIPTION — USER — EVIDENCE.

Simmons v. Powell, 8 O.W.N. 274.

WAY — PRIVATE LANE — RIGHT OF USER — PRESCRIPTION OR GRANT — EVIDENCE — FAILURE TO ESTABLISH — SETTLEMENT OF CLAIM — EXECUTION OF DOCUMENTS UNDER SEAL — LEASE AND RELEASE — ATTEMPT TO OPEN UP — ABSENCE OF FRAUD AND MISREPRESENTATION — RENT — DAMAGES — INJUNCTION — COSTS.

Adams v. Abate, 13 O.W.N. 94.

(§ II B—13)—BY PRESCRIPTION — PRIVATE WAY — EXPROPRIATION — RAILWAY — DAMAGES.

Mothersill v. Toronto Eastern R. Co., 5 O.W.N. 635.

WAY — ASSERTION OF RIGHT OF USER — PUBLIC HIGHWAY — PLAN — ESTOPPEL — ABANDONMENT — EVIDENCE.

Vansickle v. James, 9 O.W.N. 146, reversing 7 O.W.N. 473.

(§ II B—14)—AS TO WAY OF NECESSITY.

A unity of possession of a dominant and servient estate, which will prevent the assertion of a right to a prescriptive way over it, is not created by a lease of the dominant estate to the owner of the servient estate where the dominant owner reserved to himself the use and enjoyment of the way. A prescriptive right-of-way is not lost by the occupancy of the dominant estate by another person where, during such occupancy, there was no suspension of the use and enjoyment of the way by the dominant owner.

Thomson v. Maxwell, 3 D.L.R. 661, 3 O.W.N. 995.

Where it was a part of an agreement and arrangement, made at the time of the purchase of a right-of-way by a railway company, that the plaintiffs' predecessor should have an under-pass for the passing of waggons and cattle from one part of a farm to the other—the granting of the pass was a part of the consideration for the right-of-way; and the plaintiffs were entitled to have it maintained. [McKenzie v. G.T.R. Co., Dickie v. G.T.R. Co., 14 O.L.R. 671, followed. Oatman v. G.T.R. Co., 2 O.W.N. 21, distinguished.] Where the pass was used in connection with and for the purposes of the farm for over 20 years, the plaintiffs had established an easement by continuous user as of right for that period. [C.P.R. Co. v. Guthrie, 31 Can. S.C.R. 155, and G.T.R. Co. v. Vallicar, 7 O.L.R. 364, distinguished.] Semble, also, that the doctrine of presumption of a lost grant could be applied.

Leslie v. Pere Marquette R. Co., 13 Can. Ry. Cas. 219. [Affirmed 25 O.L.R. 326.]

WAY — LANE — PRESCRIPTION — EVIDENCE.

Bolton v. Smith, 6 O.W.N. 531.

(§ II B—15)—WAYS — WAYS NOT APPURTENANT TO DOMINANT ESTATE — PRESCRIPTION.

An easement by prescription in a way not appurtenant nor essential to the beneficial enjoyment of a dominant tenement, can be acquired only by an uninterrupted use for the full period of 20 years.

Salter v. Everson, 11 D.L.R. 832, 4 O.W.N. 1457, 24 O.W.R. 757.

(§ II B—19)—AS TO WATERS.

A prescriptive right, claimed pursuant to the Limitations Act, 1910, 10 Edw. VII. (Ont.) c. 34, s. 35, to deposit sawdust and other mill refuse in a stream is an inchoate right until action is brought, and the user to support the same must be continuous and of right. A prescriptive right to dispose of sawdust and mill refuse by throwing the same into a stream does not arise from the mere fact that this had been done for more than the statutory period of prescription, where it is shewn that the user was contentious and objected to, and was recognized as such by the payment of damage claims and the erection of a burner to destroy the refuse. The prescriptive right to pollute a stream by depositing the saw dust and mill refuse, arising from the operation of a one saw sawmill, does not justify the pollution thereof by the additional saw dust and refuse consequent on the operation of many saws in the mill, as well as shingle and lath mills, an edger and other modern appliances, notwithstanding that this evolution was gradual and that the rights of the mill owner lower down on the stream were not materially affected to his prejudice until forty years after the erection of the original mill.

Hunter v. Richards, 5 D.L.R. 116, 26 O.L.R. 458, 22 O.W.R. 408. [Affirmed, 12 D.L.R. 503, 28 O.L.R. 267.]

RIGHT TO WHARFAGE — REAL OR PERSONAL RIGHT — REGISTRATION — DAMAGES.

A clause in a deed that "the said D. sells and assigns from this day for ever to the said A. all rights to operate a ferry in flat-bottom boats or barges and to disembark on the northern part of the said D's land" does not, in any way, include the creation of a real servitude, but is only the transfer and sale of personal rights rendering the vendor liable for damages in the case of contravention; and the registration of such deed as a charge on the vendor's property is illegal and null. When the holder of certain rights declares that they have been granted to him by his vendor, who held

them from those preceding him in title, he must allege and prove that the latter granted to him, and must establish the claim of title between him and the first holder; it is not sufficient to produce his immediate title; otherwise the registration of his rights is illegal, and may be struck out upon an application to the court. One who illegally and without right registers a charge upon real property, which prevents the owner from making an advantageous sale, is liable for the damages which the latter sustains. Such damages should include interest upon the sale price.

Dutour v. Bastien, 54 Que. S.C. 54.

Flooding lands — Dam — Tightening — Increased user — Prescription.

In order that a dam may be tightened so as to hold back all the water of a stream to a greater extent than an original prescription right permitted, there must be shewn a user, although not absolutely continuous de die in diem so constant as to disclose the existence of a consistent course of action and user, even though periods elapse without an active assertion of such right.

Cardwell v. Breckenridge, 11 D.L.R. 461, 24 O.W.R. 569, 4 O.W.N. 1295.

C. As appurtenant; by necessity.

(§ II C—20)—Right-of-way as appurtenant — Highway between dominant and servient estates — Terminus a quo.

The fact that a highway intervenes between the dominant and the servient estate is not a bar to the existence of a right-of-way as an easement.

Petipas v. Myette, 11 D.L.R. 483, 47 N.S.R. 270, 12 E.L.R. 537.

Light and passage — Presumption limiting area.

Where the plaintiff as lessee of certain premises used as a store and residence, claims as accessory thereto the right to use as a light and passage easement, a vacant yard owned by his lessor and lying in the rear partly of the premises occupied by the plaintiff and partly of adjoining premises there is a presumption against an easement in respect of the yard in its entirety (constituting the vacant space in the rear of both premises) being accessory to the plaintiff's lease, and the onus is upon him to establish strictly his alleged rights-of-way and of light over the whole yard.

Saad v. Simard, 10 D.L.R. 224, 43 Que. S.C. 499.

Necessity — Way of — Only exists when no other means of access.

A right-of-way of necessity only exists where the grantee has no other means whatever of reaching his land. If there be any other means of access, no matter how inconvenient, no way of necessity can arise.

Fullerton v. Randall, 44 D.L.R. 356, 52 N.S.R. 354.

(§ II C—22)—Petitory action — Servitudes claimed by defendant.

The defendant in a petitory action cannot set up, as a ground of nonsuit, servitudes of rights of view and of passage with which an immoveable is charged for the benefit of the adjoining property (dominant tenement) owned by him, but he has a right to demand that his rights shall be preserved by the judgment in the action.

St. Sulpice v. Canada Industrial Co., 42 Que. S.C. 432.

Right of ingress and egress—Lane—Doors and windows—Destination du père de famille — Ownership — Prescription—C.C., arts. 549, 551, 562.

There does not arise a subservient easement allowing doors and windows to overlook an open lane when, at the time of the sale of part of the owner's land, these lights were opened not by the vendor but by the purchaser. There is no common property, when the site of a lane is furnished by each of the neighboring owners; each reserves the ownership of his land, unless he relies on the fact that the owners wished to create a common property. A man having property bordering on a lane over which he has no property right, cannot avail himself of art. 536, C.C. Que. to take on this lane a right of light at 6 feet from the dividing line. When an owner subdivides a property into building lots and establishes lanes connecting with the public street for the use of the purchasers to whom he has sold the lots, so that nothing is left him but a bare right of ownership, these lanes can be likened to public streets and the neighboring owner's have a right to light. The sale of a lot with the right of "ingress and egress" does not give a right to light. When a person establishes a lane entirely on his land and gives simply a right of passage, or even if he gives the use of it, to a neighboring owner, he does not give up on that account his property in the lane; but if he allows the right of light to his purchaser for thirty years, without protest there arises a presumption that he intended to give him the general right of using the lane. The obligation imposed by the act on an owner not to open passages of light on his land except at a certain distance from the dividing line between him and his neighbor is lost by prescription in 30 years, and the possession, during that time, of such lights opened at a less distance, frees the owner from the obligation to close them. The owner of a lane has an interest sufficient to complain that his neighbor has established lights on this lane, even when the wall which he has built opposite the latter is sold.

Friedman v. Boulrice et al., 56 Que. S.C. 356.

(§ II C—26)—Support of building.

Where the defendant, while owner of two lots of land, extended the footings of a building into one of the lots so that they

were concealed from view, one who subsequently purchased the latter lot without knowledge of the existence of the footings therein, under a certificate of title free from reservation, by reason whereof the defendant could not acquire an easement to maintain them in such a lot, except by a writing duly recorded under s. 3 of c. 50 of the Sask. Land Titles Act of 1909, cannot require their removal, as by his purchase he became the owner of the footings.

National Trust Co. v. Western Trust Co., 4 D.L.R. 455, 4 S.L.R. 210, 21 W.L.R. 571, 2 W.W.R. 667.

Centre wall—Right of support—Vague and indefinite—Demolition—Presumed acquiescence—Insufficient conclusions C.C. arts. 522, 551, 560—C.C.P. art. 541.

The demands of an action, asking the rebuilding of a centre wall of sufficient strength to support a new building which the plaintiff proposes to erect, are too vague to allow a court to award a judgment able to be fulfilled. One having a right to an easement on the walls of his neighbour, and who in good faith allows an important construction, capable of preventing the exercise of the easement, cannot suddenly demand the demolition of the building in order to get back his right. He should be restricted to a claim for indemnity.

Lavigne v. Nault, 28 Que. K.B. 14.

(§ II C—27)—In alley.

Where the vendor upon the sale of a portion of his land agrees to give the purchaser a right-of-way across the remainder of his property from a certain road to the parcel sold and to make a grant of such right-of-way "as soon as the same is surveyed" it is the duty of the vendor to define the way by selecting its precise location and having a survey made.

Burney v. Moore, 7 D.L.R. 357, 4 O.W.N. 173, 23 O.W.R. 161.

(§ II C—29)—Private right-of-way appurtenant to land—Extinction by sale of servient tenement for taxes—Assessment Act, R.S.O. 1897, c. 224, ss. 7, 149—Municipal Act, R.S.O. 1897, c. 223, s. 2 (8)—"Land."

A. J. Reach Co. v. Crosland, 45 D.L.R. 140, 43 O.L.R. 635, affirming 43 O.L.R. 209.

Appurtenances—Way not mentioned in deed.

A conveyance of land beside a way owned by the grantor, but which conveyance did not refer to the land as being bounded by such way, does not confer on the grantee any interest in the way as appurtenant to the land under the Transfer of Property Act, s. 12, R.S.O. 1897, c. 119 [1 Geo. V. c. 25, s. 15, R.S.O. 1914, c. 109] which provides that every conveyance of land shall include all ways, easements and appurtenances whatsoever "belonging to or in any wise appertaining to the land conveyed, or with the same demised, held, used, occupied and enjoyed, or taken or known as part or parcel thereof." The way in such case does not belong or appertain to the land adjoining held under the same ownership, nor the person owning the fee in same, although subject to rights-of-way granted by such person to third parties.

Peters v. Sinclair, 13 D.L.R. 468, 48 Can. S.C.R. 57, affirming 8 D.L.R. 575, 4 O.W.N. 338.

Way of necessity.

The right to use a prescriptive way over demised premises is included within a reservation in a lease of the right to cut and remove timber therefrom, as, of necessity, it implied the reservation of the usual means of ingress to and egress from the demised premises.

Thomson v. Maxwell, 3 D.L.R. 661, 3 O. W.N. 995.

Access to land—Right-of-way—Private way unnecessary if highway available—Acceptance of dedication proffered by registration of plan—Municipal by-law—Costs of action.

Aroni v. Wilson, 9 O.W.N. 295.

Easement—Right of passage—Enclosed land—Difficult access to public highway—C.C. arts. 540, 543.

An owner whose lands have only an exit on a public highway insufficient for his use, can demand a passage over the land of his neighbours, the same as an owner of lands completely enclosed. If the enclosed land results from a division or an agreement, the passage should be furnished without compensation, unless it results in any appreciable damage to the servient tenement.

Bernier v. Bernier, 28 Que. K.B. 390.

III. Extent of rights.

(§ III—30)—Right-of-way—Standing of vehicles—Negatory action.

A right to a servitude of way to communicate from the street to an interior court does not imply a right to have vehicles stand there for loading or unloading. These acts constitute an aggravation of servitude, which the owner of the servient land is justified in checking by way of a negatory action.

Cantin v. Borne, 54 Que. S.C. 470.

Right of fishing—Bed of river—Rights of parties.

A concession by the owner of a river-bank property neither navigable or floatable of "all his rights of fishing in the river, opposite the lot of the grantor, known under the letter C," does not confer on the grantee a personal servitude or a simple right of user, but an actual jus in re or right of ownership in the bed of the river for the purpose of fishing (the Chief Justice is of the opinion that this right is one of usufruct). (2) The preservation of this right of ownership is not subject to the formality of renewal of registration of title after the cadastral plan takes effect. (3) This right of ownership, limited in its object, permits nevertheless the coexistence, in favour of

the owner of the river bank, of his right to the bottom for all purposes other than that of fishing.

Duchaine v. Matamajaw Salmon Club, 27 Que. K.B. 196. [Reversed 47 D.L.R. 625, 58 Can. S.C.R. 222.

EASEMENT—TITLE—TESTIMONIAL EVIDENCE—WRITTEN PLEADING—COMMON PASSAGE—INDEMNITY—PARTITION—C.C. ARTS. 501, 508, 510, 523, 528, 531, 540, 541, 542, 543, 549, 591, 1233, 2193, C.C.P. ARTS. 199, 339, C.C. ARTS. 61, 62, S. REF. (1909), ARTS. 5551, 5552, 7349.

The word "title" in art. 549 C.C. Que. should be taken in a very extended conventional meaning. Evidence of title is from that time subject to the rules of common right. Testimonial proof of a payment made in acquiring a conventional easement it is admissible unless it is preceded by evidence in writing. Art. 549 above only applies to easements created by act of man and not to those created by the law itself as an easement of necessity. This article does not recognize like art. 690 of the Code Napoleon, a 30 years prescription as a mode of acquiring easements continuous and open. As to easements which are not continuous, as right of passage (art. 547) they can only be established in France, under the authority of art. 591, by a title, and possession from time immemorial, as here is not enough. The state of passage but not the right of passage can be acquired by prescription. The establishment of a common for pasturing animals does not imply a right of passage for cultivating the adjoining land. Although the obligations which the neighbours have, one with regard to the other, independent of any agreement (art. 508) only constitute according to the majority of jurists, a restitution on the right of property, they are nevertheless under the C.C. numbered among the real easements imposing, placing, an encumbering immoveables with a real charge, and as legal easements. In the case of an enclosed field, it is the law itself which imposes, places and burdens with a right-of-way the surrounding land for the benefit of the enclosed land for the consideration of public good which requires all landed properties to be worked and cultivated. This right does not need to be justified by any title. Art. 549 is not applicable. To exercise this right the permission of the owner of the servient tenement is unnecessary. The fact that it is enclosed and the necessity of a passage way are sufficient. From the latter principle the three following consequences flow: (a) if the enclosed owner passes over the property of his neighbour without permission before an action is brought to determine the state of the passageway he cannot be forcibly ejected, and is not liable to the penalties imposed by art. 7349 R.C.S.Q. 1909, and by arts. 61, 62 Crim. Code. This would be so although the land passed over was sown with crops; (b) a former passageway would not render inadmissible a later action by the enclosed owner so that he might pass over the land of his neighbour; (c) the payment of compensation is unnecessary for the exercise of the easement. The owner of the servient tenement has the right to use the passageway, but he must then contribute to the cost. When the enclosed state results from the division of a property by reason of a sale, exchange, partition, will, or any other contract, the easement can only be exercised over the lands which are subject to these acts, even though any other neighbouring land would present a possibility of exit infinitely easier and shorter. There is however an exception to the principle laid down by art. 543, if, for example, by reason of going across the land, the enclosed owner must pay an indemnity much greater to establish his passageway in following a shorter line, than for establishing it on another part of the land, or if it was necessary to follow a shorter exit to carry out buildings or expensive works, or if the passageway required expenses dispropectionate to the value of the land, or if, by reason of conforming to the requirements and necessities of cultivation, it was impossible for the enclosed owner to pass elsewhere than on these lands. The action for indemnity is subject to prescription and it is not maintainable unless there is a prejudice by reason of the passageway.

Gagnon v. Caron, 56 Que. S.C. 416.

(§ III—31)—LIGHT AND AIR.

The owner of the servient land must not erect any building or structure to interfere, within the distances specified in arts. 536, 537 C.C. Que. with a right of light, air, and view incident to the right to the use of windows created by a partition deed as a servitude over adjoining land. The right to use windows in the rear wall of a house, being a servitude over the adjoining property created by a deed of partition, includes the right of view and the right to receive air, and is not limited to the right to receive light. (Arts. 534, 535.)

Rosenbloom v. Sutherland, 4 D.L.R. 712, 41 Que. S.C. 481.

VIEW AND LIGHT—GARAGE.

When the servitudes established by law are not of public order the parties interested have the right to change them as they may agree. Thus an owner may grant a neighbour a right of view and of light at the distance required by art. 536 C.C. If an owner grants such right to a garage built on the division line between the two properties, which obscures the view and diminishes the light, he is not obliged to demolish it.

Desjardins v. Dupras, 26 Que. K.B. 95.

VIEW.

Art. 536 C.C. (Que.), which forbids any one to have direct views or prospect windows overlooking the land of his neighbour

at a distance of less than 6 feet from such land, applies to a stable built within the required distance even when opposite and near the line separating the two immovables, there is a barn having no opening on that side.

Papineau v. Nichol, 51 Que. S.C. 436.

Building — Access of air and light — Infringement — Pleading — Statement of claim — Unity of seisin—Implied grant—Prescription —Alternative claims—Amendment.

Business Realty v. Loew's Hamilton Theatres, 15 O.W.N. 135.

Window—Tenant—Negatory action.

The owner of a house cannot be sued by a negatory action on account of the opening of a window looking from a prohibited distance on the neighbour's property, when such a state of things was established, without his knowledge, by a tenant who had obtained permission from the complainant.

Lachance v. Mathieu, 54 Que. S.C. 479.

(§ III—32) — Right-of-way — Encroachment by building.

The person having title only to a right-of-way over land the fee of which is in another, cannot maintain an action for encroachment of a cornice of an adjoining building over the passageway unless it interferes with the reasonable use of the way.

Ridge v. Brennen, 22 D.L.R. 594, 7 O.W.N. 829.

Easement of right-of-way over bridge and nonobligation — Enclosed lands —Inadequate passage — Owner may demand passage and refuse offer of indemnity — Action "confessoire," distinct from "negatoire"—C.C. 540.

A clause insuring an easement of right-of-way over land which has been sold is not merely a personal obligation of the vendor. The clause by which the vendor forever binds himself or his representatives, as an integral part of the sale, to build a substantial and suitable way, to keep it in good repair and to renovate it each time such need is reported by experts, provides that this way shall be a bridge over a river, as high as the N.W. side of said river, for the purpose of making a way from the ground sold to the road in front and to other sites on the N.E. side which might be sold. Ground which has an inadequate passage should be considered as enclosed ground. If land has an egress on a river, and if this egress presents dangers, which in reality make the thoroughfare impassable, then this land is sufficiently established as enclosed land. The admissibility of the action of the owner of enclosed lands, who asks that the site of the passage to which he is entitled under art. 540 C.C. (Que.) be determined, is not subordinated to an offer of compensation. The owner of such lands has the right to claim it if he thinks he is justified in so doing.

Petrin v. Desmarais, 25 Rev. de Jur. 532.

(§ III—39)—Right-of-way—Obstruction —Gate.

An owner of land, on which there is a right-of-way, has no right to place thereon a fence with a gate and lock in such a way as to obstruct the passage over it, even if he does it to protect the adjoining land against tramps and offers to give a key to those who have a right to pass over it. In such case consideration may be given to what up to that time was the manner of making use of the servitude and whether or not the construction of the barrier and gate makes the use of it less convenient.

Barbeau v. McKeown, 51 Que. S.C. 311.

Passageway—Change of site.

The owner of land burdened with a servitude of passage who, availing himself of a privilege given in his title deeds, changes the site of the servitude and signifies his intention to do so to the owner of the dominant tenement has, prior to any interference with the rights of the latter, a right of action to compel him to recognize the indicated change from the time that he expressly refuses to accept it. This refusal gives the plaintiff an interest sufficient to enable him to bring an action.

Duchaine v. Lemieux, 51 Que. S.C. 358.

(§ III—42) — Negatory action — Easement of aqueduct—Removal of dam — Aggravation — Purchase by third party—Prescription—C.C., arts. 552, 553, 564.

One to whom an easement is due has the right to do the repairs necessary to preserve it. Nevertheless, after exercising an easement for more than 30 years according to a given manner, he cannot, under pretence of necessity, use a method different from the one provided for in the constitutive deed, if the condition of the servient property is thereby aggravated.

Lamy v. Bournival, 28 Que. K.B. 119.

Increase of right—Line ditch—Public waters — Destruction — C.C., arts. 501, 558—C. Mun., arts. 471, 511, 512 —S. ref. [1909] arts. 3909, 5639.

A line ditch belongs jointly to neighbouring interested owners, and the municipality has no right, even in the public interest, to link up sewer pipes to divert water from the public streets and other places in a greater quantity than that which the ditch previously received from the higher land. If it does, it commits an aggravation of easement. It should in that case, put back the places in their former state and pay for the damages which it caused. However, if the municipality, in thus diverting the public water, has made improvements, the court ought not to order the destruction of the works but direct that these waters be diverted elsewhere than into this ditch. If this order is not obeyed in a fixed time the owner of the ditch will have the right to remove them himself.

Marsan v. Laval-des-Rapides, 28 Que. K. B. 174.

IV. How lost.

(§ IV—45)—Lost grant—User—Limitations Act.

The doctrine of lost grant as applied to easements was not superseded by the Limitations Act (R.S.O. 1914, c. 75, and previous Acts), but before it can be applied there must be affirmative proof that a burden was imposed on the servient tenement of the right claimed; the evidence of user sufficient to raise the presumption of a lost modern grant depends upon the circumstances of each particular case and where established nonuser not amounting to abandonment does not destroy it.

Watson v. Jackson, 19 D.L.R. 733, 31 O.L.R. 481.

Right-of-way—Tax sale—Effect.

A right-of-way appurtenant is extinguished upon a sale and conveyance of the servient tenement for arrears of taxes. Confirmation of the sale and validation thereof by statute has the effect of curing any defect in the method of assessment.

A. J. Reach Co. v. Crosland, 45 D.L.R. 140, 43 O.L.R. 635, 15 O.W.N. 85.

Drainage rights and water supply — Termination of — Adjoining tenement — Severance of the property —By-law making it unlawful to drain two tenements by common pipe.

Wilson v. Smith, 22 D.L.R. 909, 8 O.W.N. 117.

Right-of-way—Prior hypothecary creditor—Res judicata.

A servitude of right-of-way created by the owner on his property cannot affect the rights of a previous hypothecary creditor, if the latter exercises his rights either before the judicial sale by an hypothecary action or after the sale on the distribution of the proceeds of the sale. But if he allows the sheriff to sell the property, he cannot claim priority of his hypothecary right, which is swept away on that servitude. The sale of a piece of ground made by the sheriff at the request of that hypothecary creditor does not radiate that servitude. When an immovable property on which some one has a right-of-way is advertised to be judicially sold, and if that owner makes an opposition to have his servitude, which is contested by an hypothecary creditor and set aside by the court, recognized, there is no "res judicata" between the opposant and that hypothecary creditor in a subsequent negatory action taken to have declared that such a right-of-way has been got rid of by the sheriff's sale as far as that hypothecary creditor is concerned. The right-of-way in a lane generally includes the right of ingress and egress.

Loranger v. Aubry, 27 Que. K.B. 519.

(§ IV—46)—Prescriptive rights — Loss of—Payment of damages—Interruption of user.

A claim of prescriptive right to foul the waters of a stream is defeated by proof that, for a number of years within the period necessary to acquire a prescriptive right, annual payments were made a lower riparian owner for damages occasioned by the pollution of the stream.

Hunter v. Richards, 12 D.L.R. 503, 28 O.L.R. 267, affirming 5 D.L.R. 116, 26 O.L.R. 458, 3 O.W.N. 1432.

Nonuser—Intention to abandon—Statute of Limitations.

An easement not barred by the Statute of Limitations is not lost by nonuser unless there is some act clearly indicative of an intention to abandon the right; an acquired right to use a neighbour's well is not lost by commonly using a newer well on his own lands if resort is made to the former well in pursuance of the easement when the new well runs dry.

Publicover v. Power, 20 D.L.R. 310.

Prescriptive rights — Nonusers — Lost grant—Limitations Act.

The Limitations Act, R.S.O. 1914, c. 75, ss. 35, 36, render it necessary for a person seeking to establish a prescriptive right to an easement under the statute to prove uninterrupted enjoyment for a period of 20 years immediately previous to and terminating in some action or suit in which the right is called into question. The actual user of an easement by prescription under the Limitation Act, R.S.O. 1914, c. 75, ss. 35, 26, must during the whole statutory period be such as to carry to the mind of a reasonable person in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if denied; but where the doctrine of lost grant applies, nonuser not amounting to abandonment does not destroy it. [Hollins v. Verney, 13 Q.B.D. 304, followed.]

Watson v. Jackson, 19 D.L.R. 733, 31 O.L.R. 481, varying 30 O.L.R. 517.

Right-of-way—Nonuser—Abandonment.

A mere nonuser by the abutting owners of a right-of-way or street as it appears in a registered plan of survey does not of itself, where there is no intention to that effect, operate as an abandonment of such rights; but these private rights or easements abate when the street becomes a public highway, and cannot be relied upon as a bar to the right of the municipality to close the street.

Re Jones & Tp. of Tuckersmith, 23 D.L.R. 569, 33 O.L.R. 634.

By nonuser.

The owner of land in the rear of which a third party had acquired the right to cover over a passage at a specified height from the ground is liberated from the burden on his property (whether regarded as a surface right or a servitude) by the extinctive prescription of 30 years, or by that of 10 years with title, when the beneficiary of the right allows either of these periods to elapse without making use of it.

Goldstein v. Allard, 42 Que. S.C. 255.

The owner of the servient tenement of a servitude of passage liberates it by the extinctive prescription resulting from his

possession for 30 years with no use of their right by the owner of the dominant tenement. The owner of the dominant tenement can exercise the right of passage only in the precise place established by the constituting title; to do otherwise would be a violation of the rule "No servitude without title." The right of passage being a servitude non-continuous and nonapparent it is without registration, without effect against third persons acquiring it and subsequent creditors whose rights are registered.

Hamelin v. Pepin, 42 Que. S.C. 276.

(§ IV—49)—Unity of possession.

No such unity of possession is created by a lease of a dominant estate to the owner of a servient estate as to render s. 36 of the Limitations Act, 10 Edw. VII. c. 34 (Ont.) applicable to an action by the dominant owner to establish his right to use a prescriptive right-of-way, the use of which here served in such lease.

Thomson v. Maxwell, 3 D.L.R. 661, 3 O.W.N. 995.

When the ownership of the dominant and servient tenements is united the servitude is extinct by confusion unless the relation of common servitude between the two parcels is maintained by the owner through a written instrument declaring his intention therefor.

Rosaire v. G.T.R. Co., 42 Que. S.C. 517.

EAVESDROPPING.

As criminal offence.

Eavesdropping is not a punishable offence either under the common law of England or the criminal law of Canada.

The King v. Mason, 39 D.L.R. 54, 29 Can. Cr. Cas. 210.

ECCLESIASTICAL LAW.

See Religious Institutions; Benevolent Societies.

EJECTMENT.

I. When proper remedy.
II. Title and defences.
  A. Sufficiency of plaintiff's title.
  B. Defences.
III. Verdict; judgment; relief generally.
IV. Statutory new trial.

Eviction by landlord, see Landlord and Tenant.

Defences, authority of agent, see Principal and Agent, II.

Annotation.

Ejectment as between trespassers upon unpatented land; Effect of priority of possessory acts under colour of title: 1 D.L.R. 28.

I. When proper remedy.

(§ I—1)—Purchaser in possession of lands.

A vendor who has put the purchaser in possession on being paid the purchase money has lost his right to maintain ejectment against the later although no grant or formal conveyance was made; nor can the heirs of such vendor maintain ejectment against the successors of such purchaser in the possessory title long acquiesced in by the decedent vendor and by themselves.

Halifax Power Co. v. Christie, 23 D.L.R. 481, 48 N.S.R. 264. [Appeal to Canada Supreme Court dismissed Oct. 12, 1915 (unreported).]

Action to recover possession—Evidence—Onus — Boundaries—Possession, use, and occupation—Dismissal of action and of counterclaim for damages.

Brown v. Touks, 14 O.W.N. 46.

II. Title and defenses.

A. Sufficiency of plaintiff's title.

(§ II A—5)—Root of title.

In an action of ejectment the plaintiff must trace his title back to his possession of the land or to the possession of someone else through whom he claims, or proves title under a Crown grant. [McLeod v. Delaney, 29 N.S.R. 133, approved.]

Tobin v. McDougall, 16 D.L.R. 359, 47 N.S.R. 470.

Provisional execution in ejectment — Delays—Discontinuance of inscription in review—Que. C.P. 594, 603, 654.

A defendant who has inscribed a case in review, and has later filed a discontinuance of his inscription, cannot make an opposition to annul on the ground that, previously, a provisional execution has been ordered and that the delays on that execution were not expired.

David v. Lambert, 16 Que. P.R. 65.

Recovery of possession of land—Counterclaim — Status of defendants counterclaiming — Devolution of Estates Act, s. 13—Evidence—Demand of possession or notice to quit — Necessity for — Denial of relationship of landlord and tenant.

Jones v. Hudson, 13 O.W.N. 106.

(§ II A—6)—Sufficiency of plaintiff's title — Deed of former person in possession—Boundaries.

It is not necessary in order to recover in ejectment to trace a title back to the Crown, and either party asserting title is only bound to trace it to someone who has been in possession of the land; it is quite sufficient for the plaintiff, in an action for trespass to determine the division line between lands of adjoining owners, to prove his title by putting in his title deed given by a person who had for a long time been in possession of the land. [Cunard v. Irvine, 1 James N.S.R. 31, applied.]

McIsaac v. McKay, 27 D.L.R. 184, 49 N.S.R. 476.

(§ II A—15)—Possessory titles.

On the trial of an action of ejectment

in respect of a parcel of land claimed by two adjoining owners, if neither of them has any paper title to the disputed land, the action will be dismissed, notwithstanding proof that plaintiff had placed a tent on the land and was ousted by the defendant, if it appears that such was the only act of possession by the plaintiff and that the lands were not enclosed and that the defendant had at intervals exercised acts of possession equally adverse as to the plaintiff.

Mann v. Fitzgerald (No. 2), 4 D.L.R. 274, 3 O.W.N. 1529, 22 O.W.R. 690, affirming 1 D.L.R. 26, 3 O.W.N. 488.

POSSESSORY ACTION—INSCRIPTION IN LAW—VIOLENT POSSESSION AND OF IRREGULAR TITLE—C.P. 191—C.C. 2197—2198.

In an action for the possession of real property resting on titles dating three centuries back, preuve avant faire droit will be ordered on a demurrer asking the dismissal of the action because plaintiff does not claim to be the heir of the de cujus, nor because the violent taking possession of the property by the defendant took place more than two centuries ago.

Caron v. Seminaire de Quebec, 15 Que. P.R. 302.

TITLE TO LAND—ACTION OF EJECTMENT—PAPER TITLE—POSSESSION BY ONE OF THE HEIRS AT LAW OF PATENTEE FROM CROWN—TAX SALE—INVALIDITY—DISTRESS ON PREMISES — SUFFICIENCY — ASSESSMENT ACT, R.S.O. 1897, c. 156—TITLE BY POSSESSION—LIMITATIONS ACT.

McAllister v. Defoe, 8 O.W.N. 175, 405.

POSSESSORY ACTION—CONTESTATION OF MUNICIPAL BY-LAW—DELAYS—C.C. 2192, 2193—C.P. 1064.

To maintain a possessory action, plaintiff must have been in peaceable, uninterrupted public possession, as proprietor for at least one year and one day. The defendant having jurisdiction to pass a by-law ordering the closing of a by-road if such by-law remains uncontested, by one of the means provided by law, for 30 days, it is presumed to have been legally passed and will be held to be binding on all concerned. By-law 134, herein in issue, for the closing of a byroad, will not be held to have been and to be illegal and without effect, because notice of the passing thereof was posted and read at the door of the parish church only. Ownership and control by defendant of said by-road, since 1823, under a proces-verbal, may not be set up in defence to plaintiff's possessory action such defence tending to join a petitory to a possessory action.

Patry v. St. Etienne de Beaumont, 20 Rev. de Jur. 192.

CROWN LANDS—TITLE OF OCCUPANT AS AGAINST WRONGDOERS.

Carr v. Ferguson, 9 E.L.R. 218.

B. DEFENSES.

(§ II B—21)—OUTSTANDING TITLE—TENANCY IN COMMON.

One tenant in common may maintain alone an action of ejectment against a stranger in possession of the common property. [Scott v. McNutt, 2 N.S.D. 118, applied.]

Tobin v. McDougall, 16 D.L.R. 359, 47 N.S.R. 470.

III. Verdict; judgment; relief generally.

B. MESNE PROFITS; IMPROVEMENTS; EMBLEMENTS.

(§ III B—40)—MESNE PROFITS—IMPROVEMENTS—EMBLEMENTS—ACTION TO RECOVER LAND—LIEN FOR IMPROVEMENTS—MISTAKE OF TITLE UNDER STATUTE—AT COMMON LAW—INCREASED SELLING VALUE—EXCEPTION TO GENERAL RULE AS TO LIEN—ESTOPPEL—STATEMENT OF INTENTION TO GIVE LAND—EVIDENCE.

McBride v. McNeil, 4 O.W.N. 475, 23 O.W.R. 558.

POSSESSION UNDER OPTION—EJECTMENT ON DEFAULT.

Shand v. Power, 45 N.S.R. 97, 9 E.L.R. 342.

ACTION FOR POSSESSION—DAMAGES FOR DETENTION—MESNE PROFITS.

White v. Thompson, 2 O.W.N. 667, 18 O.W.R. 478.

APPLICATION TO BE PUT IN POSSESSION AFTER ADVERSE JUDGMENT AT TRIAL.

Girroir v. McFarland, 9 E.L.R. 109.

IV. Statutory new trial.

ACTION FOR POSSESSION AND MESNE PROFITS—ENTRY OF DEFENDANTS UNDER PLAINTIFF'S TENANTS—FAILURE TO PROVE LEGAL RIGHT—NEW TRIAL.

Poulin v. Eberle, 3 O.W.N. 198, 20 O.W.R. 301.

EJUSDEM GENERIS.

See Statutes, II; Contracts, II.

ELECTION OF REMEDIES.

See Action; Pleading.

I. CHOICE.

II. EFFECT; PURSUING TWO REMEDIES.

I. Choice.

(§ I—1)—CONCURRENT RIGHTS.

When a plaintiff has separate, concurrent or successive rights of action on the same transaction, or for the same injury, he can have only one full satisfaction; this obtained, his further actions or remedies will be barred.

Black v. Dominion Fireproofing Co., 23 D.L.R. 161, 8 W.W.R. 823, 31 W.L.R. 352.

(§ 1—2)—STRAY ANIMALS ACT (SASK.)—ANIMALS DAMAGE FEASANT — REMEDY UNDER ACT—AT COMMON LAW.

The Stray Animals Act (Sask. 1915, c. 32), provides that the owner of animals distrained damage feasant may proceed under the provisions of the Act to have a justice

of the peace assess the damages but he is not bound to proceed under the Act and failure to do so does not deprive him of any other remedies he may have at common law. [Maskel v. Horner, [1915] 3 K.B. 106, followed.]

Campbell v. Halverson, 49 D.L.R. 463, 12 S.L.R. 420, [1919] 3 W.W.R. 657, affirming 11 S.L.R. 58.

(§ I—4)—TORT OR CONTRACT.

Two or more distinct causes of action for separate torts cannot properly be joined in one action; if joined the plaintiff must elect with which he will proceed. [Edinger v. McDougall, 2 A.L.R. 345; Nyblett v. Williams, 6 Terr. L.R. 200; Saddler v. Great West Ry., [1896] A.C. 450; Thompson v. London County Council, [1899] 1 Q.B. 840; Hinds v. Barrie, 6 O.L.R. 656, followed.]

Pringle v. Dwyer, 6 D.L.R. 446, 5 A.L.R. 349, 22 W.L.R. 158, 2 W.W.R. 1049.

(§ I—7)—RECOVERY OF LAND OR ACCOUNT FROM GUARDIAN.

An action against a guardian and other defendants, both to set aside a sale of property of his ward made by the former to his codefendants, at an undervaluation, in breach of his trust, the latter being aware of such breach, and also to obtain an account of all the guardian's dealings with the estate of his ward, involves two distinct and separate causes of action against different parties, and therefore the plaintiff must elect which he will pursue.

Thomas v. Day, 4 D.L.R. 238, 4 A.L.R. 347, 21 W.L.R. 244, 2 W.W.R. 133.

CONTRACT TO PURCHASE LAND—NONPAYMENT OF INSTALMENTS—ELECTION TO RESCIND CONTRACT—DECREE OF COURT—RIGHT TO RE-ELECT.

Where a party with full knowledge of all the facts, elects to rescind a contract for the purchase of land in default of payment, and asks the court to give effect to that election and the court grants the request, he is bound by his election, and cannot by neglecting or refusing to take the necessary steps to give complete effect to the court's decree obtain the right to re-elect. [Standard Trust Co v. Little, 24 D.L.R. 713, followed.]

Davidson v. Sharpe, 46 D.L.R. 256, 12 S.L.R. 183, [1919] 2 W.W.R. 76, affirming [1919] 1 W.W.R. 469. [Affirmed by Supreme Court of Canada, 52 D.L.R. 186.]

(§ I—8)—ON TRIAL.

A party cannot, with full knowledge of all relevant facts and with a choice of two courses open to him, elect to adopt one of such courses and then invoke the aid of Nova Scotia Order 34, r. 24, to avoid the consequences of a mistake in his election, as that rule does not apply to a case where a party present at a trial elects for one reason or another not to take part in it, but is intended to cover cases of inadvertence, neglect or accident, etc.

Carruthers v. Nova Motor Co. (No. 2), 8 D.L.R. 690, 46 N.S.R. 516.

II. Effect; Pursuing two remedies.

(§ II—10)—ACTION AGAINST PRINCIPAL OR AGENT—CHOICE.

For the purpose of determining their liability an agent acting for an undisclosed principal may be sued jointly with his principal; but if a judgment has been recovered against either in an action against them jointly or in an action against either separately, it will bar the prosecution of an action against either of them on the same grounds.

Brennen v. Thompson, 22 D.L.R. 375, 33 O.L.R. 465.

ELECTIONS.

I. VOTERS.
A. Right to vote; residence.
B. Registration; voters' lists.
II. ELECTIONS.
A. In general.
B. Ballots.
C. Result; recounts.
D. Election frauds; crimes.
III. NOMINATIONS.
IV. CONTESTS.

I. Voters.

A. RIGHT TO VOTE; RESIDENCE.

(§ I A—1)—PARLIAMENTARY ELECTIONS—ONTARIO VOTERS' LISTS ACT, R.S.O. 1914, c. 6, ss. 15 (1), 33, 40—APPEAL TO COUNTY COURT JUDGE—POWER TO SUBSTITUTE VOTER AS APPELLANT—APPLICATION TO JUDGE OF DIVISIONAL COURT FOR DIRECTIONS—REFUSAL TO GIVE DIRECTIONS BECAUSE QUESTION TO BE RAISED NOT PROPER FOR CONSIDERATION OF DIVISIONAL COURT—COSTS—JUDGES' ORDERS ENFORCEMENT ACT, R.S.O. 1914, c. 79.

Re Dumonchelle and Voters' List of Sandwich West, 11 O.W.N. 229.

(§ I A—6)—QUALIFICATIONS—CHALLENGE, EFFECT OF.

Where a person's name appears on an enumerator's list of voters, he can cast his vote without hindrance, unless he is challenged at the polls, and if challenged he can cast it by taking the prescribed oath.

Gross v. Strong, Pinchebeck v. Strong (No. 2), 10 D.L.R. 392, 5 A.L.R. 49, 23 W.L.R. 340, 362, 3 W.W.R. 879.

OBJECTION—FINAL REVISED VOTERS' LIST—NAME ON.

The status of the petitioner is established prima facie where on the hearing of a preliminary objection charging that he was not entitled to vote, proof was adduced that his name was on the final revised list in use at the election and that he did vote.

Re Lakeside Provincial Election: Tidsbury v. Garland, 20 D.L.R. 286, 29 W.L.R. 628, 7 W.W.R. 340.

QUALIFICATIONS GENERALLY.

It is necessary that the name of a real estate owner should be placed on the valuation roll in order to be included in the list

of voters for a municipal election though it is not required for the voters' list at an election for the House of Commons. It is also necessary that the name of the ratepayer should be placed on the valuation roll on or before the evening of Nov. 30, in order that it may appear on the list of voters which must be prepared and deposited on the following day, namely, Dec. 1.

Hobkirk v. Lasalle, 14 Que. P.R. 421.

RULE OF PROHIBITION — RECALL — BALLOTING — MUNICIPAL ELECTOR — QUALIFICATION — BRITISH SUBJECT — INTERVENTION — INTEREST C.C., ART. 77 — S. REF. [1909] ART. 5368.

In order to be a municipal elector under the Cities and Towns Act, a person's name must be on the valuation roll, and he must be a British subject; otherwise a vote given on a municipal regulation abrogating a prohibition law, is void. A person who has petitioned the municipal council to obtain a license for the sale of intoxicating liquors has a sufficient interest to intervene in a contestation of a regulation abrogating a law of prohibition against that sale.

St. Germain v. Lachine et al., 56 Que. S.C. 300.

QUALIFICATIONS GENERALLY.

Under our constitutional and municipal form of government every citizen has the right to buy such properties which will be sufficient for him to qualify himself, as a parliamentary and municipal elector, in such electoral districts as he pleases.

Herbert v. Saint Michel, 18 Rev. de Jur. 228.

(§ 1 A—8)—MUNICIPAL ELECTIONS.

The fact that the voter's name is misspelled upon a printed voters' list of municipal electors will not deprive him of the right to vote, if he takes the form of oath provided by statute.

R. ex rel. Sovereen v. Edwards, 8 D.L.R. 450, 22 Man. L.R. 790, 22 W.L.R. 723, 3 W.W.R. 581.

MUNICIPAL ELECTION — QUALIFICATION OF VOTERS—NAMES ON VALUATION ROLL.

A municipal council has not the right to register, on the eve of a municipal election, merely for the purposes of the election, without a previous notice in writing, a change of ownership in property on the valuation roll in force. And even if this change has been demanded in writing, and has been authorized by resolution of the council, it cannot be invoked for the purposes of a municipal election, if, at the time when the person presents himself to exercise his right as an elector, his name does not appear on the valuation roll in force and the change of ownership has not been inscribed on the valuation roll.

Messier v. Lefebvre, 47 Que. S.C. 354.

MUNICIPAL ELECTION — VOTERS' LISTS — PETITION TO ANNUL.

In municipal matters concerning the list of electors prepared under the Election Act, recourse may be had to C.C.P. to give full and complete efficacy to this Act. A motion asking for dismissal of a petition for annulment of a decision of a municipal council in relation to this list cannot be granted by a judge, the Superior Court alone having jurisdiction.

Bourassa v. Salaberry, 48 Que. S.C. 267.

MUNICIPAL ELECTION—VOTERS' LIST—REVISION—FINALITY.

When the validity of an election is questioned under s. 92 of the Municipal Elections Act, if it appears that the voters' list had been prepared and revised in accordance with the formalities required by the Act, it will be taken to have been revised "in accordance with law," and the court will not go behind the revision to inquire into the qualifications of the voters.

Re Kerr and Gold, 20 B.C.R. 589.

MUNICIPAL ELECTIONS—BARE OWNER—DAMAGES — PRESCRIPTION — C. MUN., ARTS. 19, 291, 300—S. REF. [1909] ARTS. 3387, 3388.

A person who has only bare ownership in an immovable worth $50, without having the possession which belongs to the usufructuary is not a municipal elector. An action for damages against the president of a municipal election for having prevented a bare owner, who pretended to be a municipal elector, from voting is barred within six months.

Valée v. Sabourin, 56 Que. S.C. 123.

QUALIFICATION — "REGISTERED OWNER" — HOLDERS OF AGREEMENTS TO PURCHASE.

Perry v. Morley, 16 B.C.R. 91, 16 W.L.R. 691.

MUNICIPAL—QUALIFICATION OF ALDERMAN—LAND SOLD SUBJECT TO RIGHT OF REDEMPTION.

Levasseur v. Pelletier, 40 Que. S.C. 490.

PARISH ELECTORAL LISTS—APPLICATION TO COUNCIL—REFUSAL TO HEAR WITNESSES—APPEAL—COSTS—QUE. C.P. 82, 549.

Upon a petition to be entered upon the electoral lists of a parish, the members of the council must hear the witnesses of the parties. They are no more allowed to judge of the merits of the application without examining the witnesses than an ordinary court is allowed to decide a case without hearing the witnesses. If the petitioner succeeds upon an appeal to have his application admitted, the municipality must pay the costs.

Letourneau v. St. Constant, 15 Que. P.R. 405.

MUNICIPAL BY-LAW—LIQUOR LICENSE.

It is not sufficient to have one's name inscribed on the assessment roll it is necessary for the legal exercise of municipal franchise that the party shall possess the qualifications required by law, one of which is that the elector shall be a British subject. In the case now submitted 21 votes were given by parties who were not naturalized British subjects and such votes were illegally recorded, and as a consequence the

vote on the by-law is, therefore, illegal and must be so declared.

St. Germain v. Lachine, 24 Rev. de Jur. 76.

(§ I A—9)—Electoral list—Domicile—Request to be put on list—Que. C.C. 79 et seq. 2 Geo. V., c. 10.

A declaration stating that the maker has asked to be put on the electoral list at Montreal, since he had been refused at Laprairie, is an acquiescence in the decision of the Laprairie council, and a formal declaration that he had his domicile in Montreal and that he wanted to have it there, since, according to the 1912 Act, one can vote only at his domicile.

Guerin v. Laprairie, 15 Que. P.R. 417.

Residence.

The owner of a house in a rural municipality where he resides each summer for five and sometimes 6 months and who carries on his business in an urban municipality, remaining there in rented premises for the balance of the year, has a right, on declaring that the country house is his principal establishment, to be inscribed on the list of electors of the municipality in which it is situated.

Godbout v. Laurent, 43 Que. S.C. 158.

Residence.

School teachers, professors and heads of institutions of learning, and the members of a teaching community, should be inscribed on the voters' list of the municipality where they have their institution or house even when they give no instruction there if they do give it in other places in the province.

Jodoin v. St. Hyacinthe, 43 Que. S.C. 123.

Residence.

An elector, unmarried and a teacher by profession, who occupies rooms in the town near the place where he teaches but passes his vacations and times of leisure with his parents in another municipality where he had formerly been domiciled, who has a room there at his disposal and who declares that he had never had any intention of changing his domicile, is validly inscribed on the list of voters of the latter municipality. The same is the case with the elector, owner of a house where he is domiciled, who retains such ownership and lives there for 4 months each year residing in another municipality during the remaining 8 months to carry on his business but without intending to change his domicile and always proposing to return to his first residence. The declarations which he makes to this effect should be favourably received.

Demers v. Saint Nicolas, 43 Que. S.C. 321.

Residence.

A period of habitation in another place is only a circumstance in establishing a change of domicile. Thus the Quebec Election Act (2 Geo. V., c. 10) does not disqualify a landowner in the province who leaves it to reside in the United States without selling his land unless it is proved that he intends to reside permanently there. This principle does not apply to a person who changes his residence from one place in the Province of Quebec to another or even elsewhere in Canada.

Cardin v. Saint David, 14 Que. P.R. 221.

B. Registration; voters' lists.

(§ I B—12)—Right to vote.

The fact that a person's name does not appear on the enumerator's list of voters does not disfranchise him, for the person may, by taking the prescribed oath, have his name added to the list and swear in his vote.

Gross v. Strong; Pinchebeck v. Strong, 10 D.L.R. 391, 5 A.L.R. 49, 23 W.L.R. 340 and 362, 3 W.W.R. 879.

Voters' list.

Where the provincial voters' list constituting the foundation of the list of voters for a Dominion election was not forwarded to the clerk of the Crown in Chancery at Ottawa, as required by the Dominion Elections Act, but was instead delivered at his request to the committee of judges to fix the polling subdivisions and was afterwards delivered to the person appointed by the King's printer to receive the same, the fact that the list was not actually forwarded to Ottawa in the terms of the statute is not material to the validity of the list, nor does the fact that the King's printer had the list printed elsewhere than at the Government printing office in Ottawa affect the validity of the list of voters certified by the committee of judges which is the original and legal list of voters for the electoral district.

Re Provencher Election; Barkwill v. Molloy, 1 D.L.R. 265, 22 Man. L.R. 16, 48 C.L.J. 155, 20 W.L.R. 11, 1 W.W.R. 768.

Where an applicant to have his name placed upon the municipal voters' list, properly qualified in every respect, made the necessary declaration before a special commissioner for taking affidavits appointed under the provisions of the Provincial Elections Act (B.C.) instead of making the same before a Commissioner for taking affidavits in the Supreme Court, as required by the Municipal Elections Act (B.C.), such noncompliance with provisions of the last-mentioned act is fatal, and the placing of his name on the municipal voters' list by the clerk of the municipality was improper and the Court of Revision rightfully struck his name from the list. [Davies v. Hopkins (1857), 3 C.B.N.S. 376, distinguished.]

Re Municipal Elections Act, 2 D.L.R. 349, 17 B.C.R. 31, 19 W.L.R. 830, 1 W.W.R. 531.

Jurisdiction of Superior Court.

When an elector's name has been, by error or otherwise, omitted from the electoral list for the legislature of Quebec, the Superior Court has jurisdiction to order the

municipal corporation, which made and confirmed the list, to insert therein the name of such elector.

Bédard v. Notre-Dame-de-Stanbridge, 54 Que. S.C. 405.

VOTERS' LIST.

When the name of an elector, possessing the qualification required by law, is inscribed on the list of voters for a district in which he has no domicile, the municipal council revising the list should not strike out his name but should order it to be transferred to the list of the district of his domicile.

Jodoin v. St. Hyacinthe, 43 Que. S.C. 123.

It follows from the provisions of art. 203 of the Quebec Election Law that the date for the revision of the electoral lists must be set within 30 days from their completion and therefore the decision of the municipal council fixing a date beyond that period on which to proceed to the hearing of complaints under a revision of such lists is illegal; and where the last day of such 30-day period is a nonjuridical day, and the municipal council assigns such revision for a Monday as the first juridical day, after the last day of the period, this will not (under 8 C.C.P.) prevent such arrangement from being illegal owing to the fact that the period fixed by art. 203 is not one of practice but is prescriptive.

Turgeon v. St. John, 18 Rev. de Jur. 429.

VOTERS' LIST.

The attestation under oath by the secretary-treasurer of the voters' list (art. 195); the examination of the list by the municipal council within 30 days from the date of its deposit and not afterwards (art. 203); the public notice and the special notice required by art. 206 of such examination; and the initialling by the president of the council before the sitting closed of insertions and corrections made in and to the list (art. 210), are all essential formalities the non-observance of which makes the list a nullity. The Superior Court has jurisdiction, under art. 50 C.C.P. to set aside a list prepared without observing these formalities.

Maher v. St. Timothée, 14 Que. P.R. 278.

PARLIAMENTARY ELECTIONS — ONTARIO VOTERS' LISTS ACT, R.S.O. 1914, c. 6, ss. 15 (1), 33, 40—APPEAL TO COUNTY COURT JUDGE — POWER TO SUBSTITUTE VOTER AS APPELLANT — APPLICATION TO JUDGE OF DIVISIONAL COURT FOR DIRECTIONS — REFUSAL TO GIVE DIRECTIONS BECAUSE QUESTION TO BE RAISED NOT PROPER FOR CONSIDERATION OF DIVISIONAL COURT — COSTS — JUDGES' ORDERS ENFORCEMENT ACT, R.S.O. 1914, c. 79.

Re Dumonchelle and Voters' List of Sandwich West, 11 O.W.N. 229.

MUNICIPAL ELECTION — COUNCILLOR — VOTERS' LIST — REMOVAL OF NAMES — IRREGULARITY.

Dimock v. Graham, 9 E.L.R. 417.

POLL TAX PAYERS — STRIKING OFF NAMES FOR NONPAYMENT OF TAX — POWERS OF TOWN CLERK.

Kelly v. McNeil, 44 N.S.R. 393.

II. Elections.

A. IN GENERAL.

(§ II A—15)—MUNICIPAL ELECTION — REFUSAL TO PRESIDE—NOTICE.

The secretary-treasurer of a municipality, bound ex officio to preside at an election of councillors, should fulfil this duty on the day fixed by the law, even when the previous public notice has not been regularly given. If he refuses to do so, he incurs the penalty provided by art. 254, Mun. Code.

Bureau v. Soulard, 54 Que. S.C. 507.

MUNICIPAL ELECTION — PRESIDING OFFICER —VACANCY.

A majority of the electors at an election meeting cannot elect a presiding officer, to remedy the absence or incapacity of the one appointed, except at the first election in a newly organized municipality. When a municipal election meeting has been opened and closed, by the person regularly appointed to preside over such meeting, the meeting cannot be continued or recommenced under the presidency of another person.

Olivier v. Roger, 53 Que. S.C. 136.

RESIDENCE—LIVING IN DIFFERENT PLACES.

The respondent, a bachelor, had for 14 years last past been engaged as his only business in farming lands which he owned in the municipality of St. Vital. During spring, summer and autumn he was almost constantly on his farm, but frequently went into Winnipeg to visit his sisters and brother-in-law, and slept during the summer more than half the time at the house occupied by them. During the winter he visited the farm every week and slept there occasionally, but most of the time at said house in Winnipeg. The house was owned by him but occupied by his sisters and brother-in-law rent free, and he, on the other hand, paid nothing for his meals and lodging when with them. Held, on the above facts, that the respondent was not an actual resident of St. Vital.

Mitchell v. Johnson, [1918] 1 W.W.R. 785.

(§ II A—16)—TO FILL VACANCY.

Failure to give 6 full days' notice of a special election to fill a vacancy in the office of municipal councillor, as required by s. 21 of the Municipal Ordinance, 1898, will vitiate the election held thereunder.

R. ex rel. Hogan v. Jollivette, 4 D.L.R. 697, 20 W.L.R. 264, 4 A.L.R. 233, 1 W.W.R. 829.

(§ II A—17)—NOTICE — STATUTORY PRELIMINARIES — BY-LAW REPEALING LOCAL OPTION BY-LAW.

Where there has been a failure by the municipal council to comply with the statutory preliminaries required by the Manitoba Municipal Act, R.S.M. 1902, c. 116, s. 376, in not posting the notice of the pro-

posed voting on a local option by-law in four or more of the most conspicuous places in the municipality, and not publishing in the notice the places of voting such departures from the requirement of the act are fatal and the by-law will be quashed, notwithstanding the saving provisions of s. 200 of the act.

Re Thompson Local Option By-law, 10 D.L.R. 493, 23 W.L.R. 786, 4 W.W.R. 112.

(§ II A—19)—Challenge — Proof of right to vote.

The court will not, on the hearing of preliminary objections, set aside an election petition filed by a person named in the authenticated list used in the election as an elector, upon the ground that the list so authenticated was invalid for alleged noncompliance with statutory formalities in the preparation and printing of same.

Re Provencher Election (No. 2): Barkwill v. Molloy, 1 D.L.R. 265, 48 C.L.J. 155, 22 Man. L.R. 16, 20 W.L.R. 11, 1 W.W.R. 768.

(II A—20)—Municipal law — Quo warranto — Qualifications of mayor and councillors — C.M. arts. 227-229.

No one can exercise the functions of mayor or municipal councillor or fulfil other municipal duties until he is legally qualified no one can be nominated for, or elected, mayor, or councillor (or other municipal office), who cannot read or write fluently. It is not sufficient to be able to read printed matter or to write his name, or even do both.

Lacaille v. Desmanches, 25 Rev. de Jur. 1.

Municipal elections — Application to unseat reeve of township — Disqualification — Claim against municipality — Indebtedness to municipality for moneys improperly received — Municipal Act, s. 53 — Voting for by-law authorizing improper borrowing — S. 319 — Claim of relator to seat.

R. ex rel. Dart v. Curry, 17 O.W.N. 203.

(§ II A—22)—Election of councillors—Date of election — Nullity — C. mun. arts. 245, 250, 257, and 258.

An election of municipal councillors, held on a different date from that fixed by the Municipal Code, is void. The president of the election has no right to change this date.

Lapierre v. Mercier, 56 Que. S.C. 261.

(§ II A—23)—Irregularities — Failure to provide sufficient number of polling places — Use of old voters' list.

The fact that a town council did not provide a sufficient number of polling places as required by the Consolidated Municipal Act 3 Edw. VII. (Ont.) c. 19, R.S.O. 1914, c. 192, will not vitiate an election where it does not appear that any voter was misled by such omission. A local option by-law election is not invalidated by the fact that the voters' list used was two years old, where the failure to prepare a new one, as the law requires, was the fault of the assessor. [R. ex rel. Black v. Campbell, 18 O.L.R. 269, followed.]

Carr v. North Bay, 13 D.L.R. 458, 28 O. L.R. 623.

Officers and inspectors.

There is no legal objection to the appointment of a person known to hold partisan views on the question voted on as a returning officer.

Re North Gower Local Option By-law, 10 D.L.R. 662, 4 O.W.N. 1177, 24 O.W.R. 489. [Affirmed, 14 D.L.R. 443, 5 O.W.N. 249, 25 O.W.R. 224.]

Municipal election — Presiding officer.

When the person who should preside at a municipal election is absent or incapable of acting, the majority of the electors assembled at a meeting may choose a president and it is not only in the case of the first election in a new municipality that they can do so.

Olivier v. Rogers, 52 Que. S.C. 86.

Officers and inspectors.

If three candidates are placed in nomination, the chairman of election, on petition to that effect, should declare a poll to permit the electors to elect two councillors out of the three candidates so nominated: and even if he considers that one of the three candidates is certain to be elected, the chairman of election has no right to address the meeting and ask if there is any opposition to such candidate being declared elected, and moreover he has no right to proclaim this candidate elected especially when there is a protest against it on the part of certain electors then present: and, on an election contest, such a proceeding will be declared illegal, and holding the poll as to the two other candidates will likewise be declared illegal, and the entire election will therefore be annulled, with costs against the candidates so elected, if they have accepted office and opposed the annulment of such elections.

Therrien v. Tisdale, 18 Rev. de Jur. 412.

Municipal election — Deputy reeve of town — Right of town to have deputy reeve — Municipal Act, 1913, s. 51 — Number of municipal electors — Count — Name of any person to be counted only once — Evidence — Affidavits — Onus — Tenants — Right to vote — ss. 2 (x), 48, 161, 177, 178 of Act — Remedy by summary proceeding under act to unseat person elected where town not entitled to deputy reeve — Municipality not a party.

R. ex rel. Sullivan v. Church, 6 O.W.N. 365, reversing 6 O.W.N. 116.

MUNICIPAL ELECTION — VALIDITY OF ELECTION OF MAYOR OF CITY — ATTEMPT TO DISQUALIFY — LIABILITY FOR ARREARS OF TAXES — MUNICIPAL ACT, 1913, S. 53, SUBS. 1 (8) — EVIDENCE — SETTLEMENT WITH TREASURER — COLLECTOR'S ROLLS — MAYOR ELECT ACTING AS SOLICITOR IN ACTIONS AGAINST CITY CORPORATION — TERMINATION OF RELATIONSHIP OF SOLICITOR AND CLIENT BEFORE ELECTION — LITIGATION ENDED BEFORE ELECTION — COSTS — PAYMENT OF CHEQUE OF CORPORATION FOR.

R. ex rel. Band v. McVeity, 6 O.W.N. 369.

(§ II A—24)—WATER COMMISSIONERS — DISQUALIFICATION.

Where, by a private act, the water commissioners of a city are elected by a general vote, and all the provisions and remedies by the Municipal Act, at any time in force with respect to councillors, are to apply in all particulars (not inconsistent with the private act) to such water commissioners as to election, unseating, filling vacancies, grounds of disqualification, and otherwise, while the aldermen of the city are elected by wards; it is the duty of a county judge, finding a commissioner disqualified by reason of having a contract with or on behalf of the municipal corporation, to order a new election, and s. 215a, providing that the unsuccessful candidate who received the highest number of votes at the last municipal election shall be entitled to the office, does not apply in this case.

R. ex rel. Martin v. Jacques, 10 D.L.R. 761, 24 O.W.R. 457, 4 O.W.N. 1112.

B. BALLOTS.

(§ II B—30)—PARLIAMENTARY ELECTIONS — BALLOTS — ONTARIO ELECTION ACT, S. 108 — CONSTRUCTION — VALIDITY OF BALLOTS — BALLOTS IMPROPERLY MARKED BY VOTERS.

Re East Lambton Provincial Election; Martyn v. McCormick, 7 O.W.N. 29.

(§ II B—31)—FORM AND CONTENTS GENERALLY — STATUTORY REQUIREMENTS AS TO UNIFORMITY OF FORM — IRREGULAR BALLOTS USED — DUTY OF RETURNING OFFICER TO REJECT — NEW ELECTION.

Re Burnaby, 7 D.L.R. 785.

(§ II B—34)—PERSONS AND PARTIES ENTITLED TO PLACE ON BALLOT.

Under s. 88 of the Manitoba Municipal Act, R.S.M. 1902, c. 116, providing that if at a meeting of electors to nominate candidates for office only one candidate be nominated for a certain office within the time limited by law, the returning officer shall declare such candidate duly elected and under s. 89 of the same act, providing that if more candidates be nominated than are required to be elected, the returning officer shall announce the same and make known the time and place of the election, the returning officer has no authority after having announced that two candidates have been nominated and after having made known the time and place of election, to reject the nomination paper of one of the candidates on the ground that he was disqualified and to declare the other candidate duly elected.

Re St. Vital Municipal Election; Tod v. Mager (No. 2), 3 D.L.R. 350, 21 W.L.R. 203, 2 W.W.R. 185.

(§ II B—37)—BALLOTS—STAMPING—ENDORSEMENTS.

Section 114 of the Election Act, R.S.O. 1914, c. 8, being not applicable to the deputy returning officer, but to the "returning officer," a ballot not stamped by the latter official in accordance with the imperative direction of s. 71 (2) is not to be counted. [The Thornbury Case, 16 Q.B.D. 739, distinguished.]

Re South Oxford Election; Mayberry v. Sinclair, 20 D.L.R. 752, 32 O.L.R. 1.

(§ II B—46) — BALLOTS — CASTING — ASSISTING VOTER — OMISSION OF DECLARATION, EFFECT.

The taking of the declaration provided for by s. 171 of the Consolidated Municipal Act in the case of illiterate persons or persons incapacitated from marking the ballot papers is not a statutory condition precedent to the right to vote, and its omission is merely an irregularity in the mode of receiving the vote, which is cured by s. 204 of the Act.

Re North Gower Local Option By-law, 10 D.L.R. 662, 24 O.W.R. 489, 4 O.W.N. 1177. [Affirmed, 14 D.L.R. 443, 5 O.W.N. 249, 25 O.W.R. 224.]

(§ II B—47)—SECRECY OF BALLOT.

Where a judicial inquiry as to the probable grounds for quashing a municipal by-law is authorized under a city charter and provision is made by the same charter for voting on the by-law by ballot and that no person shall be compelled to say how he voted, the inquiry must take place subject to the like restriction.

Re St. Boniface (No. 2), 1 D.L.R. 366, 20 W.L.R. 332, 22 Man. L.R. 733, 1 W.W.R. 844.

A ballot per se imports secrecy, and, when voting by ballot was adopted, the legislature thereby wholly abandoned and repudiated open voting, and statutory infractions of the statute whereby secrecy is impaired are fatal to a local option by-law.

Stoddart v. Owen Sound, 8 D.L.R. 932, 27 O.L.R. 221.

(§ II B—55)—BALLOTS—MARKING.

The direction of s. 102 of the Election Act, R.S.O. 1914, c. 8, that a voter shall mark his ballot "making a cross with a black lead pencil" is not imperative so as to invalidate a ballot marked in ink.

Re South Oxford Election; Mayberry v. Sinclair, 20 D.L.R. 752, 32 O.L.R. 1.

(§ II B—58)—BALLOTS—MARKING.

A ballot clearly marked for each candidate must be disallowed.

Re South Oxford Election; Mayberry v. Sinclair, 20 D.L.R. 752, 32 O.L.R. 1.

C. Results; recounts.

(§ II C—65)—Tie vote—Counting rejected ballot—Contest—Quo warranto.

On a petition alleging that the respondent was not elected by a majority vote, an irregularity by the returning officer in opening a packet of rejected ballots, counting some of them as good, and declaring a candidate elected on the strength thereof, is not a ground for voiding an election; it may be raised by information in the nature of quo warranto.

Martin v. Erlendsson; Re Bifrost, 34 D.L.R. 82, 27 Man. L.R. 464, [1917] 2 W.W.R. 189.

(§ II C—68)—Result—Neglect to enter vote in poll book.

A returning officer will not be required by mandamus to return a person as the candidate elected, where certificates of election in none of the polls were signed by the election officials as required by s. 35 of R.S.S. 1909, c. 4, nor the votes recorded in the poll books as required by s. 33 of the statute, except in one poll where the opposing candidate received a majority of the votes cast.

Re Cumberland Election (No. 2), 15 D.L.R. 48, 7 S.L.R. 8, 26 W.L.R. 176, 5 W.W.R. 688, affirming 12 D.L.R. 818.

Recounts—Clerk's duty to receive return.

A premature return by the returning officer to the clerk of the Executive Council is as effective as a regular return, to the extent of imposing upon the latter the duty of receiving the return and documents therewith, and of thereupon performing his other duties, under ss. 233, 234, 236, 237, 238, 239 of the Alberta Election Act, 1909, c. 3.

Re Clearwater Election, 14 D.L.R. 32, 6 A.L.R. 431, 25 W.L.R. 589, 5 W.W.R. 181.

(§ II C—69)—Disputed ballots—Power of court of enquiry—Duty of returning officer.

Under the Alberta Election Act, 9 Edw. VII., c. 3, the individual envelopes containing "disputed ballots" are not to be opened at the court of enquiry; that court is to decide only the question of the qualification of the several voters, and the duty of the deputy returning officer is to return these individual envelopes unopened to the returning officer with the decisions of the court as to the qualification and its automatic decisions of allowance or disallowance or a statement of disagreement as the case may be. The Alberta Election Act, 9 Edw. VII., c. 3, s. 210, which requires the returning officer to add up votes from the statement of the polls and the returns of the statement of the court of enquiry. And any votes allowed by him as to which any court of enquiry has failed to agree, etc., implies that while neither the deputy returning officer nor the court of enquiry is at liberty to open the envelopes containing the disputed ballots, it is the duty of the returning officer to do so notwithstanding any apparent inconsistency of the returning officer's return (form 52), which must be deemed to have been drawn in contemplation of a return in cases where there were no disputed ballots.

Re Clearwater Election, 11 D.L.R. 353, 24 W.L.R. 306, 4 W.W.R. 630. [Affirmed in part, reversed in part, 12 D.L.R. 598. And see 14 D.L.R. 32, 6 A.L.R. 431.]

Ballots—Canvassing—Recount.

In a recount under the Election Act, R.S. O. 1914, c. 8, the ballot is to be looked at and not the poll book.

Re South Oxford Election; Mayberry v. Sinclair, 20 D.L.R. 752, 32 O.L.R. 1.

The court has no jurisdiction under the Elections Act, R.S.S. 1909, c. 3, or otherwise, to compel the judge of a District Court to hold a recount. [Re Centre Wellington Election, 44 U.C.Q.B. 132; McLeod v. Noble, 28 O.R. 528; Re Dubuc, 3 W.L.R. 248, followed.] The effect of the Elections Act, R.S.S. 1909, c. 3, is that, when once a recount has been ordered by the District Court Judge, all questions of the sufficiency of the affidavit upon which the order was made are concluded, and no subsequent application can be entertained to set aside the order on the ground of the insufficiency of the affidavit.

Re Pinto Creek Election, 6 D.L.R. 111, 22 W.L.R. 60, 3 W.W.R. 33.

Recount.

By the election law of the province (R. S.Q. 1909, arts. 172 et seq.) the provisions of which are reproduced, mutatis mutandis, in the charter of the city of Quebec for the election of aldermen, the judge who makes a recount of the votes may use all means which he deems necessary to rectify the errors and omissions of the deputy returning officers. He can cause them to appear before him, interrogate them, and with the information thus obtained count the votes deposited in their boxes, although they may have omitted to include therewith the certified result of the voting required by the act.

Lamontagne v. Bérubé, 43 Que. S.C. 196.

Recount.

The affidavit required by s. 193 of the Dominion Elections Act, R.S.C. 1906, c. 6, upon receipt of which the County Court Judge is to proceed to recount the ballots cast at an election of a member of the House of Commons, must be such as to make it appear to the judge that a deputy returning officer has erred as therein stated, and such requirement is not satisfied by the affidavit of an elector who merely states that he verily believes that such error has been committed. All that was made to appear by the affidavit was the deponent's belief in certain facts, but

the act requires that the facts themselves must be made to appear by the affidavit. [Re North Cape Breton and Victoria Election, 6 E.L.R. 37, 532, followed.] After the returning officer has made his return to the Clerk of the Crown in Chancery, it is too late to apply, under s. 206 of the act, to a judge of the King's Bench in Manitoba for an order compelling the County Court Judge to proceed with the recount. [Bellechasse Election, 17 Q.L.R. 294, and Portneuf Election, 1 Que. S.C. 269, followed.]

Re Dauphin Election, 21 Man. L.R. 629.

(§ II C—70)—SCRUTINY.

The right of a person whose name was on the certified voters' list, to vote upon a local option by-law,, may be inquired into by a County Court Judge upon a scrutiny of the ballots cast, under the provisions of ss. 369, 371 of the Ontario Consolidated Municipal Act, 3 Edw. VII., c. 19, since the court's power in such proceeding is not limited to a mere recount or examination of the paper ballots themselves. Section 24 of the Ontario Voters' Lists Act, 7 Edw. VII., c. 4, applies to a scrutiny of a municipal election held under the Ontario Consolidated Municipal Act, 3 Edw. VII., c. 19, as well as to one held under the Ontario Election Act. Votes illegally cast at an election on a local option by-law, upon a scrutiny thereof under ss. 369 and 371 of the Ontario Consolidated Municipal Act, will be deducted from the total vote cast in favour of the by-law, where the official declaration that the by-law had carried is under attack, since there is no way of ascertaining legally in which way they were actually cast. Upon a scrutiny under ss. 369, 371 of the Ontario Consolidated Municipal Act, a ballot cast at a local option by-law election by a tenant whose name appeared upon the certified voters' list, may, under s. 24 of the Ontario Voters' Lists Act, be declared void by the County Judge if it appears that such tenant was not a resident of the municipality when his name was placed on the list, or that he had subsequently ceased to be one. [Re Orangeville Local Option By-law (1910), 476, distinguished.] A person who, without right, votes at a local option by-law election cannot be required upon a scrutiny of the vote under ss. 369, 371 of the Ontario Consolidated Municipal Act, to disclose how he voted, since s. 200 of such prohibits such disclosure.

Re West Lorne Scrutiny, 4 D.L.R. 870, 26 O.L.R. 339, 21 O.W.R. 813, reversing 25 O.L.R. 267, 277. [Affirmed, 47 Can. S.C.R. 451.]

SCRUTINY — BY-LAW ELECTION — CERTIFYING RESULT — EFFECT OF ILLEGAL BALLOTS—REMOVAL FROM WARD.

On a scrutiny of the ballots cast at a local option by-law election where there were illegal votes cast and where the count upon the inclusion of such votes gives a majority for the by-law, the judge may without inquiry as to whether the illegal votes were for or against the proposition, deduct the total of such illegal votes from the total cast in favour of the by-law, as there is no way of compelling testimony to prove for which side any of the persons who illegally voted had cast their ballots. [Re West Lorne Scrutiny, 4 D.L.R. 870, 26 O.L.R. 339, 47 Can. S.C.R. 451, followed.] Whether the removal from a town, or from a ward of a municipality of a person whose name was on the voters' list, disqualified him from casting a legal ballot in such ward may be determined on a scrutiny of the ballots cast at the election. Whether the ballot of a person who voted twice at an election was legal may be determined on a scrutiny of the ballots cast.

Under s. 23 of 1 Geo. V., c. 64, R.S.O. 1914, c. 215, whether the name of a non-resident who voted at an election was improperly placed on the voter's list may be determined on a scrutiny of the ballots cast. [Re West Lorne Scrutiny, 4 D.L.R. 870, 26 O.L.R. 339, 47 Can. S.C.R. 451, applied.]

Re Aurora Scrutiny, 13 D.L.R. 88, 28 O.L.R. 475.

BALLOTS—RECOUNT—SCRUTINY.

The clerk of the Executive Council in custody of election papers transmitted to him by a returning officer under s. 234 of the Alberta Election Act, 1909, c. 3, is bound strictly by s. 239 read with ss. 237, 238 to guard the secrecy and integrity of such papers as thereby prescribed, and under s. 239 to prevent any person, even a District Court Judge holding a recount from inspecting such papers, except under an order of a Supreme Court Judge as thereby provided.

Re Clearwater Election, 14 D.L.R. 32, 6 A.L.R. 431, 25 W.L.R. 589, 5 W.W.R. 181.

SCRUTINY.

A County Court Judge holding a scrutiny of the ballot papers deposited in a vote on a municipal by-law may go behind the voters' list and inquire if a tenant whose name is placed thereon has the residential qualification entitling him to vote. The judge has no power to inquire whether rejected ballots were cast for or against the by-law: —Ballots rejected on a scrutiny must be deducted from the total number of votes cast in favour of the by-law.

McPherson v. Mehring (Re West Lorne By-law), 47 Can. S.C.R. 451, affirming 4 D. L.R. 870, 26 O.L.R. 339, reversing 25 O.L. R. 267, which reversed 25 O.L.R. 598.

(§ II C—71)—ALBERTA MUNICIPAL ACT.

The Alberta Election Act, 9 Edw. VII., c. 3, which empowers the Lieutenant-Governor-in-Council to vary the forms provided in the Act, etc., does not affect the right of any officer to modify any provided form to meet the facts of the particular case.

Re Clearwater Election, 11 D.L.R. 353, 24 W.L.R. 306, 4 W.W.R. 630. [Affirmed in

part, reversed in part, 12 D.L.R. 598. And see 14 D.L.R. 32, 25 W.L.R. 589.]

RETURN—DECLARATION OF RESULT—CONCLUSIVENESS OF CERTIFICATE.

The return by the returning officer to the clerk of the Executive Council under s. 234 of the Alberta Election Act, Statutes of 1909, c. 3, and the subsequent publication thereof in the official Gazette under s. 236, are final and conclusive, subject to the germane provisions of the Controverted Elections Act, and to the jurisdiction of the legislature itself.

Re Clearwater Election, 14 D.L.R. 32, 6 A.L.R. 431, 25 W.L.R. 589, 5 W.W.R. 181.

RESULT—DECLARATION.

The requirement of s. 35 of R.S.S. 1909, c. 4, that the deputy returning officer shall immediately after the close of the poll and the summing up of the votes, make the written declaration required by such section, is merely directory.

Re Cumberland Election, 12 D.L.R. 818, 24 W.L.R. 717, 4 W.W.R. 1119. [Affirmed, 15 D.L.R. 47, 7 S.L.R. 8.]

CLOSING POLLS—DECLARATION OF RESULT.

When at 4 p. m., on the first day of voting, there are in the polling booth some electors who have not yet voted, the election president has discretion in closing the poll until the following day. After having thus closed the poll, he cannot revoke his decision, and declare the election at an end and proclaim elected the candidate who has received a majority of the votes.

Lamontagne v. Paquet, 49 Que. S.C. 419.

(§ II C—72)—DISPUTED BALLOTS—OF DISTRICT COURT JUDGE TO COUNT IN FIRST INSTANCE.

A District Court Judge, on a recount of an election by way of an appeal, has power to open envelopes containing disputed ballots and count those allowed by a court of enquiry.

Re Clearwater Election, 12 D.L.R. 598, 24 W.L.R. 683, 4 W.W.R. 1025. [See 14 D.L.R. 32, 6 A.L.R. 431.]

ALBERTA DISPUTED VOTES—DUTY OF RETURNING OFFICER.

In counting disputed ballots under Alberta Election Act, 9 Edw. VII., c. 2, s. 210, a returning officer should preserve their identity by restoring them to their respective individual envelopes.

Re Clearwater Election, 11 D.L.R. 353, 24 W.L.R. 306, 4 W.W.R. 630. [Affirmed in part, reversed in part, 12 D.L.R. 598. See also 14 D.L.R. 32.]

D. ELECTION FRAUDS; CRIMES.

(§ II D—75)—ELECTION FRAUDS—CORRUPT PRACTICES — EMPLOYMENT OF SCRUTINEER BY CANDIDATE—PAYMENT BY CANDIDATE OF DEBT TO VOTER.

For a candidate at a municipal election to employ and pay a scrutineer is not such a corrupt practice as is prohibited by s. 245 (2) of the Ontario Consolidated Municipal Act, 3 Edw. VII., c. 19, R.S.O. 1914, c. 192, the employment of scrutineers being authorized by s. 179 (4) of the act, added by 5 Edw. II., c. 22, and as amended by 3 Geo. V., c. 43 (R.S.O. 1914, c. 192), where it does not appear that such payment was made for the purpose of influencing the scrutineer's vote. The payment to a voter by a candidate on election day of an honest debt is not such corrupt practice as is within the prohibition of the Ontario Consolidated Municipal Act, when made without any intention of influencing the former's vote.

R. ex rel. Fitzgerald v. Stapleford, 13 D.L.R. 858, 29 O.L.R. 133.

BRIBERY.

A charge of personal bribery against a candidate at an election which, if sustained, would cause the candidate's disqualification, must be established beyond a reasonable doubt and not upon a mere balancing of probabilities.

Rudyk v. Shandro, 21 D.L.R. 266, 8 A.L.R. 425, 7 W.W.R. 1321, 30 W.L.R. 689, reversing 21 D.L.R. 250.

ILLEGAL ACTS—KNOWLEDGE OF.

In order to disqualify a candidate at a municipal election in respect of unauthorized illegal acts committed by his agents, he must be shewn to have had knowledge of such acts.

R. ex rel. Mitchell v. McKenzie, 21 D.L.R. 438, 33 O.L.R. 196.

CORRUPT PRACTICE — GIVING LIQUOR TO VOTERS.

Having a two-gallon jug of whiskey in a stable back of a polling place, out of which an agent of a candidate treated voters after they had voted, does not amount to a drink given to any voter "on account of his being about to vote or having voted" within the meaning of s. 227 of the Election Act, R.S.S. 1909, c. 3, but is merely corrupt practice of a "trivial, unimportant and limited character" within the meaning of s. 236 (c) of the act, and not affecting the validity of the election [Re Lennox, 1 O.E.C. 41; Somerville v. Laflamme, 2 Can. S.C.R. 216; Re West Prince, 27 Can. S.C.R. 241; Re South Oxford, 1 O.W.R. 795, applied.]

Hamm v. Bashford, 26 D.L.R. 573, 9 S.L.R. 68, 33 W.L.R. 473, 9 W.W.R. 1044, reversing 8 W.W.R. 793.

DOMINION ELECTIONS — CORRUPT ACTS BY PARTISAN WITHOUT KNOWLEDGE OF CANDIDATE.

Where a candidate at a Dominion election and his recognized agents have not committed any illegality, R.S.C. 1906, c. 7, s. 56, applies. Consequently, illegal acts of a partisan, of a trivial character, and which can save no influence on the election or on the majority obtained by the candidate, cannot be charged against the latter as though committed by an agent, unless the proof of agency is direct and decisive.

Bergeron v. Fortier, 45 Que. S.C. 510.

MUNICIPAL ELECTION — IMPROPER PRACTICES — INVESTIGATION BY COUNCIL — QUO WARRANTO.

The court will not grant a rule for a quo warranto calling upon county councillors to shew by what authority they exercise the office of councillors of a parish on the ground of fraudulent and improper practices in making up the voters' list and in receiving and counting the ballots where the by-laws of the county provide that such matters may be investigated and determined on petition to the council.

Ex parte Nadeau, 42 N.B.R. 473.

CORRUPT PRACTICES — AGENT OF CANDIDATE GIVING LIQUOR TO VOTERS.

Charges of corrupt practice which if proved would result in disqualification should be dealt with in the same way as if the charges were criminal ones and proved beyond a reasonable doubt. The duly appointed agent of a candidate kept liquor in a stable at the polling place and gave drinks of it to voters after voting:—Held, such a corrupt practice as to avoid the election, and not one of a trivial, unimportant and limited character. [Rudyk v. Shandro, 21 D.L.R. 266, followed.]

Rosthern Election Petition, 31 W.L.R. 184, 8 W.W.R. 793. [Reversed in 9 W.W.R. 1044.]

(§ II D—76)—MUNICIPAL—DISQUALIFICATION—OFFICER.

A school board is an administrative body charged with the care of a department of municipal affairs, and a contract with a school board is a contract with or on behalf of a municipal corporation, and is a disqualification for the holding of a municipal office, under s. 80 of the Municipal Act, 3 Edw. VII. (Ont.) c. 19.

R. ex rel. Martin v. Jacques, 10 D.L.R. 761, 24 O.W.R. 457, 4 O.W.N. 1112.

OFFENCES—MUNICIPAL ELECTIONS.

It is an indictable offence in Ontario by virtue of the Cr. Code, s. 164 and the Ontario statute, 3 Edw. VII., c. 19, s. 193, for a person to fraudulently put into any ballot box any paper other than the ballot paper which he is authorized by law to put in, at the taking of a poll under the Consolidated Municipal Act (Ont.).

R. v. Durocher, 9 D.L.R. 627, 28 O.L.R. 499, 4 O.W.N. 867, 24 O.W.R. 140. [Affirmed, 13 D.L.R. 243, 28 O.L.R. 499, 21 Can. Cr. Cas. 382.]

FRAUDULENT DEALINGS — CARRYING OF VOTERS — TREATING — CITIES AND TOWNS ACT—S. REF. [1909] ARTS. 5510, 5511, 5513, 5515, 5525, 5528.

In an election, a man who works actively and openly in the election, and with the knowledge, consent, and approval of the candidate, is the agent of the candidate. The hiring of carriages by an agent to carry the voters to the polling booth constitutes a fraudulent act sufficient to invalidate the election of the candidate. The fact that a candidate, on the evening of the election, after the votes were counted and his election was made known, received some voters at his home, and gave them drink and other refreshments, constitutes a fraudulent act sufficient to void his election and to make him lose his electoral franchise. The election day is computed from minute to minute, and does not only extend over the period of time during which the polling booths are open. The distribution of drinks to voters by a candidate on the day of an election constitutes a fraudulent act, even in the absence of any corrupt motive.

Lamontagne v. Tremblay, 56 Que. S.C. 393.

APPLICATION TO INVALIDATE THE ELECTION OF A SHERIFF OF THE CITY OF SOREL—SUFFICIENCY OF AFFIDAVIT, 52 VICT., C. 80, ARTS. 255, 257, 258, 260, 265, REPRODUCTION OF ARTS. 346, 349, AND 355 OF THE OLD MUNICIPAL CODE—C.P.C., ARTS. 123, 980, 988, 993, 1003, 43 AND 1006.

On an application to invalidate a municipal election the allegation "That the election and the majority of votes and voters in favour of the appellee has been obtained and caused by a general system of frauds, illegalities, and corrupt practices, by himself the said appellee personally, as well as by his followers, agents, and workers with his knowledge, and consent and he himself participating, "is sufficient to justify the reception of the said application as it demonstrates prima facie the legitimate cause for invalidating the election of the appellee according to the terms of the statute. The affidavit of the plaintiff may be based on his belief that the alleged facts are true. In such an application the ordinary procedure of the Superior Court on a prerogative writ ought to be followed as far as applicable.

Pouliot v. Robidoux, 25 Rev. de Jur., 424.

MUNICIPAL ELECTIONS.

The Nova Scotia Franchise Act (R.S.N.S., 1900, c. 4), is prima facie the list to be used (R.S.N.S., 1900, c. 71, s. 71, as amended by 1907, c. 56, s. 1) in the holding of town elections for mayor and councillors and is to be corrected by striking out therefrom "by scoring with red ink" the names of persons who are in arrears for taxes. Where on the trial of a controverted town election the Trial Judge rejected evidence which would have shewn how many of the persons struck off by the clerk were delinquents with respect to the payment of their taxes, the case must go back to enable the petitioner to shew that the persons whose names were so struck off were not delinquents.

Demock v. Graham, 45 N.S.R. 166, 9 E.L.R. 417.

(§ II D—77)—INTIMIDATING OF VOTERS.

The provisions of the law respecting municipal elections and elections to Par-

liament and the Legislature which make void an election secured by corruption, intimidation and undue influence apply to the vote on a temperance by-law provided for by arts. 1320 et seq. of R.S.Q. 1909. The influence exercised by a Roman Catholic curé and priests appointed by him to conduct a retrait or mission, by means of menaces from the pulpit, punishments temporal and spiritual, exclusion from the sacraments, imputations of mortal sin and refusal of absolution to penitents who will not promise to vote in a certain way, which materially affects the vote at such election, is undue influence and makes the result of the voting void.

Boily v. Baie Saint-Paul, 43 Que. S.C. 272.

RETURN OF ELECTION MADE BY RETURNING OFFICER—INJUNCTION—BREACH OF, BY AGENT OF DEFENDANT—CONTEMPT.

Davis v. Barlow, 20 Man. L.R. 158, 15 W.L.R. 49.

DOMINION ELECTION—RECOUNT—AFFIDAVIT SUFFICIENCY.

In an affidavit supporting an application for a recount of votes under the provisions of s. 193, of c. 6, R.S.N.B. 1906, it is not sufficient for the deponent to swear to his belief in the facts relied upon as grounds for the recount, but he must swear affirmatively and positively in relation to such facts.

Re Carleton, N.B., Election; Ex parte Smith, 10 E.L.R. 68, 141.

DOMINION ELECTIONS ACT — RECOUNT — COUNTY COURT JUDGE OUTSIDE OF ELECTORAL DISTRICT WHEN ORDER FOR RECOUNT MADE.

Re Sunbury and Queen's Election; Smith v. McLean, 10 E.L.R. 221.

IRREGULARITY OF OFFICIALS CONDUCTING ELECTIONS — ILLITERATE VOTERS — SECRECY OF THE BALLOT.

Re Brandon Election; Wallace v. Fleming, 20 Man. L.R. 705, 17 W.L.R. 207.

MUNICIPAL ELECTION — COUNTING BALLOTS —PAYMENT OF EXPENSES.

Gaudet v. Simpson, 12 Que. P.R. 333.

ELECTION OF COUNCILLOR—IRREGULARITY.

Prevost v. Parent, 40 Que. S.C. 146.

ELECTION OF MAYOR—CITIES AND TOWNS ACT.

Ouellette v. Cantin, 40 Que. S.C. 92.

DOMINION ELECTION — LOAN — KNOWLEDGE OF PURPOSE TO WHICH MONEY TO BE APPLIED.

Cashon v. Kaulbach, 8 E.L.R. 411.

III. Nominations.

Qualification of candidates, see Officers.

(§ III—80) — NOMINATION PAPER—SUFFICIENCY.

A nomination paper which fails to indicate the ward for which a municipal councillor has been nominated is defective, and may be rejected by the returning officer. Nonresidence of the candidate either in the ward or municipality is not a disqualification. Residence of the candidate in the ward is the sole requirement under s. 52 (c) of the Municipal Act (R. S.M. 1913, c. 133); but under s. 16 of the statutes of 1913, c. 20, this restriction may be avoided by the candidate, no so resident, agreeing to serve if elected. The omission of s. 16 from the revision of the Municipal Act did not thereby repeal it.

Smart v. Sprague, 35 D.L.R. 657, [1917] 1 W.W.R. 1537. [Affirmed, 37 D.L.R. 805, 27 Man. L.R. 566.]

DISQUALIFICATION—TAXES.

One who owes for school or municipal taxes at the time of his election as a municipal councillor is thereby incapacitated (in Quebec) from holding that office, and the council may thereupon proceed to have the office declared vacant, and to fill the vacancy accordingly.

St. Lazare v. Bilodeau, 35 D.L.R. 730, 26 Que. K.B. 129.

ELIGIBILITY OF CANDIDATES.

The president of a municipal election has a discretion to exercise in the nomination of the candidates. Before putting a candidate in nomination conformably with art. 309, Mun. Code, the president should assure himself of the eligibility of the person proposed, and if he considers him not qualified to be nominated he should shew him a procès-verbal of the reasons justifying him for his refusal to do so.

Messier v. Lefebvre, 47 Que. S.C. 354.

PROPERTY QUALIFICATION BEFORE NOMINATION—VALUATION.

No provision of the law states that a candidate in a municipal election should, for the 12 months preceding his nomination, possess as owner the same real property; he may be qualified by several properties, provided that during this period he had never ceased to own property of the value required by law. To establish the value of the properties upon which a candidate for municipal office may qualify, recourse should be had to the municipal valuation roll in force at the date of nomination. The fact that the candidate elected did not, in the declaration sent to the returning officer, mention the property on which he qualified will not annul his election when no other objection is taken to his nomination.

Birchall v. Decary, 48 Que. S.C. 418.

PREMATURITY—FAILURE TO QUALIFY.

When a municipal councillor has been required to furnish a declaration of electoral qualification, as provided by art. 283, the council cannot, before the expiration of the period of eight days which the law gives him for doing so, declare his seat vacant and proceed to appoint a successor. A resolution adopted in these circumstances for the purpose of filling the vacancy is premature and of no effect. Every ratepayer, in his capacity as a

municipal elector, has the right to institute an action for the purpose of having the nullity of such a resolution declared.

Bilodeau v. St. Lazare de Goupil, 50 Que. S.C. 37. [Reversed, 35 D.L.R. 730, 26 Que. K.B. 129.]

NOMINATION PAPERS — SUFFICIENCY — RETURN—NOTICE OF CONTEST—SERVICE.

Controverted Elections Act, R.S.C. 1906, c. 7, as amended by 5 Geo. V., 1915, c. 13, does not provide for any preliminary hearing at law in the contestation of an election; it must be heard at the same time with the petition. The word "candidate" in s. 5 of Act 1915, means any person whose candidature has been brought forth by the electors; it is not necessary that the nomination paper should have been accepted by the returning officer. Fraud and undue influence practised on a returning officer cannot be admitted in evidence as to his refusal of accepting a nomination paper. Omitting the words "I give as my address for the service of writs and documents, etc.," lacks an essential formality and is null, and the returning officer can reject it even after acceptance. When a returning officer rejects the nomination paper because of informality and declares the opponent elected, there is no acquiescence in that decision if subsequently the candidate withdraws his deposit money. Notice of a petition to contest a federal election can be effected by sending a copy by registered mail to the address given for service on the defendant, and such service dates from the deposit of that copy at the post office. A motion for particulars filed in the prothonotary's office, which has not been presented within five days' delay, as required by law, must be rejected.

Marsil v. Patenaude, 49 Que. S.C. 359.

MUNICIPAL QUALIFICATION — LANDOWNER.

For the purpose of a municipal election the valuation roll constitutes a positive proof of the value of the real estate which is indicated on the roll, but it does not prove the ownership. The qualification as owner required of candidates for municipal office should be real and not fictitious or simulated. In setting aside an election for mayor or councillor on legal grounds the court should only declare another candidate elected if the evidence shewed that the latter had really received the majority of legal votes cast.

Lapointe v. Cauchon, 52 Que. S.C. 393.

NOMINATION OF CANDIDATE FOR HOUSE OF COMMONS — SUFFICIENCY — DOMINION ELECTIONS ACT, S. 40—NOMINATION PAPER SIGNED OUTSIDE ELECTORAL DISTRICT — ABSENCE OF ADDITIONS OF NOMINATORS — ERROR IN PLACE AND DATE OF SIGNING—"AFFIRMING TO" BEFORE JUSTICE OF THE PEACE, ETC.—MEANING OF—WHETHER EVIDENCE OF, MUST BE GIVEN TO RETURNING OFFICER — PETITION TO UNSEAT — DOMINION CONTROVERTED ELECTIONS ACT, S. 12—NO CANDIDATE DECLARED ELECTED WITHIN 40 DAYS AFTER POLLING—EFFECT OF IMPOSSIBILITY OF COMPLYING WITH ACT — RIGHT TO RAISE QUESTION AT TRIAL—EFFECT OF AMENDMENTS BY C. 13, 1915, AND OF THE MILITARY VOTERS ACT, C. 34, 1917 (DOM.).

It is not necessary that the signers of the nomination paper of a candidate for election to the House of Commons should sign it within the electoral district in which he is a candidate; and the nomination paper is not defective merely because the additions of the nominators are not given, or because of a clerical error in stating the place and date of signing. In s. 40 of the Dominion Elections Act, R.S.C., 1906, c. 6, which provides that in Alberta any four or more electors "may nominate a candidate by affirming to and signing, before a justice of the peace . . . a nomination paper in form H." The meaning of "affirming" is a verbal corroboration of, or acquiescence in, the act of nomination evidenced by the writing. So long as the paper is so affirmed to and signed in the presence of one of the officials named in the section, the requirements in such respects are complied with, and when a nomination paper which has in fact been affirmed to and signed as required by the act and is in other respects regular has been accepted and acted upon by the returning officer, the nomination should not be declared null and void merely because no evidence of the facts of the affirming and signing before the prescribed official appears upon or accompanies the nomination paper. A returning officer is wrong in receiving a nomination paper which shows on its face that it was affirmed and signed before a barrister who is not shown to be a justice of the peace, magistrate or the returning officer. [Two Mountains Dominion Election; Fauteux v. Ethier, 7 D.L.R. 126, 47 Can. S.C.R. 185, followed.] A petition under the Dominion Controverted Elections Act, R.S.C. 1906, c. 7, to unseat a candidate must be filed within 40 days after polling day, but the court has no jurisdiction to entertain it if at the date of filing no candidate has been declared elected. The result is that if such declaration is not made until after the 40 days, no petition can be effective. [Yukon Election Case; Grant v. Thompson, 37 Can. S.C.R. 495, followed.] The amendments made to the Dominion Controverted Elections Act by c. 13, 1915, and the enactment of the Military Voters Act, 1917, c. 34, do not affect the law in this respect. Under the new ss. 19 and 19 (a), enacted by c. 13, 1915, such questions as to the jurisdiction of the court may be properly raised at the trial of the issues (per Simmons, J.).

Re Bow River Election, Gouge v. Holliday, 14 A.L.R. 296, [1919] 1 W.W.R. 359.

NOMINATIONS—POLITICAL COMMITTEES.

The appointment of election president by resolution of a municipal council (art.

296, Mun. Code) is not essential to the validity of the election. A unanimous appointment by a meeting of electors is valid. The gratuitous holder of a municipal office becomes, on resigning it, eligible for election as councillor whether his resignation has or has not been accepted. The mere presence of electors at the polling booth at 4 p. m. of the first day of polling is not a reason for postponing it to the following day if they have had time to vote but shewed no intention of doing so. The closing of the poll in such case at 4 p. m. is legal.

Daoust v. Valois, 42 Que. S.C. 318.

DISQUALIFICATIONS — INTEREST IN MUNICIPAL CONTRACTS.

Section 22, subs. (1), of the Edmonton Charter, having reference to persons interested in a contract with the city, is limited in its operation to qualifications or disqualifications for election. The contract between the city of Edmonton and the Edmonton Industrial Association Drilling Co. is not a contract relating to municipal works or undertakings so as to fall within s. 479. [R. v. McNamara, 7 W.W.R. 324, distinguished.]

R. ex rel. La Fleche v. Sheppard, 8 W. W. R. 593.

(§ III—82)—NOMINATIONS—REGULARITY—"NOT LESS THAN SIXTEEN DAYS" MEANS "CLEAR DAYS," WHEN.

Under s. 105 of the Alberta Election Act (Alta., 1909, c. 3), providing that the Lieutenant-Governor-in-Council may appoint a day not more than 20 nor less than 16 days from the date of the writs of election for the nomination of candidates, the 16 days referred to mean "clear days," in the computing of which the dates of the writs and the nomination must both be excluded. [McQueen v. Jackson, 72 L.J.K.B. 606, applied.]

Redman v. Buchanan, 11 D.L.R. 389, 7 A.L.R. 35, 4 W.W.R. 85.

STATUTORY PERIOD FOR NOMINATION—NON-COMPLIANCE.

When the definite statutory hour for nomination of municipal councillors is departed from deliberately and intentionally, the election cannot be said to have been conducted in accordance with the Municipal Act, R.S.O. 1914, c. 192, so as to make applicable the curative provisions of s. 150.

R. ex rel. Yates v. Lawrence, 22 D.L.R. 599, 7 O.W.N. 819.

(§ III—83)—NOMINATION BY PETITION.

Papers proposing the nomination of a candidate for election as a member of the House of Commons, under the Dominion Elections Act, which do not mention the residence and addition or description of the candidate proposed in such a manner as sufficiently to identify him do not constitute a nomination in the form that is specified as essential by s. 94 of the Act. This being, in the present case, a patent and substantial defect, it became the duty of the returning officer to give effect to the objection, taken by an opposing candidate and to reject such proposed nomination on the ground that the essential requirements of the statute had not been complied with, and such rejection could properly be made after the expiration of the time limited for the nomination of candidates by s. 100 of the Act. Technical or formal objections to nomination papers filed with the returning officer under the provisions of the Dominion Elections Act, R.S.C. 1906, should not be permitted to defeat the manifest purpose and intention of the statute.

Two Mountains Dominion Election, Fauteaux v. Ethier, 7 D.L.R. 126, 47 Can. S.C. R. 185, 12 E.L.R. 129, affirming 42 Que. S.C. 235.

REJECTION OF PETITION.

The returning officer at an election for aldermen held under the Cities and Towns Act, R.S.Q. 1909, arts. 5256 et seq., cannot reject the nomination of a candidate on the ground that he has not the qualification of landowner required by art. 5364. He can only use this power when the nomination is not in the form required by arts. 5422 to 5428 and in such case he should inscribe the word "rejected" on the back of the nomination paper with the reasons therefor in order that another nomination can be presented before expiration of the delay therefor.

Labadie v. Rinquet, 43 Que. S.C. 374.

PUBLIC SCHOOLS—ELECTION OF TRUSTEES—NEGLECT TO FILE DECLARATIONS OF QUALIFICATION — ELECTION SET ASIDE ON SUMMARY APPLICATION UNDER S. 64 OF THE PUBLIC SCHOOLS ACT — S. 61 (4) OF ACT—S. 69 (4) AND (6) OF THE MUNICIPAL ACT.

Re Barrie Board of Education, 15 O.W.N. 439.

IV. Contests.

(§ IV—90)—RULES—PRACTICE.

The Controverted Elections Act, Man., has the effect of repealing the rules passed under the former act and substituting the English election petition rules as in force in England on May 26, 1874, until new rules shall be promulgated under the Manitoba Act.

Re Lakeside Provincial Election; Tidsbury v. Garland, 23 D.L.R. 411, 25 Man. L.R. 197, 8 W.W.R. 33, affirming 20 D.L.R. 286.

Under the Alberta Election Act, 1909, c. 3, the clerk of the executive council is the proper custodian of the voters' lists for the various divisions, and a document produced from his custody, and purporting to be a voters' list will be deemed to be such list until the contrary is shewn. Under s. 3 of the Controverted Elections Act (Alta. 1907, c. 2) providing for the bringing of a petition to set aside an election by "any duly qualified elector of the electoral district in which the election was

held," the fact that the evidence of the qualification of the petitioner offered before the court was directed to his qualification existing at the time of the election instead of the date of the filing of the petition, is no objection, since there is nothing in the section which directly specifies the exact time at which the qualification of the petitioning elector must exist and it is therefore open to the court to put such an interpretation upon the section as is most consonant with the spirit and general intention of the act. Under s. 5 of the Controverted Elections Act providing that the person bringing a petition to set aside an election shall at the time of filing such petition deposit with the clerk the sum of $500, a deposit of the money by his solicitor is sufficient. On an application to set aside a petition against the applicant's election on preliminary objections, where one of the grounds of the objections provided by the Controverted Elections Act, s. 10, is that the petitioner was guilty of corrupt practices under the act, there is a presumption of innocence in favour of the petitioner. Under s. 103 of the Elections Act Alta. providing that "every voter shall be entitled to vote whose name is on the voters' list and has not been erased therefrom in accordance with the foregoing provisions of ss. 88 to 101, both inclusive, of this act," when once it is established that a person's name is on the list and has not been erased therefrom, his qualification to vote is at least prima facie established and the burden of proof is on the person contending that he is not duly qualified to establish that contention. On an application under s. 10, of the Controverted Elections Act, to set aside a petition against the applicant's election, on preliminary objections, the burden of proving the disqualification of the petitioner is upon the applicant. There is a presumption of sanity in the petitioner's favour, on an application to set aside a petition against the applicant's election on preliminary objections, where one of the grounds of objection provided by s. 10 of the Controverted Elections Act, is that the petitioner is an inmate of an insane asylum, and the petitioner is not called upon to prove that he was not suffering from such a disability.

Carstairs v. Cross; Re Edmonton Election (No. 3), 8 D.L.R. 469, 22 W.L.R. 797, 3 W.W.R. 566, affirming 7 D.L.R. 192, 5 A. L.R. 268, 2 W.W.R. 1057.

While the petitioner is to bear the costs of the publication by the returning officer in a newspaper notice of the election petition, neither the Dominion Controverted Elections Act nor the rules of court thereunder in force in Manitoba, make prepayment by the petitioner a preliminary to the insertion of the notice by the returning officer and the officer's neglect or delay should not prejudice the petitioner, particularly where the nonpayment of the money was not the cause of the delay. It is not an objection to an election petition that notice of the petition was not forthwith published as required by s. 16 of the Dominion Controverted Elections Act. The power given to the court under s. 87 of the Controverted Elections Act, to extend the period limited for proceedings "on the application of any of the parties to a petition" applies only to interlocutory proceedings after a petition has been regularly filed upon which the court has acquired jurisdiction and before the petition itself has lapsed. [Re Glengarry Election, 14 Can. S.C.R. 453, and the Assiniboia Election Case, Davin v. McDougall, 27 Can. S.C.R. 215, distinguished; Re Bothwell Election, 9 P.R. (Ont.) 485, followed.] Where an election petition under the Dominion Controverted Elections Act is presented by two petitioners and each makes an affidavit of belief in the charges laid, in the form required by the statute, the petition which would have been valid with one petitioner only will not be set aside on the ground that one of the petitioners on cross-examination admitted that he knew nothing of several of the charges, or that while he had information as to certain charges, his knowledge and understanding of the contents of the petition generally were very defective. [Lunenburg Election Case, 27 Can. S.C.R. 226, applied.]

Re Provencher Election (No. 2); Barkwill v. Molloy, 1 D.L.R. 265, 22 Man. L.R. 16, 20 W.L.R. 11, 1 W.W.R. 768.

GROUNDS—ILLEGAL VOTES—ABSENCE OF RECOUNT—IMPROPERLY MARKED BALLOTS—FAILURE OF ELECTION OFFICERS TO TAKE OATH—ALIENAGE OF RETURNING OFFICER—ELECTORS VOTING TWICE—IMPROPER INTERPRETATION OF ELECTION LAWS—INTIMIDATING ELECTORS—IMPROPER USE OF MONEY—AGENCY—ABANDONMENT—ATTACKING WHOLE ELECTION.

In the absence of a recount, the fact that a large number of illegal votes were polled for a candidate is not ground for setting aside his election under the Yukon Election Ordinances. In the absence of a recount, the fact that a large number of improperly marked ballots were counted for a successful candidate is not sufficient ground for setting aside the election under the said Ordinances. The failure of election officers to take the oath of office required by law is not ground for setting aside an election under the said Ordinances. That the returning officer of an election was not a British subject is not ground for setting aside an election under the said Ordinances. The fact that a large number of electors voted twice, is not sufficient to justify setting aside an election under the said Ordinances. Improper interpretation of election laws by local authorities so as permit a large number of unqualified electors to cast ballots, is not sufficient reason for setting aside an election under the said Ordinances. An allegation that a person illegally, wilfully and deliberately endeavoured to intimidate electors, but not charging that he acted

as agent for the candidate whose election was disputed, or that he threatened to employ force, violence or restraint in order to induce or compel any person to vote or refrain from voting at the election, or that any person was influenced or intimidated by him, is not sufficient to justify setting aside the election, under the said Ordinances. An allegation that supporters of a successful candidate paid the wages as well as the expenses of many voters in coming to the polls, does not, in the absence of an allegation that such supporters were "agents" for the candidate, and acted contrary to the law, shew sufficient ground for setting aside the election. Where the petitioner in a controverted election has, by his petition, claimed the seat for the opposing candidate, although no recount had been made on the latter's behalf upon which such claim could be made effective, the petitioner thereby adopts and ratifies what was done at the election so far as he was personally concerned, and, having thus elected, cannot abandon such claim of the seat for the unsuccessful candidate in order to attack the validity of the whole election proceedings.

Re South Dawson Election; Grant v. McLennan, 12 D.L.R. 464, 24 W.L.R. 497.

On an application by the respondent to set aside a petition against his election as a member of the House of Commons, on preliminary objections, it is not improper to dispose of a demurrer to part of the petition. [Re Lisgar Election Petition, 16 Man. L.R. 249, followed.] Under the Controverted Elections Act, s. 18, c. 7, R.S.C. 1906, the service by the petitioner of a duplicate original of the petition against a person's election as a member of the House of Commons is not necessary, but the statute is sufficiently complied with by the service of a copy. A copy of the affidavit prescribed by s. 6 of the Act, need not be served by the petitioner on the respondent in order to maintain a petition against the respondent's election as a member of the House of Commons. Apart from statute, freedom of election is at common law essential to the validity of an election, irrespective of any question of the connection of the candidate whose election is sought to be set aside with the intimidation complained of. The fact that the given name of one of the petitioners was transposed in the printed voters' list, is not a valid objection, on an application to set aside on preliminary objections a petition against the applicant's election as a member of the House of Commons, where there appears to be no doubt as to the identity of the petitioner, who appeared and gave evidence, with the person intended to be named in the voters' list. A petition to set aside an election of a member of the House of Commons is not invalidated by the fact that the affidavit verifying the petition and which is required to be filed therewith was sworn four days before the date of filing the petition.

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 23 Man. L.R. 542, 22 W.L.R. 755, 3 W.W.R. 597.

PETITION — SUBSTITUTIONAL SERVICE — GROUNDS FOR—PENDING PERIOD FIXED FOR PERSONAL SERVICE.

An order for substitutional service of an election petition under the Manitoba Controverted Election Act, s. 23, may in a proper case be made before the expiry of the time granted by the judge for personal service within Manitoba. [McLeod v. Gibson, 35 N.B.R. 376, applied.]

Re Kildonan and St. Andrews Election; Gunn v. Montague, 19 D.L.R. 796, 24 Can. Cr. Cas. 114, 25 Man. L.R. 114, 30 W.L.R. 594, 7 W.W.R. 1049, affirming 19 D.L.R. 478.

CONTROVERTED ELECTIONS ACT—SERVICE OF PETITION OF PAGE FROM COPY—EFFECT.

Where service was made on the respondent in a controverted election proceeding of what purported to be a copy of the petition, but from which copy was omitted an entire page of the original, and the omitted parts were of a substantial character and not merely formal, there is a noncompliance with the statutory provision for service contained in the Controverted Elections Act, 7 Edw. VII. (Alta.) c. 2, as to which the court has no power to permit an amendment but must set aside the petition on a preliminary objection raising the defect in service.

Re St. Paul Election, 13 D.L.R. 639, 25 W.L.R. 377, 5 W.W.R. 89.

Where, at the time of his nomination and election as mayor of Sherbrooke, a candidate for said office had the property qualification required by the charter of said city, but a day or two subsequent to his election encumbered his property to such an extent as to bring it below the amount required as a qualification to take or hold said office, his right or title to said office cannot be attacked in a proceeding to set aside his election on a petition by one elector alleging lack of property qualification at the times mentioned.

Demers v. Hebert, 8 D.L.R. 632, 42 Que. S.C. 314.

PROCEEDINGS TO UNSEAT ALDERMAN FOR DISQUALIFICATIONS—TIME.

R. ex rel. Stephenson v. Hunt, 30 D.L.R. 513, 36 O.L.R. 385.

PETITIONING VOTERS—QUALIFICATIONS OF.

The status of the petitioners as voters qualified to vote and so to bring a petition under the Controverted Elections Act, Man., may be shewn by the list of voters for the election as revised by the revising officer, and identified by him and the clerk of the executive council; and it is not essential that such proof should be supplemented by proving that the petitioners' names were also on the list furnished to the deputy returning officer, and used at the poll. [Richelieu Election Case, 21 Can. S.C.R. 168, distinguished.] The revised list of

voters is conclusive as to the right to vote at a Manitoba provincial election subject to the voter taking the oath if called upon to do so; consequently an election petition under the Controverted Elections Act, will not be set aside on a preliminary objection that the petitioners were not proved to be British subjects and twenty-one years of age where their names appeared on such revised list and no other evidence was given on that question.

Re Lakeside Provincial Election; Tidsbury v. Garland, 23 D.L.R. 411, 25 Man. L. R. 197, 8 W.W.R. 33, affirming 20 D.L.R. 286.

PETITION — SUBSTITUTIONAL SERVICE—MOTION TO SET ASIDE—GROUNDS FOR.

A motion to set aside an order for substitutional service of an election petition and the service thereunder cannot be allowed where based on an objection which is in the nature of an appeal from the former order, as where it was contended that the order was invalid for insufficient reference to identify the election in question.

Re Kildonan and St. Andrews Election; Gunn v. Montague, 19 D.L.R. 478, 29 W. L.R. 635, 7 W.W.R. 347.

CONTESTS—BALLOT—RIGHT TO INVADE SECRECY OF—ONUS OF CONTESTANT.

On the hearing of a petition, under s. 192 of the Municipal Act, R.S.M. 1913, c. 133, questioning the election of the respondent on the ground that he was not duly elected by a majority of lawful votes, evidence should not be admitted to shew for which candidate any voter had cast his ballot: s. 168; and, although it is shewn that a number of persons had voted who had no right to vote, it could not be assumed that these persons' votes had all been for the respondent, and, when the case for the petitioner depends on such assumption, it fails, and under s. 222 of the Act, the judge trying the petition will be right in dismissing it with costs. [Re Lincoln, 4 A.R. (Ont.) 206, per Moss, C.J.A., at p. 212, followed; Re West Lorne, 47 Can. S.C.R. 451, distinguished.]

Smith v. Baskerville, 24 Man. L.R. 349, 28 W.L.R. 484, 6 W.W.R. 1074.

ELECTION PETITION—PETITIONER'S DEPOSIT FOR COSTS—DEPUTY PROTHONOTARY—INTERPRETATION ACT—PUBLICATION UNDER MANITOBA ELECTIONS ACT.

That the petitioner's deposit for costs of an election petition under the Controverted Elections Act (Man.) s. 19, was made with the deputy prothonotary of the King's Bench, although the Act requires that the deposit be made with the prothonotary, is not a valid preliminary objection, for the deputy is included by virtue of the Interpretation Act, Man., s. 15.

Publication in the Manitoba Gazette and in a local paper of notice of the presentation of an election petition under the Manitoba Controverted Elections Act is no longer necessary as it was prior to 1914.

Re Lakeside Provincial Election; Tidsbury v. Garland, 20 D.L.R. 286, 29 W.L.R. 628, 7 W.W.R. 340. [Affirmed, 23 D.L.R. 411, 25 Man. L.R. 197.]

MUNICIPAL COUNCIL—BY-LAWS REGULATING ELECTIONS—PROTEST.

A by-law of a municipality respecting elections provided that an elector might file a protest against the election of a councillor with the county secretary within twenty days after the election; that the protest so filed should be read before the council on the first day of the first session after the election, and in case a majority of the council considered there was sufficient ground of complaint it should appoint a committee of three members to examine into the matter and report to the council. The by-law also provided that the council might adjourn the investigation from time to time:—Held, where a protest was filed and read before the council, and a committee appointed as provided by the by-law, and the council adjourned without receiving a report from the committee or adjourning the investigation, the court refused a rule for a writ to prohibit the council from proceeding to hear and determine the protest at a special meeting called for that purpose.

Ex parte Murchie, Re Kerr, 42 N.B.R. 475.

DOMINION CONTROVERTED ELECTION—SUMMARY PROCEEDINGS—PETITIONER A BRITISH SUBJECT—PROOF OF CANDIDATURE—NOTICES.

The Dominion Controverted Elections Act intends that preliminary objections shall be decided in a summary manner; therefore an inscription in law cannot be made which will delay the proceedings. Legal grounds ought to be raised orally during the hearing of the objections. The fact that a petitioner is not a British subject can only be raised in the the election petition itself, and ought to be decided at the same time as the merits. The petitioner proves that he has been a candidate by the production of the nomination paper, the writ of election, the return of the writ, and the proclamation in the Official Gazette. A defendant is not prejudiced by the fact that the notices of presentation of the petition and of furnishing security are duplicates instead of being copies.

Morris v. Fisher, 15 Que. P.R. 373.

REMEDIES OF CONTESTATION AND QUO WARRANTO—JURISDICTION OF COURTS.

The remedies of contestation of election and of quo warranto are not exclusive the one of the other; but contestation proceedings must be brought within a fixed delay before the circuit or district magistrate's court, whereas quo warranto is of the jurisdiction of the Superior Court.

Desaulniers v. Desaulniers, 9 D.L.R. 201, 22 Que. K.B. 71, 19 Rev. de Jur. 352.

CONTROVERTED MUNICIPAL ELECTION—QUALIFICATION OF CANDIDATE.

In a controverted municipal election in

which the contesting party asks to be declared the candidate elected, the court generally refuses to grant this application if such candidate has obtained only the minority of the votes and if the contestation is based upon the absence of qualification in the candidate elected, and when the objection is not taken at the time of nomination, but it has the power to do so.

Birchall v. Decary, 48 Que. S.C. 418.

MUNICIPAL ELECTION OF CONTROLLER—INTERVENTION TO CONTINUE CONTEST.

An elector has no right to intervene in the contestation of the election of a controller of the city of Montreal merely to watch the proceedings and continue them in case the petitioners should abandon them.

Charpentier v. Hébert, 48 Que. S.C. 13.

MUNICIPAL ELECTION—CORRUPTION—JUDGMENT VOIDING ELECTION — APPEAL — NONSUIT—PUBLIC NOTICE.

Contestations of municipal elections are proceedings of public order, in which any elector has the right to intervene in order to continue them, when the applicant threatens to abandon by collusion. When a municipal election for mayor or councillor has been voided on account of violence and corruption, and that upon an appeal to the Court of Review, the applicant discontinues the judgment rendered, the court should, for reasons of public order, refuse to have such discontinuance noted in the record, unless public notice is given in the municipality concerned, and the parties file a sworn declaration that the arrangement is not collusive.

Naud v. Ferron, 53 Que. S.C. 1.

MUNICIPAL LAW—PROHIBITION—BALLOTING — FORMALITIES R.S. QUE. [1909], (CITIES AND TOWNS), ARTS. 5372, 5524, DO. (TEMPERANCE), ART. 1321, S. 9a—6 GEO. V., C. 13.

In an election for the repeal of a prohibition by-law, the following words written on the ballot, "for the by-law revoking the by-law of prohibition," and "against the by-law revoking the by-law of prohibition," conform to the law and cannot cause the electors to make a mistake. Secret balloting is violated when, some days after the voting, the mayor of the municipality, accused of having used his influence to obtain votes, replies, "the only three persons, whom I could have influenced, I mean my sister-in-law, M.C., and M.G., have voted against me." It is not art. 5362 of the Cities and Towns Act which applies to the voting for the adoption of a by-law repealing a prohibition by-law, but art. 1321, s. 9a of the Temperance Act of Quebec. (6 Geo. V., c. 13.) The legality of a resolution of a municipal council striking out or adding names to the assessment roll cannot be attacked in an action to set aside the approval of the municipal electors of a by-law repealing a prohibition by-law. It should be done by direct procedure within the times limited and with formalities required by law. In secret balloting, art. 5524 of the Cities and Towns Act has no application, since it is not a question of electing a candidate, but of a vote upon a principle. A person can legally vote under the name of "Mrs. A. T. widow" while her husband is still living, if she is thus described on the voters list of the municipality.

Pelland v. Joliette et al., 25 Rev. Leg. 316.

Rule of Practice No. 50, relating to controverted elections for the House of Commons, which declares that no proceeding shall be rejected for defects of form, applies to every technical and formal defect which can be remedied by the judge without prejudice to the opposite party.

Morgan v. Cardin, 13 Que. P.R. 208.

MUNICIPAL—DISQUALIFICATION OF COUNCILLOR—LIABILITY FOR ARREARS OF TAXES —MUNICIPAL ACT, R.S.O. 1914, C. 192, S. 53 (1) (8.), 242 (1), AND FORM 2 —DECLARATION OF QUALIFICATION — ISSUE OF WARRANT FOR NEW ELECTION —MOTION FOR INJUNCTION.

Kennedy v. Dickson, 7 O.W.N. 769.

DISQUALIFYING CANDIDATE—FORM OF REMEDY—QUO WARRANTO OR PETITION.

Where six aldermen were to be elected, and it is alleged that eight were nominated, and that the returning officer publicly declared the names of the candidates and the place and time for a poll, but on the following day issued a notice purporting to disqualify two of the candidates and declaring the other six elected by acclamation, the remedy of quo warranto is open notwithstanding s. 92 of the Municipal Act, c. 71, R.S.B.C. 1911. Subsection (f) of s. 92, which states that "no writ of quo warranto shall hereafter issue in respect of any municipal election after the expiration of thirty days from the declaration by the returning officer of the candidates elected," means that no proceedings by way of quo warranto shall be instituted after the expiration of such time.

R. ex rel. McFarlane v. Balment, 8 W W.R. 111.

(§ IV—91)—ELECTION FRAUD OR CRIME AS GROUND.

Where objection, supported by affidavits, is made to a petition to submit a municipal by-law that some of the signers' names were procured by fraud, such names will be disregarded by the court hearing a mandamus application in which the regularity of the proceedings is questioned, when it finds such charge established, but there should be corroborating evidence besides that in the affidavits, especially when such affidavits are not made by the voters affected by the charge.

R. ex rel. Sovereen v. Edwards, 8 D.L.R. 450, 22 Man. L.R. 790, 22 W.L.R. 723, 3 W.W.R. 581.

A returning officer, whose conduct is complained of and who is made a party to an election petition is to be deemed for most purposes of the Dominion Controverted

Election Act, a respondent and the petitioners who have deposited the statutory sum ($1,000) as security have sufficiently complied with the statute, such deposit standing as security for the payment of the costs of both the member whose election is protected and the returning officer whose official action is attacked.

Re Provencher Election (No. 2); Barkwill v. Molloy, 1 D.L.R. 265, 22 Man. L.R. 16, 20 W.L.R. 11, 1 W.W.R. 768.

OWING TAXES BY ELECT—CORRUPT PRACTICE.

To invalidate a municipal election on the ground that the alderman elect owed municipal taxes at the time of his election, it is necessary that the taxes should be owed personally and not on account of a hypothec, as would be the case of the possessor of an immovable charged with the payment of taxes that the vendor had not paid. Proceedings to set aside a municipal election for corruption and undue influence should be taken within the delay of 30 days; but if the proceedings are based upon the want of qualification in the elected party there is remedy by quo warranto within such delay. The want of qualification must always exist at the time of the summons. The terms "whoever has not paid all his municipal taxes" in art. 5363, R.S.Q. 1909, mean whoever is in default after his taxes have become exigible; but this default can only exist after the expiration of 20 days from the date of the notice provided for in art. 5749.

Barrette v. Gareau, 49 Que. S.C. 173.

(§ IV—91a)—JURISDICTION—ORDER WITHOUT—CLERK'S DUTY UNDER ACT—SCRUTINY.

In election recount proceedings, the order of a District Court Judge basing a subpœna duces tecum assuming to require the clerk of the Executive Council to produce for inspection upon a recount, certain election ballot papers without the order of a Supreme Court Judge provided for by s. 239 of the Alberta Election Act (1909, c. 3), being without jurisdiction and null and void; both the order so made and any subpœna issued thereunder may and should be disregarded by the clerk of the Executive Council. The official obligation of the clerk of the Executive Council as specifically prescribed by 239 of the Act, not to permit the inspection of any ballot paper in his custody except under an order of a Judge of the Supreme Court, constrains such clerk to disregard any order in contravention thereof which may be issued by a District Court Judge in an election recount proceeding, requiring such clerk to produce such papers for inspection, and there can be no contempt in such disregard.

Re Clearwater Election, 14 D.L.R. 32, 6 A.L.R. 431, 25 W.L.R. 589, 5 W.W.R. 181. [See also 11 D.L.R. 353 and 12 D.L.R. 598.]

JURISDICTION — ORDER WITHOUT — PURPOSE OF ORDER, DETERMINING FACTOR WHEN.

In an election recount proceeding, where an order is issued by a District Court Judge in direct contravention of s. 239, of the Alberta Election Act (1909, c. 3), requiring the clerk of the Executive Council to attend under a subpœna duces tecum before the District Court Judge with certain election ballot papers and accompanying immaterial documents, the fact that the immaterial documents might legally have been covered by an order of a District Court Judge will not serve to validate the order as made.

Re Clearwater Election, 14 D.L.R. 32, 25 W.L.R. 589, 6 A.L.R. 431, 5 W.W.R. 181.

JURISDICTION — DEPOSIT FOR COSTS—ADVANCED BY ANOTHER THAN THE PETITIONER—COPY OF PETITION MINUS ONE PAGE—EFFECT.

That the deposit for costs on an election petition under the Controverted Elections Act, Alta., 1907, s. 5, was not the petitioner's own money, but was supplied by another person for the purposes of the petition, does not constitute a valid preliminary objection. The mere change of name of the electoral district in which a petitioner resides on the creation of a new electoral district, including his place of residence, does not deprive the petitioner of his status as such in the new district although by reason of the election being held within 3 months after the creation of the new district the three months' prior residence necessary under s. 104 of the Elections Act (Alta.), 1909, c. 3, to qualify as an elector is made up partly of time in which the territory was part of the former district. It is a good preliminary objection to an election petition under the Controverted Elections Act, Alta, 1907, c. 2, to shew that the "copy of petition" served was defecive because of an entire page having been omitted from the alleged copy; the defect is not curable under s. 18 of the Act, which makes the Judicature Ordinance applicable in certain contingencies, and an amendment is not permissible; but, semble, the petitioner might have applied under s. 7 of the act for an extension of time within which to make a fresh service.

Tessier v. Lessard, 20 D.L.R. 243, 7 A.L.R. 405, 29 W.L.R. 646, 7 W.W.R. 251.

QUO WARRANTO — RELATOR, QUALIFICATION OF.

A person guilty of bribery at a municipal election is not thereby disqualified from acting as a relator upon quo warranto proceedings to have a seat in the council declared vacant.

R. ex rel. Sabourin v. Berthiaume, 11 D.L.R. 68, 24 O.W.R. 559.

JURISDICTION.

In order to establish the status of the petitioner on a preliminary objection to set aside a petition against a person's election as a member of the House of Commons, it is not necessary to produce a certified copy of the voters' list actually used at the polls in the polling subdivision in which the peti-

tioner was entitled to vote, as was the former practice, but all that is now required under the Dominion Elections Act, ss. 14, 18 of c. 6, R.S.C. 1906, is the production of a copy of the original list of voters with the imprint of the King's printer. An election, held under such circumstances that, owing to threats, undue influence and menaces, the canvassers and workers on one side are effectually excluded from taking part in the election, while, at the same time, the electoral district is overrun with workers, agents and orators of the other side, is not free and fair, and is void at common law if such threats and undue influence can be reasonably held to have affected the result.

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 23 Man. L.R. 542, 22 W.L.R. 755, 3 W.W.R. 597. [See 15 D.L.R. 151, 23 Man. L.R. 542 at 549.]

MUNICIPAL DISTRICTS ACT (ALTA.)—DISQUALIFICATION OF MEMBER OF COUNCIL—POWER OF DISTRICT COURT—MAY DECLARE MEMBER OUSTED OF HIS SEAT—CANNOT DECLARE RELATOR ELECTED.

Section 78a of the Municipal Districts Act (see amendment 1918 Alta. Stats. c. 49) supersedes the former provisions on the same subject, and while a District Court Judge may, if it appears to him that a member of the council has forfeited his seat at the council or his right thereto, or has become disqualified to hold his seat, adjudge such person to be ousted of the same or may discharge the summons, there is now no jurisdiction in the District Court or a judge thereof to declare any relator elected.

R. ex rel. McNiven v. Smith, 47 D.L.R. 513, [1919] 2 W.W.R. 656.

(§ IV—92)—TIME—EXTENSION OF.

The court having jurisdiction over contested election cases under the Dominion Controverted Elections Act, has power to extend the time for filing preliminary objections to a petition filed against the return of a member of parliament although the 5 days limited therefor by statute had expired. [See Macpherson's Election Law of Canada, pp. 634, 660.]

Re Provencher Election; Barkwille v. Molloy (No. 1), 1 D.L.R. 84, 22 Man. L.R. 6, 19 W.L.R. 794, 1 W.W.R. 463.

CONTROVERTED ELECTIONS ACT—OBJECTION TO PETITION—SECOND EXTENSION OF TIME FOR MAKING—ABANDONMENT—LACHES.

Delay in taking out an order for a second extension of time under s. 37 of the Controverted Elections Act, R.S.M. 1902, c. 34, for making preliminary objections to the sufficiency of a petition filed under the act, cannot be considered an abandonment of the original order, where the delay was due to a difference of opinion between the solicitors for the respective parties as to the terms of the order. Under s. 35 of the Act, which provides that if a petition in a controverted election proceeding cannot be served personally on the respondent at his domicile, "service may be effected upon such other person, or in such other manner as any judge may appoint," an order for substitutional service may be made after the expiration of a previous extension of time, granted under ss. 33, 34 of the Act, for personal service of such petition. Under s. 37 of the Act, providing that preliminary objections may be filed to a petition by the respondent within five days after service thereof, or within such further time as any judge shall grant for the purpose, after one extension of time has been made such further time may be granted as the judge may deem necessary, his power not being exhausted by the making of the first extension. [Power v. Griffin, 33 Can. S.C.R. 39, distinguished.] While s. 33 of the Act, provides that the petition and notice of presentation thereof shall be served within five days, "or within such further time as a judge shall order," the power of a judge is not exhausted by making one extension of time, but he may make a further extension under s. 34 of the Act, which provides that service may be made "within such longer time as any judge may grant, regard being had to the difficulty of effecting service, or to special circumstances."

Re Gimli Election, Rejeski v. Taylor, 14 D.L.R. 414, 23 Man. L.R. 678, at 684, 25 W.L.R. 677, 5 W.W.R. 363, reversing 13 D.L.R. 121, 23 Man. L.R. 678. [See 14 D.L.R. 863, 23 Man. L.R. 851.]

CONTESTS — RECOUNTS — TIME — ADJOURNMENT — EXTENSION.

Sections 224, 225 of the Alberta Election Act (1909, c. 3), requiring the hearing and determination of an election recount on the day fixed and as far as practicable in a continuous proceeding, will be construed so that if from any cause the proceeding cannot be carried on at the time appointed the judge may appoint another time for the purpose, giving to s. 225 merely the force and effect of requiring the recount (when once begun) to proceed continuously as far as practicable.

Re Clearwater Election, 14 D.L.R. 32, 6 A.L.R. 431, 25 W.L.R. 589, 5 W.W.R. 181.

The right given to any elector to intervene and be substituted at any stage of the proceedings in an election petition is prescribed by the Dominion Controverted Elections Act, R.S.C. 1906, c. 7, s. 38, subs. 3, for the purpose of providing against any possible collusion or fraudulent arrangement between the original petitioner and the candidate whose election is being contested; and it is, therefore, essential to advise all electors, in strict compliance with the statute and practice rules passed thereunder, of the time, status and place of the proceedings under the petition. Election petitions and hearings thereof, under the Act, are matters of public order (i.e., matters connected with the conduct of good

government), and statutory regulations as to the time limitation of the proceedings are to be construed under the rules applicable to statutes of public order. When notice of the time and place fixed for the trial of an election petition is not given as required by R.S.C. 1906, c. 7, s. 38 (3), the order for the trial becomes null and void, and the court has no jurisdiction to proceed therewith, the statute and the rules thereunder being construed strictly.

Bergeron v. Fortier, 8 D.L.R. 459, 42 Que. S.C. 286.

DOMINION CONTESTED ELECTIONS — HEARING OF PETITION — DELAY — MOTION TO FIX DATE OF HEARING — DISCRETION OF COURT — R.S.C. c. 7, ss. 7, 40.

The hearing of a Dominion election petition must begin within six months from the date on which it was presented, and if the petitioner moves to have it fixed at a later date, when he might have done it soon enough to comply with the law, and does not give any reason for his delay, the court may, and should, in the exercise of its discretion, refuse the motion.

Paradis v. Cardin, 45 Que. S.C. 147.

(s. IV—93)—PLEADINGS — STATEMENT.

In an application to set aside an election petition under the Controverted Elections Act (Alta.) upon the ground, among others, that the petitioner was not qualified to file a petition, and where, upon the hearing it does not appear that the petitioner was, at the date of the filing, neither a defeated candidate nor a duly qualified elector, the objection on this ground will be sustained.

McVaught v. McKenzie (re Claresholm Provincial Election), 8 D.L.R. 58, 5 A.L.R. 286, 22 W.L.R. 840, 3 W.W.R. 133.

NOTICE OF PETITION AGAINST.

Richelieu Dominion Election, Paradis v. Cardin, 15 D.L.R. 831, 48 Can. S.C.R. 625, 50 C.L.J. 118.

PETITION — PUBLICATION OF — COPY OF PETITION — PAYMENT OF FEES — NON-PUBLICATIONS — OBJECTIONS — CONTROVERTED ELECTIONS ACT (MAN.).

Where the petitioners had done all that they were bound to do to secure the publication of the returning officer's notice of an election petition under the Manitoba Controverted Elections Act, having supplied that official with a copy of the petition and sufficient money for the publication of the notice, its nonpublication will not constitute a good preliminary objection.

Re Lakeside Election; Tidsbury v. Garland, 20 D.L.R. 286, 29 W.L.R. 628, 7 W.W.R. 340.

CONTESTS — PLEADINGS — QUO WARRANTO — CHARGING BRIBERY — NAMING WITNESSES IN NOTICE OF MOTION.

It is not necessary in a notice of motion in the nature of a quo warranto, charging bribery against a member of a municipal council, to state that his disqualification will be sought, where the Act under which proceedings are taken automatically disqualifies the accused if found guilty. The provisions of s. 222 of the Consolidated Municipal Act (Ont.) requiring a relator to name, in his notice of motion, by way of quo warranto, the witnesses whom he proposes to examine are obligatory, and witnesses not so named cannot be examined.

R. ex rel. Sabourin v. Berthiaume, 11 D.L.R. 68, 4 O.W.N. 1201, 24 O.W.R. 559.

The fact that the precise words of complaint specified in s. 11 of c. 7 of the Controverted Elections Act have not been used by the petitioners is not a valid objection on an application to set aside, on preliminary objections, the petition against the applicant's election as a member of the House of Commons.

Re MacDonald Election; Myles v. Morrison, 8 D.L.R. 793, 23 Man. L.R. 542, 22 W.L.R. 755, 3 W.W.R. 597.

CONTESTS — CONTROVERTED ELECTIONS ACT — OBJECTIONS TO PETITION — WAIVER.

That a preliminary objection to a petition made under the Controverted Elections Act, R.S.M. 1902, c. 144, might have been raised on a previous objection to the sufficiency of the service of the petition will not bar a subsequent application based on the former objection, especially where the objection, if made on the first application, might have been considered a waiver of the irregularity in the service of the petition.

Re Gimli Election; Rejeski v. Taylor, 14 D.L.R. 863, 23 Man. L.R. 851, 26 W.L.R. 20, 5 W.W.R. 590.

PLEADINGS — STATEMENTS — NOTICES.

The defendant who presents preliminary exceptions to a petition filed against his return as a member of the House of Commons should furnish the following particulars:—1. In what respect the copies of the petition, of the receipt of the deposit, of the notice of presentation, of the notice of security, of the appearance and of the election of domicile by the petitioner's agent are not true copies and duly certified; 2. In what respect the publication of the petition by the returning officer is irregular and the notice thereof incomplete; 3. In what respect the functionary before whom the affidavit was sworn was not competent; 4. In what respect the service of the petition and the accompanying documents and the return of such service were irregular. The respondent cannot, by preliminary objection, claim that the petitioner had ceased to be a qualified elector through commission of corrupt practices at the election.

Latraverse v. Cardin, 14 Que. P.R. 365.

PLEADINGS — STATEMENT — NOTICES.

The contestation of a municipal election in the city of Maisonneuve is governed by the Cities and Towns Act. It is necessary that the petition should be served on the defendant within fifteen days from the date of the election; if not it will be dismissed on exception to the form.

Pichet v. Lemay, 14 Que. P.R. 282.

PLEADINGS — STATEMENT — NOTICE — SECURITY.

There must be an interval of ten days between the giving of security and the presentation of a petition asking the annulment of a mayor's election. The supplementary delays granted for the hearing of the petition from the original date to a later date must not be included in this delay of ten days. There is no illegality in the filing of a petition for the annulment of an election before the date of presentation.

Paquet v. Clermont, 15 Que. P.R. 89.

PLEADING — CORRUPT INTENTION — MOTIVE.

All the documents attached to a pleading furnished by order of a court form part of the pleading; and in a contestation of a municipal election, where under the charter the acts charged are only causes of nullity when they have been made with the intention to corrupt, it is sufficient to allege this intention in the petition without the necessity of repeating it in the particulars. Allegations in the reply which are personal to the petitioner, charging him with the intention to harass and that he is only a prête-nom of persons inimical to the respondent, will be dismissed upon an inscription en droit; the petitioner, through his status of a municipal elector, has the undoubted right to contest the election whatever may be the motives which cause him to do so.

Marsil v. McDonald, 49 Que. S.C. 407, 17 Que. P.R. 414.

DEPOSIT — SUFFICIENCY OF AFFIDAVIT.

In a contestation of a provincial election, where conclusions are taken only against the elected candidate, although the returning officer and his deputies may be considered as defendants in the case under arts. 457, 459, 460, R.S.Q. 1909, the deposit of a sum of $1,000 is sufficient. The fact that the copy of the affidavit served with the petition does not mention the name of the commissioner before whom it was sworn, is an irregularity without importance, because the defendant suffered no prejudice whatever by the omission.

Tansey v. Bryant, 26 Que. K.B. 385.

(§ IV—94)—CONTESTED MUNICIPAL ELECTIONS—TRIAL PROCEDURE.

Section 220 (4) of the Consolidated Municipal Act, 3 Edw. VII. (Ont.) c. 19, providing that the proceedings before a judge to declare a seat in the council vacant, shall be entitled and conducted in the same manner as other proceedings in Chambers, does not impose a duty upon the judge to take the evidence down in writing.

R. ex rel. Sabourin v. Berthiaume, 11 D.L.R. 68, 4 O.W.N. 1201, 24 O.W.R. 559.

PROCEDURE — PETITION — NOTICE.

It is not a good preliminary objection to an election petition under the Controverted Elections Act, Man., that the returning officer had failed to publish the notice required by s. 21, where the petitioner had not been required by the returning officer to pay the cost of publication, nor had he been notified of the amount required.

Re Kildonan and St. Andrews Election, 21 D.L.R. 389, 30 W.L.R. 623, 7 W.W.R. 1498, 25 Man. L.R. 336. [Affirmed, 23 D.L.R. 887, 25 Man. L.R. 336 at 340. See also 19 D.L.R. 478, 796.]

TRIAL—PROCEDURE.

Where a charge involves disqualification of the municipal councillor whose election is contested, it should be proved beyond a reasonable doubt to warrant a finding adverse to him.

Cameron v. Beaton, 21 D.L.R. 386, 48 N.S.R. 353.

DISCONTINUANCE OF PROCEEDINGS — LEAVE — QUALIFICATION — SCHOOL TAXES.

The contestation of municipal elections being a matter subject to the summary jurisdiction of the court, one of the petitioners cannot, as of right, discontinue a petition in contestation on the ground that his consent to the taking of the proceedings was obtained by false representation, without submitting his reasons for the approval of the court. In order to exercise the rights and privileges which are conferred upon him in that capacity, a municipal elector is only obliged to pay the municipal and school taxes for which he is personally the debtor, and not those for which he may be followed under hypothecary claim.

Gamache v. Blais; 50 Que. S.C. 200.

(§ IV—95)—PENALTIES UNDER DOMINION ELECTION ACT — REMOVING NAME FROM VOTERS' LIST — ADMISSIONS — EVIDENCE.

In an action for the penalty provided by s. 249 of the Dominion Elections Act, an admission by the defendant that the plaintiff's name was on the voters' list and that he struck it off is sufficient to prove that the defendant had struck the plaintiff's name off the list, without its being produced. An admission of a party is always evidence against himself, unless privileged.

Castle v. Hayes, 47 D.L.R. 393, 12 S.L.R. 308, [1919] 2 W.W.R. 800.

SECURITY — CASH DEPOSIT — SUFFICIENCY.

The receipt of the prothonotary for the deposit of $1,000 accompanying an election petition under the Manitoba Controverted Elections Act is evidence of its sufficiency (s. 20) in answer to a preliminary objection, and throws upon the respondent the onus of shewing that the deposit was not made in bills of a chartered bank (s. 19).

Re Lakeside Provincial Election; Tidsbury v. Garland, 23 D.L.R. 411, 25 Man. L.R. 197, 8 W.W.R. 33, affirming 20 D.L.R. 286.

PROCEEDING TO VOID ELECTION — CIVIL PROCEEDING — JOINDER OF RESPONDENTS.

R. ex rel. Warner v. Skelton, 23 O.L.R. 182, 18 O.W.R. 534.

SECURITY — PARLIAMENTARY ELECTIONS — CONTROVERTED ELECTION PETITION — MONEY PAID INTO COURT AS SECURITY — PETITION NOT BROUGHT TO TRIAL — PAYMENT OUT — CONSENT OF RESPONDENT.

Crawford v. Truax, 9 O.W.N. 15.

ELECTION OF COUNCILLOR — INTEREST IN CONTRACT.

Therrieu v. Deschambault, 40 Que. S.C. 263.

TARIFF — CONTESTATION OF MUNICIPAL ELECTION — SECURITY — CANDIDATE CHOSEN BY THE COUNCIL — S.C. TARIFF, ART. 22 — QUE. M.C. 352, 698.

The petitioner in a contestation of municipal election must, within the ten days prior to the presentation of the petition, offer security for costs. A petition to quash the appointment of a councillor elected by the council must be accompanied by the formalities required by Que. M.C. art. 695 et seq. Article 22 of the tariff of the Superior Court applies to such petitions.

Shooner v. Fortin, 16 Que. P.R. 15.

DISAVOWAL OF ATTORNEY — SETTING ASIDE JUDICIAL PROCEEDINGS — ELECTION COURT.

Quesnel v. Méthot, 20 Que. K.B. 57.

CONTROVERTED ELECTION — DISQUALIFICATION — HEARING DURING SESSION.

Bourbonnais v. Lortie, 12 Que. P.R. 397.

RECOUNT — APPOINTMENT FOR, ISSUED BY COUNTY COURT JUDGE — FAILURE TO SERVE RETURNING OFFICER — MANDAMUS — APPLICATION NOT LAUNCHED UNTIL AFTER ELECTION RETURN MADE.

Re Dauphin Election, 21 Man. L.R. 629, 19 W.L.R. 451.

MUNICIPAL ELECTIONS — INTEREST IN A MUNICIPAL CONTRACT — MUNICIPAL ACT (1903), SS. 80, 219, 220, 232 — FAILURE TO GIVE EVIDENCE — RULE 498 — INTENTION IMMATERIAL.

R. ex rel. States v. Homan, 19 O.W.R. 621, 2 O.W.N. 1334, affirming 19 O.W.R. 427, 2 O.W.N. 1221.

ELECTRICITY.

I. MUNICIPAL REGULATION OF.

II. CONFLICTING RIGHTS OF DIFFERENT COMPANIES.

III. INJURIES RESULTING FROM.

A. Negligence of party producing.

B. Contributory negligence of person injured.

IV. SALE OF ELECTRIC LIGHT AND POWER.

Franchises as to, see Municipal Corporations, II F—165.

Negligence, see Master and Servant, II A —50.

Defective system, Nuisance, see Municipal Corporations, II G—195.

I. Municipal regulation of.

(§ I—1)—REFUSAL OF PERMISSION TO ERECT POLES AND WIRES — REVIEW BY PUBLIC UTILITIES COMMISSION.

In the absence of a need, so extensive as to create a public interest, for the introduction of additional electricity and power into a town, the refusal of a city council to grant permission to place a system of poles and lines for the distribution of electricity throughout the entire settled portion of the city will not be interferred with by the Public Utilities Commission (Man.).

Re Winnipeg and St. Boniface, 14 D.L.R. 186, 25 W.L.R. 618, 5 W.W.R. 293.

ERECTION OF POLES IN LANES OF TOWN — LOCATION OF POLES — CONSENT OF MUNICIPAL COUNCIL — NECESSITY FOR — UNREASONABLE WITHHOLDING.

Walkerville v. Walkerville Light & Power Co., 5 O.W.N. 429.

(§ I—2)—RESTRICTIONS AS TO IMPORTATION.

A company empowered to operate a street railway and to supply electricity for light, heat and power, over poles and wires erected in the streets and public places of a city, may, without first obtaining the consent of the city, transmit thereon electricity generated and developed beyond the city limits. After an electric street railway has, to the knowledge of a city and its officers, and with their active co-operation, erected beyond the city limits, at a cost of millions of dollars, a plant for the generation of electricity, located its sub-power houses and erected poles and wires in the city, and after the city has received about $100,000 in taxes from the company, and has adopted by-laws and resolutions requiring a company that the street railway had absorbed by amalgamation, to lay double tracks on certain streets, and to establish a schedule for operating its cars, the city cannot deprive the street railway company of the right to introduce into the city, electricity generated beyond the city limits, on the ground that its charter forbade such importation of electricity, or that permits were void which the city had granted for the erection of poles. A restriction in the charter of a street railway company that prevented it from importing electricity from without the city limits, is not binding upon a company formed by the amalgamation of such street railway company with other companies, none of which were so restricted.

Winnipeg Electric Ry. Co. v. Winnipeg, 4 D.L.R. 116, [1912] A.C. 355, reversing 20 Man. L.R. 337, 16 W.L.R. 62.

DESJARDINS CANAL — STRETCHING ELECTRIC WIRES ACROSS — NO INTERFERENCE WITH NAVIGATION.

Dundas v. Hamilton Cataract Co., 2 O. W.N. 517, 18 O.W.R. 168.

II. Conflicting rights of different companies.

(§ II—5)—Contract — Supply of electrical energy — Construction and operation — Adjustment of accounts — Findings of Trial Judge.

Ontario Power Co. v. Toronto Power Co., 16 O.W.N. 94.

III. Injuries resulting from.

A. Negligence of party producing.

(§ III A—16)—Destruction of building by fire — Crossed wires — Lack of safety devices.

Negligence sufficient to render an electric company liable for the destruction of a building from fire originating from an electric current of abnormally high voltage being carried upon wires leading into the building, may properly be inferred from the fact that several hours before the fire the company's high voltage wires became crossed with low potential service wires on the same poles, which trouble had been corrected prior to the fire; where it also appeared that the use of a simple safety device by the electric company on the pole nearest the building would have prevented the abnormally high current entering it, and that the electrical installation for the service of the burned building was not defective.

McElmon v. B.C. Electric R. Co., 12 D.L.R. 675, 18 B.C.R. 522, 25 W.L.R. 121, 4 W.W.R. 1315.

Liability of power commission — Defective wiring — Injuries to employees.

For injuries sustained by an employee of a steel company, through an explosion in a transformer station, the Hydro-Electric Power Commission of Ontario was liable, the explosion having occurred through the negligence of those employees of the Commission who made the installations in the station. The consent of the Attorney-General to the bringing of an action against the Commission entitles the Supreme Court to pronounce judgment against the Commission. [Graham v. Commissioners, 28 O.R. 1; Roper v. Public Works Commissioners, [1915] 1 K.B. 45, distinguished.]

Howarth v. Electric Steel & Metals Co.; Young v. Electric Steel & Metals Co., 29 D.L.R. 293, 35 O.L.R. 596. [As to costs, see 10 O.W.N. 67.]

Escape of current — Defective transformer.

A power company is liable to its consumers for damage caused by the escape of electricity in consequence of an unsafe system of transmission.

Vandry v. Quebec Ry. Light Heat & Power Co., 29 D.L.R. 530, 53 Can. S.C.R. 72, reversing 24 Que. K.B. 214. [Affirmed, 52 D.L.R. —.

Electric lighting system — Defects — Fire — Presumption — Additional proof — Que. C.C. 1238 et seq.

Where an electrician installed a lighting system whereby a fire was caused, in order to hold the electrician liable it is not sufficient to create presumptions by proving defects in the installation, it is necessary to establish a relation between the effect and the cause and to prove that the fire was due to these defects. If this relation, upon being proved, appears to the Trial Judge to be uncertain and he takes the case into deliberation, it is in the interest of justice to allow the plaintiff to give additional proof.

Ferland v. Laval Electric Co., 46 Que. S.C. 429.

Defective wiring — Fires — Proximate cause.

In an action for damages caused by a fire, it is not sufficient to prove defective installation of electric wiring, by which the fire might have been caused, even though no other probable cause was shewn by the defence.

Laval Electric Co. v. Ferland, 32 D.L.R. 291, 25 Que. K.B. 347. [Affirmed by Supreme Court of Canada, unreported to date.]

Negligence as to wires generally.

Where a pile-driver was ignorantly and crudely constructed and the contractor in whose control it was, continued, after notice of its dangerous proximity to high voltage electric wires, to maintain it there without utilizing the protective measures pointed out to him by the electric company which he had thereupon agreed to introduce, and where an employee was killed by the electric current coming in contract with the pile-driver, the contractor is liable in damages. Where an electric company with notice that their wires are in dangerous proximity to a crudely constructed pile-driver in operation over a river does not itself proceed to abate the danger but relies upon the promise of the operator of the pile-driver to do so, the electric company is not necessarily liable for resultant injuries, by reason of its being in control of a dangerous electric current; the electric company's undertaking being authorized by law there is no liability unless negligence can be affirmatively found. [Rylands v. Fletcher, L.R. 3 H.L. 330, distinguished; Dumphy v. Montreal Light, Heat & Power Co., [1907] A.C. 454, applied.]

Johnston v. Clark & Son, 7 D.L.R. 361, 4 O.W.N. 202, 23 O.W.R. 196.

Electric wires — Accident — Presumption—Force majeure.

The owner of things under his care is liable for damages which they cause, if he does not rebut the presumption of fault arising from art. 1054 C.C. (Que.). The liability of an electric company for damages caused by broken wires of its transmission lines is not removed by proving

that on the day of the accident there was a storm, and that wires were broken in several places in the town.

Senécal v. Montreal Public Service Corp., 54 Que. S.C. 80.

(§ III A—17)—Wires — Statutory requirement that wires carried above ground be "wholly insulated" — Wires carried on poles.

Having regard to other portions of the same statute, the requirement of s. 7 of c. 130 of the N.S. Acts of 1889, that in all cases where any electric wire or any portion thereof, is carried "above ground," that it shall be "wholly insulated," relates only to wires where carried from pipes of conductors laid underground, and does not extend to wires carried from pole to pole above the minimum height fixed by statutory authority.

Att'y-Gen'l and Truro v. Chambers Electric Light & Power Co., 14 D.L.R. 883, 13 E.L.R. 443.

(§ III A—19) — Injury by wires in streets — Dangerous agency — Statutory authority.

The effect of conferring statutory authority upon an electric power company to erect poles and power wires on a highway is that, apart from negligence, the company is absolved from the rule that any one who, for his own purposes, collects or keeps anything likely to do mischief if it escapes, is prima facie answerable for all the damages which are the natural consequence of its escape.

Roberts v. Bell Telephone Co., 10 D.L.R. 459, 49 C.L.J. 414, 4 O.W.N. 1099, 24 O.W.R. 428.

(§ III A—22)—Municipal liability — Defective pole—Shock.

An injury to a person by a shock of electricity while leaning against an electric light pole in a street, due to the faulty construction of the pole by a city, and not from want of repair, is the result of misfeasance and not merely nonfeasance, and therefore, notwithin the provisions of the Municipal Institutions Act, 3 & 4 Geo. V. (Ont.) c. 43, s. 460 (2), relating to preliminary notice of injury, and as to the time for bringing action therefor.

Glynn v. Niagara Falls, 15 D.L.R. 426, 29 O.L.R. 517.

(§ III A—24)—Injury to employees of third person—Liability.

An electric light company whose wires are constructed under municipal authority and are carried 29 feet above the surface, even if originally not insulated, owes no duty of safety to workmen of a telegraph company operating on poles erected in dangerous proximity to the high-tension wires, and cannot, therefore, be held liable for injuries resulting to them from contact with such wires. [Roberts v. Bell Telephone, 10 D.L.R. 459, applied.]

Young v. Brandon, 25 D.L.R. 206, 25 Man. L.R. 810, 9 W.W.R. 914, reversing, 9 W.W.R. 62, 32 W.L.R. 231.

(§ III A—27)—Tests and inspection — Power line on street.

An electric power company stringing its wires by statutory authority upon the public streets at a time when no other wires were there, is under no duty to inspect the wires periodically for the purpose of seeing that no other wires had subsequently been placed in too close proximity to their own wires and so avoiding injuries which might result to persons handling the dead wires of another company should the latter become charged by close contact with the power wires.

Roberts v. Bell Telephone Co., 10 D.L.R. 459, 24 O.W.R. 428.

B. Contributory negligence of person injured.

(§ III B—32)—Employee touching live wire — Course of employment.

The Workmen's Compensation Act (Que.) covers only claims for injuries received in the course of or by reason of the work done by the injured employee, and where a workman before working hours goes into the power house of his employer where he had absolutely no business and impelled by sheer curiosity touches a live wire and is killed, his employer is not liable in damages for such accident.

Coderre v. Sherbrooke, 9 D.L.R. 160, 43 Que. S.C. 201, 19 Rev. de Jur. 31.

Death of infant—Live electric wires left on ground — Contributory negligence.

Mueller v. B.C. Electric Co., 19 W.L.R. 278 (B.C.).

Electric current supplied by municipality — Board of commissioners — Statutory agents of corporation.

Young v. Gravenhurst, 24 O.L.R. 467 (C.A.).

Evidence of fault—Presumptions.

Ottawa Electric Co. v. Cunningham, 20 Que. K.B. 481.

IV. Sale of electric light and power.

(§ IV—40) — Contracts — Supply of electric current — Modification of contract — Payment for current supplied — Quantum meruit — Account — Items — Claim for damages for deceit—Costs.

Erindale Power Co. v. Interurban Electric Co. (No. 1), 9 O.W.N. 23.

Contract — Queen Victoria Niagara Falls Park Commissioners — 62 Vict. (2) c. 11, s. 36 (O.) — Grant of license to take water from Niagara River within park — Development of electrical power "for commercial use" — Construction of contract — Assignment by grantees

TO ELECTRICAL COMPANY — LEASE OF UNDERTAKING TO ANOTHER COMPANY — ASSIGNMENT OF LICENSE — "AMALGAMATION" — EXPERT EVIDENCE TO AID IN INTERPRETATION — INADMISSIBILITY — RENTAL PAYABLE TO COMMISSIONERS — ASCERTAINMENT OF — ENERGY CONSUMED IN ACT OF PRODUCTION — LIMITATION OF QUANTITY OF WATER TO BE TAKEN — RATE OF PAYMENT FOR WATER TAKEN OVER AND ABOVE AMOUNT LIMITED — DAMAGES—INJUNCTION AGAINST FUTURE BREACH OF CONTRACT BY EXCESSIVE TAKING — WAR MEASURES ACT, 1914 — ORDER OF POWER CONTROLLER FOR INCREASED PRODUCTION — EFFICIENCY OF PLANT AND MACHINERY — ADVANCE IN STANDARD.

Att'y-Gen'l for Ontario v. Electrical Development Co., 45 O.L.R. 186.

(§ IV—41) — COMPENSATION FOR WATER POWER USED TO OPERATE ELECTRIC POWER PLANT — CONTRACT — VARYING RENTAL.

Under an agreement between the Queen Victoria Niagara Falls Park Commissioners and a power company, licensing the latter to exercise certain rights in the park and in the water of the Niagara river for the purpose of generating electricity and pneumatic power to be transmitted to places beyond the park and requiring payment therefor at a specified annual rental and "in addition thereto, payment at the rate of the sum of $1 per annum (with sliding scale) for each electrical horse-power generated and used and sold or disposed of over 10,000 electrical horse-power," the extra payments are to be made as the electricity is generated at a rate greater than 10,000 horse-power as shewn by the meters, and so continue even when the generation falls below such rate, the proper basis of calculation, according to the true construction of the clause relating to additional rentals, being the highest amount or quantity of electrical horse-power generated and used and sold or disposed of at any one time, and so remaining (regardless of a drop in actual use or sale) until a higher point of generation and use or sale is reached. Where by an agreement in 1899, supplemental to an agreement in 1892, a power company stipulated to pay a specified fixed rental for a strip of land lying by the water's edge in a public park, together with the use of a portion of the flow of the river as it passes, which had been placed at its disposal for the purpose of constructing works and generating electricity; and also stipulated to pay additional rentals varying in amount by reference to the electrical horse-power generated and used and sold or disposed of by the company, "such additional rentals as shall be payable for and from such generation and sale or other disposition" to be payable half-yearly; the proper basis of calculation, according to the true construction of the clause relating to additional rentals, is the highest amount or quantity of electrical horse-power at any one time generated and used or sold, and such amount remains the true basis, regardless of a drop in actual use or sale until a higher point of generation and use or sale is reached. The extra price provided for in an agreement between the Queen Victoria Falls Park Commissioners and a power company, licensing the company to operate an electric power plant in the park and in the water of the Niagara river, for which the Park Commissioners, a public body, was to be paid "for each electrical horse-power generated and used and sold or disposed of over 10,000 electrical horse-power," includes power used by the power company for its own purposes as well as that sold to others. [Affirmed on this point.]

Att'y-Gen'l for Ontario v. Canadian Niagara Power Co., 9 D.L.R. 191, 107 L.T. 629, [1912] A.C. 852, varying 2 D.L.R. 425.

ELECTRIC LIGHT AND TELEPHONE WIRES — INSTALLATION IN SUBWAY — GRADE SEPARATION AT RAILWAY CROSSINGS — PUBLIC INTEREST.

Where grade separation has been ordered and city streets are lowered, in the public interest, so as to go under the railway lines by subways, public utility companies having telephone and electric light overhead wires on the streets should bear the entire expense of putting these wires underground except for their long distance telephone wires which may be carried overhead. [Bell Telephone Co. v. G.T., C.P.R. Cos.; Toronto (Brock Avenue Subway Case), 5 D.L.R. 297, 14 Can. Ry. Cas. 14, followed.]

Toronto Electric Light, Bell Telephone Cos. and Hydro Electric Commission v. C.P., C.N. Ry. Cos. and Toronto, 15 Can. Ry. Cas. 309.

ELECTRIC LIGHTS.

Use and location of poles on streets, see Municipal Corporations.

ELECTRIC RAILWAYS.

See Street Railways; Carriers; Railways.

Annotation.

Reciprocal duties of motormen and drivers of vehicles crossing tracks: 1 D.L.R. 783.

EMBEZZLEMENT.

See Theft.

EMINENT DOMAIN.

See Expropriation.

EMPLOYER'S LIABILITY.

See Master and Servant.

ENCROACHMENT.

Through mistake, see Adverse Possession; Estoppel.

Injunction to compel removal of encroaching wall, see Injunction.

NECESSITY OF STRICT DESCRIPTION OF LAND.

A plaintiff can only succeed secundum allegata et probata, and where a plaintiff takes a possessory action against his neighbour, charging him with encroachment on a specific part of his property (e.g., lot No. 6) and the neighbour denies this charge "as drawn" and the plaintiff persists, the action will be dismissed if the evidence shews the encroachment to have been on another part of the plaintiff's property (e.g., lot No. 7).

Viau v. Sauve, 9 D.L.R. 132. [Reversed by Supreme Court of Canada, judgment not reported.]

On an action for encroachment in constructing the wall of a building partly over the boundary line upon adjoining lands, the court has a discretion under 1 Geo. V. c. 25, s. 33 (Ont.) to award a money compensation for the encroachment if made under the belief that the land encroached upon was within his own boundaries, and in such case the judgment should decree that upon paying the compensation awarded the portion of the land which it represents should be vested in the encroaching party. If the land upon which lasting improvements have been made under mistake of title such as the wall of a building encroaching upon neighbouring land, is subject to a mortgage, the compensation money awarded on vesting the land in the trespasser under said s. 33 must be paid to the mortgagee and not to the owner of the equity of redemption unless the consent of the mortgagee to the adoption of the latter course is filed.

Ward v. Sanderson, 1 D.L.R. 356, 3 O.W.N. 802, 21 O.W.R. 254.

BUILDINGS — VENDOR AND PURCHASER — BUILDINGS ENCROACHING 2½ IN. IN REAR — INNOCENT PURCHASER.

Re Maton and Clavir, 6 D.L.R. 882, 4 O.W.N. 263.

BUILDINGS—INJURY TO ADJACENT PROPERTY —WATER FROM ROOF — INJUNCTION — DAMAGES — DESTRUCTION OF LINE FENCE—COSTS.

Huckell v. Pommerville, 1 D.L.R. 921.

The owner of an immovable sued by his neighbour for encroaching on the latter's land by a building in course of construction, may by dilatory exception have the proceedings stayed to enable him to summon in warranty the architect entrusted with the work.

Duberuil v. Labelle, 12 Que. P.R. 177.

TRESPASS — LAND — BOUNDARY — OVERLAPPING BUILDING — SUIT TO ESTABLISH TITLE.

McIntyre v. White, 10 E.L.R. 88.

MUNICIPAL LAW — EDWARD VII. BOULEVARD — LIABILITY — C.C., ART. 1053 — C. MUN., ART. 453 — S. REF. [1909] ART. 5886 (CITIES AND TOWNS).

The municipalities in the Province of Quebec, through which the Edward VII. Boulevard passes, which boulevard is built by virtue of a special Act of the government of the province at its expense, in the general interest, and under its direction, are not responsible for encroachments by the government superintendents or for damages caused thereby. In this case, these municipalities escape from the responsibility which the law imposes on them up to the time of taking possession of the public road after the work is completed. When the owner of land charges the builder of a public road along the front of his land with having encroached on his property, he must prove his right to the land which he pretends has been encroached upon. This proof is not found in the existence of a foot path made by the owner in front of his farm outside his fence, nor in the fact that the ditch is three feet from this fence, but the fence itself, existing from time immemorial, is a stronger proof of the limit of the lot on that side.

Brossard v. Laprairie, 56 Que. S.C. 114.

VENDOR AND PURCHASER — DESCRIPTION OF LAND—POSSESSION.

Re Butler and Henderson, 4 O.W.N. 498, 23 O.W.R. 576.

BUILDING — ENCROACHMENT ON LAND OF ANOTHER — STREET-LINE — BOUNDARIES — SURVEYS — DEDICATION — PRESUMPTION — ACQUIESCENCE IN PUBLIC USER — CONVENTIONAL BOUNDARY — PROJECTING EAVES — DISCHARGE OF WATER — OBSTRUCTION TO LIGHT — EASEMENT — IMPLIED GRANT — PRESUMPTION OF INTENTION — INJUNCTION — DAMAGES — COSTS.

Rous v. Royal Templar Building Co., 6 O.W.N. 498.

BUILDINGS — DEPRIVATION OF LIGHT — NOMINAL DAMAGES — COSTS.

Singer v. Prosky, 4 O.W.N. 1000, 24 O.W.R. 353.

ENEMY ALIEN.

See Aliens.

ENFORCEMENT.

Of mortgage, see Mortgage.

Of contracts, see Specific Performance.

Of judgment, see Judgment, VI.; Execution.

ENGINEERS.

Annotation

Stipulation in contracts as to engineer's decision: 16 D.L.R. 441.

PROFESSIONAL SERVICES — ESTIMATES — NEGLIGENCE.

A consulting engineer, admittedly skilled

and competent, who is called upon in a professional capacity to render an estimate of the cost of a work, is only liable, in the event of error, for negligence, and the onus of proving this negligence is upon his employer; his failure to test the bearing capacity of soil, to sustain a plant to be erected thereon, is not of itself negligence, if he was in fact familiar with the character of the soil.

Lea v. Medicine Hat, 37 D.L.R. 1, [1917] 3 W.W.R. 467.

ENLISTMENT.

See Militia; Military Law; Habeas Corpus, I B—7.

EQUITABLE ASSIGNMENT.

See Assignment, II.

EQUITY.

I. Jurisdiction.
A. In general.
B. Remedy at law.
C. Relief against judgments, orders, or awards.
D. Cases of fraud; mistake; conspiracy; trusts; wills.
E. To prevent irreparable damage.
F. To cancel instruments.
G. To avoid multiplicity of suits.
H. Retaining jurisdiction.
II. Transfers between law and equity.
III. Equity principles.
A. In general.
B. Coming into equity with clean hands.

Right to jury trial in equitable action, see Jury, I B—15.

Equitable execution, see Execution I—8.

Annotations.

Fusion with law; Pleading: 10 D.L.R. 503.

Agreement to mortgage after acquired property; Beneficial interest: 13 D.L.R. 178.

Rights and liabilities of purchaser of land subject to mortgages: 14 D.L.R. 652.

I. Jurisdiction.

A. In general.

(§ I A—1)—Fusing equity and law — Substantive and adjective law — Form of remedies.

A court with a single system of judicature combining both law and equity jurisdiction, may devise new forms of remedies to suit new and peculiar contract rights.

Boivin v. Lessard, 14 D.L.R. 808, 7 A.L.R. 97, 26 W.L.R. 312, 5 W.W.R. 794.

Equitable defences.

In an action in the King's Bench Division the presiding judge has, under s. 18 of the Judicature Act, 1909, all the power and may exercise all the jurisdiction and apply all the procedure of the Chancery Division necessary to afford every kind of equitable relief claimed or appearing incidentally in the course of the proceeding, but if a defendant raises an equitable defence, he is bound by the equitable principles applicable to the circumstances of the case in their entirety.

Duffy v. Duffy, 43 N.B.R. 555.

(§ I A—2)—Titles and property in general.

An agreement by a shipbuilding company to build a vessel for a navigation company for a certain price, payments to be made every two months to the extent of 80 per cent of the work done and material supplied, and the balance on completion, which provides that, as the work goes on after the first payment, the property in the vessel so far as constructed and in all machinery and materials purchased therefor shall become vested in and be the absolute property of the navigation company, and that the shipbuilding company will, at the request of the navigation company, execute and deliver to it such bill of sale as may be necessary so as to vest the vessel, machinery and materials in the navigation company, operates in equity, without the execution of a bill of sale, as a transfer of ownership to the navigation company, from the time of the first payment, of all the vessel, machinery and materials. [Holroyd v. Matshall, 10 H.L.C. 191, applied.]

Re Canadian Shipbuilding Co., 6 D.L.R. 174, 26 O.L.R. 564, 22 O.W.R. 585.

(§ I A—12)—Miscellaneous.

In matters where the Chancery and Probate Courts have concurrent jurisdiction, the Chancery Court will not act, when the question involved can be more conveniently and inexpensively disposed of in the Probate Court, unless some special reason be shewn why the Probate Court should not act.

Kennedy v. Slater, 4 N.B. Eq. 339.

B. Remedy at law.

Abatement of action pending action at law, see Abatement and Revivor.

Burden of showing that remedy is inadequate, see Evidence.

C. Relief against judgments, orders or awards.

Injunction against judgment, see Injunction.

Relief against judgment generally, see Judgment, VII.

D. Cases of fraud; mistake; conspiracy; trusts; wills.

Effect of fraud on right to equitable enforcement of contract, see infra, III.

Aid of, to participant in illegal contract, see Contracts.

Relief against fraudulent reduction of stocks, see Companies.

Setting aside sale for fraud, see Fraud and Deceit.

E. To prevent irreparable damage.

See Injunction, I B.

F. To cancel instruments.

As to cancellation of instruments generally, see Contracts V.

See also Reformation of Instruments.

On the ground of fraud, see supra, D.

(§ I F—35)—In equity, it is not necessary to the validity of the rescission of a sealed document, that such rescission be effected by an instrument under seal, but rescission may result from the abandonment of the contract by one party and the other accepting the abandonment, and this may be implied from their acts, although there is no writing whatever.

Handel v. O'Kelly, 8 D.L.R. 44, 22 Man. L.R. 562, 22 W.L.R. 407, 3 W.W.R. 367.

(§ I F—37)—Families Compensation Act—Release obtained by fraud—Money neither tendered back nor turned into court—Equitable jurisdiction.

In an action by the dependants of the deceased under Families Compensation Act, R.S.B.C. 1911, c. 82, a release pleaded in defence may be set aside by the court under its equitable jurisdiction, although the money paid as consideration for the release has been neither tendered back to the defendant nor brought into court to abide the issue of the action.

B.C. Electric R. Co. v. Turner and Trawford, 18 D.L.R. 430, 49 Can. S.C.R. 470, 6 W.W.R. 288, 18 Can. Ry. Cas. 430, affirming 9 D.L.R. 817, 15 Can. Ry. Cas. 39, 18 B.C.R. 132.

G. To avoid multiplicity of suits.

See Jury, Trial, Injunction.

H. Retaining jurisdiction.

(§ I H—45)—Specific performance—Primary relief—Damages—Alternative relief—Court of equity—Jurisdiction.

Where specific performance was the primary claim in the action and a decree was made for specific performance and alternatively on failure of that relief, a reference as to damages, the proceeding for damages, is nevertheless one in equity and not at common law, and an appeal from the decision of the Provincial Appellate Court affirming the right to damages might have been taken as of right to the Supreme Court of Canada within 60 days thereafter without awaiting the result of the reference; and where no appeal was taken from that judgment it would not be competent for the court hearing the case on further directions after a report had been made on the referred question of damages, to open up the original decree, nor would it be competent on an appeal from the judgment on further directions for the Appellate Court to make an order which could not be made below.

Windsor, Essex & Lake Shore Rapid R. Co. v. Nelles, 20 D.L.R. 713, [1915] A.C. 355, affirming 10 D.L.R. 832, 47 Can. S.C. R. 230.

II. Transfers between law and equity.

(§ II—50)—Where there is a bona fide dispute as to plaintiff's title in a partition suit brought in a Court of Equity that court will not, under cover of a suit for partition, adjudicate upon a purely legal title but will leave the plaintiff to his remedy at law.

Durant v. Huestis, 1 D.L.R. 786, 10 E.L. R. 423.

III. Equity principles.

(§ III—55)—Assignment of future chose in action.

An assignment of a future chose in action by way of a construction contract for a number of railway stations operates in equity as an agreement binding the conscience of the assignor and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done and that the agreement imports in equity a trust.

Fraser v. Imperial Bank, 10 D.L.R. 232; 47 Can. S.C.R. 313, 23 W.L.R. 445, 3 W.W. R. 649, reversing 1 D.L.R. 678, 22 Man. L. R. 58.

(§ III—56)—Mutuality—Real estate agent's commission—Default in purchase price.

Where an agent, having become entitled to his commission for the sale of land, after receiving half of it, agrees with his principal that he waives all claim to the balance if the purchaser does not pay the second instalment of the purchase price on the due date, and the purchaser fails to pay on that date, but pays the instalment with interest on a subsequent date, the court in the exercise of its equitable powers will not allow the agreement to stand, where it appears that it was not the intention of the parties that there should be such absolute forfeiture, but that the agent understood that the agreement in question, which was drawn up by his principal's solicitor, was intended only to provide for a forfeiture in the event of the purchaser failing to carry out the agreement of purchase.

DeSalis v. Jones, 11 D.L.R. 228, 24 W.L. R. 65, 4 W.W.R. 522.

(§ III—59)—"He who seeks equity must do equity."

Where the court is called upon under equitable pleas to set aside a tax sale which is equally void at law and in equity, the court does so, only on such terms as are equitable, upon the principle of equity, "He who seeks equity must do equity," so that where the plaintiffs might have brought a simple action in ejectment, but, instead, asked and received equitable relief, they come under the obligation to do equity.

Richards v. Collins, 9 D.L.R. 249, 27 O L.R. 390, 22 O.W.R. 592, 23 O.W.R. 499.

ESCAPE.

RECAPTION UNDER ORIGINAL WARRANT.

If a prisoner, when being taken to jail to serve a sentence imposed on summary conviction, escapes because the constable became intoxicated and permitted him to go, the escape is not a voluntary one and the escaped prisoner may be retaken on the original commitment.

R. v. Hall, 32 D.L.R. 236, 27 Can. Cr. Cas. 1.

ARREST WITHOUT WARRANT.

On a charge of escaping from the custody of a police officer after an alleged arrest, the legality of the arrest must be shewn.

R. v. Stackhouse, 41 D.L.R. 420, 29 Can. Cr. Cas. 151, 52 N.S.R. 242.

RECAPTION—PRISONER IN HOSPITAL.

When the period of imprisonment under a warrant of commitment following a summary conviction has begun to run, there can be no arrest to serve the remainder of the sentence after the period specified has expired by effluxion of time computed from the commencement of the imprisonment, because of the accused having been taken from gaol to a hospital whence she was allowed to depart without any attempt at recaption during the unexpired period of her sentence.

R. v. Peters, 29 Can. Cr. Cas. 298.

ASSISTING ESCAPE OF CRIMINAL INSANE PERSON COMMITTED TO INSANE ASYLUM.

The King v. Trapnell, 22 O.L.R. 219, 17 Can. Cr. Cas. 346, 17 O.W.R. 274.

ESCHEAT.

As to assets of defunct corporation, bona vacantia, see Companies, VI C—330.

Annotation.

Provincial rights in Dominion lands: 26 D.L.R. 137.

PROVINCIAL AND DOMINION RIGHTS—BONA VACANTIA—JURA REGALIA—ESCHEAT.

In so far as the rights of the Dominion to escheated lands or bona vacantia in the province are concerned, the provisions of the Alberta Statute, 5 Geo. V., c. 5, s. 1, purporting to vest the property of intestates dying without next of kin or other persons entitled thereto in the Crown in right of the province, are to be regarded as ultra vires.

The King v. Trusts & Guarantee Co., 26 D.L.R. 129, 15 Can. Ex. 403. [Affirmed in 32 D.L.R. 469, 54 Can. S.C.R. 107, 35 W. L.R. 358.]

ESCROW.

SEALED INSTRUMENT — EXPRESS WORDS NOT NECESSARY—EVIDENCE OF SURROUNDING CIRCUMSTANCES SHOWING THAT CONDITIONAL DELIVERY INTENDED.

It is not essential to use express words in order to make a sealed instrument operate as a mere escrow; what would otherwise be an absolute delivery as a deed may be restricted by evidence of the surrounding circumstances shewing that only a conditional delivery could have been intended. [Trust & Loan Co. v. Ruttan, 1 Can. S.C.R. 564, followed.]

Molsons Bank v. Cranston, 45 D.L.R. 316, 44 O.L.R. 58.

Where upon the formation of a mining syndicate to take over the plaintiff's mining claim, a trust company was appointed trustee to hold a transfer of the property but, so as not to affect the rights inter se of the parties thereto, undertook not to register the transfer, a registration thereof in violation of such agreement will be vacated where no intervening rights are in question; but a reconveyance of the land will not be ordered merely because of such breach of agreement where the trust company held the title to the property for valuable consideration as against the plaintiff and upon trusts in favour of the members of the syndicate who had become such members and paid for their syndicate shares upon the faith of the title being "vested" in the trust company.

Wiley v. Trusts and Guarantee Co. (No. 2), 5 D.L.R. 409, 3 O.W.N. 1494, 22 O.W. R. 625, reversing 3 D.L.R. 295.

ESTATES.

See Deeds; Wills, III; Easements; Adverse Possession; Land Titles.

ESTOPPEL.

I. OF MUNICIPALITY OR OF CROWN.
II. BY DEED OR RECORD.
A. By deed.
B. By bond or mortgage.
C. By record.
III. EQUITABLE ESTOPPEL OR ESTOPPEL IN PAIS.
A. In general; effect.
B. Of married women.
C. As to corporate existence of powers.
D. By contracts or agreements generally; ratification.
E. By conduct, request, or admissions, generally.
F. By assent.
G. By laches, silence or acquiescence.
H. By representations.
I. By negligence or fraud.
J. By inconsistence in acts, claims, etc.
K. By receiving benefits.
L. By character or relation of parties.
M. Who affected.
N. Who may be set up.

Annotations.

Ratification of agency: Holding out as ostensible agent: 1 D.L.R. 149.

Estoppel by conduct: Fraud of agent or employee: 21 D.L.R. 13.

Estoppel as against setting up ultra vires as a defence in actions on corporate contracts: 36 D.L.R. 107.

I. Of municipality or of Crown.

(§ I—6)—Of municipality to deny validity of by-law or contract.

A municipal corporation cannot attack the validity of a contract between it and an electric railway company because the by-law authorizing its execution was not submitted to the electors for approval as required by s. 64 of the B.C. Municipal Act of 1897, where the company had made large expenditures as a direct consequence of its execution, if not pursuant to the contract. [Re Point Grey, 16 B.C.R. 374, distinguished.]

Burnaby v. B.C. Electric R. Co., 12 D. L.R. 320, 3 W.W.R. 628.

(§ I—9)—By inconsistency in acts or claims.

The rule of law that where one party to a contract refuses to perform his part, the other party is freed from the obligation to perform any conditions precedent before he can maintain an action for the breach thereof, does not apply to wrongs independent of contracts, so as to waive the necessity for performing conditions precedent required in order to obtain a permit issuable by a public authority (e.g., a building permit), although the permit was refused upon other grounds.

Frankel v. Winnipeg, 8 D.L.R. 219, 23 Man. L.R. 296, 22 W.L.R. 597, 3 W.W.R. 405.

(§ I—10)—Crown becoming owner of land after notice to expropriate leasehold interest of tenant—Collection of interim rent.

The fact that the Crown, after giving notice of expropriation of property required for public purposes both to the owner and the tenant, accepted from the tenant rent accruing due under the contract of tenancy with the former owner, is not necessarily a waiver of the notice of expropriation served on the tenant, and will not estop the Crown from proceeding with the expropriation as to the tenant's leasehold interest.

Re Minister of Public Works and Billinghurst, 13 D.L.R. 769, 5 O.W.N. 49, 25 O.W. R. 28.

II. By deed or record.

A. By deed.

(§ II A—20)—Description of width of highway—Accepted survey — Municipality—Owner.

In a dispute between a municipality and the owner of land as to the width of a highway running through the land, the fact that the land was acquired by the owner through a conveyance which described the land according to a certain plan then registered and which plan shewed the width of the highway to be as claimed by the municipality, is binding on the owner, especially where a subsequent survey and plan were made at the request of the government based upon the former plan; and the owner, in an agreement for the sale of the land, dealt with it and described it by the new plan.

Peterson v. Bitulithic & Contracting Co., 12 D.L.R. 444, 23 Man. L.R. 136, 24 W.L.R. 19, 4 W.W.R. 223, reversing 7 D.L.R. 586.

Railways—Negligence — Employees' relief fund — Temporary employee — Contract of service.

An agreement by a temporary employee of the Intercolonial Railway, as a condition to his employment, to become a member of the Temporary Employees' Relief and Insurance Assn. and to accept the benefits provided by its rules and regulations in lieu of all claim for personal injury, is perfectly valid and a bar to his action against the Crown for injuries sustained in the course of employment. By accepting the benefits, he is estopped from setting up any claim inconsistent with those rules and regulations. [Miller v. G.T.R. Co., [1906] A.C. 187, and Saindon v. The King, 15 Can. Ex. 305, distinguished; Conrad v. The King, 49 Can. S.C.R. 577, followed.]

Gingras v. The King, 44 D.L.R. 740, 18 Can. Ex. 248.

Transferring under existing plans—Effect.

An estoppel may be created as to a right to object that subdivision plans were not binding upon a person laying claim to a part of a street or road shewn thereon by his making conveyances of adjoining property in describing which such street or road is recognized and approved.

Rowland v. Edmonton, 20 D.L.R. 36, 8 A.L.R. 1, 6 W.W.R. 1498. [Reversed, 21 D.L.R. 33, 50 Can. S.C.R. 520.]

One, who delivered a transfer of property to a trustee as paid for, is estopped, by permitting the latter to represent himself in advertisements made for the public to act upon, as being vested with such property, from claiming a vendor's lien, as against persons who, on the strength of such advertisements, became members of a syndicate formed to deal with such property and for the benefit of whom the trust was created.

Wiley v. Trusts and Guarantee Co., 5 D. L.R. 409, 3 O.W.N. 1494, 22 O.W.R. 625.

Acknowledgment under seal — Of payment in agreement of sale—Conclusiveness—As to assignee.

Coast Lumber Co. v. Bates, 37 D.L.R. 398, [1917] 2 W.W.R. 1223.

(§ II A—23) — Conveyance of dower to executor — Compelling account of secret profits.

A widow, the sole beneficiary of her deceased husband, does not bar herself of all interest in his land by conveying her dower interest to the executor in order to facilitate a sale, where the deed was not intended to transfer the money arising from the sale; she may still bring an action against the executor for an account of a secret

profit made by him from the sale, where the land was purchased for his benefit.

Shaw v. Tackaberry, 15 D.L.R. 475, 29 O.L.R. 490.

(§ II A—24)—Estoppel by reservation.

A purchaser, taking under a registered plan is bound by the plan and is not entitled to set up that the plan is invalid as regards streets shewn thereon on the ground that the same encroach on another plan and that no order altering the other plan had been made under the statute in that behalf, where the deed of conveyance to such purchaser excepts such streets from the land conveyed and reserves the right of others to use the same.

Peake v. Mitchell; Mitchell v. Peake, 10 D.L.R. 140, 4 O.W.N. 988, 24 O.W.R. 291.

(§ II A—26)—Covenants for title—Crown patent.

Estoppel arises against the grantor in a deed or mortgage of land in respect of his covenants for title from denying that he was the owner of the land at the date of the deed or mortgage, although his title at that time was merely that of a locatee prior to the Crown Patent; in such case a subsequent issue of the patent to the grantor to his personal representative after his decease feeds the estoppel in favour of the grantee or mortgagee. [Bolter v. Hamilton, 15 U.C.C.P. 125; Doe d. Irvine v. Webster, 2 U.C.Q.B. 224, followed.]

Berard v. Bruneau, 22 D.L.R. 83, 25 Man. L.R. 400, 8 W.W.R. 635.

C. By record.

(§ II C—35)—By record—Judgment against one or two debtors.

A default judgment irregularly signed against the employer in an action for wages brought against the employer and also against the bank which had taken possession of and sold the effects of the employer under the latter's statutory security given the bank under s. 88 of the Bank Act (Can.), 1913, will not bar the plaintiff from proceeding with the action against the bank, where the irregular judgment was abandoned by plaintiff at the trial of the claim against the bank, and leave would if necessary be given to have the judgment formally vacated, but, semble, both remedies might be pursued concurrently and no abandonment would be necessary to save recourse against the bank had the judgment been regular. [Wake v. C.P. Lumber Co., 8 B.C.R. 358, distinguished; Hammond v. Schofield, [1891] 1 Q.B. 453, applied.]

Edborg v. Royal Bank, 16 D.L.R. 385, 19 B.C.R. 514, 27 W.L.R. 680, 6 W.W.R. 180.

Res judicata—Summary conviction—Certiorari—Habeas corpus.

The doctrine of res judicata applies to prevent an Appellate Court reopening at the instance of the accused, on an appeal from a habeas corpus order which refused a discharge from custody, the question of the validity of the summary conviction in question which had previously been decided against the accused on her motion to quash the conviction itself against which decision no appeal had been taken.

R. v. Jackson, 29 Can. Cr. Cas. 352, 40 O.L.R. 173, affirming 12 O.W.N. 191. [See 12 O.W.N. 77, 161.]

(§ II C—36)—By judgment on inconsistent pleading.

Where in an action for breach of contract the defendants set up a counterclaim asking for (1) rescission and (2) recovery of a certain sum of money as damages for alleged false representations upon which the claim for rescission is based, without asking for alternative relief, and then defendants' counsel elects to rely upon the claim for damages and the Trial Judge gives judgment both in the action and on the counterclaim, and formal judgment is duly entered thereon, the defendants, if they accept the judgment so far as it is in their favour, are precluded from taking a limited appeal from that portion of the judgment which is against them upon their other claim inconsistent therewith, particularly where no cross-appeal has been launched.

Garvey v. Massey, 9 D.L.R. 366, 23 W.L.R. 7, 3 W.W.R. 767.

By judgment.

Where a municipal corporation accepted the promissory notes of a taxpayer for his tax arrears and by reason thereof had the taxes marked paid in the collector's tax roll and thereafter upon default in payment of some of the notes, took judgment thereon, the municipality is thereby estopped from afterwards seeking any other remedy for the taxes than what is available upon or incident to the notes and the judgment obtained.

Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 31 O.L.R. 62, 23 O.W.R. 170.

By judgment—Action to recover possession of lands.

Where an action to recover possession of land and for mesne profits brought by a trustee was not competent under the Land Registry Act, R.S.B.C., c. 127, s. 104, by reason of the transfer to the trustee not having been registered, but at the trial the cestui que trust as the registered owner was at the trustee's request substituted as a party plaintiff and after a trial of the merits to which the trustee proceeded under cover of the substituted plaintiffs name the action was dismissed and it was adjudged that neither the trustee nor the cestui que trust was entitled to possession, such judgment may be set up as res judicata in a subsequent action for possession brought by the trustee as to the merits disposed of in the former action; nor is the trustee's position improved as to the second action by the intermediate registration of his title and the operation of the Land Registry Act where the real issue in both proceedings did not affect the validity

of the registered title but concerned the amount which the defendant should pay under a purchase agreement from the cestui que trust.

Dominion Trust v. Masterton, 20 D.L.R. 305, 20 B.C.R. 389, 29 W.L.R. 837, 7 W.W.R. 953.

ESTOPPEL BY JUDGMENT—CONCLUSIVENESS.

A judgment inter partes raises an estoppel only against the parties to the proceedings in which it is given and their privities, i.e., those claiming or deriving title under them. As against all other persons, it is res inter alios acta, and with certain exceptions, though conclusive of the fact that the judgment was obtained and all its terms, is not even admissible evidence of the facts established by it.

International Harvester Co. v. Leeson, 7 W.W.R. 590, 30 W.L.R. 293.

BY RECORD—JUDGMENT—RES JUDICATA.

Parties to an action are estopped by the findings of fact involved in the judgment. A party cannot in a subsequent proceeding raise a ground of claim or defence which upon the pleading was open to him in a former one.

Vicars v. Williams Machinery Co., 7 W.W.R. 177.

III. Equitable estoppel or estoppel in pais.

A. IN GENERAL; EFFECT.

(§ III A—40)—ESSENTIALS—KNOWLEDGE OF LEGAL RIGHTS.

No estoppel arises where there is no evidence that both the contracting parties were not fully aware of their respective legal rights. [Toronto Electric Light Co. v. Toronto, 31 D.L.R. 577, 591, [1917] A.C. 84, 38 O.L.R. 72, followed.]

Union Natural Gas Co. v. Chatham Gas Co., 34 D.L.R. 484, 38 O.L.R. 488. [See also 40 O.L.R. 148, 38 D.L.R. 753, reversed, 40 D.L.R. 485, 56 Can. S.C.R. 253.]

BY CONDUCT — MISREPRESENTATION AS TO VALUE—OBLIGATION ON DISCOVERY OF TRUTH.

A plaintiff who seeks to set aside an agreement for the sale of land to him on the ground of the defendant's alleged misrepresentation as to value relied upon and inducing the contract, cannot succeed where it appears that, after the plaintiff actually learned the value of the land, he ratified the agreement.

Giletz v. Runham, 13 D.L.R. 616, 25 W.L.R. 389.

BY CONDUCT.

A defendant who appears as a witness to answer interrogatories on articulated facts and who objects to the relevancy of questions put to him, and who objects to questions put to other witnesses, by such proceeding acquiesces in his being summoned as a defendant and cannot raise later the question of his incapacity.

Serling v. Levine, 7 D.L.R. 266, 47 Can. S.C.R. 103, 12 E.L.R. 216.

To constitute an estoppel in pais, there must be a representation made with the intention that it should be acted upon, which representation is acted upon by the party to whom it is made, in the belief that it is true and by which he is prejudiced.

Gibson v. Toronto Construction Co., 40 N.B.R. 309.

(§ III A—41)—BY CONDUCT.

Canada Law Book Co. v. Butterworth, 9 D.L.R. 321, reversed; Canada Law Book Co. v. Butterworth (No. 2), 12 D.L.R. 143, 23 Man. L.R. 332. [Appeal to Privy Council dismissed, 16 D.L.R. 61.]

BY CONDUCT—CHANGE OF POSITION.

To establish an estoppel by conduct it must be shewn that the party relying upon it was deceived by the conduct of the other party, and that he altered his own position to his detriment by reason of such conduct of the other party.

Monarch Life Ass'ce Co. v. Mackenzie, 15 D.L.R. 695, 25 O.W.R. 743, reversing 45 Can. S.C.R. 232.

ESSENTIALS OF—CHANGE OF POSITION.

To found an estoppel it must be shewn that the party for whose benefit it is claimed altered his position because of the representation or act of the other.

Bank of Ottawa v. Stamco, 22 D.L.R. 679, 8 W.W.R. 574.

KNOWLEDGE OR RELIANCE OF OTHER PARTY.

A party may, without pleading it, take advantage of the estoppel derived from the rule that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his previous position, the former is concluded from averring against the latter a different state of things as existing at the same time. [Freeman v. Cooke, 18 L.J. Ex. 11 Ruling Cases 82, followed.]

Nixon v. Dowdle (No. 2), 2 D.L.R. 397, 20 W.L.R. 749, 2 W.W.R. 198.

BY CONDUCT—CHANGE OF POSITION.

To establish an estoppel by conduct the party setting it up must shew that he relied upon it and altered his position in consequence.

Wood v. Smart, 16 D.L.R. 97, 26 W.L.R. 817.

Where a defendant, being sued by his lessor, in order to avoid all risk of cancellation of the lease, pays an alleged surcharge under protest, reserving to himself the right to proceed by way of action for the recovery of such surcharge; the defendant is, notwithstanding the protest, estopped of his right to recover back the amount of the surcharge so paid, provided he made such payment in the absence of mistake and so made it with full knowledge of the cause, although he could otherwise have resisted the surcharge on the very same grounds which he now invokes in his claim for payment back.

Girard v. Brunet, 18 Rev. de Jur. 503.

(§ III A—45)—Failure to raise objection in pleading.

Where the defendant's counsel failing to take any objection on the trial to the fact that the Statute of Frauds was not pleaded to the counterclaim though he treated it as if it had been properly raised, his objection first taken thereto after trial on an argument directed by the court upon a new question suggested at the close of the trial, will be overruled and the plaintiff's pleadings will be deemed amended so as to raise such defence.

Frith v. Alliance Investment Co., 5 D.L.R. 491, 4 A.L.R. 238, 20 W.L.R. 551, 1 W.W.R. 907. [Affirmed, 10 D.L.R. 765, 6 A.L.R. 197.]

B. Of married women.

From attacking assessment of property, see Taxes, III B—110.

Estopped from claiming dower, see Dower.

(§ III B—50)—Coverture—Pleading.

A married woman failing to plead coverture is estopped by the judgment from setting it up afterwards.

Pearson v. Calder, 30 D.L.R. 424, 36 O.L.R. 458, 10 O.W.N. 93.

(§ III B—52)—As to separate estate—Permitting expenditures — Supposed ownership of husband.

A married woman is estopped from setting up her title to land as against the claim for expenditure in developing the land under an agreement with her husband by one whom she encouraged to make expenditures thereon, knowing that he supposed the property to belong to her husband.

Harvey v. Parton, 12 D.L.R. 834, 24 W.L.R. 379.

(§ III B—53)—Separation agreement.

Where it is provided by a separation agreement that the husband shall obtain a religious separation in another country and if not procured within 3 months by reason of any default or neglect on the part of the wife the allowance for separate maintenance shall cease, it becomes the duty of the wife to facilitate the obtaining of such religious separation, and if she declines to go to the foreign country which she knew when making the agreement would be necessary to the obtaining of the religious separation and thereby prevents her husband from fulfilling that condition of the agreement, and thereafter makes no claim thereon for many years, she will be estopped from claiming that her husband was in default in respect of maintenance payable by the terms of the agreement "until the separation is procured."

Levi v. Levi (No. 2), 3 D.L.R. 535, 21 W.L.R. 593, 2 W.W.R. 521, affirming 1 D.L.R. 776, 20 W.L.R. 598.

(§ III B—54)—To deny validity of instrument—Pinning together incomplete memoranda — Statute of frauds—Sufficiency.

Defendant's request that a memorandum extending an option given by him to plaintiffs to purchase land be pinned to the original option, estops him to assert insufficiency of the memorandum in itself within the Statute of Frauds.

McGregor v. Chalmers, 11 D.L.R. 157, 24 W.L.R. 176, 4 W.W.R. 256.

To deny validity of instrument, stood by.

Where a husband, who had been in the habit of conducting his wife's business, executes an "oil lease" of lands belonging to her, in which lease she does not join, but stands by at the execution thereof, reads the instrument, knows its contents and expresses her approval, and the husband accepts rent under the lease, and later the wife herself actually subscribes her name to the instrument in order to confirm it, she is estopped as against assignees of the lease from claiming that there was no valid execution of the lease.

Maple City Oil & Gas Co. v. Charlton, 7 D.L.R. 345, 3 O.W.N. 1629.

C. As corporate existence of powers.

From disclaiming liability as shareholder after participating in meetings, see Companies, V F—241.

(§ III C—56)—By-law — Payment for shares.

Where the plaintiff a committeeman of a co-operative society, had in such capacity given effect to a by-law of the society dealing with the withdrawal of members and payment for their shares, he was estopped from setting up, in an action to set aside such by-law, that it was irregular; and leave was granted to set up a proper plea of estoppel.

Merritt, etc., Society v. Young, 34 W.L.R. 826.

D. By contracts or agreements generally; ratification.

Attornment clause, see Landlord and Tenant, I—1.

As to forfeiture of policy, see Insurance, III F—145; V B—180.

(§ III D—60)—By agreements generally—Right to object to title—Root of title.

Under an agreement for the sale of realty, a covenant by the purchaser accepting the plaintiff's title does not estop the purchaser from subsequently objecting to the title where the objection goes to the root of the title.

Baskin v. Linden, 17 D.L.R. 789, 24 Man. L.R. 459, 28 W.L.R. 418, 6 W.W.R. 1053.

Promise to assignee—"Until otherwise advised."

A promise by a debtor to pay the money due under a building contract, to an assignee thereof, "until otherwise advised," does not estop him from setting up a provision in the contract as to his right to discharge out of the contract price any in-

indebtedness for the work on the part of the contractor.

Ledingham v. Merchants Bank, 35 D.L.R. 191, 24 B.C.R. 207, [1917] 2 W.W.R. 1016.

(§ III D—62)—Recitals in bill of lading—Weights or quantities.

Where there is nothing in the bill of lading or shipping bill of the railway to limit its responsibility for the weights or quantities entered on the bill the railway company is estopped from denying that approximately the quantity stated with the addition of the words "more or less" had been received for shipment.

Randall v. C.N.R. Co., 21 D.L.R. 457, 25 Man. L.R. 293, 19 Can. Ry. Cas. 343, 8 W. W.R. 413.

(§ III D—63)—Agency—Estoppel to deny—Clothing agent with full indicia of authority.

Where a railway company furnished its customs agent with the necessary documents, including accepted cheques, for the payment of duties necessary to enter goods through the customs house, and the agent, by a system of frauds, was able to pass a large quantity of goods free of duty, receiving back from the customs officers, on the assumption that all imposts had been fully paid, the difference between the face of the cheques and the duty actually paid, which the agent converted to his own use, the company is estopped in an action by the Crown for the duties unpaid on goods so passed and not entered for duty from claiming that in accepting the money returned, he was not acting within the scope of his employment. [British Mutual Banking Co. v. Charnwood Forest R. Co., 18 Q. B.D. 714; Ruben v. Great Fingall Consolidated, [1906] A.C. 439, distinguished.]

The King v. C.P.R. Co., 11 D.L.R. 681, 12 E.L.R. 309, 14 Can. Ex. 150.

As to agency.

Where one has so acted as from his conduct to lead another to believe that he has appointed some one to act as his agent and knows that that other person is about to act in that behalf, then unless he interposes, he will in general be estopped from disputing the agency, though in fact no agency really existed. [Pole v. Leask (1863), 33 L.J. Ch. 155, applied.]

Ramelson v. North West Hide & Fur Co., 15 D.L.R. 905, 27 W.L.R. 160.

As to agency.

Estoppel does not arise to prevent a denial of agency in respect of a purchase made by one in the name of another from whom in fact he had no authority, where the latter is first notified of the transaction after the pretended agency has been acted upon and after the consequent loss had been sustained, although, instead of directly repudiating any liability, the pretended principal answers a demand for settlement in terms which imported a doubt on his part as to the evidence of his legal position when he had no doubt, ex gr., by writing to the deceived party that while not admitting that the pretended agent is correct in asserting that he was authorized, the writer does not wish for the present to take the stand that he had absolutely no authority. Where one learns that another had been without authority purporting to act in his name, he owes a duty to the third person with whom the transaction has taken place, to inform him that the transaction was without authority, and a failure in this duty may operate as an estoppel against a subsequent denial of authority as regards obligations afterwards entered into by such third person on the faith of the pretended agency.

Wiggin v. Browning, 7 D.L.R. 274, 4 O. W.N. 155.

(§ III D—65)—Power of attorney.

The giving, by one to whom a certificate of title was issued and the land transferred as security for a debt, to the grantor of a power of attorney to deal with the granted land estops the former from questioning a subsequent transfer for value by the grantor to a third person.

Cooper v. Anderson, 5 D.L.R. 218, 20 W. L.R. 347, 21 W.L.R. 902.

(§ III D—66)—By ratification — Sales by promoter to company—Secret profits.

The right to compel a promoter to refund secret profits made from a purchase of property for a company he was promoting, is waived by the company, where, with full knowledge of all the circumstances, it entered into an agreement with the seller of the property for an extension of the time for payment.

Graham Island Collieries v. Canadian Development Co., 12 D.L.R. 316, 3 W.W.R. 817.

By ratification.

To establish estoppel by ratification of a voidable transaction entered into between parties in a fiduciary relationship it must be shewn by clear and cogent evidence that the party against whom the estoppel is set up elected to proceed with the transaction as valid, notwithstanding the breach by the other party of the fiduciary obligation to disclose certain facts, and that such election was made after having brought to his mind the proper materials upon which to exercise his power of election.

Laycock v. Lee, 1 D.L.R. 91, 17 B.C.R. 73, 19 W.L.R. 841.

(§ III D—67)—By recital in contracts generally.

Where the assignee of a contract desires to set up a claim against the other contracting party which would not be available if set up by his assignor, ex. gr., his purchase without notice that a part of a sum recited in the contract to have been paid had not in fact been paid by reason of dishonour of the cheque given therefor, and the estoppel against the other con-

tracting party by reason of the assignee's innocent reliance upon the recital, the onus of proving such claim of equitable estoppel is upon the assignee. [Hals. vol. 13, p. 371, par. 523, approved.]

McKenzie v. Goddard, 2 D.L.R. 354, 20 W.L.R. 912, 1 W.W.R. 1108.

(§ III D—68)—Forgery incapable of ratification — Promissory note — Material change.

The unauthorized addition of an interest clause to a promissory note is forgery which is incapable of ratification but under some circumstances the maker may be estopped even from setting up a forgery.

Wood v. Smart, 16 D.L.R. 97, 26 W.L.R. 817.

E. By conduct, request or admissions generally.

Acknowledgment of statement of account, see Banks, IV A—70.

Alteration of note, blanks, see Bills and Notes, V B—135.

(§ III E—70)—By conduct—Unearned funds—Construction contract—Contractor—Subcontractor.

Where a railway company pays the monthly estimates on a construction contract to a bank under a notice of prior assignment to it by the original contractor, and where the bank has notice that the beneficiary interest in such estimates has passed by equitable assignment to a subcontractor, the bank is estopped on its claim for future advances from denying such equitable assignment in defeat of the subcontractor's claim, if it has with such knowledge silently stood by and permitted the subcontractor to go on with the construction work under the contract. [Russell v. Watts, 10 App. Cas. 590, 613; Stronge v. Hawkes, 4 DeG. M. & G. 186, 196, applied.]

Fraser v. Imperial Bank, 10 D.L.R. 232, 47 Can. S.C.R. 313, 23 W.L.R. 445, 3 W.W.R. 649, reversing 1 D.L.R. 678, 22 Man. L.R. 58.

Vendor of lands—Inconsistent lease—Rescission.

Where a vendor, notwithstanding his contract to sell the lands whereby the purchaser was entitled to possession, leases for a year to a stranger, he has thereby disabled himself from performing his contract of sale and entitled the purchaser to rescind.

Larson v. Rasmussen, 10 D.L.R. 650, 5 A.L.R. 479, 24 W.L.R. 239, 4 W.W.R. 53.

Correspondence—Defendant, liability of—Plaintiff employed by another company—Reliance on defendant's conduct.

Estoppel is not raised by correspondence shewing that defendant company entertained the belief that it was liable for work done by the plaintiff where the plaintiff was in fact employed by another company not assuming to act for or on behalf of defendant company, unless it is also shewn that plaintiff changed his position to his prejudice in reliance upon defendant company's conduct and letters.

Dominion Transport Co. v. General Supply Co., 20 D.L.R. 431, 7 O.W.N. 55.

No estoppel by conduct to deny an agent's authority is established on the part of the principal merely because one of its directors who had no particular management of the property in question upon being shewn a contract for the sale of pulp wood from the principal's land made by an agent who was employed for another purpose and for that alone, said nothing until he returned to the head office where he lost no time in informing the other directors as to the sale, resulting in the principal's solicitors at once taking the necessary steps to protect the principal's interest.

British North American Mining Co. v. Pigeon River Lumber Co., 2 D.L.R. 609, 3 O.W.N. 701, 21 O.W.R. 291.

Shareholders' guaranty.

A majority of the shareholders who have signed a personal guaranty of the credit of the corporation are by their conduct estopped from alleging that under a resolution the guaranty was only to be effective upon all the shareholders signing it.

Robinson v. Ellis, 27 D.L.R. 391, 9 S.L.R. 149, 34 W.L.R. 204, 10 W.W.R. 370. [See K. & S. Auto Tire v. Rutherford, 28 D.L.R. 357.]

Expropriation proceedings—Irregularities — Prosecuting claim before board.

In expropriation proceedings the conduct and action of the expropriated party in appointing his commissioners and prosecuting his claim before the board estops him, after the award has been made from attacking it on the ground of alleged irregularities anterior to the notice of expropriation.

Royal Trust Co. v. Montreal, 44 D.L.R. 767, 57 Can. S.C.R. 352, affirming 26 Que. K.B. 557.

Apparent authority to agent—Agreement between agent and debtor—Ratification by conduct.

Where an agent of a company has apparently been given authority by the company to make a settlement with a debtor, and agrees with the debtor to take a part of the debtor's goods in full settlement of the debt, the goods being shipped to the company's office and retained for a long period under circumstances which justified the debtor in believing that the agreement had been accepted by the company, the company is estopped on the ground of ratification or adoption from denying such agent's authority or the agreement.

McKay v. Tudhope Anderson Co., 44 D.L.R. 100, 14 A.L.R. 131, [1918] 3 W.W.R. 994.

Purchase of goods by branch office—Head office having no knowledge—Agent not authorized to purchase—Estoppel from denying authority.

Farm Products v. Macleod Flouring Mills,

43 D.L.R. 770, 14 A.L.R. 128, [1918] 3 W.W.R. 1035.

DEBTOR AND CREDITOR—APPLICATION OF PAYMENTS.

Plaintiffs were estopped from claiming an overpayment to defendant, the amount in question having been credited to plaintiffs' account and plaintiffs not having objected thereto on a going into of accounts between plaintiffs, plaintiffs' father and defendant, as a result of which, on payment of balance then appearing due, plaintiffs had given release to defendant and defendant had given up the father's note.

Milman v. Canadian Fairbanks-Morse Co., [1919] 1 W.W.R. 923.

(§ III E—71)—TO REPUDIATE AGENCY—RATIFICATION—DUTY TO REPUDIATE.

Where one learns that another without authority had purported to act in his name, he owes a duty to the third person with whom the transaction has taken place, to inform him that the transaction was without authority, and a failure in this duty may operate as an estoppel against a subsequent denial of authority.

Maple Leaf Portland Cement Co. v. Owen Sound Iron Works Co., 10 D.L.R. 33, 4 O.W.N. 721, 23 O.W.R. 907.

AS TO AGENCY—ESTOPPEL TO DENY—VALIDITY OF APPOINTMENT.

By holding out a person as its agent or permitting him to appear as such a company is estopped from questioning his authority on the ground that his appointment was not under seal; and contracts with persons dealing with him in good faith without notice of any informality in his appointment are binding on the company.

Pulford v. Loyal Order of Moose (No. 2), 14 D.L.R. 577, 23 Man. L.R. 641, 25 W.L.R. 868, 5 W.W.R. 452.

LEADING TO BELIEF APPOINTMENT OF AGENT.

Where one has so acted as from his conduct to lead another to believe that he has appointed someone to act as his agent, and knows that that other person is about to act on that behalf, then, unless he interposes, he will, in general, be estopped from disputing the agency, though in fact no agency really existed. [Pole v. Leask, 33 L.J. Ch. 161, followed.]

Imperial Elevator v. Hillman, 23 D.L.R. 420, 8 S.L.R. 91, 30 W.L.R. 951, 8 W.W.R. 381.

An owner who takes possession of and occupies a house upon its completion cannot escape payment for alterations made by the contractor because, in building, the contractor had departed from the owner's instructions or from the pattern of house he had indicated when making the contract for its erection.

MacKissock v. Black, 3 D.L.R. 653, 21 W.L.R. 424, 2 W.W.R. 465.

(§ III E—72)—TAKING POSSESSION AND PAYING INSTALMENT.

A buyer who has taken possession of the immovable sold and some time thereafter has paid an instalment on account of the purchase price, is estopped from later instituting a redhibitory action.

Jacobsen v. Peltier, 3 D.L.R. 132, 42 Que. S.C. 35.

(§ III E—73)—SUBMISSION BY CONDUCT—EXCESSIVE TAXES PAID WITHOUT PROTEST.

An assignee cannot recover taxes paid on the ground that the assessments were excessive, under an assignment of the claim from the heirs of a taxpayer who had paid such taxes for many years without protest or claim that the assessments were excessive.

McCarthy v. Hull, 12 D.L.R. 502.

SUBMISSION.

If the lessor of hotel premises, having a covenant against the lessee's assignment of the lease and against subletting, encourages negotiations between the lessee and third parties to whom the lessee was arranging to sell out the hotel business with the lease of the hotel premises and the lessor's assignee of the rent, with the lessor's knowledge and consent, receives several months' rent the new occupants, the lessor will be estopped from setting up the terms of such covenant against them.

Rudd v. Manhattan, 5 D.L.R. 565, 5 A.L.R. 19, 21 W.L.R. 929, 2 W.W.R. 798.

When one party makes against another a claim in the existence and amount of which he has an honest belief, and the other agrees to pay it without investigation, such agreement, made in good faith, cannot afterwards be repudiated on the ground that the amount is excessive. [Dixon v. Evans, L.R. 5 H.L. 606, applied; Smith v. Cuff, 6 M. & S. 160, distinguished.]

Brandon Electric Light Co. v. Brandon, 1 D.L.R. 793, 22 Man. L.R. 500, 20 W.L.R. 658, 2 W.W.R. 22.

(§ III E—74)—FORBEARANCE—SALE OF SHARES—DELAY IN ASSERTING MISREPRESENTATION.

One whose subscription for company shares was obtained by misrepresentation is not precluded from obtaining relief by delay in asserting his rights, where no change occurs in the status of the company in the meantime. [Farrell v. Manchester, 40 Can. S.C.R. 339; Aaron Reefs v. Twiss, [1896] A.C. 273, followed.]

Pioneer Tractor Co. v. Peebles, 15 D.L.R. 275, 6 S.L.R. 339, 26 W.L.R. 503, 5 W.W.R. 989.

UNAUTHORIZED HYPOTHECATION OF BLANK SHARE CERTIFICATE—FORBEARANCE TO CLAIM IT.

Where the owner of a share certificate endorses it in blank annd deposits it with a company as security for an advance, and such company hypothecates it with a bank as collateral security for its own benefit, such hypothecation is a fraud on the owner, and upon payment of his debt to the company he is entitled to a return of the certificate; but where the bank has in good faith

made advances to the company on the strength of such security, and the owner, upon learning that the certificate is in the hands of the bank, takes no steps to recover it, he is estopped by conduct from claiming delivery of the certificate free from encumbrances which he, by his own neglect, has allowed to be created. [Colonial Bank v. Cady, 15 App. Cas. 267, followed; France v. Clark, 26 Ch. D. 257, distinguished.]

MacDonald v. Bank of Vancouver, 25 D.L.R. 567, 22 B.C.R. 310, 32 W.L.R. 339, 9 W.W.R. 8.

FORBEARANCE.

In the case of a subsidence or landslip through natural causes, from a high level land to a contiguous lower one, the proprietor of the part carried away, who, though notified to remove it, fails to do so, and when aware of its removel by the owner of the land on which it has fallen, stands by without objection or protest, is estopped, after the expiration of nearly 2 years, from suing to recover the value of it.

Bell's Asbestos Mines v. King's Asbestos Mines, 21 Que. K.B. 234.

(§ III E—75)—WAIVER OF STRICT COMPLIANCE WITH TERMS OF CONTRACT.

Where a purchaser of lands on the small monthly instalment plan makes default in the monthly payments, and where after the occurrence of some of such defaults the vendor condones them and waives the strict condition as to time, that waiver applies to the instalments then overdue and not to those falling due at future dates.

Handel v. O'Kelly, 8 D.L.R. 44, 22 Man. L.R. 562, 22 W.L.R. 407, 3 W.W.R. 367.

A strict compliance with the provision in an order for the purchase of an engine, that if the machine failed to develop the horse-power stipulated for in the order the seller should be immediately notified thereof by the purchaser in a specified manner, is waived by the seller sending out experts to remedy the defect upon a notice to them from the purchaser not exactly in accordance with such provision.

Lennon v. Goold, etc., Co., 5 D.L.R. 836, 5 S.L.R. 228, 21 W.L.R. 918, 2 W.W.R. 829.

(§ III E—78)—TO DENY BEING SHAREHOLDER.

A shareholder's attendances as such at the meetings of the company may estop him from denying that he is a shareholder, but do not estop him from denying that he is a shareholder in respect of a greater number of shares than were covered by the certificates issued, issued to him and on which alone his vote at the shareholders' meeting would be based.

Re Matthew Guy Carriage & Automobile Co., (Thomas' Case), 1 D.L.R. 642, 3 O.W.N. 902, 21 O.W.R. 842.

(§ III E—79) — TO DENY BY RECEIVING RENT.

If a lessor of land who, after beginning suit against his lessee for possession, accepts rent from the lessee he thereby recognizes the latter as his tenant and his claim for possession must fail.

Alexander v. Herman, 2 D.L.R. 239, 3 O.W.N. 755, 21 O.W.R. 461.

TO DISPUTE LANDLORD'S TITLE.

Where, in proceedings against an alleged overholding tenant, certain evidence tendered by the alleged tenant in contradiction of the lease was improperly rejected by the Trial Judge, the question of estoppel from disputing the landlord's title does not arise until evidence for and against the making of the lease has first been fully introduced, although it is competent for and the duty of the Trial Judge to determine both questions (tenancy and estoppel) in their proper order.

Re St. David's and Lahey, 7 D.L.R. 84, 4 O.W.N. 32, 23 O.W.R. 12.

TO DENY VALIDITY OF PATENT.

A master who uses an invention under a license from his servant, the patentee, which license is not express, but is implied by law from their relationship and from the circumstances surrounding the invention, is estopped from denying the validity of the patent.

Imperial Supply Co. v. G.T.R. Co., 7 D.L.R. 504, 11 E.L.R. 340, 14 Can. Ex. 88.

CONDUCT—INTENTION—PREJUDICE.

Hatfield v. C.P.R. Co., 17 W.L.R. 554.

F. BY ASSENT.

(§ III F—80)—BY ASSENT—ENGINEERING CONTRACT—CERTIFICATE OF NAMED REFEREE.

The acceptance of progress certificates from the engineer, who is declared by the contract to be the sole referee to "prevent all disputes and litigation," will not debar the contractor in respect of labour only in the installation of a public improvement from claiming damages not mentioned in the progress certificates for delays caused by the municipality's neglect to promptly supply the necessary material which it was to do at its own expense, as it cannot be assumed that the latter damages were to be included in a reference of disputes to the engineer which the entire contract shews to have been contemplated only in respect of the contractor's work.

MacDougall v. Pentieton, 16 D.L.R. 436, 20 B.C.R. 401, 27 W.L.R. 713, 6 W.W.R. 478.

BY ASSENT.

There can be no ratification of a sheriff's sale vitiated by reason of grave informalities by the defendant in the case, his consent being absolutely useless for this purpose as against the rights of third parties.

Savoie-Guay v. DesLauriers; Rose v. Savoie-Guay Co., 7 D.L.R. 205, 21 Que. K.B. 560.

(§ III F—82)—Appearing by party—Licensing Board issuing license.

Upon a hearing before the Board of License Commissioners sitting as a licensing court on questions as to the renewal or transfer of liquor licenses under the Municipal Act, R.S.B.C. 1911, c. 170, s. 330, any person exercising his right to appear of his own motion as a party is estopped by his admissions there made as to the facts. [Stracey v. Blake, 1 M. & W. 168, applied.]

Re McEwen v. Hesson, 17 D.L.R. 99, 28 W.L.R. 137, 6 W.W.R. 977. [Affirmed, 20 B.C.R. 94.]

G. By laches, silence or acquiescence.

See Companies, V F—261, 262.

(§ III G—85)—By laches or acquiescence.

Where a quantity of grain stored in a granary of the owner has been improperly seized by one claiming a lien thereon under the Threshing Lien Ordinance (Alta.) and sold to a third person, thus rendering the person seizing the same liable in conversion to the owner, the latter cannot complain if the court assess the value of the grain at the price sold to the third person rather than the market price at the time of the conversion, where the owner, knowing that the illegal seizure was being made and being in a position to prevent the same and to notify the buyer not to take it, remained passive and allowed the seizure and sale to be made, and the court is satisfied that the rights of the parties could have been adjusted if the owner had taken advantage of his opportunities to interfere.

Primneveau v. Morden, 11 D.L.R. 272, 6 A.L.R. 52, 24 W.L.R. 268, 4 W.W.R. 637.

By laches — Municipality — Waiver of right to assert forfeiture of franchise.

Mere forbearance on the part of a municipality in asserting a forfeiture of a street railway company's franchise for noncompliance with its requirements, does not amount to a waiver of or acquiescence in the default of the company.

Brantford v. Grand Valley R. Co., 15 D.L.R. 87, 3 O.W.N. 583, 25 O.W.R. 545.

Married woman — Delay in bringing action—Husband receiving money from wife to invest.

Mere delay by a married woman in asserting a claim against her husband on an express trust in respect of money belonging to her separate estate, received by her husband, is not sufficient to defeat an action to recover it, where the husband recognized the validity of her claim during the time of such delay, since a married woman is not chargeable with laches because of forbearance to bring an action against her husband to recover the money during the continuance of the marital relation.

Ellis v. Ellis, 15 D.L.R. 100, 5 O.W.N. 561, 25 O.W.R. 539.

By acquiescence — Correspondence—Sale—Commission transaction.

Where the plaintiff claims for the purchase price of consignments of apples, a letter and telegram by the alleged purchaser to the plaintiff inconsistent with a purchase and only consistent with a commission transaction operate as an estoppel against the plaintiff, it appearing that such letter and telegram were tacitly acquiesced in by the plaintiff.

Donaldson v. Scott Fruit Co., 18 D.L.R. 18, 28 W.L.R. 609.

By laches, silence or acquiescence—Receiving bills for rent of engines—Verbal repudiation sufficient when.

A contract to pay rental for a chattel is not created by the owner's notice to its possessor wrongfully detaining it that if he does not return it by a specified time he will be charged rent for it, unless such proposal is assented to by the latter.

Vancouver Machinery Co. v. Vancouver Timber & Trading Co., 18 D.L.R. 491, 29 W.L.R. 93, 6 W.W.R. 1523, reversing 17 D.L.R. 575.

Infringement of trademark — Injunction.

A delay of several months in bringing an action for injunction, after the discovery of the infringement of a trademark, does not amount to such laches or acquiescence as will deprive the plaintiff of his remedy.

John Palmer Co. v. Palmer-McLellan ShoePack Co., 37 D.L.R. 201, 45 N.B.R. 34.

By silence—Failure of company to claim lien on shares — Effect of purchaser acquiring notice before passing of legal title.

A company is not estopped from claiming a lien on shares of its stock for an indebtedness from the holder to the company, as against a purchaser from the latter, on the ground that the representative of the company consented to the sale without claiming its lien, of which the purchaser did not have notice at the time of the sale, but of which he was informed before receiving an assignment of the stock certificate, and paying over the purchase money.

Box v. Bird's Hill Sand Co. (No. 2), 12 D.L.R. 556, 23 Man. L.R. 415, 24 W.L.R. 706, affirming 8 D.L.R. 768.

Since a liquidator in proceedings for the compulsory winding-up of a bank has no right under s. 36 of the Winding-up Act, R.S.C. 1906, c. 144, to accept less than full payment from stockholders under s. 130 of the Bank Act, R.S.C. 1906, c. 29, on a deficiency in the assets and property of the bank, an estoppel by reason of his laches cannot be asserted against him where he places upon the list of contributories the transferees of the stock instead of the holders on the day the proceedings were commenced, since the liquidator cannot accomplish by mere laches that which he could not do with deliberation and inten-

tion. [Re National Bank of Wales, [1907] 1 Ch. 298, distinguished.]

Re Ontario Bank; Massey and Lee's Case, 8 D.L.R. 243, 27 O.L.R. 192.

The fact of a person seeing a prospectus wherein a company makes certain statements, which, if true, would affect such person's rights, and of not proceeding immediately to protest against such statements is no proof of acquiescence in such statements and of ratification of the acts or deeds therein described.

Consumers Cordage Co. v. Molson, 2 D.L.R. 451.

TAKING CHEQUE IN FULL PAYMENT.

The acceptance of a cheque bearing the words "in full rent" does not necessarily imply acquiescence therein on the part of the person who receives the cheque. In every case the special circumstances must be considered.

Royal Trust Co. v. White, 50 Que. S.C. 277.

A party who carries out an agreement and stands by for a number of years, after which a rescission of it must result in an unfair advantage to himself, is estopped from suing therefor.

Philé v. Coté, 21 Que. K.B. 128.

BY LACHES—ANIMALS—CONDUCT OF OWNER—POSSESSION.

Alcock v. Smith, 26 W.L.R. 322.

AS TO INSURANCE.

The fact that an agent, who had no authority to waive any of the conditions of a policy of insurance, after the expiration of the 2 years in which an assured person was, by the terms of the policy, prohibited from entering the employment of a railway without a permit from the company, acquired a knowledge that the former was engaged in such employment, which was never communicated to the company, cannot amount to a waiver of such condition of the policy.

Smith v. Excelsior Life Insurance Co., 4 D.L.R. 99, 3 O.W.N. 1521, 11 O.W.R. 863.

GOODS TAKEN AS PART CONSIDERATION—DUTY TO GIVE NOTICE OF INSUFFICIENCY OF QUANTITY OR VALUE—CONDUCT IMPLYING THEIR SUFFICIENCY.

Paquet Co. v. Bordeleau, 41 Que. S.C. 12.

(§ III G—87)—ACQUIESCENCE—MODIFICATION OF TERMS.

The vendor under an option of purchase who, on receiving a letter of purported acceptance accompanied by a cheque for the deposit, cashes the cheque pending negotiations between the parties as to discrepancies between the option itself and the formal agreement sent to him for signature, is not thereby estopped from insisting upon the terms in the option with which the cheque was consistent and from objecting to a variation made therefrom in the formal agreement; and if the agreement falls through because the parties are not ad idem, whereupon the vendor offers to return the money, his objection to the terms sought to be introduced by the prospective purchaser is not waived by his having cashed the cheque.

Pearson v. O'Brien (No. 2), 11 D.L.R. 176, 22 W.L.R. 703, 4 W.W.R. 342.

OPTION TO PURCHASE LANDS—MODIFICATION—FORFEITURE—WAIVER.

Defendant did not waive the right to avoid an option given plaintiffs to purchase land, because of dishonour of a cheque given by one of them for one-half the price, by allowing the latter time in which to pay the cheque.

McGregor v. Chalmers, 11 D.L.R. 157, 24 W.L.R. 176.

AS TO CONTRACTS—MODIFICATION OF TERMS—ACQUIESCENCE—WAIVER.

A condition that a proposal to modify the terms of an existing contract should not become effective until a new written agreement was entered into, is not waived by the conduct of the parties where they did nothing whatever in reliance upon such proposal after it was made.

Wallace Bell Co. v. Moose Jaw, 4 D.L.R. 438, 5 S.L.R. 155, 21 W.L.R. 871, 2 W.W.R. 752.

AS TO INFANT.

Where a bank has more than $500 on deposit in the name of an infant, and has paid a cheque for over $500 drawn by him upon his account during his infancy, and the infant has made no objection to such payment for more than a year and a half after coming of age, he will be precluded by his laches from recovering the amount of the cheque from the bank notwithstanding that he believed himself to be a year younger than he was.

Freeman v. Bank of Montreal, 5 D.L.R. 418, 26 O.L.R. 451, 22 O.W.R. 276.

(§ III G—88)—RATIFICATION AND ACQUIESCENCE—ENDORSEMENT OF NOTE IN ANOTHER'S NAME.

The act of another in placing the name of a person on a note to the knowledge of the person whose name has been placed, may be rendered valid by a ratification or acquiescence; and where the note to which the signature was disputed had been used to replace other notes which the party whose name appeared had actually signed and the extent of his liability was not increased, evidence that he and others by way of guaranty had signed a transfer to the bank of another security referring to the endorsement of the disputed note as being the subject of the guarantee, is a proof of ratification.

Banque Nationale v. Lemaire, 15 D.L.R. 152, 44 Que. S.C. 445. [Affirmed, 25 Que. K.B. 259.]

BANKS—CUSTOMER—CHEQUES SIGNED BY OTHER PARTY—ACQUIESCENCE.

If a customer of a bank knowingly lets the bank believe that he has signed cheques which were presented for payment and paid by the bank, he is estopped from denying

that subsequent disputed cheques were signed by him or by his authority.

Cabana v. Bank of Montreal, 50 D.L.R. 88, [1919] 3 W.W.R. 969.

AS TO FORGERY OF INDORSEMENT.

Where money had been paid by the defendant on account of the plaintiff on an unauthorized order, the plaintiff was held not to be estopped from denying or repudiating it simply because he had retained the forged order in his possession without prosecuting the wrongdoer, the defendant's position not having been materially altered to its disadvantage by the conduct of the plaintiff in this respect. 2. An act relied on as a waiver should (unless it has altered the position of the other party, thereby giving rise to an estoppel), be of a nature inconsistent with the exercise of the right claimed to have been waived.

Langley v. Peel Lumber Co., 11 E.L.R. 126.

(§ III G—90)—EQUITABLE ESTOPPEL—CONDUCT—AS TO REAL PROPERTY.

The plaintiff, who by purchasing the equitable interest of his vendor in a tract of land, with notice that such vendor had previously agreed to sell an undivided fractional interest in such tract of land to the defendant, renders himself prima facie liable to carry out his vendor's bargain so made with the defendant, is estopped from setting up an alleged collateral default by his vendor if such default was directly attributable to the plaintiff himself.

Strathy v. Stephens, 15 D.L.R. 125, 29 O. L.R. 383.

BY LACHES—TIMBER LIMIT—FAILURE TO INCLUDE ALL OF IN SURVEY—TRESPASS BY ONE AWARE OF LOCATOR'S CLAIM.

The failure of the plaintiff to include in his survey of a timber limit all of the land located, does not estop him, in the absence of evidence of an intention on his part to abandon the omitted land, from asserting his rights thereto against one trespassing thereon after being warned to keep off.

Chew Lumber Co. v. Howe Sound Co., 13 D.L.R. 735, 18 B.C.R. 312, 25 W.L.R. 105, 4 W.W.R. 1308.

CONTINUING PAYMENTS ON CONTRACT PROCURED BY FRAUD—IGNORANCE OF LEGAL REMEDY.

Continuing payments on a contract for the sale of land procured by fraud, or a delay in rescinding it on that account, does not necessarily amount to such acquiescence as will estop the purchaser from exercising his right of rescission, where all the material facts giving him the right to avoid the contract have not been discovered by the purchaser and where he was in ignorance of his rights as to the proper legal remedy.

Harvey v. Lawrence, 25 D.L.R. 706, 9 W.W.R. 91, 32 W.L.R. 297.

EXECUTORS—SALE OF LAND—ATTACK ON BY WIDOW OF TESTATOR—RELEASE—ESTOPPEL—CLAIM AGAINST ESTATE—ADJUDICATION BY SURROGATE'S COURT JUDGE.

Shaw v. Tackaberry, 4 O.W.N. 1369, 24 O.W.R. 630.

(§ III G—91)—EASEMENT—CONVEYANCE OF LOT ABUTTING ON INTENDED STREET—EFFECT OF.

The successor in title of the owner of a block of land containing 25 acres which had been laid out on a plan in lots with intended streets running through it, is estopped from denying that a purchaser of a lot described as abutting on one of the intended streets is entitled to use it as a right-of-way, although it is not used as a street and nothing has been done to it with the intention of making it a public street.

Budd v. Johnston, 42 N.B.R. 485.

(§ III G—94)—OF TENANT.

A tenant after having given notice of the exercise of an option to renew a lease, but which notice is unsigned, and who agrees in writing to surrender 2 years of the renewal term of 5 years, is estopped from asserting that the renewed term was to exist for more than 3 years.

Greenwood v. Bancroft, 2 D.L.R. 417, 20 W.L.R. 816, 2 W.W.R. 162.

(§ III G—102)—PURCHASE INDUCED BY MISREPRESENTATION—LACHES—OMISSION TO ASSERT CLAIM—DISCOVERY OF FRAUD.

It cannot be held that one who was induced to purchase land through fraud and misrepresentation, elected to abide by the sale, because of delay thereafter in suing for redress if the deception that had been practised upon him was of such a character as to preclude the discovery of the fraud until the time of bringing the action.

Boulter v. Stocks, 10 D.L.R. 316, 49 C.L. J. 232, 47 Can. S.C.R. 440, affirming 5 D.L. R. 268.

(§ III G—105)—PERMITTING IMPROVEMENTS—PARTY WALL—USE OF END BY ONE OWNER FOR FRONTAL FACING OF BUILDING.

Failure to object to the construction by one owner, for his own convenience, of the frontal facing of his building across the entire end of a party wall, does not estop his co-owner from insisting on the removal of half of it at a future time when he has occasion to make use of his portion of the wall.

Alberta Loan & Investment Co. v. Beveridge, 12 D.L.R. 292, 24 W.L.R. 736, 4 W. W.R. 995.

H. BY REPRESENTATIONS.

(§ III H—110)—RETRACTING BEFORE ACTED UPON.

Representations by the owner of a sand beach that it was public property, in reliance on which one has spent money for equipment to remove sand therefrom, will

not create an estoppel against the owner, if before the representations were acted upon they were retracted, and the owner's true position disclosed.

Reid v. Standard Construction Co., 34 D.L.R. 65, 51 N.S.R. 33.

CLAIM OF CREDITOR AGAINST COMPANY — MEETING OF CREDITORS OF COMPANY — STATEMENT OF REPRESENTATIVE OF CREDITOR THAT HIS CLAIM WAS AGAINST THIRD PERSON — CHANGE OF POSITION OF COMPANY AND CREDITORS ON FAITH OF STATEMENT — ADOPTION OF STATEMENT BY CREDITOR — BILL OF EXCHANGE DRAWN ON THIRD PERSON — LETTER OF CREDITOR DEMANDING PAYMENT.

Paget Grain Door Co. v. North American Chemical Co., 13 O.W.N. 270.

(§ III H—112)—REPRESENTATIONS BY WIFE AS TO TITLE TO LAND—RELIANCE BY WIFE'S CREDITORS.

Representations made by a wife in respect of her title to land, and acted upon by her creditors, but which is in fact only held by her as trustee for her husband to be reconveyed to him upon his recovery from an illness, will not create an estoppel against the husband not being himself a party to the representations.

Windsor Auto Sales Agency v. Martin, 25 D.L.R. 549, 33 O.L.R. 354.

J. BY INCONSISTENCE IN ACTS, CLAIMS, ETC.

When inconsistent with claim for rescission for fraud, see Vendor and Purchaser, I E—27.

(§ III J—120)—BY INCONSISTENCY IN ACTS—LEVY AND SEIZURE—BOND FOR DELIVERY OF GOODS AND SPECIAL STIPULATION.

Though a mere statement by a sheriff to an execution debtor, made in the office of the sheriff, that certain goods belonging to the debtor were seized by virtue of an execution against him, does not constitute a valid seizure, yet where the debtor admits the seizure and gives a bond for the delivery of the goods to the sheriff, he is estopped from setting up that the goods are not under seizure.

Dodd v. Vail, 9 D.L.R. 534, 23 W.L.R. 62. [Affirmed, 10 D.L.R. 694, 4 W.W.R. 291.]

BY INCONSISTENCY IN ACTS—SALE OF GRAIN WITHOUT SEVERANCE — PASSING OF TITLE.

Where a part of a quantity of grain stored in a grain elevator was sold to the plaintiff without severance or actual delivery of the parts so sold, and where after the sale, and before severance or delivery the entire quantity was destroyed by fire, the circumstance that, in an adjustment of the resulting insurance claims under a "blanket policy" between the seller and his insurers, the seller had stipulated with the insurers to stand between them and the plaintiff in the matter of the settlement and payment of the fire loss as a whole to him will not estop the seller as between him and the plaintiff from setting up that title under the stated sale had actually passed to the plaintiff.

Inglis v. Richardson, 10 D.L.R. 158, 4 O.W.N. 655, 24 O.W.R. 721. [Reversed, 14 D.L.R. 137.]

CONTRACT FOR SALE OF LAND — NONPAYMENT — FORECLOSURE — IMPOSSIBILITY OF PERFORMANCE.

A vendor who has put it out of his power to deliver possession of land he contracted to sell, and who refused to accept the remainder of the purchase money except on conditions he could not rightfully impose, cannot foreclose the contract for nonpayment of the purchase money.

Tytler v. Genung, 12 D.L.R. 426, 24 W.L.R. 560, 4 W.W.R. 797.

BY INCONSISTENCY IN ACTS, CLAIMS, ETC.

The accuracy of the weighing apparatus of a threshing machine that complied with the requirements of s. 33 of the Weights and Measures Act, cannot, even if the question could be raised without being pleaded, be attacked on the ground that the manner of ascertaining the number of bushels of grain threshed was contrary to the provisions of such Act, by one who tacitly assented to the use of such method of measurement by taking the grain from the separator, and afterwards, without attempting to ascertain the quantity under the Weights and Measures Act, broke the bulk thereof by drawing some of the grain to market.

Kyles v. Wilson, 3 D.L.R. 702, 21 W.L.R. 416.

(§ III J—125) — POSSESSORY TITLES — LANDS HELD IN COMMON — TRESPASSERS.

A tract of land devised by a testator to his sons to be held as tenants in common for their natural life, which had been fenced off and partitioned by them into their respective severalities, does not create an estoppel against trespassers holding such land adversely against the heirs of the reversioner.

Stuart v. Taylor, 22 D.L.R. 282, 33 O.L.R. 20.

AS TO TITLE.

Where the plaintiff, after the death of one from whom he obtained title to land with warranty, discovered that the grantor had only a life interest and a mortgagee's title thereto, and informed the executrix, as well as the remaindermen, that he had a right of action against them on the warranty, but that rather than have difficulty he would give them $250 for a quit-claim deed of their interest in the land, which was refused, but subsequently, upon the plaintiff threatening to foreclose the mortgage and bring an action against them on the warranty, they executed and delivered him such deed upon the payment of $500, the plaintiff not suggesting that he reserved or intended to reserve any further claim against them, he cannot subsequently ma.n-

tain an action against them on the warranty.

VanBuskirk v. McDermott, 5 D.L.R. 5, 46 N.S.R. 98, 11 E.L.R. 100.

§ III J—126)—To patent or accepting title.

An estoppel against a person licensed to use a patent of invention from his disputing the validity of the patent may arise from the relative positions of the parties even without recital in the written license.

Imperial Supply Co. v. G.T.R. Co., 1 D.L.R. 243, 10 E.L.R. 414, 13 Can. Ex. 507.

§ III J—130) — By acts or claim in judicial proceedings — Defence on grounds other than fraud — Subsequently discovered fraud.

The fact that a person in an action for specific performance justifies his refusal to perform on other grounds, in ignorance of the existence of fraud in the inception of the agreement, will not prevent him from subsequently setting up the fraud to defeat the contract.

Beckman v. Wallace, 13 D.L.R. 541, 29 O.L.R. 96.

Inconsistency of claims in judicial proceeding.

Where a vendor is entitled to rescind a contract for the purchase of land by reason of the purchaser's long default in paying the instalments agreed on, but instead of so doing, he launches an action for the specific performance of the agreement and recovery of the outstanding purchase money the tender by the purchaser of such purchase money with a prepared deed for execution revives the contract, and the vendor is estopped from rescinding. [Dunlop v. Bolster, 6 D.L.R. 468, 4 A.L.R. 408; Handel v. O'Kelly, 8 D.L.R. 44, followed.]

O'Kelly v. Downie, 15 D.L.R. 158, 26 W.L.R. 413, 5 W.W.R. 859.

Inconsistent acts in judicial proceeding—Criminal law—Plea of guilty as bar to future contests of facts on appeal.

A plea of guilty operates as an estoppel against the accused from calling upon the prosecution to produce evidence to establish that he is guilty, and quâ the facts alleged in the information or indictment, he is barred from a trial de novo which in certain cases is available on an appeal from two justices holding a summary trial on notice of appeal being given by a person aggrieved (Cr. Code, ss. 749, 797, as amended in 1913); any objection to be taken must then be to the form of the conviction.

R. v. Gillis, 18 D.L.R. 461, 23 Can. Cr. Cas. 160, 29 W.L.R. 129.

Prior increased punishment because of breach of recognizance — Enforcement of recognizance.

The fact that a court trying a charge of assault doubled the fine which it was about to impose on getting information that the defendant was at the time under recognizance to keep the peace given on complaint of threats to another party unconnected with the subsequent assault, will not bar the estreating of the recognizance; binding to good behaviour is not by way of punishment and the increase in the fine and the subsequent estreat of the recognizance are not two punishments for the same thing. [R. v. Rogers, 7 Mod. 29 applied.]

R. v. Walker, 18 D.L.R. 541, 23 Can. Cr. Cas. 179.

Acts in judicial proceedings—Deposing as plaintiff to examination for discovery.

A person who upon being served with an appointment for examination for discovery appears before the examiner and swears that he is the plaintiff will be estopped from denying after the claim has been dismissed with costs that he was the real plaintiff, where the defendants proceeded to trial on the assumption that he was the plaintiff notwithstanding a slight difference in name.

Barisino v. Curtis, 22 D.L.R. 899, 8 O.W.N. 195.

Action for destruction of timber — Sworn statement as to quantity.

A plaintiff suing a railway company for the value of logs cut in lumbering operations and which had been set fire by sparks from a locomotive of the railway line which ran through the timber limits, will, in the absence of satisfactory evidence of mistake, be held to the statement made in his sworn return to the government agent of the number of logs destroyed by the fire.

Dutton v. C.N.R. Co., 23 D.L.R. 43, 19 Can. Ry. Cas. 72, 31 W.L.R. 367. [Affirmed except as to damages 30 D.L.R. 250.]

Waiver of procedure regulations—Affiliation prosecution.

The provision of s. 9 of the Illegitimate Children's Act, R.S.M. 1913, c. 92, that the justice of the peace shall take the information of the mother in affiliation proceedings brought by her or on her behalf is one which concerns procedure only and may be waived as it does not go to the jurisdiction; such waiver operates against the mother to prevent her repudiating the proceedings which were dismissed where the parties went to a hearing on the merits without objection in respect thereof on which the mother attended and gave evidence.

Davis v. Feinstein, 24 D.L.R. 798, 24 Can. Cr. Cas. 160, 25 Man. L.R. 507, 31 W.L.R. 635, 8 W.W.R. 1003.

Acts or claims in judicial proceeding.

The vendor who sues for the cancellation of a promise of sale of lands is not thereby estopped from praying for the demolition of work done in contravention to such promise of sale.

Lapierre v. Magnan, 2 D.L.R. 544, 42 Que. S.C. 59.

The trial of a contentious case in a Surrogate Court upon a date upon which, un-

der the Surrogate Courts Act, 10 Edw. VII. (Ont.) c. 31, s. 29 (1), such a case cannot properly be tried, is not a nullity, but an irregularity only, and one who, by his counsel, appears at the trial, cross-examines witnesses, and argues as to costs, will be held to have waived the irregularity.

Connors v. Reid, 3 D.L.R. 636, 3 O.W.N. 1137.

Payment of the costs of an action, by the plaintiff to the defendant's attorney, made solely for the purpose of releasing the real estate of the plaintiff from the encumbrance resulting from the registry of the judgment, in order by this means to enable the plaintiff to sell such real estate but without any intention on the part of the plaintiff to waive his right to further prosecute the claim set up in his action, or the benefit of his proceedings in appeal against such judgment, does not constitute an estoppel by way of acquiescence in the judgment appealed against and does not put an end to the plaintiff's action nor invalidate his appeal in so far at least as the debt itself, and the costs of the appeal are concerned; and in these circumstances a motion on the part of the defendant asking the dismissal of the plaintiff's appeal based on such alleged acquiescence will be dismissed with costs.

Leroux v. Reade, 18 Rev. de Jur. 323.

K. By receiving benefits.

See also Companies, V. F—261.

To attack regularity of judicial sale after sharing in proceeds, see Judicial Sale, II. A—15.

(§ III K—135)—Vendee of land—Estoppel by cropping — Rescission — Damages—False representations.

A vendee of land loses his right to rescission of the agreement of sale, on the ground of false representations by the vendor, where, after he learns that the representations are untrue, he remains on the land and puts in a crop, but he is entitled to a set-off for any damages he may have sustained by reason of such false representations.

Strachan v. McGinn, 9 D.L.R. 448, 23 W. L.R. 66, 3 W.W.R. 795.

By receiving benefits—Improvements on lands induced by promise to grant.

While a person who expends money on property in which he has no interest has, as a rule, no lien therefor against the owner, particularly where the expenditure was incurred independently by such person for good and sufficient reasons of his own, although resulting in direct advantages to the owner; yet where the latter stands by and allows the defendant to spend money on certain farm lands in the expectation that the owner will receive the benefit of it, such defendant is entitled to a lien for the increased value resulting from the expenditure; and this principle applies where the expenditure is made upon the faith of a statement by the owner of his intention to give the lands to the defendant who makes the improvement, and the defendant is entitled to a lien for the reasonable and just value of such improvements in so far as they are permanent.

McBride v. McNeil, 9 D.L.R. 503, 27 O.L.R. 455, 23 O.W.R. 558.

Company — By receiving benefits from ultra vires contract.

The receipt of benefits by a company under an ultra vires contract and the altering of the position of the other party in reliance thereon, do not estop the company from setting up the invalidity of the agreement.

Union Bank v. McKillop, 16 D.L.R. 701, 30 O.L.R. 87. [Affirmed, 24 D.L.R. 787.]

By receiving benefits.

Holt v. Brooks, 11 D.L.R. 838, 18 B.C.R. 301, 24 W.L.R. 944.

(§ III K—139)—Legatee—Beneficiaries.

Beneficiaries of a testator who have received all or part of the purchase money on the sale of the land of the estate cannot subsequently set up the claim that the sale was void or voidable.

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

Where a partner sold his interest in the business to the other members of the firm for a sum payable at a specified time and payment was not enforced when due (the selling partner having died before its maturity) a trustee and executor of his estate who was also a cestui que trust under the will and who acquiesced in allowing the debt to remain uncollected and received his share of the interest paid thereon from time to time by the firm and who with full knowledge of his rights executed a release and discharge under seal to his predecessors in the trusteeship to whom the firm had repaid the debt has no right to also claim an accounting of the profits earned in excess of the interest by the loan after it became due.

Carvell v. Aitken, 2 D.L.R. 709, 10 E.L.R. 432.

(§ III K—142)—Receiving interest.

Where one agrees to sell securities for another within a limited time, for the face value thereof, or, if after the time agreed, for the face value thereof with accrued interest, and puts off the owner of the securities from time to time with promises to fulfil his agreement, the owner does not, by accepting interest and surrendering the coupons on the securities, waive his right to insist upon a sale.

Martin v. Munns, 3 D.L.R. 435, 3 O.W. N. 1055.

(§ III K—143)—By receiving payments—Contract to convey—Default by purchaser—Condonation.

A contract vendor did not condone default in payment by the purchaser by receiving a partial payment after serving notice of intention to cancel the contract, but before expiration of the redemption period under the

notice, since the vendor could assume that the balance due would be paid in that time.

Massey v. Walker, 11 D.L.R. 278, 23 Man. L.R. 563, 24 W.L.R. 168, 4 W.W.R. 557.

RECEIVING PAYMENTS.

A condition in a contract for the plowing and improving of land that it should be plowed to a certain depth, is not waived by the payment of money on the contract during the performance of the work where the inspector, whose decision, by the terms of the contract was final, had approved of such payment only upon the understanding that portions of the land should be replowed to the required depth.

Schultz v. Faber & Co., 4 D.L.R. 707, 4 A.L.R. 422, 21 W.L.R. 163, 2 W.W.R. 79.

L. BY CHARACTER OF RELATION OF PARTIES.

As to acts and authority of agent ratification, see Principal and Agent, II D—25; Insurance, V B—95.

(§ III L—145)—BY CHARACTER OR RELATION OF PARTIES—PRINCIPAL BY ACTS OF AGENT—BANK BY ITS MANAGER—IMPROVIDENT RECEIPT FOR DISHONOURED CHEQUE.

A principle who settles with his agent on the strength of a receipt by the manager of a branch bank purporting to shew a deposit made by the agent to his principal's credit, has no claim against the bank on the ground of estoppel where the deposit was of the agent's personal cheque which was dishonoured.

Saskatchewan & Western Elevator v. Bank of Hamilton, 18 D.L.R. 411, 7 S.L.R. 134, 29 W.L.R. 262, 7 W.W.R. 109.

BY CHARACTER OR RELATION OF PARTIES—OPTION TO PURCHASE IN ORIGINAL LEASE—EFFECT OF NEW LEASE.

A lessee, whose lease contains an option to purchase the demised premises during the term, does not prima facie waive his option by taking (some time in advance) a new lease without the option clause to begin when his original term expires; nor is he estopped from asserting his option to purchase at any time during the original term.

Matheson v. Burns, 18 D.L.R. 399, 50 Can. S.C.R. 115, reversing 18 D.L.R. 287.

AUTHORITY OF AGENT—SALE OF GRAIN.

A vendor of grain to a person who is in fact an agent for a member of the Winnipeg Grain Exchange, but is not known so to be by the vendor, by refraining to reply to letters written to him by such member, is not estopped from denying that sales of the grain effected by such members were authorized by him. [Ewing v. Dominion Bank, 35 Can. S.C.R. 133, distinguished.]

Winearls v. Hoey, [1917] 2 W.W.R. 287.

(§ III L—146)—BY RELATION OF PARTIES—TENANT'S ESTOPPEL UNDER LEASE—DURATION.

A lease which has expired by effluxion of time does not estop the former tenant from subsequently denying the title of his sometime landlord, but it is admissible in evidence to prove that the tenant admitted that lands covered by it were included in an ambiguous description contained in the landlord's title deeds.

Bartlett v. Delaney, 11 D.L.R. 584, 27 O. L.R. 594.

BECOMING TENANT.

Where defendant in ejectment proceedings had accepted a lease from the plaintiff which was not registered, such lease may be held to be valid between the parties and an estoppel could be raised upon it as against a mortgage subsequently made by defendant and registered.

Yeo v. Ahearn, 12 E.L.R. 73.

M. WHO AFFECTED.

(§ III M—150)—WHO AFFECTED—WHO MAY SET UP—VOLUNTARY CONVEYANCE — INSOLVENT DEBTOR — CREDITOR'S RIGHTS—HOW PROTECTED.

Even if a company were estopped by its conduct from denying the validity of a chattel mortgage made on its effects in the name of an individual mortgagor as against the mortgagee and those claiming under him, no such result follows even on the admission of authority by the company's pleadings, as regards execution creditors of the company; and the goods may be declared liable to their claims without regard to the chattel mortgage not regularly made by the company in whom the property in the goods was vested.

Smith v. Cremation Society, 20 D.L.R. 214, 29 W.L.R. 150.

(§ III M—151)—PRINCIPAL—AGENT'S RECEIPT—FREIGHT CHARGES.

Where the local agent of a railway company accepted the personal cheque of defendants' employee in payment of certain freight charges, and receipted the bills, and the employee attached the receipted bills to a draft on defendants, who paid it, the defendants are not liable for the unpaid freight charges, on the nonpayment of the cheque, on the ground that, having afforded means of inducing the defendants to pay the employee's draft, the plaintiffs were estopped from denying that they had received payment of the freight charges.

Continental Oil Co. v. C.P.R. Co., 28 D.L.R. 269, 52 Can. S.C.R. 605, 9 W.W.R. 1495, reversing 21 D.L.R. 1, 8 A.L.R. 363.

N. WHO MAY BE SET UP.

(§ III N—156)—BAR TO CLAIM OF—MISREPRESENTATION INDUCING STATEMENT RELIED ON AS ESTOPPEL.

A person cannot rely by way of estoppel on a statement induced by his own misrepresentation.

Wood v. Smart, 16 D.L.R. 97, 26 W.L.R. 817.

EVICTION.

See Landlord and Tenant.

EVIDENCE.

I. JUDICIAL NOTICE.
- A. Laws and ordinances.
- B. Proclamation.
- C. Official and judicial character of acts.
- D. Political, historical and geographical matters.
- E. Other matters.
- F. By jury.

II. PRESUMPTIONS AND BURDEN OF PROOF.
- A. In general; laws; ordinances.
- B. Establishing allegations or claims.
- C. Defences.
- D. Exceptions or exemptions.
- E. Concerning person.
- F. Corporations; partnership.
- G. Continuance; cause.
- H. As to skill; negligence; care.
- I. As to official acts.
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- K. As to rights, contracts, instruments, and property.
- L. Payment; credit.
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IV. DOCUMENTARY EVIDENCE.
- A. Preliminary matters; genuineness and validity.
- B. Statutes; ordinances.
- C. Certificate; award.
- D. Official records, reports and returns.
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- F. Pleadings and papers in suit.
- G. Evidence previously taken or used; affidavits.
- H. Tax book or list.
- I. Deeds; wills; leases; mortgages.
- J. Accounts and account books.
- K. Letters, telegrams, etc.
- L. Records and papers of corporations or carriers.
- M. Note; indorsement.
- N. Contracts.
- O. Scientific and medical books.
- P. For purposes of comparison.
- Q. Memoranda.
- R. Miscellaneous.
- S. Paper produced on notice.
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V. DEMONSTRATIVE EVIDENCE; ARTICLES AND THINGS; VIEW OF JURY.

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- B. Custom, or usage.
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- D. Subsequent change.
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- G. Consideration, or value of subject-matter.
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- C. Cause and effect.
- D. Physical conditions; medical testimony; intoxication.
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- F. Values; damages.
- G. Contingent results; what might have been.
- H. Legal questions; meaning of terms; foreign laws.
- I. Estimates of quantity; speed; time.
- J. Danger; skill; negligence.
- K. Intent; mental conditions.
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IX. ADMISSIONS.

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- B. Confidential communications.
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- E. Acts and declarations of agent, representative or tenant.
- F. Acts and declarations of former party in interest; testator or former owner.
- G. Acts and declarations of partner; associate or coconspirator.
- H. Complaints of injuries and suffering.
- I. Threats.
- J. Telephone conversations.
- K. Conversation through interpreter.
- L. Dying declarations, or those made in travail.
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- B. Customs or habit.
- C. Character; reputation; age.
- D. Knowledge; notice; belief; mental capacity.
- E. Intent; motive; fraud; undue influence; good faith; malice.
- F. Prices; values.
- G. Damages.
- H. Care; skill; negligence.
- I. Suggestive facts; facts supporting inferences.
- J. Circumstances.
- K. Similar acts or facts.
- L. Explanation and rebuttal.
- M. Payment; consideration; credit.
- N. Proof of negative.
- O. Contracts; breach; waiver.
- P. Matters pending suit.
- Q. Pecuniary condition; family circumstances.
- R. Persons; personal relations.

S. Connecting with subject; matters about other persons.
T. Criminal matters generally.
U. Title or possession.
V. Identification.
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X. Authority.
Y. Experiments.
Z. Miscellaneous.

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A. In general; corroboration.
B. Cause and effect.
C. Fraud or good faith; malice; undue influence.
D. Negligence; skill; care.
E. As to proper rights.
F. Matters as to persons; relation of parties.
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H. Documents generally; official acts or record; demonstrative evidence.
I. Contracts; gifts.
J. Wills.
K. Miscellaneous civil cases.
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XIII. ADMISSIBILITY UNDER PLEADINGS; VARIANCE.
A. Under particular pleadings.
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Review on appeal, see Appeal.
As to discovery, see Discovery and Inspection.
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Instructions upon, see Trial.
Depositions and commissions to take, see Depositions.
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Annotations.

Admissibility; competency of wife against husband: 17 D.L.R. 721.

Admissibility; discretion as to commission evidence: 13 D.L.R. 338.

Criminal law; questioning accused person in custody: 16 D.L.R. 223.

Extrinsic; when admissible against a foreign judgment: 9 D.L.R. 788.

Demonstrative evidence; view of locus in quo in criminal trial: 10 D.L.R. 97.

Meaning of "half" of a lot; division of irregular lot: 2 D.L.R. 143.

Opinion evidence as to handwriting: 13 D.L.R. 565.

Oral contracts; Statute of Frauds; effect of admission in pleading: 2 D.L.R. 636.

Proof of alienage: 23 D.L.R. 375, 376.

Deed intended as mortgage; competency and sufficiency of parol evidence: 29 D.L.R. 125.

Medical expert witnesses: 38 D.L.R. 453; 28 Can. Cr. Cas. 308.

Law relating to questioned documents and proof of handwriting: 44 D.L.R. 170.

Examination of testimony; Use of photographs: 47 D.L.R. 9.

Foreign common-law marriage: 3 D.L.R. 247.

Sufficient to go to jury in negligence actions: 39 D.L.R. 615.

I. Judicial notice.

(§ I A—6)—CITY ORDINANCES.

A municipal by-law need not be set out in a conviction before a magistrate for its violation, since, by s. 68 of the Summary Convictions Act, judicial notice must be taken of such by-law.

The King v. Elderman, 19 Can. Cr. Cas. 445.

(§ I A—8)—TREATY.

Judicial notice is to be taken under s. 8 of the Extradition Act, R.S.C. 1906, c. 155 of the extradition treaties and extradition orders-in-council published in the Canada Gazette, the official paper of the Government of Canada, without production in evidence of a copy of the Gazette. [See also s. 1128 of the Cr. Code.]

Republic of France v. Peugnet, 1 D.L.R. 204, 19 Can. Cr. Cas. 179, 5 S.L.R. 143, 19 W.L.R. 938, 1 W.W.R. 703.

STATUTORY EFFECT OF BY-LAW ON PUBLICATION IN GAZETTE—PROSECUTION FOR OFFENCE PRIOR TO PUBLICATION—PROOF OF BY-LAW—NOTICE OF BY-LAW, WHEN NECESSARY.

The King v. C.N.R. Co., 18 Can. Cr. Cas. 170 (Sask.).

B. PROCLAMATION.

(§ I B—15)—PROCLAIMED RAILWAY ORDERS.

The publication of the orders and general train and interlocking rules under s. 31 of the Railway Act 1906, gives them the effect of statutes, of which the courts are bound to take judicial notice; but the omission to publish them does not necessarily invalidate them, it merely necessitates their proof before the courts can act on them. [Underhill v. C.N.R. Co., 22 D.L.R. 279, followed; Clark v. C.P.R. Co., 2 D.L.R. 331, 17 B.C.R. 314, distinguished.]

McPhee v. Esquimalt & Nanaimo R. Co., 23 D.L.R. 561, 22 B.C.R. 67, 32 W.L.R. 125, 8 W.W.R. 1319.

OF STATE OF WAR—SEDITION.

The court will take judicial notice of the existence of a state of war between His Britannic Majesty and a foreign power on a trial for using seditious language.

R. v. Trainor, 33 D.L.R. 658, 27 Can. Cr. Cas. 232, 10 A.L.R. 164, [1917] 1 W.W.R. 415.

C. OFFICIAL AND JUDICIAL CHARACTER OF ACTS.

(§ I C—20)—On an application to set aside a petition against the applicant's election on preliminary objection, where one of the grounds of objection provided for by the Controverted Elections Act, s. 10 (c. 2 of Alberta, 1907) is that the petitioner is a Judge of the Supreme Court or of one of

the District Courts, the court is entitled to take judicial notice of the fact that the petitioner is not the holder of such an office.

Carstairs v. Cross, Re Edmonton Election, 8 D.L.R. 369, 5 A.L.R. 268, 22 W.L.R. 797, 3 W.W.R. 566, affirming 7 D.L.R. 192.

(§ I C—22)—Judicial records and decisions—Bankruptcy orders provable by referee instead of by seal of court, when.

An order of adjudication and an order of reference made in foreign bankruptcy proceedings are properly authenticated for use in evidence in Saskatchewan, although instead of being certified under the seal of the foreign court they are certified under the hand of the referee in bankruptcy, where it appears that the orders in question are, during the bankruptcy proceedings, kept continuously in the custody of the referee to whom they must be forwarded by the clerk of the Bankruptcy Court under the foreign law.

Minot Grocery Co. v. Durdick, 10 D.L.R. 126, 6 S.L.R. 44, 23 W.L.R. 270, 3 W.W.R. 904.

E. Other matters.

(§ I E—53)—Judicial notice—Railway tolls—Comparison.

The Board not having any jurisdiction over the tolls charged in a foreign country, no comparison can be made between them and those in Canada for the transportation of the same commodity.

Imperial Rice Milling Co. v. C.P.R. Co., 14 Can. Ry. Cas. 375.

(§ I E—69)—Fish and fishery rights.

The court is not bound to take judicial notice, as of a public deed, of a grant made to the Crown of a fishery right by the seigneurs who theretofore had proprietary rights or seigneurial title therein under Quebec law.

Robertson v. Grant, 3 D.L.R. 201, 21 Que. K.B. 279.

(§ I E—72)—Usages and customs.

A custom, to have the characteristics intended by law, should be based upon facts uniform, public, many in number and of long duration. When a party sets up as a custom reprehensible facts, the courts should refuse to entertain them and not permit them to be more publicly known.

Denis Advertising Signs v. Martel Stewart Co., 47 Que. S.C. 266.

F. By jury.

(§ I F—90)—To support a jury's finding of negligence in not transferring a train at a particular place to the right-hand track from the unusual left-hand track on which it had been running temporarily because of an accident on the other track, there must be evidence as to the location of the switches at which the cross-over could have been made; and the finding cannot be supported in the absence of such evidence on the assumption that the jury acted upon local knowledge of the location of switches at or near the locus in quo. [Kessowji Issur v. Great Indian Peninsula R. Co., 96 L.T.R. 859, applied.]

Graham v. G.T.R. Co., 1 D.L.R. 554, 25 O.L.R. 529, 13 Can. Ry. Cas. 232, 20 O.W.R. 965.

II. Presumptions and burden of proof.

As to undue influence, see Deeds, II F—65; Husband and Wife, II A—50.

As to ownership from possession, see Interpleader, I—10; Mechanics' Liens, V—30; Taxes, I E—48.

Res ipsa loquitur, see Negligence.

A. In general; laws; ordinances.

(§ II A—95) — Motor Vehicle Act (Man.).

Where a person sustains damage by a motor vehicle the onus of proof that the damage was not caused through the negligence of the owner lies strictly upon him under s. 38 of the Motor Vehicle Act, Man. (1908, c. 34.)

Halparin v. Bulling, 13 D.L.R. 742, 25 W.L.R. 317, 5 W.W.R. 37.

Action on guaranty company bond — Defence — False statements accompanying application.

The onus rests on the defendant in an action on a bond of indemnity executed by a guaranty insurance company, to shew the falsity of statements and answers to questions in a writing made by the mayor of a town accompanying the application of a tax collector for a fidelity bond.

Arnprior v. U.S. Fidelity & Guaranty Co., 12 D.L.R. 630, 4 O.W.N. 1426.

Shifting — Assignment of stock — Pledgee's rights in interpleader.

In interpleader proceedings, where an issue is directed between a bank, claiming as assignee of mining shares alleged to be transferred to it as security for advances, as plaintiff, and an execution creditor as defendant, if the plaintiff proves a valid transfer prior in date to the execution, the onus is shifted to the defendant.

Pallandt v. Flynn, 9 D.L.R. 460, 4 O.W.N. 821, 837, 24 O.W.R. 95, 254.

Employee — Stricken at work — Workmen's Compensation Law.

When an employee is stricken at his work there is no presumption in the law of workmen's compensation that the seizure resulted from the labour. The burden of proof rests upon the workman or representative who sues for damages.

Bougie v. Canada Box Board Co., 46 D.L.R. 258, 25 Rev. de Jur. 189.

Laws—Ordinances.

Though, under the statute, s. 303 of the Municipal Act, c. 170, R.S.B.C. 1911, providing that licenses, taxes, rate or rents payable to a municipality shall be a debt due to the municipality recoverable by action, a certified copy of the collector's roll

is made prima facie evidence of the debt, such evidence may be rebutted.

Saanich v. French, 8 D.L.R. 637, 3 W. W.R. 270.

PRESUMPTION OF FACTS—DISCRETION OF THE COURT.

Presumptions of facts are left to the discretion and to the judgment of the court. They are means of proof which the law submits to none other, and which it admits without restriction.

Dubeau v. Queen City Realty Co., 45 Que. S.C. 97.

EXECUTORS — GIFT BY DECEASED TO SON — LOAN.

The delivery of money by a father to his son is presumed to be a gift and the burden of proof lies upon the father's executors or other persons interested who contend that it was a loan. It is only when the executors representing the estate have made out a prima facie case against a person who is alleged to have borrowed money from the deceased, that the burden of proof is shifted and such person bound to furnish other material evidence in corroboration of his story, under the Evidence Act Alta., 1910 (2nd. Sess.), c. 3, s. 12.

Groat v. Kinnaird, 20 D.L.R. 421, 7 A. L.R. 390, 29 W.L.R. 675, 7 W.W.R. 264.

(§ II A—102)—FOREIGN LANGUAGE.

It will be presumed that English-speaking people in Canada are not conversant with the Chinese language so as to understand an overheard dialogue in that tongue between two Chinamen and the conversation between the Chinamen in the presence of the chief of police but in which the officer took no part is to be treated as if the latter were not present as regards the proof of an admission or confession made therein.

The King v. Hoo Sam, 1 D.L.R. 569, 19 Can. Cr. Cas. 259, 5 S.L.R. 180, 20 W.L.R. 571, 1 W.W.R. 1049.

B. ESTABLISHING ALLEGATIONS OR CLAIMS.

(§ II B—105)—SOLICITOR AND CLIENT.

In an action by a client against his solicitor for damages for negligence in not instituting the client's action against a municipal corporation at an earlier date so as to prevent the operation of a Statute of Limitations, the onus of proof is upon the client to establish that the solicitor was given and accepted instructions to sue, and not merely to write a letter, as he did, demanding a settlement, and so leaving the question of future proceedings open for further instructions.

Howse v. Shaw, 9 D.L.R. 642, 4 O.W.N. 971, 24 O.W.R. 283.

The onus is upon a boom company whose unlawful operation in the wrongful construction of works in an international river causes confusion in connection with the driving of logs down the said river and which claimed the right to recover for services rendered in respect to the booming, sorting, rafting and driving of the logs, to shew affirmatively the quantity of such logs which lawfully came into its possession. [Warde v. Æyre, 2 Bulst. 323, applied.]

Rainy Lake River Boom Corp. v. Rainy River Lumber Co., 6 D.L.R. 401, 27 O.L.R. 131, 22 O.W.R. 952.

ALLEGATION OF OWNERSHIP OF PROPERTY STANDING IN NAME OF DECEASED PERSON.

The court should require strict proof from one alleging that property belongs to him although standing in the name of a deceased person. Its attitude should be one of suspicion, until the truthfulness of the allegation is made clear by satisfactory and well-sifted evidence.

Trumbell v. Trumbell, [1919] 2 W.W.R. 198.

(§ II B—108)—ACCIDENT CAUSING DEATH —PRESUMPTION OF FAULT.

In an action claiming damages for the death of an employee due to an accident caused by an inanimate object, the French jurisprudence creates a presumption of fault against the custodian of such object and places upon him the burden of proving that the injury proceeded from a cause to which he was a stranger.

Norcross v. Gohier, 41 D.L.R. 687, 56 Can. S.C.R. 415.

TORTS—NEGLIGENCE.

In an action for damages for negligence, causing death, the personal representative, suing under Lord Campbell's Act, must shew more than the omission by the defendant employer of a statutory duty to guard the machinery; he must prove also that the fatal accident was occasioned by the neglect of the statutory duty, and where there was no witness of the accident, nor was there any evidence from which an inference could be drawn from the position of the body or otherwise that the neglect of the statutory duty was the cause of death, the action must be dismissed. [Canadian Coloured Cotton Mills v. Kervin, 29 Can. S.C.R. 478, applied.]

Loffmark v. Adams, 7 D.L.R. 696, 17 B. C.R. 440, 22 W.L.R. 547, 3 W.W.R. 269.

That death was caused by negligence of a master may be inferred, where there were no eye witnesses, from the fact that a careful and experienced painter was required to work in a cramped and insecure position on a scaffold within a few inches of improperly insulated and unprotected wires carrying a dangerous current of electricity, notwithstanding that he had been warned of their dangerous nature, where the painter's death resulted from contact with the live wire.

Lefebvre v. Trethewey, 5 D.L.R. 195, 3 O.W.N. 1535, 22 O.W.R. 694.

The onus rests upon the plaintiff of establishing the negligence of the defendant in an action for injuries sustained as the result thereof, and if, in the absence of direct proof, the circumstances are equally

consistent with both the plaintiff's and the defendant's case, the plaintiff fails.

Queer v. Greig, 5 D.L.R. 308.

(§ II B—111)—In criminal cases.

There is an onus on the Crown in every criminal case to establish such a case as will not leave it so that it can be said there is room for any theory that is not unreasonable and improbable other than that the accused is guilty.

R. v. O'Neil, 25 Can. Cr. Cas. 323, 9 A. L.R. 365, 9 W.W.R. 1321.

(§ II B—112)—In patent cases.

The onus of proving that a device does not display the novelty required for a valid patent under Canadian law lies on the person attacking the patent. [Dompierre v. Baril, 18 Rev. Leg. 597, followed; Allen v. Reid, 14 Que. L.R. 126, disapproved.]

Rolland v. Fournier, 4 D.L.R. 756.

(§ II B—113) — In prosecutions under Liquor License Act.

Evidence that in an unlicensed hotel there is a bar, and on the bar a beer pump used to pump a nonintoxicating beverage called "local option beer," and that brewer's calendars were there displayed is insufficient to convict the occupant of the offence of keeping up a sign or having a bar containing bottles or casks displayed so as to induce a reasonable belief that the premises were licensed for the sale of liquor, where the former official license sign over the door had been removed, and there was no display of bottles or casks such as are used distinctively for intoxicating liquors nor was there, apart from the brewer's calendars, any display of advertising matter suggestive of the sale of intoxicants in the place.

R. v. Bevan, 8 D.L.R. 86, 4 O.W.N. 400, 20 Can. Cr. Cas. 237.

(§ II B—114)—Judgment — Entry — New evidence.

A court or judge is not bound by any decision until the judgment or order has actually been taken out and entered. If there are material facts which were not brought to his attention at the trial, he should hear them, and should consider affidavits as to further evidence suggested or proposed to be given and the circumstances under which and when it was discovered.

Stevenson v. Dandy, 43 D.L.R. 238, 14 A.L.R. 99, [1918] 3 W.W.R. 662.

Workmen's Compensation Act — Temporary disability — Duration — Proof — R.S.Q. 7322.

Where the injured plaintiff is temporarily incapacitated, proof must be given as to when he will be better. This proof should be made by a medical man, if possible.

McLean v. Fuller, 16 Que. P.R. 50.

C. Defences.

(§ II C—115)—Sale — Condition as to notice of defect — Onus to shew noncompliance with.

In an action to recover the price of an engine, the onus rests on the vendor raising the issue in his reply, to shew that the vendee did not give notice in the manner required by the contract of sale, of the failure of the engine to work properly.

Massey-Harris Co. v. Elliott, 11 D.L.R. 632, 4 W.W.R. 134.

Margins on stock exchange—Customer's onus as to "fictitiousness."

Where a customer dealing in margins on a stock exchange resists payment of his calls to cover margins on the ground that the transactions involved were not "real" but only "pretended" sales and purchases, the onus of proof is on the customer.

Richardson v. Beamish, 13 D.L.R. 400, 23 Man. L.R. 306, 21 Can. Cr. Cas. 487, 24 W.L.R. 514, 4 W.W.R. 815.

(§ II C—119)—Contracts generally.

The burden of proof rests upon the defendant in an action to recover for making a number of suits of clothing, to establish the truth of an affirmative counterclaim that the suits were not made according to a designated sample, as required by the contract, as well as to shew the defective quality of the workmanship of the suits.

Wener v. Rubin, 5 D.L.R. 539.

The party called upon to pay an account for work ordered done by the Public Utilities Commission has the right to have the value thereof established upon a hearing of the evidence pro and con, and if such right is denied him the order to pay is illegal.

La Compagnie Electrique de Grand'mere v. Public Utilities Commission, 6 D.L.R. 92, 22 Que. K.B. 25.

(§ II C—121)—Collisions — Ships — Burden of establishing defence.

Where two vessels are meeting in a river and one of them negligently turns to the wrong side thereby causing imminent danger of a collision, the onus of proving an allegation that the vessel offended against neglected her duty to reverse her engines promptly in order to avoid a collision, rests on the original offender and can only be discharged by clear evidence.

C.P.R. Co. v. "The Kronprinz Olav;" The "Montcalm" v. Bryde, 14 D.L.R. 46, 13 E. L.R. 178, reversing the judgment of the Canada Supreme Court (unreported) which affirmed the judgment of the Deputy Local Judge in Admiralty Montreal, 19 Can. Ex. 138.

(§ II C—122) — Circulating obscene printed matter — Onus to shew subservience of public welfare.

The onus of shewing that the circulation of a grossly disgusting description of an obscene nature, describing a theatrical per-

formance, was for the public welfare, rests on the person circulating it.

R. v. St. Clair, 12 D.L.R. 710, 28 O.L.R. 271.

D. Exceptions or exemptions.

(§ II D—125)—Onus — Exceptions or exemptions — Railway construction contract — Statement as basis for subsidy.

Where a railway construction contractor and his employer stipulate that the payment to the contractor of a certain item of the contract price must depend upon the contractor's statement of the construction cost being passed by the Federal Government as basis for a specified additional subsidy, the employer is relieved from the payment where the subsidy in question is withheld by the government on the ground, among others, that the contractor's construction statement is not even in part established, unless the contractor satisfies the onus shifted upon him and affirmatively proves some other efficient cause for the denial of the subsidy.

Dini v. Brunet, 18 D.L.R. 385.

(§ II D—127) — Exemptions from taxation.

In an action against a railway company for recovery of taxes assessed against their property by a city corporation, where the company claims an exemption from taxation under s. 14, c. 40, R.S.S., the burden of proving such exemption is upon the railway company.

Prince Albert v. C.N.R. Co., 10 D.L.R. 122, 15 Can. Ry. Cas. 87, 6 S.L.R. 49, 23 W.L.R. 275, 3 W.W.R. 909.

Saving clause.

When there has been a deviation from a statutory requirement the onus lies upon those supporting the deviation to shew that the effect of same comes within the terms of a statutory saving clause intended to validate the result of the voting, notwithstanding the occurrence of certain errors and irregularities in procedure. [Re Giles and Almonte, 21 O.L.R. 362, distinguished.]

Re Milne and Tp. Thorold, 1 D.L.R. 540, 25 O.L.R. 421.

E. Concerning person.

(§ II E—135)—Status — Master and servant — Presumption of relationship — Stranger's claim.

In an action against the owner of a vehicle for damages for injuries alleged to have been sustained by the negligence of his servant resulting in a collision with the plaintiff, evidence that the vehicle in question was owned by the defendant, who was engaged in the transfer business, and that he employed men to drive vehicles at the time of the accident in question, is sufficient, in the absence of evidence to the contrary, to raise the inference that the person who was driving the vehicle, though his name was unknown, was the servant of the defendant.

Amundsen v. Ward, 16 D.L.R. 558, 6 W.W.R. 1022, 7 W.W.R. 311, 28 W.L.R. 654, affirming 11 D.L.R. 167.

(§ II E—140) — Partnership and dissolution.

In an action for winding up a partnership made for a fixed term, the onus is upon the defendant who sets up a dissolution by agreement during such term, to prove the same. If the partnership be at will, the onus is on the plaintiff to shew by what acts the partnership was terminated.

Town v. Kelly, 5 D.L.R. 14, 21 W.L.R. 610. [Reversed, 12 D.L.R. 490, 24 W.L.R. 541.]

(§ II E—142)—Burden of proof as to agency.

The burden of proof is on the person dealing with anyone as agent, through whom he seeks to charge another as principal; he must shew that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from denying it.

Ramelson v. North West Hide & Fur Co., 15 D.L.R. 905, 27 W.L.R. 160.

Agency.

It is competent to shew that one or both of the contracting parties were agents for other persons, and acted as such agents, in making the contract, as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals; and this, whether the agreement be or be not required to be in writing by the Statute of Frauds; such evidence in no way contradicts the written agreement.

Morgan v. Johnson, 4 D.L.R. 643, 3 O.W.N. 1526, 22 O.W.R. 868.

Assent by a principal to an unauthorized agreement for the sale of land made by his agent, is not shewn where the former continually repudiated the agent's act, although he at one time said he would sign the agreement, but immediately afterward refused to do so, and refused to accept the money paid by the purchaser on the agreement to the agent.

Margolis v. Birnie, 5 D.L.R. 534, 4 A.L.R. 415, 21 W.L.R. 462, 2 W.W.R. 445.

(§ II E—145)—Presumptions — Status — Master and servant — Scope.

In an action against the owner of a vehicle for damages alleged to have been sustained by the plaintiff through a collision with the defendant's vehicle, evidence that the vehicle in question was driven through the street at a time when draymen were usually at work, that the defendant was engaged in the transfer business and the driver of the vehicle was in the employ of the defendant, is sufficient, in the absence of any evidence to the contrary, to raise the inference that the person driving the waggon was acting in the scope of his em-

ployment and that he was about his master's business at the time of the accident in question.

Amundsen v. Ward, 16 D.L.R. 558, 6 W.W.R. 1022, 7 W.W.R. 311, 28 W.L.R. 654, affirming 11 D.L.R. 167.

REPRESENTATIVE CAPACITY — DESCRIPTIVE TERM.

If the name of the maker, payee or an endorser of a negotiable instrument be followed by words indicating a representative capacity, they are generally considered merely descriptio personae, and as such are immaterial.

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

(§ II E—149)—LICENSEE — INVITEE — TRESPASSER.

The burden of proof rests upon the plaintiff in an action brought under the provisions of the Workmen's Compensation for Injuries Act (Ont.) and the Fatal Accidents Act (Ont.) for the recovery of damages for the death of her husband who had fallen into the hold of a vessel moored to a dock for the winter, while such vessel was lying between the dock and another vessel upon which the deceased had worked as an engineer during the previous navigation season and upon which he had been re-engaged for the ensuing season not yet commenced, to prove the right of the deceased to be where he was when he was killed.

King v. Northern Navigation Co., 6 D.L.R. 69, 27 O.L.R. 79, 22 O.W.R. 697.

(§ II E—151)— MARRIAGE — REPUTATION AND COHABITATION.

On the trial of a prisoner for incest with his daughter, formal proof of his marriage to the girl's mother is not essential; the marriage may be proved by evidence of reputation and of cohabitation.

R. v. Lindsay, 30 D.L.R. 417, 26 Can. Cr. Cas. 163, 36 O.L.R. 171.

MARRIAGE.

A regent legal presumption is raised in favour of any marriage which is shewn to be celebrated de facto, and this presumption of law is not lightly to be repelled or broken in upon by a mere balance of probability, but the evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive.

Zdrahal v. Shatney, 7 D.L.R. 554, 22 Man. L.R. 521, 22 W.L.R. 336, 3 W.W.R. 239.

(§ II E—152)—IDENTITY—NAME.

It is not to be inferred merely from the similarity of name of the proposed purchaser in a written offer of purchase and of a member of the firm of real estate agents as disclosed upon the printed letter head accompanying such offer that the proposed vendor, on whose behalf the real estate firm were commissioned to sell the property, knew that such purchaser was the identical person who belonged to the firm, particularly where the firm were charging him a commission as for an alleged sale to which they would not legally be entitled on a sale to one of themselves for their joint benefit.

Edgar v. Caskey, 7 D.L.R. 45, 5 A.L.R. 245, 22 W.L.R. 91, 2 W.W.R. 1036, reversing 4 D.L.R. 460.

(§ II E—155)—PRESUMPTION OF DEATH — HOW ARISEN.

The presumption of death not as a matter of law, but as a matter of fact may arise on the particular facts of a case, although the seven years required for a presumption as a matter of law have not expired.

Hedge v. Morrow, 20 D.L.R. 561, 32 O.L.R. 218.

(§ II E—156)—PRESUMPTION OF DEATH — ABSENTEE NOT HEARD OF IN SEVEN YEARS.

If it is proved that for a period of seven years no news of an absentee has been received by those who would naturally hear of him if he were alive, and that such inquiries and searches as the circumstances naturally suggest have been made, a legal presumption arises that he is dead.

Re Oag and Order of Canadian Home Circles, 9 D.L.R. 771, 4 O.W.N. 643, 23 O.W.R. 796.

ABSENCE FOR SIXTEEN YEARS — PRESUMPTION OF DEATH, HOW LIMITED.

Death may not be presumed after an absence of 16 years, or even longer, if the facts shew that the missing person would not be likely to communicate with relatives or friends. [Bowden v. Henderson, 2 Sm. & G. 360, 65 E.R. 436, and Watson v. England, 14 Sim. 28, 60 E.R. 266, applied.]

Wilcox v. Wilcox, 16 D.L.R. 491, 24 Man. L.R. 93, 27 W.L.R. 359, 6 W.W.R. 213, reversing 14 D.L.R. 1.

PRESUMPTIONS — DEATH — UNHEARD OF FOR SEVEN YEARS — BURDEN OF PROOF — R.S.O. 1914, c. 183, s. 165.

As part of the evidence on the question of presumption of death of a person who has not been heard of for 7 years as regards his life insurance under R.S.O. 1914, c. 183, s. 165, it is admissible to shew by the testimony of a person who was well acquainted with him that he had been informed by another acquaintance that the latter had within a year met the assured and that he was then leading a dissolute life. The 7 years which raises the presumption of death are the 7 years preceding the issue of the writ for the recovery of a claim based on that presumption. In a case of presumption of death of a person because he has not been heard of for 7 years, the presumption simply is that he is dead, not that he died at any particular time; if after evidence warranting that presumption, it be of importance to the contesting party to establish the date of death, the onus is upon him to adduce evidence as to that fact.

Duffield v. Mutual Life Ins. Co., 20 D.L.R. 467, 32 O.L.R. 299.

DEATH.

In an action to declare valid a title by possession where the party named as defendant has not been heard of for 7 years, the court may act upon the presumption that he is dead, and appoint counsel to represent his estate under Alberta R. 57.

Wallace v. Potter, 7 D.L.R. 114, 22 W.L.R. 281, 2 W.W.R. 1085.

(§ II E—161)—ASSENT.

The consent of one of the members of a partnership to the acquirement and ownership by the other of an interest in a business competing with that of the firm may be inferred from the surrounding facts and circumstances, and such consent, if established, will relieve the partner so interested from the obligation to account to his firm for the profits derived from such interest. [Aas v. Benham, [1891] 2 Ch. 244 at p. 255, applied.]

Livingston v. Livingston, 4 D.L.R. 345, 26 O.L.R. 246, 21 O.W.R. 901.

(§ II E—162) — MALICIOUS PROSECUTION — AUTHORITY OF AGENT TO INSTITUTE CRIMINAL ACTION ON BEHALF OF PRINCIPAL—ONUS TO SHEW.

In order that the plaintiff may recover against a company in an action for malicious prosecution for an arrest caused by its agent, the onus rests upon the plaintiff to give some evidence to justify a finding that from the nature of the agent's duties or the terms of his employment he had authority to institute the prosecution. [Thomas v. C.P.R. Co., and Bush v. C.P.R. Co., 14 O.L.R. 55, followed.]

March v. Stimpson Computing Scale Co., 11 D.L.R. 343, 4 O.W.N. 1259, 24 O.W.R. 591.

AUTHORITY.

The onus rests upon the defendant, in an action by an agent to recover commission for securing a purchaser for the former's property, to shew that the agent's authority was withdrawn before he found a buyer.

George v. Howard, 4 D.L.R. 257, 5 A.L.R. 391, 2 W.W.R. 443.

(§ II E—163)—Permission of a railway company to a brakeman of another company to enter its yards to look for cars that might be delivered his master in due course, so as to, for his own convenience, facilitate their disposal when received, cannot be inferred from the testimony of the plaintiff that he had done so for several months in the nighttime, or from the testimony of a servant of the defendant that he had "seen them come out different times," since it was not sufficient to shew knowledge on the part of the defendant of the plaintiff's conduct, much less to establish acquiescence therein sufficient to amount to leave or right to do so.

Cunningham v. Michigan Central R. Co., 4 D.L.R. 221, 3 O.W.N. 1395, 14 Can. Ry. Cas. 96, 22 O.W.R. 481.

(§ II E—164)—JURISDICTION OF INTERIOR COURT — ONUS OF PROOF.

Upon a plea of autrefois convict or of res judicata, where the previous decision pleaded is that of an inferior court, the burden of proving that that court was a court of competent jurisdiction rests upon the party pleading the previous decision.

R. v. Taylor, 15 D.L.R. 679, 7 A.L.R. 72, 22 Can. Cr. Cas. 234, 26 W.L.R. 652, 5 W.W.R. 1105.

(§ II E—165)—KNOWLEDGE — NOTICE — SANITY — CAPACITY — BELIEF — INTENT.

The onus is upon the agent who seeks to enforce against his principal an alleged purchase on his own account of the principal's property which he had been employed to sell to establish to the satisfaction of the court that he disclosed to his principal the fact that the offer was on his own behalf.

Edgar v. Caskey (No. 2), 7 D.L.R. 45, 5 A.L.R. 245, 22 W.L.R. 91, 2 W.W.R. 1036.

A trespasser on lands is to be dealt with as having notice or knowledge that the owner of the land will try to use it in any reasonable and usual way which may be profitable to him, and is accountable for damages accordingly.

Marson v. G.T.P.R. Co., 1 D.L.R. 850, 4 A.L.R. 167, 20 W.L.R. 161, 1 W.W.R. 693.

(§ II E—166)—Knowledge of a dealer in books, who had a stock of 150,000 to 250,000 volumes, of the obscene character of a book, cannot be inferred from the fact that a clerk had, without his employer's knowledge, ordered a few of them and sold one, and that the defendant had, about a year before, upon receiving a few copies of such book, without reading one of them, returned them to the publisher because he had heard that the book was immoral.

R. v. Britnell, 4 D.L.R. 56, 26 O.L.R. 136, 20 Can. Cr. Cas. 85, 21 O.W.R. 800.

KNOWLEDGE.

Where the seller of a boiler and its attachments is a wholesale dealer and manufacturer of such machinery, and where the attachments sent under the contract of sale are misfits and not workable, the seller will be held strictly to knowledge of their requirements in an action by the buyer for damages for delay in returning the attachments for readjustment and alterations.

Leonard v. Kremer, 7 D.L.R. 244, 4 A.L.R. 152, 20 W.L.R. 147, 1 W.W.R. 642. [Affirmed, 11 D.L.R. 491, 48 Can. S.C.R. 518, 4 W.W.R. 332.]

In the absence of actual knowledge, it cannot be assumed that one who purchased land under a certificate of title free from any reservation, without notice of the existence therein of footings, which were concealed from view, for sustaining a wall of a building on an adjoining lot, knew of their existence, where the wall could have

been built without extending any of the footings into the land so purchased.

National Trust Co. v. Western Trust Co., 4 D.L.R. 455, 4 S.L.R. 210, 21 W.L.R. 571, 2 W.W.R. 667.

(§ II E—167)—Of principal or agent.

Where one who has engaged an independent contractor has an agent upon the work, though the agent be without authority to authorize or adopt a wrongful taking of chattels by the contractor for the purpose of the work, yet, if he have knowledge of such a wrongful taking, such knowledge may be imputed to his principal.

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45, 22 O.W.R. 485.

(§ II E—169)—Of corporation.

Acquiescence of the manager of a mortgagor in the making of extensive improvements on encumbered property by a mortgagee who was in possession, cannot be inferred from the fact that the former lived in the immediate neighborhood of the property and was aware of such improvements, where he did not object thereto for fear that the mortgagee would sell under the power in his mortgage.

Manitoba Lumber Co. v. Emmerson, 5 D.L.R. 337, 18 B.C.R. 96, 21 W.L.R. 503, 2 W.W.R. 419.

(§ II E—172)—Testamentary capacity.

A plaintiff who takes proceedings to annul a will on the ground of testator's insanity, has the burden of proof. He must shew that insanity existed when the will was made. Proof of prior and subsequent insanity does not cast upon the defendant the obligation to establish a lucid interval. The nature of the will, whether it bear the stamp of justice, foresight, benevolence, caprice or the opposite, affords presumptions only, and does not, of itself, furnish proof of the testator's mental state.

Ouimet v. Laberge, 43 Que. S.C. 221.

Where the party propounding a will in the Surrogate Court has adduced prima facie evidence on a contest there raised as to the testator's capacity, and has been granted probate thereof, other persons not made parties to such proceedings, who thereafter attack the will by an independent action to declare its invalidity on the ground of lack of testamentary capacity, have thrown upon them the onus of proof; although the contestant in the Surrogate Court had, for a consideration, withdrawn the opposition there raised.

Badenach v. Inglis, 14 D.L.R. 109, 29 O.L.R. 165.

Statements made by a testator in his lifetime were admitted on the contest of a will, as they bore, or might bear on the question of his capacity to make a will and of its due execution.

Toal v. Ryan, 4 D.L.R. 25, 3 O.W.N. 1267, 22 O.W.R. 127.

Oddities of habits and eccentric acts are not, per se, sufficient to justify a conclusion of unsound mind, especially when the provisions of the will itself are perfectly rational and logical, and evidence based on purely theoretical assertions is most dangerous and should not carry much weight as against testimony of facts. As a general rule the onus of proving that a testator was of unsound mind at the time of the making of the will rests on the person attacking the validity of the will, although special circumstances (e.g., intervals of unsoundness of mind) may shift such onus on the person defending such will.

Madore v. Martin, 3 D.L.R. 731, 18 Rev. de Jur. 480.

(§ II E—174)—Presumption as to sanity — Preponderance of evidence to rebut.

The rule as to presumption of sanity "until the contrary is proved" (Cr. Code, s. 19), as applied to a defence of insanity in a criminal case merely requires proof of insanity by a preponderance of evidence to the satisfaction of the jury.

R. v. Anderson, 16 D.L.R. 203, 7 A.L.R. 102, 22 Can. Cr. Cas. 455, 26 W.L.R. 783, 5 W.W.R. 1052.

(§ II E—177)—Intent.

Upon an agreement to purchase vacant land on small monthly instalments where the purchaser now seeks specific performance and the vendor pleads abandonment, the intention of the purchaser to abandon the contract may properly be inferred from long continued default on the monthly payments.

Handel v. O'Kelly, 8 D.L.R. 44, 22 Man. L.R. 562, 22 W.L.R. 407, 3 W.W.R. 367.

There is reasonable cause for believing that the defendant is about to quit the province within the meaning of the Arrest and Imprisonment for Debt Act, R.S. B.C. 1911, c. 12, if the intended absence is likely to prove of such duration as would, before the abolition of imprisonment for debt, have prevented the taking of the defendant's person in execution.

Oliphant v. Alexander; Selkirk v. Alexander, 6 D.L.R. 261, 2 W.W.R. 908.

(§ II E—180)—Malice — Criminal intent—Probable cause.

In an action for damages resulting from false arrest the onus of proving that the defendant acted imprudently and without reasonable and probable cause in procuring such arrest lies upon the plaintiff.

C.P.R. Co. v. Waller, 1 D.L.R. 47, 19 Can. Cr. Cas. 190.

(§ II E—181)—Malice.

Where the alleged libel is a privileged communication, the burden is upon the plaintiff to prove express malice.

Winnipeg Steel, etc., Co. v. Canada Ingot, etc., Co., 7 D.L.R. 707, 22 Man. L.R. 576, 22 W.L.R. 387, 3 W.W.R. 356.

Malice in laying the criminal charge may be inferred from the want of reasonable and probable cause in laying the in-

formation and proceeding with the prosecution.

Geers v. Nestman, 1 D.L.R. 312, 20 W.L.R. 212, 1 W.W.R. 861.

(§ II E—182)—Liquor laws — Finding liquor in boarding house — Statutory presumption.

The conclusive presumption that liquor is kept for sale in violation of law, arising under s. 27 of 9 Edw. VII. c. 82 (R.S.O. 1914, c. 215), from the finding of a greater amount of liquor on the premises of an unlicensed boarding-house keeper than may reasonably be supposed to be intended for the use of himself or family does not arise from the finding on his premises of liquor which was brought there by boarders, and which was not in the possession or control of the keeper of the house.

R. v. Borin, 15 D.L.R. 737, 29 O.L.R. 584, 22 Can. Cr. Cas. 248.

Criminal intent — Seditious words — Inferences.

On a charge of speaking seditious words (Cr. Code, s. 134), it is always open to the jury, or to the judge if trying the case without a jury, to infer the seditious intention from the words and the circumstances under which they were spoken.

R. v. Felton, 28 D.L.R. 372, 25 Can. Cr. Cas. 207, 9 A.L.R. 238, 33 W.L.R. 157, 9 W.W.R. 819.

Receiving stolen goods—Knowledge.

It is not essential to the offence of retaining stolen goods in possession that the goods should have been found in the possession of the accused; unlawful possession and knowledge of the theft may be shewn from the secret meetings between the defendant and the gang of young boys who stole these and similar goods and sold them to him from time to time.

Medres v. The King, 26 Can. Cr. Cas. 241, 22 Rev. Leg. 400.

(§ II E—185)—Onus of proof — Fraud or good faith, undue influence.

The onus probandi is upon the party who alleges fraud to prove his case as is alleged in the statement of claim or in his particulars.

Kert v. Starland, 20 D.L.R. 16, 24 Man. L.R. 832, 29 W.L.R. 759.

Fraud or good faith — Undue influence.

In an action to set aside conveyances of a debtor as fraudulent and void as against creditors the good faith of the transaction may be shewn by the uncorroborated testimony of the debtor where he gives his recital in an honest, straightforward manner without attempting to conceal anything tending to support the creditor's contention and no evidence is offered to contradict him. [Merchants Bank v. Hoover, 5 W.L.R. 516, not followed.]

Burns v. Matejka, 1 D.L.R. 837, 4 A.L.R. 55, 19 W.L.R. 863, 1 W.W.R. 431.

(§ II E—186)—Fraud in general.

A party suing on a negotiable instrument need not allege, nor at the outset prove, that he gave consideration, or is a holder in due course since these presumptions are in his favour; but, if fraud or illegality be shewn, the burden is shifted, and he must shew that, subsequently to such fraud or illegality, he gave value in good faith.

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

Fraudulent intent must be proved in an action for deceit. [Smith v. Chadwick, 9 A.C. 157, at p. 190; Derry v. Peek, 14 App. Cas. 337; Tackey v. McBain, [1912] A.C. 186, followed.]

Kinsman v. Kinsman, 5 D.L.R. 871, 3 O.W.N. 966, 22 O.W.R. 979.

(§ II E—187)—Fraud in contract — Sale of shares — Burden of proof.

Smith v. Haines, 16 D.L.R. 877, 6 O.W.N. 150.

In contract.

Where an incorporated company attacks a contract between itself and one of its directors on the ground of misrepresentation, the onus is upon the director to prove affirmatively the truth of the representation complained of.

Denman v. Clover Bar Coal Co., 7 D.L.R. 96, 6 A.L.R. 305, 22 W.L.R. 128, 2 W.W.R. 986. [Affirmed 15 D.L.R. 241, 48 Can. S.C.R. 318, 5 W.W.R. 564.]

(§ II E—189)—In sale or pledge.

Fraud and misrepresentation as to the probable yield of timber from land cannot be inferred from the vendor's exaggerated estimate thereof, where there was room for a wide difference of opinion on the question.

Eaton v. Dunn, 5 D.L.R. 604, 11 E.L.R. 52.

The onus of shewing ratification by the seller of a sale of company shares, which was induced by fraud of the purchaser, after the former acquires knowledge thereof, rests upon the purchaser.

Gadsden v. Bennetto, 5 D.L.R. 529, 21 W.L.R. 886, 2 W.W.R. 733. [Reversed, 9 D.L.R. 719, 23 Man. L.R. 33.]

Every violation of the provisions of the law regarding the procedure to be followed at sheriff's sale raises a presumption of fraud juris et de jure which cannot be rebutted.

Savoie-Guay v. DesLauriers; Rose v. Savoie-Guay, 7 D.L.R. 205, 21 Que. K.B. 560.

Where a promissory note is given in payment for tenant's fixtures on the faith of the vendor's representation that there will be no difficulty in getting possession thereof, the inference may properly be drawn that the promissory note would not have been given but for that representation.

Tew v. O'Hearn, 3 D.L.R. 446, 3 O.W.N. 1116.

(§ II E—191) — Fraudulent conveyance — Presumption of fraudulent intent.

In order to set aside a voluntary conveyance of all of a debtor's property, fraudulent intent need not be shewn where the effect of the conveyance is to prevent his creditors obtaining satisfaction of their claims. The fact that the amount owed by a grantor was small does not affect the presumption that his voluntary conveyance was intended to defraud his creditors, where the effect of the transfer was to denude the grantor of all of his property.

Whitford v. Brimmer, 12 D.L.R. 702, 47 N.S.R. 275, 13 E.L.R. 153, affirming 7 D.L.R. 190.

Onus where valuable consideration.

Although a transfer of property, even when made for valuable consideration, may be affected by mala fides, yet those who undertake to impeach such a transaction on that ground must adduce clear evidence of actual intent to defraud. [Harman v. Richards, 10 Hare 81; Hickerson v. Parrington, 18 A.R. (Ont.) 635, applied.]

Fisher v. Kowslowski, 13 D.L.R. 785, 23 Man. L.R. 769, 25 W.L.R. 417, 5 W.W.R. 91.

Consideration — Sufficiency — Presumptions — Onus — Consideration.

In an action to set aside a conveyance by a debtor as fraudulent under the stat., 13 Eliz. c. 5, the mere fact that the consideration is of less value than the property conveyed by the debtor, or that the consideration is paid to a third party, does not in itself establish fraud, but these are merely circumstances to be considered in determining whether or not there was actual intent to defraud. The burden of proving fraud in a conveyance by a debtor as against the stat. 13 Eliz. c. 5, is on those seeking to set aside the transfer. The doctrine of constructive fraud cannot be successfully invoked in favour of a creditor to deprive the grantee of the debtor of property conveyed to him by the debtor for valuable consideration, though the consideration which the grantee gave was the transfer of some of his property to a third person designated by the debtor, and though the effect of the conveyance, combined with business reverses was to impoverish the debtor, where no intent to defraud or knowledge thereof existed on the part of the grantee.

Jack v. Kearney, 10 D.L.R. 49, 41 N.B. R. 293, 11 E.L.R. 401, reversing 4 D.L.R. 836, 10 E.L.R. 298. [Distinguished in St. John v. Crystal, 10 D.L.R. 76.]

Transfer of land — Father and son — Father unable to speak English — Fiduciary relation of son — Action to set aside transfers — Burden of proof.

Where a father can neither read nor write English and the son acts as interpreter in giving instructions to a solicitor for preparing a transfer, without pecuniary consideration, from the father to the son, the only means the father had of knowing what he is signing being to depend on the honesty and good faith of the son, the son occupies a fiduciary position of a very high character, and in an action brought by the father to set aside the transfer the burden of proof rests on the son to prove that the father knew quite well the nature and effect of the instrument he was signing. Iwanchuk v. Iwanchuk, 48 D.L.R. 381, [1919] 3 W.W.R. 363.

Where a transfer of property made by a debtor is attacked by his creditors as fraudulent and intended to defeat or delay the creditors, and the transaction is shewn to be surrounded by suspicious circumstances, it will not be sustained on the uncorroborated evidence of the parties to the transaction; the onus on them to disprove the fraud, as to which a presumption has been raised against the parties to the transaction.

Green, Swift & Co. v. Lawrence, 7 D.L.R. 589, 2 W.W.R. 932.

(§ II E—193)—In insurance.

In an action on a policy of insurance exempting the insurer from liability if statements material to the risk made in the application upon which the policy was issued, were untrue, where it appears that the insured made a misrepresentation in his application and that the insurer relies thereon as a defence, the burden is upon the insurer to establish the materiality of the matter misrepresented unless the circumstances themselves raise that inference.

Clarke v. British Empire Ins. Co., 4 D.L.R. 444, 5 A.L.R. 99, 21 W.L.R. 774, 2 W.W.R. 682.

(§ II E—196)—Good faith—Contract—Interest in company shares.

Warfield v. Bugg, 1 D.L.R. 897.

(§ II E—197)—Undue influence.

In an action by a creditor of a limited liability company, upon a guarantee signed by a married woman, who was the secretary of, and a shareholder in the debtor company, the burden of proving undue influence in respect of her signature thereto obtained by her husband lies upon those who allege it. [Bank of Montreal v. Stuart, [1911] A.C. 120, followed.]

Gold Medal Furniture Co. v. Stephenson, 10 D.L.R. 1, 23 W.L.R. 664, 23 Man. L.R. 159, 49 C.L.J. 337, 4 W.W.R. 7. [Appeal quashed, 15 D.L.R. 342, 48 Can. S.C.R. 497, 26 W.L.R. 570.]

Wife's security for husband's debt.

The burden of proving undue influence lies upon those who allege it, even where the security impeached is a mortgage of a married woman's property given to secure her husband's debt. [Bank of Montreal v. Stuart, [1911] A.C. 120, applied.]

Doll v. King, 10 D.L.R. 518, 24 W.L.R. 476.

(§ II E—198) — In negotiable instrument.

Where, in an action upon a promissory

note, it is shewn that a previous negotiation of the note was a fraud upon the defendant, the plaintiff must shew not only that value has been given subsequent to such negotiation by some other holder in due course, but also that it has been given in good faith without notice of the fraud. [Tatam v. Haslar, 23 Q.B.D. 345, followed.]

Noble v. Boothby, 7 D.L.R. 1, 22 W.L.R. 232, 2 W.W.R. 1103.

In an action on a promissory note given pursuant to an agreement under which several persons advanced money to enable the payee to go on a prospecting trip for minerals for the benefit of all of them, fraud and collusion between the payee and makers of other notes that were given under such agreement will not be assumed from the unexplained fact that the payee returned their notes to them.

Lilly v. Robertson, 4 D.L.R. 852, 21 W.L.R. 585.

(§ II E—204)—TRUTH, INNOCENCE, GUILT—PRESUMPTION AS TO.

The statement or admission of the accused in the words, "I won't do it again," may constitute an implied admission of guilt of the particular crime of which he is charged, by inferences drawn from the circumstances under which the statement was made to identify what it was that his promise had reference to and to shew, in the absence of direct evidence, that the person to whom the exclamation was addressed must have charged accused with the crime immediately prior to the making of such statement.

R. v. Whistnant, 8 D.L.R. 468, 5 A.L.R. 211, 22 W.L.R. 762, 8 W.W.R. 486.

(§ II E—205) — PRESUMPTIONS — WITHHOLDING OF EVIDENCE.

It is matter of comment as regards the credit to be given a plaintiff's testimony that, knowing that his version of the transaction would be contradicted by the opposing party, he failed to produce evidence of parties easily available as witnesses whose connection with the transaction was such that they could corroborate the plaintiff's testimony, if true.

Butterfield v. Cormack, 11 D.L.R. 797, 24 W.L.R. 250. [Affirmed, 13 D.L.R. 817, 7 A.L.R. 26.]

FROM SILENCE.

In an action against a street railway company for personal injuries alleged to have been caused by starting the car while a passenger was getting off the rear platform, the fact that the conductor, who, by a rule of the company was required to be on the rear platform when the car was stopped, was not called as a witness by the defendant company militates against the defence; and the jury may draw inferences against the defendants from the keeping back of evidence which is alone in their possession. [Euclid Avenue Trust Co. v. Hobs, 24 O.L.R. 447, applied.]

Schwartz v. Winnipeg Electric R. Co., 9 D.L.R. 708, 23 Man. L.R. 60, 23 W.L.R. 688, 3 W.W.R. 1097. [Affirmed, 16 D.L.R. 681, 49 Can. S.C.R. 80.]

A presumption is raised against a spoliator who destroys or conceals the things, the finding of which would be evidence against him, and such presumption is applicable in matters of international law.

The King v. Chlopek, 1 D.L.R. 96, 17 B.C.R. 50, 19 Can. Cr. Cas. 277, 19 W.L.R. 837.

Where defendant was shewn to be unable to attend the trial on account of ill-health, and her application for a postponement of the trial has been denied, as it did not appear probable that her health would improve, no unfavorable inference is to be drawn against her from her failure to give evidence where the plaintiff insists upon proceeding with the trial.

Koop v. Smith, 20 D.L.R. 440, 20 B.C.R. 372, 29 W.L.R. 872, 7 W.W.R. 416.

The fact that one of the parties to an alleged contract with a corporation embodied in a corporate resolution, although present when the resolution was read, raised no objection or dissent, is not conclusive of his assent by silence, as such party is entitled to adduce evidence in explanation of his silence.

Re St. David's and Lahey, 7 D.L.R. 84, 4 O.W.N. 32, 23 O.W.R. 12.

Where reticence is accompanied by such circumstances as to give it an exceptionally misleading aspect, it can be assimilated to an affirmative false statement, and a contract entered into as the result of such reticence will be voided and set aside.

Liddell v. Lacroix, 8 D.L.R. 502.

(§ II E—206) — PRESUMPTION AGAINST SPOLIATOR.

In computing the amount of damages recoverable for clandestine use of a water supply the maxim "omnia praesumuntur contra spoliatorem" applies.

Brandon Electric Light Co. v. Brandon, 1 D.L.R. 793, 22 Man. L.R. 500, 20 W.L.R. 658, 2 W.W.R. 22.

F. CORPORATIONS; PARTNERSHIP.

(§ II F—211)—POWERS AND ACTS.

In winding-up proceedings, the onus is on the liquidator who seeks to place a person on the list of contributories.

Re Port Hope Brewing & Malting Co.; Johnson's Case, 3 D.L.R. 426, 3 O.W.N. 1048.

(§ II F—217)—DIRECTORS.

The presumption in the case of a director of a company is that his services as such are to be gratuitous.

Re Solicitors, 7 D.L.R. 323, 4 O.W.N. 47.

H. AS TO SKILL; NEGLIGENCE; CARE.

(§ II H—224)—STREET RAILWAYS—SNOW AND ICE—REMOVAL FROM TRACK.

The onus rests on an electric railway company, in an action against it for injuries sustained from snow removed from its railway tracks and left heaped up in a highway, to shew that it was levelled off to

a uniform depth as required by R.S.N.S. 1900, c. 71, s. 194.

Wright v. Pictou County Elec. Co., 11 D.L.R. 443, 15 Can. Ry. Cas. 394, 47 N.S.R. 166, 13 E.L.R. 47.

INJURY BY AUTOMOBILE—DUTY OF OPERATOR TO SHEW FREEDOM FROM NEGLIGENCE.

The fact that loss or damage was incurred or sustained on a highway or street by reason of a motor vehicle, under s. 7 of the Motor Vehicles Act, 8 Edw. VII. (Ont.), c. 53, R.S.O. 1914, c. 207, casts upon the owner or operator the onus of shewing that the injury was not due to his fault.

Maitland v. Mackenzie (No. 2), 13 D.L.R. 129, 28 O.L.R. 506.

PRESUMPTIONS — NEGLIGENCE — INJURY TO MILL BY FLOATAGE OF LOGS.

Under art. 1054, C.C. (Que.), a presumption of negligence arises from an injury to a mill from the floatage of logs down a stream, which can be rebutted only by evidence that the obstruction of the stream by the mill itself was the sole cause of the injury.

Pepin v. Villeneuve, 12 D.L.R. 327, 22 Que. K.B. 520.

NEGLIGENCE — MORE PROBABLE INFERENCE SHIFTING ONUS.

In a negligence case where either of two inferences is consistent with the facts proved, the one involving negligence on the defendant's part and the other exonerating him, the onus is shifted to the defendant if the former is the more reasonable or likely. [Flannery v. Waterford & Lemerock R. Co., Ir. R. 11 C.L. 30; Crawford v. Upper, 16 A.R. (Ont.) 440, applied.]

Amundsen v. Ward, 16 D.L.R. 558, 7 W.W.R. 311, 6 W.W.R. 1022, 28 W.L.R. 654, affirming 11 D.L.R. 167.

The maxim res ipsa loquitur applies to shew a prima facie case of actionable negligence on the part of a defendant who while riding a bicycle on a city street violently collided with and seriously injured a foot passenger who was crossing the street, where it appeared, (a) that there was nothing to prevent the defendant from seeing the plaintiff; (b) that he was in a better position to see the plaintiff than the plaintiff was to see him; (c) that the defendant did see the plaintiff long enough before the actual collision to warn him.

Woolman v. Cummer, 8 D.L.R. 835, 4 O.W.N. 371, 23 O.W.R. 504.

FORTUITOUS ACCIDENT—FORCE MAJEURE.

A fortuitous accident is an unforeseen event caused by a force majeure which it is impossible to resist, but it is not presumed and must be proved, and it is the one who invokes it who has the burden of proof.

Dechêne v. C.P.R. Co., 47 Que. S.C. 431.

(§ II H—226)—DERAILMENT—NEGLIGENCE —REBUTTAL.

The presumption of negligence arising from an injury to a passenger as the result of the derailment of a car at a switch over which many passenger trains passed daily, is not displaced by the railway company shewing that the accident was caused by the working out of an insecurely fastened bolt from a switch rod, if the defective condition should have been discovered by ordinary care.

Ashbee v. C.N.R. Co., 14 D.L.R. 701, 6 S.L.R. 135, 25 W.L.R. 884, 5 W.W.R. 543, 550.

(§ II H—227)—COLLISION.

Where evidence was given of a pass from the company having been found on deceased, but not to shew that this pass had been issued to him over that portion of the line, nor was the pass produced, the onus is on the defendant company to shew that deceased was traveling on a pass, and that it was not shewn that he was being carried in such circumstances as to make him a fellow servant with those operating the line.

Wilkinson v. B.C. Electric R. Co., 16 B.C.R. 113, 13 Can. Ry. Cas. 378.

(§ II H—230)—PERSONAL INJURY — RES IPSA LOQUITUR.

Dominion Fish Co. v. Isbester, 43 Can. S.C.R. 637.

(§ II H—234)—BAGGAGE.

In case of accidental destruction of goods in a bailee's custody, where an accident is proved to have been caused by a hidden defect of such a nature that it could not be guarded against in the process of construction, nor discovered by subsequent examination, the presumption that the loss has resulted from the bailee's negligence is rebutted.

Carlisle v. G.T.R. Co., 1 D.L.R. 130, 25 O.L.R. 372, 20 O.W.R. 860.

(§ II H—235)—GOODS LADEN BY SHIPPER ON CAR ON SIDING—DELIVERY TO RAILWAY COMPANY.

Spedding v. G.T.R. Co., 40 Que. S.C. 463.

(§ II H—237)—DAMAGE TO FREIGHT.

The payment by a common carrier of damages for injuries to a portion of a consignment of goods is not an admission of liability in respect to other portions thereof. [Hennell v. Davies, [1893] 1 Q.B. 367, followed.]

Albo v. G.N.R. Co., 2 D.L.R. 290, 17 B.C.R. 226, 20 W.L.R. 844, 1 W.W.R. 1105.

GOODS DAMAGED IN TRANSIT — EXCEPTED RISKS.

When goods are given to a carrier for delivery and arrive at their destination in a damaged state, there arises a presumption of fault on the part of the one who is under an obligation to indemnify the consignee. A clause inserted in a bill of lading providing "That the carriers should not be responsible for any loss, damage or delay arising from the act of God, pilferage, breakage, perils or accident of the sea, as the entry or admission of water into the vessel for any cause or for any purpose," puts the burden of proof upon the

carrier to prove that the damage to the goods arose from one of such causes.

Dechêne v. C.P.R. Co., 47 Que. S.C. 431.

(§ II H—241) — Railroads generally — Employees—Skill.

The flagrant failure of a section foreman improperly entrusted with the charge of a railway snow plow train in violation of statutory regulations requiring that only employees should be placed in charge who had passed the prescribed examination to observe the signals or to signal to the engine driver in rear may, in the absence of evidence to the contrary, be presumed to have resulted from his want of skill, knowledge or experience, or to some physical incapacity or defect, which the statutory examination or test would have revealed; and the railway company is properly held liable in damages for the death of his assistant on the snow plow in a collision resulting from the section foreman's neglect in which he also was killed; the company's action in setting an unqualified man to do such work was either the sole effective cause of the accident or a cause materially contributing to it, and the case therefore could not have been properly withdrawn from the jury.

Jones v. C.P.R. Co., 13 D.L.R. 900, 30 O.L.R. 331, 24 O.W.R. 917, reversing 5 D.L.R. 332, 3 O.W.N. 1404.

Statutory speed limit for trains—Exception.

Where a damage action against a railway company is based upon a level crossing accident due to the running of trains at a rate far exceeding that of ten miles an hour through the thickly peopled portion of a village or town and so primarily in contravention of s. 275 of the Railway Act, 1906, as amended by 8 & 9 Edw. VII., c. 32, s. 13, the onus of proof is upon the railway company to shew that it comes within the exceptions contained in the statute by having a special order of the Railway Committee or of the Railway Board governing the mode of protection of the crossing and so exempting the company from the restriction of ten miles an hour at the locus in quo, or to shew that the company had permission to exceed that limit by some regulation or order of the Railway Board applicable to the particular locality. [G.T.R. Co. v. McKay, 3 Can. Ry. Cas. 52, 34 Can. S.C.R. 81, distinguished.]

Bell v. G.T.R. Co., 15 D.L.R. 874, 48 Can. S.C.R. 561, 16 Can. Ry. Cas. 324, reversing 14 D.L.R. 279, 29 O.L.R. 247. [Leave to appeal to P. C. refused, May 22, 1914.]

In an action against a railway company for negligence causing death, the plaintiff is not bound to call the engineer or fireman on whose alleged neglect the action is based to prove a breach of duty by themselves.

Graham v. G.T.R. Co., 1 D.L.R. 554, 13 Can. Ry. Cas. 232, 25 O.L.R. 429, 20 O.W.R. 965.

(§ II H—250)—Electric railway—Negligence—Incompetence of motorman.

A finding by the jury in a negligence action against an electric railway company that the defendants were guilty of negligence consisting of the motorman being incompetent of running the car will not in itself be sufficient to render the company liable unless it is proved in evidence and found by the jury that the incompetence of the motorman resulted in some definite act or omission which was the direct cause of the injury.

Mehner v. Winnipeg Electric Co., 21 D.L.R. 786, 25 Man. L.R. 384, 18 Can. Ry. Cas. 179, 8 W.W.R. 517.

(§ II H—251)—Explosion of controller—Evidence of want of care.

An explosion in the controller of an electric street car which would not have occurred in the ordinary course of events had proper care been used in inspecting it, is prima facie sufficient to shew negligence as regards a resulting injury to a passenger.

Toronto R. Co. v. Fleming (No. 2), 12 D.L.R. 249, 47 Can. S.C.R. 612, 15 Can. Ry. Cas 386, affirming 8 D.L.R. 507, 27 O.L.R. 332.

Breaking of strap—Evidence of want of care.

The fact that a strap in a street car by which a passenger was supporting herself broke when the car swerved and her weight was thrown on it, casts upon the railway company the burden of shewing that the breaking was not due to any negligence on its part. The case is one for the application of the maxim res ipsa loquitur.

Brawley v. Toronto R. Co., 49 D.L.R. 452, 46 O.L.R. 31, reversing 44 O.L.R. 568.

Electric railway.

Where a controller of a car is shewn to have been "overhauled" by the defendant carrier shortly before an explosion occurred resulting in injury to a passenger, the burden is upon the defendant to shew that it had been properly done.

Fleming v. Toronto R. Co., 8 D.L.R. 507, 15 Can. Ry. Cas. 17, 27 O.L.R. 332, 23 O.W.R. 385. [Affirmed, 12 D.L.R. 249, 47 Can. S.C.R. 612, 15 Can. Ry. Cas. 386.]

(§ II H—255) — Master and servant — Res ipsa loquitur — Injury to servant.

The happening of an accident out of the ordinary course of events casts upon an employer the onus of explaining it and exonerating himself from liability for a resulting injury to an employee.

Dunlop v. Canada Foundry Co., 12 D.L.R. 791, 28 O.L.R. 140, affirming 2 D.L.R. 887, 4 O.W.N. 791.

(§ II H—263)—Of bailee—Warehousemen.

The burden of proving the exercise of reasonable care and that a suitable place for storage has been furnished lies upon the warehouseman when he delivers in a

damaged condition goods received by him in apparently good state.

Roy v. Adamson, 3 D.L.R. 139.

(§ II H—265)—Of municipal corporations.

In the absence of direct evidence to shew that the deceased walked into the unprotected portion of an excavation in the street, which was being made by the municipal corporation and which was left with a partial protection only so that as to the remainder it constituted a dangerous trap, an inference to that effect may be drawn from the position in which his body was found and from the fact that deceased had left his house in a hurry to catch a car and that the trench was on his direct route to do so.

McDonald v. Sydney, 8 D.L.R. 99, 46 N.S.R. 438.

In an action against a municipality for neglect to take precautions against fire whereby the death of a prisoner resulted while occupying a wooden cell after his arrest, it is incumbent on the plaintiff to establish, by the burden of proof, that the deceased's death was caused by the defendant's negligence, from a negligent act or omission, to which the death of the deceased can be attributed and traced; and if there is no direct proof of negligence, and the circumstances proven are equally consistent with the absence of negligence as with its existence, the burden has not been sustained by plaintiff, and a recovery cannot be had. [Wakelin v. South Western R. Co., 12 App. Cas. 41, applied.]

McKenzie v. Tp. of Chilliwack, 8 D.L.R. 692, [1912] A.C. 888.

(§ II H—270)—Statutory presumption—Automobile accident—Negligence.

Section 63 of the Motor Vehicle Act, R.S.M. 1913, c. 131, places the onus of proof upon the automobile owner or driver in respect of damage done by collision with a bicycle; and the effect of the statute is that negligence in the operation of the automobile is prima facie presumed because of the collision. [Toronto General Trusts Co. v. Dunn, 20 Man. L.R. 412, followed.]

Weilgosz v. McGregor, 16 D.L.R. 406, 50 C.L.J. 439, 24 Man. L.R. 133, 27 W.L.R. 324, 6 W.W.R. 175.

Automobiles and motor vehicles.

Section 33 of the Motor Vehicle Act, 2-3 Geo. V. (Alta.) c. 6, providing that the onus of shewing that any loss or damage incurred by any person from the operation of a motor vehicle did not arise through the negligence or improper conduct of the owner or driver thereof, shall rest upon the owner or driver, merely establishes a new rule of evidence in civil cases, and does not alter the common-law liability of the owner or driver for the negligent operation of a motor vehicle.

B. & R. Co. v. McLeod, 7 D.L.R. 579, 5 A.L.R. 176, 22 W.L.R. 274, 2 W.W.R. 1093.

Section 42 of the Motor Vehicles Act, R.S.B.C. 1911, c. 169, by which in any prosecution for any offence against its provisions occurring while the motor vehicle was in motion on any highway the person in charge or control of the motor vehicle, on being prosecuted therefor, shall be deemed to have been driving at an unlawful speed until the contrary is proven and is further required to prove the actual rate of speed at which the motor vehicle was being driven, does not apply to cast the same onus of proof on the defendant in a purely civil action for damages although the same default or neglect is relied upon as might be the subject of a prosecution for penalties under that statute.

Queer v. Greig, 5 D.L.R. 308.

The driver of an automobile must be held to be aware of the tendency of automobiles to frighten horses, especially in places where automobiles are so little used as to be strange objects to horses.

Stewart v. Steele, 6 D.L.R. 1, 5 S.L.R. 358, 22 W.L.R. 6, 2 W.W.R. 902.

I. As to official acts.

(§ II I—299)—Elections.

The onus of proving that the petitioner is not disqualified under the Alberta Election Act, 1909, c. 3, is discharged by his statement that he was a qualified elector and, thereupon the burden of proving disqualification is on the respondent raising the preliminary objection; proof that the petitioner was a qualified elector at the time of the election is sufficient.

Carstairs v. Cross, 7 D.L.R. 192, 5 A.L.R. 268, 2 W.W.R. 1087.

The onus probandi is upon the petitioner in proceedings under the Controverted Elections Act, 7 Edw. VII. (Alta.) c. 2, to support the regularity of his proceedings necessary to the maintenance of a petition when attacked by a motion to quash the petition, as regards the statutory grounds for setting aside election petitions under s. 10 of that statute. [Stanstead Election Case, 20 Can. S.C.R. 12, followed.] On an application by way of preliminary objection to the filing of an election petition under the provisions of the Controverted Elections Act, that the returning officer has not returned the respondent as duly elected, and that the notice prescribed by s. 119 of the Territories Election Ordinance had not been given, the onus of proof is upon the respondent raising that objection. In the absence of evidence to the contrary, a petitioner who has signed an election petition under the Controverted Elections Act, is presumed to know its contents; and the onus of supporting by proof the respondent's preliminary objection that the petitioner was not aware of the contents of the petition and therefore was not a petitioner in fact, is upon the respondent who raises it.

Carstairs v. Cross, 6 D.L.R. 59, 5 A.L.R. 266, 22 W.L.R. 48, 2 W.W.R. 891. [Affirmed, 8 D.L.R. 369, 22 W.W.R. 797.]

Residence in Canada for several years does not raise a presumption either of law or of fact that the resident is a British subject. [Currie v. Stairs, 25 N.B.R. 8; Doe dem Thomas v. Acklam, 2 B. & C. 779; Reg. v. Lynch, 26 U.C.Q.B. 208, distinguished.] The onus is upon the petitioner presenting an election petition under the Controverted Elections Act (Alta.) 7 Edw. VII., c. 2, to shew that he is himself a duly qualified elector at the date of filing the petition, and failure to prove himself a British subject, which is an essential element of an elector's qualification, may be given effect to upon the hearing of preliminary objections to the petition. In the absence of evidence to the contrary, a petitioner who has signed an election petition under the Controverted Elections Act, is presumed to know its contents; and the onus of supporting by proof the respondent's preliminary objection that the petitioner was not aware of the contents of the petition and therefore was not a petitioner in fact, is upon the respondent who raises it. [Carstairs v. Cross; Re Edmonton Election, 6 D.L.R. 59, followed.] The onus probandi is upon the petitioner in proceedings under the Controverted Elections Act, to support the regularity of his proceedings necessary to the maintenance of a petition when attacked by a motion to quash the petition, as regards the statutory grounds for setting aside election petitions under s. 10 of that Act. [Carstairs v. Cross; re Edmonton Election, 6 D.L.R. 59, applied.]

McVaught v. McKenzie (Re Claresholm Provincial Election), 8 D.L.R. 58, 5 A.L.R. 286, 22 W.L.R. 840, 3 W.W.R. 133.

(§ II I—300)—Sale by sheriff.

The onus of shewing that all of the requirements pertaining to a sheriff's sale of land under execution were complied with, rests on the person applying for confirmation thereof.

Re Price, 4 D.L.R. 407, 5 S.L.R. 318, 21 W.L.R. 299, 2 W.W.R. 394.

(§ II I—303)—Judicial act.

When it is proved that a prisoner consented that the charge against him should be summarily tried by a magistrate under the Cr. Code, s. 778, the presumption arises that the preliminary requirement of stating to the prisoner his option as prescribed by s. 778 was complied with by the magistrate.

The King v. Mali, 1 D.L.R. 256, 22 Man. L.R. 29, 20 W.L.R. 217, 1 W.W.R. 766.

Where there is any conflict or discrepancy as to the action of a judge or court officer in any matter of routine, the presumption that all was done rightly should prevail.

R. v. Hamlink, 5 D.L.R. 733, 26 O.L.R. 381, 19 Can. Cr. Cas. 493, 22 O.W.R. 107.

J. From circumstances and course of business.

(§ II J—305)—Printing contract.

In an action by the plaintiffs, a printing firm, on a disputed account for printing work done and delivered, the following circumstances raise a presumption against the claim (a) absence of plaintiff's customary records shewing the various orders for or the execution or delivery of the alleged work; (b) plaintiff's delay of about four years in pressing the claim after its repudiation by the defendant; (c) plaintiff's admission that a large portion of the claim is for work never delivered.

Kingdon Printing Co. v. Malcolm, 9 D.L.R. 651, 22 W.L.R. 939.

In the absence of direct evidence the contents of a box of military supplies was sufficiently shewn in an action by the Crown against a railway company for its loss, by the testimony of the officer in charge of the supplies, that he selected them from the general stores and turned them over to a person of excellent character, whose duty it was to box and ship them, and that the latter delivered a heavy box to the railway company, which receipted for it, and that such person could not be produced at the trial, as his term of enlistment had expired, and his whereabouts was unknown.

R. v. C.P.R. Co., 5 D.L.R. 176, 5 A.L.R. 9, 21 W.L.R. 709, 2 W.W.R. 627.

(§ II J—307)—Secondary meaning of trademark.

The onus is on the user of a merely descriptive word or term, not registered as a trademark, to shew, in his action to prevent sales of similar goods by others using the same mark as a "passing off" of their goods as his, that the mark as used by him had acquired a secondary technical and superinduced meaning denoting his goods as distinguished from the natural meaning.

Dominion Flour Mills Co. v. Morris, 2 D.L.R. 830, 25 O.L.R. 561, 21 O.W.R. 540.

(§ II J—308)—What is competitive business.

Whether or not a separate business, in which one of the members of a partnership is interested, competes with the business of his firm, so as to render him liable to account to his firm for the profits derived by him from his interest therein, is a question of fact to be decided upon the circumstances of each case.

Livingston v. Livingston, 4 D.L.R. 345, 26 O.L.R. 246, 21 O.W.R. 901.

K. As to rights, contracts, instruments, and property.

(§ II K—310)—To shew receipt by husband of wife's income was mere loan—Interest.

In order to charge a married man with interest on the income of his wife's separate estate received by him, the onus, ex-

cept possibly as to the last year's income, rests on the wife to shew that he received the money as a loan. [Alexander v. Barnhill, 21 L.R. Ir. 515 followed.]

Ellis v. Ellis, 15 D.L.R. 100, 5 O.W.N. 561.

(§ II K—311)—Representations by person in fiduciary capacity—Benefit personally acquired.

A director of a company who resigns his position as director to accept a contract of employment with the company obtained upon his representations as to material facts, has cast upon him the burden of proof of the truth of such representations, where his employment contract was in fact a bargain extravagantly advantageous to him and which would affect shareholders not concurring therein, and where the consideration for same consisted partly of an arrangement made between the resigning director and his fellow-directors by which the latter would obtain personal benefits from him.

Denman v. Clover Bar Coal Co., 15 D.L.R. 241, 48 Can. S.C.R. 318, 26 W.L.R. 435, 5 W.W.R. 564.

Variance from written building contract—Subsequent oral variation.

In an action upon a building contract where the construction actually proceeded with differed from that contemplated by the written contract between the parties as to size of building and class of materials, the party who claims that the written contract was altogether abrogated and not merely varied in such respects by the verbal arrangement between the parties by which the change was assented to after the contract was made, has the onus cast upon him to prove such claim.

McKenzie v. Elliott, 10 D.L.R. 466, 4 O.W.N. 1151, 24 O.W.R. 443, 49 C.L.J. 414, affirming 2 D.L.R. 899.

Sale of goods—Saving proviso "if unable to deliver promptly."

Where a written contract for the sale of goods contains a clause for delivery on a certain date with a proviso that "if for any reason the seller may be unable to fill the order or deliver the goods at the time stated, the buyer will not in any way hold the seller responsible for damages," the onus is upon the seller, in case of failure to deliver promptly to establish his inability to deliver at the stated time.

Leonard v. Kremer (No. 2), 11 D.L.R. 491, 48 Can. S.C.R. 518, 26 W.L.R. 568, 4 W.W.R. 332, affirming 7 D.L.R. 24.

Contracts—Sale by manufacturer.

Where a person sends an order for an engine to the manufacturer thereof and subsequently refuses to accept an engine tendered in response to the order on the ground that it is not the article ordered, the onus is on the vendor to prove that it fulfills a requirement of the order that it is entirely a new engine.

Haug v. Baade, 15 D.L.R. 520, 7 S.L.R. 47, 26 W.L.R. 750.

Onus of proof—As to contracts—Liability presumed for use of another's chattel, when.

The onus is on the party setting up a specific agreement for car rental in railway construction work, to prove it; but if both parties had pleaded that there was no express agreement to pay, and the claimant had relied upon the presumption of a promise to pay the fair value of the use of another's chattels, the onus would be upon the party who used them to establish his contention that he was to have them free of charge.

Copresham v. Parsons, 19 D.L.R. 443, 7 W.W.R. 944.

Contracts generally—Burden of proof—Failure of plaintiff to satisfy.

McFarlane v. Collier, 3 D.L.R. 889, 3 O.W.N. 1510, 22 O.W.R. 579.

In an action upon a document purporting to be a promissory note, but which is in fact not a promissory note but an agreement in writing, consideration will not be presumed in favour of the plaintiff.

Imperial Life Ins. Co. v. Audett, 5 D.L.R. 355, 4 A.L.R. 204, 20 W.L.R. 372, 1 W.W.R. 819.

The onus rests upon the plaintiff, a real estate broker, in an action for one-half of the net profits from a sale of land by him under a contract with the defendant, of shewing that he was relieved by the former of the duty imposed upon him by such contract, of subdividing the land into lots at his own expense, and of advertising it for sale.

Cruikshank et al. v. Irving, 6 D.L.R. 237, 21 W.L.R. 172, 4 A.L.R. 348, 2 W.W.R. 134.

Where, after nearly half of the purchase price had been paid on a contract for the sale of land, the vendor sought to cancel the agreement, notwithstanding he had knowledge that the vendee was ready and willing to pay the balance due within three days of the time limited for payment in the notice of cancellation, in an action by the vendee for specific performance, the onus rests on the vendor to shew that such cancellation was in strict accord with the requirements of the contract of sale.

Brown v. Roberts, 2 D.L.R. 523, 17 B.C.R. 16, 1 W.W.R. 987.

In order to maintain a plea of prescription the defendant must prove affirmatively that the plaintiff did not attack the contract he seeks to have avoided, within the year following his knowledge of the existence of such contract.

Banque Nationale v. Godbout, 8 D.L.R. 668, 19 Rev. Leg. 401.

Where a publishing firm which publishes annually a residence and business city directory, sells under a written contract to the plaintiff, a practising barrister, a copy of the directory, and is bound by custom to insert in the directory in large, heavy type the subscriber's name, calling and office address, and where the contract specifies the name and office address, but where the

publishing firm by custom (for its protection) gives public newspaper notice to all citizens to call or write and see to the correctness of their names and addresses in the proof leaves of the directory, the subscriber may safely rely upon the specific mention of his name and address contained in his contract, and need not call or write to ensure accuracy.

Archambault v. Lovell, 8 D.L.R. 611, 42 Que. S.C. 344.

(§ II K—313)—Insurance.

In an action on a policy of fire insurance, the onus rests upon the insurance company of establishing the materiality of alleged misrepresentations of concealments by the applicant of material circumstances affecting the risk.

Patterson v. Oxford Farmers Mutual Fire Ins. Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O. W.R. 122.

In order that the acceptance of payments of premiums on a contract of life insurance shall constitute a waiver by the insurer of a condition of the contract that it shall be void if the insured should, without a permit, within two years from date of contract, enter into employment of a railway, the onus rests upon those claiming under the policy to shew that the payments were accepted by the insurance company with notice or knowledge of the fact that the insured had violated such condition of the policy.

Smith v. Excelsior Life Ins. Co., 4 D.L. R. 99, 3 O.W.N. 1521, 22 O.W.R. 863.

Insurance—Variation of statutory condition.

The onus of proof that a condition is not just and reasonable within the Fire Insurance Policy Act, R.S.B.C. 1911, c. 114, lies on the assured.

Hall Mining & Smelting Co. v. Connecticut Fire Ins. Co., 18 B.C.R. 113.

(§ II K—314) — Presumptions — Deeds—Alterations in.

It is to be presumed that alterations appearing in a deed were made before it was executed, but where that presumption has been rebutted by proof to the contrary, there is no presumption that the alterations were made with the assent of the grantor.

Hedge v. Morrow, 20 D.L.R. 561, 32 O.L. R. 281.

Deeds.

Where $250 is paid by the husband to his wife on the execution of a deed of separation which did not contain any alimentary provision and did not stipulate that such sum was intended for the wife's maintenance, it cannot be presumed that such payment was intended to relieve her husband from his duty to support her as, apart from its inadequacy, the payment may have been made for other purposes, and the wife is, therefore, entitled to an alimentary allowance.

Frémont v. Frémont, 6 D.L.R. 465, 26 O. L.R. 6, 21 O.W.R. 644.

(§ II K—316)—The onus rests upon a mortgagee in possession of encumbered property of shewing that he had purchased the mortgagor's equity of redemption, since "once a mortgage, always a mortgage."

Manitoba Lumber Co. v. Emmerson, 5 D. L.R. 337, 18 B.C.R. 96, 21 W.L.R. 503, 2 W.W.R. 419.

(§ II K—317)—Will.

On a motion to construe a will the court cannot look beyond the document itself and must reject the affidavit of the party who drew the will as to the testator's intention. [Re Davis, 40 N.B.R. 23, followed.]

Re Piper, 2 D.L.R. 732, 3 O.W.N. 1243.

Where there was an evident doubt in the mind of a testator whether one of his sons or a daughter would inherit under a devise in their grandfather's will, and the testator declared in his will that no provision was thereby made for such son because of his being a devisee under his grandfather's will, but that in case such daughter, instead of such son, should take thereunder, that the latter should replace the daughter as one of the testator's universal legatees, then in order that such son, who, as a fact, did not take under his grandfather's will, may take as universal legatee to the exclusion of his sister, he must shew that he was not provided for by the will of his grandfather, and that the property he was supposed to take thereunder was a part of his father's estate.

Greece v. Greece, 3 D.L.R. 841.

Although the word "child" in C.C. (Que.) 980 means not only child in the first degree, but all descendants, this presumption of law may be rebutted by other proof of the intention of the testator in making the will.

Graham or Trahan v. Cardinal, 8 D.L.R. 533, 43 Que. S.C. 144.

(§ II K—318)—Negotiable paper.

The onus of proving the failure of the consideration for which a promissory note was given rests upon the maker thereof.

Lilly v. Robertson, 4 D.L.R. 852, 21 W. L.R. 585.

The true test to decide upon whom the burden of proof rests in an action on negotiable paper is to ask the question, which party would succeed if no further proof were adduced? In an action on a negotiable instrument a plea of general denial by an endorser puts the plaintiff to the proof only that the defendant signed his name, the burden of proof is upon the defendant if he wish to shew that his signature was intended only in the capacity of a witness.

Nicholson v. McKale, 5 D.L.R. 237, 41 Que. S.C. 340.

The onus rests upon the holder of a promissory note payable to the order of the payee, to shew in an action thereon, that it was indorsed to him by the payee or someone by him duly authorized to do so.

Hamilton v. Isaacson, 5 D.L.R. 114, 21 W.L.R. 333.

Where one defendant in an action upon a negotiable instrument relies upon a failure of consideration, either total or partial, or upon payment of the instrument or any part thereof, the onus is upon him to prove such failure or payment. Where a negotiable instrument has been endorsed to and left with a bank by a customer thereof, the proper conclusion, in case of a conflict of evidence as to the terms upon which the instrument was so indorsed and left, will usually be that it was as collateral security for any advances by the bank to the customer and not for collection only.

Merchants Bank v. Thompson, 3 D.L.R. 577, 3 O.W.N. 1014, 21 O.W.R. 740.

The fact that a promissory note bore conspicuously the words "renewable on payment of 850 cash" is some evidence that the note was not given for accommodation only.

Walsh v. Hennessey, 3 D.L.R. 823, 21 W.L.R. 609.

§ II K—321)—Capital stock—Subscription to stock.

A ratification of the sale of company shares to directors who made a secret profit from a sale of the company assets, cannot arise from the fact of the completion of the sale by the shareholders, where they did not learn until long afterward that the directors made such secret profit.

Gadsden v. Bennetto, 5 D.L.R. 529, 21 W. L.R. 886, 2 W.W.R. 733. [Reversed on another point, 9 D.L.R. 719, 23 Man. L.R. 33.]

(§ II K—322)—Gift.

In order to shew that money delivered by one person to another was intended as a gift, the onus rests on the recipient to establish a clear and unmistakable intention on the part of the deliverer to make a gift.

Johnstone v. Johnstone, 12 D.L.R. 537, 28 O.L.R. 334.

Express directions to executors to hold and invest all of the testator's property of all kinds until the time fixed for distribution thereof, precludes the inference of an intention to enlarge the gift of an annuity, which was expressly charged upon the income of his estate, so as to render it a charge upon the corpus thereof.

Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936, 21 O.W.R. 562.

(§ II K—330)—Ownership or possession.

On an application to the court to restrain expropriation proceedings taken by a railway company on the ground that the company had agreed upon a price with plaintiff, the plaintiff's status is proved prima facie by shewing that he had been served as owner with notice of arbitration proceedings by the company without his further shewing his title or interest in the land.

Haney v. Winnipeg & Northern R. Co., 1 D.L.R. 387, 20 W.L.R. 540, 14 Can. Ry. Cas. 39.

(§ II K—338)—Presumed grant—Presumption as to "lost grant."

Where there is evidence of user, open and uninterrupted for twenty years, the jury may and ought to presume a lost grant. [Re Cockburn, 27 O.R. 450, followed.]

Hunter v. Richards, 5 D.L.R. 116, 26 O. L.R. 458, 22 O.W.R. 408. [Affirmed, 12 D. L.R. 503, 28 O.L.R. 267.]

(§ II K—339)—Presumption from possession.

In the case of chattels, as in the case of land, no presumption is made in favour of a wrongful possessor either as to the extent or as to the duration of his possession. [Ex parte Fletcher, 5 Ch. D. 809, at p. 813; Trustees and Agency Co. v. Short, 13 App. Cas. 793, at p. 798, followed; Glenwood v. Phillips, [1904] A.C. 405, applied.]

National Trust Co. v. Miller; Schmidt v. Miller, 3 D.L.R. 69, 46 Can. S.C.R. 45, 22 O.W.R. 485. [Reversed on another point, 15 D.L.R. 755, [1914] A.C. 197.]

(§ II K—343)—Boundaries, street lines, etc.

In an action to restrain a municipality from interfering with a fence erected by the plaintiff along the centre line of land used as a highway, upon the ground that such centre line forms the boundary of the plaintiff's property, the onus is upon the plaintiff to establish that the boundary is as he alleges. In an action or counterclaim by a municipality for the removal of a fence erected upon and to restrain the obstruction of land alleged to form part of an allowance for road, the onus is upon the municipality to establish the existence and location of the allowance for road.

Lake Erie Excursion Co. v. Tp. of Bertie, 4 D.L.R. 585, 3 O.W.N. 1191, 22 O.W.R. 42.

Where, in a dispute as to the proper boundary between two farms, both owners claim a strip lying between them, and it appears that a fence, which has been standing for some thirty years, and was built by the defendant, throws the disputed strip on the plaintiff's side, and that the defendant's barn forms part of and is in line with the fence, though he says that he did not know the true boundary when he built the fence and barn, and a road has been made upon the strip by the plaintiff, who has had such use and occupation as is possible in the case of such land, and the defendant has repeatedly attempted to purchase the strip from the plaintiff, and there is evidence tending to shew an agreement by the defendant to fix as the boundary the line contended for by the plaintiff, the proper conclusion is that the plaintiff has established title by possession to the strip in dispute.

Snair v. Hume, 5 D.L.R. 687.

L. Payment; credit.

(§ II L—345)—Action for unpaid customs duties — Payment — Onus to shew.

In an action by the Crown to recover customs duties on goods not entered or declared, the onus rests upon the defendant to

shew payment and full compliance with the requirements of the Customs Act.

The King v. C.P.R. Co., 11 D.L.R. 681, 12 E.L.R. 309, 14 Can. Ex. 150.

Where a claimant is a partner in a firm of ship-supply merchants and is also the owner of a one-third interest in a certain vessel, and where the claimant sells out his one-third interest in the vessel to the owners of the remaining two-third interest, and it appears that at the time of this sale there was a current account for ship supplies outstanding against the vessel in question and in favour of the firm of merchants of which the claimant was a partner, there is from these circumstances of themselves no presumption that the claimant by virtue of selling his interest in the vessel intended thereby to waive his claim as a merchant for the ship supplies, and this especially since none of the parties to the sale of the interest in the vessel appears to have so treated the supply account.

Ernst v. Slawenwhite (No. 2), 7 D.L.R. 239.

The fact of payment is and always has been a matter of defence, the onus of proving which is upon the defendant.

Ontario Asphalt Block Co. v. Cook, 4 D. L.R. 22, 3 O.W.N. 1289, 22 O.W.R. 203.

Credit entries in the books of the plaintiff company, as well as the receipts for payments received, are, as against the company, to be taken as admissions of payments received, and are prima facie evidence that the defendant is entitled to be credited with the various sums represented by these entries and receipts, but it is open to the plaintiff to shew by other evidence that the payments represented by these entries and receipts were not in fact made, but that the entries and receipts were in respect of the same amounts and the plaintiffs not having discharged the onus so resting upon them, the defendant was entitled to credit for all the amounts shewn.

Massey-Harris Co. v. Horning, 4 S.L.R. 448.

MUNICIPAL CORPORATION—NOTE—CONSIDERATION—POWERS—WRITTEN PLEADING—EVIDENCE—C.C. ART. 1204—S. REF. [1909] ART. 5279.

Everyone being presumed to bind himself and his successors, therefore when the plaintiff produces a note, he is not obliged to produce evidence that he has given consideration for the note. When a municipal corporation, having the right to sign notes in the execution of all powers, rights and privileges "which are conferred upon it by the Act, and of all the duties and obligations which are incumbent upon it" is sued upon a note, and alleges that it had no right to sign or transfer it, or that it was given for an illegal consideration, it must plead this and prove it.

Guilmette Co. v. Montreal North, 55 Que. S.C. 53.

(§ II L—348)—INSURANCE MONEY.

The fact that an insurance policy, issued by underwriters in England, is stamped with the name of an agent in Toronto, and bears a marginal note shewing the equivalent in Canadian currency of the face value of the policy, is an indication that it is payable in Ontario.

Farmers Bank v. Heath (No. 2), 5 D.L.R. 291, 3 O.W.N. 805, 879, 22 O.W.R. 614.

(§ II L—351)—CREDIT.

Apart from the fact that no surcharge was filed by the defendant as the rules require, the onus rests upon him of shewing that the plaintiff, a creditor, who was suing for a balance due him, and who had taken over and completed a contract the defendant had with a town, had received more money therefrom than he had accounted for.

Ontario Asphalt Block Co. v. Cook, 4 D.L.R. 22, 3 O.W.N. 1289, 22 O.W.R. 203.

(§ II L—353)—INSTALMENT PAYMENTS.

A receipt for "instalment due in November last with interest to date" is, unless the contrary be shewn, sufficient evidence that all previous instalments and interest have been duly paid.

Gillespie v. Wells, 2 D.L.R. 519, 22 Man. L.R. 355, 21 W.L.R. 231, 2 W.W.R. 272.

(§ II L—354)—PRESUMPTION AS TO DEPOSIT UNDER ELECTION ACT.

The receipt for the required deposit of $200, accompanying the nomination papers, given under the provisions of s. 97 of the Dominion Elections Act, is evidence merely of the production of the papers and not of the validity of the nomination.

Two Mountains Dominion Election; Fauteaux v. Ethier, 7 D.L.R. 126, 47 Can. S.C.R. 185, 12 E.L.R. 129.

Payment of the deposit required on filing an election petition, under the Alberta Controverted Elections Act, is sufficient, if made by the petitioner's agent on his behalf.

Carstairs v. Cross (No. 2), 7 D.L.R. 192, 5 A.L.R. 268, 2 W.W.R. 1087. [Affirmed, 8 D.L.R. 369, 22 W.W.R. 797.]

M. MISCELLANEOUS.

(§ II M—355)—MECHANICS' LIEN—SUBCONTRACTOR—DEFENCE—NONINDEBTEDNESS TO PRINCIPAL CONTRACTOR.

The onus rests on the owner, in an action by a subcontractor to obtain a mechanics' lien, of shewing that nothing is due from him to the principal contractor.

Brown v. Allen, 13 D.L.R. 350, 18 B.C.R. 326, 25 W.L.R. 128, 4 W.W.R. 1306.

(§ II M—362)—MALICIOUS PROSECUTION.

The innocence of the plaintiff in an action for malicious prosecution of the charge against him is sufficiently established where the allegation of his statement of claim that the defendant falsely and maliciously prosecuted him, was not denied by the defendants in their defence, the truth of such

allegation being thereby admitted under order 19, r. 13, of the B.C. Rules.

Harris v. Hickey, 2 D.L.R. 356, 17 B. C.R. 21, 19 W.L.R. 948.

FALSE IMPRISONMENT—ONUS OF PROOF.

In an action against a town treasurer and a constable for false arrest and imprisonment, where the defendants set up that the plaintiff, if imprisoned, was not imprisoned against his own free will, the fact that the plaintiff when arrested by the constable did not resist but went willingly to gaol under the arrest does not prove or tend to prove the defendants' plea, it being a legal duty not to resist the arresting officer, and also the onus is upon the defendants to prove plaintiff's willingness to go to gaol.

Markey v. Sloat, 6 D.L.R. 827, 41 N.B. R. 234, 11 E.L.R. 295.

(§ II M—363)—INTESTACY.

The presumption is that a testator intended to dispose of his entire estate and not to die intestate as to the whole or any part thereof.

Re Christenson, 21 D.L.R. 354, 7 W.W. R. 1382, 30 W.L.R. 703.

LIBEL AND SLANDER.

In an action for libel, where the occasion is privileged, express malice may be proved in two ways: (1) By inference to be drawn from the excessive language of the document itself, and (2) by recklessly stating what was untrue or stating that which defendant knew to be untrue.

Winnipeg Steel Granary & Culvert Co. v. Canada Ingot Iron Culvert Co., 7 D.L. R. 707, 22 Man. L.R. 576, 22 W.L.R. 387, 3 W.W.R. 356.

Under a plea of truth and public interest brought to an action for libel, the onus of proof lies on the defendant.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

(§ II M—364)—VIOLATION OF LORD'S DAY ACT — NECESSITY OF PROSECUTION SHEWING CONSENT OF ATTORNEY-GENERAL.

It is not essential that a fiat from the Attorney-General authorizing the commencement of a prosecution for a violation of the Lord's Day Act, R.S.C. 1906, c. 153, should be put in evidence on the trial as a part of the case for the prosecution; the absence of such consent being a matter of defence. [R. v. C.P.R., 12 Can. Cr. Cas. 549, distinguished.]

R. v. Thompson; R. v. Hammond; R. v. Churchill; R. v. Aberns, 14 D.L.R. 175, 22 Can. Cr. Cas. 78, 7 A.L.R. 40, 25 W.L.R. 576, 5 W.W.R. 157.

RESIDENCE, PRESUMPTION AS TO.

Where it is shewn that the petitioners presenting an election petition and whose status was in question had resided in the electoral district for four years, and preceding the election, for a whole year, and the date of the writ for the election was not shewn, it will be presumed that he had resided in such district for the three months immediately preceding the issue of the writ.

Carstairs v. Cross, 7 D.L.R. 192, 5 A.L.R. 268, 2 W.W.R. 1087. [Affirmed, 8 D.L.R. 369, 22 W.W.R. 797.]

POSSESSION OF RANGING CATTLE — REGISTERED BRAND.

Where a defendant is charged with stealing a steer and the only evidence going to shew possession of the steer by him is that the steer was branded with the registered brand of the company owning it, that an indeterminate time after it was so branded it was found with a herd of cattle grazing in the vicinity of the defendant's ranch, that it was then branded with the defendant's brand and marked with his earmarks, the defendant's brand indicating that it had been put on within the previous two months, and it is not shewn that the defendant ever saw the steer, there is not sufficient evidence of possession of the steer to throw upon the defendant the burden of proving that it came lawfully into his possession, and, therefore, s. 889, Cr. Code, has no application.

R. v. Dubois, 3 A.L.R. 477.

KNOWLEDGE—NOTICE TO SOLICITOR—FRAUDULENT PREFERENCE — ACTION BY JUDGMENT CREDITOR.

Gunn v. Vinegratsky, 20 Man. L.R. 311.

MURDER—LETTER RECENTLY IN POSSESSION OF ACCUSED FOUND BESIDE THE DEAD BODY.

The King v. Bennett, 17 Can. Cr. Cas. 332.

PRESUMPTION OF NEGLIGENCE — EVIDENCE TO REBUT.

Collas v. Langevin, 40 Que. S.C. 441.

III. Best and secondary evidence.

(§ III—365)—OF RULES.

An objection to allowing a witness to state the purport of a rule without its being produced, though serious, cannot prevail if not put forward in time.

Montreal Tramways Co. v. McAllister, 34 D.L.R. 565, 26 Que. K.B. 174. [Affirmed by Privy Council, 51 D.L.R. 429.]

A defendant, after refusing to produce a document in his possession when called for by the plaintiff, cannot afterwards put it in evidence for his own advantage.

Cyr v. DeRosier, 40 N.B.R. 373.

(§ III—369)—SECONDARY EVIDENCE—MATTERS IN WRITING.

Where secondary evidence of the contents of a written document has been given without objection, or a statement has been made by counsel and accepted by both sides as a correct version of the document, although there is no evidence of its loss or destruction, the court must construe its meaning in the same manner as if it had been produced.

O'Regan v. C.P.R. Co., 9 D.L.R. 849, 41 N.B.R. 347, 11 E.L.R. 457.

(§ III—372)—COPIES.

A copy of a notarial protest of a promissory note in the form prescribed by s. 125 of the Bills of Exchange Act, R.S.C. 1906, c. 119, in duplicate, is sufficient in an action on the note to prove the protest, where the repertory of the notary shews the regular protestation of the note, since, by art. 1209, C.C. (Que.), the acts of notaries are declared to be authentic acts. A copy of a notarial protest of a promissory note is sufficient evidence in an action on the note unless the defendant, as required by art. 1211, C.C. (Que.), shews that the original protest never existed.

Banque Nationale v. Joncas; Noel v. Banque Nationale, 5 D.L.R. 276, 13 Que. K.B. 341.

(§ III—374) — ASSAULT AND WRONGFUL IMPRISONMENT—ACTION FOR—LOSS OF WARRANT OF ARREST—EVIDENCE AS TO REGULARITY OF.

At the trial of an action for assault and wrongful imprisonment the warrant of arrest could not be found. It was proved that the defendant had the warrant prepared by a solicitor and took it to the justice, who compared it with the form in the statute; found it correct and thereupon signed it. Held, that this was sufficient proof of the form and contents of the warrant. The form in the statute concludes with the words "Given under my hand and seal." Held, that there was prima facie evidence that the warrant had been issued under the seal of the justice.

Taylor v. Durno, 45 D.L.R. 450.

OF LOST CORPORATE RECORDS.

Secondary evidence may be given in an action against a joint stock company of matters in their by-laws and books when these cannot be found.

Lalonde v. Galeries Parisiennes Co., 51 Que. S.C. 134.

(§ III—376) — ADMISSIBILITY — SECONDARY EVIDENCE NOT OBJECTED TO AT HEARING.

Secondary evidence is admissible where the primary evidence cannot be produced, or where the party against whom the evidence is tendered does not object.

Barrie v. Diamond Coal Co., 17 D.L.R. 385, 7 A.L.R. 138, 28 W.L.R. 701, 6 W.W.R. 651.

PROOF OF ATTEMPT OF SIMILAR OFFENCE WITH ANOTHER PERSON AT ANOTHER TIME — CHILD'S EVIDENCE NOT UNDER OATH—CORROBORATION.

The King v. Iman Din, 18 Can. Cr. Cas. 82, 15 B.C.R. 476.

IV. Documentary evidence.

As to veracity, see Principal and Agent, III—30.

A. PRELIMINARY MATTERS; GENUINENESS AND VALIDITY.

(§ IV A—380) — CONTENTS OF WRITTEN DOCUMENT — PAROL EVIDENCE — REDUCTION IN SALE PRICE — IMPROBATION—QUE. C.P. 225—QUE. C.C. 1234.

A written document may be attacked by the sworn evidence of the adverse party, notwithstanding the terms of art. 1234, C.C. (Que.). A vendor who sues to have the sale price reduced may attack by improbation the defendant's contentions which were based on conversations having taken place after the contract.

Themens v. McDuff, 16 Que. P.R. 78.

(§ IV A—385)—CONCURRENT AGREEMENT.

An agreement concurrent with another writing may be proved by witnesses, and even constitutes a real condition of the written contract.

Lachance v. Petit, 53 Que. S.C. 368.

(§ IV A—393) — PROOF OF IDENTITY — ALLEGED ANCIENT DOCUMENTS IN PROOF OF — ENLARGED PHOTOGRAPHS — EVIDENCE—CONSIDERATION OF BY COURT.

Re Cochran's Trust; Robinson v. Simpson, 47 D.L.R. 1, 52 N.S.R. 278.

B. STATUTES; ORDINANCES.

(§ IV B—396) — FOREIGN STATUTES — EXTRADITION.

The provincial laws of evidence are applicable to extradition proceedings by virtue of the Canada Evidence Act, R.S.C. 1906, c. 145, s. 35, and where such proceedings take place in the Province of New Brunswick the provincial statute C.S.N.B. 1903, c. 127, s. 58, applies to make a copy of a statute of the demanding state authenticated under the seal of that state, prima facie evidence that the foreign law is as there enacted.

Ex parte Thomas, 38 D.L.R. 716, 28 Can. Cr. Cas. 396, 45 N.B.R. 148.

STATUTES.

Under the Alberta Evidence Act, 1910, c. 3, the statute law of another Province of Canada may be proved on a legal proceeding in Alberta by the mere production (that is, without the introduction of an expert witness) of a statute purporting to be printed by the authority of the legislature of the other Province, and the marking of a copy as an exhibit is merely for convenience.

Dodge v. Western Canada Fire Ins. Co., 6 D.L.R. 355, 5 A.L.R. 294, 2 W.W.R. 972.

C. CERTIFICATE; AWARD.

(§ IV C—401)—MARRIAGE LICENSE ISSUED IN UNITED STATES—AUTHENTICATION.

A copy of a marriage license and of a return shewing the performance of a ceremony thereunder, is admissible in evidence without further proof, under s. 23 of the Canada Evidence Act, when certified under the seal of a Court of Record of a state of the United States.

R. v. Hutchins, 12 D.L.R. 648, 22 Can.

Cr. Cas. 27, 6 S.L.R. 220, 25 W.L.R. 1, 4 W.W.R. 1240.

CERTIFICATES OF MARRIAGE AND BIRTH.

A certificate of marriage attested by the clerk of a court in the United States and the certificate of birth by a pastor are prima facie evidence of marriage and birth.

Chiniquy v. Begin, 24 D.L.R. 687, 24 Que. K.B. 294, reversing 20 D.L.R. 347, and varying 7 D.L.R. 65.

(§ IV C—404)—CHURCH DECREES—CIVIL ACTION TO ANNUL MARRIAGE BETWEEN TWO ROMAN CATHOLICS WHEN CEREMONY PERFORMED BY A METHODIST MINISTER.

Hébert v. Cloutre, 6 D.L.R. 411. [Reversed on other grounds, 15 D.L.R. 498, 16 Que. P.R. 29.]

D. OFFICIAL RECORDS, REPORTS, AND RETURNS.

(§ IV D—405)—OFFICIAL RECORDS OF SURETY COMPANY—ADMISSIBILITY IN ACTION ON BOND.

Official books and reports which the official is bound to furnish as one of the duties incidental to his office are presumptive evidence against his sureties as such officer in an action under their bond that he should well and truly account for and pay over the moneys coming to his hands in his official capacity.

Jordan School District v. Gaetz, 23 D.L.R. 739, 8 A.L.R. 433, 32 W.L.R. 202, 8 W.W.R. 658.

COPY AS "SUFFICIENT EVIDENCE."

Under s. 45, Evidence Act, R.S.B.C. 1911, which makes provision for the production of copies of original instruments certified under the hand and seal of the registrar and provides that "in every such case the copy so certified shall be sufficient evidence of the original instrument and of its validity and contents," a copy of an original document offered in evidence under said section can have no greater effect than the original would have if it were produced.

Dinsmore v. Philip, [1918] 3 W.W.R. 457, 26 B.C.R. 123, reversing [1918] 1 W.W.R. 405.

(§ IV D—406)—LAND TITLES.

The production of further evidence to shew that an execution was lodged in the land titles office on a day prior to that stated in the certificate of execution issued by the registrar, may be permitted by the court on an application to confirm a sale of land by the sheriff under such writ.

Re Price, 4 D.L.R. 407, 5 S.L.R. 318, 21 W.L.R. 299, 2 W.W.R. 394.

CROWN GRANT—IDENTITY OF PREDECESSOR IN TITLE.

The production on the trial by the plaintiff's solicitor of a grant from the Crown to a person of the same name as the person from whom the plaintiff claims the property granted as heir and devisee of the grantee is sufficient evidence of the identity of the plaintiff's predecessor in title with the grantee to sustain a verdict for the plaintiff in an action for the land.

Simpson v. Malcolm, 43 N.B.R. 79.

(§ IV D—408)—SHERIFF'S RETURNS.

The truth of the sheriff's return of nulla bona to an execution, cannot be questioned on an application to confirm a sale of land thereunder, without a substantive application to set aside the return as a matter of record.

Re Price 4 D.L.R. 407, 5 S.L.R. 318, 21 W.L.R. 299, 2 W.W.R. 394.

(§ IV D—409)—ANNUAL STATEMENT UNDER COMPANIES ACT.

In an action against the directors of a company for wages, under s. 94 of the Ontario Companies Act, 7 Edw. VII., c. 34 (see now 2 Geo. V., c. 31, s. 96), a certified copy of the last annual statement to the government of the affairs of the company, shewing that the defendants were then directors, and the minute book of the company, shewing that the directorate has not since been changed, is sufficient proof that the defendants are directors of the company.

Pukulski v. Jardine; Perryman v. Jardin, 5 D.L.R. 242, 26 O.L.R. 323, 21 O.W.R. 983.

REPORT OF COMMISSIONER.

Proceedings before commissioners appointed by the Crown to allot amongst the grantees named in a township grant the land to which they were entitled, as kept by the clerk of the commission, are admissible in evidence in cases subsequently arising concerning the allotments made by them. An allotment card containing the description of certain land allotted a person named in a township grant in Nova Scotia by the commissioners appointed by the Crown to allot it, is admissible in evidence in a subsequent action concerning the land described on such card.

Boehner v. Hirtle, 6 D.L.R. 548, 46 N.S.R. 231, 11 E.L.R. 222.

E. JUDGMENTS AND JUDICIAL RECORDS.

(§ IV E—410)—RECORD OF COURT HOLDING SPEEDY TRIAL UNDER CRIMINAL CODE—RECITAL OF FACTS AFFIRMING JURISDICTION.

If the record of a County or District Judge's Criminal Court (or in Quebec a Judge of Sessions (or in Quebec a Judge of Sessions or district magistrate) on a prosecution under the speedy trials clauses (Part XVIII. of the Cr. Code) produced on a habeas corpus motion in pursuance of an ancillary writ of certiorari contains the recital of facts requisite to confer jurisdiction, it is conclusive and cannot be contradicted by extrinsic evidence, the proceedings of such court under Cr. Code, s. 834, having to be considered as those of a

court of record. [Re Sproule, 12 Can. S. C.R. 140, followed.]

R. v. Guay, 19 D.L.R. 820, 23 Can. Cr. Cas. 243, 21 Rev. de Jur. 253.

DIVISION COURT—RECORD OF APPEAL CASE—EVIDENCE.

Where a case in a Division Court is appealable under s. 125 (a) of the Division Courts Act, R.S.O. 1914, c. 63, the judge is to take down the evidence in writing, and where stenographic notes are not taken, the judge should take down the depositions at least as fully as is customary on examinations taken in longhand before a Master; mere notes of such part of the evidence as the judge thought fit to take do not satisfy the requirements of the statute. [Smith v. Boothman, 9 D.L.R. 450, 4 O.W.N. 801, followed.]

Barrett v. Phillips, 21 D.L.R. 710, 33 O.L.R. 203.

OF PRIOR ACTION—PRINCIPAL AND AGENT—COMMISSIONS.

Where an agent obtains judgment against a principal for commission and thereafter sues a person in whose hands there are alleged to be moneys derived from the transaction wherein the commission was alleged to be earned, the judgment against the principal is not admissible as evidence of the facts established by it as against the defendant in the second action.

Chalmers v. Machray, 39 D.L.R. 396, 55 Can. S.C.R. 612, [1917] 3 W.W.R. 361, affirming 26 D.L.R. 529, 26 Man. L.R. 105, 9 W.W.R. 1435.

Under s. 103 (now 107) of the County Courts Act, the entry of a judgment in the procedure book constitutes the judgment, and as, by s. 162 (now 168), County Courts are Courts of Record, the production of the procedure book shewing the entry proves the judgment and it is not necessary to prove the cause of action upon which such judgment was founded to shew that the court had jurisdiction over it.

Dixon v. Mackay, 21 Man. L.R. 762.

(§ IV E—411)—FOREIGN JUDGMENTS—EFFECT OF APPEAL PENDING IN THE FOREIGN JURISDICTION.

The fact that the suit in which the foreign judgment given in evidence was rendered, is still pending by way of appeal to a higher court in the foreign jurisdiction, does not make the decision less conclusive as evidence between the parties to it while it stands. Howland v. Codd, 9 Man. L.R. 435; Scott v. Pilkington, 2 B. & S. 11, 121 Eng. R. 978, applied.]

Wilcox v. Wilcox, 16 D.L.R. 491, 24 Man. L.R. 93, 27 W.L.R. 359, 6 W.W.R. 213, reversing 14 D.L.R. 1.

TERMINATION OF CRIMINAL PROSECUTION.

The termination of a prosecution by withdrawal of the charge before the justice may be proved without any formal record or certificate as a basis for an action for malicious prosecution. [R. v. Ivy, 24 U.C.C.P. 78; Hewitt v. Cane, 26 Ont. R. 133; McCann v. Preveneau, 10 Ont. R. 573; Goddard v. Smith, 6 Mod. 262, disapproved.]

Tamblyn v. Westcott, 20 D.L.R. 131, 23 Can. Cr. Cas. 391, 7 W.W.R. 1037

EXTRADITION PROCEEDINGS.

Under s. 16 of the Extradition Act, R.S.C. 1906, c. 155, authorizing the receiving in evidence in extradition proceedings of depositions or statements taken in a foreign state on oath, or copies of such depositions and statements and foreign certificates thereof, if duly authenticated, an affidavit tending to establish before the extradition commissioner the crime charged against a person sought to be extradited does not vitiate the extradition proceedings because such affidavit was taken by questions and answers and then written out in narrative form before being sworn to.

Re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123, 2 W.W.R. 368.

INDICTMENT IN FOREIGN STATE—EXTRADITION.

Where the demand for extradition is not founded on any conviction made in the foreign state, a certified copy of an indictment there found against the accused is not admissible in proof of the prima facie case required to justify a committal for extradition. [United States v. Browne (No. 2), 11 Can. Cr. Cas. 167; Re Browne, 6 A.R. (Ont.) 401; Re Harsha, 10 Can. Cr. Cas. (No. 1) 433, followed.]

United States v. Jackson, 28 Can. Cr. Cas. 290.

(§ IV E—412)—JUDGMENT IN CRIMINAL CASE AS EVIDENCE — BREACH OF RECOGNIZANCE.

While the general rule is that a conviction in a criminal case is not proof, in civil proceedings, of the acts upon which the conviction may be grounded, it is still evidence of the particular fact which it recites; and, where it is for an assault, the conviction is admissible as proof on application before another tribunal for forfeiture and estreat of a recognizance there given by the defendant to keep the peace and be of good behaviour.

R. v. Walker, 18 D.L.R. 541, 23 Can. Cr. Cas. 179.

PRIOR SUMMARY CONVICTION — LIQUOR ACT.

A memorandum signed by the magistrate in his docket at the time of a summary conviction for an offence under the Liquor Act, 1916 (Alta.), will be admissible to prove same before the same magistrate as a prior conviction upon a charge for a second offence, if no formal conviction for such prior offence had been drawn up. It is the fact of the first offence, not the first conviction, under ss. 40, and 60 of the Act, that attaches the increased penalty to the second, and, on proof of the offence charged as a second offence and on proof of the previous conviction under the act for an offence of a prior date to that being tried, a conviction with the increased penalty for a second offence is justified. In proving the

prior offence by a prior conviction which had not been attacked, regard need be had only to the adjudication of guilt, and the fact that the punishment awarded on the prior conviction was in excess of the statutory limit will not affect the validity of the adjudication of guilt when proof of same is adduced on the second charge as evidence of the prior offence.

R. v. Tansley, 29 Can. Cr. Cas. 225, 12 A.L.R. 88, [1917] 3 W.W.R. 70, affirming 38 D.L.R. 339, 28 Can. Cr. Cas. 280.

F. Pleadings and papers in suit.

(§ IV F—415)—Leave to put in documents omitted at trial.

The plaintiff may, on terms, put in as evidence a document he failed by an oversight to put in at the trial.

Peirson v. Crystal Ice Co., 32 W.L.R. 949.

G. Evidence previously taken or used; affidavits.

(§ IV G—420)—Depositions taken at former trial of witness absent from Canada — Authentication — Signing by judge—Cr. Code, s. 999—Trial for conspiracy.

R. v. Baugh, 33 D.L.R. 191, 38 O.L.R. 559, 28 Can. Cr. Cas. 146.

Judicial commission—Witness domiciled out of the jurisdiction—Examination, the legality of which is subject to the obtaining of a beginning of evidence by writing—Admission under reserve—C.C.P., art. 380.

An examination, by judicial commission, previous to the commencement of an action, of a witness domiciled in a foreign country, is subject to certain regulations and rules applicable to the case where a witness is allowed to give evidence before commencing the action on account of illness or permanent absence. When it is a question of knowing whether the interrogatories, which should be submitted to a witness by a judicial commission, are legal, and that their legality depends on a commencement of proof by writing, the court should allow the interrogatories, if they appear to be relevant to the action, reserving to the opposite party the right to object.

Continental Bag & Paper Co. v. Price, 56 Que. S.C. 339.

(§ IV G—421)—Former testimony.

Where a new trial has been granted to the accused by a court of criminal appeal on the ground that the principal witness for the prosecution had not been properly sworn at the first trial, the depositions of the accused given on the first trial as a witness on his own behalf and his cross-examination and re-examination, may notwithstanding be given in evidence on behalf of the prosecution on the second trial as being evidence of admissions made by the accused.

The King v. Deakin (No. 2), 2 D.L.R. 282, 19 Can. Cr. Cas. 274, 17 B.C.R. 13.

Former depositions of absent witness—Cr Code (1906), s. 999.

The deposition of a witness taken on the preliminary enquiry upon the same charge may be read against the accused where the witness, a foreigner, had been summoned but had left for parts unknown.

R. v. Frank, 14 D.L.R. 382, 22 Can. Cr. Cas. 100.

Criminal trial—Former testimony—Absent witness for prosecution—Deposition at preliminary enquiry.

A court of criminal appeal will not interfere with a preliminary finding by the Trial Judge under Cr. Code, s. 999 (amendment of 1913), on admitting in evidence the prior deposition of an absent witness for the Crown taken on the preliminary enquiry, that such witness was absent from Canada, where such finding was based on proof that the absent witness was a police officer who had obtained a short leave of absence and having thereafter failed to report for duty had been heard from in the United States under circumstances tending to shew that he had gone there to avoid giving evidence at the trial in question; it is not a prerequisite to the admission of the prior deposition that there should be absolute proof of absence from Canada, but only that such facts should be proved from which such absence "can be reasonably inferred."

R. v. Angelo, 16 D.L.R. 126, 19 B.C.R. 261, 22 Can. Cr. Cas. 304, 27 W.L.R. 108, 5 W.W.R. 1303.

Deposition of absent witness.

Where a new trial had been ordered and the Crown on the second trial before the same judge desired to put in the evidence given at the first trial of a witness who had since left Canada, it is sufficient that the judge signs the evidence of such witness extended from the shorthand notes at any time before it is actually received in evidence under Cr. Code, s. 999 at the second trial; this may be done even after tender of same and objection taken by the defence to the lack of authentication.

R. v. Baugh, 33 D.L.R. 191, 38 O.L.R. 559, 28 Can. Cr. Cas. 146.

Witnesses and evidence—Commencement of proof in writing—Action in factum—Married woman—Que. C.C. 177, 1233.

The testimony of a person at law, when it is taken in writing, is equivalent to a written document coming from that person, and can serve as a commencement of proof in writing when it renders probable the fact alleged; this is the case when the answers given are more or less embarrassed or artificial, shewing that the party seeks to dissimulate the truth either by falling back on a defective memory, or by pretending to ignore facts which ought to be known to him, either by varying or wavering in his replies, or by recognizing facts whose truth one can reasonably infer from those facts which the witness has denied. Besides the

actions in jus resting on a contract of civil law, or on a principle of positive law, doctrine and jurisprudence have always recognized, under the name of an action in factum, demands based on certain principles of equity, and material facts which form quasi-contracts, such as the wrongful enriching oneself at the expense of others, and the recovery of what has been paid without reason, condicto sine causa. Default of authorization to contract, in a married woman, cannot be pleaded against an action for recovery of what has been paid without reason, or founded on wrongful enrichment, tending to put the parties in the condition they were before such contracts.

Langlois v. Labbe, 46 Que. S.C. 373.

(§ IV G—422)—Foreign commission—Use at trial "saving all just exceptions."

An order to take the plaintiff's evidence on commission and directing that it may be used at the trial "saving all just exceptions," excludes only ordinary exceptions as to admissibility, and does not apply so as to leave it open for the Trial Judge to exercise a judicial discretion by insisting that the plaintiff's evidence shall be given viva voce at the trial, unless the order so provides.

Elgin City Banking Co. v. Mawhinney, 17 D.L.R. 577.

Depositions in collision inquiry—Admissibility in main action.

Depositions of the mate of a vessel in proceedings of a judicial nature before the Court of Formal Investigation, to inquire into a collision under ss. 782-801 of the Canada Shipping Act (R.S.C. 1906, c. 113), cannot be received in evidence in the main action to determine the liability for the collision, the plaintiff having been a party to and represented by counsel at such proceedings.

The King v. The "Despatch;" The Border Line Transportation Co. v. McDougall, 28 D.L.R. 42, 22 B.C.R. 496, 16 Can. Ex. 319, 34 W.L.R. 123, 10 W.W.R. 230.

Marking a letter as an exhibit to a party's deposition on discovery examination does not make the letter evidence, even when all the depositions are put in as evidence; but when both parties conduct their case before the Trial Judge on the assumption that the letter so marked was in evidence, and no objection is made at the trial that it was not properly put in, an objection raised in appeal that it was not before the court will not be entertained.

Richardson v. Ramsay, 2 D.L.R. 686, 5 S.L.R. 110, 20 W.L.R. 566, 1 W.W.R. 1070.

In an action on a promissory note made by the defendant to a payee who endorsed to the plaintiff, upon an application by plaintiff to use at the trial his own evidence taken on an examination for discovery, leave having been given on such examination to have the evidence taken as on a commission for use at the trial, subject to any order in respect to the use thereof which the Trial Judge might make), the Trial Judge, on the motion, while giving due weight to strong affidavits of physical inability, will, in his judicial discretion, consider whether plaintiff has an adequate legal remedy for the recovery from the payee upon his endorsement of the note, the obtaining of which from the defendant maker was tinged with fraud, particularly where the plaintiff with knowledge of many such fraudulent notes continues to associate himself with the payee by buying from him notes of other makers similarly obtained and tinged with fraud. Upon an application to use at the trial the evidence of the plaintiff taken on a commission, upon the ground of physical inability to attend, the fact that plaintiff is associated with a fraudulent payee of the note sued upon, and can introduce his alleged material evidence through that fraudulent payee, will be considered by the Trial Judge on the motion.

Park v. Schneider, 6 D.L.R. 451, 5 A.L.R. 423, 22 W.L.R. 70, 2 W.W.R. 1022.

The depositions taken before justices on a preliminary inquiry are not part of the trial proceedings, though in certain circumstances the court may give leave to have them read as evidence at the trial.

The King v. Montminy, 3 D.L.R. 483, 20 Can. Cr. Cas. 63.

Deposition—Stenographer's notes.

If one party does not put on the record the stenographic notes of the depositions of his witnesses, the other party may, by motion, ask that they be placed on the record within a fixed delay; and on his failing to do so the court will give judgment as if such evidence had not been given.

Arseneault v. Vachon, 20 Que. P.R. 195.

(§ IV G—423)—Affidavits of value previously taken.

The affidavit of value made by the executor of an estate on taking out probate may be admissible in evidence against the estate on an arbitration to fix the value of some of the lands belonging to the estate expropriated for railway purposes; the arbitrators should consider whether the time which had elapsed between the affidavit of value and the date as of which compensation was to be paid by the railway was such as to make the affidavit of little or no importance in fixing the value of the property at a later date.

Canadian North. West. R. Co. v. Moore, 23 D.L.R. 646, 8 A.L.R. 379, 30 W.L.R. 676, 7 W.W.R. 1327.

The court may permit it to be shewn by affidavit that a sheriff's sale of land under an execution was held at the hour specified in the notice of sale, where the application to confirm the sale did not disclose such fact. It is unnecessary, in Saskatchewan, to produce the original or certified copies of the execution, and its renewal, as well as the sheriff's return of

nulla bona thereof, on an application to confirm a sale of land thereunder, the practice of the court for many years in that province having permitted such facts to be shewn by affidavit.

Re Price, 4 D.L.R. 467, 5 S.L.R. 318, 21 W.L.R. 299, 2 W.W.R. 394.

AFFIDAVITS — NONRESIDENT PLAINTIFF — CROSS-EXAMINATION BY DEFENDANT.

Christner v. Fisher, 10 D.L.R. 804, 23 W.L.R. 530.

DIVORCE — PRACTICE — ADULTERY — EVIDENCE ON TRIAL BY AFFIDAVIT—DISCRETION.

On an application for an order for direction in a divorce action, counsel for petitioner asked for an order allowing proof of the facts by affidavit at the trial, owing to the remoteness of witnesses and the financial disability of the petitioner. Held, that the trial must be held on oral evidence, but a saving clause giving the Trial Judge power to allow proof by affidavit of such facts as he may deem proper may be inserted in the order.

Jensen v. Jensen, 25 B.C.R. 513.

I. DEEDS; WILLS; LEASES; MORTGAGES.

(§ IV I—430)—TITLE.

When there is no dispute between the parties on the question as to the right of ownership, the production by one of them of a title conformable to his possession is sufficient evidence of ownership without there being any necessity of going back to the titles of former owners.

Rigaud-Vaudreuil Gold Fields v. Boldue et al. 25 Que. K.B. 97.

(§ IV I—431)—DEEDS.

An admission or statement in a Crown grant will not adversely affect any interest in the land after the Crown has parted with all of its interest therein, the same rule applying in that respect as well to the Crown as to a private person.

Boehner v. Hirtle, 6 D.L.R. 548, 46 N.S. R. 231, 11 E.L.R. 222.

The rights of a grantee from the Crown under a patent are limited by the terms of the patent and these cannot be enlarged by reference to petitions, memorials, reports or correspondence in the Crown Lands Department leading up to the grant.

Hunter v. Richards, 5 D.L.R. 116, 26 O. L.R. 458, 22 O.W.R. 408. [Affirmed, 12 D.L.R. 503, 28 O.L.R. 267.]

(§ IV I—432)—DOCUMENTARY EVIDENCE—WILLS AND DEEDS—CERTIFIED COPIES—ADMISSIBILITY TO PROVE TITLE.

A document purporting to be a certified copy of an unprobated will executed in the Province of Quebec by a resident of that province and a certified copy of a conveyance purporting to have been made by the executors under the said will, both of which documents are registered in the county of Gloucester, are not, in the absence of proof of the death of the testator, admissible to prove title in one claiming through him.

Sweeney v. DeGrace, 42 N.B.R. 344.

(§ IV I—434)—MORTGAGES.

Proof of acquiescence in the discharge of a mortgage signed by executors will not be inferred: There must be positive documentary evidence to that effect or at least a commencement of proof in writing or the admission of the interested party.

Consumers' Cordage Co. v. Molson, 2 D. L.R. 451.

MORTGAGES—PAROL EVIDENCE TO SHEW DIFFERENT ADVANCE FROM THAT RECITED AS PAID — CORROBORATION — BROTHER AND SISTER—TRUST.

Where a mortgage is given for a specific sum stated to be then advanced, the receipt of which is acknowledged in the mortgage, the mortgagor may still shew by parol evidence that the sum named was not in fact advanced. On a claim against the estate of a deceased person for lands alleged to have been held in trust by the deceased for the claimant, who was his sister, a claim in the pleadings of the attacking parties (the other next of kin) that the property was partnership property between the deceased and his sister, may, although not established by the evidence, operate as an admission that the sister had at least a beneficial interest in the properties, and thus corroborated her testimony that the deceased brother acted as her business agent and employee in real estate investments and as such held the lands, purchased with her money and registered in his name, in trust for her. [Cook v. Grant, 32 U.C.R. 511, distinguished.]

Voyer v. Lepage, 19 D.L.R. 52, 8 A.L.R. 139, 7 W.W.R. 933, affirming 17 D.L.R. 476.

J. ACCOUNTS AND ACCOUNT BOOKS.

(§ IV J—435)—ACCOUNTS AND ACCOUNT BOOKS.

Where the bookkeeping entries for goods supplied are made as in the name of the wife of the defendant in respect of goods supplied to a woman introduced by the defendant as his wife, the defendant will be held liable for the price of the goods notwithstanding that the book account was not in his name, where the goods were in fact supplied on his credit and in faith of his representations and not on the woman's credit, if the method of charging was made in like manner as in the ordinary case of a wife buying as agent of her husband.

Redferns v. Inwood, 8 D.L.R. 618, 27 O. L.R. 213.

BANK BOOK OF ACCUSED—ADMISSIBILITY.

The private bank account of an accused cashier is admissible in evidence against him on a charge of embezzlement to shew that the deposits of moneys in his private account at or about the time of the alleged embezzlement is too large to be accounted for by his salary or known income, as tending to shew that the missing money went

into his possession and not into that of his fellow employees.

R. v. Minchin, 15 D.L.R. 792, 22 Can. Cr. Cas. 254, 7 A.L.R. 148, 26 W.L.R. 633, 5 W.W.R. 1028. [Affirmed, 18 D.L.R. 340.]

CONCLUSIVENESS OF ACCOUNTS—PRINCIPAL AND SURETY.

A provision in a guaranty, that the stating, settling or admission of an account between the principal debtor and creditor shall be conclusive evidence against the sureties, will not prevent the sureties from objecting to illegal charges, nor to charges not illegal but improper to the knowledge of the creditor.

Northern Crown Bank v. Woodcrafts, 33 D.L.R. 367, 11 A.L.R. 1, [1917] 1 W.W.R. 1205, varying 28 D.L.R. 728.

An account stated between the principal debtor and creditor is not conclusive against nor binding upon the surety.

Standard Bank v. Alberta Engineering Co., 33 D.L.R. 542, 11 A.L.R. 96, [1917] 1 W.W.R. 1177, varying 27 D.L.R. 707.

CRIMINAL TRIAL — DEFENDANT'S BANK ACCOUNT — RELEVANCY ON CHARGE OF THEFT OF MONEY.

On a charge of theft in respect of the amount alleged to have been embezzled from the city's funds by a city employee it is admissible for the Crown to put in evidence the defendant's bank account shewing that about the time of the defalcation as disclosed by the audits, a deposit was credited to him by the bank of a like amount to that embezzled, but where any suggestion based on the bank deposit was met by shewing that the money was a loan procured by a discount at another bank of his own and his wife's note, there is no "substantial wrong or miscarriage" (Cr. Code, 1019) to entitle the accused to a new trial or to set aside the conviction, if the judge directed the jury that none of the deposits were shewn to have come from the city funds, and no unfair or improper use prejudicial to the accused had been made of the bank account.

Minchin v. The King, 18 D.L.R. 340, 23 Can. Cr. Cas. 414, 6 W.W.R. 800, affirming 15 D.L.R. 792, 22 Can. Cr. Cas. 254, 7 A.L.R. 148.

ENTRIES IN BOOKS OF VENDOR — ADMISSIBILITY.

Clergue v. Plummer, 38 O.L.R. 54, reversing 37 O.L.R. 432. [Affirmed by Supreme Court of Canada (judgment unreported). See 12 O.W.N. 367.]

(§ IV J—437)—SOLICITOR'S DOCKET.

Entries in a solicitor's docket, while not conclusive, are prima facie evidence of the proper remuneration for his services.

Re Solicitors, 7 D.L.R. 323, 4 O.W.N. 47.

K. LETTERS, TELEGRAMS, ETC.

(§ IV K—440)—ASSIGNMENT TO PLAINTIFFS OF CONTRACT OF DEFENDANT TO PURCHASE LAND IN SASKATCHEWAN—ACTION FOR SPECIFIC PERFORMANCE—DEFENCE BASED ON MISREPRESENTATION—PROOF OF—CONFLICT OF ORAL TESTIMONY—INFERENCES FROM DOCUMENTARY EVIDENCE—FINDING OF TRIAL JUDGE—REVERSAL ON APPEAL—EQUITIES AVAILABLE AGAINST ASSIGNEES.

Canadian Freehold securities Co. v. McDonald, 17 O.W.N. 65.

LETTER OF ATTORNEY—AFFIDAVIT.

In an action of disavowal against an attorney, a letter addressed by him to his client, even if sufficiently proved, does not constitute proof which can combat the judicial avowal contained in a sworn affidavit produced by the plaintiff, in which he described himself as being "one of the plaintiffs," such document being absolute proof against him on the question of authorization of his attorney to bind the action.

Paradis v. Nantel, 24 Rev. Leg. 123.

(§ IV K—441)—LETTERS.

Letters written without prejudice, and bona fide to induce the settlement of litigation, are not admissible in evidence against the party sending them, but this rule does not protect a letter not written for the purpose of a bona fide offer of compromise, but containing threats. [Pirie v. Wyld, 11 O.R. 422, followed.]

Underwood v. Cox, 4 D.L.R. 66, 26 O.L.R. 303, 21 O.W.R. 757.

ADMISSIBILITY OF LETTER.

Marking a letter with the words "without prejudice" does not necessarily exclude it from being given in evidence against the writer; the letter is to be excluded if the writer is in dispute or negotiation with another and is offering terms without prejudice for the settlement of the dispute or negotiation, but to determine whether these conditions exist the Trial Judge may look at the letter marked "without prejudice." [Re Daintrey, [1893] 2 Q.B. 119, distinguished.]

Bank of Ottawa v. Stamco et al., 22 D.L.R. 679, 8 W.W.R. 574.

(§ IV K—444)—TELEGRAMS.

The testimony of a telegraph agent that the original of a telegram, if it ever existed would have been destroyed long before the trial, but since he had never seen the original of the telegram, he could not say that that particular document had been destroyed, is not sufficient as a foundation for the admission in evidence of the copy received by the addressee. Before a copy of a telegram is admissible in evidence it must be first proved that it was sent and that the original, if it cannot be produced, was lost or destroyed.

Adamson v. Vachon, 8 D.L.R. 240, 5 S.L.R. 400, 22 W.L.R. 494, 3 W.W.R. 227.

L. Records and papers of corporations or carriers.

(§ IV L—450)—Private book of agents' rules.

An agents' guide book marked "private and confidential" issued by an insurance company exclusively for the guidance of its agents, is not admissible against or binding on an insured person in an action on a policy issued by the company.

Gill v. Yorkshire Ins. Co., 12 D.L.R. 172, 23 Man. L.R. 368, 24 W.L.R. 389, 4 W.W.R. 692.

Register of vessel.

A certified copy of the register of a vessel is admissible as prima facie evidence of its ownership.

Boddington v. Donaldson Line, 31 D.L.R. 520, 44 N.B.R. 290.

Foreign company—Evidence of incorporation—Jurisdiction of county court.

In an action in a Magistrate's Court by a foreign corporation the only evidence of the incorporation was supplementary letters of incorporation increasing the capital stock. This evidence was received by the magistrate without objection and judgment entered for the plaintiff. On review before a County Court Judge the judgment was set aside on the ground that there was no evidence of incorporation. Held, on motion for a certiorari to quash the order of review, that, whether, or not, there is such evidence is a question of law and the County Court Judge had jurisdiction, notwithstanding the amount involved was under $40.

Ex parte Ault & Wiborg Co., 42 N.B.R. 548.

N. Contracts.

(§ IV N—460)—Contracts — Repairs — Que. C.C. 1233.

An owner can give verbal orders to have certain necessary repairs made to his property, and, if such repairs are made with the knowledge of himself or his agent, parol evidence thereof may be given, and the owner must pay for them. It would be otherwise if there were a written order; in that case the owner's liability would be limited to the works specially mentioned in the written document.

Clavel v. Jacobs, 46 Que. S.C. 527.

O. Scientific and medical books.

(§ IV O—467)—Medical books—Oral proof of their authority.

If a witness called to give expert testimony is asked about a text book e.g., as to mental diseases, and expresses ignorance of it, or denies its authority, no further use of it can be made by reading extracts from it, for that would be in effect making it evidence; but, if he admits its authority, he then, in a sense, confirms it by his own testimony, and then may quite properly be asked for an explanation of any apparent differences between its opinion and that stated by him.

R. v. Anderson, 16 D.L.R. 203, 22 Can. Cr. Cas. 455, 7 A.L.R. 102, 5 W.W.R. 1052.

P. For purposes of comparison.

(§ IV P—471)—To prove authorship.

The presence of lexicographical errors common both to the copyright book and to the later publication, alleged to be an infringement thereof, is prima facie evidence that the later publication was copied from the other.

Cartwright v. Wharton, 1 D.L.R. 392, 25 O.L.R. 357.

Q. Memoranda.

(§ IV Q—475) — Stenographic memoranda — Admissibility as evidence or to refresh memory.

In an action for specific performance of an alleged contract entered into by an alleged agent for the sale of defendant's land, where the defence is that the agent had no authority to sell the land in question, a memorandum taken by the alleged agent's stenographer of portions of a conversation between the owner and the alleged agent, when instructions of some sort were given, but which memoranda was not signed by the defendant, is inadmissible in evidence to prove the authority of the agent, but it may be used by the stenographer for the purpose of refreshing her memory on the witness stand when called to prove the conversation.

Fysh v. Armstrong, 9 D.L.R. 575, 22 W.L.R. 966, 3 W.W.R. 747.

Memoranda consulted by witness.

A witness under examination may be ordered to hand over for inspection such parts of notes from which he is reading as relate to the subject-matter upon which he has testified, not limiting it to the parts used by such witness.

Canadian Spool Cotton Co. v. Lyall, 14 Que. P.R. 203.

Document held by witness.

A witness at the trial may be ordered to file into court a document which he has in his possession.

Dubee v. Vipond, 14 Que. P.R. 386.

R. Miscellaneous.

(§ IV R—480)—Hospital chart.

A chart made by hospital nurses, one of whom was not available as a witness at the trial, shewing the plaintiff's condition while an inmate of a hospital, is not admissible against him in an action for negligent injuries, but may be used to refresh the memory of the nurse as to entries thereon which she herself made.

C.P.R. Co. v. Quinn, 11 D.L.R. 600, 22 Que. K.B. 428, 19 Rev. de Jur. 543.

(§ IV R—483)—Maps — Plats—Sketch.

A township plan which shews an overlapping of different grants is to that extent erroneous and such overlapping as to

the land last granted must be rejected as false description.

Boehner v. Hirtle, 6 D.L.R. 548, 46 N.S. R. 231, 11 E.L.R. 222.

A plan or sketch of the locus in quo will be excluded on being produced to witnesses being examined as to the position and movements of a tug and its tow in a negligence action, if the sketch purports to shew on its face the relative position of the tug and tow at different points in their course, and such positions are involved in the questions at issue. [Beamon v. Ellice, 4 Car. & P. 585, applied.]

Wattsburg Lumber Co. v. Cook Lumber Co., 4 D.L.R. 8, 17 B.C.R. 410, 20 W.L.R. 833, 2 W.W.R. 248.

SURVEY OF TIMBER LIMIT.

Surveys made by the plaintiffs and which were accepted by the Government of British Columbia and declared by government regulations to be the true boundaries of plaintiff's timber limits granted by the government, are sufficient evidence of title to maintain an action for trespass against persons who are clearly shewn to be trespassers in cutting timber within the marked boundaries of the limit.

Adams Powell River Co. v. Canadian Puget Sound Co., 17 D.L.R. 591, 19 B.C.R. 573, 28 W.L.R. 13.

(§ IV R—485)—PRIVATE COST MARKS.

Private cost marks on merchandise or its containers in the usual course of business are admissible as evidence to fix the cost price of goods as to which the seller is unable to produce invoices under an agreement of sale at invoice price plus ten per cent.

Periard v. Bergeron, 9 D.L.R. 537, 47 Can. S.C.R. 289, 23 W.L.R. 425, 3 W.W.R. 633.

(§ IV R—489)—INSURANCE CASES—STOCK-TAKING RECORD.

In an action on a policy of fire insurance for the total destruction of a stock of merchandise by fire, in order to shew the value of the stock then on hand, evidence is admissible of a stock taking four months previous to the fire, where there is nothing to throw doubt on the bona fides or accuracy of such record.

Strong v. Crown Fire Ins. Co., Strong v. Rimouski Fire Ins. Co., Strong v. Anglo-American Fire Ins. Co., Strong v. Montreal-Canada Fire Ins. Co., 13 D.L.R. 686, 29 O.L.R. 33.

INSURANCE CASES — STOCK-TAKING RECORD —ADMISSIBILITY.

In an action on a policy of fire insurance for the total destruction of a stock of merchandise by fire, in order to shew the value of the stock then on hand, evidence is admissible of a stock taking four months previous to the fire, where there is nothing to throw doubt on the bona fides or accuracy of such record.

Anglo-American Fire Ins. Co. v. Hendry, 15 D.L.R. 832, 48 Can. S.C.R. 577, 50 C.L.J. 75, affirming, sub nom. Strong v. Crown Fire Ins. Co., 13 D.L.R. 686, 29 O.L.R. 33.

(§ IV R—494)—BURDEN OF PROOF — DELIVERY — RECEIPTS TO CARRIERS — RECEIPT PRIOR TO LOCATING GOODS.

The rule of evidence that a written receipt signed and delivered (acknowledging the delivery of goods by the shipper to a consignee) shifts the burden of proof, cannot be applied in favour of the shipper, in the face of the consignee's direct denial of delivery and the fact that such receipts were by the consignee company's rules of business exacted prior to inspection or delivery of the goods and that such receipts were not really effective until a later stage when the goods, if found, might be checked and delivered.

Henderson v. Inverness R. Co., 16 D.L.R. 420, 47 N.S.R. 530.

S. PAPER PRODUCED ON NOTICE.

(§ IV S—496)—NOTICE TO PRODUCE.

A notice to produce "all . . . reports, documents, questions and answers relating in any respect to the examination, relating to the matter in question in" an action for alleged conspiracy between the examiners and the College of Dental Surgeons to undermark the plaintiff's examination papers so as to prevent his admission to such college, is not sufficient to apprise the defendant that discovery of the examination papers and answers of other candidates at the same examination was required.

Richards v. Verrinder, 2 D.L.R. 318, 20 W.L.R. 779, 2 W.W.R. 102.

PROOF OF PREVIOUS CONVICTION — CERTIFICATE.

The King v. Atkinson, 18 Can. Cr. Cas. 279, 9 E.L.R. 212.

EXAMINATION FOR DISCOVERY — DECEASED PARTY.

Depositions on the examination for discovery of a party since deceased are not admissible on behalf of his executors on a revivor of the same action.

Atkinson v. Casserley, 22 O.L.R. 527.

LETTER—PROOF OF MAILING.

The posting of a letter, properly stamped, is evidence of the fact of its having been received by the person to whom it was addressed.

Canadian Druggists' Syndicate v. Thompson, 24 O.L.R. 108, 19 O.W.R. 401.

PROMISSORY NOTE — PROOF OF SIGNATURE — COMPARISON OF HANDWRITINGS BY JUDGE — ABSENCE OF EXPERT EVIDENCE.

Kalmet v. Keiser, 3 A.L.R. 26, 13 W.L.R. 94.

NEGLIGENCE — DEPOSITION OF WITNESS BEFORE THE CORONER'S INQUEST — INADMISSIBILITY.

Johnson v. The King, 13 Can. Ex. 379.

CUSTOMS ACT — REFERENCE BY MINISTER —AFFIDAVIT USED BEFORE MINISTER — ADMISSIBILITY.

The King v. Morris, 13 Can. Ex. 384.

ADMISSIBILITY OF EVIDENCE — LEASE — SECONDARY EVIDENCE WHERE NOTICE TO PRODUCE GIVEN.

Cyr v. DeRosier, 9 E.L.R. 550.

AFFIDAVIT OF DECEASED PLAINTIFF — EVIDENCE AT TRIAL — OPPORTUNITY FOR CROSS-EXAMINATION.

Macdonald v. Delion, 17 W.L.R. 614.

PAYMENTS MADE ON ACCOUNT OF DEBT — ENTRIES IN CREDITOR'S BOOKS — RECEIPTS GIVEN BY CREDITOR'S AGENT.

Massey Harris Co. v. Horning, 19 W.L.R. 260.

A writ of attachment, issued in Saskatchewan, under r. 417 of the Judicature Ordinance, is prima facie evidence on an interpleader, arising from a seizure thereunder that the attaching party was a creditor of the party against whom the attachment issued. [Palmer v. Ross, 18 W.L.R. 204, reversed as to ruling on this point at the trial, but the trial judgment affirmed on other grounds.]

Patterson v. Palmer, 19 W.L.R. 422.

V. Demonstrative evidence; articles and things; view of jury.

(§ V—505)—SAMPLES OF SUNKEN WRECK —DISCRETION—REVIEW.

Refusing to permit samples of the hull from the wreck of a floating dry dock to be taken for the use at the trial is within the discretion of the Trial Judge under r. 659 (B.C.) and therefore not reviewable, although the preferable course would be an order for survey or inspection of the res.

Seattle Construction & Dry Dock v. Grant, Smith & Co., 26 D.L.R. 671, 22 B.C.R. 433, 33 W.L.R. 981, 10 W.W.R. 49.

PRODUCTION OF VALUABLE BONDS — PLACE OF PRODUCTION.

Bonds and debentures of value should be directed to be inspected at their place of safe custody, and the additional cost occasioned by reason of their inspection being there ordered should be borne by the person desiring that locality.

Lumber Mfr's Yard v. Moose Jaw Flour Mills, 7 W.W.R. 755.

(§ V—510) — ADMISSIBILITY OF ARTICLES SEIZED UNDER SEARCH WARRANT.

Upon a trial for keeping a common betting house in violation of ss. 227, 228 Cr. Code, articles for recording bets which were seized upon the premises by police officers, are admissible in evidence against the prisoner, irrespective of a claim by the accused that the alleged search warrant was illegal and that the police officers had obtained possession of the articles by means of their own trespass.

R. v. Honan, 6 D.L.R. 276, 20 Can. Cr. Cas. 10, 26 O.L.R. 484, 20 O.W.R. 527.

EVIDENCE OBTAINED BY ILLEGAL SEARCH AND SEIZURE

Evidence is none the less admissible because of the invalidity of the search warrant in the execution of which the evidence was procured. [R. v. Honan, 20 Can. Cr. Cas. 10, 26 O.L.R. 484, 6 D.L.R. 276, applied.]

R. v. Gibson, 30 Can. Cr. Cas. 308, [1919] 1 W.W.R. 614.

(§ V—511)—VIEW BY COURT —CRIMINAL TRIAL BY MAGISTRATE.

A police magistrate sitting as such under Part XVI. Cr. Code, summarily trying an indictable offence, has no right during the trial to take a view of the land in respect of a transaction in which the charge of fraud was made which he was trying as such magistrate, at least where there is no consent of both the Crown and the accused to his so doing. [R. v. Petrie, 20 O.R. 317, applied.]

R. v. Crawford, 10 D.L.R. 96, 21 Can. Cr. Cas. 79, 18 B.C.R. 20, 22 W.L.R. 969, 3 W.W.R. 731.

CHILD EXHIBITED TO JURY AS EVIDENCE OF PATERNITY.

The King v. Hughes, 17 Can. Cr. Cas. 450, 22 O.L.R. 344.

MURDER BY STABBING—FINDING OF KNIVES BELONGING TO ACCUSED.

On a trial for murder by stabbing, it is not error to admit evidence of the finding in the prisoner's room, where he was arrested, of knives belonging to him capable of producing the fatal wound.

The King v. Ventricini, 17 Can. Cr. Cas. 183.

VI. Parol and extrinsic evidence concerning writings.

"Other and extrinsic evidence" as to jurisdictional amount, see Courts, II A—160.

As to matters required by statute to be in writing, see Contracts, I E—67.

Annotation.

On Statute of Frauds: 2 D.L.R. 636.

A. IN GENERAL.

(§ VI A—515)—IN GENERAL.

Though terms cannot be imported into a written contract to vary it, evidence of circumstances surrounding the making of the contract or contemporaneous with its performance in whole or in part, may be taken into consideration in determining the amount of damages for breach of the contract.

Kelly v. Nepigon Construction Co., 8 D.L.R. 116, 4 O.W.N. 279, 23 O.W.R. 298.

Verbal representations, not contained in a written contract, cannot be relied upon to defeat it where the contract plainly provides that no representation not contained in the contract shall be binding, but in such a case the language of such proviso must be so clear that the average man entering into it would know that he was debarring himself from relying upon the outside representation. Where a "satisfaction slip" is signed by one party to a contract for the purchase of an engine, which slip states that the "work done and supplies furnished" are accepted and satisfactory, such party is not thereby estopped

from setting up that the engine purchased was defective and unsatisfactory, where the party signing did not read the slip, nor was it read to him, and his signature was obtained by defendant's agent stating to him that it was a certificate of the time spent by the seller's expert at his place in fitting up the engine.

Eisler v. Canadian Fairbanks Co., 8 D.L.R. 390, 22 W.L.R. 888, 3 W.W.R. 753.

It cannot be shewn by parol, in the absence of fraud or misrepresentation on the part of the tenant as to the contents of his lease, which contains an option permitting him to purchase the demised premises during his term, that the landlord refused to assent to such condition and executed the lease on the express understanding that the only right of purchase given the tenant was that in case the former wished to dispose of the property during the term he would sell to the tenant for the sum mentioned in the lease in preference to any other person. [Croome v. Lediard, 2 My. & K. 251, 39 Eng. R. 940; Stewart v. Kennedy, 15 App. Cas. 108, followed.]

Hunter v. Farrell, 14 D.L.R. 556, 42 N.B.R. 323, 13 E.L.R. 354.

STATUTE OF FRAUDS.

Where there is no writing signed by the purchaser, the vendor of goods, in the absence of delivery, either complete or partial, and in the absence of earnest money, cannot establish his claim by the evidence of the buyer; ie., the writing required under the Statute of Frauds (C.C. (Que.) 1235) cannot be supplied by the examination of the purchaser.

Clairoux v. Blouin, 9 D.L.R. 145.

INDEFINITE DESCRIPTION OF LAND — STATUTE OF FRAUDS.

Parol evidence is admissible to establish the legal description of land otherwise indefinite under the requirements of the Statute of Frauds. [Caisley v. Stewart, 21 Man. L.R. 341, followed.]

Williams v. Black, 23 D.L.R. 287, 8 W.W.R. 1139, 31 W.L.R. 844.

ADMISSIBILITY OF ORAL EVIDENCE—QUEBEC PRACTICE.

An admission by the Crown, in its plea to a petition of right, claiming commission on an option obtained for the Crown; that the option was obtained by the suppliant, and that while some remuneration should be paid it had not been fixed, and that the claim was excessive, is a "commencement of proof in writing" which will, under Quebec law, let in oral evidence under art. 1233 C.C.P.

Wright v. The King, 22 D.L.R. 269, 15 Can. Ex. 203.

CONTRACTOR TO FURNISH MATERIAL AND LABOUR — PAROLE EVIDENCE TO PROVE EXTRA WORKS DONE BY SUBCONTRACTOR IN ACCORDANCE WITH AN AGREEMENT.

Where a contractor is to furnish material, labour and skill in a contract for work by estimate, parole evidence is admissible to prove that certain extra works were done by a subcontractor in accordance with an agreement between him, the contractor and the proprietor, and that such work was charged as extras and apart from the contract price, and also to prove the cost of the work. Art. 1690 C.C. (Que.) has no application as between a general contractor and a subcontractor.

C. E. Deakin v. Harris Construction Co., 46 D.L.R. 222, 55 Que. S.C. 249.

COMMENCEMENT OF PROOF IN WRITING — ADMISSIBILITY OF ORAL EVIDENCE.

The admission may be divided when the part contested and opposed is improbable or met by evidence of bad faith. This is the position when a defendant sued for loan of money pleads that the plaintiff did not advance this money by that title, but it was in order to pay the cost of a construction, the ownership of which was to be in common, and it is established that the defendant had tried to sell this immoveable as his own and had even mortgaged it. These latter facts separated from the admission furnish a commencement of proof in writing which admits of the production of oral testimony.

Hébert v. Demers, 47 Que. S.C. 252.

NOTICE OF MECHANIC'S LIEN.

Although evidence of the notice to the owner of the registration of an architect's lien cannot be made by a process-verbal of a bailiff of the Superior Court, the bailiff may be called as a witness to prove the delivery of the written notice to the owner. As between the privileged creditors and the owner evidence of the notice cannot legally be made without production of the written notice itself, but if the litigation is between the privileged creditor and a third party it can be made by oral evidence, the prohibition in art. 1233 C.C. (Que.) not applying to such a case.

Brunswick Balke Collender Co. v. Racette, 49 Que. S.C. 50.

WRITING CONTAINING PART OF CONTRACT.

In applying the rule that oral evidence of a contract is admissible where it is contended that the writing relied upon does not contain the whole agreement, the distinction must be observed between an oral condition postponing the operation of a written instrument and an oral agreement which can affect the instrument only after it has come into operation.

Morse v. Mac & Mac Cedar Co., 25 B.C.R. 417, [1918] 2 W.W.R. 205.

LOAN — INTEREST — COMMENCEMENT OF PROOF IN WRITING — PRESUMPTION.

If a defendant pleads to an action for repayment of a loan that he has paid the interest but he does not owe the capital, and at the hearing admitted that the sum claimed had been given him by the plaintiff's grantor in consideration of the payment of interest during the life of the donor, there are, in these circumstances, a divisible admission and a commencement of

proof in writing which allow the admission of parol evidence. The payment of interest upon a sum of money is a presumption of a loan rather than a gift.

Laplante v. Frappier, 24 Rev. Leg. 286.

SALE OF LAND — JUDICIAL ADMISSION — COMMISSIONS—CUSTOM.

A contract for sale of land on commission, between an owner and an agent, is not a commercial contract, and cannot be proved by witnesses unless there is a commencement of proof by writing. A judicial admission may be divided according to circumstances, in the discretion of the court, when the part of the admission objected to is impossible or invalidated by contrary evidence. According to established custom, the commission to be paid such agent, when at the vendor's request he finds a purchaser, is 2½ per cent upon the sale price.

Laporte v. Demault, 24 Rev. Leg. 248.

DURATION OF LEASE.

The duration of a lease, payable in monthly instalments can be proved by oral testimony.

Pelletier v. Lamarre, 50 Que. S.C. 441.

CONTRACT — WRITTEN — ACTION FOR REPAYMENT OF MONEY — ORAL EVIDENCE REQUIRED THAT CONTRACT WAS CARRIED OUT — EVIDENCE FOR DEFENCE TO VARY OR CONTRADICT — ADMISSIBILITY.

In an action for repayment of money due on a written contract, the fact that it is necessary for the plaintiff to shew by oral evidence that the contract had been carried out does not entitle the defendant to submit evidence to vary or contradict the contract.

Alexander v. Letvinoff, 26 B.C.R. 324, [1919] 2 W.W.R. 808.

DELEGATION OF PAYMENT — WRITTEN EVIDENCE — PRIVATE CORRESPONDENCE — DATE — COMMENCEMENT OF PROOF IN WRITING C.C., ARTS. 1173, 1229, 1233.

A purchaser who binds himself, in a deed of sale, to pay a delegatee, cannot prove by evidence against the latter the date of a private letter by which the deed of sale from the delegator to the delegatee has been revoked before the acceptance of the delegation; this evidence can only be received in a noncommercial matter, by another writing or by evidence which is commenced by some writing. A commencement of proof in writing will not be found in answers given by the party in his deposition before the court, when these answers only contain hearsay evidence, and beliefs, and do not contain any positive assertion rendering certain the fact which it is desired to prove.

Morin v. St. Pierre, 56 Que. S.C. 474.

CONTRACTS — CONDITION NOT EXPRESSED IN WRITTEN AGREEMENT — ORAL EVIDENCE OF CONDITION — INOPERATIVE AGREEMENT — PRINCIPAL AND AGENT—SALES OF LAND MADE BY AGENT NOT ASSENTED TO BY PRINCIPAL — COMMISSION.

Rimand v. Lines, 8 O.W.N. 464.

GARNISHMENT — CONTRACT.

Where garnishee in a mortgage to defendant covenanted to make certain payments, evidence of a verbal agreement at the time of the mortgage (sworn to by garnishee and defendant) that garnishee should be required to pay only in case she made a sale of the land, not if she kept it, was held inadmissible; and garnishee was found indebted to defendant.

Morrison v. Cybulak, [1919] 1 W.W.R. 880.

(§ VI A—516)—CONTRACT — AUTHENTIC DEED—WRITTEN EVIDENCE—MISTAKE OF FACT—ACTION FOR RECTIFICATION—C. CIV. ARTS. 992, 1233, 1234.

Written evidence cannot be received against an authentic deed of sale to prove mistake, when the mistake relates to the agreement itself; but it is admitted to establish facts showing that there has been a mistake in the wording of the deed. In such case the party injured has a right of action for rectification.

Black v. Amyot, 56 Que. S.C. 34.

LEASES — RENT — ORAL EVIDENCE — COMMENCEMENT OF PROOF — ILLEGAL EVIDENCE — C.C. ARTS. 1233, 2260, S. 5 — C. PRAC. ARTS. 286, 316.

A lease of a store for commercial purposes is a mixed contract, in which, unless the matter or the amount in litigation exceeds $50, oral evidence is admitted against the merchant, but not in his favour. Consequently, a lease of a store for commercial purposes cannot, on the request of the merchant, be proved by oral evidence, without a commencement of proof in writing. Notwithstanding the rule of jurisprudence that the admission without objection of illegal oral evidence given by ordinary witnesses, or by a party for himself, raises the presumption of the consent of the adverse party to this evidence and renders it in fact admissible, it is not always the case when this illegal evidence is contained in the evidence of an adverse party. In this case, a commencement of proof in writing can be constituted by his attorneys against him, but not for him and in his favour. A commencement of proof in writing can be found not only in the evidence of the adverse party questioned as a witness in the inquiry, but also in his preliminary examination.

Blain v. Chèvrefils, 55 Que. S.C. 172.

(§ VI A—518)—WILLS.

In an action to set aside an authentic will, oral evidence is admissible to establish (a) that it was not properly made and dictated; (b) that the testator was not of sound mind though he had declared the contrary; (c) that an interlineation not signed nor initialled is an interpolation as to which an inscription de faux is not required.

Ouimet v. Laberge, 43 Que. S.C. 221.

B. Custom, or usage.

(§ VI B—520)—Custom or usage—Written agreements.

Although a written agreement for the sale of goods without any ambiguity, and complete under the Statute of Frauds, cannot ordinarily be varied or added to by parol evidence, trade terms in such an agreement may be explained by parol evidence as for example what is known to the trade as an automobile "fully equipped."

Halifax Automobile Co. v. Redden, 15 D.L.R. 34, 48 N.S.R. 20, 13 E.L.R. 436.

C. Prior and collateral parol agreements.

(§ VI C—525)—Representation or guaranty — Oral testimony — Admissibility — Fraud and misrepresentation — Contemporaneous or prior oral agreement — Discount on price — Demurrage — Evidence — Counterclaim.

M. Hilty Lumber Co. v. Thessalon Lumber Co., 3 D.L.R. 894, 3 O.W.N. 1593, 22 O.W.R. 770.

In an action to recover an amount claimed to be due on a written contract for cutting and hauling logs for a paper manufacturing company which contained the following clauses: (1) The plaintiff "agrees to haul none but good, sound, merchantable logs;" (2) all logs hauled by him "to be scaled by—or some other competent person to be appointed" by the company, "whose scale shall be final between the parties to this instrument;" and (3) "logs to be scaled by scaler to what in his judgment will make good merchantable lumber," parol evidence is admissible to shew that the parties entered into a collateral verbal agreement that the logs were to be scaled on the same scale as had been used by the company's scalers in scaling logs hauled for it by the plaintiff under similar written contracts during the two preceding seasons and that the parties entered into the written contract on the faith of the verbal agreement, where it appeared that the company's scalers did not use the method of scaling of the preceding seasons, but used, at the direction of the company, another method which materially reduced the plaintiff's renumeration, upon the ground that such evidence explained and made clear the aforesaid clauses therein which were so doubtful and uncertain in their meaning that without it the actual intention of the parties might and probably would be defeated, such evidence in no way altering the written contract.

Mann v. St. Croix Paper Co., 5 D.L.R. 596, 41 N.B.R. 199, 11 E.L.R. 81.

One who, to the knowledge of the seller, purchases land under a written agreement in his own name, for a syndicate he was about to form, of which he is to be a member, may shew a contemporaneous parol promise by the seller to pay him for organizing the syndicate, since such evidence does not tend to alter or vary the written agreement.

Benson v. Hutchings, 13 D.L.R. 273, 23 Man. L.R. 530, 24 W.L.R. 782, 4 W.W.R. 907.

Parol or extrinsic evidence concerning writings.

If a contract not required by law to be in writing, was not intended to express the whole agreement between the parties, an omitted term expressly or impliedly agreed on before or at the time of executing the written contract, if not inconsistent with the terms thereof, may be shewn by parol.

McLean v. Crown Tailoring Co., 15 D.L.R. 353, 29 O.L.R. 455.

Sale of goods—Admissibility.

A verbal agreement made concurrently with a sale of goods but not referred to in the written order, that the vendor's representative would, in consideration of the sale, assist the buyer in demonstrating and retailing the goods is a collateral agreement of which oral evidence is admissible where it does not contradict the writing, and the buyer may set up a claim for damages for the breach of such collateral agreement by way of counterclaim to an action for the price.

Jeffress v. MacKinnon, 23 D.L.R. 151.

Promissory note — Contemporaneous parol agreement.

Where a promissory note is given for shares of stock in furtherance of a plan to erect tanks for the supply of oil, a contemporaneous verbal agreement for the return of the note upon the failure to erect such tanks is inadmissible to disprove liability thereon in an action by the maker for the replevy of the instrument.

Wilton v. Manitoba Independent Oil, 25 D.L.R. 243, 25 Man. L.R. 628, 32 W.L.R. 465, 9 W.W.R. 202.

Contemporaneous writings.

Although it is sound doctrine that a contract which is written establishes the rights of the parties between themselves and cannot be changed or modified by any prior negotiations or stipulations whether written or oral, nevertheless, a contract may be evidenced and established through the medium of several writings, as well as by one document, and the import of a written paper purporting to contain the terms of a contract may be controlled, altered or extended by a contemporaneous agreement in writing, provided that it be shown that both papers refer to the same subject-matter, persons and things. If a written document amounts to a mere admission or acknowledgment of certain facts forming a link only in the chain of evidence by which a contract is sought to be established, it may be given concurrently with, and be aided and supported by other evidence, even by oral evidence, when the contract is required by law to be in writing.

S. Hyman v. Jones Bros., 51 Que. S.C. 279.

SALES — MEMORANDUM OF TERMS — EVIDENCE OF PAROL AGREEMENT NOT ADMITTED TO VARY — REPRESENTATION BY AGENT OF PLAINTIFF TO OBTAIN SIGNATURE.

On the trial of an action to recover the price of a piano sold by plaintiff company to defendant, evidence was given, and the trial judge found, that it was orally agreed at the time the memorandum of sale was signed that the piano should be a new one and should be shipped direct from the factory to defendant. It was proved that the piano delivered to defendant did not come direct from the factory but was sent by plaintiff to a prospective buyer in Amherst and, after having been in his possession for a period of about two weeks and not accepted by him, was then sent to defendant. The contract having been reduced to writing effect could not be given to the defence set up with respect to the oral agreement.

Phinney v. Vacheresse, 52 N.S.R. 508.

(§ VI C—526)—WARRANTY.

A parol warranty of a chattel dehors a written agreement may be shewn where the writing does not contain all of the terms of the contract.

Tocher v. Thompson, 15 D.L.R. 31, 23 Man. L.R. 707, 26 W.L.R. 288, 5 W.W.R. 793, 812.

D. SUBSEQUENT CHANGE.

(§ VI D—530)—In an action for money received by the defendant for goods sold by him for the plaintiffs as their agent, the dispute was as to the amount of commission the agent was to receive, the agent claiming 5 per cent commission under a written agreement, and the plaintiffs claiming by subsequent oral agreement the defendant was to receive thereafter one-half such commission, the plaintiffs' contention was upheld where the evidence shewed that after the date of the alleged oral agreement, the defendant received a statement from the plaintiffs bearing the words "two and a half per cent commission, when sold" and never disputed it, and he sent them his own statement charging only 2½ per cent, and that all the plaintiffs' cheques were made out to the defendant on the 2½ per cent basis and their correctness was never disputed by him.

Niagara Falls Co. v. Wiley, 4 D.L.R. 96, 21 W.L.R. 93.

AUTHORITY TO AGENT — MODIFICATIONS — QUE. C.C. 1233, 1235.

When written authority is given to a real estate agent for the sale of a property, verbal modifications of the contract, as for example a change in the sale price, cannot be proved by parol evidence.

Parizeau v. Tougas, 46 Que. S.C. 525.

E. MEANING; INTENTION; EXPLANATION.

(§ VI E—535)—DESCRIPTION OF PROPERTY — EXPLANATION AS TO PROPERTY INTENDED.

In an action to compel defendant to carry out a written agreement to purchase leasehold property described as located at "No. 171 Chesley st.," on his refusing to proceed on discovering that the property was located on an alley and not on the named street, oral evidence offered by plaintiff to shew that the sale was intended to cover property not located on Chesley st. was not only inadmissible, but such agreement would be void under the Statute of Frauds; no part performance of the contract appearing.

Porter v. Rogers, 11 D.L.R. 304, 42 N.B. R. 82, 12 E.L.R. 551.

INTENTION—AMBIGUITY.

Where the terms of a modified offer made by a plaintiff are left ambiguous and may equally refer to one interpretation or to another, the burden is upon the plaintiff to establish that his interpretation of the terms is the correct one.

Canada Law Book Co. v. Butterworth, 12 D.L.R. 143, 23 Man. L.R. 352, 24 W.L.R. 124, 4 W.W.R. 237, reversing 9 D.L.R. 321. [Appeal to Privy Council dismissed, 16 D.L.R. 61.]

INTERPRETING WRITING — DISCOUNT—PENALTY CLAUSE — CONDUCT OF PARTIES.

Evidence is admissible to shew from the dealing between the parties that a stipulation in a written contract for a discount on prompt payment was in fact a mode of stipulating a penalty for default and that the net amount was the actual purchase money.

Colgrove v. Gundy, 17 D.L.R. 45, 28 W. L.R. 731.

PAROL AND EXTRINSIC EVIDENCE CONCERNING WRITINGS — MEANING, INTENTION, EXPLANATION — CONTRACT FOR BRED FOXES.

A written agreement of sale of bred animals (e.g. blue foxes) is to be interpreted in the light of all the circumstances surrounding the parties at the time it was made, and if it bears internal evidence of an intention to deal with the progeny of the vendor's own stock and such is shewn to be in line with the ordinary course of the vendor's business, such a term may be read into the contract although there would not otherwise have been sufficient parol evidence to warrant a reformation of the contract by adding a specific clause to embody such term.

Provincial Fox v. Tennant, 18 D.L.R. 389. [Reversed, 21 D.L.R. 236, 48 N.S.R. 555.]

CONTRACT IN FORM OF LETTER — PREVIOUS LETTER REFERRED TO — PREVIOUS LETTER CONTAINING EXPRESS REFERENCE TO PRICE LIST — ORAL EVIDENCE ADMISSIBLE TO EXPLAIN CONTRACT — JUDICIAL NOTICE OF PROVINCIAL LAWS.

Parol evidence is admissible to prove that the discount mentioned in a contract, in the form of a letter, to purchase steel drills, which merely quotes sizes and rate of discount, but does not mention any price,

referring, however, to a previous letter which contains an express reference to a standard drill price list, means, according to the usage of trade, discount off the standard drill prices, and so proves that the written contract contains all essential terms. A term of the contract being that "The value of this contract to be from $25,000 to $35,000 net," the court further held that the purchaser was bound to purchase goods to the value of $25,000, with an option to purchase a further $10,000 worth, which the vendor was bound to supply if ordered.

Hankin v. John Morrow Screw & Nut Co., 45 D.L.R. 685, 58 Can. S.C.R. 74, affirming 54 Que. S.C. 208.

CONTRACT—TERMS COMMITTED TO WRITING—PAROL EVIDENCE NOT ADMISSIBLE TO SHEW OTHER TERMS.

Where the contracting parties have committed the terms of the contract to writing, especially a writing under seal, parol evidence is not admissible to shew that there were other terms agreed on which were not included in the contract.

Shields v. Landreth, 45 D.L.R. 330, 12 S.L.R. 102, [1919] 1 W.W.R. 763.

Oral evidence is admissible to make plain an ambiguous and uncertain provision of a written agreement in order to put the court and jury in possession of facts which throw light upon the intention of the parties which was obscured by their doubtful language in expressing it.

Mann v. St. Croix Paper Co., 5 D.L.R. 596, 41 N.B.R. 199, 11 E.L.R. 81.

Parol testimony is not admissible in contradiction of the contents of a writing, but the complete admission of the opposite party may be allowed as proof of a condition not expressed in the writing; the party himself may very well admit and acknowledge that the writing which is validly made does not contain all the conditions agreed upon.

Audet v. Jolicoeur, 5 D.L.R. 68, 22 Que. K.B. 35.

Oral testimony will not be admitted to explain a written agreement and amplify its terms on the ground that it does not express sufficiently the intention of the parties. In a sale or assignment by the contractor for manufacturing and supplying lumber, who contracted for the work with subcontractors, of his claim against the purchaser, the agreement that the assignee "will be responsible for, and hold the assignor indemnified against, all costs, expenses and damages whatsoever in connection with suits of the subcontractors respecting the wood furnished or to be furnished" applies only to suits actually pending and not to claims which might afterwards give rise to actions.

Dubuc v. Laroche, 21 Que. K.B. 398.

MEANING OF CONTRACT.

Although oral evidence cannot be admitted against a writing, proof of attendant facts and circumstances may be made by witness to shew that the real contract entered into differs from that which the writing purports to have dislosed.

Rainboth v. O'Brien, 24 Que. K.B. 88.

LEASE AND SPECIFICATIONS — CONTRADICTIONS.

When from the terms of a lease and of the specifications of certain works there are obvious contradictions as to what the owner undertook to do, these contradictions furnish a commencement of proof sufficient to permit of the admission of oral evidence.

Manion v. Bertrand, 47 Que. S.C. 270.

CLAUSE IN CONTRACT.

Oral evidence cannot be admitted to explain a clause in a contract on behalf of one who has caused it to be inserted.

Tessier v. Notre Dame-Du-Perpetuel-Secours, 52 Que. S.C. 510.

CONTRACT — SALE — "ABOUT."

The plaintiffs sold and delivered to the defendants, under a written contract, a quantity of mill machinery, one condition of the contract being that it could not be varied or added to by any agreement not expressly stated therein. In an action for an unpaid balance of the purchase money the defendants set up in a counterclaim, in addition to other items, a claim for damages resulting from breaches of parol agreements in respect to the subject matter of the contract. Held, that as the contract was meant to contain the whole bargain between the parties, evidence respecting the parol agreements could not be received. The contract provided for shipment, "delivered f.o.b. cars Fairville, N.B., about 6 weeks from receipt of order." Evidence could not be received to shew that the word "about" was intended to be used by the parties with any other than the ordinary and natural meaning.

Berlin Machine Works v. Randolph, 45 N.B.R. 201.

The onus is on the defendants to prove their plea that a written memorandum of contract was signed on the condition that the plaintiffs should not be entitled to payment until certain village debentures were sold; and that the defendants had not satisfied the onus. But, if the defendants had conveyed to the minds of the plaintiffs their (defendants') intention not to make payment until the debentures were sold, a mere unenforceable understanding, and not an effective agreement, would have resulted —an expectation, based upon representations of circumstances, that, though payment might be legally enforced upon performance, it would not then in fact be demanded.

Perrini v. Peacock, 19 W.L.R. 910.

CONTRACT — CONSTRUCTION — AMBIGUITY — PAROL EVIDENCE OF CIRCUMSTANCES — FALSA DEMONSTRATIO NON NOCET.

If the language of a written contract has a definite and unambiguous meaning, parol evidence is not admissible to show that the

parties meant something different from what they have said. But if the description of the subject-matter is susceptible of more than one interpretation parol evidence of the surrounding circumstances is admissible to help in determining what the subject-matter of it is.

McLeay v. Burns, [1919] 3 W.W.R. 917.

(§ VI E—537)—Terms of payment — Statute of frauds.

Parol evidence is admissible to explain the terms of payment under a contract for the exchange of lands, whether under the Statute of Frauds or otherwise.

Martin v. Jarvis, 31 D.L.R. 740, 37 O.L.R. 269.

Contract with railway — Meaning of "right-of-way clearing."

A contract in writing made for clearing the right-of-way of a railway contained a clause under which the plaintiff agreed to do and complete all the right-of-way, clearing between stations 490 and 714 in conformity with the specifications annexed, for 830 per acre. Held, that extrinsic evidence was properly admitted to shew that amongst railway contractors and in railway construction work the words "right-of-way clearing" had acquired a special and technical meaning, and applied only to land requiring to be cleared and not to the full area of the right-of-way.

Laine v. Kennedy, 43 N.B.R. 173.

(§ VI E—538)—Wills.

Declarations of a testator are not admissible to prove what he meant by his will, but extrinsic evidence of surrounding circumstances is admissible to shew what he probably intended. [Davidson v. Boomer, 17 Gr. 509, followed.]

Re Anne Campbell, 7 D.L.R. 452, 4 O.W.N. 221, 23 O.W.R. 233.

Parol evidence as to testator's intention — "Surrounding circumstances" — Admissibility of testator's declaration.

Where a devise specifically describes land not owned by the testator, and there is no inconsistency otherwise in the description which would shew that the testator had misdescribed something which he owned as by the use of general words which would carry the land without the specific description, evidence of oral expressions of the testator that he intended to give certain of his lands to the beneficiary named is not admissible to prove that the latter lands were intended and not the lands which he did not own described in the devise.

Re Carvill; Standard Trusts Co. v. King et al., 15 D.L.R. 206, 6 S.L.R. 146, 26 W.L.R. 189, 5 W.W.R. 581.

F. As to commercial paper.

Annotation.

Of presentment of bills and notes: 15 D.L.R. 41.

(§ VI F—540)—As to commercial paper.

Where a loan is made which is evidenced by a promissory note and a cheque is produced shewing payment of the alleged amount of the loan (less discount) bearing the endorsement of the borrower, he is not allowed to parol testimony to prove that he only signed this note as "additional security" at the request of another party to guarantee or secure any depreciation in the value of shares transferred or sold by this latter party to a stranger, the alleged agent of the party who loaned the money, with a right of redemption under the provisions contained in a deed, as this would be varying by parol testimony a written contract. Parol testimony is only allowed under s. 40 of the Bills of Exchange Act to prove "conditional" delivery or delivery "for a special purpose only and not for the purpose of transferring the property in the bill," but these words have only a limited application, and when the note is delivered and the property in it has passed, even if only for purposes of security, then parol evidence is inadmissible to vary or explain the contract, and ss. 40, 41 of the act do not in fact change the law as to the admissibility or inadmissibility of parol evidence. Verbal testimony upon facts and circumstances connected with the making and endorsement of a bill, not objected to at trial or hearing can be taken into account by the court, and such facts and circumstances might be sufficiently cogent to render the defendant's pretensions plausible and constitute a groundwork for admission of verbal testimony which would, standing by itself, be inadmissible; but the mere assertion of a contemporaneous verbal agreement is one which, being in contradiction of a written contract, cannot be put forward in verbal testimony.

Vineberg v. Jones, 8 D.L.R. 513, 22 Que. K.B. 128.

Collateral agreements — Simulation.

Bills of exchange, promissory notes and cheques are commercial documents, and all agreements or transactions which relate to them are, consequently, commercial matters. English law allows parol evidence of a collateral or secondary contract made at the same time as the written contract. Proving such a collateral contract is not contradicting or changing the terms of the written contract. An admission is divisible when one part of the reply is invalidated by allegations of fraud or simulation, or does not agree with the pleadings. Article 1210 C.C. (Que.), which establishes the principle that an authentic writing makes complete proof of the agreements to which it relates, has an exception where the writing is attacked on the ground of simulation; parol evidence is then admissible to shew the simulation, as it does not vary the terms of a valid written instrument. In the examination of evidence including simulation all the writings of the parties relating to the agreement or transaction should

be interpreted one with the other, as forming a single agreement.

Lacouture v. Badeau, 24 Rev. de Jur. 516.

EVIDENCE — VERBAL AGREEMENT MODIFYING A WRITTEN CONTRACT — ADMISSIBILITY OF ORAL EVIDENCE — C.C. ART. 1234.

Oral evidence of a verbal agreement having the effect of modifying a written contract is permitted if it is a question of a commercial matter, or where the amount in question does not exceed $50.

Roy v. Doyon, 55 Que. S.C. 217.

(§ VI F—541)—CONDITIONAL ACCEPTANCE OF BILL OF EXCHANGE.

Parol evidence is admissible to shew, as against a bank standing in the position of holder with notice, that the acceptance of a bill of exchange rested upon a consideration that the acceptors are not to be liable unless they were at its maturity indebted to the drawers.

Standard Bank v. Wettlaufer, 23 D.L.R. 507, 33 O.L.R. 441.

(§ VI F—542)—PROMISSORY NOTE — DIRECTOR AND CORPORATION.

The general rule that parol evidence is inadmissible to vary the terms of a written contract applies also to a promissory note, and it is not open to the managing director of a corporation to shew by extrinsic evidence that the liability on a promissory note signed in his individual capacity was intended to be that of the corporation, which shortly afterwards went into liquidation. [Wilton v. Man. Independent Oil Co., 25 D.L.R. 243, 25 Man. L.R. 628; Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, followed.]

Lindsay-Walker v. Hilson, 27 D.L.R. 233, 26 Man. L.R. 206, 34 W.L.R. 290, 10 W.W.R. 293.

(§ VI F—544)—CHEQUES.

A judgment in a prior action authorizing the amendment of a cheque by the curator in the insolvency of the drawer's estate so as to make it payable to the person found to be the legal holder instead of to a government official who made no claim thereto and declined to endorse same because of his official position, may be regarded in an action against the bank to recover the amount of the cheque, as evidence that such new payee is the lawful holder, where no valid objection to payment by the bank is shewn nor had it taken any steps to annul such judgment.

Brossard v. Sterling Bank et al., 8 D.L.R. 889.

NEGOTIABLE INSTRUMENTS.

An alleged oral agreement made prior to the making of a promissory note by which the payee and the proposed endorsee were to renew it at maturity for a further fixed period, cannot be shewn in contradiction of the effect of the note itself so as to extend the time for payment.

Union Bank v. MacCullough, 7 D.L.R. 694, 4 A.L.R. 371, 2 W.W.R. 403.

Where a debtor alleges payment and satisfaction of a claim against him in the hands of an assignee, and tenders parol evidence of an alleged agreement made between himself and the assignor under which the debtor joined the assignor in a promissory note and agreed to pay the note to the extent, and in satisfaction, of the assigned claim, and where it appears that neither the debtor nor the assignor was a trader, and that their agreement was therefore not a commercial matter, parol evidence of the agreement is not admissible.

Reader v. Calumet Metals Co., 6 D.L.R. 496, 10 Rev. de Jur. 346.

It may be shewn by parol evidence that the persons who signed a negotiable instrument ostensibly as agents were in fact not acting for any principal but for themselves.

Crane v. Lavoie, 4 D.L.R. 175, 22 Man. L.R. 330, 21 W.L.R. 313, 2 W.W.R. 429.

NOTE—GUARANTY.

The declaration of a party that the maker of a note is solvent, and that on his default it will be paid, cannot be proved by oral testimony at least without a commencement of proof in writing.

Mailloux v. Comfoltey, 18 Que. P.R. 473.

(§ VI F—548)—PRESENTMENT PROVED BY SUBSEQNENT PROMISE TO PAY.

When a promise to pay a promissory note is made by the maker after the note has fallen due, it is primâ facie evidence of presentment.

Sparrow v. Corbett, 16 D.L.R. 184, 18 B.C.R. 356.

G. CONSIDERATION, OR VALUE OF SUBJECT MATTER.

(§ VI G—550)—PAROL EVIDENCE—SALE OF REAL ESTATE.

Parol testimony is admissible to prove the sale of real estate of a value and for a price that do not exceed $50.

Moquin v. Dingman, 44 Que. S.C. 341.

VALUE OF GOODS SOLD — DELIVERY AND ACCEPTANCE.

Parol testimony is admissible in regard to the sale of goods of a value exceeding $50, even although the goods have not been delivered, if there has been an acceptance of them by the purchaser.

Carrière v. Deziel, 50 Que. S.C. 28.

(§ VI G—551)—CONTRACT GENERALLY.

Where the document relied upon by the plaintiff to make out a contract for sale of lands under the Statute of Frauds does not purport to contain all of the terms of the bargain, it is open to the defendant to shew either by a cross-examination of the plaintiff or by other parol evidence, that the writing does not in fact contain all

the terms of agreement and is therefore an insufficient memorandum under the statute.

Rogers v. Hewer, 8 D.L.R. 288, 5 A.L.R. 227, 22 W.L.R. 807, 3 W.W.R. 477.

(§ VI G—553)—Consideration for deed as security between solicitor and client—Varying by parol.

That a deed from a client to his solicitor was intended as security for a greater amount than the consideration expressed cannot be shewn by parol; since the rule is that, in order to sustain such a conveyance the consideration therefor must be truly stated.

Duffy v. Mathieson, 13 D.L.R. 587, 13 E.L.R. 73.

Consideration of deed — Assumption of mortgages.

A deed of conveyance setting forth the consideration as "an exchange of lands and $1," subject to certain mortgages, "the assumption of which is part of the consideration herein," without further description of the incumbrances in the habendum, and no express covenant assuming the payment of them, is not a case of such precise expression of consideration as would preclude the admission of parol evidence to explain the full extent and nature of the transaction.

Campbell v. Douglas, 25 D.L.R. 436, 34 O.L.R. 580.

Of deed.

Where a deed sets out only a nominal consideration, the parties thereto may give parol evidence of the real consideration, and there is no onus of proof upon the grantor.

Shaw v. Robinson, 40 N.B.R. 473.

H. Fraud; mistake; omissions.

(§ VI H—560)—Where fraud, mistake or accident is set up, the rule that parol evidence to modify a written instrument is not admissible is inapplicable to the extent of the facts and circumstances relating to the instrument or portion thereof put in issue by the allegation of fraud, mistake or accident.

Jadis v. Porte, 23 D.L.R. 713, 8 A.L.R. 489, 31 W.L.R. 234, 8 W.W.R. 708.

Contract—Misrepresentations.

One knowing how to read and write, who signs an agreement without reading it, cannot be allowed to prove by witnesses fraudulent representations the other party had made upon the tenor of the agreement, in order to induce him to sign it.

Paré v. Carette, 54 Que. S.C. 231, affirming 53 Que. S.C. 306.

(§ VI H—561)—Fraudulent representations.

Oral testimony may be allowed to prove the facts and the false representations, especially when the parties have agreed in admitting that the obligation alleged to be incurred is not that stated in the written document.

Meunier v. Laprès, 47 Que. S.C. 470.

(§ VI H—562)—Mistake.

Parol evidence is admissible, in an action on a written contract, under a plea that it was executed under a mistake as to its contents, to shew all of the circumstances surrounding the making and execution of the agreement, from which is to be determined whether the signer is to be bound by it.

Edmonton Securities v. Lepage, 14 D.L.R. 66, 6 A.L.R. 282, 25 W.L.R. 532.

Rectification of mortgage.

Although there is no previous agreement in writing, rectification of a mortgage may be allowed on oral evidence when there is clear proof of the intention.

Fordham v. Hall, 17 D.L.R. 695, 20 B.C.R. 562, 27 W.L.R. 908, 6 W.W.R. 769.

Reservation of mineral rights — Intention.

The real intention of parties, or a mistake as to a reservation of mineral rights in a written agreement for the sale of land, may be shewn by parol evidence in the same action for specific performance of the contract so varied, and this even where the Statute of Frauds is pleaded.

Greig v. Franco-Canadian Mortgage Co., 23 D.L.R. 860, 32 W.L.R. 280, 9 W.W.R. 22. [Reversed on another point, 29 D.L.R. 260, 10 A.L.R. 44.]

The maxim nemo ex facto alterius prægravari debit applies to contracts. Where the defence to an action on a contract is that it was executed in error, such error, as in the case of duress and fraud, can be proved by oral testimony.

Church v. Laframboise, 50 Que. S.C. 385.

I. Condition; trust; mortgage.

Relationship of parties, purchaser or agent, see Mortgage, III—47; as trustee, see Vendor and Purchaser, I B—5.

(§ VI I—565)—Condition of guaranty.

A written guaranty cannot be varied by verbal evidence shewing that its operation was to be conditional upon the incorporation of a company.

Kimball Lumber Co. v. Anderson, 27 D.L.R. 555.

Guarantees.

Numerous contradictions in the testimony of a party examined as a witness, and improbabilities in his statements form a commencement of proof in writing and render admissible oral evidence of a guarantee in writing of the debt of a third party exceeding $50. A creditor who, when the debt was paid, remitted the guarantee to the person who had signed it, may prove by witnesses (a) the existence of the guarantee; (b) the possession which he had had of it; and (c) the remittance that he had made of it.

Pelletier v. Ackerman, 41 Que. S.C. 224.

Condition — Written notice of — Parol evidence—Que. C.C. 1232, 1622.

The service of a written notice informing an owner that the piano furnishing the

lodging of his tenant is the property of a third person, and is not subject to his rights as lessor, may be proved by parol evidence.

Archambault v. Gerard, 46 Que. S.C. 346.

(§ VI I—566)—STATUTE OF FRAUDS—CONDITIONAL PURCHASE OF LANDS.

Where the receipt for the deposit on a proposed sale of land is not in itself a sufficient memorandum under the Statute of Frauds and no formal agreement has been signed, it is open to the proposed purchaser to shew by parol evidence that his promissory note given to the vendor as well as the cash deposit made, was delivered subject to a condition of the bargain that he would buy only in the event of his being successful in his efforts to sell his own property so as to place him in funds with which to carry out the proposed purchase.

West v. Browning, 17 D.L.R. 296, 19 B.C.R. 407, 28 W.L.R. 15, 6 W.W.R. 781.

CONDITIONAL DELIVERY OF DEED—ESCROW.

Parol evidence is inadmissible to shew that a deed delivered to a purchaser was done conditionally or in escrow.

Amar Singh v. Mitchell, 30 D.L.R. 719, 23 B.C.R. 249, [1917] 1 W.W.R. 201.

CONDITION OF SHARE SUBSCRIPTION.

Oral testimony cannot be received to establish that subscriptions for shares in the capital stock of a company were made conditionally contrary to the terms of a writing stating that they were made without conditions.

St. Roch Hotel Co. v. Barbeau, 48 Que. S.C. 94.

(§ VI I—567)—TRUSTS.

A trust intended by an instrument purporting to be an assignment absolute on its face may be established by parol evidence.

Shepard v. Bruner, 24 D.L.R. 40, 31 W.L.R. 721, reversing 19 D.L.R. 869.

CONSTRUCTIVE TRUST—STATUTE OF FRAUDS.

An unexpressed trust cannot be supplemented by a deed of the grantor's wife who joined with him in the conveyance; a constructive trust may be proved by parol evidence, and is not within the Statute of Frauds.

Langille v. Nass, 36 D.L.R. 368, 51 N.S. R. 429.

(§ VI I—568)—MORTGAGE—AFTER-ACQUIRED PROPERTY.

Where an agreement for the sale of land and other property provides for a "mortgage back" to secure an unpaid portion of the purchase price, parol evidence is not admissible to prove that a clause in the mortgage by which it was made to cover "after-acquired" property was not intended to be inserted therein. [Campbell v. Edwards, 24 Gr. 152; Clarke v. Joselin, 16 O. R. 68, applied.]

Cottonwood Timber Co. v. Molsons Bank, 29 D.L.R. 29, 22 B.C.R. 541, 34 W.L.R. 909, 10 W.W.R. 1215.

PAROL EVIDENCE AS TO ADDITIONAL EQUITABLE MORTGAGE—ADMISSIBILITY.

B.C. Trust Corp. v. Aickin, 27 D.L.R. 725, 22 B.C.R. 417, 34 W.L.R. 303.

(§ VI I—569)—EQUITABLE MORTGAGE.

The intention to create an equitable mortgage by delivery or deposit of documents of title may be established by parol evidence alone, and it is sufficient if only some or one of the material documents of title be so delivered or deposited.

Zimmerman v. Sproat, 5 D.L.R. 452, 26 O.L.R. 448.

J. TO IDENTIFY SUBJECT OR PERSON.

(§ VI J—570)—LACK OF DEFINITE DESCRIPTION IN WRITTEN AGREEMENT—EVIDENCE TO SUPPLEMENT—ADMISSIBILITY—PURCHASER'S BREACH OF CONTRACT—DAMAGES—COSTS.

Brooks v. Fletcher, 9 O.W.N. 335.

LEGATEE AND AMOUNT NOT NAMED—PAROL TRUST—STATUTE OF FRAUDS.

A person and an amount not named in a will, but referred to therein as having been made known to the executor, may be identified by extrinsic evidence, and the bequest thereupon be established; it is not a parol trust within the Statute of Frauds.

Lemon v. Charlton, 34 D.L.R. 234, 44 N. B.R. 476. [Affirmed, 45 D.L.R. 604.]

(§ VI J—571)—SUBJECT—IDENTITY OF.

The production for reference at the trial of what purports to be a copy of a registered plan the correctness of which alleged copy was neither admitted nor proved, is insufficient in an action for taxes, to prove that lots and subdivisions referred to in assessment rolls are identical with those shewn on the registered plans, so as to prove compliance with s. 22 of the Assessment Act (Ont.), 4 Edw. VII., c. 23, s. 22.

Sturgeon Falls v. Imperial Land Co., 7 D.L.R. 352, 31 O.L.R. 62, 23 O.W.R. 170.

Where an agreement for the sale of land is evidenced by a receipt signed by the owner, which stated that he had received from the purchaser a certain sum of money "on acct. of purchase of 3 acres of land at" a certain price per acre on a specified body of water, such description is sufficient within the Statute of Frauds to permit the admission of parol evidence for the purpose of identifying the land which evidence is that the owner and the purchaser, before the agreement was made, went to the land and there found that three of the boundary lines were clearly visible to the eye because made by natural objects, and that the other was a line dividing the land from that of an adjoining owner which was pointed out to the purchaser by the owner. [Plant v. Bourne, [1897] 2 Ch. 281, followed.]

Baxter v. Rollo, 5 D.L.R. 764, 18 B.C.R. 769, 21 W.L.R. 892, 2 W.W.R. 786.

Where the instruments relied upon to shew a contract for the sale of land

described the property sold with such certainty that its identity could be ascertained, parol evidence to identify it is admissible.

Rogers v. Hewer, 1 D.L.R. 747, 5 A.L.R. 227, 19 W.L.R. 868, 1 W.W.R. 471.

(§ VI J—572)—Persons, identity of.

Parol evidence is admissible in proof of the connection of separate writings so as to form a complete memorandum to satisfy the Statute of Frauds.

Bailey v. Dawson, 1 D.L.R. 487, 25 O.L.R. 387, 20 O.W.R. 908.

A bequest in the following terms: "to the party at whose house I die," may be construed in the light of the surrounding circumstances as a gift to the son-in-law of the decedent as head of the household where the testator was making his home at the time of his decease, and not to the owner of the house.

Re Woeffle, 1 D.L.R. 105, 3 O.W.N. 518, 20 O.W.R. 896.

Description of parties.

A true description of the contracting parties may be established by the admission of extrinsic evidence.

Newberry v. Brown, 23 D.L.R. 627, 21 B.C.R. 556, 32 W.L.R. 118, 8 W.W.R. 1283, affirming 20 D.L.R. 896.

K. Circumstances.

(§ VI K—575)—Circumstances of sale—Delivery and payment.

Oral evidence of the circumstances of a sale, of delivery and of payment can be admitted notwithstanding the signature on the written order.

Trudeau v. Beaudet, 47 Que. S.C. 401.

L. Concerning records.

(§ VI L—580)—In an action to determine the boundary of a street as appears by a regularly recorded subdivision plan or plat, evidence of instructions given to surveyors who laid out the street and made the plans at the instance of a private owner of the entire tract is not admissible to contradict what is shewn by the plan itself as to the intended width of the street.

Saskatoon v. Temperance Colonization Society, 8 D.L.R. 875, 22 W.L.R. 897.

Birth certificate — Name — Authentication.

Parol evidence is admissible to prove that a certificate of birth, signed by a competent public officer in a foreign country, containing the name "Herman," refers to a defendant described in an action for annulment of marriage under the name of "Moses Harry," when the same public officer has signed the certificate of marriage of the father and mother of this defendant, and the certificate is admitted as authentic by all the parties. It is not necessary, under art. 1220 C.C. (Que.) that this certificate should be authenticated before the British Consul.

Guttman v. Goodman, 26 Que. K.B. 270.

Attachment.

Proof of the existence of a judicial proceeding, such as an attachment after judgment which has been destroyed by a party himself or by his agent, cannot be made by witnesses.

Giroux v. Martin, 24 Rev. Leg. 195.

(§ VI L—581)—Disproving plea of guilty stated in summary conviction.

On a habeas corpus motion attacking a summary conviction as upon a plea of guilty for a vagrancy offence, the defendant's affidavit is admissible to shew that he did not plead guilty but had admitted only one of the essential circumstances which must concur to constitute an offence.

R. v. Swett, 19 D.L.R. 694, 23 Can. Cr. Cas. 272, 29 W.L.R. 887, 7 W.W.R. 608.

M. Character of party.

(§ VI M—586)—Agency.

Parol evidence may be given to shew that a contract is binding not only on those whom, on the face of it, it purports to bind, but that it also binds another, by reason that the act of one of the contracting parties in signing the agreement was in fact done as the agent of such other and is in law the act of the principal.

Morgan v. Johnson, 4 D.L.R. 643, 3 O.W.N. 1526, 22 O.W.R. 868.

Parol evidence is admissible in an action on a contract by one whose name does not appear therein, to shew that the person in whose name it was made was merely an agent.

Pulford v. Loyal Order of Moose, 14 D.L.R. 577, 23 Man. L.R. 641, 25 W.L.R. 868, 5 W.W.R. 452.

(§ VI M—587)—Partnership—Payment—Real estate agent—Commissions.

A commercial partnership, no more than a civil partnership, cannot be proved by witnesses. It is only in a case where a third person acknowledges that a partnership is his creditor or his debtor that he can prove by witnesses the existence of such partnership, but such proof is not admissible when third person has only contracted with a partner personally. (2) If a payment made to another than the creditor is valid in a case where the one who receives the payment is the actual owner of the debt, the debtor ought then to prove the existence of the rights of such creditor to accept the payment according to the rules to which the latter would be himself subject. (3) There is no commencement of proof in writing, allowing proof by witnesses of the existence of a partnership to carry on the business of real estate agents, in the admission of one of the partners that, in two later instances, he has divided with the other partner his commission upon sales made by the instrumentality of the latter.

Lamontagne v. Lafontaine, 53 Que. S.C. 326.

CREATION OF PARTNERSHIP.

A partnership agreement may be established by parol evidence, even though the partnership is to deal in lands. [Forster v. Hale, 5 Ves. 308; Dale v. Hamilton, 5 Hare 369, 2 Ph. 266; Gray v. Smith, 32 Ch. D. 208, and De Nichols v. Curlier, [1900] 2 Ch. 410, followed.].

MacKissock v. Brown, 10 D.L.R. 472, 23 Man. L.R. 348, 23 W.L.R. 782, 4 W.W.R. 60.

CONTRACTS—PAROL EVIDENCE—CONDITION.

Long v. Smith, 23 O.L.R. 121, 18 O.W.R. 88.

PAROL AGREEMENT SUPERSEDED BY WRITTEN CONTRACT—IMPLIED OBLIGATION—FORMAL RELEASE OF ALL CLAIMS.

Wicks v. Miller, 21 Man. L.R. 534, reversing 17 W.L.R. 314.

AGREEMENT UNDER SEAL—COLLATERAL PAROL AGREEMENT—EVIDENCE—TRUST.

Donald v. McManus, 10 E.L.R. 200.

ORAL EVIDENCE TO CONTRADICT WRITTEN AGREEMENT—SPECIFIC CLAUSE IN WRITING INCONSISTENT WITH CONDITION.

Carter v. C.N.R. Co., 24 O.L.R. 370, 19 O.W.R. 853.

LOST DEED — SECONDARY EVIDENCE — WHEN ADMISSIBLE.

Eaton v. Crooks, 3 A.L.R. 1.

"READY PRINTS" FOR NEWSPAPER — ADVERTISEMENTS—ORAL EVIDENCE TO VARY WRITTEN AGREEMENT.

Winnipeg Saturday Post v. Couzens, 21 Man. L.R. 562, 19 W.L.R. 255.

BILL OF SALE—SECONDARY EVIDENCE—ORAL EVIDENCE OF CONVERSATIONS.

Evans v. Evans, 19 W.L.R. 237.

VII. Opinions and conclusions.

A. IN GENERAL.

(§ VII A—590)—EXPERT TESTIMONY — DIFFERENCE IN VIEWPOINT OF EXPERTS —WEIGHT.

Upon a question of negligence by a municipality, in omitting to take the advice of competent engineers in constructing a bridge, the ex post facto expert opinion of such engineers, although endorsing the methods adopted without their advice, is entitled to less weight owing to the difference in viewpoint of such experts.

Guelph Worsted Spinning Co. v. Guelph; Guelph Carpet Mills Co. v. Guelph, 18 D.L.R. 73, 30 O.L.R. 466.

OPINION WITNESSES — STATUTORY LIMITATIONS AS TO NUMBER—APPLICABILITY TO EXPROPRIATION AWARDS.

Unless a party brings his own witness within the terms of s. 10 of the Evidence Act, Alta., and makes him an opinion witness, such witness is not to be counted as one of the three witnesses who may be called upon either side to give opinion evidence merely because the opposite party brought out his opinion on cross-examination; but if the party who called him proceeds to re-examine in respect of such opinion, the witness is to be counted as his witness giving opinion evidence under the statute. Section 10 of the Evidence Act, Alta., limiting to three the number of witnesses on each side to be called to give opinion evidence applies to an arbitration under the Railway Act, Alta., 1907, c. 8, to fix compensation for land compulsorily taken.

Can. North. West. R. Co. v. Moore, 23 D.L.R. 646, 8 A.L.R. 379, 7 W.W.R. 1327, 30 W.L.R. 676.

An "expert" is one who, by experience, has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation.

Rice v. Sockett, 8 D.L.R. 84, 27 O.L.R. 410.

Upon the proper interpretation of s. 10 of the Alberta Evidence Act, 1910 (2nd sess.), c. 3, in the event of a trial or inquiry involving several facts, upon which opinion evidence may be given, a party is entitled to call three witnesses to give such evidence upon each of such facts, and he is not limited to three of such witnesses for the whole trial. Section 10, is an attempt to put a limit to what is commonly known as expert evidence, and it should not be extended to all evidence which might literally be called opinon evidence, but should be given a fair interpretation so as to make it reasonable and workable.

Re Seamen v. C.N.R. Co., 6 D.L.R. 142, 5 A.L.R. 376, 22 W.L.R. 105, 2 W.W.R. 1006.

The evidence of expert witnesses should not necessarily prevail over that of disinterested nonexpert witnesses.

Wilson v. H. G. Vogel Co.; H. G. Vogel Co. v. Gardiner; Gardiner v. Locomotive & Machine Co., 4 D.L.R. 196.

IN GENERAL.

A party can only demand an expert or an order to his adversary to appoint an expert by means of an ordinary and direct action. The fact that the applicant, instead of stating the grounds of his claim in a declaration proceeds by the usual petition, is not a ground of nullity if this petition is accompanied by the ordinary writ of summons. The architect is an employee of the person for whom he superintends the construction of a building and cannot be appointed expert for such person in respect to said work.

Carbonneau v. Matton, 13 Que. P.R. 287.

EXPERTS—EXAMINATION OF WITNESSES.

The court appointing experts has a right to order that no witness shall be examined by them or to limit the evidence in the terms of art. 404, C.C.P. 2.

Lalonde v. Fickler, 50 Que. S.C. 453.

D. PHYSICAL CONDITIONS; MEDICAL TESTIMONY; INTOXICATION.

(§ VII D—606)—SUBMITTING TO MEDICAL EXAMINATION.

No right exists at common law to compel the victim of an accident, who sues for

bodily injuries, to submit to a medical examination.

Hunt v. Donnelly, 17 Que. P.R. 341.

PROOF OF DISABILITY—WORKMEN'S COMPENSATION ACT.

The proof of partial permanent disability through the evidence of doctors who examined the victim is legal, even if in their appreciation those doctors are guided by the data of authors.

St. Maurice Lumber Co. v. Cadorette, 25 Que. K.B. 410.

Opinions of expert witnesses, such as those of physicians, are admissible as evidence of reduced capacity to work, under the provisions of the statute respecting accidents to workmen.

Jennings v. Brissette, 25 Que. K.B. 21.

(§ VII D—607)—TESTIMONY OF MEDICAL EXPERTS—STATUTORY NUMBER.

Section 10 of the Evidence Act, R.S.O. 1914, c. 76, which prohibits the calling of more than three expert witnesses without leave of the court, is not violated if in connection with the statutory number of experts there is also given the testimony of the attending physician describing the condition of the injured after the accident and that of the physician who made an examination for insurance, but not being regarded as expert witnesses.

Burrows v. G.T.R. Co., 23 D.L.R. 173, 18 Can. Ry. Cas. 183, 34 O.L.R. 142.

(§ VII D—609)—OPINIONS OF VETERINARY SURGEONS—CAUSE OF DEATH OF FOXES.

The defendant, to establish its defence that the foxes died from natural causes and not from its negligence, called a veterinary surgeon, who stated that the conditions he found in the lungs, on a postmortem examination, shewed that the foxes died of pneumonia and not from suffocation, and gave his reasons for his conclusion; the plaintiff, in answer or rebuttal, called another veterinary, and, on the evidence of the defendant's veterinary being read to him, stated that the symptoms described would not necessarily shew that death resulted from pneumonia, and were quite consistent with the supposition that it resulted from suffocation. Held, that the evidence in answer or rebuttal was properly received.

Trenholm v. Dominion Express Co., 43 N.B.R. 98.

E. SANITY; CAPACITY; CHARACTER.

(§ VII E—615)—The evidence of one medical man that a person is of unsound mind is not sufficient upon which to base an application for the appointment of a guardian of his estate on the ground that he is insane, at least two being required.

Re George, 8 D.L.R. 731, 22 W.L.R. 885, 3 W.W.R. 743.

OPINION OF EXPERT.

The fact that an expert witness giving only opinion evidence for the defence was not cross-examined for the prosecution, nor was his evidence contradicted, does not place an obligation upon the Trial Judge to direct the jury that they are bound to accept the evidence as correct; it is properly left to the jury to accept or reject such opinion evidence.

R. v. Moke, 38 D.L.R. 441, 12 A.L.R. 18, 28 Can. Cr. Cas. 296, [1917] 3 W.W.R. 575.

F. VALUES; DAMAGES.

(§ VII F—620)—VALUE ON EXPROPRIATION—AFFIDAVIT OF VALUE ON LAND TRANSFER.

Affidavits of value of real estate filed on the transfer of same under the Land Titles Act (Sask.), for the purpose of fixing the fees payable on the transfer will not be taken as evidence of the value of the land on its expropriation, but are admissible for the purpose of confronting the deponent in cross-examination if called as a witness in the expropriation proceedings.

The King v. Ferrie, 14 D.L.R. 601, 14 Can. Ex. 260.

EXPERT EVIDENCE — ENGINEER'S ESTIMATES FROM PLANS.

A finding at the trial on the quantum of damages based on an engineer's estimate of quantities ascertained from plans will be reversed on appeal where a discrepancy, unnoticed at the trial, clearly appears between the condition of the work as shewn by the testimony and that indicated by the plans, if the alterations in the work subsequent to the plans had necessarily made an estimate of quantities on the basis of the plans unreliable.

Neros v. Swanson, 16 D.L.R. 842, 28 W.L.R. 266, varying 1 D.L.R. 833.

QUANTUM VALEAT—MORTUARY TABLES.

The testimony of a witness in regard to estimates based on mortuary tables shewing the expectancy of life and the cost of an annuity at given ages is admissible, quantum valeat, though the witness is not capable of explaining the basis upon which the tables had been prepared. [Rowley v. London & N.W.R. Co., L.R. 8 Ex. 221; Vicksburg & M. R. Co. v. Putnam, 118 U.S.R. 545, applied.]

C.P.R. Co. v. Jackson, 27 D.L.R. 86, 52 Can. S.C.R. 281, affirming 24 D.L.R. 380, 9 A.L.R. 137, 31 W.L.R. 726.

(§ VII F—621)—SERVICES.

Affidavits of counsel expressing opinions regarding the propriety of a solicitor's conduct in obtaining money from his client as a retainer are most improper on an application by the client for delivery of a bill of costs and for an account of money handed by the client to the solicitor.

Re Solicitor (No. 2), 4 D.L.R. 217, 3 O.W.N. 1274, 22 O.W.R. 156.

G. CONTINGENT RESULTS; WHAT MIGHT HAVE BEEN.

(§ VII G—625)—While the general rule is that in a civil action any fact which tends to affect the amount of damages is relevant and admissible, opinion evidence is not admissible in support of a claim for special

damage for delay in delivery of a chattel ex. gr. (a dredge) under a contract of sale, to shew a mere probability that the purchaser, had he obtained the earlier delivery contracted for, might have obtained a contract with certain commissioners for public works for the use thereof but was deprived of the opportunity of so doing by the delay.

Brown v. Hope, 2 D.L.R. 615, 17 B.C.R. 220, 20 W.L.R. 907, 2 W.W.R. 153.

In determining whether the freight and passenger tolls of a railway company should be reduced, the Railway Board will not act upon the supposition that a reduction in rates would, by attracting additional traffic, result in an increase of earnings where it is impossible to discover any source from which such additional traffic could be obtained.

Dawson Board of Trade v. White Pass & Yukon R. Co., 2 D.L.R. 532, 21 W.L.R. 7, 13 Can. Ry. Cas. 527.

H. Legal questions; meaning of terms; foreign laws.

(§ VII H—631)—Abstract of title.

The legal effect of an abstract of title to lands situated in a foreign country cannot be established by the conclusions of an attorney practising therein, but it is for the court to construe the effect of all documents, having in view the foreign law with respect to them as proved by him.

Tucker v. Jones, 25 D.L.R. 278, 8 S.L.R. 387, 33 W.L.R. 1, 9 W.W.R. 620.

(§ VII H—632)—Foreign laws.

A question as to the law of a foreign jurisdiction is one of fact and not of law, and the court should, therefore, accept the opinion of an expert in the foreign law in preference to its own upon the construction of a statute of the foreign jurisdiction.

United States v. Webber (No. 2), 5 D.L.R. 866, 20 Can. Cr. Cas. 6, 11 E.L.R. 379.

In a prosecution for bigamy the clergyman who, in a foreign country performed the marriage ceremony is competent to give expert evidence regarding the statute from which he derived his authority.

The King v. Bleiler, 1 D.L.R. 878, 19 Can. Cr. Cas. 249, 4 A.L.R. 320, 21 W.L.R. 18, 2 W.W.R. 5.

In an action for crim. con., the admission of the defendant, that he knew the plaintiff to be married, coupled with the affirmative testimony of those present at the ceremony, is evidence of the marriage, though it took place in a foreign country, but it is not sufficient to prove the foreign marriage law.

Zdrahal v. Shatney, 7 D.L.R. 554, 22 Man. L.R. 521, 22 W.L.R. 336, 3 W.W.R. 239.

Foreign laws—Extradition.

Where the expert evidence given on the part of the prosecution to prove the foreign law is contested by the accused in extradition proceedings, the extradition commissioner may refer to the foreign text books and reports bearing upon the subject. [Bremer v. Freeman, 10 Moore P.C. 306, applied.]

Re Goodman, 28 D.L.R. 197, 26 Can. Cr. Cas. 84, 34 W.L.R. 531, 10 W.W.R. 781. [Affirmed 29 D.L.R. 725, 26 Can. Cr. Cas. 254, 26 Man. L.R. 537, 34 W.L.R. 1091.]

I. Estimates of quantity; speed; time.

(§ VII I—637)—Speed of automobile—Evidence based on speedometer.

Evidence of the driver of an automobile and of his wife, as to the speed of the car, based on a shewing of a speedometer, is to be preferred in a prosecution for operating a motor vehicle at an unlawful speed, to mere opinion evidence.

R. v. Barker, 12 D.L.R. 346, 21 Can. Cr. Cas. 267, 47 N.S.R. 248, 12 E.L.R. 535.

J. Danger; skill; negligence.

(§ VII J—643)—Shunting train—Coupling pin—Injury to employee.

The undisputed evidence that an employee of a railway company who was employed to heat the cars in the railway yard, while attending to his duties, was going from a second-class car to the baggage car for coal, that as he was reaching for the door of the baggage car the train suddenly stopped, the baggage car and the second class car parted from the breaking of a knuckle pin, the employee being thrown to the ground and injured by the wheels of the baggage car, is sufficient evidence to justify the jury in finding that the injuries were the result of the negligence of the company in stopping the train too suddenly, when air brakes and safety chains were not in use.

Worseley v. C.N.R., 43 D.L.R. 287, 23 Can. Ry. Cas. 385, 11 S.L.R. 473, [1918] 3 W.W.R. 638.

L. Appearance; identity; quality; authenticity.

(§ VII L—658)—Heating apparatus.

Where the litigation is about the capacity of an installation for the heating of a church, and the proof produced by the parties does not establish any scientific test of the heating apparatus, the court should order the facts to be verified by experts and persons skilled in this matter.

St. Alexis v. Record Foundry & Machine Co., 49 Que. S.C. 323.

M. Handwriting.

(§ VII M—660)—Proof of—Testimony of experts—Comparison.

Under the law governing proof in the Province of Quebec, the testimony of experts in handwriting by comparison is admissible.

Pratte v. Voisard, 44 D.L.R. 157, 57 Can. S.C.R. 184.

Opinions—Competency of witness.

The manager of a bank who has handled commercial paper signed by the alleged makers of a note is a competent witness to give his opinion as to the genuineness of the signatures to such note.

Langley v. Joudrey, 13 D.L.R. 563, 13 E.

L.R. 135. [Affirmed on other grounds, Langley v. Joudrey (No. 2), 15 D.L.R. 10.]

SIGNATURE—HANDWRITING EXPERT—PROOF.

Proof by comparison of writing, made by a single expert, is legal, but is insufficient to establish the authenticity of a signature denied under oath by the person against whom it is pleaded. [Deschenes v. Langlois, 15 B.R. 388, followed.]

Banque Nationale v. Tremblay, 46 Que. S.C. 304.

INTENT TO DEFRAUD INSURANCE COMPANY—WILFULLY SETTING FIRE.

The King v. Beardsley, 18 Can. Cr. Cas. 389.

FOREIGN MARRIAGE—EVIDENCE—ADMISSION OF ACCUSED—FOREIGN LAW—PRESUMPTION—JUDICIAL NOTICE.

R. v. Naoum, 24 O.L.R. 396.

(§ VII M—661)—COMPARISON OF HANDWRITING—FORGERY.

Evidence by comparison of writing should always be received by the courts with great care; the test of genuineness ought to be the resemblances between the writings compared in their general character and not in the manner of forming particular letters. The most efficacious means of shewing the general character of handwriting where evidence by comparison of handwriting is produced, is by witnesses who have seen the accused write when his mode of writing was not in question.

R. v. Ranger, 30 Can. Cr. Cas. 65, 53 Que. S.C. 423.

RIGHT OF TRIAL JUDGE TO COMPARE.

It is competent for a judge and jury to compare the handwriting of a disputed document with others which are in evidence in the cause and which are admitted or proven to be in the handwriting of the supposed writer.

Rohoel v. Darwish, 13 A.L.R. 180, [1918] 1 W.W.R. 627.

FORGERY — CORROBORATION — COMPARISON OF HANDWRITING—VALUE OF EXPERT EVIDENCE.

The King v. Henderson, 18 Can. Cr. Cas. 245.

VIII. Confessions; testimony or evidence wrongfully obtained.

(§ VIII—670)—CRIMINAL LAW — POLICE PHYSICIAN QUESTIONING PRISONER TO DETERMINE ON SANITY.

Answers to questions put to a prisoner in custody by a police physician who put the questions merely for the purpose of forming an opinion upon his mental condition are admissible to prove him sane where they were not in the nature of admissions or confessions as regards the charge against him, although no warning was given the accused that what he might say could be used in evidence against him.

R. v. Anderson, 16 D.L.R. 203, 7 A.L.R. 102, 22 Can. Cr. Cas. 455, 26 W.L.R. 783, 5 W.W.R. 1052.

A distinction is to be drawn between a solemn confession made before a justice of the peace or before any person having such authority over the accused as will bring the latter to believe that any promises made to him will be observed, and a confession made at any other time and under different circumstances.

R. v. Cummings, 5 D.L.R. 86.

An admission of the prisoner made on the witness stand and a letter written by him saying, among other things, "I can't marry you now," and making reference to procuring medicine for the girl's pregnancy is corroborative of a charge of seduction under promise of marriage.

The King v. Comeau, 5 D.L.R. 250, 11 E.L.R. 37, 104, 19 Can. Cr. Cas. 350, 46 N.S.R. 450.

PRIOR CAUTIONING BY POLICE CONSTABLE.

Answers made by the prisoner to questions propounded by the police at the police station are none the less admissible by reason of the fact that the usual caution was given by a constable while on the way there with the prisoner and that the latter was not again cautioned at the police station on his arrival there a few minutes later, if nothing was done to take away the effect of the caution. [R. v. Elliott, 3 Can. Cr. Cas. 95, 31 O.R. 14, and Reg. v. Day, 20 O.R. 209, followed.]

R. v. Wallace, 24 Can. Cr. Cas. 158, 20 B.C.R. 97.

VOLUNTARY STATEMENTS.

A statement voluntarily made by the accused to a police officer after the usual caution on his arrest on a criminal charge is admissible on his trial upon another criminal charge not connected with the first.

R. v. Van Horst, 24 Can. Cr. Cas. 157, 20 B.C.R. 81.

ADMISSION BY PRISONER TO CONSTABLE ON SUBSEQUENT OCCASION TO THAT ON WHICH HE WAS CAUTIONED.

R. v. Bela Singh, 25 Can. Cr. Cas. 169, 7 W.W.R. 603.

INTERROGATION BY POLICE—REPETITION OF STATEMENT AFTER CAUTION.

Where a person in custody as a material witness is interrogated by the police without being cautioned and thereupon makes admissions implicating himself in the crime, his repetition of the same statement before the same officers on another occasion, after being cautioned that he is not obliged to answer, but that if he does so, his statement may be used against him, will not be admitted if he was not further cautioned that his previous statements could not be used and that he need not repeat them or say anything further unless he so desired.

R. v. Kong, 24 Can. Cr. Cas. 142, 20 B.C.R. 71.

CONFESSIONS.

The admission of misconduct by the wife, defendant in an action en séparation de corps for adultery, may be proved by the

plaintiff without violating the provisions of art. 186 C.C. (Que.) and art. 1006 C.C.P.

Hamilton v. Church, 42 Que. S.C. 233.

(§ VIII—671)—Testimony at preliminary inquiry.

In an action for libel complaining of the statement in a report of a Police Court trial that the plaintiff had been found guilty of blackmail, where the defence is an honest misunderstanding of what was said by the magistrate, and an apology, questions as to what was said about the plaintiff by the witnesses in the Police Court are not admissible in cross-examination of the plaintiff. Where Police Court proceedings are relevant in an action the proper method of proving them is to put in the record of such proceedings.

Dickinson v. "The World," 5 D.L.R. 148, 17 B.C.R. 401, 21 W.L.R. 529, 2 W.W.R. 553.

A statement made by the prisoner, after the statutory caution, upon a preliminary enquiry being held upon a charge of escape from custody will, if relevant, be admitted in evidence against him upon a subsequent trial for murder. A statement made voluntarily by a person upon a preliminary enquiry on an offence with which he was charged, and in which he gave an account of a shooting connected with the charge then being inquired into and admitted firing the shot, will be admitted in evidence upon a charge of murder laid against him after the death of the person injured by the shooting although such death occurred subsequent to the preliminary enquiry upon which the admission was made.

R. v. James, 4 D.L.R. 717, 19 Can. Cr. Cas. 391, 17 B.C.R. 165, 21 W.L.R. 563.

Testimony of accused in previous civil proceedings.

The evidence of the accused upon his examination taken under s. 52 of the Assignments Act, Alta., following his assignment for the benefit of creditors, is admissible against him on the trial of a criminal charge of obtaining credit on false pretences unless on the examination he has objected to answer upon the ground that the answer would tend to criminate him or upon some other of the grounds referred to in the Canada Evidence Act, R.S.C. c. 145, s. 5, or in the Alberta Evidence Act, 1910, Alta., 2nd session, c. 3, s. 7, and this although the examination proceedings may have been irregular. [R. v. Widdop, L.R. 2 C.C.R. 3, and R. v. Van Meter, 11 Can. Cr. Cas. 207, 3 Terr. L.R. 416, applied.]

R. v. Graham, 21 D.L.R. 513, 8 A.L.R. 182, 24 Can. Cr. Cas. 54, 31 W.L.R. 117, 8 W.W.R. 460.

Testimony at coroner's inquest.

An answer given by a prisoner charged with murder, to a question put to him by the coroner in a conversation held before the opening of the inquest, is voluntarily made, and admissible against him on the trial.

Trepanier v. The King, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177.

(§ VIII—673)—Mixed question of law and fact.

An admission of the first marriage is to be received with caution on a prosecution for bigamy, because of the motives which might induce such a representation to be made whether true or not, and because it is an admission of a mixed question of law and fact.

The King v. Naoum, 19 Can. Cr. Cas. 102, 24 O.L.R. 306.

(§ VIII—674)—Proof that voluntary.

An entirely voluntary confession by the accused made to one in authority and without interrogation by the person in authority, is admissible although no caution or formal warning was given the accused. A confession made to one not in authority in the presence of a person in authority need not be preceded by a warning, if it is shewn affirmatively that the confession was free and voluntary.

The King v. Hoo Sam, 1 D.L.R. 569, 19 Can. Cr. Cas. 259, 5 S.L.R. 180, 20 W.L.R. 571, 1 W.W.R. 1049.

A confession made in the office of the chief detective of the city, in his presence, and that of his assistant and one or two newspaper men who happened to be there, without pressure upon the accused, or threats or promises of immunity, but upon his own initiative and after he had been warned by the chief detective in the following words: "Now, I am going to ask you a few questions. Make a statement if you want to; but I am going to tell you that you are not obliged to make one, but if you do, it will be taken down and may be used in connection with your trial," is admissible in evidence on the trial of the accused.

R. v. Cummings, 5 D.L.R. 86.

Inducing fellow-prisoner to elicit statement.

The admissibility of a confession in a criminal case is to be determined by the evidence given at the trial, and where a confession had been admitted in evidence as not having been shewn to have been induced by a person in authority upon the facts then deposed to, and an application after conviction for leave to appeal upon the question of law under Cr. Code, s. 1015, will not be granted upon the ground, supported by affidavits, that the fellow-prisoner who testified to the confession by the accused had been induced to obtain the confession by a detective acting in the interests of the prosecution, but not present when the confession was made.

R. v. Farduto, 10 D.L.R. 669, 19 Rev. Leg. 165.

Incriminating statements made to detective—Prisoner not cautioned.

Incriminating statements made by a pris-

oner to a detective who did not caution the prisoner, will not be admitted in evidence on the hearing of an extradition charge, without evidence to shew that they were made voluntarily.

United States v. Wrenn, 10 D.L.R. 452, 21 Can. Cr. Cas. 119.

SUBORDINATE FACT.

An acknowledgment of a subordinate fact not directly involving guilt and not essential to the crime charged is not a "confession" within the rules by which evidence of a statement by way of confession made to a person in authority may be received only where shewn to have been made freely and voluntarily.

R. v. Hurd, 10 D.L.R. 475, 21 Can. Cr. Cas. 98, 6 A.L.R. 112, 23 W.L.R. 812, 4 W.W.R. 185.

Before the Crown introduces statements made by a prisoner while in custody as evidence of an admission or confession, the onus is on the Crown to shew that there has been no inducement given to make those statements. [R. v. Bruce, 12 Can. Cr. Cas. 275, 13 B.C.R. 1, followed.]

R. v. Bogh Singh, 12 D.L.R. 626, 18 B.C. R. 144, 21 Can. Cr. Cas. 323, 49 C.L.J. 594, 24 W.L.R. 941.

WRITTEN CONFESSION.

A written confession of his defalcations, signed by the accused after it had been read over and explained to him, is admissible, although no part of it but the signature was in his handwriting, if it be also shewn that no inducement was held out or threat made to obtain his signature, and that the confession was therefore a voluntary one.

DePaoli v. The King, 28 D.L.R. 378, 25 Can. Cr. Cas. 256, 24 Que. K.B. 525.

Where the master accompanied by a police constable threatened his servant, saying "you will be arrested if you do not say where the stolen goods are," the statement made by the servant should be excluded from being put in evidence against him because it was not made freely and voluntarily. [R. v. Thompson, [1893] 2 Q.B. 12; Ibrahim v. The King, [1914] A.C. 599; R. v. Ryan, 9 Can. Cr. Cas. 347, applied.]

R. v. De Mesquito, 26 D.L.R. 464, 21 B. C.R. 524, 24 Can. Cr. Cas. 407, 32 W.L.R. 368, 9 W.W.R. 113.

IRREGULAR CAUTION BY POLICE.

Every case reserved as to the admissibility of a statement made by an accused person while under arrest must be decided according to its own circumstances; and where the statements made by the accused under arrest for murder were not confessions of guilt, but were intended to justify the killing as done in self-defence and were, in substance, repeated by the accused in giving evidence on his own behalf at the trial, the Court of Appeal, acting under Cr. Code, s. 1019, should affirm the verdict whether or not the form of caution given by the police, before the admission was made, was strictly regular in telling him not only that he need not make any statement and that if he did so it might be used against him, but that he had "nothing to hope for and nothing to fear by any statement he might make," where the Court of Appeal finds the circumstances to be such that the case against the accused was clearly made out apart from the admissions to the police officers and their admissibility was most unlikely to have affected the verdict.

R. v. Spain, 36 D.L.R. 522, 28 Can. Cr. Cas. 113, 27 Man. L.R. 473, [1917] 2 W.W. R. 465.

In order that evidence of a confession of crime by an accused person may be admitted against him, his mind should be disabused of all idea of hope of securing leniency by making it, and he must not be led to expect that some benefit may be obtained by making such confession. In order that evidence of a confession of guilt made by one charged with crime, may be admitted on the trial therefor, it must be first affirmatively shewn that it was freely and voluntarily made after the accused had been warned that what he said might be used against him, and, where there is any doubt as to the sufficiency of such warning, the evidence of the confession should not be admitted especially on a trial of a person for his life. A confession of crime is not voluntarily made where a person accused of murder, who had for nearly a week been on a drunken debauch, while confined in a tavern crowded with curiosity seekers, was privately plied with questions by detectives, and who, after being told that his wife and son had made statements contradictory to his own, said he would tell all, and made the alleged confession after he was warned that what he said might be used for or against him. Evidence of a confession of crime is inadmissible against a prisoner where, before making it, he was informed by the officers having him in charge, that whatever he might say would be taken down and might be used "for or against him." A confession of crime made by a person accused therewith, in connection with an appeal for assistance from his plight, is not admissible against him.

Trepanier v. The King, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177.

INSUFFICIENCY OF CONFESSION TO SUPPORT CONVICTION FOR CARNAL KNOWLEDGE OF CHILD.

R. v. Blyth, 28 Can. Cr. Cas. 20, 11 O. W.N. 406.

CROWN USING ONE AFTER COMMITTAL FOR TRIAL AS COMPELLABLE WITNESS AGAINST THE OTHER.

Ex parte Ferguson, 17 Can. Cr. Cas. 437.

ARREST ON MINOR CHARGE—INTERROGATION OF PRISONER BY POLICE OFFICER—WARNING TO ACCUSED WITHOUT STATING THAT HOMICIDE MIGHT BE CHARGED.

The King v. Rossi, 17 Can. Cr. Cas. 182.

STATUTORY WARNING.

When the prosecution offers evidence of an alleged confession made by an accused to a police officer, it is the duty of the presiding judge to enquire into all the circumstances in order to ascertain whether the confession was made freely, and, if he finds that it was not, he must reject the evidence. [R. v. McGraw, 12 Can. Cr. Cas. 253, followed.] The onus is upon the prosecution to shew that the statement or confession was made voluntarily, and the proper mode of proving that it was so made is by negativing the possible inducements by way of hope or fear that would have made the statement inadmissible, and not merely by taking the affirmative answer of the officer under oath that the statement was made voluntarily. [R. v. Tutty, 9 Can. Cr. Cas. 544, followed.] The court should, perhaps, be more astute to see that the rules as to the statutory warning to a prisoner had been observed before it admits an alleged confession in evidence in cases where the accused is undefended than in those where counsel is employed.

R. v. Sanavitch, [1917] 3 W.W.R. 568.

IX. Admissions.

(§ IX—675)—OWNERSHIP OF LANDS.

Where the question at issue was whether the decedent, a former owner from whom no conveyance could be shewn, was or was not the owner at the time of his death, his admission that he had sold the land to defendant's predecessors, whom the evidence shewed he had let into possession and who with their successors had since exercised acts of ownership, such as logging on it, is admissible on defendant's behalf in the absence of any written evidence of the sale as a statement against decedent's interest to support the theory that he had sold the land and no longer claimed any title or interest therein as against plaintiff's claim of title under conveyances from such decedent's heirs taken with notice of such alleged sale and adverse possession; the admission was not in derogation of any grant made by the decedent, and as the plaintiff had identified himself in interest with the decedent, the latter's statement was admissible in evidence whether or not he was in possession at the time the admission was made. [Ivat v. Finch, 1 Taunt. 141, applied.]

Halifax Power Co. v. Christie, 23 D.L.R. 481, 48 N.S.R. 264. [Appeal to Canada Supreme Court dismissed October 12, 1915 (unreported to date).]

ADMISSIONS BY CROWN—TITLE BY POSSESSION.

An instrument constituting an admission touching the title to lands claimed by adverse possession, made by the only executive authority competent to make it on behalf of the Crown, is admissible in evidence against the Crown, and is prima facie evidence of title by possession.

Tweedie v. The King, 27 D.L.R. 53, 52 Can. S.C.R. 197, reversing 22 D.L.R. 498, 15 Can. Ex. 177.

AFFIDAVIT—VALUE OF LAND.

An affidavit by an owner of land whose property has been expropriated, made by him prior to the expropriation, when he was acting in the capacity of an administrator, should not be received in evidence against him as an admission of its value at the time of expropriation.

Canadian North. West. R. v. Moore, 31 D.L.R. 456, 53 Can. S.C.R. 519, 10 W.W.R. 1231, affirming 23 D.L.R. 646, 8 A.L.R. 379.

CONFESSION—EQUIVOCAL STATEMENT.

A statement made by the accused will not avail as an admission of guilt if it be an equivocal one such as a request for forgiveness for "what he had done," made at a time at which no accusation was made against him of any criminal offence, and when it did not appear that he knew that he was suspected of the alleged offence.

R. v. Blyth, 28 Can. Cr. Cas. 20, 11 O. W.N. 406.

IMPEACHMENT OF.

One cannot, because of his negligence, impeach a prior declaration made by him.

Rivet v. Beauvais, 51 Que. S.C. 83.

WRITING.

Only complete admission of the party can replace the writing mentioned in art. 1235 C.C. (Que.).

Burtner Coal Co. v. Gano Moore Co. and C.P.R., 24 Rev. Leg. 435.

ACKNOWLEDGMENT OF LIABILITY — MASTER AND SERVANT—NEGLIGENCE.

The payment of hospital bills and money advances by an employer to his employees, who was the victim of an accident in the course of his work, does not constitute an acknowledgment of liability, but are merely acts of generosity and sympathy.

Botara v. Montreal Locomotive Works, 54 Que. S.C. 359.

(§ IX—677)—ADMISSION BY INFANT—DELITS.

A minor is not bound by the admission or the acknowledgement that he has made delits or quasi delits in the absence of any other proof of it.

Lachapelle v. Guay, 47 Que. S.C. 346.

(§ IX—678)—ADMISSION IN PLEADINGS.

A statement of defence by an administrator of a deceased contractor, in an action to enforce a mechanics' lien for materials furnished in his lifetime, that the books and records of the deceased shewed that the plaintiff furnished materials to a certain amount, which was the true balance due by the deceased, and that the administrator had no knowledge of the rights and liabilities of the parties, and that he submitted himself to the court for direction, does not amount to an admission of liability on the part of the estate, but only to a contention that it should not be held for a greater amount.

Canadian Equipment & Supply Co. v. Bell, 11 D.L.R. 820, 24 W.L.R. 415.

CONTRACT OF SALE—ADMISSIONS OF AGENT OF VENDEE.

Admissions by an agent of the vendee made months after the transaction had taken place to a person who had nothing whatever to do with it, are no part of the res gestæ and are not admissible to establish a contract of sale of goods and their delivery.

LeBlanc v. LaPorte, 10 E.L.R. 261.

X. Hearsay, declaration; res gestae.

A. IN GENERAL; PEDIGREE; REPUTATION.

(§ X A—680)—STATEMENTS OF THIRD PERSON—NEGLIGENCE.

Evidence by a plaintiff as to statements made to him are admissible against him as proof of negligence by him, as establishing his knowledge of the existence of conditions he should have guarded against.

Stowe v. G.T.P.R. Co., 39 D.L.R. 127, [1918] 1 W.W.R. 546. [Affirmed by 49 D.L.R. 684.]

PEDIGREE — REPUTATION — ADMINISTRATION—NEXT OF KIN—MATTER OF PEDIGREE — HEARSAY — DECLARATIONS ADMITTED—COSTS.

Re Woods, Brown v. Carter, 4 O.W.N. 388, 23 O.W.R. 353.

CONTRIBUTIONS FOR MOTHER'S SUPPORT—MOTHER'S LETTERS ACKNOWLEDGING.

Moffit v. C.P.R. Co., 2 A.L.R. 483.

(§ X A—681)—PROOF OF RELATIONSHIP AND SURVIVORSHIP.

Evidence of a witness that he is a member of a firm of bankers who had acted as agents for a family and had had business relations with it for over fifty years, that he personally knew the plaintiff and from the knowledge and belief derived from such knowledge of the family he believes the plaintiff to be a daughter and the only surviving child of such family, is proper proof of the relationship.

Simpson v. Malcolm, 43 N.B.R. 79.

(§ X A—683)—BOUNDARIES.

The location of a township boundary line may be proved by hearsay evidence.

Boehner v. Hirtle, 6 D.L.R. 548, 46 N. S.R. 231, 11 E.L.R. 222.

DECLARATIONS AS TO OCCUPANCY—ADVERSE POSSESSION—WHEN ADMISSIBLE.

A declaration of one in adverse possession, made upon the land by its then occupant, is evidence in support of a claim of title by adverse possession; provided, such declaration is apparently made in good faith and goes to shew (a) the character, or (b) the extent, of the declarant's occupancy; but:—Semble, such a declaration is not admissible to prove simply the date when the declarant first acquired possession, or for how long a time he held it.

Mersereau v. Swim, 42 N.B.R. 497.

(§ X A—684)—GIRL'S AGE IN SEDUCTION CHARGE.

The girl's own statement of her age as nineteen is not competent evidence on a charge under Cr. Code, s. 212 of seduction of a girl under twenty-one under promise of marriage nor does s. 984 (2) enable the jury to infer a girl's age from her appearance except in charges of crimes against children under sixteen years of age referred to in s. 984.

R. v. Hanberg, 24 Can. Cr. Cas. 297, 8 S.L.R. 239, 31 W.L.R. 770, 8 W.W.R. 1130.

PROOF OF DEATH BY LETTERS OF ADMINISTRATION.

Letters of administration are admissible to prove the death of the intestate. [Scribner v. Gibbon, 9 N.B.R. 182, followed.]

Simpson v. Malcolm, 43 N.B.R. 79.

PROOF OF DEATH.

When it is impossible to inscribe a death upon the registry, as in the case of a person drowned whose body was not recovered and who could not be buried, proof of the death may be made by witnesses.

Laflamme v. Levis Ferry, 47 Que. S.C. 291.

B. CONFIDENTIAL AND PRIVILEGED COMMUNICATIONS.

(§ X B—685)—COMMUNICATION BETWEEN SOLICITOR AND CLIENT.

The privilege attached to communications between solicitor and client is given in favour of the client and not of the solicitor, and is a matter of public order both under French law and English law.

Montreal Street Railway v. Feigleman, 7 D.L.R. 6, 22 Que. K.B. 102.

(§ X B—688)—SOLICITOR'S TESTIMONY—ADMISSIBILITY AS PART OF RES GESTÆ—PROMISSORY NOTE—INTEREST—REASONABLENESS — ACTION AND CROSS-ACTION — CONSOLIDATION — JUDGMENT — RECONVEYANCE OF LAND AND DISCHARGE OF MORTGAGE.

Matchett v. Stoffel; Stoffel v. Matchett, 10 O.W.N. 276.

(X B—690)—STATE SECRETS—PUBLIC OFFICER—PUBLIC INTEREST.

A public officer called as a witness cannot be compelled to reveal facts which should be kept secret in the public interest. This objection of public interest may be raised by a subordinate employee by the direction of the Minister under whom he works, without the latter being obliged to testify personally before the court as to his reason for those instructions. The state does not give up its right to retain information of national interest by the fact that it has already communicated it to certain persons. The administrative power is the sole master of secrets; and after taking the stand of refusing to divulge them by reason of the national interest, the court has no discretion.

Rheault v. Landry et al., 55 Que. S.C. 1, 20 Que. P.R. 187.

(§ X B—693)—CONVERSATION WITHOUT PREJUDICE.

In an action on a policy of fire insurance it was error to admit evidence on the part

of plaintiff that the defendants had through their agents denied liability altogether, the same being offered by the plaintiff because of his contention that the requirement in the policy as to arbitration did not apply if the insured denied any liability whatever, where the defendants objected to such evidence on the ground that the denial had been made during negotiations looking to a compromise of the plaintiff's claim and that the negotiations were without prejudice and that it had been so stated at the time, without first hearing the evidence tendered in support of the objection to prove that the statement was made without prejudice in settlement negotiations.

Guimond v. Fidelity Phoenix Fire Ins. Co., 2 D.L.R. 654, 10 E.L.R. 562, 41 N.B.R. 145. [Affirmed, 9 D.L.R. 463, 12 E.L.R. 35.]

C. PARTY'S OWN ACTS AND DECLARATION.

(§ X C—695)—PARTY'S ACTS AND DECLARATIONS—PROOF OF SCOPE OF AGENT'S AUTHORITY.

Where it appears that an owner of real estate listed his property with an agent, but a dispute arises later as to the authority of the agent to sign a contract of sale with the purchaser, the owner claiming that the agent had authority only to procure and submit an offer, a telegram from the agent to the owner stating that he had sold certain lots at the listed prices, followed by a reply by the owner that he understood that he had taken those lots "off the market" and declining to sell, instead of answering that the agent had no authority to sell, is evidence tending to shew that the agent did have authority to sell and not merely to find and submit an offer from a prospective purchaser.

Fysh v. Armstrong, 9 D.L.R. 575, 22 W.L.R. 966, 3 W.W.R. 747.

CASES OF EXPROPRIATION—FIXING VALUES.

The fact that one party to the issue presented on an arbitration is allowed to give evidence of a class which is not relevant, does not entitle the opposing party to answer with the same kind of irrelevant testimony; and the opposing party, although successful in the issue is properly refused costs of his irrelevant evidence. [R. v. Cargill, [1913] 2 K.B. 271, applied.]

Re Ketcheson and Canadian Northern Ontario R. Co., 13 D.L.R. 854, 29 O.L.R. 339, 25 O.W.R. 20.

(§ X C—696)—AGAINST INTEREST—ADMISSIONS UNDER OATH.

Evidence of statements made to a witness by a deceased person is admissible if they are statements against the interest of the deceased.

Little v. Hyslop, 7 D.L.R. 478, 4 O.W.N. 285, 23 O.W.R. 247.

The rule that permits the use of affidavits based upon information and belief cannot be made the means of introducing, on an application for an interlocutory injunction in a suit to set aside a fraudulent transfer of property, the evidence of the judgment debtor taken in the suit in which the judgment was rendered.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

Where the defendant, sued for damages for malicious prosecution, is called as a witness on his own behalf, and with a mistaken notice of benefiting his own defence denies ever having entertained any belief of the plaintiff's guilt, a judge trying the case without a jury is bound to give effect to his denial as proving for the plaintiff that there was a want of reasonable and probable cause for the prosecution, although he may be of opinion that there was reasonable and probable cause and that the defendant did believe in the charge he laid and that his contradiction of such belief, under oath, was falsely made with a mistaken view of evading responsibility such as might be attributed to a very ignorant and stupid man acting from motives of low cunning.

Geers v. Westman, 1 D.L.R. 312, 5 S.L.R. 85, 20 W.L.R. 212, 1 W.W.R. 861.

Any statement of the accused made against self-interest is admissible if made voluntarily.

R. v. James, 4 D.L.R. 717, 19 Can. Cr. Cas. 391, 17 B.C.R. 165, 21 W.L.R. 563.

As on an application by a wife for interim alimony proof of marriage is all that is necessary, her cross-examination on the motion as to matters which might disentitle her to permanent alimony will not be considered where the plaintiff alleges cruelty. [Cook v. Cook, 12 C.L.T. Occ. No. 73, followed.]

Karch v. Karch (No. 1), 3 D.L.R. 658, 3 O.W.N. 1032, 21 O.W.R. 883.

(§ X C—697)—MOTIVES AND PURPOSES.

Evidence of an alleged incriminating admission said to have been made by the plaintiff, after his acquittal, is not admissible for the defence in an action for malicious prosecution in proof of reasonable and probable cause where the question of guilt is not in issue.

C.P.R. Co. v. Waller, 1 D.L.R. 47, 19 Can. Cr. Cas. 190.

(§ X C—699)—CRIMINAL CASES—DECLARATIONS BY ACCUSED—STATEMENTS AS TO ALLEGED FORGERY.

In order that the true sense of the statement of the accused put in evidence against him may be ascertained, he is entitled to shew the facts and circumstances surrounding the making of it to the like extent as in the case of a contract he is entitled to shew them in order to assist in its interpretation. Where the person charged with attempting to utter forged documents is not implicated with the commission of the alleged forgery, his statement made subsequent to his attempt to pass the document that the same is a forgery and that he "knew they were forged" is not necessarily a sufficient admission that he knew them

to be forged at the time when he attempted to utter them; the admission is an equivocal one which has to be construed with reference to the surrounding circumstances, and if these indicate merely that he had formed an opinion from knowledge acquired after the attempt that the documents were forged, it affords no proof either of the forging itself or of knowledge of the forgery at the time of the alleged offence of attempting to utter forged documents.

R. v. Girvin, 34 D.L.R. 344, 27 Can. Cr. Cas. 265, 10 A.L.R. 324, [1917] 1 W.W.R. 907.

CRIMINAL CASES.

Detective officers may properly interrogate a prisoner charged with crime, while under arrest or being kept in sight in view of arrest, and answers given without threat or inducement may be given in evidence against him. R. v. McCraw, 12 Can. Cr. Cas. 253, distinguished.]

Trepanier v. The King, 19 Can. Cr. Cas. 290, 18 Rev. de Jur. 177.

D. ACTS AND DECLARATIONS OF THIRD PERSONS GENERALLY.

(§ X D—700)—JUDGE'S OPINION—VERACITY OF WITNESS—CRIMINAL PROSECUTION.

Reasons for judgment unfavourable to the credibility of a party in a civil action are inadmissible in evidence to impeach his veracity, when testifying in his own behalf, in a criminal prosecution.

R. v. Baugh, 31 D.L.R. 66, 27 Can. Cr. Cas. 373, 36 O.L.R. 436.

(§ X D—701)—AS TO ACCIDENTS OR INJURY.

About 5.30 on a December afternoon, G. left his place of employment to go home. An hour later his body was found some 350 yards east of a crossing of the G.T.R. Co., nearly opposite his house. There was no witness of the accident, but it was shewn on the trial of an action by his widow and children, that shortly after he was last seen an express train and a passenger train had passed each other a little east of the crossing, and there was evidence shewing that the latter train had not given the statutory signals when approaching the crossing. The jury found that G. was killed by the passenger train, and that his death was due to the negligence of the latter in failing to give such warnings. This finding was upheld by the Court of Appeal. Held, that the jury were justified in considering the balance of probabilities and drawing the inference from the circumstances proved, that the death of G. was caused by such negligence.

G.T.R. Co. v. Griffith, 13 Can. Ry. Cas. 302.

E. ACTS AND DECLARATIONS OF AGENT, REPRESENTATIVE OR TENANT.

(§ X E—710)—AGENTS GENERALLY.

In an action to recover the purchase price of certain liquor sold to the defendant, evidence by the plaintiff's attorney of statements made to him by defendant's husband that he was defendant's agent to purchase goods and that he purchased the goods in question as such agent, where such statements were made after action brought and one year after the purchase in question, is not admissible.

LeBlanc v. LaPorte, 40 N.B.R. 468.

(§ X E—714)—NEGLIGENCE—STREET RAILWAY—INJURY TO PASSENGER—ELECTRIC EXPLOSION—CONDUCT OF MOTORMAN—FINDINGS OF JURY—EVIDENCE—INSPECTION — RECOLLECTION OF WITNESS — WRITTEN REPORT—IMPROPER REJECTION —NEW TRIAL.

Fleming v. Toronto R. Co., 13 Can. Ry. Cas. 278, 25 O.L.R. 317.

F. ACTS AND DECLARATIONS OF FORMER PARTY IN INTEREST; TESTATOR OR FORMER OWNER.

(§ X F—720)—CIRCUMSTANCES AS TO VALUE OF DECEDENT'S ESTATE — LETTERS — WILL.

For the purpose of determining the object of a testator's bounty or the subject of disposition, evidence of the value of the testator's estate at the time of the making of the will or codicil is admissible as a circumstance surrounding the testamentary acts; but a letter written by the testator after the making of the codicil is not admissible for that purpose.

Re Aldridge Will (No. 1), 28 D.L.R. 527, 9 A.L.R. 422, 33 W.L.R. 910, 9 W.W.R. 1517. [See also 28 D.L.R. 531, 9 A.L.R. 512.]

CONVENTIONAL LINE—ADMISSIONS BY PREDECESSOR IN TITLE—CROWN GRANT.

Evidence to support a conventional line should be clear and definite. Authority to assist in ascertaining the true line between the properties of adjoining owners will not extend to the establishment of a conventional line. Admissions by a predecessor in title of one of the parties as to an alleged conventional line constitute an element for consideration, and in a doubtful case may be a controlling factor, but cannot be considered where the true line has been satisfactorily proved. A plan attached to a grant from the Crown and referred to in it, is receivable in evidence for the purpose of locating the lines of the grant.

Lewis Miller & Co. v. Clow, 52 N.S.R. 1.

(§ X F—722)—REBUTTING PRESUMPTION OF OWNERSHIP—POSSESSION.

The statements, acts and conduct of predecessors in title, with reference to the ownership of a strip of land, are receivable in evidence against a party claiming through them, by title obtained subsequent to such statements and conduct, and may be taken in connection with other circumstances to displace the presumption of ownership arising from possession.

Taylor v. Vanderburgh, 30 D.L.R. 196, 36 O.L.R. 337.

G. Acts and declarations of partner; associate or co-conspirator.

(§ X G—727) — Conspiracy to commit crime—Acts and declaration of conspirators after commission.

Acts and declarations of those charged with the crime of conspiracy to procure the performance of an abortion, occurring immediately after its commission, and made while procuring care for the person upon whom the abortion was performed, are admissible as tending to establish the conspiracy.

R. v. Bachrack, 11 D.L.R. 522, 21 Can. Cr. Cas. 257, 28 O.L.R. 32.

Conspiracy to commit crime in Ontario—Commission in foreign country—Evidence.

Where, on a criminal trial for conspiracy to procure an abortion, it appeared that the defendants conspired to procure its performance in Ontario, but finding it difficult to do, went to a foreign country, evidence is admissible as to what occurred there in furtherance of the conspiracy.

R. v. Bachrack, 11 D.L.R. 522, 21 Can. Cr. Cas. 257, 28 O.L.R. 32.

(§ X G—728)—Agents, representatives, or associates.

Where the charge is for carrying on an illegal lottery business and not for fraudulently representing that the accused was carrying on such business, the prosecution must prove that the business was in fact carried on as alleged and not merely that the accused represented that she was conducting such business or that she authorized her agents to so represent.

The King v. Lumgair, 19 Can. Cr. Cas. 123; 3 O.W.N. 309.

H. Complaints of injuries and suffering.

(§ X H—730) — Accident insurance — Statement by insured immediately following accident.

For the purpose of proving the physical condition of a deceased person in an action on a policy of accident insurance, evidence is admissible as to what was said by him immediately after the occurrence of an injury alleged to have caused his death.

Youlden v. London Guarantee & Accident Co., 12 D.L.R. 433, 28 O.L.R. 161, affirming 4 D.L.R. 721, 26 O.L.R. 75.

Statement by deceased as to happening of accident.

In an action for compensation for death caused by the wrongful act or default or neglect of the defendant company, the defendant put in evidence, subject to objection of the plaintiff's counsel, a statement, made on cross-examination at the inquest by the doctor who attended the deceased immediately after the accident, as to what the deceased told him was the cause of the accident, and also a statement of a similar character made to the manager of the defendant company shortly after the accident.

Held, on a motion to set aside the verdict for the plaintiff or for a new trial, that a statement made by the deceased to the plaintiff shortly after the accident, explaining how it happened, was, under the circumstances, properly received, and was not a ground for a new trial.

Wentzell v. New Brunswick, etc., R. Co., 43 N.B.R. 475.

J. Telephone conversations.

(§ X J—740)—Telephone conversations.

Where an alleged telephone conversation is set up and the defendant tenders the evidence of his stenographer who heard the defendant's end of the talk, the stenographer's evidence is admissible, such elements in the problem as (a) the fragmentary nature of the testimony; (b) the possibility of a dishonest party talking into a telephone in the hearing of his witness without having any connection with the person to whom he was purporting to talk and giving answers to questions that were never asked, merely go to the weight, not to the admissibility of such evidence.

Warren v. Forst, 8 D.L.R. 640, 23 O.W.R. 311, 46 Can. S.C.R. 642, affirming 24 O.L.R. 282.

Judicial notice of system—As notice.

A telephonic communication by the accountant of a bank, that the bank has funds to pay to a defendant, made in the usual way, and replied to by persons apparently in the office of the defendant is prima facie notice to the defendant that the money is available, and if it has not been stipulated that notice shall be given to a particular person, the identity of the recipient need not be proven, in the absence of denial by the defendant; where the automatic system of signalling is used, the court will take judicial notice that no call to "central" is necessary.

Fidelity Oil & Gas Co. v. Janse Drilling Co., 27 D.L.R. 651, 9 A.L.R. 439, 34 W.L.R. 370, 10 W.W.R. 533.

L. Dying declarations, or those made in travail.

(X L—750) — When admissible — Homicide.

A dying declaration is only admissible in the case of homicide where the death of the deceased is the subject of the charge and the circumstances which led to the death are the subject of the dying declaration.

R. v. Inkster, 24 Can. Cr. Cas. 294, 8 S.L.R. 233, 31 W.L.R. 782, 8 W.W.R. 1098.

M. Former testimony.

(X M—755) — Notwithstanding certain departures from the rules of evidence are permitted in the interlocutory stages of a proceeding, the reading therein of depositions of another party taken in a different action is not thereby authorized.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

Evidence is admissible against the accused on a charge of assault tried upon indictment that he had pleaded guilty to another identical charge for the same offence laid before a magistrate, on which charge no sentence had been pronounced or further proceedings taken for lack of jurisdiction in the magistrate to try the charge.

The King v. Burke, 19 Can. Cr. Cas. 141.

As the question of the guilt or innocence of an accused person cannot be considered upon an application to change the place of trial, a copy of his cross-examination on a trial which resulted in a disagreement, will not be referred to, although filed with such application.

The King v. Stauffer, 19 Can. Cr. Cas. 205, 4 S.L.R. 284.

XI. Relevancy and materiality.

A. In general.

As to nationality, alien enemy, see New Trial, II—5.

As to cause of death, see Insurance, VI C—270.

As to previous chastity, see Seduction, II—7.

Evidence of title to rebut charge of forcible entry, see Forcible Entry.

Evidence in rebuttal of statutory presumption as to guilt, see Intoxicating Liquors, III G—89.

As to authorship of libellous letter in newspaper, see New Trial, II—7.

As to meaning of libel innuendo, fair comment, see Discovery, IV—32.

(§ XI A—760) — Meaning of libellous words.

Evidence adduced by the plaintiff in an action for libel as to the meaning of certain ambiguous words and the newspaper article containing them held to have been properly admitted.

Knott v. Telegram Printing Co., 32 D.L.R. 409, 27 Man. L.R. 336, [1917] 1 W.W.R. 974. [Affirmed, 39 D.L.R. 762, 55 Can. S.C.R. 631, [1917] 3 W.W.R. 335.]

In general.

The pleadings raised an issue whether or not the plaintiff, in order to induce the defendants to enter into the agreement sued on, falsely represented to them that, by virtue of his own interest and the interest of others represented by him, he controlled a certain company and could determine whether the company would accept the defendants' offer or not. A letter had been written by the plaintiff to one of the defendants before the acceptance of the offer in which he spoke of other parties as interested in the sale and holding out for a larger sum:—Held, that interrogatories put by the defendants to the plaintiff, under r. 407b added to the King's Bench Act by 5 & 6 Edw. VII., c. 17, s. 2, asking for information as to the names of the other parties referred to, and as to all communications between them and the plaintiff relating to the proposed sale, were relevant to the issue and should be fully answered.

Affleck v. Mason, 21 Man. L.R. 759.

Principal and agent — Sale of money order — Allegations of declaration — Evidence — Contract — Criminal prescription — Civil responsibility — C.C. 1030, 1709, 1713.

In an action by a principal against his agent for $3,998.59 representing the sale of money orders, wherein the declaration alleges a contract of agency, and also that the defendant had received for sale a certain amount of money order, "belonging to the plaintiff's upon terms requiring the said defendant to account for," verbal evidence can be admitted to prove the business between the parties and the amount for which the defendant should render an account. The facts that the principal had another person arrested and convicted for theft as agent of money orders, does not relieve the defendant of his civil responsibility to account for the sale of the same money orders.

Dominion Express Co. v. Dini, 46 Que. S.C. 396.

Non-support of wife — Omission to supply necessaries — Former acquittal on similar charge — Evidence of neglect prior thereto not admissible on subsequent charge.

The King v. Yuman, 17 Can. Cr. Cas. 474, 22 O.L.R. 500.

(§ XI A—761) — As to concurrent dates.

On a charge of obtaining money under false pretense of ownership of certain chattels, the testimony of a witness taken nearly a year after the alleged offence, stating merely that such witness "was" the owner, is insufficient to negative the alleged pretence, unless such deposition by its context or otherwise indicates the date of the offence as the time at which he was the owner.

Re William Staggs (No. 2), 8 D.L.R. 284, 5 A.L.R. 354, 3 W.W.R. 393.

Unregistered Crown grants — Date.

An unregistered Crown grant is admissible in evidence where it is not sought to set it up against a registered instrument. Where the applicability of the Registry Act (B.C.) depends on the date of an instrument, an unregistered Crown grant is relevant evidence to such issue and admissible as such.

Dorrell v. Campbell, 32 D.L.R. 44, 23 B.C.R. 500, [1917] 1 W.W.R. 500.

C. Character; reputation; age.

(§ XI C—770) — Character.

In an action for false imprisonment for nonpayment of a municipal tax, the fact that the plaintiff had been previously arrested and held within the prison limits for debt is not relevant on the question of quantum of damages.

Markey v. Sloat, 6 D.L.R. 827, 41 N.B.R. 234, 11 E.L.R. 295.

CHARACTER OF WOMAN SEDUCED.

Unless the plaintiff's character is impugned by the defendant's pleading in an action for breach of promise and seduction, it is not open to the plaintiff to give general evidence of good character; but if the defendant, without calling witnesses as to general reputation, brings out in cross-examination of plaintiff and of her witnesses, collateral facts which alone might lead to an inference that the plaintiff was of general bad character, it is not error to permit the plaintiff in rebuttal to make explanation of the specific instances, the facts as to which had been brought out only in part on the cross-examinations.

Collard v. Armstrong, 12 D.L.R. 368, 6 A.L.R. 187, 24 W.L.R. 742, 4 W.W.R. 879.

(§ XI C—771)—THEFT—BAD CHARACTER—OTHER OFFENCES.

Upon a charge of theft it is not competent for the prosecution to adduce evidence tending to shew that the accused had been guilty of a theft subsequent to that for which he is being tried, where no evidence as to character has been offered by the prisoner. The introduction of such evidence, even though not objected to by counsel for the accused, will invalidate the conviction.

The King v. Doyle, 28 D.L.R. 649, 26 Can. Cr. Cas. 197, 50 N.S.R. 123.

(§ XI C—774)—AGE—SEDUCTION.

On a criminal charge of seduction of a girl under twenty-one where the evidence of the girl's parents is not available, the girl's own testimony that her age was nineteen and the testimony to the like effect given by the woman under whose care she had been when a small child based upon information then received and upon personal observation is admissible in proof of her age being under twenty-one. [R. v. Cox, [1898] 1 Q.B. 179, 67 L.J.Q.B. 293, 18 Cox 672, followed.] Cr. Code, s. 984, does not exclude any other class of evidence that is by law admissible, but provides for another means of determining the age of the child or young person against whom the offence was committed in the specified classes of cases where the age is material, by enacting that the jury or magistrate, as the case may be, may infer her age by the girl's appearance.

R. v. Spera, 28 D.L.R. 377, 25 Can. Cr. Cas. 180, 34 O.L.R. 539.

D. KNOWLEDGE; NOTICE; BELIEF; MENTAL CAPACITY.

(§ XI D—776)—In an action to enforce a separation agreement evidence is admissible to prove when and how the plaintiff became aware of the adultery of the other party relied upon as a cause of separation, provided that the adultery itself is regularly proved.

Nargang v. Nargang, 1 D.L.R. 323, 20 W.L.R. 206, 5 S.L.R. 115, 1 W.W.R. 865.

(§ XI D—777)—MENTAL CAPACITY.

Where a conveyance is attacked on the ground of the insanity of the grantor, and a primâ facie case of insanity is made out, so as to cast upon those supporting the conveyance the onus of proving that it was executed during a lucid interval, an affidavit of execution in the ordinary form attached to the conveyance, and formal statements in printed discharges from an asylum, not borne out by the material which should interpret them, are not sufficient evidence that the conveyance was so executed.

Hoover v. Nunn, 3 D.L.R. 503, 3 O.W.N. 1223, 22 O.W.R. 28.

E. INTENT; MOTIVE; FRAUD; UNDUE INFLUENCE; GOOD FAITH; MALICE.

(§ XI E—781)—TESTATOR; CHEQUE TO SON—GIFT OR LOAN—ADMISSIBILITY OF EVIDENCE—INTENT.

Evidence is admissible, on a dispute as to whether a cheque given to the son by the father was by way of gift or loan, to shew similar gifts of the parent to other children or of the general plan of the parent to lend and not to give property to his children under similar circumstances.

Groat v. Kinnaird, 20 D.L.R. 421, 7 A.L.R. 390, 29 W.L.R. 675, 7 W.W.R. 264.

FORGERY OF ENDORSEMENT TO CHEQUE.

On a charge of forgery of the endorsement of a cheque, the feigned handwriting of the signature, the retention of the proceeds of the cheque so endorsed and false statements afterwards made to the effect that no such cheque had been received are material on the question of criminal intent in signing the endorsement. [See also R. v. Pariseault, 28 Can. Cr. Cas. 112.]

R. v. Hoffman, 31 Can. Cr. Cas. 126, 45 O.L.R. 234.

F. PRICES; VALUES.

(§ XI F—790)—FRAUDULENT SALE OF SHARES—MISREPRESENTATIONS AS TO ASSETS.

In an action for the rescission of a sale of shares on the ground of fraudulent misrepresentations as to the assets of the corporation due to an exchange of timber lands, a question in the examination of the defendant for discovery as to whether he disposed of the lands or utilized them for profit, or raised money upon them, is irrelevant to the issue.

Appleton v. Moore, 23 D.L.R. 673, 22 B.C.R. 28, 32 W.L.R. 114, 8 W.W.R. 1286.

SALES.

Evidence of sales subsequent to the date of filing expropriation plans is admissible to prove the value of the lands expropriated.

Toronto Suburban R. Co. v. Everson, 34 D.L.R. 421, 54 Can. S.C.R. 395.

ASSESSMENT FOR TAXES.

Evidence of the value at which the holder advertised mineral rights for sale is

admissible for the purpose of assessing them for taxation.

Re Canada Co. and Tp. of Colchester North, 33 D.L.R. 61, 38 O.L.R. 183.

(§ XI F—793)—Relevancy and materiality — Expropriation proceedings — Value—Sale of undivided interest in property expropriated.

To establish the value of land expropriated, evidence is admissible shewing recent sales of land of similar character and use in the neighbourhood of that taken. Evidence of the sale of an undivided half of property expropriated is admissible on the question of damages in order to establish market value, but it is to be considered along with other circumstances establishing value.

Re National Trust Co. and C.P.R. Co., 15 D.L.R. 320, 29 O.L.R. 462.

(§ XI F—794)—Services.

Evidence that the workman was earning a certain sum per day at the time of the injuries complained of is not relevant for the ascertainment of the "estimated earnings" during the three years preceding the injury which is an element in fixing the workman's compensation for the injury under the Workmen's Compensation for Injuries Act, R.S.O. 1897, c. 160, s. 7.

Nigro v. Donati (No. 2), 8 D.L.R. 213, 4 O.W.N. 453, 23 O.W.R. 438, affirming 6 D.L.R. 316.

(§ XI F—797)—As to value of real property—Railway expropriation.

The price paid for lands contiguous to the land concerned in expropriation proceedings by a railway company, although such price includes damages caused by the operation of the railway alongside the property, is properly regarded in proof of the value of the expropriated property as is also the price mentioned in an option to purchase the same. [Dodge v. The King, 38 Can. S.C.R. 149, applied.]

Re Billings and Can. Northern Ontario R. Co., 15 D.L.R. 918, 16 Can. Ry. Cas. 375, 29 O.L.R. 608.

G. Damages.

(§ XI G—800)—Personal injury — Employer's liability insurance—Relevancy.

The rule that in an action for damages against an employer for personal injuries there must be no intimation to the jury that an insurance company with which the employer has an employers' liability insurance against such claims is the real defendant in interest, is not violated where the only reference on this point that was brought to the jury's attention was (a) plaintiff's testimony that he thought that a certain doctor who examined him told him that an insurance company sent him there, (b) the testimony of defendant's doctor brought out, upon cross-examination by plaintiff's counsel, that he was sent to examine plaintiff by a certain insurance company, (c) reference by plaintiff's counsel, in the examination of another witness, to the effect that this doctor was the doctor who examined the plaintiff "on behalf of the insurance company;" and where no reference to such insurance was made by plaintiff's counsel in his address to the jury. [Loughead v. Collingwood Shipbuilding Co., 16 O.L.R. 64, distinguished.]

Mitchell v. Heintzman, 9 D.L.R. 20, 4 O.W.N. 636, 23 O.W.R. 763.

Loss of profits from failure to lease hotel.

In order to determine the plaintiff's damages in an action for the breach of an agreement to build a hotel and lease it to him, evidence is admissible to shew the probable profits from the business had the hotel been built, not for the purpose of recovering such profits, which are too remote and speculative, but for the purpose of shewing the value of the term of the plaintiff's lease.

Beatty v. Bauer, 13 D.L.R. 357, 18 B.C.R. 161, 24 W.L.R. 830, 4 W.W.R. 1099.

(§ XI G—802)—Personal injuries.

Contributions made by the employer before action towards the medical and hospital expenses of an employee who afterwards sued him for damages alleging that he has been injured by the negligence of the employer's foreman and that the employer was liable therefor under the Workmen's Compensation Act (Ont.), should not, in a subsequent action for the injuries, be taken as evidence of the payer's liability, unless expressly made upon that basis, but should count to his advantage in assessing the damages.

Nigro v. Donati (No. 2), 8 D.L.R. 213, 4 O.W.N. 453, 23 O.W.R. 438, affirming 6 D.L.R. 316, 4 O.W.N. 2.

Personal injuries—Sickness resulting.

The allegations in an action claiming damages for bodily injury, that the plaintiff has received serious and harmful injuries which will prevent his working during the rest of his life, that he has had a nervous shock and will suffer all his life on account of this accident both physically and morally, permits evidence to be given of the opinion of doctors that the plaintiff is exposed in the future, on account of the injuries he has received, to other maladies.

Montreal Street R. Co. v. Normandin, 26 Que. K.B. 467. [See also 33 D.L.R. 195, [1917] A.C. 170.]

(§ XI G—803) — Probable duration of life.

The fact that the deceased was an unusually healthy man, although 82 years old, may be considered in awarding damages, under the Fatal Injuries Act, 1 Geo. V., c. 33, R.S.O. 1914, c. 151, and a finding of a probable greater duration of life than that of the average man may be based thereon.

[Rowley v. London & North Western R. Co., L.R. 8 Ex. 221, 226, followed.]

Goodwin v. Michigan Central R. Co., 14 D.L.R. 411, 29 O.L.R. 422, 25 O.W.R. 182.

H. Care; skill; negligence.

(§ XI H—810)—Negligence.

The rule that the failure of any person to perform a duty imposed on him by statute or other legal authority should be considered evidence of negligence applies only to violations of a statutory or valid municipal regulation established for the benefit of private persons, where the action is brought by a person belonging to the protected class, and only if other elements of actionable negligence concur.

Bears v. Central Garage Co., 3 D.L.R. 387, 22 Man. L.R. 202, 21 W.L.R. 252, 2 W.W.R. 283.

I. Suggestive facts; facts supporting inferences.

(§ XI I—820) — Contracts — Suggestive facts.

Canada Law Book Co. v. Butterworth (No. 2), 12 D.L.R. 143, 23 Man. L.R. 352, reversing 9 D.L.R. 321. [Affirmed, 16 D.L.R. 61.]

(§ XI I—823)—Suggestive facts—Criminal case—Connected criminal act.

Where evidence of the commission of one criminal act is in itself circumstantial evidence of the commission of another criminal act, it is admissible in evidence to establish the commission of the latter; so where a cashier is short in his accounts and alone has a check on the amounts, evidence of an alteration made by him in the books to make them tally with the cash is evidence tending to convict him of the theft.

R. v. Minchin, 15 D.L.R. 792, 22 Can. Cr. Cas. 254, 7 A.L.R. 148, 26 W.L.R. 633, 5 W.W.R. 1028. [Affirmed, 18 D.L.R. 340.]

K. Similar acts or facts.

(§ XI K—830)—Proof of vaccination of other persons than the plaintiff and evil results following is admissible, although far from conclusive, to contradict an averment of a plea stating that a large number of persons had been vaccinated by the same doctor with the same vaccine without evil results.

Boilard v. Montreal, 9 D.L.R. 152, 43 Que. S.C. 171.

(§ XI K—831)—Libel and slander.

Evidence of a slander spoken to a witness, but not complained of in the statement of claim, is not admissible to prove a subsequent slander which is complained of in the action. (Decision of Supreme Court of Alberta, affirmed on appeal without opinion.)

Wickens v. McConkey, 7 D.L.R. 602.

Similar slanderous words.

For the purpose of proving malice in action for slander actionable per se, evidence of similar slanderous words other than those set forth in the statement of claim is properly admissible.

King v. Londerville, 25 D.L.R. 352, 8 S.L.R. 376, 31 W.L.R. 821, 8 W.W.R. 1108.

(§ XI K—836) — Values — Eminent domain.

Evidence of settlements made by the railway with other persons for parts of other farms taken for the right-of-way is not relevant in expropriation proceedings under the Railway Act (Can.).

Re Ketcheson and Can. Nor. Ontario R. Co., 13 D.L.R. 854, 29 O.L.R. 339, 25 O.W.R. 20.

Conditions as to irrigation at other places.

To establish the question whether lands are irrigable within the meaning of an agreement warranting them to be, the evidence of adjacent owners as to the effect of irrigation upon their lands is irrelevant and therefore inadmissible. [Metropolitan Asylum v. Hill, 47 L.T.N.S. 29, applied.]

Babcock v. C.P.R. Co., 27 D.L.R. 432, 9 A.L.R. 270, 33 W.L.R. 941, 9 W.W.R. 1484.

(§ XI K—837) — Murder — Evidence of other crimes—Assault on companion of person killed.

On a trial for murder, where the accused, for the purpose of robbery, induced the deceased by false pretences to leave his companion and accompany him to a lonely spot where the dead body was afterwards found, evidence of an assault and robbery of the companion made by the accused an hour after the separation is admissible if it tends to shew that the murder had taken place in furtherance of a scheme by the accused to rob both the deceased and his companion and for such purpose to get them separated, and this notwithstanding that it shews the commission of another crime. [R. v. Birdseye, 4 C. & P. 386, distinguished.]

R. v. Gibson, 13 D.L.R. 393, 28 O.L.R. 525, 21 Can. Cr. Cas. 477.

Other offences—Defence.

Where, in answer to questions to a Crown witness by counsel for the accused on the trial of a charge of theft, the witness divulges facts tending to prove another theft of about the same time from the same employer, and no objection is taken to the admission of that part of the testimony, the admission of the same will not constitute a ground for appeal from the verdict against the accused, and, semble, the evidence was admissible, as in answer to the plan of defence which was to throw the crime upon a fellow employee.

Rivet v. The King, 27 D.L.R. 695, 25 Can. Cr. Cas. 235, 24 Que. K.B. 559.

Intent — Abortion — Prior similar offences.

Where, in answer to a charge of using instruments to cause an abortion, the accused sets up in defence that the instruments were used to prevent septic poisoning in a miscarriage already begun, and he gives his own testimony to that effect, he

becomes liable to be cross-examined as to alleged previous criminal acts similar to that alleged and performed in a similar manner, and, on his denial of same, to have his plea of innocent intent negatived by proof of the other similar criminal acts although these occurred two and four years previous to the offence charged. Such evidence would be admissible apart from any evidence of system, and if the defence does not develop until the defendant is in the witness box, he is to be given an opportunity of answering such rebuttal evidence by giving further evidence in sur-rebuttal.

Brunet v. The King, 42 D.L.R. 405, 57 Can. S.C.R. 83, 30 Can. Cr. Cas. 16, affirming 27 Que. K.B. 481. [See also 30 Can. Cr. Cas. 9.]

MURDER—OTHER CRIMES.

The mere fact that the evidence tends to shew the commission of other crimes does not render it inadmissible if it is relevant to the issue before the jury, and it is relevant on a murder trial if it bears upon the question whether or not the shooting was in self-defence by shewing a chain of subsequent transactions by the accused from which the jury might infer that they were intended to cover up the disappearance of the deceased and his personal property.

R. v. Letain, 29 Can. Cr. Cas. 389, 28 Man. L.R. 386, [1918] 1 W.W.R. 505.

CONSPIRACY—FRAUD.

It is a general principle of the law of evidence that the proof adduced must have direct connection with the question in issue. Therefore, in a plea to an action on an insurance policy the allegations that the insured had conspired with other persons to defraud, and made a business of defrauding insurance companies in general, may be rejected on an inscription in law.

Glen Falls Ins. Co. v. Murcheson, 24 Rev. Leg. 342.

M. PAYMENT; CONSIDERATION; CREDIT.

(§ XI M—846) — RELEVANCY AND MATERIALITY — PAYMENT — PROMISSORY NOTE — MEMORANDA OF — ADMISSIBILITY — SALE OF LAND.

A memorandum given on the day before the date of the agreement for sale of lands acknowledging receipt of a promissory note for the cash payment and specifying certain reservations and restrictions against the land in more detail than they were described in the formal agreement is properly admitted in evidence in an action to enforce the agreement for the purpose of shewing that the purchaser knew that the transfer was to be subject to the specified reservations.

Manufacturers Life Ins. v. Walsh, 20 D.L.R. 504, 8 A.L.R. 90, 7 W.W.R. 808.

O. CONTRACTS; BREACH; WAIVER.

(§ XI O—855)—Upon the question of breach of implied warranty as to fitness on the sale of an engine the following are tests: (a) Would the engine properly govern; (b) were the castings unfit for use to seller's actual or presumed knowledge; (c) was the crank case defective; (d) were the frequent breaks due to inherent defects; (e) was one of the pistons defective and secretly plugged by the seller before delivery; (f) was it deficient in power; (g) was its workmanship of inferior grade.

Alabastine Co. v. Canada Producer, etc., Co., 8 D.L.R. 405, 30 O.L.R. 394, 23 O.W.R. 841.

BREACH OF PROMISE.

In an action for breach of promise, evidence that third parties have made accusations against the plaintiff, or that conclusions derogatory to the plaintiff will be drawn from the fact of the breach, is not admissible.

D. v. B., 38 D.L.R. 243, 40 O.L.R. 112.

(§ XI O—857)—BREACH.

Under the statute C.S.N.B. 1903, c. 116, s. 41, subs. (2), a plea of the general issue in an action for a breach of warranty of soundness of a horse, will permit the defendant to adduce evidence to shew that it was sound prior to and at the time of the sale.

Hale v. Tompkins, 6 D.L.R. 502, 41 N.B. R. 269, 11 E.L.R. 91.

Q. PECUNIARY CONDITION; FAMILY CIRCUMSTANCES.

(§ XI Q—865)—RELEVANCY TO SHEW RELATIONSHIP OF EMPLOYEE TO EMPLOYER — INDEPENDENT CONTRACT, NEGATIVED WHEN.

The solvency of the alleged independent contractor is an element to be considered in determining whether a person employed in driving logs on a river for various timber owners does so as their employee or as an independent contractor; and a finding of fact on that question by the Trial Judge should not be disturbed except on some strong ground.

Fraser v. Dumont, 19 D.L.R. 104, affirming on different grounds, 48 Can. S.C.R. 137.

R. PERSONS; PERSONAL RELATIONS.

(§ XI R—871)—CRIMINAL CASES.

It cannot be shewn on the trial of a person for rape, that a few minutes after the commission of the offence charged, or at any other time, he committed a similar crime against the person of a sister of the complaining witness, such evidence not being admissible either as part of the res gestae, or to shew a propensity on the part of the accused to commit such crimes. [R. v. Bond, [1906] 2 K.B. 389, 21 Cox C.C. 252, followed, and Reg. v. Rearden, 4 F. & F. 76, distinguished.]

R. v. Paul, 5 D.L.R. 347, 4 A.L.R. 377, 21 W.L.R. 699, 2 W.W.R. 614.

T. CRIMINAL MATTERS GENERALLY.

(§ XI T—885)—CRIMINAL CASES—RELEVANCY—INCIDENTALLY PROVING ANOTHER CRIME—EFFECT ON ADMISSIBILITY.

In a criminal trial where evidence of cer-

tain facts is directly relevant to the issue joined, the circumstance that such facts incidentally shew that the accused has been guilty of another crime does not render such evidence inadmissible.

R. v. Minchin, 18 D.L.R. 340, 6 W.W.R. 809, 23 Can. Cr. Cas. 340, affirming 15 D.L.R. 792.

U. Title of possession.

(§ XI U—890)—Title or possession of real property—Description in patent supported by evidence of occupation.

Where the description of an island referred to fixed points on the mainland and the sides of the channels were given as its limits, no area being given, and a plan referred to in the patent did not shew the locality by reference to fixed points but was said to render the description ambiguous, evidence of the circumstances, including correspondence leading up to the grant and of prior occupation of the land described in the patent was held to be admissible for any purpose of identifying the parcel intended to be granted. [Gordon-Cumming v. Houldsworth, [1910] A.C. 537, 541, and Grey v. Pearson, 6 H.L.C. 61, 106, followed.]

Bartlett v. Delaney, 11 D.L.R. 584, 27 O.L.R. 594.

(§ XI U—891)—Of personal property—Wife's separate estate.

Parol testimony of a wife separate as to property that goods, seized as her husband's, belong to her as having been acquired before marriage, or as gifts from friends and relatives after marriage, is sufficient evidence of the fact.

Plamondon v. Larue, 43 Que. S.C. 18.

(§ XI U—892)—Of real property.

Possession of land must be considered in every case with reference to the peculiar circumstances; the character and value of the property, the suitable and natural mode of using it, and the course of conduct which the proprietor might reasonably be expected to follow with a due regard to his own interests must all be taken into account in determining the sufficiency of the possession.

Kirby v. Cowderoy, 5 D.L.R. 675, [1912] A.C. 599, 2 W.W.R. 723.

V. Identification.

(§ XI V—896)—By voice.

Evidence of the identity of the accused as the person who assaulted the complainant may be given by the latter's identification of the voice of the accused when taken into custody as being the voice of the man who spoke when the assault took place and whom he could not otherwise identify.

R. v. Murray and Mahoney, 33 D.L.R. 702, 27 Can. Cr. Cas. 247, 10 A.L.R. 275, [1917] 1 W.W.R. 404. [See also R. v. Murray (No. 1), 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319. For later decision, see 11 A.L.R. 502, 38 D.L.R. 395, [1917] 2 W.W.R. 895.]

(§ XI V—897)—Criminal trial—Identification of money with proceeds of separate robberies.

Where the person accused of a murder committed in connection with a robbery is shewn to have suddenly become possessed of a sum of money, although previously he was entirely out of money and out of work, and the prosecution allege that such money is made up in part of money taken from the murdered person, but the accused giving evidence on his own behalf swears that the money was received in one sum from a third party not produced as a witness, it is competent for the prosecution to discredit such testimony by shewing that the excess over and above what was in the possession of the murdered man was obtained by robbing the latter's companion and so accounting for the difference in the amount of money of which the accused had suddenly become possessed, and the much smaller sum which the deceased had in his possession when robbed and murdered.

R. v. Gibson, 13 D.L.R. 393, 21 Can. Cr. Cas. 477, 28 O.L.R. 525.

W. Justification; mitigation.

(§ XI W—902)—Mitigation—Libel.

The facts and circumstances leading to the publication of a libellous charge that the plaintiff's candy factory was found by a public health inspector to be in an unclean and unsanitary condition, and that the destruction of a large quantity of candy was ordered, as well as the facts tending to shew the writer's belief that the premises described were those of the plaintiff, are admissible in mitigation of damages when so pleaded.

Lumsden v. Spectator Printing Co., 14 D.L.R. 470, 29 O.L.R. 293.

Z. Miscellaneous.

(§ XI Z—915)—Wrongful removal of corpse from burial lot.

In an action for the wrongful removal of human remains from a burial lot, evidence as to the amount of care bestowed on the lot by the plaintiff is immaterial.

O'Connor v. Victoria, 11 D.L.R. 577, 4 W.W.R. 4.

XII. Weight, effect and sufficiency.

A. In general; corroboration.

Corroboration, see Appeal, VII M—535; Witnesses, III—58; Forgery; Perjury, II B—50.

Corroborations of bona fides of conveyance, see Fraudulent Conveyances, VI—30.

Credibility, see Appeal, VII L—485.

As to property rights, see also infra, XII—E.

(§ XII A—920)—Effect—Sufficiency.

As s. 1003 Cr. Code specifically requires that the "testimony admitted by virtue of this section," i.e., a statement taken in court from a child of tender years not understanding the nature of an oath upon the trial of certain sexual crimes, must be

corroborated by "some other material evidence in support thereof implicating the accused," the testimony so taken from one child of tender years cannot constitute the kind of corroboration required by the Code of the testimony similarly taken from another child of tender years.

R. v. Whistnant, 8 D.L.R. 468, 5 A.L.R. 211, 22 W.L.R. 762, 3 W.W.R. 486.

Upon a sale of seed grain, where the buyer pleads that it lacked vitality, and was frosted, a random test of 100 seeds is unsafe upon which to base a conclusion as to the general vitality of 150 bushels of the grain, a more general and complete test being necessary under the circumstances. [Lawton v. Reid, 2 W.L.R. 240, applied.]

Carlstadt Development Co. v. Alberta Pacific Elevator Co., 7 D.L.R. 200, 4 A.L.R. 366, 21 W.L.R. 433, 2 W.W.R. 404.

Where the agreement under which the plaintiff seeks to hold the defendant liable is an unusual one, and there is nothing in writing to support the statements of the plaintiff, which are directly denied by the defendant, a very clear case must be made by the plaintiff to succeed and his evidence as to the terms of the alleged agreement should be clear and specific.

Kinsman v. Kinsman, 7 D.L.R. 31, 4 O.W.N. 20, 22 O.W.R. 979, reversing 5 D.L.R. 871.

As between two witnesses, of whom one is interested and the other is not, credit should, as a general rule and in the absence of anything to the contrary, be given to the latter.

Bateman v. County of Middlesex, 6 D.L.R. 533, 27 O.L.R. 122, 23 O.W.R. 685.

The rules of evidence applicable to a criminal prosecution requiring corroboration of the testimony of the complaining witness as to the fact of rape and requiring disclosure by her of the alleged act, do not apply to a civil action for damages for assaulting and ravishing the plaintiff without her consent.

Dunn v. Gibson, 8 D.L.R. 297, 20 Can. Cr. Cas. 195, 4 O.W.N. 329, 23 O.W.R. 356.

When the sole witness is an interested party and is giving evidence with respect to what took place between him and a deceased person it is a safe and judicious general rule to require corroboration, but there is no hard and fast rule to prevent a judge or jury from action upon such evidence though not corroborated, where the inherent probabilities of the case are in favour of the truth of the evidence.

Power v. Munro, 5 D.L.R. 577, 11 E.L.R. 508.

In an action at the suit of the executrix of a grocer's estate for the balance on account of groceries furnished by the decedent to the defendant's wife, a corroboration of the alleged instruction by the defendant to his wife testified to by him not to run a bill, must be furnished to overcome the presumption that she had his implied authority to purchase on credit necessaries suitable to his degree and estate.

Scott v. Allen, 5 D.L.R. 767, 26 O.L.R. 571, 22 O.W.R. 597.

CORROBORATION—CONNECTED ACTS.

There need not be two witnesses to prove every fact necessary to make out an assignment of perjury, the corroboration being required merely for the perjured fact as a whole and not to every detail or constituent part of it; and where the accused had in his testimony connected two persons at different points with the one act, e.g., a joint attempt to bribe him for his vote at an election, evidence on the perjury charge by one of the alleged bribers negativing the bribery charge as to himself and evidence by the other to the like effect as regards himself, may establish the perjury, the one statement sufficiently corroborating the other. [The King v. Houle, 12 Can. Cr. Cas. 56; Reg. v. Roberts, 2 C. & K. 607, 614, applied.]

R. v. Curry, 12 D.L.R. 13, 21 Can. Cr. Cas. 273, 47 N.S.R. 176, 13 E.L.R. 11. [Affirmed, 15 D.L.R. 347, 13 E.L.R. 550.]

AGAINST ESTATE OF DECEASED—TEST.

The corroboration required under s. 12 of the Evidence Act, Ont., against the estate of a deceased person is that the evidence of the claimant be corroborated by other material evidence sufficient to lead to the conclusion that the testimony of such claimant is true or probably true.

Cowley v. Simpson, 19 D.L.R. 463, 31 O.L.R. 200.

ACCOMPLICE—INDECENCY WITH MALE PERSON—CR. CODE (1906), S. 206.

R. v. Williams, 19 D.L.R. 676, 23 Can. Cr. Cas. 339, 7 O.W.N. 426.

CONFLICTING TESTIMONY — PROBABILITIES —SCALE TURNED BY.

On conflicting testimony as to the application of a payment by cheque, the court will incline to give credence to the version which appears the more reasonable and probable.

Lancaster v. Hinds, 20 D.L.R. 238.

UNSWORN TESTIMONY OF CHILD — CANADA EVIDENCE ACT 1906.

Neither under Cr. Code, s. 1003 nor under s. 16 of the Canada Evidence Act, 1906, can there be corroboration of the unsworn testimony of a child of tender years who does not understand the nature of an oath, by similar unsworn testimony of another child.

R. v. McInulty, 16 D.L.R. 313, 22 Can. Cr. Cas. 347, 19 B.C.R. 109, 27 W.L.R. 464, 6 W.W.R. 315.

DECEDENT'S ACT.

An agreement of a decedent in connection with the settlement of an action may be proved and corroborated, under the Evidence Act (R.S.O. 1914, c. 76, s. 12), by the evidence of the solicitors for the parties thereto.

MacEwan v. Toronto General Trusts Co., 35 D.L.R. 435, 28 Can. Cr. Cas. 387, 54 Can.

S.C.R. 381, reversing 29 D.L.R. 711, 36 O.L.R. 244.

POLICE SPY NOT AN ACCOMPLICE.

A police spy is not an accomplice and the practice of requiring corroboration in the case of an accomplice does not apply to him.

R. v. McCranor, 31 Can. Cr. Cas. 130.

CHARGE OF ABORTION.

A conviction for procuring an abortion (Cr. Code, s. 303), made against the person performing the illegal operation, may be founded on the testimony of the woman on whom the operation was performed, although her testimony is not corroborated, there being no statutory requirement of corroboration in such case.

R. v. Sadick Bey, 25 Can. Cr. Cas. 259, 20 Rev. Leg. 140.

CREDIBILITY.

The evidence of one who impeaches his own veracity is to be received with the most scrupulous jealousy.

Baldwin v. Hesler, 38 O.L.R. 172.

REJECTION OF IMPROPER EVIDENCE BY APPELLATE COURT.

Where evidence has been improperly admitted before a judge without a jury, even when no objection has been there raised, it is the duty of the Court of Appeal to reject it and to decide the case on legal evidence.

Royal Bank v. Pound, 24 B.C.R. 23.

REJECTION OF IMPROPER EVIDENCE ADMITTED WITHOUT OBJECTION.

Where the Trial Judge allows in certain evidence to the reception of which no objection is raised, he may on giving judgment ignore the evidence on the ground that it is not proper and should have no weight with the court in deciding the rights of the parties. [Jacker v. International Cable Co., 5 T.L.R. 13, followed.]

Robertson v. Brown et al., 24 B.C.R. 88.

SEVERAL CAUSES OF ACTIONS—SIMILARITY OF EVIDENCE.

When there are several causes instituted at the same time and the evidence is declared to be common to all, this evidence should be considered as a whole and as applying to each case.

Montreal Invest., etc., Co. v. Sarault, 24 Que. K.B. 249. [Affirmed in 44 D.L.R. 530, 57 Can. S.C.R. 464.]

EVIDENCE OF ACCOMPLICE.

The corroboration which is necessary in the case of evidence of an accomplice should be made by evidence independent of that of the accomplice and which affects the prisoner by fastening or tending to fasten the crime on to him. There should be evidence which implicates the prisoner, i.e., which corroborates in some material particular not only that the crime was committed but also that the prisoner was guilty of it. It is not, however, necessary to produce as corroboration direct evidence that the prisoner committed the crime, it is sufficient to establish proof of circumstances that he had something to do with its perpetration.

R. v. Dumont, 29 Can. Cr. Cas. 442, 54 Que. S.C. 9.

FORGERY—COMPARISON OF WRITINGS.

Evidence by comparison of writing should always be received by courts with great circumspection. The criterion of the authenticity of the writing should consist above all things in the resemblance between the writings compared, in the general character of such writings and not in the way the letters are formed. The most efficacious means of establishing such general character is by witnesses who have seen the accused write when his way of writing was not questioned

Le Roi v. Ranger, 30 Can. Cr. Cas. 65, 53 Que. S.C. 423.

ACTION FOR MONEY DUE UNDER CONTRACT WITH MUNICIPAL CORPORATION—FALSE RECEIPTS—FRAUDULENT CONSPIRACY—ONUS—WEIGHT OF EVIDENCE—TESTIMONY OF ACCOMPLICES—CORROBORATION—FINDING OF FACT OF TRIAL JUDGE.

Jess v. Hamilton, 8 O.W.N. 489.

ACTION AGAINST EXECUTORS OF DECEASED MORTGAGEE—ATTEMPT TO ESTABLISH PAYMENT MADE ON ACCOUNT OF MORTGAGE—CORROBORATION—EVIDENCE ACT, R.S.O. 1914, c. 76, s. 12.

Bender v. Toronto General Trusts Corp., 11 O.W.N. 9, 129.

PREPONDERANCE OF PROOF.

It is not the number of witnesses, however respectable they may be, but the whole of the circumstances proved by a less number of equally respectable witnesses, which should prevail, if it removes all doubt in the mind of the court and supports the conviction of the contested fact.

Collector of Revenue for Quebec v. Lepinay, 50 Que. S.C. 433.

AS TO FACTS NOT PLEADED.

Evidence, given under reserve of objections, of facts which are not alleged in the pleadings should be disregarded by the judgment on the merits of the action.

Payette v. Can. North. Que. R. Co., 50 Que. S.C. 64.

(§ XII A—921)—EXPERT TESTIMONY—OPINIONS.

Where, at the close of the evidence in the trial of a breach of contract case, upon the motion of the plaintiff under ss. 392 et seq. C.C.P., for the appointment of viewers and experts, the Trial Judge, sua sponte and over the defendant's objection, appoints a single viewer and expert, such appointment will on appeal be set aside as irregular where the directory provisions of the Code have not been strictly followed.

Pontbriand v. Chateauguay, 7 D.L.R. 22, 46 Can. S.C.R. 603.

In an action for negligent driving in a collision case where the defendant is asked by his counsel "whether anything more could have been done than was done to pre-

vent the collision which occurred," the question may properly be excluded as being the point which the jury has to decide, the proper procedure being that the defendant should state the facts without giving his opinion and leave it to the jury to determine whether he could have done anything more than he did to avoid the collision. [Courser v. Kirkbride, 23 N.B.R. 404, followed.]

Campbell v. Pugsley, 7 D.L.R. 177, 11 E.L.R. 561.

STALE DEMANDS.

The fact that the claim made is old and stale forms an additional reason why incomplete and unsatisfactory parol evidence in its support should not be credited.

Cooper v. Anderson, 9 D.L.R. 287, 23 W.L.R. 241, 3 W.W.R. 962. [Affirmed, 16 D.L.R. 852, 28 W.L.R. 203.]

JUDGE—MAY ACCEPT EVIDENCE OF ONE WITNESS.

The Trial Judge before whom a matter is heard is at full liberty, having considered the evidence on both sides, to decide that he will trust and accept in toto the evidence given by one witness.

Foley Bros. v. McIlwee, 44 D.L.R. 5, [1919] 1 W.W.R. 403. [See 24 B.C.R. 532.]

(§ XII A—923)—POSITIVE AND NEGATIVE—EQUAL CREDIBILITY—CORROBORATION — ONUS.

If one person testifies to a fact and that fact is denied with equal certainty by the other, both standing equal as to credibility before the court, that one upon whom the onus lies to prove that fact has failed unless there be exterior circumstances which would come to his assistance.

Rainboth v. O'Brien, 20 D.L.R. 654.

In the estimation of the value of evidence in ordinary cases, the testimony of a credible witness who swears positively to a fact should receive credit in preference to that of one who testifies to a negative.

Hallett v. Bank of Montreal, 43 D.L.R. 115, 46 N.B.R. 62.

(§ XII A—924)—FALSE EVIDENCE.

The evidence of a witness will not necessarily be disregarded in toto because false in an immaterial particular.

Queer v. Greig, 5 D.L.R. 308.

PREJUDICIAL TO PARTY GIVING—ALLEGATION OF MISTAKE — COMPETENCY OF TRIAL JUDGE TO DECIDE — APPELLATE COURT SETTING ASIDE FINDING.

When a statement has been made prejudicial to the case of the person making it, and it is alleged that it was made under a mistake, no one is so competent to decide whether that allegation is correct as the judge who hears the evidence and can observe the manner of those making it. The finding of a judge under those circumstances, that the explanation is an afterthought and should not be accepted, ought not to be set aside except under very special circumstances shewing that the judge has misapprehended the evidence or the effect of the documents put before him.

S.S. "Borghild" v. D'Entremont; S.S. "Borghild" v. Jordan; S.S. "Borghild" v. Boudreau, 46 D.L.R. 344.

B. CAUSE AND EFFECT.

(§ XII B—925)—REVERSING JURY.

In an action for personal injury alleged as resulting from infected vaccine used in the vaccination of a child, a finding by the jury that the vaccine was infected will be set aside where the evidence in the case does not go beyond shewing that the injury complained of might be attributed to (a) infected vaccine, or (b) infantile paralysis, or (c) any of several other causes, and there is no direct evidence of the use of infected vaccine.

Boilard v. Montreal, 18 D.L.R. 366, 21 Rev. Leg. 58.

(§ XII B—927)—PERSONAL INJURIES—INFECTED VACCINE.

In a trial by jury the verdict must be based on actual proven facts, and not on mere opinion; therefore, in an action in damages for injuries resulting from vaccination alleged to have been performed negligently with infected vaccine, positive proof as to the quality of the vaccine must be adduced to justify a condemnation; the maxim res ipsa loquitur cannot apply, especially where it is proven that the illness following upon the vaccination might be due to one of several causes.

Boilard v. Montreal, 9 D.L.R. 152, 43 Que. S.C. 171.

(§ XII B—928)—DEATH, SUFFICIENCY OF PROOF OF NEGLIGENCE CAUSING.

In an action for negligently causing death, it is necessary that there be reasonable evidence from which it may be inferred that death was due to negligence, since it cannot be inferred from mere conjecture, yet it is not necessary that the manner of its occurrence should be shewn to a demonstration.

Lefebvre v. Trethewey Silver Cobalt Mine, 5 D.L.R. 195, 3 O.W.N. 1535, 22 O.W.R. 694.

(§ XII B—929)—DAMAGES.

An award of damages for the wrongful removal by a railway company of a spur track adjoining a coal and lumber yard from which coal and lumber could be unloaded from cars into the yard with little labour, based upon the owner's evidence of the additional cost of hauling coal and lumber from the company's freight yards, is not erroneous, though evidence that a transfer company would handle such commodities at a less sum per day for each team, if it appeared that the coal and lumber owners' teams were better than those of the transfer company and would do more work per day.

Robinson v. C.N.R. Co., 5 D.L.R. 716, 21 W.L.R. 916, 14 Can. Ry. Cas. 281.

The court will not be deterred, by the fact that the evidence is, from the nature of the case, uncertain and unsatisfactory,

from an attempt to assess damages where some damages have been suffered. [Chaplin v. Hicks, [1911] 2 K.B. 786, followed.]

Broderick v. Forbes, 5 D.L.R. 508.

C. Fraud or good faith; malice; undue influence.

(§ XII C—932)—Malice.

The fact that the examination papers of an applicant, who was refused admission to the College of Dental Surgeons, were undermarked as the result of a conspiracy between the examiners and the college, is not shewn, nor can a conspiracy be inferred where it appears that each examiner, who marked the applicant's papers differently, acted independently and without reference to the other, notwithstanding that expert witnesses for the plaintiff testified that he should have received higher markings.

Richards v. Verrinder, 2 D.L.R. 318, 20 W.L.R. 779, 2 W.W.R. 102.

(§ XII C—934)—Collusion.

Collusion between an architect and a contractor sufficient to invalidate the former's decision, which by contract was final as to the value of work performed or materials furnished for the defendant, is not shewn by the fact that the architect did not make any measurements, nor obtain any account of quantities, and that he acquiesced in the amount the plaintiff claimed therefor.

Hamilton v. Vineberg (No. 2), 4 D.L.R. 827, 3 O.W.N. 1337, 22 O.W.R. 238.

D. Negligence; skill; care.

(§ XII—935)—Verdict of jury—Action of negligence—Nonsuit—New trial.

At a trial before a jury in an action for alleged negligence, it is the duty of the judge to decide whether there is evidence from which the jury might reasonably and properly conclude that there was negligence. If there was not such evidence he should withdraw the case from the jury and direct a nonsuit, though it could not be said that there was no evidence at all.

Harris v. Winnipeg Electric R. Co., 29 Man. L.R. 306, [1919] 1 W.W.R. 453.

(§ XII D—936)—Master and servant — Violation of statutory duty by employer — Contributory negligence.

Notwithstanding a prima facie right of action in favour of an employee is established by shewing his employer's violation of a statutory duty, such prima facie right disappears where a finding of the contributory negligence of the employee is properly reached.

Pressick v. Cordova Mines, 11 D.L.R. 452, 4 O.W.N. 1334, 24 O.W.R. 631. [Affirmed, 14 D.L.R. 514.]

Negligence imperiling employee.

When a workman in the course of his employment is placed in a position of peril by the negligence of his master in the construction of the works and ways of the master, and an accident happens to the workman in the way that might be expected from the negligence found, a jury can infer that the negligence caused the accident.

Fairweather v. Canadian General Electric Co., 10 D.L.R. 130, 28 O.L.R. 300, 24 O.W.R. 164.

(§ XII D—943)—Personal injuries from electricity — Specific act of negligence.

It is not enough for the plaintiff suing in tort for personal injuries alleged to be due to negligence to shew that he has sustained an injury under circumstances which may lead to a suspicion or even a fair inference that there may have been negligence on the part of the defendant; he is bound to give evidence of some specific act of negligence on the part of the defendant whom he seeks to make liable. [Lovegrove v. London Brighton & S.C.R. Co., 16 C.B.N.S. 669, applied.]

Till v. Town of Oakville, 21 D.L.R. 113, 33 O.L.R. 120, varying 20 D.L.R. 635, 31 O.L.R. 405.

(§ XII D—944) — Contributory negligence — Animals on railway.

The onus of proof upon the defendant company, under subss. 4, 5 of s. 294 of the Railway Act, 1906, to establish negligence against the plaintiff in an action for injury to animals on the track, is not displaced by a finding that the plaintiff was careless in looking after the injured animals, if the nature of such carelessness was not determined.

Maves v. G.T.P.R. Co., 14 D.L.R. 70, 6 A.L.R. 396, 25 W.L.R. 503, 5 W.W.R. 212.

Contributory negligence of child.

In an action to recover for the alleged negligence of a railway company in running over a child eight and one-half years of age, where the testimony of the witnesses fails to bring out a material point as to the question of the contributory negligence of the child (e.g., why he failed to observe the approach of the car) it is error on the part of the Trial Judge not to permit the child to testify either under oath or in the form of unsworn evidence received under the provisions of s. 39 of the Evidence Act, R.S. M. 1902, c. 57, where it appears that the child understood the duty of telling the truth.

Schwartz v. Winnipeg Electric R. Co., 12 D.L.R. 56, 23 Man. L.R. 483, 24 W.L.R. 5, 4 W.W.R. 319.

E. As to property rights.

(§ XII E—945)—Prescriptive way.

A claim of continuous user relied upon as creating a prescriptive right-of-way across lands is negatived by evidence that a fence had stood at one end of the way for 12 years, over which persons using the way had to climb, although a gate was maintained, at the opposite end of the way for the convenience of the owner of the servient estate, that the way varied greatly as to locality, and that in several different years before the bringing of action, the servient

owner had plowed the locus in quo and sowed grain thereon.

Petipas v. Myette, 11 D.L.R. 483, 47 N.S.R. 270, 12 E.L.R. 537.

AGREEMENT TO GIVE PROPERTY TO CHILD — CONSIDERATION — CORROBORATION.

Proof of facts sufficient to make out an express agreement must be given in order to support a claim made by a son against the estate of his deceased father that the son was to have the property upon which the father resided as an inducement for the son to remain at home and work the property. Under the provisions of the Evidence Act, R.S.N.S. 1900, c. 163, s. 34, such agreement, assuming it to have been made, can not be enforced in the absence of corroborative evidence. The statement of the widow to the effect that "my husband told me often that he wanted W. to have the place" is not corroboration of the character required.

Re George Fraser, 52 N.S.R. 122.

PROPERTY OF WIFE — TRUST — CORROBORATION.

Where a husband seeks to have it declared that his deceased wife held certain lands as a trustee for him, his own evidence requires corroboration.

Bachand v. Bachand, 33 W.L.R. 743, 9 W.W.R. 1184.

F. MATTERS AS TO PERSONS; RELATION OF PARTIES.

Relationship of parent and illegitimate child, see Master and Servant, V—340.

(§ XII F—950)—EXISTENCE OF ABSENTEE.

Mere information respecting an absentee furnished by third parties, the nature, origin and correctness of which cannot be established, does not prove the existence of the absentee.

Picard v. Picard, 48 Que. S.C. 316.

(§ XII F—951)—INSOLVENCY.

It cannot be inferred from a letter sent by a company to a creditor, which merely stated "have representative meet the creditors" at a specified time and place, that it was a meeting of the company's creditors called for the purpose of compounding with them, where the proceedings at the meeting are not disclosed, by means of which a special application or significance of the words of the letter might appear.

Re Manitoba Commission Co., 2 D.L.R. 1, 22 Man. L.R. 268, 21 W.L.R. 86, 2 W.W.R. 276.

(§ XII F—952)—MARRIAGE.

In a prosecution for bigamy the clergyman who performed the marriage ceremony is competent to testify that he was an ordained minister and, therefore, authorized to perform such ceremony.

The King v. Bleiler, 1 D.L.R. 878, 19 Can. Cr. Cas. 249, 4 A.L.R. 320, 21 W.L.R. 18, 2 W.W.R. 5.

In an action for criminal conversation, where evidence of a marriage can be proved by an eyewitness, in a jurisdiction wherein the old common-law disqualification has been removed and a party to the action is, therefore, a competent witness, the husband himself is one of the best eyewitnesses and is competent.

Zdrahal v. Shatney, 7 D.L.R. 554, 20 Can. Cr. Cas. 205, 22 Man. L.R. 521, 22 W.L.R. 336, 3 W.W.R. 239.

An extract from the baptismal register of a Presbyterian church in a foreign country certifying to the baptism of a child born of the marriage of two persons and signed by the officiating pastor is proof that such clergyman who signed such certificate is the custodian of records and authorized to issue certificates of baptism; and such proof coupled with that of an uninterrupted public status of legitimacy is abundant evidence of filiation. A certificate under the seal of the clerk of a County Court of a foreign state certifying to the fact that two persons were joined in matrimony is prima facie proof of marriage in accordance with the law of such foreign state, and it is immaterial whether or not that marriage is considered ecclesiastically valid in view of the rules and regulations of a religious body to which either of them may have belonged.

Chiniquy v. Bégin, 7 D.L.R. 65, 41 Que. S.C. 261.

BIGAMY — PROOF OF SECOND MARRIAGE.

A conviction of bigamy cannot be sustained where the sole proof of the second marriage is an admission of the accused that he and the woman "went through a form of marriage."

R. v. Hutchins, 12 D.L.R. 648, 22 Can. Cr. Cas. 27, 6 S.L.R. 220, 25 W.L.R. 1, 4 W.W.R. 1240.

(§ XII F—954)—INTENT.

Evidence is inadmissible to shew that the intention of a testator, as expressed after making a will, was to thereby benefit one child to a greater extent than other members of his family.

Re Boehmer, 3 D.L.R. 857, 3 O.W.N. 1353, 22 O.W.R. 287.

HUSBAND AND WIFE — DIVORCE RULES — EVIDENCE OF ADULTERY BY AFFIDAVIT.

Leave may be given upon due cause shewn for petitioner to adduce evidence of adultery by affidavit under s. 21 of the Divorce Rules of British Columbia.

Macdonald v. Macdonald, 18 D.L.R. 308, 6 W.W.R. 244.

G. TO OVERCOME WRITING, PLEADING, OR JUDICIAL PROCEEDINGS.

(§ XII G—955)—PARTNERSHIP AGREEMENT.

The nonexistence of a partnership in fact may be proved by oral testimony in the face of a partnership agreement, and where a Trial Judge accepts as true the harmonious evidence of the only two persons who knew the facts and who signed the partnership agreement and thereupon found the written agreement to have been in fact mere-

ly contingent although on its face absolute, the finding will not on appeal be disturbed.

Kelly v. Sayle, 15 D.L.R. 776, 19 B.C.R. 93, 26 W.L.R. 877.

H. Documents generally; official acts or record; demonstrative evidence.

(§ XII H—960)—Book entries.

Credit entries in a bank account are only prima facie evidence, which may be contradicted by parol evidence to shew that the amount credited was not in fact received.

Pyke v. Sovereign Bank, 24 D.L.R. 720, 24 Que. K.B. 198, affirming 14 D.L.R. 383.

Action upon mortgage brought by executors of deceased mortgagee — Release of part of mortgage moneys asserted by mortgagor defendant — Fabrication of documents in corroboration of story of defendant — Perjury in face of court — Effect as to weight of other evidence — Disbelief of Trial Judge — Effect of corroborative testimony given on foreign commission.

Toronto General Trusts Corp. v. Peterson, 13 O.W.N. 224.

(§ XII H—961)—Canadian Naval charts.

Canadian Naval charts, issued under the orders of the Minister of the Naval Service of Canada, are accepted as prima facie evidence to the same extent as Imperial Admiralty Charts.

The King v. The "Despatch;" The Border Line Transportation Co. v. McDougal, 28 D.L.R. 42, 22 B.C.R. 496, 16 Can. Ex. 319, 34 W.L.R. 123, 10 W.W.R. 230.

(§ XII H—964) — Authenticity of entries by captain of ship — Weather conditions.

Evidence from the log of a ship, although authentic as respects those matters which the captain is obliged by law to enter in it, has no evidentiary force for other matters added, such as atmospheric and meteorological variations indicating bad weather and tempests.

Dechêne v. C.P.R. Co., 47 Que. S.C. 431.

I. Contracts.

(§ XII I—965)—In an action for the recovery of a physician's bill for services, where the nature and duration of the services are in issue, and where the physician testifies in detail supporting the claim, and the other testimony is conflicting and unsatisfactory, the evidence of the physician should be given credence, under subs. 7 of art. C.C. (Que.) 2260.

Reader v. Calumet Metals Co., 6 D.L.R. 496, 10 Rev. de Jur. 346.

Documents — Proof by attesting witness—Necessity.

A document to the validity of which an attesting witness is necessary must be proved by his evidence unless his absence is satisfactorily accounted for.

Nichols and Shepard Co. v. Skedanuk, 11 D.L.R. 199, 6 A.L.R. 368, 4 W.W.R. 587. [Reversed on another point, 13 D.L.R. 892, 6 A.L.R. 368 at 380.]

Corroboration — Donatio causa mortis.

In order to properly establish a gift causa mortis the evidence of the donee must be sufficiently "corroborated by other material evidence," as required by the Evidence Act, R.S.N.S. 1900, s. 25, c. 63.

McGuire v. McGuire, 33 D.L.R. 103, 50 N.S.R. 477.

Money lent — Promotion of company — Evidence.

Jackson v. Pearson, 4 O.W.N. 456, 23 O.W.R. 526.

(§ XII I—969) — Written or printed terms—Weight of.

A written clause of a contract is entitled to have greater effect attributed to it than a clause in a printed portion of the agreement pertaining to the same subject.

Mann v. St. Croix Paper Co., 5 D.L.R. 596, 41 N.B.R. 199, 11 E.L.R. 81.

K. Miscellaneous civil cases.

(§ XII K—978)—Infringement of trademark — Trap witness — Confusion.

A person sent as a "trap witness" to purchase an article of a certain brand claimed to be imitated, and who knew the distinctive character of the various brands, does not establish confusion as an element of proof in an action for injunction for the infringement of a trademark.

Ogden v. Can. Expansion Bolt Co., 22 D.L.R. 813, 33 O.L.R. 589.

(§ XII K—979)—Insurance matters.

An inference of the cause of an injury may be drawn by the court from statements made by the injured person as to his symptoms immediately after the injury; courts like individuals habitually act upon a balance of probabilities. [Evans and Co. v. Astley, [1911] A.C. 674, followed.]

Youlden v. London Guarantee & Accident Co., 4 D.L.R. 721, 26 O.L.R. 75, 21 O.W.R. 674. [Affirmed, 12 D.L.R. 433, 28 O.L.R. 161.]

In the absence of evidence of the value of insured property it is impossible to say that the failure of the applicant to disclose that the property was incumbered was a nondisclosure of a material circumstance of which the insurer should have been informed. Testimony of the president of an insurance company to the effect that in his opinion, the board of directors would not have passed an application for insurance had the existence of an incumbrance on the insured property been known, is inadmissible to shew that the company was prejudiced by the nondisclosure of such fact, since such testimony did not tend to shew that the board of directors would have taken a similar view.

Patterson v. Oxford Farmers Mutual Fire Ins. Co., 7 D.L.R. 369, 4 O.W.N. 140, 23 O.W.R. 122.

(§ XII K—983)—Libel or slander.

In an action for slander the witnesses must be able to swear to the exact words of the defendant, and not merely to the substance or effect of them. [Decision of Supreme Court of Alberta affirmed on appeal without opinion.]

Wickens v. McConkey, 7 D.L.R. 602.

L. Criminal cases.

See Criminal Law, II A—44.

(§ XII L—985)—Corroboration of accomplice — Detective — Offence under Liquor License Act — Place of offence — Liquor License Act (Sask. Statutes 1913, c. 64).

Amsden v. Rogers, 30 D.L.R. 534, 26 Can. Cr. Cas. 389, 9 S.L.R. 323, 34 W.L.R. 1174, 10 W.W.R. 1337.

Reasonable doubt.

In a criminal prosecution the guilt of the accused must be established beyond reasonable doubt.

R. v. Shortall, 28 Can. Cr. Cas. 98, 12 O.W.N. 94.

Liquor Act—Possession—Carrier.

No alteration in the general rules of evidence or in the principle that the plaintiff must prove his case to the extent required by law is effected by the Liquor Act. Evidence by an official of an express company that he delivered parcels "said to contain liquor" to the defendant, cannot be evidence of possession of liquor by the defendant.

R. v. Scott, 11 A.L.R. 163, 28 Can. Cr. Cas. 102, [1917] 2 W.W.R. 317.

Previous offence.

A defect or invalidity in respect to the punishment awarded on a conviction cannot affect the validity of the adjudication as conclusive evidence between the prosecution and the accused on a subsequent proceeding that a previous offence had been committed.

R. ex rel. Nutt v. Tansley, [1917] 3 W.W.R. 70, affirming 38 D.L.R. 339, 28 Can. Cr. Cas. 280, [1917] 2 W.W.R. 1025.

(§ XII L—986)—Confession.

A court should weigh all the circumstances which precede and surround a confession, in order that it may decide as to its accuracy, the observation of the rules in such cases provided, and its validity or invalidity.

R. v. Cummings, 5 D.L.R. 86.

While the matter of a confession in a criminal case should go as a whole to the jury, it is within the province of the jury to accept a part of it and discredit other parts.

R. v. Farduto, 10 D.L.R. 669, 19 Rev. Leg. 165.

Statement of child—Threat.

On an indictment for an indecent assault on a girl of 7 years of age, the answers given by the girl to questions put to her by her mother immediately on her return home after the assault, are properly admitted in corroboration of the girl's testimony. The mother's promise not to punish her if she told the whole truth is not an inducement to make the statement depriving it of being spontaneous.

Shorten v. The King, 42 D.L.R. 591, 57 Can. S.C.R. 118, [1918] 3 W.W.R. 5.

Testimony of stool pigeons.

Whatever the opinion of the court may be as to the use of stool pigeons in securing convictions there is nothing to prevent a conviction being based on their evidence. The character of witnesses is a matter touching only the credibility of their testimony.

R. ex rel. Tiderington v. Rose, 14 A.L.R. 118, [1918] 3 W.W.R. 950.

(§ XII L—987)—Reasonable doubt.

While neither the character, reputation or extent of one's business, constitutes a reason why he should not be convicted of a criminal offence, or punished if guilty, yet they all have weight in considering the probability of the truth of the charge, and a bearing upon the question whether there was reasonable evidence of guilt, as well as upon the fact whether he was guilty or innocent.

R. v. Britnell, 4 D.L.R. 56, 20 Can. Cr. Cas. 85, 26 O.L.R. 136, 21 O.W.R. 800.

(§ XII L—989) — Corroboration of accomplice or associate.

While it is the duty of a court to caution the jury as to the danger of convicting the accused on the uncorroborated evidence of an accomplice and to advise them not to convict him on such evidence, yet, notwithstanding such caution and advice, a verdict of guilty rendered by the jury will be legal and cannot be set aside on the ground alone that there was no evidence corroborative of that of the accomplice. [R. v. Stubbs, 25 L.J.M.C. 16; R. v. Frank, 16 Can. Cr. Cas. 237, 21 O.L.R. 196, 16 O.W.R. 50; R. v. McNulty, 17 Can. Cr. Cas. 26, 22 O.L.R. 350, 17 O.W.R. 611; R. v. Reynolds, 15 Can. Cr. Cas. 209, 1 S.L.R. 480, 9 W.L.R. 299, followed; R. v. Warren, 2 Cr. App. R. 194, 73 J.P. 359; R. v. Everest, 2 Cr. App. R. 116, 130, 73 J.P. 269, disapproved.]

R. v. Betchell, 5 D.L.R. 497, 19 Can. Cr. Cas. 423, 4 A.L.R. 402, 21 W.L.R. 665, 2 W.W.R. 624.

"Spotter" evidence — Disorderly house.

Pretended negotiations by persons in the pay of the police made merely for the purpose of getting evidence against the accused woman and with no intent of returning at the time appointed by her for purposes of prostitution will not support a charge against her of keeping a common bawdy-house.

R. v. Sands (No. 2), 28 D.L.R. 375, 25 Can. Cr. Cas. 120, 25 Man. L.R. 690, 9 W.W.R. 496. [See 25 Can. Cr. Cas. 116.]

Evidence of accomplice—Manslaughter.

Defendant was indicted and tried on a charge of having caused the death of one S., and was convicted of manslaughter. There was no evidence to shew that the accused was one of the persons present and

participating in the affair which led to the death of S., with the exception of that given by two persons which were in company with the accused and participating with him in carrying out a common intention, and who, therefore, were accomplices within the meaning of Cr. Code, s. 69 (2). Held, that the case was one in which the Trial Judge should have warned the jury of the danger of convicting on the evidence given, and that, as he had failed to do so, the conviction must be quashed.

The King v. Morrison, 38 D.L.R. 568, 20 Can. Cr. Cas. 6, 51 N.S.R. 253.

(§ XII L—990)—Theft.

The denial by a railway conductor of the receipt of a cash fare from a passenger, for which he did not account to the railway company, indicates a purpose to fraudulently convert it, sufficient to deprive him, on a trial for theft under s. 355 of the Cr. Code, of the defence that he might have accounted for it at some other time and place than on the occasion when he made returns to the company for the trip on which he received it. A prima facie case of theft under s. 355 is established by the fact that a railway conductor failed to account, as his duty required, to a railway company for cash received from a passenger in payment of fare, which he denied receiving.

R. v. Martin, 4 D.L.R. 650, 19 Can. Cr. Cas. 376, 4 A.L.R. 329, 21 W.L.R. 658, 2 W.W.R. 602.

Criminal law — Murder — Evidence — Dying declaration.

R. v. Giovanzzi, 16 O.W.N. 291.

(§ XII L—993)—Corroboration — Indecent assault — Time of complaint — Eliciting statement by questioning child.

Evidence of statements made by a child as to an indecent assault made upon her are not necessarily involuntary and inadmissible in corroboration of her testimony because she was led to make the statement only by questions put by her natural guardian and then only after the lapse of ten days from the alleged offence, if there was in the questions no suggestion as to the person to be blamed.

R. v. McGivney, 15 D.L.R. 550, 19 B.C.R. 22, 22 Can. Cr. Cas. 222, 5 W.W.R. 1181.

(§ XII L—995)—Extraditable offences.

The evidence to warrant a committal for extradition need not be such as to justify a conviction at the trial. A prima facie case only need be made.

United States v. Webber, 5 D.L.R. 863, 20 Can. Cr. Cas. 1, 11 E.L.R. 379.

Evidence of reputation — House of ill-fame.

Evidence of the general reputation of a house as being a house of ill-fame is not alone sufficient to convict the person whose residence it is of keeping a common bawdy-house without proof that the people who go there are of ill-fame or that prostitution is there carried on. [State v. Anderson, 72 Atl. Rep. 648, distinguished.]

R. v. Sands (No. 2), 28 D.L.R. 375, 25 Can. Cr. Cas. 120, 25 Man. L.R. 690, 9 W.W. R. 496.

Disorderly house.

Evidence as to a general reputation of the house is admissible upon a charge of keeping a disorderly house.

The King v. Demetrio (No. 1), 20 Can. Cr. Cas. 316.

(§ XII L—999)—Seduction.

A finding that a woman under the age of 21 years had sexual intercourse with the prisoner on a number of occasions in the year 1910, he being then over the age of 21 years, negatives a charge of seduction under promise of marriage based upon a similar act in the year 1911 alleged to have been induced by a promise of marriage. [R. v. Romans, 13 Can. Cr. Cas. 68, distinguished; R. v. Longheed, 8 Can. Cr. Cas. 184, at p. 187, approved.]

The King v. Comeau, 5 D.L.R. 250, 19 Can. Cr. Cas. 350, 46 N.S.R. 450, 11 E.L.R. 37, 104.

Death from contact with train — Absence of eye witness — No warning at crossing — Reasonable inferences — Balance of probabilities.

G.T.R. Co. v. Griffith, 45 Can. S.C.R. 380.

Corroboration of claim against decedent's estate.

Re Montgomery; Lumbers v. Montgomery, 20 Man. L.R. 444, 17 W.L.R. 77.

Conviction — Refusal to state case — Appeal — Supplementing case for Crown by testimony given on behalf of defence.

R. v. Girvin, 3 A.L.R. 387, 18 W.L.R. 482.

Onus of proof — Varying statements of plaintiff as to nature of accident.

Durocher v. Kinsella, 40 Que. S.C. 459.

Claim of seaman to share in profits of sealing — Oral agreement — Evidence — Corroboration—Documents.

Hansen v. The "Thomas F. Bayard," 16 W.L.R. 527.

XIII. Admissibility under pleadings; variance.

See Trial; Pleading.

Memorandum to refresh memory, from pleadings, see Witnesses, II A—32.

(§ XIII A—1000)—The admissibility of evidence is a question of right; its force or its weight is a question of fact given over for the decision of the court of the jury. The only facts admissible in evidence are those set out in the pleadings. Evidence allowed under protest of facts after the action or the dispute and not invoked by a supplementary defence or by a supplementary response, should be rejected as illegal.

Gagnon v. Caron, 56 Que. S.C. 416.

(§ XIII A—1003)—Admissibility under pleadings — Negligence — Railways.

In an action to recover the value of a horse claimed to have been killed by an engine of the defendants' railway, the fact that the statement of claim alleges an absence of cattle-guards at the railway crossing on plaintiff's land, does not preclude the plaintiff from relying on evidence adduced at the trial as to a defective fence, where the statement of claim does not specifically allege that the loss of the horse was due to the absence of cattle-guards, but alleges in general terms that it was due to the negligence of the defendants.

Stitt v. C.N.R. Co., 10 D.L.R. 545, 23 Man. L.R. 43, 15 Can. Ry. Cas. 333, 23 W.L.R. 641, 3 W.W.R. 1116.

(§ XIII A—1004)—Under plea of payment—Note.

In an action for money due under a contract, evidence of payment by the defendant of a note which he had indorsed for the plaintiff, in connection with the same transaction, is admissible under the plea of payment.

Leblanc v. Lutz, 34 D.L.R. 454, 44 N.B.R. 398.

Under plea of accord and satisfaction.

Where the trial is common to two cases, and in one of them a plea of previous settlement, accord and satisfaction, is set forth, but not in the other, the evidence sustaining the plea is relevant to both cases, and the plea may be maintained in the second action on a general denial.

Zelicovitch v. Shapiro, 26 Que. K.B. 286.

B. Variance.

(§ XIII B—1010)—Application to introduce newly discovered — Necessity of showing reasonable diligence — Application refused.

The rule with respect to applications for leave to introduce newly discovered evidence must be such as reasonable diligence on the part of the party offering it could not have secured before the trial or hearing; the newly discovered evidence must be material, going to the merits of the case, and not merely cumulative or corrobative, and must be such as ought to be decisive of the case. An affidavit offered in support of the application is fatal to it where it is shown that the manner of obtaining further evidence had been under consideration and was abandoned, and was only taken up again after an adverse decision had been given.

Re Cochrane's Trusts, 52 N.S.R. 271.

EXAMINATION.

See Discovery; Witnesses; Depositions.

EXCHANGES.

Of lands, see Vendor and Purchaser.

Bills of exchange, see Bills and Notes; Cheques; Banks.

By-laws — Against member associating himself with company that violates rules of exchange — Validity — Reasonableness — Unjust discrimination — Public policy.

Since a by-law of the Winnipeg Grain Exchange, forbidding members entering the employ of any joint stock company that grants rebates from the commission established by the association for the sale of grain, is general in its nature, and prevents the taking of employment in any capacity with a nonconforming company, it is unreasonable and therefore void, where there is no reason for such a broad application of the restriction; and, the by-law is void in toto, since such unreasonable portion cannot be separated from the reasonable portion of the by-law forbidding any member of the exchange becoming a shareholder or officer of a nonconforming company. That a by-law does not extend to and prohibit entering the employment of partnerships which make such rebates, does not render the by-law void for inequality in its application; since it applies equally to all members of the association. Such a by-law is not contrary to public policy because of its imposing a restraint on the liberty of the members of the exchange in the disposal of their services as they may see fit; since such regulation is reasonable and necessary for the protection of the interests of the association. The manager of a joint stock company is within such by-law. The fact that the by-law would have an ex post facto effect on a contract of employment entered into before a person became a member of the exchange, and prior to the adoption of the by-law, does not render the by-law void, where such person on becoming a member of the association agreed as a continuing condition precedent to membership, to be governed by the constitution, by-laws and rules and regulations of the exchange and all amendments thereto.

Matheson v. Kelly (Winnipeg Grain Exchange Case), 15 D.L.R. 359, 26 W.L.R. 475, 5 W.W.R. 950.

Warranty—Latent defect.

A party to an exchange of property cannot be held liable for a latent defect, which he has denied at the time of the exchange, but against which he expressly refused to guarantee.

Gauthier v. Gagnon, 53 Que. S.C. 224.

EXCHEQUER COURT.

See Courts; Appeal, II A—35; Crown; Expropriation.

EXECUTION.

I. In general.
II. Supplementary proceedings.

Annotations.

What property exempt from: 16 D.L.R. 6; 17 D.L.R. 829.

When superseded by assignment for creditors: 14 D.L.R. 503.

Stay of proceedings in actions by alien enemies: 23 D.L.R. 375.

As affected by moratorium: 22 D.L.R. 805.

I. In general.

Exemption from, see Exemptions.

Rights and liabilities growing out of levy, see Levy and Seizure, III A—40.

Against property claimed by wife, judgment against husband, see Interpleader, I—10.

Title to property acquired by husband managing wife's property, see Husband and Wife, II D—70.

Against shares of stock, charging order, receiver, see Judgment, III B—205.

Against property on Indian reserve, see Indians, II—5.

Against partner, see Partnership, III—10; Interpleader, I—10.

Of declaration of right, see Judgment, VI—255.

Of personal judgment in action for specific performance and vendor's lien, see Vendor and Purchaser, II—30.

Stay of execution pending appeal, see Appeal, XI—720.

(§ I—1)—Judgment against estate — Execution issued against lands — Lands sold to plaintiff — Legal and equitable title.

Execution will issue and will bind the lands of an estate, when judgment against the estate has been allowed by the executors of the same to go by default. Such execution will be prior to the claim of any person obtaining his title through the executors; provided that the execution is filed before transfer to the claimant takes place. Land Titles Act, R.S. Sask. 1909, c. 41, s. 118, amended by 3 Geo. V. 1912-1913, c. 16. [Morgan v. De Geer, 36 D.L.R. 161, followed.]

Ruttle v. Rowe, 50 D.L.R. 346, [1919] 3 W.W.R. 1120, affirming 46 D.L.R. 164.

In the absence of the legal representative of a company appointed to receive legal notice addressed to the company from the bailiwick of a sheriff where the company had an office, the notice required to be served on the company that such of its shares as were owned by an execution debtor were to be seized on execution cannot be served on any other person unless he has been authorized to receive the same on behalf of the representative.

Malouf v. Labad, 2 D.L.R. 226, 3 O.W.N. 796, 21 O.W.R. 575.

In general.

It was a sufficient seizure of the buildings, which were locked up and unoccupied and in a small remote settlement, for the bailiff to put up notices that he had seized them and of the date of sale without leaving any person in possession or attempting to remove them. As a solicitor, at the time of the sale, on the defendant's behalf, gave the bailiff a written notice forbidding the sale, the debtor must be presumed to have known of the day finally fixed for the sale, and the fact that no notices of the several adjournments of the sale had been given by the bailiff became unimportant. Although the price obtained at the sale was only a small percentage of the cost of the buildings, the circumstances were such that it did not appear that any greater price could have been got, and the bailiff was not bound to apply to the judge under s. 185 (now 192) for power to sell, as that section is only for the bailiff's protection and his not acting under it should not affect the validity of the sale. If a seizure is made while the writ of execution is in force, a sale may be made after the writ has expired.

Dixon v. Mackay, 21 Man. L.R. 762.

Form of writ.

Re Writ of Execution, [1917] 1 W.W.R. 303.

(§ I—2)—Right to — Against whom.

Where, in an action against a mining company for wages, two executions have been issued, the one to the sheriff of the county where the head office of the company is situated, and the other to the sheriff of the county where the company carries on its business, the costs of the latter execution will be disallowed in a subsequent action against the directors of the company for the wages, under s. 94 of the Ontario Companies Act, 7 Edw. VII., c. 34 (see now 2 Geo. V., c. 31, s. 96).

Pukulski v. Jardine, 5 D.L.R. 242, 26 O.L.R. 323, 21 O.W.R. 893.

Interest in partnership—Procedure.

The only method by which an execution creditor can reach a partnership interest upon a judgment against one of the partners only, is, not by virtue of his execution, but by a charging order founded on his judgment under the Partnership Ordinance 1899 c. 7, s. 25 (see Con. Ord. N.W.T. 1911, c. 94), without the necessity for an execution being issued thereon.

Re Reid: Ex parte Imperial Canadian Trust Co., 29 D.L.R. 349, 10 A.L.R. 40, 34 W.L.R. 1003, 10 W.W.R. 1110.

Land Titles Act—Foreclosure — Judgment for balance.

The provision of s. 62 of Land Titles Act, Alta. (amended 1916), that no execution shall issue after final judgment until encumbered or mortgaged land has been sold, or foreclosure ordered, and that levy shall then be made only for the balance due, does not apply to a judgment in favour of the vendor for balance of the purchase price, after the purchaser has forfeited all interest in the land by permitting the foreclosure of a mortgage assumed as part of the purchase price.

Werth v. Davie, 32 D.L.R. 384, 11 A.L.R. 46, [1917] 1 W.W.R. 615.

Quebec practice.

A writ of execution issued by the prothonotary of one of the Quebec courts, on his

own authority and without an order from one of said courts, is illegal and irregular.

Clarkson v. Marcoux Succession, 14 Que. P.R. 309.

SAISIE-ARRÊT AFTER JUDGMENT—CREDIT ON WRIT OF EXECUTION.

A creditor being able to use at the same time the different modes of execution given to him by law can take a saisie-arrêt after judgment and a writ of execution simultaneously. If the saisie-arrêt is first instituted and the tiers-saisies having declared that they were indebted at the time of the seizure and that they will owe more later on, the seizing creditor is only obliged to give credit upon a writ of execution for the sums received by him up to that time, but not for the debts seized which will only become exigible in the future.

Dessaules v. De Sambor, 47 Que. S.C. 306.

ORDER OF DOMINION BOARD OF RAILWAY COMMISSIONERS DIRECTING PAYMENT BY RAILWAY COMPANY OF SUM OF MONEY TO MUNICIPAL CORPORATION — ORDER MADE RULE OF SUPREME COURT OF ONTARIO—ISSUE OF WRIT OF FI. FA. THEREON—JURISDICTION OF BOARD—FINALITY OF ORDER—RAILWAY ACT, R.S.C. 1906, C. 37, SS. 46, 56 (9) — PROCEDURE — SALE OF PUBLIC UTILITY UNDER EXECUTION.

Re Toronto and Toronto R. Co., 42 O.L.R. 82.

LEAVE TO ISSUE—JUDGMENT.

Wigmore v. Greer, 8 O.W.N. 250.

SUBROGATION—COSTS—ATTORNEY'S FEES.

A creditor subrogated to the rights of his debtor may, in his own name, cause a writ of execution to be issued against the debtor of his transferor: but he cannot include in the writ the costs of the attorneys distraining.

Prudential Trust Co. v. International Construction Co., 24 Rev. Leg. 257.

REGISTRATION OF WRIT — LAND TITLES ACT —TRANSFER OF WRIT — RENEWAL — COPY OF JUDGMENT.

In order to bind the lands of an execution debtor the copy of a writ of execution or of a renewal of such writ, delivered to the registrar of land titles must be delivered to him by the sheriff and the words in s. 149 (1) of the Land Titles Act "if a copy of such writ has not already been delivered or transmitted to the registrar" must be read as if they were followed by the words "by the sheriff or other duly qualified officer," the words "other duly qualified officer" meaning "other duly qualified officer acting in the capacity of sheriff." On the transfer of a writ of execution to a new district, unless a certified copy of the judgment is filed therein, the writ of execution when renewed can bind only the lands in the bailiwick of the sheriff by whom it was delivered to the registrar.

Re Land Titles Act, [1918] 3 W.W.R. 90.

(§ I—3)—AGAINST WHAT.

The provision of art. 2134, R.S.Q. 1909, that the license is only transferable with the consent of the Minister, is a provision in favour of the Minister alone, and lack of his consent to transfer cannot be set up by the debtor in opposition to the seizure. [Durand v. Quebec, 13 Que. S.C. 308, approved.] The rights conferred by a mining license issued under the Quebec Mining Law, art. 2098 and following, R.S.Q. 1909, are immovable property and may be seized under a writ of execution.

Rouleau v. International Asbestos Co., 5 D.L.R. 434, 18 Rev. de Jur. 295.

HOW LIMITED — WHEN RATABLY APPORTIONED.

The Alberta Creditors Relief Act does not pretend to give a creditor who issues a fi. fa. any right to levy, or to direct the sheriff to levy, for any more than his claim, but merely provides that when the amount is levied the sheriff may retain it so as to give other creditors a right to share, that is, the levy is to be for the benefit of the creditors under certain specified conditions. When a sheriff levies goods under a writ of execution against a debtor he is not prima facie entitled to seize more than enough to satisfy the writ, and any exception to this rule is rather apparent than real, e.g., where there is but a single chattel greatly exceeding the execution debt, in which case the excess seizure is by necessity merely.

Stacey Lumber Co. v. Cazier, 17 D.L.R. 823, 8 A.L.R. 59, 28 W.L.R. 945, 6 W.W.R. 1382.

PRIOR MORTGAGEE OR PLEDGEE — SALE OF COMPANY'S SHARES.

Where the sheriff seizes under an execution certain stock of a mining company, and certain other claimants set up alleged prior assignments of such stock securing loans, the right of the execution creditor to press an immediate sale of the stock, at the risk of sacrificing it, should be determined upon all the circumstances of the case, keeping in view the rights of the prior assignee in the event of their establishing in due course the validity of their alleged assignments; and in this respect the determining principle of the English practice, as to the forced sale of property under an execution where there is a prior mortgage against it, ought to be the guide in Ontario so far as consistent.

Pallandt v. Flynn, 9 D.L.R. 460, 4 O.W.N. 821, 837, 24 O.W.R. 95, 254.

PROPERTY SUBJECT TO.

An execution attaches to land only to the extent of the debtor's interest therein, existing when the execution was filed in the land titles office, as against a mortgage upon the land.

Rogers Lumber Co. v. Smith, 11 D.L.R. 172, 6 S.L.R. 187, 23 W.L.R. 946, 4 W.W.R. 441.

SEIZURE OF CHEQUE TO DEBTOR.

A cheque by the sheriff in favour of the judgment debtor for the latter's remuneration on his employment by the sheriff to feed and care for certain horses seized as to which an interpleader was pending is not subject, while still in the sheriff's hands before delivery to the debtor payee, to seizure by the sheriff under Alberta practice r. 359, considered without reference to the new r. 615. [Courtoy v. Vincent, 21 L.J. Ch. 291, 51 E.R. 626, followed.]

Gregoire v. Markham Co., 22 D.L.R. 747, 7 W.W.R. 1096, 30 W.L.R. 427.

EQUITABLE INTEREST — MONEY IN BANK IN ANOTHER'S NAME — TRUST — ONUS.

Under r. 614 (Alta.), the sheriff may seize and sell any equitable interest in any goods and chattels. Money standing in a person's name in a bank, without any indication that it is a trust account, prima facie belongs to that person, and the burden of shewing that it is in reality a trust account rests upon the party making the assertion; unless that burden is met to the satisfaction of the Trial Court, an execution creditor cannot successfully seize under the writ an automobile claimed to have been purchased with the funds of the execution debtor standing in the name of another person.

McLean v. Merchants Bank, 27 D.L.R. 156, 9 A.L.R. 471, 34 W.L.R. 81, 10 W.W.R. 191.

SALE OF LANDS BY SHERIFF — SUBJECT TO MORTGAGE — GROWING CROPS — RIGHT TO SAME BY PURCHASER.

Growing crops upon lands sold by the sheriff under execution, which are not cut at the time of completion and confirmation of the sale, pass with the lands to the purchaser.

Nichol v. Pedlar & Johnston, 50 D.L.R. 47, [1919] 3 W.W.R. 712.

MORTGAGEE IN FEE — NOT IN POSSESSION — ESTATE OF, NOT SEIZABLE IN POSSESSION.

The estate of a mortgagee in fee who has not taken possession of the land is not seizable in execution on a judgment against him.

Ciceri v. Burino, 45 D.L.R. 340.

EQUITABLE EXECUTION — RECEIVER — COMPANY SHARES—CHARGING ORDER.

Equitable execution is not a means of reaching assets which in their nature are not exigible, but is a means of freeing exigible assets from impediments in the way of execution and reaching them when such impediments prevent them being taken in ordinary course; it cannot be made the means of reaching assets not in the province. [Holmes v. Millage, [1893] 1 Q.B. 551, followed.] A receiver by way of equitable execution cannot sell; his function is to receive and hold; and sale cannot be indirectly brought about by declaring the judgment to form a charge upon the property sought to be reached, unless the case can be brought within the provisions of s. 140 etc. of the Judicature Act, R.S.O. 1914, c. 56 (dealing with charging orders). [Flegg v. Prentis, [1892] 2 Ch. 428, followed.] The plaintiff, having recovered in Ontario a judgment against the defendant for payment of a sum of money, obtained, ex parte, an order for a receiver, with a view to reaching shares in a company of which the defendant was said to be the beneficial owner. The company was a Dominion company, having a place of business in Ontario, but its head office was in Quebec:—Held, that the order should be regarded as an interim one, and a motion should be made (on notice to the defendant) to continue it. Quære, whether the company was "a company in Ontario," within s. 140 of the Judicature Act. Semble, if a charging order were made, the receivership would be ancillary to it. The plaintiff's remedy was to make a seizure under the Execution Act, R.S.O. 1914, c. 80, s. 12, etc. A motion by the plaintiff to amend the order for a receiver, by adding a direction to sell, was refused.

Herold v. Budding, 37 O.L.R. 605.

AGAINST LAND—AMOUNT—QUESTIONING.

Land of a judgment debtor cannot be taken under execution for a sum less than $40. Another creditor may take an opposition à fin d'annuler against a writ of execution thus issued.

Michaud v. Destrempes, 49 Que. S.C. 486.

PROPERTY IN COMMON—RELIEF.

Co-owners of undivided moveable property, seized from one of them, in execution of a judgment against him, have, to exempt their undivided shares from seizure and sale, the recourse to the opposition "à fin de distraire."

Davie v. Caron, 25 Que. K.B. 415, 49 Que. S.C. 2.

COMPANY SHARES — DATE OF SEIZURE — PRIOR UNRECORDED TRANSFER.

An execution creditor can take under his writ only the true interest of his execution debtor, and this applies to cut down the apparent to the true title in the case of shares of the capital stock of a company—the true interest alone is exigible. [Morton v. Cowan, 25 O.R. 529, followed.] The rights of a bona fide purchaser without notice of the writ being in the sheriff's hands for execution are protected by s. 10 of the Execution Act, R.S.O. 1914, c. 80. Shares being by statute made exigible, the writ binds them only from the time of actual or constructive seizure. [Hatch v. Rowland, 5 P.R. 223, approved.] Although a transfer of shares must be duly recorded to complete the title, any unrecorded dealing is not void, but is valid as "exhibiting the rights of the parties thereto towards each other": Companies Act, R.S.O. 1914, c. 178, s. 60. An unrecorded transfer of a share, prior in time to the seizure by the sheriff of the share under a writ against the transferor, which was in the sheriff's hands before the transfer, was held to give

the transferee the title to the share, as against the purchaser at the sheriff's sale under the execution, subject to proof of the bona fides of the transfer.

Re Montgomery and Wrights, 38 O.L.R. 335.

LAND—EFFECT OF TRANSFER.

The transferor of land having parted with all his interest therein, the land is therefore not subject to a writ of execution. [Union Bank v. Lumsden Milling Co., 23 D.L.R. 460, 8 S.L.R. 263, distinguished.]

Schlosser v. Colonial Investment Co., 9 S.L.R. 382.

GOODS NOT WHOLLY PAID FOR — MERGER OF DEBT IN CHATTEL MORTGAGE.

Goods which have not been wholly paid for, and the balance of the price of which has been secured by a chattel mortgage subsequently released, a cheque being taken for the balance then due, are not exigible by the sheriff under a judgment in an action upon the cheque. This is due to the fact that the simple contract debt became merged in the higher security effected by the chattel mortgage, and upon the release thereof no right to sue for the price of the goods as such revived.

Shenkman v. Steinbook, 7 W.W.R. 1051.

SEIZING CHEQUE PAYABLE TO DEBTOR.

A company assigned to a bank all debts, choses-in-action, etc., due or to become due to it, as collateral security for its existing and future indebtedness to the bank. Thereafter the company directed its agent to sell off the stock in his hands; pay himself his own salary and forward the balance to it. A sale for cash was effected by the agent, but the purchaser's cheque payable to the company was seized by the sheriff upon execution issued by the bank against it. Held, that at the time of the seizure the cheque was the property of the agent.

Bank of B.N.A. v. Wildren, 9 W.W.R. 997.

(§ I—4)—TIME OF ISSUING.

An execution lodged in the land titles office and duly renewed, will, by virtue of r. 346 of the Judicature Ordinance of 1898 (Sask.) (now r. 466 of the Sask. Rules of Court), have effect, and priority from the time of the original filing thereof.

Re Price, 4 D.L.R. 407, 5 S.L.R. 318, 21 W.L.R. 299, 2 W.W.R. 394.

EXECUTION DE BONIS OR DE TERRIS — TIME OF ISSUING—DESCRIPTION.

A writ of execution de bonis must be exhausted before the issue of a writ de terris unless a procès-verbal de carence is produced, and it is not necessary in a petition for annulment of a decree on this ground to give a description of the movables. [Rose v. Savoie-Guay, 7 D.L.R. 205, followed.]

James Bay & E.R. Co. v. Bernard, 23 D.L.R. 701, 24 Que. K.B. 6.

(§ I—6)—JUDGMENT—VARIATION—AMENDMENT—IRREGULARITY—RULES 219, 497, 502.

Sask. Land & Homestead Co. v. Moore, 9 O.W.N. 5, 343.

(§ I—7)—RETURN OF SHERIFF—COLLATERAL ATTACK—COMPANY AND DIRECTORS.

A labourer with an unsatisfied judgment for wages against a company in Alberta is entitled to invoke the personal remedy against the directors which the Companies Ordinance, 1901, c. 61, provides, on obtaining bona fide the sheriff's return than the execution against the company cannot be realized upon; and the propriety of the sheriff's return can be questioned in a subsequent action against the directors only for fraud or collusion.

Guenard v. Coe, 16 D.L.R. 513, 7 A.L.R. 245, 5 W.W.R. 1044, 26 W.L.R. 626. [Reversed on another point, 17 D.L.R. 47.]

JUDGMENT DECLARING RIGHT TO FUTURE PAYMENTS—ABSENCE OF DIRECTION FOR PAYMENT OR RECOVERY—RULE 533—EXECUTION ISSUED UPON JUDGMENT AFTER ACCRUAL OF FUTURE PAYMENTS—IRREGULARITY—JUDGMENT ENTERED IN CONFORMITY WITH JUDGMENT PRONOUNCED—SUPPLEMENTARY ORDER FOR PAYMENT OF SUMS ACCRUED DUE—RULE 523—SCOPE OF—EFFECT OF SUBSEQUENT LEGISLATION AND AMENDMENTS OF CONSTITUTION OF FRIENDLY SOCIETY UPON RIGHTS PASSED INTO JUDGMENT—ONTARIO INSURANCE ACT, R.S.O. 1897, C. 203, S. 163, SUBSS. 5 AND 6 (3 ED. VII., C. 15, S. 8)—5 GEO. V., C. 30—7 GEO. V., C. 99.

The distinction between a judgment that "the defendant do pay to the plaintiff" a sum of money and a judgment that "the plaintiff do recover against the defendant" a sum of money, is obsolete, and a judgment in either form is sufficient to found an execution (R. 553); but before any execution can issue there must be a judgment directing either payment or recovery of money. [Hoffman v. McCloy, 38 O.L.R. distinguished.] A retrospective statute will not interfere with rights that have already passed into judgment unless the intention of the legislature so to interfere is clearly expressed: it cannot be inferred from a mere expression of a general retroactive effect. [Re Merchants Life Association, 2 O.L.R. 682, followed.] The Act, 5 Geo. V., c. 30, which amends the Ontario Insurance Act, R.S.O. 1914, c. 183, by providing that no person who has become or may become entitled to an instalment under the earlier Act shall be entitled to receive payment unless he continues to be a member of the society and pays his dues, though retrospective in its operation, did not relieve the society from liability. The plaintiff was not bound to resort for payment to a fund of $200,000 provided by the society, which had been distributed. By a

judgment in appeal, 33 O.L.R. 116, at p. 119, it was decided that the plaintiff was entitled to be paid without discrimination as to the source of payment. Amendments to the constitution of the society, made in 1915, though intended to be retroactive and to include the plaintiff, could not interfere with the judgment; and there was nothing in an act respecting the society, passed in 1917, 7 Geo. V., c. 99, which indicated any intention to interfere with the judgment.

Grainger v. Order of Canadian Home Circles, 44 O.L.R. 53.

ERROR IN RETURN—AMENDMENT.

The return by a sheriff to a writ of execution may, in general, be amended even after execution has been executed, and, in some cases, even though application for the amendment be not made by the sheriff himself. In an action against a sheriff for a false return to writs of execution, held that the case was a proper one in which to allow the return to be amended to conform to the facts.

Gault's v. Christopherson, [1918] 3 W.W.R. 898.

(§ 1—8)—SEIZURE BY SHERIFF—LIEN OF EXECUTION CREDITOR.

Where the sheriff seizes, under an execution, certain moneys belonging to the execution debtor, the execution creditor thereby acquires a lien upon the moneys so received, and such lien is protected on the execution debtor subsequently dying insolvent, and the administratrix of his estate is not entitled to delivery up of the moneys so seized for distribution pari passu under s. 52, Trustee Act (Ont.), the saving clause of which section declares, in effect, that the statutory direction for distribution pari passu shall not prejudice "any lien existing in the lifetime of the debtor on any of his real or personal property.

Re Hunter, 8 D.L.R. 102, 4 O.W.N. 451.

In Alberta an execution against lands filed in the Land Titles Office binds all lands of the debtor owned at the time of filing or subsequently acquired by him, while the writ remains in force.

Lee v. Armstrong, 37 D.L.R. 738, 13 A.L.R. 160, [1917] 3 W.W.R. 889.

"LANDS"—MORTGAGE.

The Execution Act (R.S.B.C. 1911, c. 79, s. 27), by virtue of which a judgment, when registered, forms a lien and charge on all the "lands" of the judgment debtor, includes also the interest of a mortgagee; and intending purchasers of the mortgage, also the mortgagor, when making payments, are obliged to search and determine whether any judgments exist against the mortgagee before dealing with him.

Re Land Registry Act; Re Mandeville, et al., 36 D.L.R. 292, 24 B.C.R. 137, [1917] 1 W.W.R. 1522.

PRIORITIES — AGREEMENT OF SALE — LAND TITLES ACT.

The English Judgments Acts (1838 to 1868) and the writ of elegit, if ever applicable to the North-West Territories, are not now in force in Saskatchewan; under a fi. fa. of the lands of an execution debtor, a sheriff may sell and transfer the lands, until registration of the sale, an execution creditor can only sell the property of his debtor subject to the same equities as when the title was in the debtor; when the sheriff's transfer has been registered, all unregistered incumbrances are not protected by the Land Titles Act (R.S.S., c. 41). The Land Titles Act, R.S.S., c. 41, s. 118, as amended by c 16, s. 17, 1912-13, gives a writ of execution which has been filed in the proper Land Titles Office priority as a charge on the lands over prior equitable mortgages, liens, charges or encumbrances not registered or protected by caveat. The interest of the vendor who has not transferred the legal title to his vendee may be seized and sold under a fi. fa., subject to the equities existing against the vendor. An execution creditor cannot by fi. fa. obtain subsequent instalments of purchase money due under a prior agreement of sale: he must proceed by garnishee or equitable execution.

Weidman v. McClary Man. Co., 33 D.L.R. 672, 10 S.L.R. 142, [1917] 2 W.W.R. 210.

EQUITABLE INTEREST.

A vendor's lien for unpaid purchase money upon land the vendor has agreed to sell, but has not transferred, cannot be reached by fi. fa. against the lands of the vendor; some form of equitable execution is necessary for that purpose.

Seay v. Sommerville Hardware Co., 33 D.L.R. 508, 11 A.L.R. 201, [1917] 1 W.W.R. 1497.

SUBSEQUENT LANDS.

In Alberta an execution against lands filed in the Lands Titles Office binds all lands of the debtor owned at the time of filing or subsequently acquired by him while the execution remains in force. [Lee v. Armstrong, 37 D.L.R. 738, followed.]

Robin Hood Mills v. Haimson (Harrison), 40 D.L.R. 328, 14 A.L.R. 196, [1918] 2 W.W.R. 58.

EQUITABLE ESTATES—PURCHASER'S INTEREST IN LAND—CAVEATS.

The filing of a caveat under s. 17, c. 16, of the Land Titles Act (Sask.), on a writ of execution does not bind the unascertained equitable interest of a vendee under an agreement for the sale of lands so as to make it enforceable against the interest in the lands under a transfer subsequently registered.

Foss v. Sterling Loan, 23 D.L.R. 540, 8 S.L.R. 289, 8 W.W.R. 1093, 31 W.L.R. 860, affirming 21 D.L.R. 755.

SUBSEQUENTLY ACQUIRED INTEREST.

An execution will bind not only the interest of the debtor at the time the execution is filed, but any further interest which the debtor may acquire during the continuance in force of the execution.

Rogers Lumber Co. v. Smith, 11 D.L.R.

172, 6 S.L.R. 187, 23 W.L.R. 946, 4 W.W.R. 441.

LIEN AGAINST LANDS—BENEFICIAL INTEREST.

The cancellation of an unregistered transfer of title under the Land Titles Act (Sask.), and the substitution of a transfer by the registered owner to another party at the request of the first purchaser so as to save double registration on the latter's resale of the land, will not revest in the registered owner any exigible interest in the property so as to subject it to an execution against the lands of such beneficial owner filed after he had parted with all beneficial interest therein to the first purchaser.

Mackenzie v. Gray, 17 D.L.R. 769, 7 S. L.R. 115, 28 W.L.R. 322, 6 W.W.R. 914.

CLAIM OF HOMESTEAD EXEMPTION.

The burden of proof and of expense in a claim for a homestead exemption as against an execution lodged in the Land Titles Office against the debtor's lands lies upon the debtor, and when he succeeds only upon proof of extraneous facts as to intermittent actual occupation of the lands and the effect of a cropping agreement with a tenant, he may properly be ordered to pay the execution creditor's costs of an application by originating summons to declare the exemption.

Hart v. Rye, 16 D.L.R. 1, 5 W.W.R. 1280, 27 W.L.R. 9.

LIEN BY REGISTRATION—PRIOR TRANSFER—INCOMPLETENESS OF TRANSACTION.

An execution registered against lands under the Land Titles Act (Alta.), before the registration of a transfer which had in fact been previously made by the debtor, may be ordered to be removed from the certificate of title as not binding the lands, notwithstanding that it was a term of the agreement under which such transfer was made that certain encumbrances should be discharged from certain other lands taken by the debtor in exchange and that such was not done until after the execution had been recorded. [Jellett v. Wilkie, 26 Can. S.C.R. 282, followed.]

Merchants Bank v. Price, 16 D.L.R. 104, 7 A.L.R. 344, 5 W.W.R. 1279, 27 W.L.R. 48.

EQUITABLE INTEREST IN LAND — LIEN FOR UNPAID PURCHASE MONEY.

A mere equitable interest in land cannot, unless authorized by statute, be reached by a common-law fi. fa., and in the absence of legislation giving that right, a vendor's equitable lien for the unpaid purchase money cannot be sold on execution.

Traunweiser v. Johnson, 23 D.L.R. 70, 11 A.L.R. 224, 8 W.W.R. 1028, 31 W.L.R. 712.

EQUITABLE INTERESTS—VENDOR'S LIEN.

A vendor's lien for the balance of the unpaid purchase money is not an interest in the land which can be reached by an execution creditor. [Bank of Montreal v. Condon, 11 Man. L.R. 366, followed.]

Bain v. Pitfield, 28 D.L.R. 206, 26 Man. L.R. 89, 33 W.L.R. 681, 9 W.W.R. 1163.

Under the Land Titles Act, Alta., an unpaid vendor of land has an interest which is subject to execution, and which can be sold or transferred thereunder. [Traunweiser v. Johnson, 23 D.L.R. 70; Merchants Bank v. Price, 16 D.L.R. 104, 7 A.L.R. 344; Bain v. Pitfield, 28 D.L.R. 206; disapproved.]

Adanac Oil Co. v. Stocks, 28 D.L.R. 215, 11 A.L.R. 214, 33 W.L.R. 864, 9 W.W.R. 1521.

STATUTORY LIEN FOR COSTS — RIGHTS OF SHERIFF—CREDITORS' TRUST DEED ACT, S. 14 (2).

Re Vancouver Carriage & Implement Co., 10 W.W.R. 579.

(§ 1—9)—PAYMENT—SATISFACTION—DISCHARGE.

Where, after judgment, the plaintiff placed an execution in the hands of the sheriff and a garnishing order was also issued and the money was realized by the sheriff under the execution, the judgment debtor is not entitled to a discharge of the garnishing order until it has been ascertained whether other creditors, if any, will come in with executions upon which they would be entitled to share pro rata upon the fund in case such other executions were received by the sheriff within the statutory period of three months after the sheriff's notice is given under ss. 24, 25 of the Executions Act, R.S.M. 1902, c. 58.

Kolega v. Genser, 6 D.L.R. 188, 22 Man. L.R. 518, 22 W.L.R. 197, 3 W.W.R. 22.

PROPERTY BID IN AT SALE—WITHDRAWAL FOR INSUFFICIENT BIDS.

Where an execution creditor instructs the sheriff not to sell certain of the property advertised for sale under the execution at a price less than a specified sum, such instruction is equivalent to an offer by the creditor to buy in at the sum so specified and is pro tanto a satisfaction of his claim, where it appears that under those instructions the sheriff actually withdrew the property from sale for insufficient bids and turned it over to the creditor who, by taking it into custody and subsequently offering to sell all and actually selling part, assumed ownership in relation thereto.

Corsbie v. J. I. Case Threshing Machine Co., 14 D.L.R. 55, 6 S.L.R. 118, 25 W.L.R. 466, 5 W.W.R. 153.

SATISFACTION AND DISCHARGE—RESALE OF PROPERTY BY UNPAID VENDOR—COSTS.

A resale by a vendor of a saw mill and machinery after the recovery of a judgment for the unpaid purchase instalments due thereon, will preclude the vendor, except as to the costs, from proceeding with the enforcement of the judgment even for the balance of the claim after crediting the amount realized upon the resale. [Cam-

cron v. Bradbury, 9 Gr. 67; Gibbons v. Cozens, 29 O.R. 356, followed.]

McPherson v. U.S. Fidelity & Guaranty Co., 24 D.L.R. 77, 33 O.L.R. 524, affirming 9 D.L.R. 726.

SATISFACTION FOUNDED ON WRONGFUL LEVY —SETTING ASIDE.

The court has power to summarily set aside a sheriff's return of satisfaction on an execution founded upon a wrongful seizure and sale of property belonging to third persons, the value of which the execution creditor and the sheriff were compelled to repay to the claimants thereof in an action for conversion.

Bell v. Hart, 25 D.L.R. 389, 49 N.S.R. 348.

CREDITOR'S RELIEF ACT—ASSIGNMENT FOR CREDITORS.

The fund realized at a sheriff's sale under execution and an entry thereof made by the sheriff in the form required by subs. 1 of s. 6 of the Creditors' Relief Act, R.S.O. 1914, c. 81, prior to the making by the debtor of a general assignment for the benefit of creditors, is distributable ratably among all execution creditors and those who placed their executions after the making of the assignment but within the period fixed by subs. 2 of s. 6 of the Act. [Breithaupt v. Marr, 20 A.R. (Ont.) 689; Roach v. McLachlan, 19 A.R. (Ont.) 496, distinguished.]

Re Harrison, 26 D.L.R. 157, 35 O.L.R. 45.

PAYMENT—PRIORITIES—EQUITABLE ASSIGNMENT—COSTS.

Shaw v. Canada Motor Car Co., 28 D.L.R. 782, 34 W.L.R. 831, 10 W.W.R. 1086.

PARTNERSHIP—RECEIVER—PRIORITY.

Execution against the property of a partnership which were in the sheriff's hands prior to the date of the appointment of a receiver of the partnership assets, held not entitled to be satisfied in full in priority to executions, which did not reach the sheriff until after that date. [Roach v. McLachlan, 19 A.R. (Ont.) 496; Edmonton Mortgage Co. v. Gross, 3 A.L.R. 500, distinguished.]

Re Natural Gas, Light & Appliance Co., 13 A.L.R. 358, [1918] 1 W.W.R. 769.

RECEIVER — EQUITABLE EXECUTION — ORDER TO RECEIVE JUDGMENT DEBTOR'S SHARE OF ESTATE OF DECEASED PERSON —DEFENDANT EXECUTOR AND RESIDUARY LEGATEE UNDER WILL—APPLICATION FOR ORDER FOR PAYMENT OVER — UNNECESSARY ORDER—TRANSFER TO ANOTHER CREDITOR OF BENEFITS UNDER WILL.

Douglas v. Smart, 15 O.W.N. 141.

SHERIFF'S SALE—PAYMENT—OWNERSHIP.

The adjudication in a sheriff's sale being perfect only on payment of the price, the accrued income and revenue, before such payment belongs to the seized party.

St. Catherine St. Realty Co. v. Loranger, 19 Que. P.R. 307.

DISTRIBUTION—CONTESTATION.

The contestation of a petition for folle enchère by a purchaser is equivalent to a contestation of the judgment for distribution, and such contestation, after the homologation of the judgment for distribution, can only be made successfully if it is authorized by the court or a judge and accompanied by an affidavit.

Friedman v. Marchand, 18 Que. P.R. 140.

(§ I—10)—LIFE OF JUDGMENT—FURTHER RENEWALS.

Where execution was issued upon a judgment within six years after the date of the judgment, and the execution was kept alive by renewal for more than twenty years, further renewals may be obtained under r. 571, C.R. Ont. 1913; The Limitations Act, 10 Edw. VII. (Ont.), c. 34, s. 49, is no bar to such renewal. [Re Woodall, 8 O.L.R. 288; McDonald v. Grundy, 8 O.L.R. 113; Price v. Wade, 14 P.R. (Ont.) 351, distinguished.]

Poucher v. Wilkins, 21 D.L.R. 444, 33 O.L.R. 125. [Distinguished in Doel v. Kerr, 25 D.L.R. 577, 34 O.L.R. 251.]

FORECLOSURE—STAY OF EXECUTION.

Section 62 of the Land Titles Act (Alta.), as amended in 1916, providing that no execution shall issue upon a personal judgment obtained under power of sale or covenant contained in a mortgage or agreement for the sale of lands, until sale or foreclosure of the lands is first ordered and had, does not apply with respect to an execution upon lands situate outside the province. The court has inherent power, however, in cases where it appears just and convenient, to order a stay of any execution proceedings.

Lineham v. McNeill, 31 D.L.R. 768, 10 A.L.R. 272, [1917] 1 W.W.R. 400.

ABATEMENT BY DEATH—REVIVOR—RENEWAL.

A writ of fi. fa. does not become inoperative, nor a sale thereunder invalid, because the executors of the execution creditor have not revived the action, nor obtained leave to renew the writ.

Mahaffy v. Bastedo, 33 D.L.R. 228, 38 O.L.R. 192.

STAY—PARTITION.

The coproprietor of an undivided interest in the bare ownership of immovable property, which has been seized under a writ of execution, may ask, by an opposition, for a stay of proceedings for the purpose of giving him time to prosecute an action in partition and licitation. He may demand partition and licitation against the usufructuary thereof and his coproprietors.

Martel v. Vigneault, 50 Que. S.C. 363.

There is no power to renew writs of execution which have expired. Even if there is any such power its exercise is purely discretionary.

Labrosse v. Choquette, [1917] 1 W.W.R. 491.

RENEWAL OF WRIT—LOCAL MASTER—REGISTRAR.

The Local Master in Chambers of a Judicial District has power to grant an order for the extension of time for filing a renewal writ of execution in a Land Titles Office. Where the question arises whether the rights of third persons have been affected by such an order the fact should not be determined by the registrar but on a reference to the court or "judge" issuing the order.

Re Renewal of Execution, [1917] 1 W.W.R. 113.

RENEWAL OF WRIT—LAND TITLES ACT.

A renewal of a writ of execution can only operate as a renewal if it be received by the registrar within 2 years of the receipt of the original writ, or is accompanied by a judge's order under s. 192 of the Land Titles Act; but if it be received by the registrar after such 2 years and without a judge's order permitting it to operate as a renewal, it operates in the Land Titles Office as an independent writ.

Re Land Titles Act; Re Beaver Lumber Co. [1917] 3 W.W.R. 760.

(§ I—11)—SETTING ASIDE EXECUTION ISSUED ON SATISFIED JUDGMENT.

An execution will be set aside when issued on a judgment rendered on an award made under the Workmen's Compensation Act, R.S.B.C. 1911, c. 244, after the settlement of the claimant's demand by an employer.

B.C. Copper Co. v. McKittrick, 13 D.L.R. 111, 18 B.C.R. 129, 24 W.L.R. 939.

VOLUNTEERS AND RESERVISTS ACT—ENACTMENT—JUDGMENT AS NEW DEBT.

Although a debt becomes merged in a judgment, the original debt is not detracted from, and therefore a proceeding to enforce a judgment for a debt, obtained on the day the Volunteers and Reservists Relief Act (Alta. 1916, c. 6) came into force, is a proceeding for the enforcement of a debt due before the passing of the Act; and the defendant, a volunteer, is entitled to the protection afforded by the Act.

International Harvester Co. v. Hogan, 32 D.L.R. 455, 10 A.L.R. 400, [1917] 1 W.W.R. 857, reversing 30 D.L.R. 790.

STAY — SUMMARY JUDGMENT — TRIAL OF CROSS CLAIMS—SET-OFF—TERMS.

Cox Coal Co. v. Rose Coal Co., 11 O.W.N. 22.

On an application for the stay of execution, leave will not be granted to file further material. [Barker v. Lavery, 14 Q.B.D. 769, followed.]

Williamson v. Grigor, 6 D.L.R. 53, 17 B.C.R. 334, 22 W.L.R. 29, 2 W.W.R. 898.

STAY—PENDENCY OF APPEAL—SUPPLEMENTAL MATERIAL—TERMS.

Barnum v. Beckwith, 7 D.L.R. 931, 17 B.C.R. 496, 22 W.L.R. 761, 3 W.W.R. 441.

STAY OF—APPEAL PENDING—DISMISSAL OF ACTION—STAY OPERATIVE AS TO COSTS ONLY.

Ottawa Separate School Trustees v. Ottawa, 25 D.L.R. 783, 9 O.W.N. 324.

STAY OF PENDING APPEAL—WHEN GRANTED—AFFIDAVIT SHEWING INABILITY TO REPAY.

Atkinson v. C.P.R. Co., 25 D.L.R. 769, 8 S.L.R. 179, 9 W.W.R. 110, 32 W.L.R. 246.

SETTING ASIDE — PURCHASE-MONEY JUDGMENT—NOTE—LAND TITLES ACT, ALTA., S. 62, 1916, c. 3, s. 15.

Quebec Bank v. Mah Wah, 34 D.L.R. 191, 10 A.L.R. 417, [1917] 1 W.W.R. 1509. [See 33 D.L.R. 133, 10 A.L.R. 413.]

ORDER OF DOMINION BOARD OF RAILWAY COMMISSIONERS DIRECTING PAYMENT BY RAILWAY COMPANY OF SUM REPRESENTING PART OF COST OF BRIDGE—DOMINION RAILWAY ACT, R.S.C. 1906, c. 37, ss. 46, 56—ORDER MADE RULE OF SUPREME COURT—WRIT OF FI. FA. THEREON—MOTION TO STAY EXECUTION—JURISDICTION.

Re Toronto and Toronto R. Co., 43 D.L.R. 739, 42 O.L.R. 82, 23 Can. Ry. Cas. 218. [See 42 O.L.R. 413.]

STAY — OPPOSITION — INTERVENTION — PARTIES—HEIRS.

Where a judgment is executed on behalf of a plaintiff who has died since its rendition, and one of the defendants asks, by way of opposition, that the proceedings be suspended until the plaintiff's heirs have continued the suit, so that he may object by way of opposition to the irregularity of the seizure and the partial extinction of the debt, the plaintiff's heirs will be entitled to intervene in the case to contest the opposition. A proceeding by way of intervention is the only regular mode inasmuch as judgment having been rendered there can be no continuance of suit.

Deuscher v. Cohen, 19 Que. P.R. 329.

COSTS — EXECUTION FOR — STAY — JURISDICTION.

The Supreme Court of Canada gave judgment for the plaintiff for damages for deceit, ordered a reference as to the amount thereof with a direction that there should be a set-off of the amount due from the plaintiff to the defendant under a contract, and gave judgment unconditionally in favour of the plaintiff for costs. Held, that a Judge of the Supreme Court of British Columbia had no jurisdiction to order a stay of execution for the costs, pending the result of the reference.

Barron v. Kelley, [1918] 3 W.W.R. 466. [See 41 D.L.R. 590, 56 Can. S.C.R. 455, [1918] 2 W.W.R. 131.]

STAY PENDING APPEAL—WORKMEN'S COMPENSATION—ALTERNATIVE REMEDIES.

On the trial of this action, which was for damages at common law for alleged injury sustained, the jury awarded the plaintiff substantial damages, and judgment was entered accordingly. The defendant's counsel

thereupon moved for a stay of execution pending an appeal to the court en banc. The evidence shewed that in the event of the appeal being successful it would be impossible for the defendant to recover from the plaintiff any money which in the meantime the plaintiff might obtain under his judgment:—Held, that although sufficient grounds were shewn for a stay of execution in the ordinary case, yet as it appeared that the plaintiff would be entitled to substantial compensation under the Workmen's Compensation Act, and as the plaintiff's counsel had announced his intention to ask such compensation in the event of the defendant's appeal being allowed, a partial stay only should be granted, and a stay was accordingly ordered for the amount of the judgment less the sum of $1,200 ordered to be paid into court within ten days, and costs.
Schell v. Regina, 8 S.L.R. 24.

STAY—COUNTY COURT ACT.

When a plaintiff has recovered judgment in the County Court, a judge has power, under s. 113 of the County Courts Act, to suspend execution when the defendant has a judgment against the plaintiff in the Supreme Court for a larger amount.
Butterfield v. Jackson, 23 B.C.R. 489, [1917] 2 W.W.R. 362.

STAY—OPPOSITION TO SEIZURE ON IMMOVABLES DISMISSED ON MOTION—CHARTER OF THE CITY OF ST. JOHN, QUEBEC—53 VICT. C. 71, SS. 512 TO 516, REGULATING CHATTEL ATTACHMENTS AND 532, 533, 534 CONCERNING SEIZURE OF IMMOVABLES — C.P. OLD SS. 581, 651, AMENDED BY NEW SS. 645, 721.
Saint John v. Decelles, 18 Rev. de Jur. 524.

STAY OF PROCEEDINGS — RULE 523 — RAILWAY—DESTRUCTION OF TIMBER—ACTION FOR DAMAGES — STATUTORY LIMITATION OF AMOUNT RECOVERABLE — TRIAL — FINDINGS OF JURY—JUDGMENT—ISSUE DIRECTED—NEGLIGENCE—ORDER STAYING EXECUTION PENDING TRIAL OF ISSUE.
Fawcett v. C.P.R. Co., 6 O.W.N. 634.

JUDGMENT FOR RECOVERY OF PURCHASE MONEY OF LAND — PROCEEDING UNDER EXECUTION AFTER COMING INTO FORCE OF MORTGAGORS AND PURCHASERS RELIEF ACT, 1915 — NECESSITY FOR LEAVE OF JUDGE UNDER S. 2—STAY OF EXECUTION FOR LIMITED PERIOD—TERMS.
McMurtry v. Bullen, 8 O.W.N. 401.

(§ I—12)—PRECIPE.

The fact that the præcipe for a writ of execution for costs is signed by the attorney is a tacit consent to the execution itself being taken out in the client's name.
Flantz v. Wills, 14 Que. P.R. 256.

(§ I—13)—CHANGE OF GUARDIAN—QUEBEC C.P. 621.

The party distrained, being absent at the time of the seizure, may have the guardian who was officially appointed replaced by a person of his choice, even by one of his own servants. Solvency is not absolutely required from a guardian, provided he is beyond any reproach.
Frost & Wood Co. v. Thibeaudeau, 16 Que. P.R. 281.

II. Supplementary proceedings.

Priorities, Creditors Relief Act, Trustee Act, see Executors and Administrators, IV A—85.

Crops, assignment, priorities, see Fraudulent Conveyance, III—10.

(§ II—15)—Where a conveyance absolute in form is held merely as a mortgage security, the equity of redemption may be sold under execution upon a judgment against the person entitled to the equity, although the right of redemption is not disclosed upon the documents of title or upon the registry records. [McCabe v. Thompson, 6 Grant 175; Fitzgibbon v. Duggan, 11 Grant 188, distinguished.]

Wallace v. Smart, 1 D.L.R. 70, 22 Man. L.R. 68, 19 W.L.R. 787.

Ontario Con. R. 903, does not extend to authorize the summary examination of the transferee of a judgment debtor, although the transferee is within the jurisdiction if the sole property transferred was land outside of the jurisdiction and consequently not exigible under execution in Ontario.
Crucible Steel Co. v. Ffolkes, 1 D.L.R. 381, 3 O.W.N. 750, 21 O.W.R. 302.

CREDITOR'S RELIEF ACT (ALTA.)—CONTESTATION OF CREDITOR'S CERTIFICATE.

Only the debtor can take advantage of mere irregularities in the proceedings taken by a creditor to rank upon the debtor's estate by the deposit with the sheriff of a court certificate obtained under s. 9 of the Creditors' Relief Act, 1910, Alta., c. 4; another creditor has the statutory right to contest the collocation upon the ground that the debt claimed is not really and in good faith due from the debtor, but, by analogy to the rule of collateral attack of a judgment, he cannot take advantage of another creditor's irregularities in procedure against the same debtor in matters which are directory only and not conditions precedent to the granting of a certificate of claim.
Campbell v. Medicine Hat Grocery Co., 16 D.L.R. 471, 7 A.L.R. 365, 6 W.W.R. 561, 27 W.L.R. 748.

SALE UNDER SHERIFF'S WARRANT — JUDGMENT CREDITORS—PRUDENCE OF REASONABLE BUSINESS MAN IN CONDUCTING —NEGLIGENCE—DAMAGES.

The party having the conduct of the sale of goods and chattels, seized under the sheriff's warrant, issued at the request of the judgment creditors, is liable in damages, unless he exercises the judgment and discretion which a reasonably careful business man would exercise under the circumstances. Accepting the suggestion of the sheriff and one possible bidder that the goods be sold en

bloc, without any further inquiry, is not such prudence.

Fair et al. v. Wardstrom, 47 D.L.R. 16, [1919] 2 W.W.R. 555.

DISTRIBUTION UNDER CREDITORS' RELIEF ACT —RIGHTS UNDER EXECUTION SUBSEQUENT TO ASSIGNMENT FOR CREDITORS.

Section 6 of the Creditors' Relief Act, R.S.O. 1914, c. 81, applies to a case where the sheriff has realized money by sale of a debtor's property under execution, and made the entry required by subs. 1, before the making by the debtor of a general assignment for the benefit of creditors; and the fund realized is divisible among all creditors coming in within the time limited by subs. 2, although after the assignment. [Roach v. McLachlan, 19 A.R. (Ont.) 496, and Breithaupt v. Marr, 20 A.R. (Ont.) 689, distinguished, on the ground that the sheriff's sale in the first case was after the chattel mortgage and in the second case after the assignment, and so the sheriff was selling the goods of the chattel mortgagee and of the assignee.]

Re Harrison, 26 D.L.R. 157, 35 O.L.R. 45.

DISTRIBUTION — INTERPLEADER — ASSIGNEE FOR CREDITORS.

To enable claimants to share in money realized by the bailiff of the County Court under an execution they must observe the requirements of s. 207 of the County Courts Act. Where money has been paid by an assignee to the bailiff under a bond given for payment of the plaintiff's claim in the event of interpleader proceedings being decided against him, and which has not been realized under a writ of execution, it cannot be reached by an execution creditor, and the bailiff should not advertise it for distribution under ss. 204, 205. [Davies Brewing Co. v. Smith, 10 P.R. (Ont.) 627; Roach v. McLachlan, 19 A.R. (Ont.) 496, followed.]

Draper v. Jackson, 26 D.L.R. 319, 26 Man. L.R. 165, 33 W.L.R. 796, 10 W.W.R. 78.

CROPS—PRIORITIES—INTERPLEADER.

A sale of a share or interest in a growing crop, in good faith and for valuable consideration, is valid as against an execution creditor, even though the execution was in the sheriff's hands prior to the sale, this fact being unknown to the purchaser.

Forrester v. Elves, 32 D.L.R. 670, 11 A.L.R. 134, [1917] 1 W.W.R. 1384.

PROCEEDINGS TO DECLARE DEBTOR OWNER OF PROPERTY—FRAUDULENT CONVEYANCE—FAMILY SETTLEMENT — TRUST — GOOD FAITH.

Harvey v. Mitchell, 30 D.L.R. 478.

DISTRIBUTION — CREDITORS' RELIEF ACT — SHERIFF'S SALE OF LAND—PRIORITIES—COSTS.

Rogers Lumber Yards v. Stuart, 39 D.L.R. 771, [1917] 3 W.W.R. 1090.

CREDITORS' RELIEF ACT—SHERIFF'S SCHEME OF DISTRIBUTION—AMOUNT FOR WHICH EXECUTION CREDITOR ENTITLED TO RANK —CONTESTATION — EVIDENCE — INSOLVENT ESTATE—MONEYS IN HANDS OF TRUSTEE FOR CREDITORS NOT DEALT WITH IN SCHEME OF DISTRIBUTION.

Re Michaud and Larson, 14 O.W.N. 65.

DISTRIBUTION—INSOLVENCY—OPPOSITION.

Articles 672-3, C.C.P., apply to the distribution of moneys realized from the sales of immovables as well as of movables. In an opposition filed to an order of collocation by a creditor, alleging insolvency of the debtor and demanding to be collocated for a dividend, the opposant should demand that the creditors be called in, in conformity with the provisions of art. 673, failing which the court may dismiss without costs the contestation of the opposition, leaving the opposition on the record to be proceeded with according to law.

Cardin v. Vigneault, 52 Que. S.C. 528.

DISTRIBUTION—VALIDITY OF PROCEEDINGS—WHO TO ATTACK.

The report of a scheme of collocation made after the delay mentioned in Art. 794, C.C.P. is legal: And, even if it was not, the illegality could not be invoked by a creditor or by a person having a privilege or claim upon the immovable.

Gadbois v. Denovan, 52 Que. S.C. 81.

INTERPLEADER — CLAIMS FOR RENT AND WAGES — PRIORITIES — STATUTE VIII. ANNE.

In 1910 the plaintiff leased certain lands to the defendants on crop rentals. In October, 1911, certain differences arose, and an agreement was entered into whereby the plaintiff was to receive out of the crop grown on the said lands grain to the value of $6,750, and the amount of certain notes. In November the plaintiff recovered judgment and issued execution against the defendants for $9,016, being the total secured by the last-mentioned agreement. The sheriff made a seizure, and the grain was sold November 29, 1911. The claimants then filed their claims for wages under the Creditors' Relief Act. The plaintiff then disputed their claims, and claimed the entire proceeds as rent. On an interpleader before the Local Master at Moose Jaw, the plaintiff was held entitled to the whole of the money as rent. The claimants appealed to a Judge in Chambers:—Held, that the Statute of 8 Anne, c. 14, does not apply when the landlord is also the execution creditor, the Act only contemplating executions issued by third parties.

Douglas v. Vivian, 7 S.L.R. 80.

MONEY IN COURT — ABSCONDING DEBTOR — CLAIMS OF JUDGMENT CREDITORS — CREDITORS' RELIEF ACT — ABSCONDING DEBTORS ACT—DISTRIBUTION OF FUND BY COURT—REFERENCE—COSTS.

Woodbeck v. Waller, 12 O.W.N. 201.

MONEY IN COURT—MONEY TO CREDIT OF EXECUTION DEBTOR — PAYMENT OUT TO SHERIFF FOR DISTRIBUTION AMONG CREDITORS—CLAIMS BY ASSIGNEES OF DEBTORS — CONSIDERATION — INVALIDITY —COSTS.

Chaplin v. Chaplin, 9 O.W.N. 123.

ABSCONDING DEBTOR—DISTRIBUTION AMONG CREDITORS—PRIORITIES.

Moneys realized under the rules of court relating to absconding debtors and in the hands of a sheriff for distribution, which are not "the proceeds of the property of an absconding debtor," should be distributed among those creditors only whose executions of certificates were in the sheriff's hands within one month from the date of his entry in the execution book.

Re Creditors' Relief Act, 9 W.W.R. 225.

(§ II—16)—COMMITMENT OF DEBTOR—N. S. COLLECTION ACT.

On an examination of a judgment debtor, although it is the normal course for a judgment creditor to have a full explanation in answer to his questions, yet, if as a result of the whole examination one is able to glean the history of what has been done, it would appear to suffice, and a motion to punish the judgment debtor for contempt because his answers are not satisfactory should be denied. Upon a motion by a judgment creditor to commit a debtor for contempt upon the ground that on his examination as a judgment debtor it appears that he had concealed or made away with his property in order to defeat and defraud his creditors, the court should not commit the debtor merely on a reasonable suspicion but must be prepared to find as a fact that the debtor is guilty of the act charged. [Wallis v. Harper, 7 U.C.L.J., (O.S.) 72, distinguished.]

Charlebois v. Martin, 8 D.L.R. 579, 4 O.W.N. 412, 23 O.W.R. 898.

The Nova Scotia Supreme Court, on an appeal by a judgment debtor from the decision of the officer charged with the duty of examining such debtor as to his financial condition, etc., in the proceedings under s. 9, Collection Act, R.S.N.S. 1900, c. 182, has the power, upon the application of the judgment creditor, to make the same adjudication as such officer might have made under s. 27 (e) of the Act aforesaid, providing that, if it appears to such officer that the debtor had made a fraudulent disposition of his property, the officer may commit him to gaol, though the officer stated in his decision that, while a good deal of evidence was given as to the debtor's dealing and transactions as to real and personal property owned by him, he had decided not to make any order under s. 27 (e) aforesaid, on the ground that he was not asked so to do, and the court may exercise such power, though there had been an election before the examining officer by the judgment creditor to proceed under another clause of s. 27 aforesaid, thus making him not strictly entitled to raise the question on the appeal.

Henn v. Smith, 6 D.L.R. 48, 11 E.L.R. 1.

SUPPLEMENTARY PROCEEDINGS — COMMITTAL OF JUDGMENT DEBTOR UNDER THE COLLECTION ACT, R.S.N.S., c. 182—FRAUDULENT DISPOSITION OF PROPERTY.

Canadian Underskirt Co. v. Gorman, 6 D.L.R. 917, 11 E.L.R. 7.

(§ II—20)—On an examination of a judgment debtor, where it does not appear that an execution had issued and had been returned by the sheriff nulla bona, an objection on that ground to the examination is without force, unless it is affirmatively shewn by the debtor that the process of the court has been abused.

Fee v. Tisdale, 8 D.L.R. 524, 4 O.W.N. 373, 23 O.W.R. 489.

DISCOVERY IN AID—GROUNDS—NULLA BONA.

Unless it is affirmatively shewn that an ex parte order for examination in aid of execution was an abuse of the process of the court, the order should not be set aside merely on the ground that the material upon which it was granted does not disclose that execution was issued or that the sheriff had made a return nulla bona or was prepared to do so.

Proby v. Erratt Co., 31 D.L.R. 342, 9 S.L.R. 378, [1917] 1 W.W.R. 161.

JUDGMENT DEBTOR—EXAMINATION OF IN AID OF EXECUTION—KNOWLEDGE OF DEBTOR AS TO ASSETS AND LIABILITY—ORDER TO INFORM HIMSELF—POWER OF COURT.

Badger v. Torosoff, 46 D.L.R. 683, 12 S.L.R. 98, [1919] 1 W.W.R. 919. [See 39 D.L.R. 606.]

MORTGAGE IN DEFAULT—JUDGMENT—LAND NOT REALIZED UPON—EXAMINATION AS JUDGMENT DEBTOR.

A judgment having been obtained on a mortgage in default, an order will not issue for the examination of the defendant as a judgment debtor until the lands mortgaged have been realized upon, and the sum so realized found insufficient to satisfy the judgment. 9 Geo. V., 1919 (Alta.), c. 37, subs. 2.

Latimer v. Day et al., 50 D.L.R. 111, [1919] 3 W.W.R. 618.

JUDGMENT DEBTOR—EXAMINATION OF TRANSFEREES—CON. R. 903—ACTION PENDING TO SET ASIDE TRANSFERS.

Crucible Steel Co. v. Ffolkes, 12 D.L.R. 839, 4 O.W.N. 1591, 24 O.W.R. 983.

EXAMINATION OF OFFICERS OF CORPORATION.

Where an order for the examination of a director of a corporate judgment debtor purports to be made under the provisions of r. 910 (Ont. Con. R. 1897), but contains words indicating that it was intended to make r. 902 applicable also, and the court making the order has said that in its opinion the case fell within r. 902, the examination may be as full and wide as though the

director were being examined as an officer of the company under r. 902.

Powell-Rees v. Anglo-Canadian Mortgage Corp., 8 D.L.R. 995, 4 O.W.N. 352, 23 O.W.R. 456.

Ont. Con. R. 902, providing that the officers of a corporation may be examined under a judgment against the corporation, includes a director and all who have been such officers. [Société Générale de Commerce, etc. v. Farina, [1904] 1 K.B. 794, followed.] One who has been mainly instrumental in obtaining letters patent incorporating a company in Ontario, and has twice been to England in connection with the company's affairs, and has been a director of the company and represented as the Canadian president, and purports and undertakes to act on behalf of the company, and does not deny that he knows all about its property, may be examined under a judgment against the company as an officer thereof, under r. 902.

Powell-Rees v. Anglo-Canadian Mortgage Corp. (No. 3), 5 D.L.R. 818, 26 O.L.R. 490, 22 O.W.R. 529. [Affirmed 8 D.L.R. 994, 4 O.W.N. 219.]

EXAMINATION OF JUDGMENT DEBTOR'S WIFE —FOR DISCOVERY IN AID OF EXECUTION —EX PARTE ORDER SET ASIDE—COSTS —RULES 582, 583.

Re Sovereign Bank; Wallis's Case, 11 O.W.N. 160.

JUDGMENT DEBTOR — MOTION TO COMMIT — FAILURE TO ATTEND FOR EXAMINATION— UNSATISFACTORY ANSWER — RULE 587 — FORUM — COURT OR CHAMBERS — RULE 207 (4)—NOTICE OF MOTION— NECESSITY FOR SETTING OUT ANSWERS COMPLAINED OF — UNDERTAKING TO ATTEND AND ANSWER — COMPLIANCE WITH—DISMISSAL OF MOTION—COSTS.

Thackeray v. Brown, 17 O.W.N. 171.

(§ II—25)—QUEBEC PRACTICE.

All immovables to be sold at sheriff's sale should be described according to the prescriptions of the civil law with indication of their boundaries and of co-terminous lands and of the cadastral name and number. Failure to give these boundaries or the proper cadastral description is a fatal irregularity vitiating the sale. In all execution proceedings the movables of the debtor should be seized and discussed before his immovables are sold, or at least it should be established by a return of nulla bona that there are no movables to seize; and failure so to do is a fatal irregularity of which any interested party may avail himself to have the sale of the immovables annulled.

Savoie-Guay Co. v. Deslauriers; Rose v. Savoie-Guay Co., 7 D.L.R. 205, 21 Que. K.B. 560.

The amendment to art. 891 C.C.P. by 2 Geo. V. (Que.), c. 50, enacting the proceedings to be taken where the judgment debtor's services are not valued in money does not apply to all debtors, but only to insolvents who have made an abandonment of their property for the benefit of their creditors pursuant to the terms of C.C.P. arts. 853 et seq.; nor does such amendment authorize the court to place a valuation upon the services of the judgment debtor performed without salary for his wife carrying on business as a contractor.

Pion v. Fortier, 6 D.L.R. 136, 14 Que. P.R. 74, 42 Que. S.C. 407.

OPPOSITION — PROVISIONAL EXECUTION — SERVICE OF JUDGMENT—ERROR—FIAT—QUE. C.P. 651.

It is not necessary to serve a judgment ordering provisional execution. An error in the title of a fiat for a writ of possession which is entitled "fiat for writ of summons," is not substantial, and does not give right to an opposition.

David v. Lambert, 46 Que. S.C. 384.

SALE—FRAUD.

An opposition à fin de distraire, founded upon a deed of sale of a restaurant, will not be dismissed upon motion, after the examination of the opposant and of two witnesses on the ground that the sale appeared to be tainted with fraud and bad faith. The sale should be contested in the ordinary way by making the vendor a party to the cause.

Chevalier v. Montreal, 50 Que. S.C. 418.

SALE EN BLOC—ACTION PAULIENNE.

It is permissible to attack, by the action paulienne, the sale of a hotel with the movables in it, when the sale is made pursuant to an action for passing title under an agreement for sale, executed and registered at a time when the contesting plaintiff was not yet a creditor. Advantage can be taken of the provisions of arts. 1569, a, b, c, d, C.C. (Que.) respecting sales en bloc, only by persons who are creditors at the time of the sale and not by those who become so only after the sale.

St. Charles & Co. v. Lavigne, 50 Que. S.C. 392.

NOTICE ON A REPORT "DE NON INVENTUS," BY WAY OF AN ENTRY—DEBTOR IN A LOCALITY IN A DISTANT PART OF THE PROVINCE.

A notice of "non inventus" may be filed when it is the most suitable under the circumstances. Here a legal debtor disappeared from the place where he was domiciled, without leaving his address with his creditors and settled in a distant part of the province. An opposition to annul, based on a flaw in the judgment should, in order to be maintained, move for revocation of this judgment. One who pleads on the merits is not concerned with an opposition to annul on account of an irregularity in the notice.

Choiniere v. Menard, 25 Rev. de Jur. 293.

HOMESTEAD LANDS—EXEMPTION FROM SEIZURE—REGISTERED ENCUMBRANCE.

Northwest Thresher v. Fredericks, 44 Can. S.C.R. 318.

INTERPLEADER—SEIZURE OF CROP GROWN ON LAND OF A MARRIED WOMAN—SEIZURE FOR DEBTS OF HUSBAND—FRAUD.
Karst v. Cook, 3 S.L.R. 406.

LAND TITLES ACT—FAILURE OF REGISTRAR TO REGISTER EXECUTION AGAINST LAND.
Sievell v. Haultain, 4 S.L.R. 142, 18 W.L.R. 388.

SEIZURE—DEFAULT OF GUARDIAN—DEMAND FOR IMPRISONMENT.
Mérisse v. Harris, 40 Que. S.C. 252.

CONSERVATION — SALE OF PERISHABLE THINGS.
Parizeau v. Meloche Heirs, 12 Que. P.R. 161.

EXECUTION UPON MOVABLES—OPPOSITIONS TO WITHDRAW — ADVERTISEMENT AND SALE.
Bourgeois v. Bourgeois, 40 Que. S.C. 238.

WRIT FOR ANOTHER BAILIFF.
A bailiff has no right to make a seizure on a writ of execution addressed to another bailiff.
Brittle v. Tammaro, 12 Que. P.R. 416.

SHERIFF'S SALE—INSUFFICIENT SECURITY—REMEDY.
The nullity or illegality of the security given by the purchaser of an immovable at a sheriff's sale should be attacked by direct action and cannot be dealt with by petition for folle enchère.
Ross v. Johnson, 12 Que. P.R. 378.

EXEMPTION — JUDGMENT RECOVERED FOR PRICE OF GOODS SEIZED—PAYMENT OF GOODS BY NOTE—ONE NOTE GIVEN BY TWO PARTIES FOR PURCHASES MADE SEVERALLY.
McBride v. Brooks, 4 S.L.R. 124, 16 W.L.R. 271.

JUDGMENT AND EXECUTIONS — PRIORITY AMONG ENCUMBRANCERS—LAND TITLES ACT—EXPIRATION OF EXECUTION.
Evans v. Postill, 2 A.L.R. 141.

SHERIFF'S SALE OF LAND—RETURN OF GOODS WRIT—EXECUTION—EFFECT OF ON SALE.
Re Shere, 4 S.L.R. 51, 16 W.L.R. 277.

COLLECTION ACT—R.S.N.S. [1900], c. 182—COMMISSIONER—DISCRETION AS TO ORDERING ASSIGNMENT OF PROPERTY.
Brown v. Marshall, 10 E.L.R. 146.

MARRIED WOMAN — JUDGMENT DEBT — COLLECTION ACT (N.S.)—EXAMINATION OF DEBTOR—PROHIBITION.
Adams v. Slaughenwhite, 8 E.L.R. 57.

EXECUTION AGAINST GOODS OF ONE PARTNER —PRIORITY AS BETWEEN VENDOR OF LAND SOLD ON CROP PAYMENTS AND EXECUTION CREDITOR OF PURCHASER.
Smith v. Thiesen, 20 Man. L.R. 120.

SALE OF LAND UNDER MORTGAGE—DISTRIBUTION OF SURPLUS AMONG EXECUTION CREDITORS —PRIORITY — CREDITORS' RELIEF ACT.
Thompson v. Bergland, 3 S.L.R. 470.

ASSIGNMENT FOR BENEFIT OF CREDITORS—MONEY PAID TO SHERIFF BY ASSIGNOR BEFORE ASSIGNMENT—PRIORITY.
[Clarkson v. Severs, 17 O.R. 592, followed.]
Newton v. Foley, 20 Man. L.R. 519.

INTERPLEADER—SEIZING OF CROP—LEASE OF LANDS TO DEBTOR—EXCESSIVE RENT RESERVED—INTENT TO PROTECT LESSEE.
Waterous Engine Works Co. v. Wells, 4 S.L.R. 48, 16 W.L.R. 274.

SALE OF LAND UNDER EXECUTION—ALTERATION IN BOUNDS OF SHERIFF'S JURISDICTION—WRIT RECEIVED BY ONE SHERIFF—SALE BY ANOTHER.
Reliance Loan & Savings Co. v. Goldsmith, 3 A.L.R. 197, 15 W.L.R. 53.

ASSIGNMENT FOR BENEFIT OF PARTICULAR CREDITORS—SEIZURE OF GOODS UNDER EXECUTION—VALIDITY OF ASSIGNMENT.
Canadian Bank of Commerce v. Davidson, 3 S.L.R. 403.

STATUTE EXECUTION—SALE OF LAND UNDER —NOTICE REQUIRED—EXCESSIVE LEVY—INTEREST ON DEBT AFTER MATURITY.
McWade v. McEachren, 9 E.L.R. 145.

COLLECTION ACT, R.S.N.S. 1900, c. 182—INTERPRETATION — COMMITMENT FOR FRAUD.
McCallum v. Bruce, 10 E.L.R. 143.

SEIZURE OF GRAIN—EXEMPTION—CLAIM OF OWNERSHIP—TENANCY—BILL OF SALE.
Roberts v. Gray, 17 W.L.R. 277.

EXEMPTION—CHATTEL USED BY EXECUTION DEBTOR IN HIS TRADE OR PROFESSION—MINING CLAIM—SEIZURE BY FILING WRIT.
McRae v. Frooks; Hanna v. Frooks, 17 W.L.R. 287.

EXECUTIVE.

Power of judiciary over, see Action, I B—5.

EXECUTORS AND ADMINISTRATORS.

I. APPOINTMENT; RESIGNATION; REMOVAL.
II. POWERS AND LIABILITIES; CONDUCT OF ESTATES; ASSETS.
A. Rights, powers and duties.
B. Liabilities.
C. Assets.
III. SUITS AFFECTING ESTATE.
A. On behalf of.
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IV. INDEBTEDNESS; DISTRIBUTION; ACCOUNTING AND SETTLEMENT.
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C. Distribution; accounting; settlement; discharge.
V. CREDITOR'S RIGHTS AGAINST LAND; SALE OF LAND FOR DEBTS.
VI. FOREIGN EXECUTORS AND ADMINISTRATORS.
VII. EXECUTORS DE SON TORT.

Annotations.

Compensation: mode of ascertainment: 3 D.L.R. 168.

Status of alien enemies as: 23 D.L.R. 375.

I. Appointment; resignation; removal.

(§ I—1) — SUBSTITUTED APPOINTMENT — NONACCEPTANCE BY SUBSTITUTE—APPOINTMENT AS EXECUTOR AND TRUSTEE UNDER WILL OF TESTATOR'S WIDOW—CONFIRMATION—ACCEPTANCE OF OFFICE BY PETITIONING FOR AND ACCEPTING LETTERS PROBATE.

Re Harper, 12 O.W.N. 208.

DESCRIPTION—"GUARDIAN OF ESTATE."

The appointment of "testamentary executors" can be made by using other words of the same sense, and the intention of the testator to that effect can be gathered from the whole will; therefore, the nomination of persons as "guardians to my estate," as described in the will cited below, is equivalent to the appointment of the same persons as "testamentary executors."

Ex parte Allison, 51 Que. S.C. 188.

ADMINISTRATOR PENDENTE LITE.

The rules authorizing a court to appoint an administrator pendente lite do not apply where the estate to be represented is the very estate to be administered, or to the case of the plaintiff, who without right or title has commenced an action and then seeks to legalize his unwarranted act by an order of the court. [Fairfield v. Ross, 4 O.L.R. 534, followed.]

Hunter v. Dow, [1917] 3 W.W.R. 132.

(§ I—3)—WHO MAY BE APPOINTED—TRUST COMPANY AS EXECUTOR—SYNDIC.

Under the British Columbia practice letters probate of a will may issue direct to a trust company authorized in that behalf without the intervening appointment of a syndic, but the company must appoint a suitable person to take the executor's oath, and an authenticated copy of the resolution of appointment should be verified by affidavit and filed with the application for the probate.

Re Comer Estate, 16 D.L.R. 850, 20 B.C.R. 432, 5 W.W.R. 1359.

ACTION BY ADMINISTRATOR—PROPER PARTY DID NOT BRING THE ACTION—SURROGATE COURTS ACT, R.S. SASK. 1909, C. 54, S. 77—COSTS.

An administrator, who is not a proper one under the Surrogate Courts Act, R.S.S. 1909, c. 54, s. 77, cannot succeed in an action for compensation. The court cannot assume that the action will succeed on the merits, as the issues, apart from the right to bring the action, were never determined. Costs must be awarded to the defendant. [Forster v. Farquhar, 1 Q.B. 564, distinguished.]

Western Trust Co. v. C.N.R. Co., 49 D.L.R. 668, [1919] 3 W.W.R. 815, varying as to costs, [1919] 3 W.W.R. 612.

ADMINISTRATION ACT, R.S.B.C., 1911, C. 4, S. 12 INVOKED—DISCRETION OF COURT—LIMITED ADMINISTRATION GRANTED.

Re Owen, [1919] 1 W.W.R. 313.

(§ I—4)—RENUNCIATION—APPOINTMENT OF COEXECUTOR BY COURT.

On the renunciation of a coexecutor appointed by the will, the court may, under art. 924 C.C. (Que.) appoint another executor in his place, where the intention of the will negatives control by one executor only; and such power may be exercised at the instance of a creditor of a partnership of which the deceased was a member, where recourse against his estate seems probable, not only because of the ordinary liability as a partner, but because of facts shewing an independent personal responsibility on his part by reason of the manner in which the moneys were obtained from the creditor.

Re Kussner Estate, 15 D.L.R. 14, 20 Rev. de Jur. 128.

ADMINISTRATOR OF NONRESIDENT'S ESTATE—APPOINTMENT — JURISDICTION — ORIGINATING NOTICE.

Under r. 433 a Judge of the Supreme Court has jurisdiction on an application by way of originating notice to appoint the public administrator a trustee to administer a trust under a will of a person domiciled outside Alberta whereby real estate in Alberta is devised.

Re Leonard, 13 A.L.R. 241, [1918] 2 W.W.R. 222.

EXECUTOR AN EXTRA-PROVINCIAL COMPANY NOT LICENSED IN B.C.—POWER OF ATTORNEY TO MANAGER—RIGHT OF MANAGER TO BE APPOINTED ADMINISTRATOR—TRUST COMPANIES REGULATION ACT, R.S.B.C. 1911, C. 43, SS. 12, 14—ADMINISTRATION ACT, R.S.B.C. 1911, C. 4.

Re Henderson, 26 B.C.R. 329, [1918] 3 W.W.R. 890.

ADMINISTRATION OF ESTATE—APPLICATION BY BENEFICIARY FOR ADMINISTRATION ORDER—RULE 612—REFUSAL OF APPLICATION.

Re Foy, 13 O.W.N. 451.

REPLACEMENT OF TESTAMENTARY EXECUTORS.

Although before the coming into force of the Civil Code of Quebec the replacement of testamentary executors could not be left to the judges, art. 924 of the Code, which allowed such replacement, applies to wills made before the Code. If the testator has expressed a desire that his testamentary executors be replaced judicially it may be so done.

Masson v. Bastien, 19 Que. P.R. 462.

SURROGATE COURT PRACTICE—GRANT OF ADMINISTRATION TO NEXT OF KIN, PASSING OVER WIDOWS—PROOF AS TO COMMITTAL OF WIDOW ON CRIMINAL CHARGE—DISCRETION OF COURT AS TO PROPER PARTY TO ADMINISTER—ABSOLUTE OR LIMITED GRANT OF ADMINISTRATION—RIGHTS OF ADMINISTRATION AS BETWEEN WIDOW AND NEXT OF KIN—RULE, ON PETITION FOR ADMINISTRATION, AS TO REQUIRING

RENUNCIATION OR CITATION OF PARTY HAVING PRIOR RIGHT TO ADMINISTER—RIGHT OF OFFICIAL ADMINISTRATOR AS AGAINST NEXT OF KIN—RIGHT OF ATTORNEY FOR WIDOW—SERVICE OF NOTICE ON OFFICIAL GUARDIAN—WIDOW'S RIGHT TO RETRACT RENUNCIATION.

The proper method of proving committal of an accused person is by a certificate under the hand and seal of the clerk of the court exhibiting the records thereof. On petition for grant of administration strict proof is not necessarily required to show committal on a criminal charge of one whose relation to deceased would ordinarily give such one the first right to administration, the allegation in the petition to that effect, verified under oath, being sufficient to enable the court to exercise its discretion as to who is the proper party to administer the estate. Whether a grant of administration shall be absolute or limited is largely in the discretion of the court. Where a widow has renounced administration in favour of another person, an absolute grant of administration to the next of kin applying therefor is a proper one to make rather than a limited grant conditional on the custody of the widow. The next of kin has by law the same title to administration as the widow has, but the practice is to make the grant to the widow, unless some objection exists against her. However the grant to her is discretionary, and the court will, on sufficient cause shown, exercise its discretionary power, and grant administration to the next of kin in preference to the widow (rule as laid down in Walker & Elgood on Executors & Administrator, 3rd ed. at p. 43 approved). It has become the established maxim of the court that where any party has a prior right to administration the court required him to be cited or to renounce before administration will be granted to any other person, but in certain cases, especially where the person entitled in priority was so entitled by the practice of the court and not by statute the court has relaxed the rule and granted administration to one with an inferior title without requiring the renunciation or citation of those with a superior right. By renunciation one waives or abandons his right to administration and is therefore not entitled to be cited or summoned on an application for grant of administration. An official administrator in Manitoba is not entitled to a grant of administration as against the next of kin. An attorney for the widow is not entitled to a grant of administration until all the next of kin have renounced. Where the applicant for administration serves the usual notice on the official guardian that he is about to apply for letters of administration no further notice on his part to such official guardian is necessary. A widow who has renounced administration may apply for permission to retract her renunciation, and if she is given such permission and is otherwise a fit and proper person, there is nothing to prevent her, if the court thinks fit, from obtaining a revocation of a grant of administration to the next of kin and securing a grant to herself.

Re Shulman Estate, [1919] 1 W.W.R. 62.

(§ I—6)—STATUTORY NOTICE TO EXECUTOR TO APPLY FOR PROBATE—PENALTY ON DEFAULT.

Rockwell v. Parsons, 11 D.L.R. 850, 12 E. L.R. 180.

ADMINISTRATOR C.T.A. — APPOINTMENT OF RESIDUARY LEGATEE—PROCEDURE.

Where there are several residuary legatees and no executor, one of them may take out letters of administration with the will annexed, without the consent of or notice to the others, and may proceed to prove the will in solemn form, either mero motu or in consequence of having been challenged to do so by a party whose interests are adverse to it.

Curtis v. Skeffington, 9 W.W.R. 834.

(§ I—9)—WILL — CONSTRUCTION — APPOINTMENT OF TRUST COMPANY AS "EXECUTOR AND TRUSTEE"—REVOCATION BY CODICIL OF APPOINTMENT OF EXECUTOR AND APPOINTMENT OF INDIVIDUALS AS EXECUTORS—EFFECT AS TO TRUSTEESHIP—APPEAL—CONSENT ORDER APPOINTING ADDITIONAL TRUSTEE.

Re Messenger, 6 O.W.N. 667, 7 O.W.N. 125.

ACTION TO REMOVE COEXECUTOR.

A testamentary executor has no right against his coexecutor to seek his destitution or dismissal; such an action belongs to the heirs and interested persons in case of mal-administration.

Waters v. Waters, 52 Que. S.C. 342.

(§ I—12)—ADMINISTRATION OF ESTATES—APPLICATION FOR ADMINISTRATION—INFANT CHILDREN—NECESSITY OF BOND.

Re Luchetta, [1919] 2 W.W.R. 885.

(§ I—13) — REMOVAL — GROUNDS — INDEBTEDNESS TO ESTATE—PERMITTING SURVIVING PARTNER TO CONTINUE BUSINESS.

It is not a ground for removing an executor that he is himself indebted to the estate upon a mortgage made to the testator if there are no arrears owing by him upon it, or that he had permitted the salaried and only partner in the deceased's law practice to take entire charge of the closing out of the accounts of the practice for the estate, where the salaried partner, by reason of his name being used in the partnership name, was personally liable to the clients and interested in seeing that trust funds were promptly accounted for, and no impropriety was shewn in the partner's administration nor any loss attributable thereto.

Cooper v. Taylor, 22 D.L.R. 393.

JUDICIAL APPOINTMENT — RENUNCIATION — ACCOUNT.

The executor of a will appointed by the

court having accepted the office cannot, any more than the one named in the will, renounce it except by authority of the court, or a judge. So long as the administration of the estate continues, he remains executor unless and until replaced in which latter case he must render an account of his administration to his successor. He is not obliged to render any to the heirs or universal legatees until his office expires with the final execution of the directions of the will.

Phelan v. Coultée, 42 Que. S.C. 396.

DISMISSAL — INVENTORY — DECLARATION OF CONVEYANCE—FOREIGN DOMICILE.

The neglect of an executor to cause to be made an inventory of the property left by the testator and to file the declaration of conveyance of ownership of the immovables do not furnish ground for his dismissal. Nor does the fact that he resides out of the province when he did so at the date of execution of the will and has a coexecutor residing in the province. The court is not obliged, in order to decide an application for dismissal of an executor to convoke and consult with a family council before doing so.

Myers v. Myers, 42 Que. S.C. 415.

REMOVAL — GROUNDS — UNPROFITABLE INVESTMENTS.

In a subsitution the institutes have the right to perform conservatory acts such as the demand for removal of the executor in possession of the substituted property. An action for the removal of an executor by which it is alleged that the latter is badly administering the property of the succession sufficiently states the grounds for the removal to enable the plaintiff to resist an inscription en droit. An executor who leaves the funds of the succession on deposit in the bank at 3 per cent, when he could place them much more profitable in hypothecary loans, shews incapacity which justifies the interested parties in demanding his removal. Nevertheless, the court, in the absence of fraud and when the executor is solvent, instead of removing him may order him to place the money of the succession as required by law within a specified delay and reserve the final decision upon the demand in case of his default in making such investments.

Robert v. Martin, 48 Que. S.C. 27.

ACCOUNTING—ELECTION.

An action for an account against an executor may conclude for the removal of such executor if he does not offer to pay a certain sum to represent the balance of the account, and the plaintiff will be ordered to elect between these two demands.

Bourassa v. Bourassa, 17 Que. P.R. 452.

DEATH OF ADMINISTRATOR — UNADMINISTERED ESTATE OF INTESTATE—APPOINTMENT OF ADMINISTRATOR OF ESTATE OF DECEASED ADMINISTRATOR.

National Trust Co. v. Proulx, 20 Man. L.R. 137, 15 W.L.R. 349.

GRANT OF LETTERS OF ADMINISTRATION TO INFANT—VALIDITY OF GRANT UNTIL REVOKED.

Belanger v. Belanger, 24 O.L.R. 439, 19 O.W.R. 695.

II. Powers and liabilities; conduct of estate; assets.

A. RIGHTS, POWERS AND DUTIES.

(§ II A—15) — ASSETS — DISPOSAL OF — DUTY TO PREVENT SACRIFICE.

It is the duty of executors when obliged to realize on shares, to exercise a sound discretion and not to hastily and improvidently throw them on the market.

Re Fulford, 14 D.L.R. 844, 29 O.L.R. 375.

EXTENSION OF POWERS OF EXECUTORS.

Genéreux v. Bruneau, 47 Can. S.C.R. 400.

WILL UPKEEP OF PROPERTY DURING LIFE TENANCY BEFORE SALE—MONEYS FROM GENERAL ESTATE NOT APPLICABLE FOR THE PURPOSE.

Testatrix gave certain land to her executors upon trust, together with all furniture and personal property thereon, to the use of her husband for life and on his death to be sold and the proceeds up to a certain sum to be paid to the park commissioners of Vancouver for a play ground. Held, that the executors could not apply any moneys from the general estate for the upkeep of the property.

Re Ceperley Estate, [1919] 2 W.W.R. 495.

REAL PROPERTY—DEVOLUTION OF LAND TO EXECUTOR OF SOLE OR SURVIVING EXECUTOR.

Under the Torrens System of Land Titles (Sask.) there is a right to the devolution of land to the executor of a sole or surviving executor.

Re Land Titles Act, Whitman's Case, [1919] 1 W.W.R. 600.

(§ II A—17)—CONTRACT ENTERED INTO BY ONE EXECUTOR—ABSENCE OF AUTHORITY TO BIND COEXECUTOR—FAILURE TO PROVE APPROVAL OF COEXECUTOR—ACTION BY CONTRACTOR FOR PRICE OF WORK AND MATERIAL—DEFENCE OF NON-CONCURRING EXECUTOR—PAYMENT INTO COURT OF PART OF SUM CLAIMED — TOTAL RELIEF FROM PERSONAL LIABILITY — TERMS — COSTS — INDEMNITY OF CONTRACTING EXECUTOR OUT OF ESTATE OF TESTATOR—STEAM BOILERS INSPECTION ACT AND REGULATIONS—EXPENSIVE LITIGATION OVER TRIFLING SUM.

Jones v. Toronto General Trusts, 17 O.W.N. 259.

(§ II A—21)—AS TO INVESTMENTS.

Where trustees who are vested with absolute discretion as to the conversion of nonproductive securities of an estate, delay the conversion thereof, the proceeds when realized enure to the benefit of life tenants so as to give them the same ben-

edit as if the conversion had taken place within a reasonable time from the death. Re Irwin, 4 D.L.R. 803, 3 O.W.N. 936.

SHARES ACQUIRED UNDER OPTION HELD BY TESTATOR—SUBSIDIARY COMPANY—ILLEGAL TRUST—ASSETS—INVESTMENTS.

Nontrustee securities acquired by executors under an option held by a testator to subscribe for additional shares at less than the market value, become assets of the estate to be converted by the executors, and cannot be retained by them as a permanent investment under such testamentary direction. Neither can shares of nontrustee stock in various subsidiary companies received by executors on the dissolution of a company as a so-called trust, in exchange for shares of the latter company held by a testator. There is, in such case, no such similarity or identity between the shares of the parent company and the subsidiary companies composing it, sufficient to permit the executors to retain the substituted shares. [Re Smith, [1902] 2 Ch. 667, and Re Anson's Settlement, [1907] 2 Ch. 424, considered and applied.] Power to retain investments made by a testator does not amount to an implied authority to make similar investments on behalf of the estate. [Re Nicholls; Hall v. Wildman, 14 D.L.R. 244, 29 O.L.R. 206, distinguished.] Power to invest in nontrustee securities of similar nature to those held by a testator at his death is not conferred on executors by a testamentary direction to keep any investments held by the former at his decease, and to invest the money of his estate as it came in in government bonds and securities and municipal debentures, and also to hold any increased stock received as stock dividends or similar additions to the testator's holdings. That shares held by a testator at his death were not fully paid up, so that his executors were compelled to pay the balance due on his subscription, does not prevent them holding the shares as an investment made by the testator, under a testamentary power to keep any investment held by the testator at his death.

Re Fulford, 14 D.L.R. 844, 29 O.L.R. 375.

An executor cannot, except at his own risk, invest money of an estate in disregard of the express direction of a will that it should be deposited in a chartered bank at interest until the arrival of the time fixed for the distribution thereof, and, as no discretion was conferred on the executor as to the disposal of the money, s. 2 of c. 130, R.S.O., 1897, giving authority to executors or trustees to invest trust moneys in their hands or to vary investments already made, at their discretion, is not applicable.

Re Richardson, 5 D.L.R. 449, 22 O.W.R. 605.

DEPARTURE FROM DIRECTIONS OF WILL IN PURCHASING ANNUITIES INSTEAD OF INVESTING TO PROVIDE SAME—EXECUTORS RETAINING ONE OF THEMSELVES ON SALARY IN MANAGEMENT OF ESTATE.

Where the will directs the executors to set apart a sufficient portion of the estate to provide for certain annuities, they should not be permitted to depart from such directions, by purchasing annuities, especially where those entitled to the residuary estate (into which under the will the amount to be invested in the meantime to provide the annuities will ultimately fall) oppose such purchase. Executors permitted to retain one of themselves for work in the management of the estate and to pay him a monthly salary therefor.

Re Charlton Estate, [1919] 1 W.W.R. 134.

(§ II A—24)—DELAY IN DISTRIBUTION—ORDER TO BORROW—SUCCESSION DUTIES.

An order authorizing executors to borrow a sufficient amount to pay succession duties, a small sum advanced by the executors, an existing mortgage on the property, and the executors' commissions up to the time of the application, on the security of a mortgage on the testator's property, is properly made where the distribution of the estate is delayed under the will.

Re Elliott, 40 D.L.R. 649, 41 O.L.R. 276.

BORROWING MONEY TO PAY DEBTS—RIGHTS OF LENDER—TRUSTEE ORDINANCE—SUBROGATION—TAXES AND FUNERAL EXPENSES.

Where a will does not, either expressly or impliedly, give power to the executors to borrow money the estate is not legally liable to a person who has lent money to the executors for the purpose of paying off debts of the estate. [Farhall v. Farhall, L.R. 7 Ch. 123, followed.] Moreover, under the interpretation given by the Ontario decisions on the similar section of the Ontario Act from which the trustee Ordinances, C.O., c. 119, was copied and which must be followed here. [See Ward v. Serrell, 3 A.L.R. 123; B. & R. Co. v. McLeod, 18 D.L.R. 245.] Section 44 of the Ordinance not only makes all creditors of an estate payable pari passu, but prevents an executor from preferring one creditor to others; the court cannot, therefore, order the executors for the purpose of making payments contrary to said section. Nevertheless a lender whose money has been used for such purpose is entitled under the principles applied in McCullough v. Marsden, [1918] 3 W.W.R. 725, affirmed 45 D.L.R. 645, to be subrogated to the position of the creditors whose claims have been paid. In respect to money which has been applied to preferred claims, e.g., funeral expenses, or in keeping down charges upon the lands, e.g., taxes, the lender is entitled to be placed in the position which the executors would have held if they had paid them out

of their own pockets; and in the case of taxes may properly be subrogated to the position of the taxing bodies and thus given a charge upon the lands.

Re Breckenridge Estate, [1918] 3 W.W.R. 803.

PROMISSORY NOTE—ENDORSEMENT.

An executor, who has received from the testator only the usual powers conferred by law, has no right to endorse promissory notes. When an executor endorses notes the succession that he represents will not be liable for them if it is not proved that it benefited from them.

Carriage Harness v. Grenier, 47 Que. S.C. 310.

(§ II A—25)—COSTS.

An administrator is justified in contesting a claim of a woman for all of his decedent's property because of the breach of the latter's agreement to devise it all to her in consideration of her keeping house for him during his lifetime, since he could not safely recognize the binding force of the claim without a decision of a court in its favour and therefore he will be allowed his costs from the estate.

Legeas v. Trusts & Guarantee Co., 5 D.L.R. 389, 4 A.L.R. 190, 20 W.L.R. 172, 1 W.W.R. 802.

(§ II A—28)—POSTPONING SALE AND DISTRIBUTION.

Notwithstanding a clause in the will declaring that the trustees may postpone the sale and conversion of any part of the estate so long as they deem proper, it is their duty to sell and convert into money as soon as they reasonably can to realize a fund which would be immediately distributable in cash, using the power of postponement to obtain a better return but not for mere purposes of accumulation where there is no direction for accumulation in the will.

Re Caswell Estate, 1 D.L.R. 497, 5 S.L.R. 213, 20 W.L.R. 462, 1 W.W.R. 941.

POSTPONING SALE AND DISTRIBUTION—SECURING AGAINST ANNUITIES UNDER WILL.

Where the will bequeaths to one person a sum of money to be paid from the produce of lands devised to another, the executors upon whom the land devolves under the Alberta system of land tenure upon the owner's decease cannot safely transfer the land under the provisions of the Land Titles Act, Alta., to the devisee without obtaining from him a registrable charge in respect of the annuity or obtaining and registering a court order establishing the charges.

Re Cust, 19 D.L.R. 190, 7 W.W.R. 614.

(§ II A—30)—POWER OF SALE—RULE OF PERPETUITIES.

The power given to an executor by the Trustee Act, R.S.O. 1897, c. 129, s. 16, to sell real estate to pay a legacy for payment of which no express provision is made, is not cut down by the Devolutions of Estates Act, R.S.O., 1914, c. 119. A power of sale expressly conferred by a will does not fail merely because the use to which the fund is to be put offends against the rule as to perpetuities; in such an event the fund goes to those who would take upon an intestacy.

Kennedy v. Suydam, 30 D.L.R. 744, 36 O.L.R. 512.

POWER TO GIVE OPTION — EXECUTED CONTRACT.

Money paid on an option given by an executor, which has expired through no fault of the person who gave it, will be treated as an executed contract, and cannot be recovered back.

Musgrave v. Parker, 35 D.L.R. 427, 51 N.S.R. 370.

DIRECTION TO SELL LAND—POWER OF EXECUTORS TO EFFECT SALE—TRUSTEE ACT, S. 44—SALE TO ONE OF THREE EXECUTORS — CONSENT OF ADULTS INTERESTED — PAYMENT INTO COURT OF SHARE OF INFANT.

Re Ross, 13 O.W.N. 373.

BREACH OF TRUST—DIRECTION IN WILL TO CREATE TRUST FUND IN PART BY SALE OF COMPANY SHARES—SALE NOT MADE BECAUSE NOT IN INTEREST OF ESTATE—USE OF DIVIDENDS ON SHARES TO MAKE UP FUND—AGREEMENT BETWEEN EXECUTORS AND BENEFICIARIES OF FUND (LIFE-TENANTS AND REMAINDERMEN)—RATIFICATION OF COURSE TAKEN BY EXECUTORS — CONSTRUCTION OF WILL AND AGREEMENT — EXECUTORS ACTING "HONESTLY AND REASONABLY"—TRUSTEE ACT, S. 37 — REFUSAL TO PRONOUNCE JUDGMENT FOR ADMINISTRATION—R. 612.

In an action for an account and for administration, where the executors had acted honestly and reasonably, and had not been guilty of a breach of trust, they ought fairly to be excused. Trustee Act, R.S.O. 1914, c. 121, s. 37. Accordingly, an account could not be directed to be taken on the footing of a wilful default; and no sufficient reason was shewn for taking the management of the estate out of the hands of the executors by pronouncing a judgment for administration, r. 612.

Elliott v. Colter, 45 O.L.R. 360.

A testator devised all his real and personal property to trustees "upon trust to sell and convert into money such real and personal estate." The trustees sold an undivided three-eighths part or share of a block of the land so devised. Held, that the power given the trustees did not authorize the sale of an undivided three-eighths part or share of a block of the land so devised, nor of an undivided interest in real property.

Re Land Registry Act and Anthony, 22 B.C.R. 535.

DIRECTION TO EXECUTORS TO SELL LAND AND INVEST PROCEEDS—SALE OF LAND BY TESTATOR AS NO REVOCATION OF WILL—DUTY OF EXECUTORS TO PAY OVER INCOME FROM ESTATE TO WIDOW DURING LIFETIME—DISTRIBUTION AFTER DEATH OF WIDOW.

Re Hobbs, 10 O.W.N. 437.

POWER OF EXECUTOR TO SELL LANDS—TIME—BEST INTEREST OF ESTATE—DELAY—POWER OF SALE STILL PRESERVED.

Re Henderson and Hill, 10 O.W.N. 340.

DIVISION OF FARM AMONG SONS—APPOINTMENT OF TRUSTEE TO MAKE DIVISION IF SONS SHOULD NOT AGREE—POWERS OF TRUSTEE—SALE OF LAND—COUNTY COURT JUDGE—RIGHT OF APPEAL.

Re Pherrill, 10 O.W.N. 459.

RIGHT TO PROPERTY OF TESTATOR—INVENTION OF RELATIVES IN POSSESSION OF ASSETS TO OPPOSE GRANT OF PROBATE OF WILL—INJUNCTION.

Longstreet v. Sanderson, 11 O.W.N. 166.

TITLE—POWER OF SALE—REGISTRATION.

An unrestricted power of sale over real estate given to executors does not confer upon them an ownership in such real estate, and their interest should be registered merely as a charge.

Re Prefontaine, [1917] 1 W.W.R. 667.

(§ II A—40)—DISPOSAL OF REAL PROPERTY.

Under the provisions of the Devolution of Estates Act (Man.), as amended by s. 2, of c. 21 of 5 & 6 Edw. VII. (Man.), a sale of land of a decedent cannot be made by the administrators without the approval of the Registrar-General where there are no debts and there are adult heirs who do not concur in the sale, or where there are infants interested.

McInnis Farms v. McKenzie, 12 D.L.R. 100, 23 Man. L.R. 120, 23 W.L.R. 863, 4 W.W.R. 205.

In Manitoba an administrator is liable to creditors for real estate assets in his hands.

Re Montgomery; Lumbers v. Montgomery, 8 D.L.R. 699, 22 Man. L.R. 735, 22 W. L.R. 634, 3 W.W.R. 295.

POWER TO SELL AND CONVEY LAND—INTEREST OF INFANTS—APPROVAL OF COURT—VENDORS AND PURCHASERS ACT.

Re Burridge, 4 O.W.N. 1605, 24 O.W.R. 962.

WILL—CONSTRUCTION—POWER OF EXECUTORS OF DECEASED EXECUTRIX TO CONVEY LANDS OF TESTATOR.

Re Macaulay, 7 O.W.N. 134.

(§ II A—41)—PARTNERSHIP REAL ESTATE.

Where the executors of a deceased member of a partnership are empowered by a Michigan Court of Chancery to sell to themselves partnership lands situated in Ontario and to execute the necessary conveyance thereof, the administrator of the surviving partner, who was appointed by the Surrogate Court of Ontario, need not join in such conveyance.

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

(§ II A—42)—SALE BY ORDER OF COURT.

An application by administrators, for the approval of a sale of lands belonging to the estate may be made in Saskatchewan by way of an originating summons issued pursuant to the provisions of subs. 8, s. 624, of the Sask. Rules of Court (1911), following statutory form 80, and returnable before a Judge in Chambers. Administrators as trustees for the next of kin of the intestate have no right to purchase property belonging to the estate without the leave of the court, but a sale of land by the estate to one of the administrators may be approved and leave given to the administrator to purchase where the sale is an advantageous one for the estate.

Re Lockhart, 1 D.L.R. 754, 20 W.L.R. 413, 1 W.W.R. 933.

DEVOLUTION OF ESTATES ACT—APPROVAL OF ADULTS INTERESTED IN ESTATE—SALE WITHOUT APPLICATION TO OFFICIAL GUARDIAN—CONFIRMATION—TERMS.

Re McDonald, 5 O.W.N. 238, 25 O.W.R. 221.

(§ II A—43)—A decree of a court of competent jurisdiction directing the sale of lands of a deceased person to his executors will protect the purchasers where all or a part of the purchase money has been received by the testator's beneficiaries.

Re Mills, 3 D.L.R. 614, 3 O.W.N. 1036, 21 O.W.R. 887.

TRANSFERRING PROPERTY AS SECURITY FOR DECEDENT'S DEBT.

An executor has no authority under Quebec law to transfer property of an estate to secure payment of an unsecured debt of his decedent.

Klock v. Molsons Bank (No. 2), 3 D.L.R. 521, 44 Que. S.C. 193.

FRAUD—PURCHASE FROM CESTUI QUE TRUST—LIMITATIONS ACT—LIABILITY OF EXECUTOR—ACCOUNTS—INTEREST—COSTS.

Under a will, the defendants, two of the four sons of the testator were trustees of property which was vested in them, and was to be distributed among the four in equal shares, the distribution being left in the hands of the four individually, and not in the hands of the defendants as trustees and executors. The complaint of the plaintiff, one of the four, was that, certain residuary real estate having been apportioned in shares, the defendants, by fraud, obtained from the plaintiff a deed of his share, sold it to an innocent purchaser, and then laid out the proceeds in other land, on which they had made a profit. Held, affirming the finding of Riddell, J., the Trial Judge, that no fraud or overreaching on the part of the defendants had been shewn. In the distribution, the home-

stead was conveyed to R., one of the defendants, and in the conveyance was included lot 2, which was not a part of the homestead, and was not mentioned by the defendant as part of R.'s share, and not noticed by the plaintiff when he signed the deed, which he did without reading it, although he was requested to read it. Held, that the defendants as to the division did not stand towards the plaintiff in a fiduciary relationship: they were bare trustees, bound to divest themselves of the legal estate in the way determined by the four; and were not brought within the rule against purchases from cestui que trust; but, assuming that they were trustees, they acted honestly and reasonably, and should, after the lapse of many years, have the benefit of ss. 46, 47, 48 of the Limitations Act, R.S.O. 1914, c. 75. And held, as to R., that, having got lot 2 as part of his share, and having sold it and received the proceeds, he should account personally to the plaintiff for his share thereof, were it not that the Limitations Act was a bar in his case also—there was no concealed fraud which prevented him from claiming the benefit of the statute. The plaintiff also claimed in this action to recover one quarter of the amount found by a Surrogate Court Judge to be in the hands of the defendants as executors. It appeared that the judge had, in taking the accounts, allowed the parties for all the payments made by them during the father's lifetime in order to preserve the property, and had deducted the amount of these payments from the amount for which the executors were chargeable. Held, that the evidence before the judge warranted this, and his approval was final and binding upon all the parties represented, except in so far as fraud or mistake might be shewn. [Re Wilson and Toronto General Trusts Corp., 15 O.L.R. 596, followed.] Held, also, that the plaintiff was entitled to bring an action upon the footing of these accounts just as if they were settled accounts, in case due payment was not made by the executors, or might make an application for an administration order if circumstances warranted that course. Held, therefore, varying the judgment of Riddell, J., that the plaintiff was entitled to judgment for his share of the moneys in the hands of the defendants, with such interest as the amount had borne since it was paid into court in this action.

Tyrrell v. Tyrrell, 43 O.L.R. 272; 14 O.W.N. 265, reversing in part 13 O.W.N. 105.

(§ II A—44)—Mortgage to pay annuity.

Where a will provides for an annuity to be paid by the executors to the testator's widow "so long as my estate will pay the same," after giving a life interest in the family residence to the widow and a devise of land to the testator's son, and providing for other bequests with a direction that at the decease of the widow the proceeds of the residue and remainder of the estate, both real and personal, including the family residence, be divided among certain persons, the executors have no right to raise the annuity by way of a mortgage on the family residence or on the land devised to the son, the widow being entitled to the annuity only if there is cash enough on hand to pay for the same.

Re Erskine, 10 D.L.R. 93, 4 O.W.N. 702, 24 O.W.R. 15.

Mortgage of real estate.

After land has been transferred and conveyed by executors to the one to whom it was devised, the former cannot be authorized, under paras. 7, 8, Sask., r. 624, to execute a mortgage thereon.

Re Materi Estate, 4 D.L.R. 6, 21 W.L.R. 283.

Conduct of estate—Homestead and preemption lands—Mortgage by executor — Infant devisees — Right to have trust declared.

Roberts v. National Trust Co., 23 D.L.R. 890, 32 W.L.R. 55.

B. Liabilities.

Liability for maintenance, request, see Wills, III G—150.

Under subs. (b) of s. 21 of the Devolution of Estates Act (Man.), declaring that the personal representative shall hold the land as trustee for the person beneficially entitled, the trust relationship of the administrator is the same in both real and personal property.

Re Montgomery, Lumbers v. Montgomery, 8 D.L.R. 699, 22 Man. L.R. 735, 22 W.L.R. 634, 3 W.W.R. 295.

(§ II B—45)—Liability of executor—Secret profits.

A sole beneficiary under a will has a prima facie interest in an estate sufficient to maintain an action to compel an executor to account for a secret profit made on the sale of assets of the estate, even though the beneficiary may not ultimately share in the estate by reason of the debts exceeding the assets.

Shaw v. Tackaberry, 15 D.L.R. 475, 29 O.L.R. 490.

Fraud — Failure to prove — Claim to moneys found due by Surrogate Court—Forum—Credibility of witnesses.

Tyrrell v. Tyrrell, 43 O.L.R. 272.

Refusal of executor to administer estate—Estate of widow durante viduitate—Failure to prove remarriage of widow—Claim of title by possession—Evidence—Judgment for administration — Maintenance of child entitled in remainder—Improvements under mistake of title—Costs.

Trainor v. O'Callaghan, 11 O.W.N. 315.

MAINTENANCE OF CHILDREN — LIABILITY FOR TUITION FEES.

In a case where a testator has appointed his wife his executrix with instructions to have his children educated, and a tutor is appointed for the children who without opposition on their part looks after their maintenance and education and incurs therefor expenses to the amount of $395, the executrix will be obliged to pay this amount the tutor having acted as her negotiorum gestor. A testator has the right to give to his executor the control of the education of his children.

Bruneau v. Paquette, 48 Que. S.C. 282.

C. ASSETS.

(§ II C—55)—UNDISPOSED PORTION—VOID GIFT OF BANK DEPOSIT.

Upon the failure of a testamentary gift of a bank deposit in the joint name of a testator and another, where the money was not disposed of by will or otherwise, it becomes undisposed property of the testator's estate.

Vogler v. Campbell, 11 D.L.R. 605, 4 O.W.N. 1389, 24 O.W.R. 680. [Reversed 14 D.L.R. 480, 5 O.W.N. 169.]

ASSETS OF ESTATE OF INTESTATE—BANK SHARES SUBJECT TO DOUBLE LIABILITY CLAIM — DISTRIBUTION OF SHARES AMONG NEXT OF KIN—PERSONAL LIABILITY OF ADMINISTRATORS—LIABILITY OF ASSETS—BANK ACT, ss. 53, 130—DEVASTAVIT — LIMITATIONS ACT—BAR TO CLAIM UPON DEVASTAVIT, BUT NOT TO CLAIM UPON CONTRACT—TIME WHEN CALLS MADE — PERSONS TO WHOM SHARES TRANSFERRED—TRANSFERS NOT RECORDED—SECTION 43 OF BANK ACT—EQUITABLE OBLIGATION TO PAY—LIABILITY NOT ONLY UPON SHARES TRANSFERRED BUT TO EXTENT OF ASSETS RECEIVED—COSTS.

Clarkson v. McLean, 42 O.L.R. 1.

RIGHT TO SELL—EXEMPTIONS ACT—CONFIRMATION OF SALE.

An administrator has no authority to dispose of property covered by s. 5 of the Exemptions Act, R.S.S., c. 47. A sale thereof which has been made by the administrator honestly and in good faith and is beneficial, may be confirmed, however, by the court, whereon an order will be made for the payment of the proceeds to the widow and children.

Re Kolbe Estate: Standard Trusts Co. v. Kolbe, 11 S.L.R. 405, [1918] 3 W.W.R. 310.

LIQUIDATION OF ESTATE—ACTS OF TRADE—ABANDONMENT.

Upon the death of a trader his quality of trader does not pass to his heirs with his estate. Acts done by the testamentary executors of a trader to realize the assets of the estate, to close up deals begun, to terminate contracts on hand, or to free the estate from onerous obligations, without any intention of profit, do not constitute acts of trade, nor render the testamentary executors liable to the provisions of the law concerning abandonment of property.

Henry v. Seaton, 54 Que. S.C. 289.

DEVOLUTION OF ESTATES ACT—CAUTION—ORDER ALLOWING ADMINISTRATRIX TO REGISTER — APPLICATION TO VACATE ORDER—ADMINISTRATION ORDER—APPLICATION FOR PARTITION.

Re McCully, 23 O.L.R. 156, 17 O.W.R. 846.

ADMINISTRATION OF ESTATE—EXECUTORS—BREACH OF TRUST—DEVOLUTION OF ESTATES ACT.

McKinley v. Graham, 3 O.W.N. 256, 20 O.W.R. 441.

EXECUTORS SUBSCRIBING FOR STOCK IN A COMPANY — ABSENT BENEFICIARY OFFICIAL GUARDIAN.

Re Burke, 19 O.W.R. 924, 2 O.W.N. 1513.

SALE OF LANDS—NO POWER TO SELL IN WILL—PERMANENT IMPROVEMENTS.

Rose v. Parent, 2 O.W.N. 783, 18 O.W.R. 745.

SALE OF LAND TO TESTATOR'S SON—WHEN ALLOWED.

Order may be made allowing executors to sell lands to the son of the testator, less the amount of a mortgage on the same paid by him, and of which he holds an assignment.

Re Currier, 2 O.W.N. 1014, 19 O.W.R. 19.

APPLICATION BY EXECUTOR FOR DISCHARGE—EXECUTORSHIP MERGED INTO TRUSTEESHIP—LIABILITY OF EXECUTOR AS TRUSTEE.

Re Estate of Thomson, 9 E.L.R. 147.

TRUST FOR INVESTMENT—NATURE OF INVESTMENTS—"SECURITIES" — COMPANY SHARES — DEBENTURES—SECOND MORTGAGES—FOREIGN LAND.

Re J.H., 25 O.L.R. 132, 20 O.W.R. 474.

III. Suits affecting estate.

A. ON BEHALF OF.

(§ III A—60)—DOCUMENT—SIGNATURE OF DECEASED PERSON—DENIAL BY EXECUTION—AFFIDAVIT.

Article 208 C.C.P. is strict law, and the affidavit of a testamentary executor who declares that he knows the signature of the de cujus and has serious doubts of the authenticity of the document set up against him, is irregular and will be struck out of the record.

Beaulne v. Chene, 16 Que. P.R. 252.

MORTGAGE—ACTION FOR MORTGAGE MONEY BY EXECUTORS OF DECEASED MORTGAGEE—SERVICES RENDERED BY MORTGAGOR TO MORTGAGEE—PROMISE TO PAY FOR BY LEGACY — SPECIFIC PERFORMANCE — INTEREST—COMPOUND INTEREST—ADEMPTION OR SATISFACTION—EVIDENCE—CORROBORATION.

Eastern Trust Co. v. Berube, 7 O.W.N. 114.

(§ III A—65)—Suit to protect estate—Appointing receiver on executor's default.

Where it appears that the executor of a decedent's estate lives out of the jurisdiction and no one is left in charge of the estate and the executor wholly ignores the Surrogate Court when called upon to account, an order appointing a receiver of the moneys and property of the estate will, if the property is in danger, be made on the ex parte application of a beneficiary under the will of the deceased.

Re Beaird 9 D.L.R. 842, 4 O.W.N. 720, 23 O.W.R. 955.

Action to recover damages for death—Fatal Accidents Act—Trustee Act.

Where the death of a person was occasioned, as alleged, by the negligence of the defendant, it was held, that an action by the administrator of the estate of that person to recover money paid for funeral expenses and "damages for the death" would not lie. The action could not be maintained under the Fatal Accidents Act, R.S.O. 1914, c. 151 the relatives who survived the deceased not being within the limited class mentioned in s. 4 (1). Nor could the action be brought by virtue of s. 41 of the Trustee Act, R.S.O. 1914, c. 121, which is intended to prevent the wrongdoer escaping liability by reason of the death of the person injured, and does not create a new right of action. Before that enactment, the death of a person injured from any cause put an end to the action—Actio personalis moritur cum personâ. Even if that maxim is now abolished, save as to actions of libel and slander, as said in Mason v. Town of Peterborough, 20 A.R. (Ont.) 683, 685, 686, the principle that, in a Civil Court, the death of a human being cannot be complained of as an injury, laid down in Baker v. Bolton, 1 Camp. 493, and affirmed in Admiralty Commissioners v. S.S. Amerika, [1917] A.C. 38, remains untouched.

England v. Lamb, 42 O.L.R. 60.

Executors and administrators—Official administrator — Jurisdiction — Letters of administration—Fatal accident Act.

T. a foreman in the defendant's employ, received in the course of his employment injuries in the judicial district of Moosomin from which he subsequently died at Brandon, in the Province of Manitoba. He was not domiciled in nor did he leave any assets in Saskatchewan. The plaintiff was the official administrator for the judicial district of Regina and assuming to act under the authority of the Surrogate Courts Act (R.S.S., 1909, c. 54, s. 77), filed an affidavit in the office of the Surrogate Court at Regina and obtained a certificate from the clerk stating that it had filed such affidavit and that thereupon it became the administrator of T.'s estate to all intents and purposes. The present action was brought claiming compensation for the death of the deceased under an Act Respecting Compensation to the Families of Persons Killed by Accidents, (R.S.S., 1909, c. 135). Held, that the plaintiff had no status to maintain the action inasmuch as in its capacity of official administrator it was limited territorially to the judicial district of Regina, whereas the accident had occurred in the judicial district of Moosomin, and that the filing of the affidavit under s. 77 of the Surrogate Courts Act, and the issue of the clerk's certificate thereon were both futile inasmuch as the statute applied only to the case of an intestate whose last place of abode was within Saskatchewan. Held, further, that it was doubtful whether any court in the province could in the circumstances make a grant of letters of administration but that in any event the plaintiff's application at trial to be allowed to apply therefor was an indulgence that should not be granted, the plaintiff being an entire stranger to the action, and the statutory time for bringing action having expired.

Western Trust Co. v. C.N.R., 12 S.L.R. 374.

Action to set aside mortgage made by deceased—Denial of signature of subscribing witness—Evidence.

Way v. Shaw, 10 O.W.N. 124, 11 O.W.N. 27.

Action by, to recover two sums of money lent by testator—Defence—Gift of one sum—Evidence—Corroboration—Entry in diary—Insufficiency—Evidence Act, R.S.O. 1914, c. 76, s. 12—Extended term of credit as to other sum — Acknowledgment — Debt — Release by parol.

Gardiner v. Shield, 17 O.W.N. 214.

Testamentary — Execution — Frivolous contestation — Expenses — Personal condemnation—C.C., art. 549.

A testamentary executor who frivolously contests a necessary action formed by a universal legatee, in order to have a request of the testament placed aside can be personally condemned to the expenses of the contestation.

Grisé v. Demers, 25 Rev. Leg. 332.

(§ III A—68)—Suits affecting estate—foreign guardian—Payment over of infants' moneys—"Welfare of children" as test.

A foreign guardian of the property of infants entitled to moneys derived from the estate of a person domiciled in Ontario is not entitled as of right to an order against the administrator of the estate for payment over of the fund; the court will refuse to direct payment over unless satisfied that such course is for the benefit of the infants. [Re Chartard, [1899] 1 Ch. 712; Stileman v. Campbell, 13 Gr. (Ont.) 454; Mitchell v. Richey, 13 Gr. 445; Flanders v. D'Evelyn, 4 Ont. R. 704, applied; Hanrahan v. Hanrahan, 19 Ont. R. 396, distinguished.]

Re Lloyd, 19 D.L.R. 659, 31 O.L.R. 476.

(§ III A—69)—Advice of court.

It is not within the power of the court to advise an executor under subs. (1), s. 39, c. 129, R.S.O. 1897, as to whether property belongs to the estate he represents or to another person, since that is not a question pertaining to "the management or administration of the property" about which the court may, under such subsection advise the personal representative of a deceased person. [Re Rally, 25 O.L.R. 112, followed.] Re Turner, 5 D.L.R. 731, 3 O.W.N. 1438, 22 O.W.R. 543.

Upon an application under Con. R. 938, as amended 1904, by R. 1269, the court will decline to advise or direct an executor as to whether he should follow the opinion of his solicitor and lay claim, as part of the estate, to land held adversely thereto, such an application made summarily not being within the terms of rr. 938, 1269.

Re Gordon, 4 D.L.R. 3, 3 O.W.N. 1458, 22 O.W.R. 577.

Application of executor to court for advice—What may be considered.

It is only upon legal matters or difficulties arising in the discharge of the duties of an executor, that the court is authorized to give advice in an application upon originating notice, and not such as involve the exercise of judgment and discretion on the part of the executor, such as the advisability of, and the proper time to realize on, the assets of an estate.

Re Fulford, 14 D.L.R. 844, 29 O.L.R. 375.

B. Suits and judgments against.

(§ III B—70) — Judgment against—Payment in due course of administration—Election of judgment creditor in certain cases.

The proper form of judgment against executors or administrators, in respect of a liability of the deceased, is a judgment for payment in due course of administration; unless there is on their part a distinct affirmative admission of assets sufficient to pay all the creditors of the estate, in which event the judgment creditor may at his election, have judgment either against the executors or administrators personally or judgment for payment in due course of administration. [J.I. Case Threshing Machine Co. v. Bolton, 2 A.L.R. 174, followed.] When judgment is for the amount recovered to be paid in due course of administration, it is improper to issue any executions whatever on the judgment. The remedy in case of anticipated or actual default on the part of the executor or administrator is to apply for an order for administration and, if necessary, the apointment of a receiver.

Northern Crown Bank v. Woodcrafts, 46 D.L.R. 428, 14 A.L.R. 473, [1919] 2 W.W.R. 347. [See also 28 D.L.R. 728, 33 D.L.R. 367, 42 D.L.R. 326.]

Specific performance — Agreement to transfer stock.

Specific performance against the executors of an estate may be granted of the testator's agreement to transfer a fixed number of company shares which plaintiff was to receive for organization of the company.

McGregor v. Curry, 20 D.L.R. 706, 31 O.L.R. 261. [Affirmed, 25 D.L.R. 771.]

Costs—When allowed out of estate.

Where a man defends an action brought against him as executor and fails, he may be forced to pay the costs out of his own pocket; but he is entitled to be allowed, out of the estate in his hands as executor, all reasonable expenses which have been incurred in the management of the estate, and these include the costs of an action reasonably defended. A Surrogate Court Judge, when asked to allow an executor such costs, must deal with them as charges and expenses; and the direction of the Trial Judge in the action in which such costs were incurred, as to allowance out of the estate or otherwise, cannot bind the Surrogate Court Judge. [Re Beddoe, [1893] 1 Ch. 547, followed.] Where the plaintiff's costs of an action brought against an executor as such were, by the judgment in the action, ordered to be paid by the executor, and were so paid, the allowance by the Surrogate Court Judge to the executor, on his passing his accounts, of the sum so paid, and also his own costs of defending the action, was affirmed—there being nothing to shew that the action was unreasonably defended.

Re Dingman, 35 O.L.R. 51.

Practice—Pleading—Action against executor prior to probate—Executor subsequently taking probate.

A writ of summons may be regularly issued against and served upon an executor prior to probate if the executor subsequently proves the will and accepts the trust. [Mohamadu, etc. v. Pitchey, [1894] A.C. 437, 63 L.J.P.C. 90, distinguished.] An allegation in a statement of claim that the defendant is an executor is a sufficient allegation, whether the defendant is sued before or after probate.

Canadian Bank of Commerce v. Francis, 12 S.L.R. 97, [1919] 1 W.W.R. 624.

Action by distributee to recover share of estate by executors of deceased administrator — "Trustee" — Limitations Act, R.S.O. 1914, c. 75, ss. 47, 48—Breach of trust—Administration bond—Remedy by action against bondsmen—Commencement of period for statutory bar—Assets in hands of executors.

Armstrong v. McIntyre, 9 O.W.N. 240.

Breach of trust by intestate—Director of company — Misfeasance — Quasi-contractual obligation—Question of law—Motion for preliminary trial—Rule 132.

Port Arthur Waggon Co. v. Trusts & Guarantee Co., 11 O.W.N. 88.

IMPROVEMENTS ON LAND—LEASE OF FARM BY FATHER TO SON—REQUEST—REPRESENTATIONS—FAILURE TO PROVE DEFINITE CONTRACT.

Muirhead v. Muirhead, 11 O.W.N. 221.

ACTION FOR REDEMPTION—ORAL AGREEMENT WITH TESTATOR—CORROBORATION—EVIDENCE ACT, R.S.O. 1914, c. 76, s. 12—TRUST—MORTGAGE—ADVERSE POSSESSION.

Girardot v. Curry, 10 O.W.N. 441.

CLAIM UPON ESTATE—MONEYS RECEIVED BY TESTATOR FROM WIFE—BEQUEST BY WIFE TO SON—EVIDENCE—CORROBORATION—EVIDENCE ACT, S. 12.

Willson v. Jamieson, 12 O.W.N. 29.

ACTION AGAINST EXECUTOR OF DIVISION COURT CLERK FOR FEES NOT PAID TO BAILIFF—EVIDENCE OF BAILIFF—CORROBORATION—ENTRIES IN CLERK'S BOOKS—TIME LIMIT—PUBLIC OFFICERS ACT, R.S.O. 1914, c. 15, s. 13—APPLICATION OF PAYMENTS ON ACCOUNT—SURETY FOR CLERK — LIABILITY — INTEREST — CHANGE IN CONTRACT—RATE OF INTEREST—ACQUIESCENCE.

Poole v. Wilson, 12 O.W.N. 340.

ADMINISTRATION ORDER—MOTION FOR—UNDERTAKING AS TO SHARES IN ESTATE.

Re Davenport; Boyd v. Day, 5 O.W.N. 436.

DEATH OF EXECUTOR.

An action against executors will be dismissed on exception to the form when, owing to the death of one of them, the functions of the executors have ceased, and the heirs secured possession of the estate.

Fortier v. McIntosh, 17 Que. P.R. 387.

SURROGATE COURTS—JURISDICTION—"CLAIM OR DEMAND"—CLAIM TO ESTABLISH DONATIO MORTIS CAUSA.

Re Graham, 25 O.L.R. 5, 20 O.W.R. 297.

IV. Indebtedness; distribution; accounting and settlement.

A. DEBTS AND OBLIGATIONS.

(§ IV A—75)—DIRECTIONS.

Before applying to the court for directions as to the share of a beneficiary whose whereabouts are not known, the executor should first institute inquiries as to where the beneficiary was last known to be alive.

Re Carvill; Standard Trusts Co. v. King, 15 D.L.R. 206, 6 S.L.R. 146, 26 W.L.R. 189, 5 W.W.R. 581.

FALSE CLAIMS—PENALTY—COSTS.

A plaintiff making an unfounded charge against an executor of having made a secret commission will be visited with costs to the fullest extent possible.

Cooper v. Taylor, 22 D.L.R. 393.

CLAIMS AGAINST ESTATE—MEDICAL ATTENDANCE UPON DECEASED—REASONABLENESS OF CHARGES.

Barnaby v. O'Donnell, 25 D.L.R. 739, 49 N.S.R. 386.

INSOLVENT ESTATE OF INTESTATE—CREDITORS' CLAIMS—PAYMENT PARI PASSU WHETHER CREDITORS DOMESTIC OR FOREIGN.

Re Scatcherd, 15 O.W.N. 222.

WILL—CLAIM OF WIFE AGAINST ESTATE OF TESTATOR FOR MONEY LENT TO HIM—DIRECTION TO EXECUTORS TO PAY NAMED SUM BORROWED FROM WIFE—CONVEYANCE OF PROPERTY AFTER DATE OF WILL—EVIDENCE — ADEMPTION — SATISFACTION—SET-OFF.

Dandy v. Dandy, 16 O.W.N. 13.

IN GENERAL—NOVA SCOTIA PROBATE ACT, S. 119 — FINAL ACCOUNT — SETTING UP STATUTE OF LIMITATIONS TO CLAIM FILED—AMENDMENT.

An executor or administrator, who has filed in the Probate Court a petition for the settlement of his account, and has formally cited the creditors and others interested to appear, etc., at such settlement, is, in respect of the claims of the parties so cited, in the position of a plaintiff and not a defendant; and, consequently is not bound to file an appearance to all or any of such claims. 2. It is not necessary, under the Nova Scotia Probate Act, for an executor or administrator in proceeding finally to settle his account, to file or deliver a written plea setting up the Statute of Limitations to any claim coming up for adjudication. Semble, that if such written plea were necessary under s. 119 of the Act, the executor would be allowed to amend his proceedings by filing such plea in the hearing of his final account.

Re Estate of Eleazer Gidney et al., and Armstrong, 11 E.L.R. 58.

(§ IV A—76)—DISBURSEMENTS—SOLICITOR'S FEES NOT TAXED.

As there can be no recovery of solicitor's costs without taxation, an agreement by a residuary legatee, authorizing an executor to retain an amount for legal service to be rendered the estate and the interest of the legatee, is illegal and affords no independent representation of the estate as to be capable of taxation, and the executor will not be discharged for disbursements made in respect thereto.

Cookson v. Driscoll; Re Estate of Leahy, 27 D.L.R. 488, 50 N.S.R. 1.

(§ IV A—80)—PRESENTATION AND PROOF OF CLAIM.

In an action against executors on a contract of option alleged to have been entered into between plaintiff and the executors' decedent, the plaintiff must be held strictly to the proof of his claim, especially where he bases that claim on verbal statements and acts of the deceased.

Adamson v. Vachon, 8 D.L.R. 240, 5 S.L.R. 400, 22 W.L.R. 494, 3 W.W.R. 227.

A father who maintains his married daughter at his home is presumed to do so out of kindness and in fulfilment of a natural obligation and cannot recover from her estate or that of her husband the cost

thereof, unless clear proof is adduced to the effect that in keeping his daughter he intended making money advances only. [Robin v. Robin, 11 Rev. de Jur. 503, followed.]

Gladstone v. Slayton, 3 D.L.R. 27, 21 Que. K.B. 440.

CORROBORATION—DEGREE OF PROOF.

The corroboration required against the estate of a deceased person under a statute preventing recovery upon the evidence of the opposite party alone "unless such evidence is corroborated by some other material evidence" need only be of such material facts as lead to the conclusion that the testimony of the party is true. [Radford v. Macdonald, 18 A.R. 167, applied.]

McGregor v. Curry, 20 D.L.R. 706, 31 O.L.R. 261.

CORROBORATION.

The corroborative evidence required in proof of a claimed cause of action against the estate of a deceased person under the Evidence Act, R.S.B.C. 1911, c. 78, s. 11, must be of a material character, supporting the claimant's case, although not necessarily sufficient in itself to establish the case. [Thompson v. Coulter, 34 Can. S.C.R. 261, applied.]

Ledingham v. Skinner, 21 D.L.R. 300, 21 B.C.R. 41, 30 W.L.R. 741, 8 W.W.R. 52.

CORROBORATION.

Where the transactions between the plaintiff and the deceased were separate, each giving rise to a separate cause of action, corroboration in regard to one transaction is not corroboration in regard to the other as against the estate of the deceased person in an action to establish an agency and to recover an alleged secret profit as to both transactions.

Dandy v. National Trust Co., 22 D.L.R. 153, 30 W.L.R. 461.

CORROBORATION.

A claim for money loaned and goods sold a deceased, based solely on the parol evidence of the claimant, and not evidenced by any writing or entry in any book or document, nor corroborated by facts aliunde or by the testimony of other persons, cannot be allowed. (Critical review of authorities.)

McKinnon v. Shanks, 28 D.L.R. 77, 26 Man. L.R. 427, 34 W.L.R. 761, 10 W.W.R. 895.

"VOUCHERS"—UNSWORN DOCUMENT FOR SOLICITOR'S FEES.

An unsworn document authorizing an executor to pay an amount to a solicitor for professional services is not a "voucher," and cannot be allowed as an item in the executor's account.

Cookson v. Driscoll; Re Estate of Leahy, 27 D.L.R. 488, 50 N.S.R. 1.

ACTION AGAINST—CLAIM UPON ESTATE OF DECEASED PERSON FOR SERVICES RENDERED AND EXPENSES INCURRED — EVIDENCE — DOCUMENTS SIGNED BY AGED PERSON SHORTLY BEFORE DEATH—LACK OF INDEPENDENT ADVICE — CORROBORATION—RECOVERY OF REDUCED AMOUNT—COSTS.

Wilson v. McMorran, 7 O.W.N. 221.

CLAIM AGAINST EXECUTOR—PROMISE TO PAY SUM OF MONEY ON SETTLEMENT OF ACTION FOR RENT—EVIDENCE OF SOLICITOR —CORROBORATION—PROMISE MADE TO PERSONS REPRESENTING ESTATE OF DECEASED LESSOR—CONFIRMATION AFTER ISSUE OF LETTERS OF ADMINISTRATION —STATUTE OF FRAUDS—CONSIDERATION —PUBLIC POLICY—COSTS.

McEwan v. Toronto General Trusts Corp., 9 O.W.N. 185.

CLAIMS AGAINST ESTATE—RIGHT TO CONVEYANCE OR DAMAGES — FAILURE TO ESTABLISH.

Chapman v. Bradford, 10 O.W.N. 158.

(§ IV A—82)—CLAIM FOR SERVICES RENDERED DECEASED FOR LONG PERIOD — PROMISE TO PROVIDE BY WILL—PART OF CLAIM BARRED BY LIMITATIONS.

Re Rutherford, 25 D.L.R. 782, 34 O.L.R. 395.

(§ IV A—85)—MONEYS MADE BY SHERIFF UNDER EXECUTION BEFORE ADMINISTRATION ORDER—RULE 613 (B)—CREDITORS RELIEF ACT, R.S.O. 1914, C. 81—PRIORITIES—TRUSTEE ACT, R.S.O. 1914, C. 121, S. 63 (1).

Re Williamson, 36 D.L.R. 783, 39 O.L.R. 413. [See also 12 O.W.N. 202.]

BORROWING OF MONEY TO PAY DEBTS OF ESTATE — RIGHTS OF LENDER AGAINST ESTATE—CONSTRUCTION AND EFFECT OF S. 44, TRUSTEE ORDINANCE, C.O. C. 119 —SUBROGATION—RIGHT OF LENDER TO BE SUBROGATED TO POSITION OF EXECUTORS AND CREDITORS — POSITION OF LENDER IN RESPECT TO MONEY USED IN PAYMENT OF TAXES AND FUNERAL EXPENSES.

Where a will does not, either expressly or impliedly, give power to the executors to borrow money, the estate is not legally liable to a person who has lent money to the executors for the purpose of paying off debts of the estate. [Farhall v. Farhall, L.R. 7 Ch. 123, 41 L.J. Ch. 146, followed.] Moreover, under the interpretation given by the Ontario decisions on the similar section of the Ontario Act from which the Trustee Ordinance, C.O., c. 119, was copied, and which must be followed here. Section 44 of the Ordinance not only makes all creditors of an estate payable pari passu, but prevents an executor from preferring one creditor to others; the court cannot, therefore, order the repayment of money borrowed by the executors for the purpose of making payments contrary to said section. Nevertheless a lender whose money has been used for such purpose is entitled under the

principles applied in McCullough v. Marsden, 14 A.L.R. 94, to be subrogated to the position of the creditors whose claims have been paid. In respect of money which has been applied to preferred claims, e.g., taxes, the lender is entitled to be placed in the position which the executors would have held if they had paid them out of their own pockets; and in the case of taxes may properly be subrogated to the position of the taxing bodies and thus given a charge upon the lands.

Re Breckenridge Estate, 14 A.L.R. 377.

(§ IV A—90)—Burial expenses.

Where the effect of a will is to give to the testator's widow her maintenance for life out the whole estate, and debts are incurred by her for maintenance on default of the executors to furnish her with sufficient means to provide for herself the amount of such debts must be reimbursed to her estate by her husband's estate as being maintenance but the expenses of the widow's funeral are not maintenance and must be paid for out of her own estate.

Re Swayzie, 3 D.L.R. 631, 3 O.W.N. 621, 21 O.W.R. 95.

(§ IV A—91)—Debts and obligations—"Testamentary expenses"—Scope of—Succession duty against devisee, when.

A direction in a will for payment of "testamentary expenses" out of the estate is not sufficient to entitle a specific devisee to be relieved at the expense of the estate of payment of any succession duty to which the devise to him is subject.

Re Cust, 18 D.L.R. 647, 7 W.W.R. 387. [See also Re Cust, 19 D.L.R. 190, 8 A.L.R. 39.]

B. Instructions and control by court.

(§ IV B—95)—Where a person who held certain real and personal property under conveyances from the deceased which were admitted to have been made to him in trust for the grantee and other creditors of deceased was also the executor of the decedent's estate, but his conduct, in dealing with the property, was consistent only with the assertion of an absolute title and he had neglected for a long time to prove the will or to file an inventory of the estate, or to have the estate appraised, those circumstances constitute sufficient grounds for ordering the estate to be administered by the court.

Power v. Munro, 5 D.L.R. 577, 11 E.L.R. 508.

Administration order—Rule 610—Application to set aside—Delay—Stay of proceedings — Executor's personal claim against estate—Application to Surrogate Judge to direct action to be brought in Supreme court—Surrogate Courts Act, R.S.O. 1914, c. 62, s. 69 (7).

Re Cronan, 10 O.W.N. 300.

Administration order—Conduct of administrator.

Re Stevens; Johnson v. Hancock, 17 O.W.N. 165.

C. Distribution; accounting; settlement; discharge.

(§ IV C—100)—In general.

On an application to the court for an order for payment out of the money deposited in court by the administrators of an estate, under r. 1258 (Ont. Con. r. 1897), of the shares of certain heirs, where it appears that there is a claim against the estate by one who alleges himself to be an heir, a sufficient amount will be ordered to be retained in court to cover that claim and an issue directed to determine the fact of whether or not the claimant is a lawful heir.

Re Vine, 8 D.L.R. 505, 4 O.W.N. 408, 23 O.W.R. 486.

Where all the parties beneficially entitled to a decedent's real estate agree that they do not want the estate divided, the administrator should hand it over to them undistributed and undivided. An administrator, though he has the right to sell real estate for the purpose of distributing the estate among the parties beneficially entitled thereto, cannot convey undivided fractions of it to some of the next of kin and retain a fraction in his hands so as to charge the expense of the administration after such distribution to the balance left in his hands. Where a decedent's estate is of such a nature that the administrator can reasonably divide it and thus distribute it in specie amongst the parties beneficially entitled thereto, he may do so instead of converting it into money.

Re Montgomery; Lumbers v. Montgomery, 8 D.L.R. 699, 22 Man. L.R. 735, 22 W.L.R. 634, 3 W.W.R. 295.

Legacies—Duty as to payment—Release of legacy — Estoppel — Accounting—Evidence Act.

An executor, who has been given a legacy payable at the death of a person to whom the bulk of the estate was devised subject to the legacy, owes no duty to those interested in the devisee's estate to see that sufficient assets were set apart to meet the legacy at the devisee's death. A release executed by an executor-legatee, to a devisee, for the purpose of enabling the latter to sell land upon which the legacy was a possible charge, though absolute in form, does not estop the executor from claiming the legacy or shewing the true state of affairs. Where a cheque belonging to the estate was cashed by an executrix, but stated by her to have been paid over and accounted for, she cannot be required to again account for it in an administration of the estate under another will, and her testimony as to payment requires no corroboration under s. 12 of the Evidence Act.

Sproule v. Murray, 48 D.L.R. 368, 45 O.L.R. 326.

ACCOUNTING — SECRET PROFITS — SALE OF LAND—PURCHASE FOR BENEFIT OF EXECUTOR.

An executor will be compelled to account for the difference between the actual value of land belonging to an estate, and what it was sold for, together with the rents and profits realized by him from the land, where it was secretly purchased for his benefit.

Shaw v. Tackaberry, 15 D.L.R. 475, 29 O.L.R. 490.

DISTRIBUTION IN SPECIE—SHARES OF STOCK.

Where in the administration of the estate of an intestate a sale of shares of stock cannot be profitably made because of the uncertainty of their market value, a distribution in specie will not be allowed over the objections of certain next of kin, if in effect it would place the control of the corporation in favour of some over the others.

Re Harris, 22 D.L.R. 381, 33 O.L.R. 83.

SETTLEMENT OF ESTATE—RELEASE—VALIDITY.

Re Estate of Levose Bent, 34 D.L.R. 196 50 N.S.R. 390.

EXPENDITURES—REPAIRS—APPORTIONMENT.

The burden of expenditures made by executors for repairs and improvements of a permanent character, made in order to procure a tenant for the property, should be apportioned between capital and income in accordance with the rule in In re Freman, [1898] 1 Ch. 28, 33. [Brereton v. Day, [1895] 1 I.R. 518; Re Smith; Bull v. Smith, 84 L.T.R. 835, followed.]

Re Elliot, 40 D.L.R. 649, 41 O.L.R. 276.

SETTLEMENT—APPROVAL OF COURT.

National Trust Co. v. Matheson, 15 O.W.N. 32.

Where a direction in a will to erect tombstones would if carried out probably exhaust the estate and prevent the executor paying any legacies, and as none of the next of kin insisted on such direction being carried out, the executor may disregard such direction. The devisee of the land must take it subject to the mortgage, and this having been paid out of the moneys of the estate, the devisee must, before securing a conveyance of the land, refund the amount so paid to the estate, and in default of such refund being made the executor should proceed against the land for the amount.

Re Carley, 4 S.L.R. 280.

ACCOUNTING AND DISTRIBUTION — TRUST COMPANY—MAINTENANCE AND EDUCATION OF INFANT—COMPENSATION FOR SERVICES—LOAN AND TRUST CORPORATIONS ACT, R.S.O. 1914, c. 184, s. 18 (E).

An infant became entitled to his mother's estate, valued at $9,000. A trust company was appointed administrators of the mother's estate and guardians of the boy's estate, one of their officers being appointed guardian of his person. During his minority the company expended on his behalf $1,100 more than the income of his estate: —Held, that sums paid out of capital, should not be allowed to the company upon the passing of its accounts:—Held, also, that it was not competent for the company to be appointed guardian of the person of the infant: Loan and Trust Corporations Act, R.S.O. 1914, c. 184, s. 18 (e): the appointment of an officer of the company as guardian was an evasion of the spirit of that Act; and the guardian so appointed was not entitled to any compensation out of the estate for his services. Order of the Judge of the Surrogate Court of York, varied.

Re Bundle, 32 O.L.R. 312.

SETTLEMENT OF DECEDENT'S ESTATE—PAYMENT OF LEGACIES—TIME FOR.

Re Allen Estate, 16 O.L.R. 883, 14 E.L.R. 151.

SETTLED ESTATES ACT—ORDER FOR SALE OF LANDS—PROCEEDS INVESTED BY EXECUTORS IN MORTGAGE TAKEN IN NAME OF ACCOUNTANT OF SUPREME COURT — MORTGAGE MONEYS PAID TO EXECUTORS —SPECIAL ORDER AUTHORIZING ACCOUNTANT TO EXECUTE RELEASE.

Re McInnes, 6 O.W.N. 672.

SETTLED ESTATES ACT—MONEY IN COURT—PAYMENT OUT TO EXECUTORS TO BE APPLIED ACCORDING TO TRUST OF WILL.

Re Moisse, 8 O.W.N. 542.

ADMINISTRATOR'S ACCOUNT — PAYMENT OF DEBTS IN FULL—PRESUMPTION AS TO ASSETS—IDENTIFICATION OF ASSETS—IDENTIFICATION OF ASSETS OF ANOTHER ESTATE — ACCOUNT — REFERENCE — JUDGMENT—MODIFICATION ON APPEAL —COSTS.

Godkin v. Watson, 9 O.W.N. 251.

SHARE OF BENEFICIARY—SETTLEMENT—INCOME AND CAPITAL.

Re Hamilton, 9 O.W.N. 144.

ASCERTAINMENT OF NEXT-OF-KIN—IDENTITY.

Re Corr, 4 O.W.N. 824, 1068, 24 O.W.R. 103, 521.

MONEY IN COURT — PAYMENT OUT — AFFIDAVITS—COSTS.

Re Griffith, 12 O.W.N. 411.

PASSING ACCOUNTS — PAYMENT TO WIDOW OUT OF PERSONALTY OF LUMP SUM IN LIEU OF DOWER IN LAND DEVISED TO SON —ALLOWANCE TO EXECUTORS AS COMPENSATION FOR SERVICES—CHARGE OF PART OF SUMS PAID ON LAND—EXONERATION OF PERSONALTY PRO TANTO — COSTS.

Re McGrath, 13 O.W.N. 398.

PASSING ACCOUNTS IN SURROGATE COURT—ORDER OF SURROGATE COURT JUDGE—APPEAL — PAYMENTS — TAXES — COMMISSION—COSTS.

Re McCarty, 15 O.W.N. 449.

A partnership is formed by consent of the partners without the necessity of any formality and its existence can be deduced from facts and circumstances manifesting such consent, oral evidence of which is ad-

missible. Notwithstanding the death of one partner, the partnership may continue by consent of the survivors for the term fixed by the will of the deceased. A provision in the will relieving the executor from the necessity of making any inventory other than the annual commercial inventory always prepared, followed by a provision that at the expiration of the partnership term the succession will be wound-up as economically as possible after an inventory is taken in the presence of the testator's wife and adult children, should be so interpreted as to recognize the validity of an inventory made by the executor himself with the aid of the employees in the business, a part of the assets so inventoried composing the succession of the testator in the movables. It is sufficient that this inventory, once taken, may be sent to, and accepted by, the interested parties though they had not been present at the weighing, measuring and counting of the stock. The settlement thus effected is final and binds the minor legatees. When an immovable belongs, in undivided parts, to a succession, and to its executor, the latter is entitled to retain possession of it until reimbursed the share of the expenses paid him properly apportionable to the succession.

Tanguay v. Tanguay, 44 Que. S.C. 253. [See also 42 Que. S.C. 193.]

INTERIM ACCOUNTS.

Although an executor is only obliged to render a final account after he has performed all his functions, he can, nevertheless, be obliged in the interim to furnish the heirs with a statement of the revenues of the succession.

Bourassa v. Bourassa, 26 Que. K.B. 521.

DISTRIBUTION OF SHARES—COEXECUTORS.

Where shares of an incorporated company, held in the names of two executors, are distributed by one of them amongst the heirs, transferred and delivered to them, the acceptance by the coexecutor of his number of shares is a presumption of his consent to the distribution and transfer.

Waters v. Waters, 52 Que. S.C. 342.

TESTAMENTARY EXECUTORS—RENDERING ACCOUNTS—JOINT AND UNDIVIDED LIABILITY TO RENDER ACCOUNTS — DISPUTES AND STRAIGHTENING OF ACCOUNTS—C. CIV. S. 913, 1123.

The curator of an interdict is not obliged to obtain the consent of the family council to bring an action for rendering accounts in the name of his ward. Be that as it may, the authority given to demand an account includes that of disputing it or of suing for redress. Several testamentary executors charged with the administration of a succession being "jointly bound to render one and the same account, this obligation is indivisible. It follows that an administration account cannot be disputed as against one of the executors alone, nor can it be made the object of an action for straightening the account brought against one of the executors alone. In an action concerning the straightening of an account the plaintiff cannot dispute or contest certain items of the account without admitting all the others. The plaintiff should add as parties all those whose presence is necessary for the exercise of his right of action; and the defendant is not obliged to supply an omission of the plaintiff to invalidate his remedy. It seems that a demand for rendering account for a period not covered by the account disputed cannot be added to an action for straightening the account which must result in a final adjudication of the audit since the new account would be itself susceptible to dispute.

Desmarais v. M., 55 Que. S.C. 100.

(§ IV C—102)—TIME FOR SETTLEMENT—TRUSTEE'S DISCRETION.

A testamentary executor who under the will has had the administration of property for a lengthy and indefinite period is bound to render accounts of his administration to the interested legatees at reasonable intervals upon their demand and at their expense; this principle does not conflict with the provisions of art. 918 C.C. [Quinn v. Fraser, 10 Q.L.R. 320, approved and followed.]

Fiset v. Larue, 5 D.L.R. 509, 41 Que. S.C. 469.

It is a necessary consequence of the conclusion that a gift has vested, that the enjoyment of it must be immediate on the beneficiary becoming sui juris, and cannot be postponed till a later day unless the testator has made some other destination of the income during the intermediate period; a trustees' discretion to defer payment will be ignored in the absence of such a provision. [Wharton v. Masterman, [1895] A.C. 186, applied.]

Re Hamilton, 8 D.L.R. 529, 4 O.W.N. 441, 23 O.W.R. 549. [Affirmed, 12 D.L.R. 861, 28 O.L.R. 534.]

(§ IV C—103)—ACCEPTANCE OF LEGACY.

Where a niece went to live with her aunt, a widow and childless, but no arrangement was made as to the niece remaining any definite time and nothing being said by either party as to remuneration except a voluntary statement of the aunt that she would do well by the niece, and the niece ran errands, purchased provisions, and did a small portion of the housework and the aunt allowed her the sum of $10 a month, and by will bequeathed her $2,000 with a contingent interest in a further sum of $1,000, the niece cannot enforce any further claim for her services against her aunt's estate, for the period during which such allowance was accepted.

Smith v. Hopper, 3 D.L.R. 339, 3 O.W.N. 1039, 21 O.W.R. 891.

(§ IV C—107)—RELEASE OF, UNDER SEAL—LIMITATIONS ACT.

A release under seal executed by a beneficiary of an interest in remainder, dis-

charging an executor from all accounting and demands, converts the interest in remainder into an interest in possession, and in the absence of fraud the Limitations Act (R.S.O. 1914, c. 75, s. 47) begins to run from the date of the release.

Lees v. Morgan, 39 D.L.R. 259, 40 O.L.R. 233, reversing 11 O.W.N. 222.

DISCHARGE OF EXECUTOR.

Where all the heirs have sold and transferred their shares of the estate to the universal usufructuary legatee, with the exception of one particular legatee, and no distribution or winding up of the estate is necessary; and where the executor testamentary and administrator in trust has refused to do acts necessary for the administration of the property, the office of the executor is ended, and he can be relieved from his function.

Keon v. McNally, 54 Que. S.C. 95.

(§ IV C—108)—SEPARATE TRUSTS—EXPENSES OF ADMINISTRATION.

Where a testator directs the creation of a trust fund from one of his properties and the investment of same by the executors during the minority of the beneficiaries, the general estate is chargeable with the costs of the creation of the trust fund but not of its investment and distribution; the latter costs are to be paid by the fund itself bearing the expenses of its own administration in like manner as if there had been a direction to pay it over to separate trustees instead of its being managed by the executors of the testator's estate. [Re Church, 12 O.L.R. 18, applied.]

Re Wilson, 9 D.L.R. 634, 4 O.W.N. 906, 24 O.W.R. 214.

(§ IV C—110)—REMUNERATION—COMMISSION—DISBURSEMENTS.

Remuneration to trustees, of a percentage of the gross value of the estate, should be allowed on the gross value as of the time when the accounts are passed, a valuation should then be made by the registrar of the unrealized assets and the percentage based on that valuation. Trustees who have been allowed a commission to manage the estate will not be allowed as a disbursement, commissions paid to agents on collection of interest of mortgages in which some of the estate moneys were invested.

Stephen v. Miller, 40 D.L.R. 418, 25 B.C.R. 388, [1918] 2 W.W.R. 1042. [Affirmed, 49 D.L.R. 698.]

EXECUTOR'S COMPENSATION—ADVANCE ALLOWANCES.

A Surrogate Court on the passing of an executory's accounts should not, under ordinary circumstances, fix in advance the compensation of an executor trustee for the future work to be performed in getting in and distributing the unrealized part of the estate.

Re Paterson Estate, 17 D.L.R. 466, 24 Man. L.R. 217, 28 W.L.R. 177, 6 W.W.R. 882.

FUTURE SERVICES.

An executor or trustee should not be allowed by an interim order a large sum as compensation for future services; the same rule should be applied even where a duly authorized trust company is the executor.

Re Fortune Estate, 21 D.L.R. 646, 25 Man. L.R. 239, 30 W.L.R. 735.

INTEREST—BEQUEST OF.

Where it was not necessary for the realization of the estate for the administratrix to carry on the business as she did for some time after the decedent's death, and the direction of his will was that the same should be sold and converted into money to be invested at interest, the administratrix may be allowed a reasonable amount for her services for carrying on the business which resulted in large profits, and may be allowed interest for the period during which the business was carried on to be computed at a reasonable rate on the amount of capital which the business represented at the testator's death, under a bequest to her of the "interest" on the fund to which the proceeds of the business belonged, but she is not entitled to take the entire profits as interest; the surplus profits are to be treated as belonging to the corpus of the estate.

Re Bean Estate, 23 D.L.R. 335.

COMPENSATION TO—REVIEW.

The amount allowed by the Surrogate Court Judge to executors for their services cannot be questioned in an action for an account, nor otherwise that upon an appeal from the order of that judge.

Sproule v. Murray, 48 D.L.R. 368, 45 O.L.R. 326.

COMPENSATION FOR SERVICES — QUANTUM — APPEAL — COMMISSION ON RECEIPTS — MANAGING BUSINESS — SOLICITOR EXECUTOR—TRUSTEE ACT.

In Ontario, executors and trustees have a right to be paid for their services, and generally by a percentage on the receipts: [Trustee Act, R.S.O. 1914, c. 121, s. 67.] Where there is no error in principle, the court is, on appeal, loath to interfere as to the quantum of the allowance made to executors, even though it seems that it is more liberal than the Appellate Court would in the first instance have given. Where the executors (the widow and the solicitor) of a retail liquor seller carried on his business for three years after his decease, paid his debts, and sold the business for a large sum, so that the value of the estate was increased from $26,237 to $230,126, an allowance of $4,650 to the executors, both of whom rendered valuable services during the three years, was confirmed. [Thompson v. Freeman, 15 Gr. 384, followed.] In estimating the value of the executors services, legal business done and advice given by the solicitor executor, for which, but for his position, he might have made professional charges, were properly taken into account: Section 67 (4) of the Trustee Act. Though the cash receipts from the

business did not actually pass through the hands of the solicitor executor, the widow being empowered by the will to receive all moneys, he rendered such advice and assistance in the disposal of these moneys as entitled him to a commission for his services in respect of them.

Re Smith, 38 O.L.R. 67.

COMMISSION.

Re Godchere Estate, 5 O.W.N. 625.

SURROGATE COURTS — ORDER OF JUDGE ON PASSING ACCOUNTS FIXING COMPENSATION OF EXECUTORS — APPEAL — FORUM — SURROGATE COURTS ACT, s. 34.

Re Henderson, 8 O.W.N. 31.

ADMINISTRATION OF ESTATE — PASSING OF ACCOUNTS — FAILURE TO SET APART TRUST FUNDS — ABATEMENT OF LEGACIES — RESIDUARY ESTATE — TRUSTEES' COMMISSION—COSTS.

Re Cormack, 11 O.W.N. 74.

COMPENSATION FOR SERVICES—QUANTUM.

Re Nesbit, 11 O.W.N. 93.

(§ IV C—111)—COMMISSIONS GENERALLY.

There is no fixed rate of compensation applicable under all circumstances for services of executors and trustees; they are entitled to reasonable compensation; and what is reasonable compensation must be governed by the circumstances of each case. [Robinson v. Pett, 2 White and Tudor, L.C. Eq. 214, followed.] Though shares in companies may be readily convertible, yet the risk of liability upon an executor in case of a loss to the estate owing to their fluctuation in value should be considered in fixing his compensation where a large part of the estate consists of corporate shares. Where an estate consists of assets in different provinces, and there are a large number of pecuniary legacies, many of the legatees being infants, and a trust fund is created by the will, a sum equivalent to about 3 per cent of the value of the estate is not too large a compensation to be allowed to the executors.

Re Griffin, 3 D.L.R. 165, 3 O.W.N. 1049, reversing 3 O.W.N. 759.

COMMISSION TO EXECUTORS — APPORTIONMENT OF COMMISSION.

Part of a testator's estate consisted of a dry goods business, which was carried on by his two executors for nearly a year before it was sold en bloc, one executor doing practically all the work. Upon passing the accounts, the probate judge allowed a commission of four and one-half per cent upon the whole estate to the executor who carried on the business and a commission of one-sixth per cent to the other. No commission was allowed upon sales made in carrying on the business. Upon appeal, the court refused to interfere with the judge's discretion in apportioning the commission.

Re Manzer, 42 N.B.R. 251.

(§ IV C—113)—ACCOUNTING — STENOGRAPHER'S COSTS.

Executors may charge for stenographer's costs incurred in their administration.

McDonald v. Saunderson, 50 Que. S.C. 422.

(§ IV C—115) — ADMINISTRATRIX SOLE BENEFICIARY OF ESTATE AFTER PAYMENT OF DEBTS — RIGHT OF CREDITOR OF ESTATE TO SET OFF HIS CLAIM AGAINST A PERSONAL CLAIM AGAINST HIM BY ADMINISTRATRIX.

The plaintiff was an assignee of moneys owing by J. and of the rights under a covenant by the defendant guaranteeing payment thereof. The plaintiff was administratrix of estate of D., deceased, and defendant claimed the right to set off against the plaintiff the amount due upon the covenant in a mortgage given by D. and which mortgage had been assigned to J. If the D. estate was solvent the plaintiff became the sole beneficiary after payment of debts. When administration was granted there was a large apparent surplus. Over four years had elapsed since granting of administration to the plaintiff. No declaration had been filed under s. 99 of the Administration Act as to insolvency of the estate. Held that, as the plaintiff, while a party to this action in her personal capacity, is an appointee of the court, there should be judgment directing plaintiff to file and pass her accounts as administratrix with the registrar within two months; the plaintiff is entitled to judgment on her claim but all proceedings under such judgment are stayed pending the taking of and reporting upon the administration accounts and subsequent order as to set-off or otherwise. [Review of authorities.]

Donald v. Jukes, [1919] 1 W.W.R. 169.

(§ IV C—120)—ACCOUNTING OF EXECUTOR —FAILURE TO ACCOUNT FOR SECRET PROFIT.

That land belonging to an estate was secretly purchased for the executor's benefit at less than its actual value, and afterwards conveyed by the ostensible purchaser to a third person in payment of a debt of the executor, and that the latter failed to account in the Surrogate Court for the difference, is a fraud or mistake within s. 71 of the Ontario Surrogate Courts Act, 10 Edw. VII. c. 31, R.S.O. 1914, c. 62, which will permit the impeachment of his account in another action.

Shaw v. Tackaberry, 15 D.L.R. 475, 29 O.L.R. 490.

ACCOUNTS IN SURROGATE COURT — DISALLOWANCE OF PAYMENT TO WIFE OF EXECUTOR — EFFECT UPON CLAIM — NO BAR TO RECOVERY FROM ESTATE — PAYMENT WITHOUT NOTICE TO BENEFICIARIES — REFUSAL OF COURT TO REOPEN CASE FOR FRESH EVIDENCE.

Re Hopf, 10 O.W.N. 352.

EXECUTOR'S ACCOUNTS — PASSING BEFORE SURROGATE COURT — ITEMS OF ACCOUNT — SALE OF MORTGAGE AT DISCOUNT — COMMISSION PAID TO AGENT OF PURCHASER — COSTS — TAXATION — EXECUTOR'S COMMISSION — APPEAL — ACCOUNTS SENT BACK TO SURROGATE COURT.

Re Reinhardt, 17 O.W.N. 140.

(§ IV C—122)—IMPROVIDENT PAYMENTS.

The payment by an executor, in order to facilitate the settlement of an estate, of the succession duty on a legacy, on the theory that it created an annuity, is not improvident, notwithstanding it subsequently appeared to have been erroneously paid under a mistake of law.

Bethune v. The King, 4 D.L.R. 229, 26 O.L.R. 117, 21 O.W.R. 559.

PROOF OF CLAIM AGAINST ESTATE — NECESSITY FOR CORROBORATION — MATERIAL FACT.

Re Estate of Kaulbach; Moorhead v. Kaulbach, 45 N.S.R. 62, 9 E.L.R. 226.

PASSING ACCOUNTS OF ADMINISTRATOR — INTEREST ON MONEY DEPOSITED AS DISTRIBUTION SHARE IN BANK.

Re Estate of David Kennedy, 10 E.L.R. 56.

CLAIM FOR BOARDING, LODGING AND NURSING TESTATOR — UNCORROBORATED EVIDENCE.

Re Estate of Thomas Hastings, 10 E.L.R. 9.

V. Creditor's rights against land; sale of land for debts.

See Wills; Execution.

(§ V—125)—SALE OF REAL ESTATE FOR PAYMENT OF DEBTS — EVIDENCE — CLAIMS — LIMITATIONS — INVENTORY AND APPRAISEMENT — AFFIDAVIT.

On application to the judge of probate to revoke a license for the sale of real estate for the payment of debts, etc., granted by the registrar, the judge is not confined to the evidence that was before the registrar on the occasion of the ex parte application. But where the court is satisfied that, even on the materials which were before the registrar, a case was made out for the sale of real estate, the decision of the judge of probate refusing to rescind the order for sale will be sustained. There is nothing in the statutes, or in the practice of the court of probate, requiring claims to be filed in that court, apart from the permissive provision, for greater caution, enabling a creditor to file his claim in order to prevent any question being raised as to the running of the statute of limitations, which is all that the provision referred to means. The inventory and appraisement are binding upon the parties to the proceeding to prove the value of the estate. An affidavit referring to the original inventory on file and showing the amount at which all the personal property belonging to the estate has been appraised, and that none of it has been sold, realized upon or collected, but that it is all on hand, is a substantial compliance with s. 43 (1) of the Probate Act (R.S.N.S. 1900, c. 158) to support an application for leave to sell real estate for the payment of debts.

Re Chisholm Estate, 50 N.S.R. 341.

EXECUTION OF TRUSTS — SURVIVING EXECUTOR — TRUSTEE ACT, R.S.O. 1914, c. 121 — SALE OF LAND CHARGED WITH PAYMENT OF LEGACIES — CAUTION — REGISTRATION — DEVOLUTION OF ESTATES ACT, R.S.O. 1914, c. 119, s. 14 — TRANSFER OF INTERESTS — INTEREST ON LEGACIES.

Re Luton, 7 O.W.N. 768.

SALE OF LANDS OF TESTATOR TO PAY LEGACIES — ABSENCE OF DEBTS — CONVEYANCE — "PERSONS BENEFICIALLY INTERESTED" — LEGATEES — DISPENSING WITH CONCURRENCE OF PERSONS ENTITLED TO LAND SUBJECT TO PAYMENT OF LEGACIES — DEVOLUTION OF ESTATES ACT, R.S.O. 1914, c. 119, s. 21 (1), (2).

Re Pearcy and Finotti, 12 O.W.N. 36.

VI. Foreign executors and administrators.

(§ VI—130)—POWER OF — DISCHARGE OF MORTGAGE OF LAND IN ONTARIO.

On the registry of the will of a deceased mortgagee which has been proved in Great Britain, together with the foreign letters probate, in the proper registry office in Ontario for the county where the mortgaged land lies, a discharge of the mortgage by the executor may be registered; the latter has the right to discharge it without proving the will in Ontario or having the probate resealed by a Surrogate Court thereof, but a foreign administrator would not have the like right.

Re Green and Flatt, 13 D.L.R. 547, 29 O.L.R. 103.

FOREIGN ADMINISTRATOR — RIGHT TO SUE ON NEGOTIABLE INSTRUMENTS HELD BY HIM.

A foreign administrator has the right to sue, on negotiable instruments held by him, in any other jurisdiction without any other grant.

Browns v. Browns, 48 D.L.R. 72, [1919] 2 W.W.R. 754.

ALIEN EXECUTOR — QUALIFICATIONS UPON OATH—PROBATE TO.

Smithson v. Smithson, 25 D.L.R. 745, 9 W.W.R. 501, 33 W.L.R. 229.

FINAL DISTRIBUTION — PAYMENT OF BALANCE TO FOREIGN ADMINISTRATRIX.

Re Law, 24 D.L.R. 871, 34 O.L.R. 222.

PROPERTY OF INTESTATE DOMICILED IN FOREIGN COUNTRY — ANCILLARY ADMINISTRATION — TITLE TO COMPANY SHARES — SITUS — JURISDICTION AS TO — SALE.

Re Fenwick, 25 D.L.R. 850, 35 O.L.R. 29.

APPLICATION BY EXECUTOR FOR ADMINISTRATION ORDER — FOREIGN DOMICILE OF TESTATOR — ISSUE OF LETTERS PROBATE BY FOREIGN COURT — ESTATE SAID TO BE IN ONTARIO — ATTORNMENT TO FOREIGN JURISDICTION — DISCRETION TO REFUSE ORDER.

Re Porter, 11 O.W.N. 363.

QUEBEC LETTERS OF ADMINISTRATION — RESEALING.

A certified copy of "letters of verification" issued out of the Superior Courts of Quebec may not be "resealed" under the provisions of s. 69 of the Surrogate Courts Act. (Sask.). It should be shewn by someone having knowledge of the law of Quebec, that "letters of verification" issued in that province is a legal document of the same nature and effecting the same purpose and giving the same rights and authority as letters of administration in Saskatchewan, when such "letters of verification" are tendered for resealing.

Re Dunlop Estate, 34 W.L.R. 427.

NOTICE TO NEXT OF KIN.

An administrator appointed in U.S.A. to the estate of a person there domiciled may appoint an attorney who will be entitled to take out letters of administration in Saskatchewan, but there should be a summons to shew cause served upon the next-of-kin before the administration is granted, and administration should be granted to the attorney for the use and benefit of the U.S.A. administrator until such person shall apply for and obtain administration in Saskatchewan.

Re Wyatt Estate, 6 W.W.R. 1514.

DECEASED DOMICILED IN SASKATCHEWAN — DEBT OWING BY ALBERTA COMPANY — EXECUTRIX SUING IN ALBERTA — PROBATE GRANTED IN SASKATCHEWAN AFTER DEFENCE FILED BUT NOT IN ALBERTA — PAYMENT INTO COURT—COSTS.

An executrix named in the will of deceased who died domiciled in Saskatchewan brought action on demand notes given to deceased by defendant, a company incorporated in Alberta and carrying on business there only. The action was brought in Alberta and before probate was obtained either in Saskatchewan or Alberta. Defendant did not deny the debt but questioned plaintiff's right to receive the money which it paid into court. Probate was issued on Saskatchewan after defence was filed but there was never any ancillary probate in Alberta. An order of the Master giving plaintiff leave to enter judgment and costs of suit except of application for judgment, was varied as to costs and defendant given costs of appeal: the judgment to stand in favour of plaintiff for the moneys in court without costs but no payment out to be made until a judge is satisfied that the treasury department has no claim for succession duties.

Torguson v. Wayne Supply Co., [1919] 2 W.W.R. 875

MOTION FOR DIRECTIONS — LOCAL AND FOREIGN ADMINISTRATORS — LOCAL CREDITORS.

Re Donnelly, 2 O.W.N. 1388, 19 O.W.R. 708.

VII. Executors de son tort.

(§ VII—140)—VALIDITY OF SALE BY—RELATING BACK.

The validity of sale by an executor de son tort, which is done for the benefit of the estate, relates back, upon his appointment as administrator, to the death of the intestate by operation of law, and he cannot thereafter claim the property or the value thereof in his capacity as administrator. [Maher v. Hubley, 17 N.S.R. 295, distinguished; Whitehall v. Squire, 1 Salk. 295; Christie v. Clarke, 16 U.C.C.P. 544, 27 U.C.Q.B. 21; Robertson v. Burrill, 22 A.R. (Ont.) 356, followed.]

Murray v. Munro, 27 D.L.R. 98, 49 N.S. R. 501.

EXECUTOR DE SON TORT — SALE OF ASSETS OF DECEASED INTESTATE BY INTERMEDDLER — PROCEEDS APPLIED IN PAYMENT OF DEBTS AND FUNERAL EXPENSES.

Pickering v. Thompson, 24 O.L.R. 378, 19 O.W.R. 697.

EXEMPLARY DAMAGES.

See Damages.

EXEMPTIONS.

I. IN GENERAL.
II. PROPERTY AND RIGHTS EXEMPT.
A. In general.
B. Tools; implements; etc.
III. WHO MAY CLAIM.
From taxation, see Taxes, I F.

Annotation.

What property is exempt: 16 D.L.R. 6; 17 D.L.R. 829.

I. In general.

(§ I—4)—ASSIGNMENT TO EVADE — EFFECT — RIGHT TO RECOVER BACK.

Where a debtor owning property exempt by law from execution assigns such property to a third party merely for the purpose of defeating his creditors and solely without consideration, although it may appear that the debtor's intention was to do an act which would be a violation of the law, yet since his act could not have the effect of defeating or delaying his creditors, he is not by such assignment deprived of the right to recover back the property from the assignee who has given no consideration for it.

Scheuerman v. Scheuerman, 17 D.L.R. 638, 7 A.L.R. 380, 29 W.L.R. 246, 7 W.W. R. 522.

II. Property and rights exempt.

A. In general.

(§ II A—5)—Exercise of right—Assignment for creditors.

The right to claim an exemption as against an assignee for creditors is founded on the restrictive words used in s. 17 of the Homestead Act, R.S.B.C. 1911, c. 100, and in the instrument of assignment which adopts the words of the Act; and in order to be entitled to such right it must be claimed at the time of the delivery of possession to the assignee or within a reasonable time thereafter, else it will be presumed to have been waived.

Roy v. Fortin, 25 D.L.R. 18, 22 B.C.R. 282, 32 W.L.R. 790, 9 W.W.R. 407.

When property exempt from seizure.

In a simple case, if clear proof were presented to the execution creditor by affidavit or otherwise that land apparently affected by the execution lodged by him in the Land Titles Office was exempt under the homestead exemption law, he should, at the expense of the debtor, do what was necessary to remove the cloud on the title.

Hart v. Rye, 16 D.L.R. 1, 5 W.W.R. 1280, 27 W.L.R. 9.

In general.

The agreement for maintenance, as well as that ordered by judicial decree, ceases to be exigible on a change taking place in the condition of the creditor by which he is enabled to support himself. The debtor is not obliged to procure a judicial discharge of the agreement or decree.

Laflamme v. Saint Jacques, 41 Que. S.C. 172.

(§ II A—12)—Homesteads — Exemption ordinance — Executions — Administration orders.

The duty of an administrator is to realize the assets of the decedent's estate available to pay debts, but he may not without the consent of the widow proceed to sell the homestead and distribute the proceeds in payment of debts if the homestead was exempt under the Exemption Ordinance; such homestead in the occupation of and necessary for the widow and children did not constitute assets available either under execution or under an administration order.

Re Conlin Estate, 19 D.L.R. 793, 7 A.L.R. 437, 7 W.W.R. 187.

Pensions and proceeds.

Exemption from seizure provided for in art. 599, par. 13, C.C.P. (62 Vict. c. 53) as to pensions created by financial institutions for their employees, extends itself to pension funds and provisions for old age created by a railroad company to assure the performance and efficiency of the service of the public use. In consequence the benefits of the insurance of a railroad employee in the association established by such company and providing such funds are exempt from seizure.

Jetter v. G.T.R. Co., 18 Rev. de Jur. 204.

(§ II A—16)—Wages — Public office under the Crown—Right of attachment — Exigibility.

Where a judgment debtor holds a public office under the Crown whose remuneration is payable out of national funds, e.g., in the R.N.W.M. Police Force it is contrary to the policy of the law that his remuneration, intended to maintain him in a state of usefulness in the force, should be subject to attachment or other method of execution.

Hobbs v. Att'y-Gen'l of Canada, 18 D.L.R. 395, 7 A.L.R. 391, 29 W.L.R. 650, 7 W.W.R. 256.

Wages.

Article 599, par. 9, C.C.P. declaring wages nonseizable in a certain proportion, assimilates thereby the part nonseizable to other exempt property as respects debts for maintenance. It follows that for such a debt the nonseizable part of the wages can be seized.

Panneton v. Gagnon, 47 Que. S.C. 8.

Salary of municipal employees.

The salary of a municipal employee (a valuator), of a city or town, whose engagement is neither by the month nor by the year but by the day can be seized for the portion indicated in par. 11 of art. 599 C.C.P.

Chabot v. Ringuet, 49 Que. S.C. 4.

B. Tools; implements; etc.

(§ II B—20)—Stock-in-trade — Butcher shop.

The safe, cash register, counter, etc., of a butcher are "stock-in-trade of his business" and so not exempt from seizure under a writ of fi. fa.

Endrizzi v. Peto and Beckley, [1917] 1 W.W.R. 1439.

Stallion as means of livelihood.

A stallion which is kept for breeding purposes and which is the chief source of revenue and means of livelihood of its owner is exempt, under s. 29 (a) of the Executions Act (Man.) from seizure under execution.

Williams v. M. Rumely Co., [1917] 3 W.W.R. 301.

(§ II B—22)—Of farmer on assignment for creditors.

A farmer who operates a mill through an employee and who, when the season's work on his farm is over, buys and sells stock as opportunities occur, does not thereby cease to be a farmer; if he makes an assignment for benefit of his creditors he is entitled to retain two working horses and, if he sells them, the proceeds of such sale or the promissory notes representing the same. If in such case the curator, having allowed the insolvent, as a farmer, to keep the two horses refuses to deliver to him the note given on the sale of one of them and, with the authority of the inspectors, contests the proceedings by the insolvent for possession of said note although he had previously promised to de-

liver it over, he will be personally ordered to pay the costs of the proceedings.

Hébert v. Rondeau, 14 Que. P.R. 1.

AUTOMOBILE TO EARN LIVING.

An automobile worth $1,400, even if it is the only vehicle owned by a doctor, is not nonseizable from the fact that he used it to earn his living as a cabman.

Robitaille v. Asselin, 49 Que. S.C. 1.

PHYSICIAN'S VEHICLE.

A country physician's horse, vehicle and harness are not exempt from seizure.

Tudhope Anderson Co. v. Lafortune, 17 Que. P.R. 433.

III. Who may claim.

(§ III—30)—PERSON OF FAMILY — PARTNERSHIP.

The property of a partnership is not exempt by virtue of the Exemptions Ordinance (c. 27, C.O. 1898) from seizure under execution; the provisions of said ordinance being applicable only to an individual who may have a family and to the family.

MacKinnon v. Beals, 10 A.L.R. 503, [1917] 1 W.W.R. 1328.

EXPERT TESTIMONY.

See Evidence.

Annotations.

Medical experts: 38 D.L.R. 453.

Questioned documents and proof of handwriting: 44 D.L.R. 170, 13 D.L.R. 565.

EXHIBITIONS.

TRADE PRIVILEGES—CONCESSIONS.

Hopkins v. Canadian National Exhibition Assn., 5 O.W.N. 639.

EXPLOSIONS.

IN GENERAL.

There can be no recovery on the ground of negligence for injuries sustained by an explosion of dynamite into which a pick was stuck by a mine employee, where the proof fails to shew any negligence on the part of the master in permitting the explosive to be in the place where the injury occurred, or as to how it came there, or that its presence could have been discovered by the most careful inspection, or, if the explosion was caused by an unexploded charge, by counting the explosions at the time a blast was made.

Root v. Vancouver Power Co., 2 D.L.R. 303, 17 B.C.R. 203, 20 W.L.R. 847, 1 W.W.R. 1111.

ILLEGAL OR NEGLIGENT USE — INJURY TO SERVANT—USE OF EXPLOSIVES — UNGUARDED RECEPTACLE — FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Davidson v. Peters Coal Co. (No. 2), 5 D.L.R. 882, 4 O.W.N. 36, 23 O.W.R. 25, affirming 2 D.L.R. 908, 3 O.W.N. 1160.

ILLEGAL OR NEGLIGENT USE.

Where in a process of thawing dynamite one employs an illiterate labourer and fails to acquaint him with the directions in which the process of thawing is to be followed, and that the mode of thawing was carried on contrary to the directions issued with each box, as a result of which an explosion occurs killing such servant, the master is liable in an action for his death by the administrator of the deceased.

Toronto Construction Co. v. Strati, 46 Can. S.C.R. 631, affirming 19 O.W.R. 88.

SERVANT INJURED BY EXPLOSION OF SHELL —CONTRIBUTORY NEGLIGENCE.

Smith v. Royal Canadian Yacht Club, 19 O.W.R. 1001, 3 O.W.N. 19.

EXPROPRIATION.

I. RIGHT TO TAKE PROPERTY.
- A. In general.
- B. Who may exercise.
- C. What may be taken.
- D. For what purpose.
- E. Right acquired.

II. PROCEDURE.
- A. In general.
- B. Petition.
- C. Trial; award.
- D. Appeal; new trial.

III. RIGHTS AND REMEDIES OF OWNERS.
- A. In general.
- B. What constitutes a taking of, or injury to, property.
- C. Right to compensation.
- D. Payment or security; taking possession of property.
- E. Consequential injuries.

IV. ADDITIONAL SERVITUDE.
- A. In general; on railroad way.
- B. On highway.

Annotations.

Allowance for compulsory taking, liquor license: 27 D.L.R. 250.

Damages for expropriation,—Measure of compensation. 1 D.L.R. 508.

I. Right to take property.

Municipal powers as to, see Municipal Corporations, II A—30.

A. IN GENERAL.

(§ I A—1)—HIGHWAYS — EXPROPRIATION —VALIDITY OF AWARD.

The members of the Ontario Railway and Municipal Board in fixing the amount of compensation allowed for land expropriated under the Toronto & Hamilton Highway Commission Act, act as judges rather than arbitrators merely, and the fact that they allowed another member of the Board who had not heard the evidence to read it and express his views regarding the case is no ground for vitiating the award.

Re Toronto & Hamilton Highway Commission and Crabb, 32 D.L.R. 706, 37 O.L.R. 656.

ILLEGAL EXPROPRIATOR BY MUNICIPAL CORPORATION — ACTION TO RECOVER PROPERTY.

A municipal corporation has no right to dispossess a person of his property without

legal proceedings and under the due course of law.

Grenier v. St. Edouard de Fabre, 25 Rev. de Jur. 290.

(§ I A—4)—Right of municipality.

Articles 421, 423 (a) of the Montreal charter as to expropriation for improvements do not apply to the acquisition of real estate for the administrative purposes of the city corporation.

Birchenough v. Montreal, 3 D.L.R. 299, 21 Que. K.B. 467.

Municipal Acts — Improvements—Setting aside.

When a municipal council passes a by-law for the expropriation of land, ostensibly acting within the powers conferred by s. 576 of the Municipal Act, 1903, purports to act in pursuance of a well thought out and comprehensive scheme for the acquisition of parks, pleasure grounds, boulevards, drives, gardens and places of recreation and enjoyment; when the propriety of the scheme has been generally approved, and has not been attacked by a single ratepayer as such, has been acted upon and money expended in pursuance of it for many years, and when each plot of land is essential to the harmonious development of the whole, such by-law will not be set aside at the instance of an owner of lots expropriated and included in the scheme who has been an active and zealous pioneer for the acquisition and construction of such improvements, especially when there is no evidence of fraud, dishonesty or trickery on the part of such council. The erroneous introduction of unnecessary words cannot destroy a description otherwise clear.

Watson v. Toronto Harbour Commissioners, 41 D.L.R. 633, 42 O.L.R. 65.

Municipal corporation — Expropriation of land — By-law — Notice of expropriation — Repealing by-law — Expropriation of smaller portion — New notice — Liability for damages for passing of first by-law and entry — Municipal Act, 1903, s. 463 — Municipal Act, 1913, s. 347.

Guest v. Hamilton, 5 O.W.N. 889.

Right of municipality.

The provisions of Title VIII of the Municipal Code respecting expropriation for municipal purposes do not exclude those of art. 407 C.C. (Que.), which should be applied in regard to the damages.

Thibaudeau v. Ste. Thécle, 43 Que. S.C. 207.

Municipal expropriation — Formalities — Propriety — Petitionary action — C.C. art. 407 — C. mun. art. 789.

A municipal corporation, desiring to expropriate certain land, sent notice to the owner of the time and place of the valuation. Later, after notice of the award had been received, the city notified the owner of this notice. The owner not having appeared to either of these notices, and not having filed an objection within 30 days, he cannot bring a petitory action against the municipality which, on the payment of the indemnity fixed by the arbitrators, has become the owner of the expropriated.

Leduc v. Lochaber Nord, 25 Rev. Leg. 152.

B. Who may exercise.

(§ I B—5)—Municipal corporation — Municipal Act — Must be by by-law — Corporation cannot confer jurisdiction on official referee when expropriation illegal.

The acquiring or expropriation of land by municipal corporations is governed by s. 322 of the Municipal Act (R.S.O. 1914, c. 192) and must be done by by-law. An expropriation for civic purposes being illegal because there is no by-law authorizing it, the corporation cannot, by consent, confer jurisdiction on the official referee to assess the damages, and any award made by him is void.

Grosvenor St. Presbyterian Church v. Toronto, 45 D.L.R. 327, affirming 40 D.L.R. 574.

(§ I B—8)—Railway company — Plans and profile — Vacating for delay.

Where the plan of the line of a proposed railway has been approved by the Railway Commissioner of Manitoba, and filed in the land titles office of the district, but nothing has been done towards actually establishing the railway, except the obtaining of a charter which incorporated the provisions of the Manitoba Railway Act, and the payment in of a specified deposit in respect of such charter, the Public Utilities Commission of Manitoba has jurisdiction, upon the application of an owner through whose property the proposed line runs, to set aside the plans on the company's default in proceeding within a reasonable time.

Re Winnipeg North-Eastern R. Co. (No. 2), 11 D.L.R. 147, 15 Can. Ry. Cas. 183, 4 W.W.R. 256, affirming 10 D.L.R. 469, as to jurisdiction.

C. What may be taken.

(§ I C—15)—Gravel lands — Need of surveys.

Gravel land which is required by a railway company for obtaining construction material and the right of way for a spur line to take it out may be expropriated under s. 180 of the Railway Act, 1906, without any plans being submitted to the Railway Board; no deposit of plans is required as would be necessary were the land required for a right-of-way for its line, but a certified copy of the surveyor's plan is to be served upon the property owner as well as the notice to treat.

Sask. Land & Homestead Co. v. Calgary & Edmonton R. Co., 21 D.L.R. 172, 51 Can. S.C.R. 1, 8 W.W.R. 312, 19 Can. Ry. Cas. 126, affirming 14 D.L.R. 193, 6 A.L.R. 471.

OF TOLL ROAD — TOLL ROAD EXPROPRIATION — PARTIES TO ARBITRATION — TOWNSHIPS INTERESTED.

Brockville & Prescott Road Co. v. Counties of Leeds & Grenville, 5 O.W.N. 362.

IN QUEBEC.

Article 5792 R.S.Q. 1909, relating to cities and towns forms part of the charter of the town of Outremont which, therefore, cannot, without the owner's consent, expropriate the property of any religious, charitable or educational corporation.

Outremont v. Missionary Sisters of the Immaculate Conception, 14 Que. P.R. 211.

(§ I C—16)—BEACH — HARBOUR — VALIDITY OF GRANT — COMPENSATION — VALUE — PUBLIC LANDS.

The right to alienate part of the public domain by the King of France has always been recognized even subsequent to the Edict of Moulins. A title to certain beach lots, in Quebec, founded on a grant from Louis XIV. is valid, and cannot be attacked by the Crown. Such lands do not form part of the Harbour of Quebec. In estimating compensation for the expropriation of land by the Crown, the value of the property for expropriation purposes cannot be taken as a basis; the value of the property to the owner, not to the party expropriating it, is to be considered.

Belanger v. The King, 42 D.L.R. 138, 17 Can. Ex. 333.

(§ I C—21)—TIDELANDS — LAND COVERED WITH WATER.

Land covered with water may be expropriated by a city for a water-works system under the provisions of the Sask. City Act, where the land was granted by the Crown, without reservation except the right of navigation and fisheries, before the passage of the North-West Irrigation Act, 1898.

Ex parte Young, 5 D.L.R. 83, 5 S.L.R. 351, 21 W.L.R. 860, 2 W.W.R. 758.

(§ I C—32)—LANDS OF PROVINCIAL RAILWAY—CROSSINGS.

When application is made under s. 159 of the Railway Act, 1906, for the approval of a location plan of a Dominion railway crossing lands of a provincial railway company, the Board must first determine in each case whether expropriation of the required lands of the provincial railway should be authorized, since the order of approval carries with it the right of expropriation of such lands within the limits set out in s. 177 of the Act. Section 176 of the Act does not authorize the taking of lands of a provincial railway company; and the settled practice of the Board accords with this view.

Lachine, Jacques Cartier & M. R. Co. v. Montreal Tramways, etc., 18 Can. Ry. Cas. 133.

FOR CROSSING OF OTHER RAILWAY.

An order was made by the Railway Board authorizing a railway company, for the purpose of completing a projected spur authorized by a former order of the board, to take a portion of land acquired by another railway company after the making of the former order referred to. It was also ordered that the expense of the crossings on the land in question should be borne jointly by the two companies.

Qu'Appelle Long Lake & Saskatchewan R. Co. v. C.P.R. Co., 21 W.L.R. 628.

D. FOR WHAT PURPOSE.

(§ I D—52)—ELECTRIC LIGHT.

The Municipal Act of 1903, 3 Edw. VII. (Ont.) c. 19, as amended, does not confer power upon a town to acquire "in invitum" by arbitration and expropriation proceedings a plant owned by a company organized for the manufacture of gas and electricity.

Sarnia Gas & Electric Light Co. v. Sarnia, 4 D.L.R. 19, 3 O.W.N. 1455, 22 O.W.R. 558.

(§ I D—55)—FOR RAILROAD — PUBLIC WORK — WHARF FRONTING ON AREA TAKEN.

The King v. Falardeau, 14 D.L.R. 917, 14 Can. Ex. 265.

RAILWAYS — CONDEMNING PROPERTIES FOR —FILING PLANS.

The sale, by deed, stipulating for immediate delivery and possession, to a railway company of all that portion of certain lots required by it for its right-of-way and other purposes necessary for construction, maintenance, or operation as the same appears on the plans already filed or to be filed in the land registry office of the county in which such lands are situate, does not give the company any right to the possession for the purpose of taking away sand and gravel therefrom of lands outside of the lands designated upon the plan or plans filed under the Railway Act, 1906, if further lands are required, the new or amended plan must first be filed before the railway acquires any right of possession under such deed.

Ha Ha Bay R. Co. v. Larouche, 10 D.L.R. 388, 22 Que. K.B. 92.

PUBLIC LANDS.

Lands dedicated to a public use under a provincial statute may be expropriated under the Railway Act (Dom.), for railway purposes.

Lachine, Jacques Cartier & Maisonneuve R. Co. v. Montreal Gas Co., 28 D.L.R. 382, 18 Can. Ry. Cas. 438.

GOVERNMENT RAILWAY ACT, 1881, S. 18 — VESTING OF PROPERTY IN THE CROWN — TITLE TO LAND — STATUTE OF LIMITATIONS — DISABILITY — ABSENCE FROM PROVINCE — GENTLEMAN'S RESIDENCE—INTEREST.

Under the provisions of s. 18 of the Government Railways Act, 1881, the land taken for the purpose of a railway became absolutely vested in the Crown, not only by the deposit of the plan and description in the registry office, but also by the actual possession assumed by the Crown. The

title to the land does not become vested in the Crown by the mere survey of the land, as provided by s. 5 of the Government Railways Act. Under the circumstances of the case the claim was not barred by the Statute of Limitations. Where the expropriating party has done all that could reasonably be expected of it to settle for the land taken, and that the delay in prosecuting the recovery of the claim may justly have been construed as an abandonment of the same, interest will only be allowed from the date on which the Petition of Right was filed in court.

Howard v. The King & Pictou; Re Strathcona Estate, 59 D.L.R. 527, 19 Can. Ex. 271.

RAILROADS.

The right of expropriation is given to railway companies not for their own benefit but in the public interest and to enable reasonable facilities to be given to the public. Upon a strict compliance with the provisions of s. 178 of the Railway Act, 1906, the company has the right to acquire the lands covered by its application unless it is established that the application is not bona fide and that the company does not require the lands for public purposes, or that it is acquiring them for some ulterior purpose.

C.P.R. Co. v. Coquitlam Landowners, 13 Can. Ry. Cas. 25, 20 W.L.R. 632.

(§ I D—57) — EXPROPRIATION FOR RAILWAY YARDS.

Under s. 178 of the Railway Act, 1906, giving the Railway Board the right to give a railway company permission to take more land for railway purposes than it is entitled to take under subs. (b) of s. 177 of the Act, providing that there may be taken for stations, depots, etc., an area one mile in length by 500 feet in breadth including the width of the right-of-way, if such additional land is shewn to be "necessary," the word "necessary" should be given a liberal construction.

Prince Albert v. C.N.R. Co., 10 D.L.R. 122, 15 Can. Ry. Cas. 87, 6 S.L.R. 49, 23 W.L.R. 275, 3 W.W.R. 900.

(§ I D—58)—SPURS OR BRANCH LINES—LANDS OWNED BY APPLICANT FOR SPUR—COMPENSATION.

Section 225 of the Railway Act, 1906, applies to spurs or branch lines ordered under s. 226 as well as to branch lines authorized under s. 222. The lands necessary for a spur constructed under s. 226 are, therefore, to be acquired by agreement or expropriation in the same manner as lands for other railway purposes. Consequently, where lands so required are owned by the applicant for the spur, and the applicant has not been compensated for them in accordance with the Act, they do not become vested in the railway company by the mere operation of s. 226, subs. 5, upon refund of the cost of the spur by means of rebates. [Boland v. G.T.R. Co., 18 Can. Ry. Cas. 60, followed.]

Standard Crushed Stone Co. v. G.T.R. Co., 18 Can. Ry. Cas. 374.

INDUSTRIAL SPUR—SCOPE OF RIGHT — POWERS OF BOARD.

When an order of the Railway Board authorizing the construction and operation of an industrial spur provides that the respondent should retain the ownership of the right-of-way on which the siding is located, the Board can only authorize the applicant to take expropriation proceedings to enable it to acquire the right-of-way across the lands of the respondent so as to reach by an extension of the spur another industry which it desires to serve.

G.T.R. Co. v. Hamilton & Toronto Sewer Pipe Co., 18 Can. Ry. Cas. 369.

(§ I D—60)—RIPARIAN RIGHTS — WATER-POWERS — PUBLIC WORK — 7 WM. IV., C. 66 — 9 VICT., C. 37, S. 7 — B.N.A. ACT, S. 108 — VALUATION OF WATER-POWERS.

The River Trent, by a series of statutes, was appropriated by the Crown for the purpose of constructing the Trent Canal. At the time of Confederation the whole river from Rice Lake to the Bay of Quinte had become part of the canal system. Held, that the river had, under the circumstances, become a public work of Canada and passed by s. 108 of the B.N.A. Act to the Dominion at the time of Confederation. 2. That the title of defendant to lots on the river did not carry with it the solum or bed of the river, and therefore the defendant had no legal right to compel the dam erected above his lots on the river to be maintained by the Crown. 3. In estimating the value of a water-power the cost of exploiting the same must be considered. That being so, even if the river in question were not a public work no value as enuring to the defendant could be placed upon the water-power, as it would cost more to develop than the results to be attained would justify.

The King v. Kilbourn, 47 D.L.R. 346, 19 Can. Ex. 7.

(§ I D—66) — RESERVOIR — WATERWORK SYSTEM.

Expropriation proceedings to acquire land for a city waterworks system must be based upon the Sask. City Act.

Ex parte Young, 5 D.L.R. 83, 5 S.L.R. 357, 21 W.L.R. 860, 2 W.W.R. 758.

(§ I D—67) — WATER RIGHTS — LAKES AND STREAMS — PUBLIC USE — PRIOR PUBLIC UTILITY FRANCHISE — LANDS COVERED BY WATER.

A right of expropriation granted to a mining and power company by legislative authority in its act of incorporation as to "lakes or streams or lands covered by water" will be construed as not including public rivers nor those in which rights and franchises of other corporations such as river improvement companies had become vested by special legislation. Mere general

words in an expropriation clause of an incorporating statute will not confer the right to compulsorily acquire property which had formerly been acquired in the same way by another company where the purposes of the earlier project would be seriously interfered with.

Thomson v. Halifax Power Co., 16 D.L.R. 424, 47 N.S.R. 536.

(§ I D—73)—Water and water rights —Dams.

Statutory powers of expropriation in the incorporating statute of a power company are to be strictly construed so as not, by mere general words authorizing expropriation for the damming of a river, to deprive the public of rights theretofore existing unless a clear legislative intention to abrogate public rights is disclosed in the statute.

Miller v. Halifax Power Co.; Thomson v. Halifax Power Co., 13 D.L.R. 845, 47 N.S.R. 334, 49 C.L.J. 707.

E. Right acquired.

(§ I E—75)—Rights acquired by adoption of expropriation by-law — Vesting of property.

The mere adoption of a by-law providing for the expropriation of property for public purposes does not vest the property in a municipality. [Re Prittie and Toronto, 19 A.R. (Ont.) 503; Re Macpherson and Toronto, 26 O.R. (Ont.) 558, and Re McColl and Toronto, 21 A.R. (Ont.) 256, distinguished.]

Grimshaw v. Toronto, 13 D.L.R. 247, 28 O.L.R. 512.

(§ I E—78) — By railway company against owner of fee.

The title to land expropriated for a right of way by a railway company that received a subsidy under 27 Vict. (N.B.), c. 3, 1864, and 28 Vict. (N.B.), c. 12, 1865, is, by such acts, limited to an easement merely, and upon abandonment thereof for railway purposes the title reverts to the original owner.

Carr v. C.P.R. Co., 5 D.L.R. 208, 14 Can. Ry. Cas. 40, 41 N.B.R. 225. [Affirmed, 15 D.L.R. 295, 48 Can. S.C.R. 514, 13 E.L.R. 559.]

Public lane or highway—Dedication.

G.T.R. Co. v. Guelph, 12 Can. Ry. Cas. 371.

Transcontinental Railway Commission —Railway Act.

The King v. Jones, 44 Can. S.C.R. 495.

Power to enter lands and take material for repair of highways — Arbitration.

Cook v. North Vancouver, 16 B.C.R. 129.

II. Procedure.

A. In general.

(§ II A—80)—Land covered with water, which was granted by the Crown after the passage of the Irrigation Act, 1898 (Sask.) can be expropriated by a city for waterworks purposes, only under the provisions of such Act.

Ex parte Young, 5 D.L.R. 83, 5 S.L.R. 357, 21 W.L.R. 860, 2 W.W.R. 758.

City corporation — Error in notice — Power to desist — Serious mistake —Nullity as to object.

A city corporation in Quebec has power to desist from an expropriation proceeding already commenced because of a serious mistake or error in the notice of expropriation given by it to the owner and the plan on which the notice was based, where such error is a cause of nullity as to the substance of the object of the expropriation.

Bisaillon v. Montreal, 46 D.L.R. 331, 58 Can. S.C.R. 24, affirming 26 Que. K.B. 1.

Right to repeal expropriation by-law.

Since under s. 463 (1) of the Consolidated Municipal Act, 3 Edw. VII. (Ont.) c. 19, R.S.O. 1914, c. 124, an award of arbitrators in an expropriation proceeding is not binding on a city unless adopted by a by-law within three months after award, the by-law authorizing the proceeding may be repealed before the completion of the arbitration. [Re McColl and Toronto, 21 A.R. 256, followed.]

Grimshaw v. Toronto, 13 D.L.R. 247, 28 O.L.R. 512.

Warrant of possession — Validity — Noncompliance with statutory requirements.

A warrant of possession, issued under s. 217 of the Railway Act, 1906, will be valid until set aside, although all of the statutory requirements were not strictly complied with, as s. 220 of the Act provides that the proceedings are to be continued in the court which issued the warrant.

Sanders v. Edmonton, Dunvegan & B.C. R. Co., 14 D.L.R. 89, 6 A.L.R. 459, 25 W.L.R. 540, 5 W.W.R. 172.

Warrant of possession — Notice of application for — Service of on registered owner only, after sale — Railway Act.

The service of a notice to treat on the expropriation of lands for railway purposes need only be made upon the registered owner, and, in the absence of fraud, the railway company may disregard an unregistered interest of which they have notice; on the subsequent registration of an interest in a part only of the land the holder thereof may be added as a party to the expropriation proceedings, but he is not entitled to a separate offer of compensation or a separate award against the company for his portion. [Re Edmonton, Dunvegan & B.C.R. Co., 15 D.L.R. 938, varied.]

Sanders v. Edmonton, Dunvegan & B.C. R. Co., 18 D.L.R. 633, 28 W.L.R. 967, 7 W.W.R. 430, 18 Can. Ry. Cas. 71. [See also 14 D.L.R. 88.]

WARRANT OF POSSESSION—RAILWAY—EXPROPRIATION OF LAND — APPLICATION FOR WARRANT FOR IMMEDIATE POSSESSION.

Re Strong and Campbellford, Lake Ontario & Western R. Co., 5 O.W.N. 25, 24 O.W.R. 966.

BY-LAW — NOTICE OF EXPROPRIATION — REPEALING BY-LAW — EXPROPRIATION OF SMALLER PORTION—NEW NOTICE.

Guest v. Hamilton, 5 O.W.N. 310, 25 O. W.R. 274.

QUEBEC PROCEDURE.

The indemnity is fixed by the valuators of the municipality as provided by art. 908, Mun. Code (Que.). Therefore, a resolution of council, naming an arbitrator, notice to the owner of the land expropriated to do the same and the arbitration which follows are nullities; especially if the rules required on pain of nullity for common law arbitrators have not been observed. The declaration of the owner that he is satisfied "under reserve of the damages which have not been estimated" is not an acquiescence which covers these nullities and is no bar to his exercise of the legal remedies to which they entitle him.

Thibaudeau v Ste. Thécle, 43 Que. S.C. 207.

CONSENT OF PARTIES.

The "consent of parties" provided for in s. 204 of the Railway Act, 1906, to the fixing of a day on which the arbitrators appointed to settle the value of land expropriated for railway purposes, can be given verbally and oral evidence of it is admissible.

Can. Nor. Quebec R. Co. v. Naud, 22 Que. K.B. 221, affirming 42 Que. S.C. 121. [Affirmed, 14 D.L.R. 307, 48 Can. S.C.R. 242.]

SPECIAL STATUTORY PROCEDURE — ARBITRATION — EXPROPRIATION FOR RAILWAY — RETROACTIVENESS OF STATUTE.

In railway expropriations the parties have a right to refuse to take proceedings under the special statutes passed for this purpose and to agree to an ordinary, voluntary and conventional arbitration, these acts not being of public order. By the Quebec Act of 1912, 3 Geo. V., c. 42, the arbitration in the matter of expropriation by railway companies is abolished and replaced by an enquête before a Judge of the Superior Court, but this Act has no retroactive effect, and does not apply to an arbitration started before December 21, 1912, the date on which the Act was brought into force.

Girard v. Ha-Ha-Baie, 47 Que. S.C. 325.

(§ II A—81)—ATTEMPT TO AGREE—SALE—CONSENT THERETO MANIFESTED, PARTLY IN WRITING, AND PARTLY BY CONDUCT.

The owner of land who, on receiving notice from school commissioners that a piece of it is required for a school, causes a letter to be written to them that he is ready to surrender it (livrer le terrain), at $200 per arpent, cash..... "this amount to be paid within fifteen days," and afterwards agrees upon a date and hour to meet the secretary-treasurer, on the premises, to measure and to stake out the lot, which is done by that officer alone, he failing to attend, effects a sale of the lot so staked out, that gives the commissioners the ownership and right of possession thereof; and having admitted that he caused the above letter to be written, his own parol testimony is inadmissible to prove that the clause granting fifteen days for payment of the price, was unauthorized.

Matte v. School Commissioners of St. Jean, 44 Que. S.C. 289.

(§ II A—83)—RAILWAY—SEPARATE TITLES AND OFFERS TO TREAT.

Where titles are distinct, each separate owner is entitled as of right to have a separate offer of compensation made to him by the railway company expropriating the land for railway purposes.

Re Edmonton, Dunvegan & B.C.R. Co., 15 D.L.R. 938, 16 Can. Ry. Cas. 396, 5 W.W.R. 1192, 26 W.L.R. 767. [Varied in 18 D.L.R. 633.]

RAILWAY CO.—NOTICE—SERVICE OF—OWNER AT TIME OF DEPOSIT OF PLAN—SUBSEQUENT PURCHASER—RIGHTS OF.

A railway company taking expropriation proceedings for its right-of-way under the Railway Act, 1906, is not entitled to proceed upon a notice to treat served upon a person who was the owner at the time of the deposit of its plan, profile and book of reference to the exclusion of a purchaser whose title was already registered at the time the notice to treat was served on his vendor; the purchaser is entitled to have an offer made to him which he can either accept or refuse and it is not sufficient that the purchaser was offered the opportunity of taking the vendor's place in the arbitration proceedings.

Lachine, Jacques Cartier & Maisonneuve Ry. Co. v. Reid, 20 D.L.R. 816, 23 Que. K.B. 816.

(§ II A—84) — DESCRIPTION — CURATIVE STATUTE — CONSTITUTIONALITY — JUS TERTII.

No title passes to land taken under an expropriation proceeding in which the statutory requirements as to the description of the land are not complied with. The curative provisions of Act 1881 (R.S.C. 1906, c. 36, s. 82) only apply where the lands are taken possession of. Where the Dominion Parliament has power to authorize the expropriation of provincial lands for a Dominion railway, it has the like power to enact a curative statute relieving nunc pro tunc for a noncompliance with the strict provisions of the statute under which the expropriation is made.

The King v. Lee, 38 D.L.R. 695, 16 Can. Ex. 424, 23 Can. Ry. Cas. 218. [Affirmed, 52 D.L.R. —, 59 Can. S.C.R. 652.

PLAN AND DESCRIPTION — SUFFICIENCY — SHERIFF'S SALE.

Where a large area of land, composed of several cadastral lots, has been expropriated by the Crown for the purposes of a military training camp, the deposit of a plan and description giving the number of lots in severalty, the concessions and parishes in which such lands are situate, together with a red line upon the plan shewing the external boundary and mete of the camp, and the description referring to the same, in the following words: "This is a plan and description of certain lands, as shewn on the plan within lines marked in red." Held, such plans and descriptions are satisfactory compliance with the requirements of s. 8 of the Expropriation Act (R.S.C. 1906, c. 140), identifying with certainty the lands taken and conveying such notice both to the owners thereof and the public. A sale upon the owner at the date of the deposit of such plan and description made by the sheriff several months thereafter is to be treated as made super non domino, the lands being vested in the Crown, and the sale declared null and void.

Lamontagne v. The King, 16 Can. Ex. 203.

PLAN AND DESCRIPTION.

Depositing in a registry office of a plan and copy of the "Book of Reference," is not a compliance with the provisions of s. 8 of the Expropriation Act; it is a plan and description by metes and bounds that is so required.

The King v. Roy, 15 Can. Ex. 472.

PLANS—MODIFICATION.

An order of the Railway Board authorizing an expropriation, and the plans and specifications approved by it, for this purpose, can only be changed or modified by another order of the Commission.

Baril v. G.T.R. Co., 46 Que. S.C. 295.

B. PETITION.

(§ II B—85)—PETITION—OWNER'S LIABILITY AS TO COSTS—ARBITRATION—PUBLIC UTILITY.

A petition asking expropriation for building a church being the initial step in legal proceedings, only an offer of a sum of money to the party to be expropriated, followed by a deposit in court of the amount, can subject the latter to the costs of the arbitration. The costs incurred on expropriation in a matter of public utility, especially the costs of an arbitration for part of the proper indemnity, are payable to the expropriated owner.

Notre Dame de Sorel v. Roberge, 15 Que. P.R. 65.

C. TRIAL; AWARD; JUDGMENT.

(§ II C—92)—INSTRUCTIONS—WARRANTS FOR POSSESSION—SUMS TO BE PAID INTO COURT.

Re Campbellford, Lake Ontario & Western R. Co., 3 D.L.R. 889, 3 O.W.N. 1513.

(§ II C—93)—POWERS OF JUDGES—SCOPE OF JUDGMENTS.

In the exercise of jurisdiction conferred by the statutes in matters of expropriation for the purpose of construction of railways or of the exploitation of hydraulic power, the Judges of the Superior Court act in their official capacity, with the powers and attributes of their judicial functions; they are not experts or personæ designatæ; judgments or orders made by them ought to dispose of all the questions of fact and of law which are involved in the contestations.

Bouchard v. Quebec Development Co., 50 Que. S.C. 246.

(§ II C—94)—AMENDMENT OF AWARD.

The powers of the expropriation commissioners of the city of Montreal do not cease until their final report is filed and published, and until such publication they may revise their awards, decrease or increase the indemnities to be allowed to expropriated parties, and reconsider their decisions, and a mandamus will not lie to compel them to make a return on a resolution which they had reconsidered before the publication of their report.

Hampson v. Dupuis et al., 8 D.L.R. 500.

(§ II C—95) — INVALIDITY — OMISSION TO DEFINE LANDS TAKEN — METHOD OF ASCERTAINING AMOUNT OF COMPENSATION.

Bull v. St. John & Quebec R. Co., 13 E.L. R. 289.

D. APPEAL; NEW TRIAL.

(§ II D—100)—LAND — AWARD — APPEAL FROM JURISDICTION OF COURT—SCOPE OF.

It is competent for the court apart from the jurisdiction given by the Railway Act (Can.), to act upon its own view of the evidence taken by the arbitrators in expropriation proceedings upon an appeal taken from the award. [Re Macpherson and Toronto, 26 O.R. 558, followed.]

Re Muir and Lake Erie & Northern R. Co., 20 D.L.R. 687, 32 O.L.R. 150, 19 Can. Ry. Cas. 107.

EXPROPRIATION BY MUNICIPALITY — ORDER OF JUDGE FOR ISSUE OF WRIT OF POSSESSION—R.S.Q. 1909, ART. 5799—REVIEW.

An order of a Judge of the Superior Court, made under the authority of art. 5799, R.S.Q. 1909, for the issue of a writ to put a municipality of a town in possession of real property expropriated, cannot be reviewed. [Henriville (Corp.) v. Lafond, 2 B.R. 126; Richard v. Grand'Mere, 22 B.R. 272; Richelieu Ry. Co. v. Jetté, 17 Can. S.C.R. 493, and C.P.R. v. St. Thérèse, 16 Can. S.C.R. 606, followed.]

Grand'Mere v. Balcer, 45 Que. S.C. 109.

(§ II D—101)—UNSATISFACTORY AWARD—INTERFERENCE WITH—REMITTING CASE TO ARBITRATORS.

The fact that arbitrators in awarding damages for the expropriation of a railway right-of-way through a brickmaking plant

which entailed additional expense for the carriage of brickmaking materials to the factory, based their award on uncontradicted evidence as to an impracticable system of transportation will not justify interference with the award by the appellate court if there is evidence to support it, even though the court is dissatisfied with the award; as the appeal must be dealt with on the evidence produced before the arbitrators and the court cannot remit to them for the taking of additional testimony an award made under the Railway Act (Can.).

Re Davies and James Bay R. Co., 13 D. L.R. 914, 28 O.L.R. 544.

AWARD—LUMP SUM—WHEN TREATED AS EQUIVALENT TO VERDICT OF JURY.

An award of a lump sum as damages for land expropriated will not be treated on appeal as equivalent to the verdict of a jury, where it is apparent from the evidence that some items entering into the award should have been eliminated as a matter of law.

Re Van Horne and Winnipeg & Northern R. Co., 14 D.L.R. 897, 16 Can. Ry. Cas. 72, 26 W.L.R. 200, 5 W.W.R. 736.

WHERE EVIDENCE SUFFICIENT TO SUSTAIN AWARD.

Where, in an arbitration proceeding, the appellant's evidence was directed to establishing damages on a wrong basis, and, on appeal, he does not seek a rehearing on that ground, but insists that such evidence was proper, the award will be upheld if there is any evidence to sustain it.

Sask. Land & Homestead Co. v. Calgary & Edmonton R. Co., 14 D.L.R. 193, 6 A.L.R. 471, 25 W.L.R. 925, 5 W.W.R. 268. [Affirmed, 21 D.L.R. 172, 51 Can. S.C.R. 1.]

An application to the Superior Court of Quebec under s. 209 of the Railway Act, 1906, to set aside an award of arbitrators, made in expropriation proceedings under that Act, on the ground of the inadequacy of the compensation awarded, which application is instituted by a petition praying that a writ of appeal may be issued in the nature and form of an appeal from a decision of an inferior court, and that the court may decide upon the amount of compensation and may render the award which the arbitrators should have rendered, is an appeal to the Superior Court from the award, and not an action in that court to set the award aside, and, therefore, no further appeal lies to the Court of King's Bench from the decision of the Superior Court upon such an application.

Rolland v. G.T.R. Co., 7 D.L.R. 441, 14 Can. Ry. Cas. 21.

QUEBEC PRACTICE.

A document styled "declaration" and filed by the railway's arbitrator on an appeal of the award granted, and in which document he says that the allegations of the petition in appeal are true, will not be rejected from the record on a motion to that effect, although such arbitrator has not much interest to file such declaration.

Lachine, Jacques Cartier & Maisonneuve R. Co. v. Ross Realty Co., 14 Que. P.R. 305.

(§ II D—103)—REMITTING AWARD TO ARBITRATORS—FAILURE TO ITEMIZE AWARD.

On an appeal from the award of arbitrators in an expropriation proceeding the court has power, under s. 46, of the Expropriation Act, R.S.M., 1902, c. 61, to refer back the award for reconsideration and redetermination where it is impossible to deal intelligently with the appeal by reason of a lump sum being awarded, without any indication by the arbitrators, who refused to give their reasons for their award, as to the nature of the items of damages comprising it.

Re Van Horne and Winnipeg & Northern R. Co., 14 D.L.R. 897, 16 Can. Ry. Cas. 72, 26 W.L.R. 200, 5 W.W.R. 736.

SETTING ASIDE AWARD—EXPROPRIATION FOR CHURCH—SPECIAL RULES—APPEAL.

The mode of acquiring, by means of expropriation, a lot of land required for construction of a church is specially provided for; it does not admit of the application of provisions general and inconsistent with "the law of expropriation." Though the law declares that there shall be no appeal from award of arbitrators on expropriation for a church the Superior Court has, notwithstanding, jurisdiction to set it aside if affected with serious irregularities or nullities.

Notre Dame de Sorel v. Roberge, 15 Que. P.R. 67.

CONSTRUCTION AND OPERATION — LOCATION PLANS—DELAYING NOTICE TO TREAT—ACTION TO COMPEL EXPROPRIATION.

Vancouver, Victoria & Eastern R. & Navigation Co. v. McDonald, 44 Can. S.C.R. 65, 12 Can. Ry. Cas. 74.

POSSESSION BEFORE PAYMENT OF COMPENSATION.

Re C.N.R. Co. and Blackwood, 20 Man. L.R. 113, 15 W.L.R. 454.

APPOINTMENT OF ARBITRATORS BY JUDGE — PERSONA DESIGNATA — POWER TO RESCIND.

Re Chambers and C.P.R. Co., 20 Man. L.R. 277, 15 W.L.R. 694.

PERSONA DESIGNATA — PAYMENT OUT OF COURT TO LANDOWNER — INTEREST ON AWARD.

Re G.T.P.R. Co. and Marsan, 3 A.L.R. 65.

WARRANT FOR IMMEDIATE POSSESSION.

Where a railway company moved under s. 217 of the Railway Act, 1906, for a warrant for immediate possession, it was held that although it was a case of hardship on the landowner there was no discretion left to the judge under the statute. Order granted.

McCarthy v. Tillsonburg, Lake Erie & Pacific R. Co., 12 Can. Ry. Cas. 272, 2 O. W.N. 34, 16 O.W.R. 964.

DOMINION RAILWAY ACT — AWARD — ENFORCEMENT BY SUMMARY ORDER UNDER ONTARIO ARBITRATION ACT—OMISSION TO NAME DAY FOR MAKING AWARD — STATUTORY PROVISION—WAIVER.

Re Horseshoe Quarry Co. and St. Mary's & Western Ontario R. Co., 22 O.L.R. 429, 12 Can. Ry. Cas. 155, 17 O.W.R. 757.

ARBITRATION—COSTS—FEES OF ARBITRATOR WHO RESIGNED PENDING THE ARBITRATION.

Blackwood v. C.N.R. Co., 20 Man. L.R. 161, 15 W.L.R. 110.

MOTION FOR TAXATION OF COSTS ON APPEAL.

When a sum of $17,000 has been granted to an expropriated party on an appeal confirming the decision of the arbitrators, such party's solicitor is entitled to a sum of $200 besides the taxable costs.

G.T.R. Co. v. Garceau, 12 Que. P.R. 337.

DISCONTINUANCE OF EXPROPRIATION PROCEEDINGS—ORDER.

Re Lafontaine Park; Montreal v. Cushing, 40 Que. S.C. 1.

III. Rights and remedies of owners.

A. In general.

(§ III A—105)—EXPROPRIATION PENDING A TRESPASS ACTION.

Where, pending an action against a railway company for trespass, the company takes expropriation proceedings in respect of the land in question, judgment may be given for the plaintiff for such damages as he has sustained apart from the compensation which he would be entitled to claim in the arbitration to be held in respect of the expropriation of the land.

Como v. Can. Nor. Alberta R. Co. and C.N.R. Co., 9 D.L.R. 683, 15 Can. Ry. Cas. 46, 23 W.L.R. 299.

MONEY IN COURT—DISTRIBUTION OF FUND—SUM PAID BY RAILWAY COMPANY AS COMPENSATION FOR LAND EXPROPRIATED—EQUITABLE ASSIGNMENTS AND ORDERS UPON FUND—NOTICE TO RAILWAY COMPANY—PRIORITIES—REFERENCE—COSTS.

Re G.T.R. Co. and Brooker, 16 O.W.N. 146.

(§ III A—106)—COMPENSATION—TITLE OF OWNERS — DEED — PRESCRIPTION — INFANCY.

By a deed between father and son, executed in 1880, it was provided that in consideration of the son's release of his rights in the estate of his mother, the father "promises to transfer to his son, at his demand, all his rights and pretensions into certain two lots of land." The demand to transfer was never made and prescription had meanwhile run against this right, except for the interruption thereof on account of the minority of certain children. The Crown expropriated the land. Held, that the deed created a gift upon a potestative condition exercisable by the donee and his heirs, a mere jus ad rem to demand the transfer but conveying no fee in the land, which was extinguishable by prescription; that the compensation moneys may be paid to the owners in possession subject to their undertaking of indemnifying the Crown in respect of any claims which might be asserted by the children, against whom prescription was not acquired,—such right being a divisible right.

The King v. Timmis, 46 D.L.R. 578, 18 Can. Ex. 453.

RAILWAY ACT—QUEBEC—EXPROPRIATION—POSSESSION—OWNER'S ACQUIESCENCE—REMEDIES OF OWNER.

The taking of possession of land by a railway company for the construction of its right-of-way, with the owner's acquiescence, does not deprive him of anything more than his remedy for disturbance or for recovery of possession. He retains his right to exercise his petitory claim and to revendicate the land if the company fails to compensate him according to law.

Canada v. Gulf Terminal R. Co., 23 Que. K.B. 299.

B. What constitutes a taking of, or injury to, property.

(§ III B—110)—CONVERSION OF RIGHTS—COMPENSATION — ACTION — PARTIES — SPECIAL ADAPTABILITY.

By virtue of s. 8 of the Exchequer Court Act, the deposit of the plan and description of the land expropriated has the effect of vesting the property in the Crown, and from such time, under s. 28 of the Act, the compensation money stands in lieu of the land, and any claim to the land is converted into a claim for the compensation money. A corporation holding the shares of a subsidiary company has no locus standi to prosecute a claim for compensation on behalf of the latter; the action of the subsidiary company must be brought in its own corporate name. The special adaptability of land for railway purposes is but an element of the market value of the land. In assessing compensation for the taking of such land regard must be had of its value to the owner, not the value to the taker. The doctrine of reinstatement does not apply to the taking of lands not used as a going manufacturing concern. The best test of the market value is what other properties in the neighbourhood have brought when acquired for similar purposes.

The King v. Quebec Gas Co. and Quebec, 42 D.L.R. 61, 17 Can. Ex. 386. [Affirmed, 49 D.L.R. 692]

WHAT CONSTITUTES A TAKING OF OR INJURY TO PROPERTY—RAILWAY PURPOSES—UNDERLYING MINERALS.

A railway company does not acquire any right to minerals underlying land expropriated for a right-of-way; since the respective rights of the company and the landowner to the minerals are to be fixed and determined under ss. 170, 171 of the Railway Act, 1906, on future application to the Railway Board, which may require

the company to purchase the minerals, it necessary for the safe support of the railway, or to submit to such order as the Board may make relative to the working of the minerals by the landowner.

Re Davies and James Bay R. Co., 13 D.L.R. 912, 28 O.L.R. 544.

WHAT CONSTITUTES INJURY TO PROPERTY—RAILWAY TUNNEL—INJURY BY EXPLOSIVES—LIS PENDENS.

The injury to a building caused by a railway company by the use of explosives in making a tunnel is accidental and a quasi-délit and not of the nature of those contemplated by the Railway Act. An exception of lis pendens demanding the dismissal of an action for the damages incurred by such injury on the ground that arbitrators have already been appointed, in proceedings for expropriation of the property damaged, to estimate the damages as provided by law will be dismissed.

Malouin v. Can. Northern Montreal Tunnel & Terminal Co., 15 Que. P.R. 123.

(§ III B—115)—"TAKING"—PLANS AND NOTICE TO TREAT—HIGHWAY.

Filing plans and specifications and service of notice to treat, in an expropriation by a municipality for the purpose of opening a lane, constitutes a "taking" of land in the statutory sense as entitling the owner to claim compensation under s. 399 of the Municipal Act, R.S.B.C. 1911, c. 170.

Hanna v. Victoria, 27 D.L.R. 213, 22 B.C.R. 555, 34 W.L.R. 307, 10 W.W.R. 457, affirming 24 D.L.R. 889, 32 W.L.R. 916, 9 W.W.R. 761.

MUNICIPAL ACT—ARBITRATION TO FIX COMPENSATION.

An arbitration under the provisions of the Municipal Act (R.S.O. 1914, c. 192) in regard to compensation for land expropriated is had only to fix the amount of the compensation after which, with a knowledge of the price that must be paid if the land be taken, the municipality may proceed or withdraw in the manner and under the circumstances set out in the Act; an award is binding and conclusive as to the price to be paid if the land is finally taken and as to that only.

Re Toronto and Grosvenor St. Presbyterian Church Trustees, 40 D.L.R. 574, 41 O.L.R. 352, reversing 40 O.L.R. 550. [Affirmed, 45 D.L.R. 327.]

DIVERSION OF HIGHWAY — PERMISSION OF BOARD — COMPENSATION — PROVIDING NEW ROAD.

An application by a railway company for permission to divert a highway in a city, and for that purpose to take lands of a private individual, was opposed by that individual, but approved by the municipality:—Held, that the application should be granted, but only on proper compensation being made to the owners of land affected; and the Board directed that the company should construct a road 41 feet wide alongside its right-of-way.

Re C.N.R. Co. and St. Boniface, 27 W.L.R. 830.

(§ III B—116)—RAILWAY IN STREET.

The Railway Board may make it a condition of the occupation of a street by a railway company's tracks running along that street, that the railway company should compensate landowners injuriously affected because of the operation of the railway on the highway, if such landowners have not been compensated in some other way.

Hamilton v. G.T.R. Co., 5 D.L.R. 60, 14 Can. Ry. Cas. 196.

POWER OF RAILWAY BOARD—CONSTRUCTION AND LOCATION OF RAILWAY—CONDITION AS TO COMPENSATING ABUTTING OWNERS ULTRA VIRES—RESCISSION OF ORDER OF BOARD.

G.T.P.R. Co. v. Landowners, etc., Fort William, [1912] A.C. 224.

(§ III B—119) — STREETS — DAMAGE TO PROPERTY BY CHANGE OF GRADE.

The provisions of the Arbitration Act, R.S.B.C. 1911, c. 11, s. 8, as to the appointment of an arbitrator by the court on the default of the opposite party to make an appointment, do not apply to an arbitration of the claim of an adjoining owner against a municipality for damages to his property by the regrading of the street; the procedure to be followed on the default of the municipality to name an arbitrator under s. 394 of the Municipal Act, R.S.B.C. 1911, c. 170, s. 394, is to apply for a mandamus against the municipality.

Walker v. South Vancouver, 14 D.L.R. 446, 18 B.C.R. 480, 25 W.L.R. 824, 5 W.W.R. 389.

(§ III B—126)—DRAINAGE.

The test in determining injuring liability under the Municipal Drainage Act, 10 Edw. VII. (Ont.) c. 90, is whether the drainage work is necessary in fact or in law to enable or improve the cultivation or drainage of lower land suffering injury from water brought from upper land by artificial means, and, where the drainage work will carry this water to a sufficient outlet, the lands from which the water causing the damage is artificially brought are assessable for injuring liability.

Re Tp. of Orford and Tp. of Aldborough, 7 D.L.R. 217, 3 O.W.N. 1517, 22 O.W.R. 853.

C. RIGHT TO COMPENSATION.

Valuation, special adaptability, 8 per cent allowance, see Damages, III L—240.

Railway Act, value of land, sufficiency of award, see Arbitration, III—15.

Compensation for mining rights expropriated for railway purposes, see Arbitration, III—17.

Tender of conveyance as prerequisite to

compensation, Dominion and provincial statutes, see Arbitration, III—16.

Evidence as to value of land, see Evidence, XI F—790.

Interest on award, see Interest I C—25.

(§ III C—135)—Expropriation of water-lot—Values—Speculative benefits.

Where there is no evidence of market value to guide the Exchequer Court in assessing compensation for a water-lot expropriated for public purposes under the Expropriation Act, Can., the compensation will not be granted with reference to a hope or expectation as to the use of the property which cannot be regarded as a right of property in the claimant, e. g. the expectation of the owner of a water-lot in a public harbour being able to obtain the requisite permission by order-in-council to place erections thereon under R.S.C. 1906, c. 115. Special adaptability is nothing more than an element of market value in expropriation cases; the compensation to be awarded for the property taken is to be fixed as if the scheme under which the compulsory powers are exercised had no existence. [The King v. Macpherson, 15 Can. Ex. 215, followed.]

The King v. Wilson, 22 D.L.R. 585, 15 Can. Ex. 283. [Affirmed by Supreme Court of Canada (unreported).]

Agreement of sale—Authority of minister — Jurisdiction — Arbitration — Compensation — Shipyard — Earning capacity—Market value — Abandonment—Damages—Severance.

The Dominion Government expropriated some shipyard property on Richelieu and St. Lawrence rivers. The owners, claiming compensation, set up an agreement for the purchase of the property on behalf of the Crown entered into by the Minister of the Public Works, providing that payment therefor should be established by arbitration, and they contended that the Exchequer Court had therefore no jurisdiction to hear and determine the matter of compensation. Held, that as the agreement failed to comply with the requirements of art. 1434 C. C.P., it was invalid as submission to arbitration, and as no time was fixed the submission was revocable, by virtue of art. 1437, at the option of either party, and under the English common law at any time before the award. 2. The King has the undoubted right attached to his prerogative of suing in any court he pleases. 3. The Minister had no power, unless authorized by an order-in-council or statute, to bind the Crown with such agreement. 4. In fixing compensation for the expropriation of such property its "earning capacity" cannot be taken as the basis of the market value; the best test is what similar property sold for in the immediate neighbourhood. 5. In the valuation of the wharves, regard must be had to their present condition and allowance made for their depreciation. 6. Where part of the land expropriated was abandoned by the Crown, the owners were entitled to compensation for the use and occupation of the land for the period held by the Crown, but they could not claim any damages for injurious affection or severance of the land, inasmuch as the severed portion did not form a unit of the land expropriated, and was, in fact, severed by a highway.

The King v. McCarthy, 46 D.L.R. 456, 18 Can. Ex. 410.

Market value—Estimated profits—Business never undertaken — Indefinite offers—Evidence of value.

An owner of property expropriated is not entitled to claim as an element of its market value at the time of the expropriation a sum representing estimated profits from a business which he asserts might have been done on the property but which in fact had never been undertaken. Offers to purchase property which are more or less indefinite and not so made as to be binding upon the persons making them are not to be regarded as satisfactory evidence of the value of such property in the opinion of the proposed purchasers.

The King v. Crosby, 46 D.L.R. 528, 18 Can. Ex. 372.

Valuation of right-of-way — Common lane—Damage and depreciation due to severance.

The rights of the owners of the "fee" in a piece of land between two properties, used as a lane way, and over which the neighbor has an absolute right-of-way, is in effect only a right-of-way, and no more valuable than the rights of the owner of the right-of-way, and will be valued as such. The value to be paid for in expropriation is the value to the owner as it existed at the date of taking, and not the value to the taker. The value to the owner consists in all advantages the land possesses, to be determined as at the time of taking. Between the westerly line of the expropriated property, and the buildings on the land adjoining, which buildings and land are also the property of the defendants, there is a strip of land, 10 feet wide, left vacant. Held, that, in as much as, when the property comes into the market, the buildings, now very old, will have to be torn down (if it is to be used in any practical manner), and the ten feet can be sold with the rest no damage or depreciation is suffered by reason of the severance of the ten feet and of their being left vacant.

The King v. Barrett, 49 D.L.R. 138, 19 Can. Ex. 175.

Compensation—Actual value—Homologation of plan—Deduction for.

Commissioners in fixing the owner's compensation in expropriation proceedings are not entitled to make any deduction from the actual value of the land taken, in respect of the burden imposed upon it by the confirmation or homologation of a plan.

Royal Trust Co. v. Montreal, 44 D.L.R.

767, 57 Can. S.C.R. 352, affirming 26 Que. K.B. 557.

Where it is not alleged that the financial limit of a municipality may be overrun, a landowner is entitled to judgment, on motion, for the amount of an award rendered by arbitrators under c. 20 of B. C. Statutes of 1873 and c. 64 of the B.C. Statutes of 1892, where the parties could not agree as to compensation for land taken possession of by a municipal corporation for waterworks purposes, notwithstanding the city, which did not pay the award within the time limited by the statute, proposed to abandon the arbitration and take a smaller amount of land, as, where land has been once expropriated and possession taken by a municipal corporation it cannot withdraw therefrom. [Reg. v. Commissioners of H. M. Woods, etc., 19 L.J.Q.B. 497, distinguished.]

Davie v. Victoria, 2 D.L.R. 287, 20 W.L.R. 544, 1 W.W.R. 1021.

WATER LOTS — VALUATION — RIPARIAN RIGHTS—DAMAGES—LOSS OF ACCESS—RIGHT-OF-WAY.

The Crown, having expropriated some water lots in the outskirts of Halifax, N.S., sought by an information to have determined the amount of compensation. Held, that in the absence of any sales of similar property in the neighbourhood from which the value of the property could be ascertained, a valuation of 7½ cents per square foot was a fair basis of compensation, adding thereto a 10 per cent allowance for the compulsory taking; that the owners were also entitled to damages for the depreciation of property not expropriated, occasioned by the loss of access to the waterfront for boating and bathing purposes, and of a right-of-way they enjoyed over a railway, as a result of the expropriation.

The King v. Brenton, 42 D.L.R. 373, 18 Can. Ex. 138.

CITY—COUNTY—STATUTORY RIGHTS—ABANDONMENT OF PROPERTY.

The rights of the County of York to damages for expropriation by the City of Toronto of the Toronto & York Radial R. Co. and all its real and personal property within the city are statutory under the Act of 1897, and are not affected by the fact that by a by-law the county has abandoned certain roads over which the line is operated to minor municipalities of the county.

Re Toronto and Toronto & York Radial R. Co. and County of York, 43 D.L.R. 49, 42 O.L.R. 545, 23 Can. Ry. Cas. 218.

MEASURE OF DAMAGES—EASEMENT.

In fixing the amount of compensation by arbitration in respect of an easement expropriated by a power company, under authority conferred on it by the Dominion Statute incorporating it (2 Edw. VII. c. 197, s. 21 (e)), the damage or depreciation caused by the possession and potential use of the power to expropriate is to be included in the award.

Re Coleman and Toronto & Niagara Power Co., 38 D.L.R. 65, 40 O.L.R. 130.

WHARF—POSSESSORY TITLE—RIGHT-OF-WAY—LOSS OF PROFITS.

It being undisputed that the suppliant was entitled to compensation for the expropriation of a wharf and for the deprivation of the right-of-way to and from the wharf over the railway tracks; the suppliant was, under the circumstances of the case, entitled to compensation for such expropriation and for the deprivation of the right of way; but the loss of business not affected by the taking of the wharf, or the loss of profits in connection with a business in anticipation but not actually embarked on, were not elements of compensation.

Maxwell v. The King, 40 D.L.R. 715, 17 Can. Ex. 97.

SPECIAL ADAPTABILITY—VALUATION.

On an expropriation of lots specially adapted for warehouse purposes the same value per square foot does not attach to small lots as to larger lots. The owners are entitled to an allowance for the compulsory taking in addition to the value of the land.

The King v. Vassie & Co.; Joseph Allison; Prudential Trust Co.; Petrie Mfg. Co., 40 D.L.R. 306, 17 Can. Ex. 75.

GRAVEL LANDS—VALUE.

In an expropriation of gravel lands by the Crown the basis of compensation is the true or fair market value of the property as a whole; the value to the owner, not the value to the Crown expropriating it, is to be considered. The amount awarded may be allowed to go to a mortgagee.

The King v. Thomas Nagle, 40 D.L.R. 266, 17 Can. Ex. 88.

FARM—TIMBER LAND—VALUATION.

The basis of compensation for the expropriation of farm or timber lands by the Crown for training camp purposes is the market value of the property as a whole at the time of expropriation, as shewn by the prices other farms had brought when acquired for similar purposes.

The King v. Bowles, 41 D.L.R. 254, 17 Can. Ex. 482. [Affirmed by Supreme Court of Canada, December 11, 1916 (unreported).]

TOTAL OR PARTIAL ABANDONMENT—JURISDICTION OF EXCHEQUER COURT.

Under s. 23 of the Expropriation Act (R.S.C. 1906, c. 143) the Exchequer Court has jurisdiction to adjudicate upon claims arising out of a total as well as partial abandonment of the land expropriated. The claim for compensation arises on the original expropriation and is not defeated by the subsequent proceedings, even after revesting the claim for compensation still remains open for adjustment. The court, in assessing the amount, should take into consideration the fact of the abandonment, together with all the other circumstances

of the case. The measure of the right should not be treated as something in the nature of a claim for damages for disturbing or injuriously affecting the value of the property.

The King v. Gibb; Gibb v. The King, 42 D.L.R. 336, [1918] A.C. 915, 119 L.T. 586, reversing 27 D.L.R. 262, 52 Can. S.C.R. 402.

HYDRO-ELECTRIC POWER COMMISSION—STRIP OF LAND TAKEN FOR TRANSMISSION LINE —5 GEO. V. C. 19, S. 5 (O.)—COMPENSATION OF LANDOWNER—PROPER METHOD OF ASCERTAINMENT—AWARD OF ARBITRATOR—FINDINGS—EVIDENCE—APPEAL —UNDERTAKING TO ERECT AND MAINTAIN FENCE.

Re Hydro-Electric Power Commission and Porter Estate, 15 O.W.N. 19.

OWNER'S RIGHT TO COMPENSATION—AMOUNT UNDER "VALUATION" AS DISTINCT FROM "ARBITRATION"—RAILWAY ACT.

The "amount of compensation payable under the Railway Act," 1906, may refer as well to money payable under a valuation as to money payable under an arbitration both methods being recognized by the Act.

Re Laidlaw and Campbellford, Lake Ontario & Western R. Co., 19 D.L.R. 481, 31 O.L.R. 209.

COMPENSATION—RIGHT TO AMEND—REDUCING AMOUNT.

It is open to the court in an expropriation case to permit an information to be amended at the trial for the purpose of reducing the amount tendered as compensation.

The King v. College de St. Boniface, 15 Can. Ex. 68.

RAILWAYS — EXPROPRIATION OF LAND — AGREEMENT WITH OWNER AS TO COMPENSATION—MEANING OF "COMPENSATION" IN S. 210 OF RAILWAY ACT, R.S.C. 1906, C. 37—PAYMENT INTO COURT—COLLATERAL AGREEMENT—FARM CROSSINGS—DRAINAGE—BOARD OF RAILWAY COMMISSIONERS.

Re Campbellford L.O. & W.R. Co. and Buckley, 9 O.W.N. 105.

RAILWAYS—APPLICATION FOR APPOINTMENT OF ARBITRATOR—JURISDICTION—FORUM —SUGGESTED AGREEMENT AS TO COMPENSATION — CROSS-EXAMINATION OF OFFICERS OF CLAIMANT COMPANY.

Re Acton Tanning Co. and Toronto Suburban R. Co. 9 O.W.N. 450.

RAILWAY—EXPROPRIATION OF LAND—RAILWAY ACT, R.S.C. 1906, C. 37, S. 196—APPOINTMENT OF ARBITRATOR TO DETERMINE COMPENSATION—APPLICATION FOR —DISPENSING WITH SERVICE OF NOTICE OF APPLICATION ON PERSONS HAVING INTEREST — APPOINTMENT OF BOARD OF THREE ARBITRATORS.

Re Toronto Hamilton & Buffalo R. Co. & McCallum, 15 O.W.N. 433.

(§ III C—136)—SHIPYARD—COMPENSATION —VALUATION—PETITION OF RIGHT.

Where the Crown had been in occupation of a piece of land for a certain time previous to its expropriation, the compensation for such occupation was ascertained by accepting the value thereof as established in the expropriation proceedings and by allowing legal interest thereon.

McCarthy v. The King, 46 D.L.R. 620, 18 Can. Ex. 438.

(§ III C—140)—TAKING RAILWAY LANDS—RIGHTS—TERMS—FEE.

In fixing the rights which may be taken in railway lands, and the terms and compensation under s. 176 of the Railway Act, 1906, lands which are not only not put to an immediate railway use, but (as the Railway Board finds) will not reasonably and probably be required for such purposes by the senior railway, should be dealt with as the lands of a private individual, and absolute rights conferred on the applying company therein, but the fee in railway lands which may reasonably be required at some time in the future to be put to a railway use by the senior company, should be left in the senior company and compensation should be paid for the use and enjoyment that the applicant company obtains. [Re Guelph & Goderich Ry. Co. and G.T.R. Co., 6 Can. Ry. Cas. 138, followed.]

South Ontario Pac. R. v. G.T.R. Co., 38 D.L.R. 695, 20 Can. Ry. Cas. 152. [Affirmed by Supreme Court of Canada (unreported).]

RAILWAY TAKING GRAVEL LAND.

Compensation for a gravel pit and the right-of-way thereto taken by a railway company under s. 180 of the Railway Act, 1906, to obtain a supply of material for construction purposes, is to be made as of the time when the company took possession of the land under judge's order or as of the service of the notice to treat, and not on the basis of values some years later when the arbitration took place.

Sask. Land & Homestead Co. v. Calgary & Edmonton R. Co., 21 D.L.R. 172, 51 Can. S.C.R. 1, 8 W.W.R. 312, 19 Can. Ry. Cas. 126, affirming 14 D.L.R. 193, 6 A.L.R. 471 [See also 50 D.L.R. 16, as to taxation of costs.]

BASIS—"SPECIAL ADAPTABILITY"—ALLOWANCE OF 10 PER CENT.

Where property is taken by the Crown for a proposed public work, in assessing compensation to the owner, it is not proper to treat the value to the owner both of the land, and rights incidental thereto, as a proportional part of the value of the proposed work or undertaking when realized; but the proper basis for compensation is the amount for which such land and rights could have been sold had there been no scheme in existence for the work or undertaking. On the other hand, regard must be had to the adaptability of the property for such a use and the possibilities of the same being realized. "Special adaptability" as used in expropriation cases does not denote an element over and above or separable from the value of the land in the

market; but on the contrary signifies something that enters into and forms an essential part of the actual market value. [Sidney v. North Eastern R. Co., [1914] 3 K.B. 629, applied.] The allowance of 10 per cent. upon the market value in view of the compulsory taking of property ought not to be made when the property was acquired with the open purpose of speculating on the chances of the property being expropriated.

Raymond v. The King, 29 D.L.R. 574, 16 Can. Ex. 1. [Affirmed, 49 D.L.R. 689.]

AMOUNT OFFERED—COURT'S POWER TO REDUCE—AMENDMENT.

Where the Crown in expropriation proceedings, and under the terms of the Expropriation Act, offers a definite sum as compensation by the information, and when there is no request to amend the information, and counsel for the Crown at the trial adheres to such offer, it is not for the court to reduce the same notwithstanding that the evidence may establish a smaller sum as the proper amount of compensation.

Att'y-Gen'l of Canada v. Cahan and Eastern Trust Co., 31 D.L.R. 149, 16 Can. Ex. 458.

ARBITRATORS — EXCESS OF JURISDICTION — AWARD FINAL AND WITHOUT APPEAL — COMPENSATION—BUILDING LOTS.

The appellant, by means of expropriation proceedings, obtained a servitude over lands of respondent, and, under the authority of arts. 5790 to 5800 R.S.Q., an arbitration took place to decide the amount of compensation payable to respondent. Prior to expropriation, the respondent laid out as building lots part of his lands, which were devoted mainly to agricultural uses. Article 5797, provides that the award of the arbitrators should be final and without appeal. Appellant took an action to set aside the award of the arbitrators. Held, that the arbitrators were within the scope of their jurisdiction in valuing the lands of respondent as town building lots instead of as agricultural property, as the decision, as to whether the lands had a present marketable value as town lots or not, was a question of fact upon which it was the duty of the arbitrators to pass.

Montmagny v Letourneau, 39 D.L.R. 214, 55 Can. S.C.R. 543.

EXPROPRIATION OF LAND—ACCESS TO RIVER — COMPENSATION — MEASURE OF — ACCRUING ADVANTAGES.

The advantage accruing to a large residential property capable of useful subdivision from its frontage along a river is to be considered in fixing the compensation for injurious affection of the remaining lands on a strip of the property being taken for a railway right-of-way which cut off across to the river.

Re Muir and Lake Erie & Northern R. Co., 20 D.L.R. 687, 32 O.L.R. 150, 19 Can. Ry. Cas. 107.

MUNICIPAL CORPORATION — EXPROPRIATION OF LAND—SEVERANCE OF FARM BY TAKING STRIP FOR DEVIATION ROAD—ARBITRATION AND AWARD — COMPENSATION FOR LAND TAKEN—VALUE OF TREES IN ORCHARD — DAMAGE BY SEVERANCE — AWARD MADE BY TWO OF THREE ARBITRATORS —VALIDITY —MUNICIPAL ACT, 1913, SS. 332 ET SEQ.; INTERPRETATION ACT, R.S.O. 1914, C. 1, S. 28 (c)—APPEAL FROM AWARD — EVIDENCE — INCREASE IN AMOUNT—COSTS.

Re Fowler and Tp. of Nelson, 6 O.W.N. 409.

EXPROPRIATION—COMPENSATION—WINNIPEG CHARTER—"INTRINSIC VALUE."

Under s. 818 of the Winnipeg Charter, the arbitrators are to determine (1) the intrinsic value of the property taken; (2) the increased value of the residue; (3) and the damage to the residue, and the difference between (1) and (2), or (1) and (3) shall constitute the compensation, which the party interested shall be entitled to. "Intrinsic value" means the ordinary or normal, as distinguished from the speculative, value of land. Under the English Lands Clauses Act, 1845, the owner is entitled to "full compensation" without any deduction for the increased value attaching to his remaining property, whereas, under the Winnipeg Charter, the owner is only entitled to the difference between the intrinsic value of the part taken and the increased value of the part left. It is inconvenient and unjust to apply the rule that "compensation to the owner should be based upon the value of the lands to the owner rather than to the expropriator" to the expropriation of lands for the purposes of streets.

Re Winnipeg and Battaglia, 7 W.W.R. 206.

EASEMENT —DAMAGES —PROSPECTIVE PROFITS.

One who has acquired the easement of laying pipes for an aqueduct and sewers upon certain lands, part of which are afterwards expropriated by the Crown has no estate or interest in the lands taken. All he is entitled to is value of the piece of aqueduct expropriated and the value of the easement upon the same.

Ruel v. The King, 38 D.L.R. 613, 16 Can. Ex. 214.

CANAL—RIPARIAN RIGHTS—VIEW—WATER.

Upon an expropriation of land by the Crown for the enlargement of a canal, compensation will not be allowed for an obstruction of view to property fronting thereon, by earth left piled up in the course of construction not necessarily incidental to the expropriation nor for the loss of the use of the canal for watering purposes, to which there are no riparian rights as such in the ordinary sense.

The King v. Farlinger, 39 D.L.R. 107, 16 Can. Ex. 381.

VALUE OF LANDS—VALUE TO OWNERS—SPECULATIVE VALUE.

The value of lands agreed to be conveyed by the Crown under an agreement for complete reinstatement of the owners of a gas and electric plant site expropriated by the Crown is not the value to the grantors, but to the owners, who are entitled to compensation according to the terms of the agreement only. No allowance will be made for the speculative value of the land expropriated, or for the additional value of the old site in regard to the increased cost of erection of buildings or of cost of operation.

The King v. Halifax Electric Tramway Co., 40 D.L.R. 184, 17 Can. Ex. 47. [Affirmed, 52 D.L.R. —, 59 Can. S.C.R. 650.

CROWN GRANT — RESERVATIONS — ABANDONMENT—ADVANTAGES.

In an expropriation by the Crown of lands held under a Crown grant subject to a reservation in favour of the Crown of the right to retake the lands if required for public purposes, the owners are entitled to have their rights duly adjusted without fixing the actual value of the rights remaining in the Crown under the grant and want of registration does not affect the validity of the conditions or reservations. Where expropriation has been abandoned, but no legal rights are invaded and no damage suffered, compensation cannot be allowed; all advantages to the property by the construction of a railway crossing are to be taken into consideration in estimating the amount of compensation.

Fugere v. The King, 40 D.L.R. 51, 17 Can. Ex. 1.

FIXING COMPENSATION — GENEROSITY — 10 PER CENT ALLOWANCE.

Generosity is not an element which should enter into the arbitrator's or judge's consideration, when fixing the compensation to be allowed for compulsory purchase. An additional allowance of 10 per cent of the award for the compulsory taking will not be allowed where the circumstances which justify such allowance do not exist.

The King v. Larivée, 42 D.L.R. 151, 56 Can. S.C.R. 376.

VALUE OF LAND—SPECULATIVE PURCHASE—10 PER CENT ALLOWANCE.

In assessing compensation for property taken under compulsory powers, it is not proper to treat the value to the owner of the land and rights, as a proportional part, the value of the realized undertaking proposed to be carried out. The proper basis of compensation is the amount for which the property could have been sold had the proposed undertaking by the Crown not been in existence, with the possibility that the Crown or some other person might obtain those powers. The price the property brought from purchasers speculating upon the expropriation affords no proper mode for arriving at its market value, and having been acquired for such speculative purposes, the usual 10 per cent allowance for the compulsory taking will be refused.

The King v. Picard, 17 Can. Ex. 452.

MARKET VALUE—RIGHT TO STREET—TITLE—REVERSION.

For purposes of compensation lands must be assessed as of the date of the expropriation, at their market value, in respect of the best uses to which they can practically and economically be put, taking into consideration any prospective capabilities. The best criterion of the market price is the price at which property in the neighbourhood changes hands in the ordinary course of business. Mere interference with a public right to travel upon a street, the person claiming compensation therefor not having the fee or any predial rights therein, is not an element of compensation. A reversionary right in favour of a vendor of the land materially affects the value of the land itself, as compared with land the title to which is free of any encumbrances.

The King v. Carrieres de Beauport Cie, 17 Can. Ex. 414.

WATER LOTS—RIPARIAN RIGHTS—ACCESS.

A riparian owner on the foreshore of a tidal and navigable water has the right to the water for domestic purposes, also the right of access and exit to and from his property, which are elements of value in estimating compensation for the expropriation of lots by the Crown.

The King v. Duncan, 17 Can. Ex. 433.

FARM — VALUE — MILL — TIMBER—CONVERSION.

In estimating the amount of compensation for the expropriation of a farm by the Crown for the purposes of a military training camp, the property is to be valued, not by segregating the acreage in severalty, so much for the timber and other things thereon, but by the prices paid for similar properties when acquired for similar purposes, and its value accordingly at the time of expropriation. The owner, however, will not be allowed compensation for a mill erected and operated upon the land after the expropriation, and he is answerable to the Crown, in conversion, for all timber cut and removed by him after that time.

The King v. Thompson, 18 Can. Ex. 23.

INDUSTRIAL OR AGRICULTURAL LANDS.

Lands in the vicinity of what promises to become a railway junction have a higher value than that of land for agricultural purposes, and are to be valued as land of the industrial or building class, in estimating the amount of compensation for their expropriation by the Crown.

The King v. Quebec Improvement Co., 18 Can. Ex. 35.

VALUATION—QUANTITY SURVEY METHOD.

The "quantity survey method" does not apply to the valuation of farm property as the basis of compensation in an expropriation thereof by the Crown. The best guide is the market value of the property as a whole, as shewn by the prices of similar

properties in the immediate neighbourhood when acquired for similar purposes.

The King v. Griffin, 18 Can. Ex. 51.

SEVERANCE—FARM—ACCESS.

Where the most serious damage from the severance of a farm, resulting from an expropriation by the Crown, is removed by the latter's undertaking to provide sufficient means of access across the expropriated property, compensation must be assessed in view of such undertaking.

The King v. Cote, 18 Can. Ex. 58.

VALUE—PROSPECTIVE CAPABILITY.

In estimating the amount of compensation for the expropriation of land by the Crown the prospective capabilities of the property or its speculative value cannot be taken into consideration. The compensation should be measured by the prices paid for similar properties in the immediate neighbourhood.

The King v. Blais et al., 18 Can. Ex. 63.

The re-instatement principle cannot be taken as the basis of compensation for residential property expropriated for a public work; nor can the prospective value of the property arising from the construction of the work be taken into consideration. The best guide is the selling value of similar property in the locality.

The King v. Blais et al., 18 Can. Ex. 67.

In estimating compensation for the expropriation of water-front property by the Crown for the purpose of harbour fortifications, mere prospects of developing the property into a summer resort cannot be taken into consideration in arriving at its true market value.

The King v. Davis et al., 18 Can. Ex. 72.

INTERFERENCE WITH BUSINESS—GOOD-WILL.

In awarding compensation for the compulsory taking of land by the Crown, a fair allowance will be made in respect of the interference with the owner's business as a going concern, small as the good-will of such business may be.

The King v. Jalbert, 18 Can. Ex. 78.

EFFECT OF ABANDONMENT — ADVANTAGES —SET-OFF.

An abandonment by the Crown, under s. 23 of the Expropriation Act, of part of the land taken for a public work, must be taken into account in assessing compensation therefor; and any benefit or advantage accruing from the construction of the public work must likewise, under s. 50 of the Act, be taken into account and consideration given to it by way of set-off.

The King v. Bannatyne, 18 Can. Ex. 82.

GOVERNMENT RAILWAY — GRAVEL PIT — COMPENSATION — BASIS OF VALUE.

Where land was taken for the purpose of a gravel-pit for a government railway the price paid at the sale of the land some three years after the expropriation of the right-of-way when the land had been enhanced in value by the operation of the railway, was held to be the best test and starting point for ascertaining the market value of the land.

Demers v. The King, 15 Can. Ex. 492.

ABANDONMENT OF PROCEEDINGS — DAMAGES —COSTS—INTEREST.

Under s. 23 of the Expropriation Act, the Crown, through its proper Minister, in that behalf may abandon in whole or in part any land previously taken for the purpose of a public work. Where the owner is allowed to retain possession and such abandonment is made in full and no loss having been sustained by the owner between the time of the taking and of the abandonment, compensation even in the nature of nominal damages will not be allowed because the taking was authorized by statute. The court, however, may declare the owner entitled to the costs of and incidental to making his defence to the information and order such costs to be taxed as between solicitor and client including all legitimate and reasonable charges and disbursements under the circumstances. In such a case there should be no allowance of interest to the owner either upon the amount offered as compensation by the information or upon the amount of compensation claimed by the owner.

The King v. Frontenac Gas Co., 15 Can. Ex. 438.

RAILWAYS — COMPENSATION FOR SEVERANCE —DEDICATION.

A severance of development land occasioned by an expropriation by the Crown for railway purposes, whereby the owner is prejudiced in his ability to dispose and use certain lots thereof, entitles him to compensation for the damage caused by the severance; the measure of damages is the market value of the land at the time of the expropriation. [Holditch v. Canadian Northern Ry., [1916] 1 A.C. 536, 27 D.L.R. 14, distinguished; Cowper Essex v. Acton Local Board, 14 A.C. 153, followed.] A dedication of highways by registered plan, approved by the municipality, does not, until they are accepted as highways, divest the owner from the fee therein, so as to be considered in any pecuniary advantage to the land as a whole.

The King v. Studd, 16 Can. Ex. 365.

COMPENSATION — RAILWAYS — HOTEL PROPERTY—EASEMENT.

Upon an expropriation by the Crown of a portion of a hotel site for railway purposes, compensation should be allowed on the basis of a building lot, for injury to the property from the construction and operation of the railway, and for an easement of a right-of-way over a street affected by the expropriation.

The King v. Birchdale, 16 Can. Ex. 375.

COMPENSATION — RAILWAYS — FLOODING FROM DITCHES.

The commissioners of the National Transcontinental Ry. had expropriated a certain portion of a farm while in the possession of the suppliant's predecessor in title and

paid him compensation therefor and for all damages resulting from the expropriation—the deed of sale stating that the compensation paid comprised "tous les dommages de quelque nature que ce soit." After the suppliant acquired the farm flooding occurred, and the suppliant claimed that it was due to the construction of a new drain by the railway authorities. The evidence shewed that the flooding was occasioned by the failure of the suppliant to open and complete his boundary ditches. Held, that the injury, even if it arose from anything done by the railway authorities, was covered by the compensation paid to the suppliant's auteur, and that no claim for damages would lie unless another expropriation had been made or some new work performed, causing damages of a character not falling within the scope of those arising from the first expropriation.

Moisan v. The King, 16 Can. Ex. 431.

EXPROPRIATION BY RAILWAY — COMPENSATION — VALUE OF — LAND — REV. S., 1906, c. 37, ARTS. 197, 198.

The law of Canada, in matter of expropriation as regards the principles upon which compensation for the land taken is to be awarded is the same as the law of England. The indemnity to be paid for land is the value to the owner as it existed at the date of taking, not the value to the taker. The value to the owner consists of all advantages which the land possesses, present or future, but it is the present value along of such advantages that falls to be determined. When there is a special value over the bare value of the ground consisting in a prospective value on account of certain undertaking, the value is not a proportional part of the assessed value of the whole undertaking, but is merely the price enhanced above the bare value of the ground, which possible intending undertakers would give. That price must be tested by the imaginary market which would have ruled had the land been exposed for sale before any undertakers had secured the powers or acquired the other subjects, which made the undertakings, as a whole, a realized possibility.

Lachine, Jacques Cartier & Maisonneuve Ry. Co. v. Mitcheson, 47 Que. S.C. 3.

RAILWAY — EXPROPRIATION OF LAND — COMPENSATION — QUANTUM — AWARD — APPEAL.

Re Campbellford, Lake Ontario & Western R. Co. and Noble, 11 O.W.N. 245.

RAILWAYS — COMPENSATION FOR LAND TAKEN — ARBITRATION AWARD — RAILWAY COMPANY WRONGLY ENTERING UPON LAND — ACTION FOR TRESPASS — WHETHER TAKING POSSESSION RAILWAY COMPANY AMOUNTS TO ACCEPTANCE OF OWNER'S OFFER — PRACTICE — COSTS — OBJECT OF ACTION ATTAINED LEAVING QUESTION OF DISPOSITION OF COSTS — GOING ON TO TRIAL — JURISDICTION OF JUDGE IN CHAMBERS — MOTION FOR LEAVE TO DISCONTINUE.

A railway company entering upon land without payment of the price agreed upon or fixed by arbitration or without a warrant giving it leave to enter, is a wrongdoer and liable to an action of trespass. Where the whole object of an action has been attained and nothing remains but to dispose of the costs, it would be improper for the plaintiff to bring the case down to trial, for that purpose alone, unless the defendant, upon being applied to, refused to consent that the matter be desposed of in Chambers. But unless the defendant does consent to such a disposal of the matter, a Judge in Chambers has no jurisdiction except perhaps where the defendant has substantially conceded the plaintiff's demand. Where the defendant has not conceded the plaintiff's demand and objects to the disposal of the costs in Chambers, the plaintiff may move for leave to discontinue pursuant to r. 560. Upon such application the defendant is prima facie entitled to costs as a term of the plaintiff being allowed to discontinue; but in a proper case the application may be granted without payment of costs.

Haney v. C.N.R. Co., [1919] 1 W.W.R. 131.

(§ III C—142)—FOR INJURY TO BUSINESS.

The owner of land cannot recover as special damage resulting from the service of a notice of expropriation, by a railway company, which was abandoned, the anticipated profit on a crop which the owner desisted from raising because of the notice having been served.

Marson v. G.T.P.R. Co., 1 D.L.R. 850, 4 A.L.R. 157, 20 W.L.R. 161, 1 W.W.R. 693.

(§ III C—143) — MINERALS — QUARRY OF ROCK.

The words "or other minerals" used in s. 133 of the Ontario Railway Act (R.S.O. 1914, c. 185), do not include the ordinary rock of the district; where a quarry of such rock has a special value, such value should be included by arbitrators in fixing the amount of compensation for land expropriated.

Re McAllister and Toronto & Suburban R. Co., 39 D.L.R. 207, 40 O.L.R. 252, 22 Can. Ry. Cas. 272.

SUBJACENT AND ADJACENT SUPPORT—MINERAL RIGHTS.

The effect of the Railway Act (Can.) with regard to the expropriation of land by a railway company differs from that of the Railway Clauses Consolidation Act, 1845, in that under the former act the company acquiring the surface has a right of support from minerals subjacent and adjacent to the line. Under the Canadian Act the owner of minerals is entitled to compensation for loss arising from the restriction of his rights, without waiting until he wishes to work the minerals; this compensation is to

be ascertained as at the date of the deposit of plans, and once for all.

Davies v. James Bay R. Co., 26 D.L.R. 450, [1914] A.C. 1043, varying 13 D.L.R. 912, 28 O.L.R. 544, 16 Can. Ry. Cas. 78.

NARROWING OF HIGHWAY — ABUTTING OWNERS.

The narrowing of a highway under municipal powers entitles abutting owners to claim compensation from the municipality for consequential injuries to their property. [Ramsay v. West Vancouver, 22 D.L.R. 826, 21 B.C.R. 401, approved.]

West Vancouver v. Ramsay, 30 D.L.R. 602, 53 Can. S.C.R. 459, 10 W.W.R. 1184.

TAKING RIGHTS OF ABUTTING OWNER.

"Due compensation" under s. 437 of the Consolidated Municipal Act (Ont.), 1903, providing for "due compensation" being made to owners of land taken for the purpose of widening streets, simply means a full indemnity in respect of all pecuniary loss suffered, and the only subjects of such pecuniary loss are (1) the lands actually taken, and (2) the injury to the leasing or selling value of what is left. Where a city, under a by-law, took, for the purpose of widening a street, ten feet from the front of a building lot, and the owner of the land has been sufficiently compensated by an award of arbitrators for the value of the land taken and for the consequent injury to the rest of the land by reason of the bringing of the street line nearer to the house, the fact that a street railway is to be placed on the widened street is not an element of damage to be considered, under s. 437 of the said Act, providing for "due compensation" in a case of that sort. Under s. 437 of the said Act, the fact that the claimant would be assessed for a portion of the cost of widening the street under a local improvement plan by which the city and the adjacent owners share the cost, does not constitute an element of damage to be considered by the arbitrators. [Re Pryce and Toronto, 20 A.R. (Ont.) 16, distinguished.]

An item for injuries for "depreciation caused by the change of the general character of the street" need not be considered by the arbitrators, under s. 437.

Re MacDonald and Toronto, 8 D.L.R. 303, 27 O.L.R. 179.

COMPENSATION FOR LOWERING STREET — ASSESSMENT FOR IMPROVEMENT NOT AN ELEMENT OF DAMAGE.

Under s. 394 of the Municipal Act, R.S. B.C. 1911, c. 170, providing for compensation to owners for damage to their property by a municipality in grading and paving the streets, the fact that the owner, whose property was damaged, may later be assessed for a portion of the cost of the work under a local improvement by-law, does not constitute an additional element to be considered by the arbitrators in their assessment of the damages. [Re Macdonald & Toronto, 8 D.L.R. 303, 27 O.L.R. 179, applied.]

Okell v. Victoria, 16 D.L.R. 353, 6 W.W.R. 354, 27 W.L.R. 403.

(§ III C—144)—RIPARIAN RIGHTS—ARBITRATION—ACTION — COMMON-LAW REMEDY NOT SUPERSEDED.

A mere invitation to the upper riparian proprietor by the company whose works, constructed under statutory authority, have interfered with his riparian rights that he name his arbitrator, but without the company naming any arbitrator for itself, is not a commencement of expertise proceedings under R.S.Q., art. 7296, so as to operate as a bar to his proceeding by action in lieu of arbitration to recover compensation for the damages sustained, particularly where it was not shewn that the company had taken any further steps towards an arbitration.

Dorchester Electric Co. v. Roy, 20 D.L.R. 32, 49 Can. S.C.R. 344, affirming 12 D.L.R. 767.

WATER LOT — CROWN GRANT — HARBOUR — CROWN DOMAIN—PRESCRIPTION.

The Crown, by instituting expropriation proceedings in respect of a water lot, elects not to exercise a right of resumption for purposes of public improvement reserved to it in a Crown grant of such lot. Such right being vested in the Quebec Harbour Commissioners, under (1859) 22 Vict., c. 32, notwithstanding their public character and the nature of their trust does not form part of the Crown domain. Under art. 2242 C.C. (Que.) such right was extinguished by lapse of time, it not having been exercised during the thirty years following its acquirement by the Harbour Commissioners.

Power v. The King, 42 D.L.R. 387, 56 Can. S.C.R. 499, reversing 34 D.L.R. 257, 16 Can. Ex. 104.

WATER LOTS—BASIS OF VALUATION—MUNICIPAL ASSESSMENT — ADVANTAGES — WHARF.

The basis or starting point for the valuation of water lots, expropriated by the Crown for the purpose of wharf improvements, may be had from a municipal assessment of the property, taking into consideration the higher assessable value of the land owing to its location, and the advantage afforded to the owners as a result of the improvements.

The King v. Hudson Bay Co., 42 D.L.R. 181, 17 Can. Ex. 441.

WATER LOTS — VALUATION — ADVANTAGES —SET-OFF.

In estimating the amount of compensation upon the expropriation of water lots by the Crown for harbour improvement purposes, regard will be had to the local market value of the land, its state of improvement respecting water frontage, and the advantage and benefit accrued to the owners as a result of the undertakings, the latter of which, under s. 50 of the Exchequer

Court Act, must be considered by way of set-off.

The King v. Bradburn, 42 D.L.R. 168, 17 Can. Ex. 447.

WATER LOTS—WHARVES—VALUATION—HARBOUR COMMISSIONERS' LINE—SHERIFF'S SALE—NO REGISTRATION OF DEED—POSSESSORY AND PRESCRIPTIVE RIGHTS.

The King v. Hearn, 16 Can. Ex. 146. [Reversed, 55 Can. S.C.R. 562.]

(§ III C—146)—LAND TAKEN FOR HIGHWAYS—COMPENSATION—WHEN FIXED.

The Rural Municipalities Act, c. 3, s. 196, subs. 5, 1911-12, does not contemplate the fixing of compensation and damage for lands taken for highways, before the actual taking of such lands by the municipality.

Blomfield v. Rural Mun. of Starland, 25 D.L.R. 43, 9 A.L.R. 203, 32 W.L.R. 905, 9 W.W.R. 552, affirming 21 D.L.R. 859, 31 W.L.R. 573.

OPENING AND CLOSING STREETS—LANDS INJURIOUSLY AFFECTED—ARBITRATION.

Upon the location plan being approved by the Railway Board and an agreement made with the respondent municipality, that if the respondent closed certain streets and opened others, the applicant would pay compensation to any one whose lands were injuriously affected; the remedy of the property owners is against the respondent recoverable by arbitration proceedings under the Municipal Act, and the applicant is responsible to the respondent for the amount of compensation awarded.

C.N.R. Co. v. North Bay, 18 Can. Ry. Cas. 309.

(§ III C—147)—EXPROPRIATION FOR PUBLIC WORK—COMPENSATION—MARKET VALUE.

In assessing compensation for lands taken for a public work, sales made by the defendant to the Crown of other lands for the purposes of the public work in the neighbourhood of those taken may be relied on as establishing the market value of the lots expropriated.

Rex v. Bickerton, 15 Can. Ex. 61.

(§ III C—148)—RIGHTS OF OWNER—VALUE AT WHAT TIME—RAILWAY ACT (CAN.).

The exception of arbitrations then "pending" from the amendment made by 8 & 9 Edw. VII. (Can.), c. 32, to the Railway Act, 1906, as to the time in relation to which the value of property expropriated is to be fixed where title is not acquired by the railway within a year from the date of depositing the plans, does not apply so as to exclude the application of the amending act, unless the arbitrators had taken office before the statute took effect after having been sworn in under s. 197; so where prior to the amending statute (1909) an order had been made appointing arbitrators, but one of them declined the appointment and a new arbitrator was not appointed until after the passing of the amending act, the "arbitration" was not "pending" when the latter act was passed.

Re Taylor and C.N.R. Co., 9 D.L.R. 695, 23 Man. L.R. 268, 15 Can. Ry. Cas. 51, 23 W.L.R. 645, 3 W.W.R. 1072.

RAILWAY PURPOSES—VALUATION.

On the expropriation of land for railway purposes the value to be paid is the value to the owner as it existed at the date of the taking, and not the value to the taker; such value is the present value alone of the advantages which the land possesses whether present or future. [Cedars Rapids v. Lacoste, 16 D.L.R. 168, [1914] A.C. 569; R. v. Trudel, 19 D.L.R. 270, 49 Can. S.C.R. 511, followed.]

Greer v. C.N.R. Co., 22 D.L.R. 15, 8 S.L.R. 53, 19 Can. Ry. Cas. 139, 30 W.L.R. 572, 7 W.W.R. 1072.

BUSINESS PROPERTY — SHOPPING CENTRE — HOTEL — COMPENSATION — ALLOWANCE OF 10 PER CENT FOR COMPULSORY TAKING.

The Crown, for the purpose of extending the post office at Hamilton expropriated several properties in the shopping centre of the city, one of which was a hotel property. Held, that the owners were entitled to be compensated according to the value of the properties as business property, and that the hotel property, though acquired in separate lots, should be valued as one property, according to the frontage of the building occupied as the hotel, taking into consideration the present state of repairs of the properties, plus an allowance for the compulsory taking.

The King v. Hunting, Barrow, & Bell (3 cases), 18 Can. Ex. 442.

CONFLICTING THEORIES OF VALUE—VOLUNTARY SALE—TEST OF MARKET VALUE.

When, in establishing the amount of compensation payable for land expropriated, evidence is adduced by one of the parties to show that the land at the time of the expropriation had a potential commercial value inhering in an undeveloped water power, while the evidence of the other party is directed to show that the land had only a value for agricultural purposes, the court may accept the price paid for the property at a recent voluntary sale as the proper test of actual market value at the time of the taking.

The King v. Grass, 18 Can. Ex. 177.

RAILWAY — EXPROPRIATION OF LAND — ONTARIO RAILWAY ACTS, 6 EDW. VII., C. 30 AND 3 & 4 GEO. V., C. 36—LAND "TAKEN" WHEN NOTICE OF EXPROPRIATION SERVED—REGISTRY ACT — PURCHASER OR VALUE WITHOUT NOTICE—"OWNER"—TRUE OWNER AT TIME OF EXPROPRIATION — NOTICE — COMPENSATION—ARBITRATION—STATED CASE—COSTS.

Toronto & Suburban R. Co. v. Rogers, 17 O.W.N. 108.

(§ III C—150)—TO WHOM COMPENSATION MUST BE PAID—UNREGISTERED OWNER.

An unregistered owner of lands setting up a claim for compensation for expropri-

ation thereof or injury thereto under s. 394 of the Municipal Act, R.S.B.C. 1911, c. 170, may escape the disability imposed by s. 104 of the Land Registry Act, R.S.B.C. 1911, c. 127, provided such owner, prior to the commencement of his proceeding to obtain compensation, shall have procured and registered a conveyance of such lands, thus perfecting his title before action.

North Vancouver v. Jackson, 16 D.L.R. 400, 19 B.C.R. 147, 27 W.L.R. 456, 6 W.W.R. 389.

LIFE TENANT AND REMAINDERMAN.

A 10 per cent allowance for compulsory taking in eminent domain proceedings is really a part of the value, and is to be similarly treated as between a tenant for life and a remainderman; it is error to direct the ten per cent to be paid to the life tenant. Apart from any damage to the tenant for life in respect to inconvenience or injury independently of the value of the property, the compensation awarded in eminent domain proceedings is to be held for the remainderman, and the interest only on the fund paid to the tenant for life where by the terms of the trust the property was not to be sold until the latter's death. [Smith v. G.N.R. Co., 23 W.R. 126; Leedham v. Chawner, 4 K. & J. 458, applied.]

O'Mullin v. Eastern Trust Co., 21 D.L.R. 375, 48 N.S.R. 219.

DETERMINATION OF OWNERSHIP.

The proper practice in expropriation proceedings is to have the title settled before the assessment of damages, so that it will be certain that the arbitrator has the right claimants before him and the compensation may be properly fixed.,

Miller v. Halifax Power Co., 24 D.L.R. 29, 48 N.S.R. 370.

RIGHT OF DEVISEE.

No right to compensation in expropriation proceedings exists in respect of the privilege conferred on other members of the testator's family under a devise of a farm to a son expressed in the following terms: "for his own use subject to the right of the rest of my family to use the same for the summer as heretofore as I know he will allow them to do;" the privilege referred to is to be construed as existing only so long as the devisee remained in occupation and was the owner, and could not be claimed to the detriment of the fee. [Dougherty v. Carson, 7 Gr. 31, followed.]

The King v. Taylor, 22 D.L.R. 473, 15 Can. Ex. 209.

WATERSIDE PROPERTY—RIPARIAN RIGHTS.

Where waterside property is expropriated by the Crown before the owner has asked for or obtained statutory permission to build wharves or other erections upon the solum, in the absence of evidence to shew that the possibility of obtaining such permission had increased the value of the property in the market, such possibility ought not to be taken into consideration in assessing the compensation.

Raymond v. The King, 29 D.L.R. 574, 16 Can. Ex. 1. [Affirmed, 49 D.L.R. 689, 59 Can. S.C.R. 682.]

OWNER OF ADVERSE POSSESSION.

In order to entitle an owner to claim compensation for the Crown's expropriation of a foreshore adjoining his land, he need not establish his ownership by a documentary title, but his title may be founded on adverse possession.

Tweedie v. The King, 27 D.L.R. 53, 52 Can. S.C.R. 197, reversing 22 D.L.R. 498, 15 Can. Ex. 177.

(§ III C—154) — COMPENSATION — RIGHTS OF MORTGAGOR—BONUS.

The King v. Macpherson, 20 D.L.R. 988, 15 Can. Ex. 215.

(§ III C—157)—LEASE—RIGHTS OF OWNER —RIGHTS OF LESSEE.

On expropriation of a portion of leased land the owners are entitled to compensation for the land taken and for injurious affection to the remainder without regard to the special use of the land; the lessees are entitled to compensation for interference to business and necessary expenses of removing to another site.

The King v. Montgomery-Campbell and Northfield Coal Co., 40 D.L.R. 147, 17 Can. Ex. 32.

"PERSON INTERESTED" — LESSEE — EXPIRATION OF LEASE — RENEWAL — FUTURE RIGHTS.

A lessee whose lease expired several weeks after a company had deposited its plans and given the general notice of expropriation mentioned in ss. 191 to 194 of the Railway Act, 1906, is not a "person interested" as therein mentioned. He is merely an occupant with a precarious title, who can be expelled from the land to be expropriated, without his having any remedy in compensation or damages against the company. After a company has deposited its plans, profiles and book of reference, and given the general notice for the purpose of expropriation, the owner cannot grant any future right upon the property or renew the lease to the detriment of the company.

Marleau v. Cedars Rapids Mfg. & Power Co., 24 Rev. Leg. 1.

LANDLORD AND TENANT.

Where land expropriated by a railway company is subject to a lease separate amounts should be awarded to both landlord and tenant. Quaere as to whether a tenant has a right to have his compensation ascertained by a separate award by a different board of arbitrators. It is contrary to sound construction to permit the use of a term not altogether apt to defeat the intention of the legislature, which must not be assumed to have foreseen every result that may accrue from the use of a particular word.

Pacific Great East. R. Co. v. Larsen, 22 B.C.R. 4, 8 W.W.R. 1.

TENANTS—RAILWAY EXPROPRIATION—ARBITRATION.

In a railway expropriation, a tenant is entitled to compensation different from that of the proprietor and to have this compensation ascertained by a different Board of arbitrators.

The C.N.O.R. Co. v. Daniel McAnulty Realty Co., 15 Que. P.R. 168.

(§ III C—158) — COMMUNITY PROPERTY — WILL — AGREEMENT OF SALE — MORTGAGE—PRESCRIPTION.

In an expropriation of land by the Crown for training camp purposes, held, that land acquired by a testator during his married life being community property could only be disposed of by him to the extent of his interest therein, and those claiming under the will were entitled to compensation therefor to no greater extent; that the testator's wife having died intestate, half of the community went to her children, who were entitled to compensation accordingly. A purchaser of such land, who has resold it to the Crown, is only entitled to compensation according to the terms of the agreement of sale, but not to damages for the compulsory taking; nor will compensation be allowed for mortgages or hypothecs which have become prescribed. The amount recovered being greater than the amount offered, interest was allowed from the date of expropriation.

The King v. Berry, 41 D.L.R. 345, 17 Can. Ex. 462.

D. PAYMENT OR SECURITY; TAKING POSSESSION OF PROPERTY.

(§ III D—160)—COMPENSATION—POSSESSION—DEPOSIT OF PLAN.

The date of the deposit of a plan, profile and book of reference is the date with reference to which compensation or damages for land taken by a railway company under the Railway Act, 1903, are to be ascertained, and subsequent dealings with the land by the owner cannot affect the amount of compensation or damages to be awarded.

Re Myerscough and Lake Erie & Northern R. Co., 11 D.L.R. 458, 4 O.W.N. 1249, 15 Can. Ry. Cas. 168, 24 O.W.R. 525.

ABANDONMENT OF LAND TAKEN—COSTS—INTEREST.

Under s. 23 of the Expropriation Act, the Crown, through its proper Minister in that behalf, may abandon in whole or in part any land previously taken for the purpose of a public work. Where the owner is allowed to retain possession and such abandonment is made in full, no loss having been sustained by the owner between the time of the taking and of the abandonment, compensation even in the nature of nominal damages will not be allowed because the taking was authorized by statute. The court, however, may declare the owner entitled to the costs of and incidental to making his defence to the information and order such costs to be taxed as between solicitor and client, including all legitimate and reasonable charges and disbursements under the circumstances. In such a case there should be no allowance of interest to the owner either upon the amount offered as compensation by the information or upon the amount of compensation claimed by the owner.

The King v. Frontenac Gas Co., 15 Can. Ex. 438.

ACQUIESCENCE IN JUDGMENT—AUTHORITY OF SOLICITOR.

A railway company, after having been condemned, in a petitory action, to deliver up, within specified time, lands of which it had taken possession without previous expropriation, and taking advantage of the option given to it by the judgment of retaining the lands upon payment of a fixed sum, allows the time fixed to pass without abandoning the property and pays the owner the amount mentioned in the option; it becomes itself the owner of the lands and cannot afterwards proceed with expropriation. A deposit by the company of the amount mentioned in the option, in the hands of its solicitor in the action, for the purpose of security on an appeal, implies a tacit mandate to the latter to acquiesce in the final judgment by paying the sum fixed by the option, and the failure of the company to abandon the lands within the time fixed involves tacit ratification of that mandate.

Canada Gulf & Terminal R. Co. v. McDonald, 25 Que. K.B. 42.

DEPOSIT — FEES — GOVERNMENT TAX — "OTHER REASONS" — HYPOTHECARY CLAIMS.

In an expropriation under the Expropriation Act (Que.) the city of Montreal, which deposited in court the amount of the compensation instead of paying it directly to the owner, should pay the fee of 1 per cent fixed by art. 113 of the tariff, as well as the percentage of 1 per cent to the government (12 Vict., c. 112, s. 4), even in a case where the city had obtained from the owner an extension of the delay for making the payment on condition that the amount of the compensation was deposited in court. The words "other reasons" in art. 7599, R.S.Q., mean reasons of the nature of an hypothecary claim such as a rent, a dower, an open substitution and, other obstacles resulting from some hypothec, and which prevent, like those in art. 7599 the payment of the moneys into the hands of the claimant. So long as the creditor has not accepted the consignment, or so long as a judgment which can no longer be appealed has not declared such a consignment good and valid, its effects as to the extinction of the obligation and its accessories are neither final nor similar to a payment, and the consigned moneys remain in the debtor's assets.

Dufresne v. Montreal, 53 Que. S.C. 337, 24 Rev. de Jur. 161.

Arbitration — Appeal — Payment — Interest—Possession—Municipal and school taxes.

Where there is an appeal from an arbitration award under R.S.C., c. 37, s. 209, in an expropriation by a railway company, the judgment given upon such appeal is final, and in such case the action brought by the company to set aside the award does not deprive the person whose land was expropriated of his right to demand payment of his indemnity. The interest upon the indemnity in such an expropriation runs from the date of the actual taking of possession of the land expropriated by the company; and such possession only follows upon registration of the plan and notice of expropriation. These may, nevertheless, be expected after a formal demand, when the final demand takes place only by action to record the indemnity, it runs only from the notice of action. As long as the company is not in possession of the land expropriated, it is not bound to pay the municipal and school taxes imposed upon such real estate.

Lachine, Jacques Cartier & Maisonneuve R. Co. v. Charlebois, 27 Que. K.B. 47.

(§ III D—161) — Railway expropriation — Claim for occupation prior to award.

An award in expropriation proceedings under the Railway Act (Can.) fixing the compensation for land taken for the railway and the damages to the remainder of the land, does not include the damages to which the owner is entitled for the company's wrongful use and occupation of the lands prior to the expropriation.

Gauthier v. C.N.R. Co.; Dagenais v. C.N.R. Co., 17 D.L.R. 193, 7 A.L.R. 229, 19 Can. Ry. Cas. 144, 28 W.L.R. 240, 6 W.W.R. 949, varying 14 D.L.R. 490 and 494.

(§ III D—163) — Compensation when awarded—Deposit of plan—Notice.

The word "title" employed in s. 192 (2) of the Railway Act, 1906, as amended by 8-9 Edw. VII., 1909, c. 32, is equivalent to the word "right" and "effectively acquire a title under the terms of said statutes, to the lands which a company requires for its works" means acquiring a right which prevents the proprietor from disposing of his property. If an expropriating company has, within the year of the deposit of the plans and book of reference, served on the interested parties the notice mentioned in par. (a) and (b) of s. 193, of the Railway Act, 1906, the arbitrators must determine the compensation with reference to the date of such deposit, even if their award is made only after the expiry of the year from such deposit.

Forget v. Lachine, etc., R. Co., 24 Que. K.B. 174.

E. Consequential injuries.

Land injuriously affected, offsets, advantages, see Damages, III L—280.

Loss of access, closing highway, see Damages, III L—275.

Severance, incidental damage to owner, lessee, see Damages, III L—236.

(§ III E—165) — Values in vicinity — Opinion evidence.

In eminent domain proceedings opinion evidence of a person competent to speak on the subject is admissible to prove the general course of values of what had been shewn to be a certain class of real estate in the vicinity, and does not contravene the rule prohibiting proof of collateral issues as to the value of separate properties in the neighbourhood. [Lewin v. New York Elevated R. Co., 165 N.Y. 572, followed.]

Re Billings and C.N. Ontario R. Co., 19 D.L.R. 841, 31 O.L.R. 329.

Commercial basis.

In estimating the damages incurred by reason of an expropriation of land by a city where it became necessary to cut away part of a residence, leaving the rest of the house and the remaining land of little value for residential purposes, but it appears that the locality having become a business district, the remaining land with the house entirely removed was worth more for business purposes than the value of the remaining land for residential purposes, plus the value of the house, it is error on the part of the arbitrators in making an award on the basis of the value of the land for commercial purposes to also allow damages for injury to the house because of the severance of part of it, since the value of the portion of the house removed is merged in the valuation allowed to the claimant on the basis of the greater valuation given to the property by reason of its adaptability for commercial purposes. [Ossalinsky v. Manchester, cited in Brown & Allen on Compensation, appendix, p. 659, followed.]

Hawkins v. Halifax, 10 D.L.R. 747, 47 N.S.R. 233, 12 E.L.R. 167.

Severance and loss of access — Subdivision lands—Future annoyance.

The basis of a claim to compensation for lands injuriously affected by severance must be that the lands taken are so connected with or related to the lands left that the owner of the latter is prejudiced in his ability to use or dispose of them to advantage by reason of the severance; but the owner of a registered subdivision, which has been parceled out and a number of lots transferred before the taking of some of the lots for railway purposes, cannot claim additional compensation for injurious affection to the remaining land by the severance thereof and loss of access thereto. [Cowper Essex v. Acton, 14 App. Cas. 153, distinguished.] Section 155 of the Railway Act, 1906, requiring a railway company to make full compensation to all persons interested for all damage by them sustained by reason of the exercise of the powers of expropriation, and ss. 191 and 193 distinguishing between compensation for

land taken and damage suffered, do not change the well-settled rule, that land so taken cannot by its mere use, as distinguished from construction of works upon it, give rise to a claim for compensation, and gives no right to claim additional compensation for depreciation in value by reason of the prospective or future annoyance from noise, smoke and vibration of passing trains.

Holditch v. C.N.O.R. Co., 27 D.L.R. 14, [1916] 1 A.C. 536, 20 Can. Ry. Cas. 101, affirming 20 D.L.R. 557, 30 Can. S.C.R. 265.

BUILDING LOTS—LOSS OF ACCESS.

An expropriation of building lots by the Crown does not entitle the owner to special damages for the depreciation in value to the remainder of the lots because of their being cut off from the proposed extensions of a public street, the losses, if any, being offset by the advantages.

The King v. Torrens, 40 D.L.R. 108, 17 Can. Ex. 19.

VALUATION OF COMMERCIAL ENTERPRISE.

Suppliant alleged that the sand and clay to be found on the property expropriated had special quality and merit for manufacture of high class brick and brick tile, and, that with the small quantity of land left to him after the expropriation of the property it was impossible to carry on his proposed enterprise. The suppliant paid $10 an acre for the property; the Crown offered $30 an acre, and it was admitted that this amount was ample if there was no special merit in the clay. He never commercialized it, there has been no established business on the premises and the supposed profits are conjectural. The land taken is but a small piece of the whole. The land is to a certain extent swamp land not suitable for the alleged purposes, and other clay is available in the vicinity. Held.—That, in as much as there was no special or peculiar merit in the clay and sand found on the expropriated land, and furthermore that, as suppliant has suffered no injury to any feasible commercial undertaking, by reason of the amount of land taken or of the works constructed by respondent, there was no ground for increasing the amount of compensation tendered to suppliant by respondent.

Beharriell v. The King, 48 D.L.R. 272, 19 Can. Ex. 95.

RIGHTS AND REMEDIES OF OWNERS—WIDENING STREET.

Upon an arbitration to determine the compensation to which a landowner is entitled for the expropriation under a city by-law of a strip of his land for the widening of a contiguous street, the arbitrator will consider whether or not certain conditions, predicated as necessarily reducing the value of the expropriated land, are merely temporary, for instance, a prior city by-law rendering the property in question residential, thus opening to the owner the right in such event to shew that the restrictive by-law might later on be repealed and the property thereby might become commercial and in consequence more valuable.

Re Gibson and Toronto, 11 D.L.R. 529, 28 O.L.R. 20.

RAILWAY—COMPENSATION FOR SEVERANCE.

A severance of subdivision property, by a railway expropriation, which does not injuriously affect the land as a whole, is not an element of compensation. [Holditch v. Can. North. Ont. R. Co., 27 D.L.R. 14, [1916] 1 A.C. 536, followed.]

Re C.N.P.R. and Byng-Hall, 35 D.L.R. 773, 23 B.C.R. 38. [See also 28 D.L.R. 751.]

VALUATION — CLOSED DOWN MILL — INDUSTRIAL SITE.

The amount of compensation allowed for expropriation of a mill property, which has been closed down for a number of years and the buildings on which are in a dilapidated condition, should not be estimated as if the mill were a going concern, although its situation should be considered if it makes the property especially valuable for industrial purposes.

The King v. Peters, 32 D.L.R. 692, 15 Can. Ex. 462.

CROWN RAILWAYS — SHUNTING-YARD — SCHOOL — COMPENSATION — HARBOUR — RIPARIAN RIGHTS — CONSEQUENTIAL INJURIES.

The Dominion government, in the operation of its railways, constructed a shunting-yard on lands reclaimed by it from the waters of Bedford Basin, partly in front of the school buildings of the suppliant corporation. The latter owning water lots thereon, which had been improved as a bathing pavilion and wharf in connection with the school, claimed compensation for injurious affection by reason of the construction and operation of said yard. Held, Bedford Basin being a public harbour at the time of Confederation, was the property of the Dominion by virtue of the B.N.A. Act, and no title to water lots thereon could pass under a provincial grant. [Maxwell v. The King, 40 D.L.R. 715, 17 Can. Ex. 97, followed.] The fact that the suppliant had been allowed a crossing over the railway tracks to reach the beach where its lots were situated, did not give it an irrevocable license as against the Crown, nor could it under the circumstances claim such license as a riparian proprietor, nor could such license be considered as an element of compensation. The injury having been caused by the operation of works on lands other than those taken from the suppliant, the latter was not entitled to compensation therefor.

Sisters of Charity of Rockingham v. The King, 46 D.L.R. 213, 18 Can. Ex. 385, 24 Can. Ry. Cas. 388.

COMPENSATION — NEW TAKING OR NEW WORKS—DAMAGES NOT CONTEMPLATED AT TIME OF FIRST EXPROPRIATION.

Where compensation for damages arising from an expropriation has been paid, it is no answer to a claim arising out of a new taking or the construction of new works, where the last mentioned damages could not at the time of the first expropriation be foreseen, or contemplated.

Therriault v. The King, 44 D.L.R. 641, 18 Can. Ex. 298.

Where the owner of riparian land upon whose land the Crown erects an ice pier becomes entitled to damages under the Expropriation Act, R.S.C. 1906, c. 143, for injurious affection to the remainder of his property, he cannot claim as one of the items damages sustained by reason of a collision of one of his vessels with the pier in question while the vessel was being launched, where it appears from the evidence that due care was not exercised in the launching.

Pickels v. The King, 7 D.L.R. 698, 14 Can. Ex. 379.

EASEMENT — DEPRECIATION FROM POSSESSION AND POTENTIAL USE — POWER OF COMPANY—REFERENCE BACK TO ARBITRATORS.

Upon an appeal from an award fixing the amount of compensation to be paid to a landowner in respect of an easement expropriated by the Dominion statute incorporating it, 2 Edw. VII. c. 107, s. 21 (c), it was decided that the landowner was entitled to be paid, not only for the damage caused to him by what had been done, but for all the damage that was caused to him by the power given to the company, whether it had in fact exercised it or not, provided the company's notice covered the user of it; and an order referring the matter back to the arbitrators was made. Pursuant to this order, the majority of the arbitrators made an award for a small sum; and it was held, upon appeal, that what was really in issue was the damage or depreciation caused by reason of the possession and potential use by the company of its unused powers—what was to be valued was the property in the owner's hands, subject to the restrictions or easements by which it was affected, though their discharge or the unlikelihood of their use or enforcement must be considered in ease of the loss. Held, also, that it was beyond the power of the company to enter into an agreement to limit the easement to that actually in use. [Ayr Harbour Trustees v. Oswald (1883), 8 App. Cas. 623, followed. Stourcliffe Estates Co. v. Bournemouth Corp., [1910] 2 Ch. 12, distinguished.] Held, also, that the award could not be interfered with on the ground that the arbitrators had no right to deal with the costs of the former arbitration: the statute where applicable must govern. The award was set aside, and the matter again referred back to be considered by the arbitrators.

Re Coleman and Toronto & Niagara Power Co., 38 D.L.R. 65, 40 O.L.R. 130.

LAND INJURIOUSLY AFFECTED—INTEREST.

Where one parcel of land is expropriated for railway purposes and another parcel of land of the same owner is injuriously affected by the carrying out of such purposes, the amounts awarded in arbitration proceedings in respect to both subjects are to be treated as purchase money. [Re MacPherson and Toronto, 26 O.R. 558; Re Davies & James Bay R. Co., 20 O.L.R. 534, followed.] Arbitrators may award interest on purchase moneys from the date of the service of the notice of expropriation.

Green v. C.N.R. Co., 8 S.L.R. 255, 33 W.L.R. 261, 9 W.W.R. 907.

(§ III E—166)—BUSINESS — LICENSE — ELEMENT OF VALUE.

The defendant J.C. had been carrying on for a long period a grocery and liquor business in the premises expropriated. The liquor side of the business was being operated at a profit, while the grocery did not yield large returns. The liquor license was only good for one year, and its renewal was dependent upon a petition being endorsed by a certain number of the ratepayers. Moreover, it was granted to the individual only so long as he continued in business in the same premises; and the defendant was an old man. At the time of the expropriation it was also shown that prohibition legislation was impending which would have put an end to the defendant's sale of liquor. Held, that under all the circumstances the court, in determining the amount of compensation, was not called upon to decide whether the license was an interest in land and value the same separately, but that the proper principle to follow was to compensate the defendant for the value of the premises to him and the loss of his business as a whole.

The King v. Courtney, 27 D.L.R. 247, 16 Can. Ex. 461.

(§ III E—170)—ALTERATION OF STATE OF HIGH LAND — INJURY TO OWNER OF LOWER — DAMAGES — ART. 501 C.C. P.Q.

Where the owner of a superior heritage alters its natural state to the injury of the owner of lower adjoining land, he is liable under art. 501 C.C.P., to the latter for damages, not as for a simple tort, but as for a breach of duty imposed by law.

Therriault v. The King, 44 D.L.R. 641, 18 Can. Ex. 298.

COMPENSATION — CONSEQUENTIAL INJURIES BY RAILWAY CONSTRUCTION — SEVERED PARCEL.

When a railway intersects a piece of land the company must pay not only compensation for the land actually taken, but also damages for injuries to the remainder of

the parcel sustained by reason of the compulsory severance.

Re Myerscough and Lake Erie & Northern R. Co., 11 D.L.R. 458, 4 O.W.N. 1249, 15 Can. Ry. Cas. 168, 24 O.W.R. 535.

BY CONSTRUCTION AND OPERATION OF RAILROAD—DAMAGES—RIGHT TO COMPENSATION.

The owner of property over which one railway has obtained a right of way is entitled to other and different damages from a second company expropriating land alongside the first, the property having already adjusted itself to the first invasion.

Re Billings and C.N. Ontario Ry. Co., 15 D.L.R. 918, 16 Can. Ry. Cas. 375, 29 O.L.R. 608.

EXPROPRIATION OF LAND—TAKING PART OF GOLF COURSE—COMPENSATION—VALUE OF LAND—COST OF ACQUIRING ADDITIONAL LAND—AWARD—ALLOWANCE FOR RECONSTRUCTION OF COURSE.

The railway company having taken 8⅝ acres out of 76 acres belonging to the club and laid out as a golf course, and having by the construction of the railway severed 6½ acres from the rest, it was held, that the club were not bound to put up with such a course as could be laid out on the 67 acres left, nor to pay over the railway lands; and the cost of acquiring other premises (15 acres), suitable and convenient, was a fair test of the damage suffered by the club. [The Queen v. Burrow, Metropolitan Ry. Co. v. Burrow, London Times Jan. 24, and Nov. 22, Boyle and Waghorn on Compensation, p. 1052, and Hudson on Compensation, p. 1521, and Edinburgh v. North British R. Co., Princes' Street Gardens Arbitration, Hudson, p. 1530, applied.] Where the most advantageous use has been made of property by its owner, it is that value that the taker must pay, and the taker cannot reduce that value by limiting the damage to what lies immediately near the part taken, if the owner suffers through his whole property by its being reduced to an area too restricted to be used to the same advantage as that which the whole afforded. The award of arbitrators of $7,240 as compensation to the club for land taken for the railway, under the Railway Act, (Can.), and land injuriously affected, was increased on appeal to $18,050, allowance being made for the acquisition of additional acreage, for sewer piping, etc., taken and rendered useless, for reconstructing and providing tees and greens, and for damage to the club-house from smoke, noise, and vibration.

Re Brantford Golf & Country Club and Lake Erie & Northern R. Co., 32 O.L.R. 141.

LIABILITY OF RAILWAY.

Where any right of property is injuriously affected by a railway company in the exercise of powers conferred upon it by Act of Parliament, the company is not liable in damages for such injury unless Parliament has made provision therefor.

Laurentide Paper Co. v. The King, 15 Can. Ex. 499.

SECOND INVASION—MARKET VALUE—POTENTIAL VALUE—COMPULSORY TAKING.

The owner of property over which one railway has already obtained a right of way is entitled to other and different damages from a second company expropriating land alongside the first, the property having already adjusted itself to the first invasion. The owner of property is entitled to get the market value of his land, estimated at the best use it can be put to, and taking all its prospective capabilities into consideration. In valuing lands, subdivided into lots, situate in a small community, where a number of other subdivisions are on the market, the probability that the owner will have to wait years to sell, and then only receive the price in instalments, instead of as in expropriation, are matters to be considered. In case of compulsory taking, the usual 10 per cent is allowed.

The King v. Lynch, 19 Can. Ex. 198.

VALUATION AS DISTINGUISHED FROM ARBITRATION—RAILWAY—EXPROPRIATION OF LAND.

Re Laidlaw and Campbellford, Lake Ontario & Western R. Co., 5 O.W.N. 534, 25 O.W.R. 421.

(§ III E—171)—ACCESS—DEVISEES—CO-TENANTS.

Tenants in common, devisees of a strip of land, intended by the testator to be dedicated and used as a public road, and who have refused to follow out the testator's wishes, and have held the land for the purpose of obtaining damages for expropriation thereof, have no such interest as will entitle them to damages under s. 155 of the Railway Act, 1906, although the land has been used as a means of better ingress and egress to and from land owned by one of the parties.

C.N.R. Co. v. Billings, 32 D.L.R. 351, 21 Can. Ry. Cas. 310, reversing 15 D.L.R. 918, 29 O.L.R. 608.

(§ III E—173)—NOISE, SMOKE AND VIBRATION—RIGHT TO RECOVER FOR, IN CONDEMNATION PROCEEDINGS.

Where part of a proprietor's land is taken from him and the future use of the part so taken may damage the remainder, such damage may be an injurious affecting of the proprietor's other lands; so a railway expropriating a narrow strip of land for trains to cross over is liable for the injuries affecting of the land adjoining by reason of smoke, noise and vibration occasioned by trains passing over such strip.

Re Billings and C.N. Ontario R. Co., 15 D.L.R. 918, 16 Can. Ry. Cas. 375, 29 O.L.R. 608. [Reversed on another point 32 D.L.R. 351, 21 Can. Ry. Cas. 310.]

(§III E—174)—SPUR OR SWITCH.

The Railway Board will usually follow the principle that a railway company de-

siring to take land of a private individual should be given the right, provided the individual can be properly compensated for his land and for damages to adjoining land, but it is a ground for refusing to give the railway company that privilege that the proposed railway line is a cut-off for freight only which if permitted would run through a valuable suburban subdivision for the development of which the land proprietor had dedicated large sections for the construction of driveways and parks, which might be expected to benefit both the suburban locality and the adjoining city and so be considered as in the nature of a public undertaking.

C.P.R. Co. v. Smith, 5 D.L.R. 391.

(§ III E—176)—Obstructing access to water.

Where arbitrators dealing with an objection to the admissibility of evidence of increased value to set off against damage in eminent domain proceedings under the Railway Act (Can.) stated that they would take the evidence, but would specify separately, in their award the increased value and the gross amount of damages against which it was set-off, and thereby enable the objecting party to have reviewed by the courts the application of the "set-off" provisions of the Railway Act, but no two of the three arbitrators could agree on the amounts on the basis of excluding the benefits, but concurred in awarding one dollar damages for lands injuriously affected but not expropriated, but without specifying how the amount was arrived at, the arbitrators' statement as to separate findings will be held to be equivalent to a promise to exercise their discretionary power to state a case for the opinion of the court, a reliance upon which may have prejudiced the objecting party in the conduct of his case, and the arbitrators' nonfulfilment, although unintentional, of the promise given is such misconduct on their part as will justify setting aside the award.

Re False Creek Flats Arbitration (No. 2), 8 D.L.R. 422, 17 B.C.R. 282, 21 W.L.R. 761, affirming 1 D.L.R. 363.

(§ III E—180)—Loss of access—Highway—Railway.

The obstruction of natural, proximate and direct approaches to land by the construction of a railway, across existing streets, entitles the owner to compensation for depreciation in the value of the land, as against the railway company, but not against the city agreeing to the location. Holmested v. C.N.R. Co., 29 D.L.R. 761, 9 S.L.R. 327; Holditch v. C.N.O.R., 27 D.L.R. 14, [1916] 1 A.C. 536, followed.]

Holmested v. Moose Jaw and C.N.R., 36 D.L.R. 747, [1917] 2 W.W.R. 597.

(§ III E—186)—Alteration of highway—Nuisance—Remedy.

One who suffers special damage by reason of a nuisance created in a highway, by the execution of certain works under statutory powers, has a right of action at common law, if conditions precedent to such execution prescribed by statute have not been observed.

Dominion Iron & Steel Co. v. Burt, 33 D.L.R. 425, [1917] A.C. 179, 20 Can. Ry. Cas. 134, [1917] W.N. 46, affirming 25 D.L.R. 252.

Construction of subway—Compensation to abutting owner.

The construction of a subway in pursuance of an order-in-council under ss. 178, 179 of the Railway Act, R.S.N.S. 1900, c. 99, required for the public safety to carry a highway under a railway, entitles an abutting property owner to recover, from the company executing the work, compensation for the value of his land injuriously affected thereby though the land itself is not actually taken. [Parkdale v. West, 12 App. Cas. 602, followed; Burt v. Sydney, 15 D.L.R. 429, 50 Can. S.C.R. 6, 16 D.L.R. 853, applied.]

Burt v. Dominion Steel & Iron Co., 25 D.L.R. 252, 49 N.S.R. 339. [Leave to appeal to Privy Council granted, 26 D.L.R. 154. Affirmed, 33 D.L.R. 425, [1917] A.C. 179.]

Compensation for land taken—Damages for injurious affection — Betterment—Interest.

Re Humphrey and Victoria, 19 W.L.R. 615.

Compensation for land taken—Arbitration—Judgment to enforce award.

Usher v. Town of North Toronto, 2 O.W.N. 851, 18 O.W.R. 808.

Compensation for lands injuriously affected by closing of streets—Determination by council.

Winnipeg v. Brock, 16 W.L.R. 45.

Compensation for injury to land—Subway—Municipal powers—No part of the land actually taken—Time allowed for making claim.

Winnipeg v. Toronto General Trusts Corp., 20 Man. L.R. 545, 18 W.L.R. 50.

IV. Additional servitude.

See Damages, III L.

A. In general; on railroad way.

(§ IV A—192)—Prospective value—Second invasion—Elements of damage—Benefits due to expropriation—Quantum of damages.

Property used as a farm in proximity to a village, but with only a prospect that at some distant date, some parts might be sold as building lots, will be classed as farming lands, and be valued as such and not as building lots; such prospect being too distant. In a case of second expropriation, where the property has already adjusted itself to conditions created by the first invasion, the owner of property is entitled to other and different damages due to such second expropriation. Where by second expropriation a railway takes a strip of land

for a railway yard on each side of the right-of-way first taken, the extra inconvenience and delay due to longer crossing and to the more extensive use of the property as a yard, are elements of the damages to be allowed him. The benefits accruing to the remaining part of the property by the expropriation and to the use to be made of the land taken, will be taken into consideration in fixing the quantum of damages due an owner. [The King v. Trudel, 19 D.L.R. 270, 49 Can. S.C.R. 501.]

The King v. Fontaine, 49 D.L.R. 126, 19 Can. Ex. 188.

B. On highway.

(§ IV B—195)—Where a railway established a freight shed and freight shunting yard which materially increased the traffic upon that part of the railway running along a city street and injuriously affected the value of the property fronting on the street to an extent not contemplated when the grant was made many years previously by the municipal corporation of permission to carry the railway line along such street, the Railway Board of Canada will order compensation to be paid by the railway to such of the landowners within the territory injuriously affected as were the owners of their property prior to such change of conditions. Purchasers of property upon a street upon which a railway is operated who bought subsequently to the establishment of a railway yard and the incidental damage to the properties on that street by reason of the shunting of cars thereon, having purchased with notice of the new conditions, are not entitled to compensation in damages as are the landowners who had acquired title previous to the establishment of the railway yard.

Hamilton v. G.T.R. Co., 5 D.L.R. 60, 14 Can. Ry. Cas. 196.

Condition as to construction of railway in streets — Compensation to abutting landowners.

G.T.P. Ry. Co. v. Landowners, etc., of Fort William, 28 T.L.R. 37.

Diversion of water—Order of Railway Commission.

Blais v. G.T.R. Co., 39 Que. S.C. 236.

EXTENSION OF TIME.

See Moratorium.

For appeal, see Appeal, III F.

EXTORTION.

By threat or accusation of crime—Constable with warrant.

A constable who is given a warrant of arrest for theft to have executed in another county on its being endorsed by a magistrate there and who, at the same time, acts for the private prosecutor in attempting to settle the charge with the accused is properly convicted of extortion under Cr. Code, s. 454, if he accuses or threatens to accuse the person against whom the warrant is directed of the criminal offence therein mentioned and thereby obtains from such person a payment of money as representing the value of the article alleged to have been stolen and a reimbursement for expenses.

R. v. Lapham, 10 D.L.R. 315, 4 O.W.N. 838, 24 O.W.R. 111, 21 Can. Cr. Cas. 79.

Justice of the peace exacting unlawful fees—Qui tam action.

Aikens v. Simpson, 18 Can. Cr. Cas. 99.

Threatening in writing to accuse of crime with intent to extort.

The King v. Hatch, 18 Can. Cr. Cas. 125.

Information—Criminal offence disclosed—Refusal of magistrate to issue—Magistrate receiving illegal fees.

R. v. Graham, 17 Can. Cr. Cas. 264.

EXTRA WORK.

Recovery for, building contracts, see Contracts.

EXTRADITION.

I. International.

II. Within British Empire.

I. International.

Certified copy of foreign indictment as prima facie case, see Evidence, IV E—411a.

(§ I—1)—Several offences.

An extradition charge may include more than one offence. [Re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, followed.]

New York v. Israelowitz, 29 Can. Cr. Cas. 323, 25 B.C.R. 143.

(§ I—3)—Bankruptcy offences — Concealing property.

Actual concealment of property in anticipation of bankruptcy, and failure to disclose the whereabouts of himself or the property, after the bankruptcy, are sufficient grounds for granting the extradition of the bankrupt, when demanded by a foreign state, upon a charge of fraudulently concealing while bankrupt, from his trustee, property of his estate. It is not necessary that the evidence should be sufficient to justify a conviction.

Re Goodman, 29 D.L.R. 725, 26 Can. Cr. Cas. 254, 26 Man. L.R. 537, 34 W.L.R. 1091, 10 W.W.R. 1178, affirming 28 D.L.R. 197, 26 Can. Cr. Cas. 84.

Extradition will be ordered for an offence under the Federal Bankruptcy Act of the United States, s. 29 (b), which enacts that "a person shall be punished by imprisonment for a period not to exceed two years, upon conviction of the offence of having knowingly and fraudulently, while a bankrupt, or after his discharge, concealed from his trustee any of the property belonging to his estate in bankruptcy" such enactment being similar in its terms to s. 417 of the Can. Crim. Code, subs. 2, which is in effect a bankruptcy law. [R. v. Stone (No. 2), 17 Can. Cr. Cas. 377, followed.]

Re Webber, 6 D.L.R. 805, 19 Can. Cr. Cas. 515.

PERSONS SUBJECT TO EXTRADITION.

Extradition will be ordered under the extradition treaties and conventions with the United States, only upon its being established that the extradition offence is a crime against the law of the demanding country, and if it had been committed in Canada would be a criminal offence there. [Re Latimer, 10 Can. Cr. Cas. 244, followed.]

Re William Staggs (No. 2), 8 D.L.R. 284, 5 A.L.R. 354, 22 W.L.R. 853, 3 W.W.R. 393.

BREAKING PAROLE—FUGITIVE.

A person from another country who has broken his parole in that country, where he has been convicted of obtaining money under false pretenses, may be extradited as a fugitive under s. 18 of the Extradition Act, R.S.C. 1906, c. 155, although breaking parole is not an extraditable offence.

United States of America v. Allison, 42 D.L.R. 595.

TRIAL—IDENTICAL OFFENCE.

An extradited person is to be tried for the offence only with which he is charged in the extradition proceedings and for which he was delivered up: this does not cover a distinct offence, though of a similar character, to which the evidence before the foreign extradition commissioner was not directed and which was not included in the charges on which extradition was demanded, although the foreign extradition warrant stated the offence in general terms which might include either of the transactions.

Buck v. The King, 38 D.L.R. 548, 55 Can. S.C.R. 133, 29 Can. Cr. Cas. 45, [1917] 3 W.W.R. 117, reversing 35 D.L.R. 55, 27 Can. Cr. Cas. 427.

(§ I—4)—WARRANT ON PRIMA FACIE CASE.

If the proofs tendered on an extradition hearing shew a primâ facie case against the accused, a committal for extradition is justified.

United States v. Wrenn, 10 D.L.R. 452, 21 Can. Cr. Cas. 119.

Where two countries have enacted criminal legislation to prevent a certain crime, in respect of which extradition proceedings are instituted in manifest good faith by one of such countries, too much regard should not be paid by the other country in such proceedings to the ordinary technicalities of criminal procedure; and extradition may be ordered notwithstanding a discrepancy between the date of the alleged offence in the information and the date proved by the evidence. The offence of fraudulent concealment of property by a bankrupt committed in the United States and for which extradition may be had from Canada is a continuing offence which may be begun before the date of the bankruptcy adjudication and continued to completion thereafter.

United States v. Webber (No. 1), 5 D.L.R. 863, 20 Can. Cr. Cas. 1, 11 E.L.R. 379.

In determining whether the evidence upon a demand for extradition is sufficient for a commitment in extradition, the judge or commissioner may order extradition if the evidence makes out a probable case of guilt by shewing circumstances which raise a presumption against the prisoner; but if, from the slender nature of the evidence, the unworthiness of the witnesses, or the conclusive proof of innocence produced in answer, the judge or commissioner is satisfied that the charge is not sustained and that if the trial were within this jurisdiction, the accused must be acquitted, an order for extradition should be refused. [Girvin v. The King, 45 Can. S.C.R. 167, applied; 14 Hals. 412, approved.]

Republic of France v. Peugnet, 1 D.L.R. 204, 19 Can. Crim. Cas. 179, 5 S.L.R. 268, 19 W.L.R. 938, 1 W.W.R. 703.

A warrant issued by an extradition commissioner is not open to the objection, on an application for a writ of habeas corpus, that he acted merely upon the complaint, without taking any evidence, where, in his reason for his judgment, he sets out the various steps taken by him, since, under the statute, all that is necessary is that as a result of such proceedings, he shall be of the opinion that the warrant should issue. It is no objection to a warrant of extradition that it contains more than one charge.

Re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123, 2 W.W.R. 368.

PROCEEDINGS.

Where the original arrest or imprisonment upon an extradition charge has been illegal as made without warrant upon a request by telegram, it is not necessary that the prisoner should be first discharged from the illegal custody in order to hold him under good process subsequently issued in a criminal matter. [Hooper v. Lane, 6 H.L.C. 443, distinguished.] While a telegram from the authorities in the foreign country asking for the arrest of a fugitive criminal is not alone sufficient to justify an arrest, it is not an objection to an extradition warrant of arrest issued upon a sworn information that the information was not based upon personal knowledge, but merely upon such telegraphic communication.

Re Webber, 6 D.L.R. 805, 19 Can. Cr. Cas. 515.

PROVING FOREIGN INDICTMENT.

A certified copy of the indictment against the accused in a United States Court is admissible under s. 23 of the Canada Evidence Act, R.S.C. 1906, c. 145, in support of extradition proceedings taken in Canada to have him sent back to answer the indictment.

Re Goodman, 28 D.L.R. 197, 29 D.L.R. 725, 26 Can. Cr. Cas. 84, 254, 26 Man. L.R. 537, 34 W.L.R. 531, 1091, 10 W.W.R. 781. [Affirmed, 29 D.L.R. 725; 26 Can. Cr. Cas. 254.]

FORGERY—IDENTIFICATION—SIGNATURES.

For the purpose of extradition for the offence of forgery, identity of the person charged may be sufficiently established by a comparison of the signature with a document signed by the accused. [Re Smith, 3 Crim. App. 87, followed.]

United States v. Ford & Frary, 29 D.L.R. 80, 26 Can. Cr. Cas. 430, 34 W.L.R. 912, 10 W.W.R. 1042.

ON FOREIGN INDICTMENT—FOREIGN LAW.

Where extradition is demanded to answer a foreign indictment for larceny, proof of which indictment is made before the Extradition Judge, and the facts disclose an offence which would be an extraditable crime under Canadian law, it may be inferred from the fact of the indictment in the demanding state that such facts constitute larceny under the state law. [Re Deering, 24 Can. Cr. Cas. 133, 24 D.L.R. 818, applied.]

New York v. Israelowitz, 29 Can. Cr. Cas. 323, 25 B.C.R. 143.

PROVINCIAL LAWS — EVIDENCE ACT — JUDICIAL NOTICE OF FOREIGN LAWS.

The provincial laws of evidence are applicable to extradition proceedings by virtue of the Canada Evidence Act, R.S.C. 1906, c. 145, s. 35, where not inconsistent with Federal laws; and in an extradition case in Manitoba the Provincial Statute, R.S.M. 1913, c. 65, s. 32, enables the extradition tribunal to take judicial notice of the laws of any part of the United States of America.

Re Rosenberg, 29 Can. Cr. Cas. 309, 28 Man. L.R. 439, [1918] 1 W.W.R. 845.

STEALING—RESTITUTION OF MONEY TAKEN FROM PRISONER WHEN ARRESTED—PROVING IDENTITY WITH MONEY STOLEN.

Where there is no proof of identity of the money found on the prisoner when arrested, with the money which he was charged in extradition proceedings with having stolen, the Extradition Judge should order the return to the prisoner of the money taken from him by the police at the time of arrest.

United States v. Tounder, 23 Can. Cr. Cas. 76.

(§ 1—6)—IMMUNITY FROM PROSECUTION FOR DIFFERENT OFFENCE.

The president of a bank, on extradition from the United States under a treaty (convention of July 12, 1889), permitting extradition for "fraud" by a banker, when made criminal by a statute, cannot be held under s. 153 of the Bank Act, R.S.C. 1906, declaring penal the making of any "wilfully false or deceptive statement" in a bank return required by law to be made to the Minister of Finance of Canada, fraud not being an essential ingredient of such statutory offence.

R. v. Nesbitt, 11 D.L.R. 708, 21 Can. Cr. Cas. 250, 28 O.L.R. 91.

EXTRADITABLE OFFENCES — FORGERY — DESCRIPTION.

When a requisition for the crime of forgery is amended by changing the offence to that of "uttering forged paper," also extraditable, and the fugitive is surrendered for the latter offence, his right not to be tried for any other crime or offence than for the one extradited has not been violated; the warrant of surrender is conclusive as to the offence charged, and the offence therein is sufficiently described if set out in the general words of the extradition treaty.

Re Hall, 39 D.L.R. 551. [See 42 D.L.R. 330.]

VALIDITY OF WARRANT OF SURRENDER.

A prisoner having been surrendered to the Canadian Government for a crime covered by the treaty between Great Britian and the United States; the court has no power to challenge the validity or regularity of the warrant of surrender, issued by authority of the Government of the United States nor has it any right to go behind the said warrant to inquire whether the proceedings upon which it is founded are or are not regular; although it may examine the proceedings abroad to see that a surrender has not been obtained on one charge, and then another or different crime laid and prosecuted in Canada.

The King v. Hall, 42 D.L.R. 330, 30 Can. Cr. Cas. 129, 52 N.S.R. 260. [See Re Hall, 39 D.L.R. 551.]

GOOD FAITH OF PROCEEDINGS.

On a demand for extradition the accused is not entitled to adduce evidence that the extradition proceedings are not being taken in good faith. [Re McTier, 17 Can. Cr. Cas. 80, disapproved; R. v. Delisle, 5 Can. Cr. Cas. 210, distinguished.]

Re Rosenberg, 29 Can. Cr. Cas. 309, 28 Man. L.R. 439, [1918] 1 W.W.R. 845.

(§ 1—7) — PRELIMINARY HEARING — DISCHARGE—REARREST.

Under s. 13 of the Extradition Act (R.S. C. 1906, c. 155), the Extradition Judge is not to try the fugative for the offence laid, but merely to conduct a preliminary enquiry in the manner laid down in Part XIV. Cr. Code, in order to establish a prima facie case; a discharge of the fugative is no bar to his subsequent arrest for extradition for the same offence.

United States v. Ford & Frary, 29 D.L.R. 80, 26 Can. Cr. Cas. 430, 34 W.L.R. 912, 10 W.W.R. 1042.

JUDGE SIGNING DEPOSITIONS — STENOGRAPHER'S CERTIFICATE — EVIDENCE — ADMISSIBILITY.

The omission of the Extradition Judge to himself sign the depositions, even if the signature by a duly sworn shorthand reporter is not alone sufficient, will not invalidate the order of committal for extradition. Where evidence is taken in the demanding country and the depositions are received by the Extradition Judge under s. 16 of the Extradition Act, (Can.), the admissibility

of the matter contained in the depositions depends on the foreign law of evidence which it is to be assumed was rightly administered; the Extradition Judge need not enter into an enquiry as to whether certain formalities had been taken which would have been a prerequisite in a proceeding taken under Canadian law.

Re Rosenberg, 29 Can. Cr. Cas. 309, 28 Man. L.R. 439, [1918] 1 W.W.R. 845.

(§ I—8)—Review of proceedings.

In an extradition proceeding under the Extradition Act, the omission of the extradition Judge to read the accused the statement set forth in subs. 2 of s. 684, Cr. Code, is not fatal to the proceedings. A foreign deposition for use in an extradition proceeding must purport to be certified as the original or a true copy thereof by a judge, magistrate or officer of the foreign state; and it is not admissible in the extradition proceeding when it appears that the certificate is not given by any such foreign officer competent to certify that the original deposition contains a true record of the evidence given by the deponent.

Re William Stagge (No. 1), 7 D.L.R. 738, 5 A.L.R. 350, 3 W.W.R. 177.

On an application for a writ of habeas corpus for discharge from custody of a person remanded by an extradition commissioner for extradition to a foreign country the decision of the commissioner as to the sufficiency of the evidence, where there is any evidence at all, as to the identity of the party remanded by him, cannot be reviewed.

Re Darraeq, 5 D.L.R. 771, 19 Can. Cr. Cas. 483.

Extraditable offences—Larceny—False pretences.

If the crime for which extradition is asked is a crime against the law of both countries and is in substance to be found in the treaty, although under different heads, effect is to be given to the claim for extradition, so where the offence is larceny under the foreign law but in Canada is only obtaining money or goods by false pretences, which is likewise an extraditable crime, a committal for extradition on a charge of stealing will stand.

Ex parte Thomas, 38 D.L.R. 716, 45 N.B. R. 148, 28 Can. Cr. Cas. 396.

Theft or larceny—Proof of foreign law.

An order for extradition to the United States on a charge of larceny of promissory notes is justified where the facts disclosed in the extradition proceedings make out a prima facie case of theft under Canadian law without more in proof that such facts constitute larceny under the foreign law than might be inferred from his indictment in the foreign state for the offence. [Re Murphy, 2 Can. Cr. Cas. 578, 23 A.R. 386; R. v. Watts, 5 Can. Cr. Cas. 246, 3 O.L.R. 368; Porter v. McManus, 25 N.B.R. 215, applied.]

Re Deering, 24 D.L.R. 818, 24 Can. Cr. Cas. 133, 49 N.S.R. 41.

(§ I—9)—Identity of accused — Photograph.

The identity of the accused in an extradition proceeding founded on a foreign indictment may be shewn by the production of a photograph of the accused verified in the foreign proceedings; the Extradition Judge may compare such photograph with the features of the prisoner before him and from such comparison conclude that the prisoner is the identical party who was indicted.

State of New York v. Israelowitz, 29 Can. Cr. Cas. 323, 25 B.C.R. 143.

Committal—Habeas corpus—Review of evidence.

Re McTier, 17 Can. Cr. Cas. 80.

Offences made criminal by laws of both countries—Section 29b of United States Bankruptcy Act—Bankruptcy law—Defrauding creditors—Retroactivity of the Extradition Treaty of 1906 between Great Britain and the United States.

The King v. Stone, 17 Can. Cr. Cas. 249 & 377.

Party committed under Extradition Act—Irregularity of arrest.

A prisoner committed by a judge under the Extradition Act, cannot set up an irregularity in his arrest as a ground for habeas corpus.

Stone v. Vallee, 39 Que. S.C. 424, 18 Can. Cr. Cas. 222.

Treaty with Russia—Arrest without formal requisition from foreign state—Validity—Extradition Act.

Re Fedorenko (No. 3); Att'y-Gen'l for Canada v. Fedorenko, 18 Can. Cr. Cas. 256, [1911] A.C. 735, 27 T.L.R. 541.

II. Within British Empire.

(§ II—15)—Fugitive Offenders Act — Depositions—Refusal to testify.

As a magistrate is expressly empowered by s. 29 of the Fugitive Offenders Act, 44-45 Vict. (Imp.) c. 69 (R.S.C. 1906, c. 154, s. 27), to take depositions for the purpose of that act in the absence of the person accused, he must be held to have the like power to punish a witness for refusing to testify in proceedings so taken in Manitoba in the absence of accused for the purpose of bringing the latter back from England to Manitoba to answer the charge.

R. v. Simpson; Re Whitla, 28 D.L.R. 402, 26 Can. Cr. Cas. 15, 26 Man. L.R. 129, 33 W.L.R. 547, 833, 9 W.W.R. 986, 1461.

Fugitive Offenders Act—Warrant of arrest.

A Canadian magistrate hearing a demand for extradition to another part of the Brit-

ish Empire under the Fugitive Offenders Act, 44-45 Vict. (Imp.) c. 69 (R.S.C. 1906, c. 154), may legally issue a provisional warrant for the apprehension of the fugitive on the sworn information of some credible person, if in his discretion he sees fit to do so; and this although the information was upon information and belief only; but if he considers it desirable or necessary he may require the evidence of other witnesses. An information under the Fugitive Offenders Act (Imp.), should disclose the charge with sufficient certainty to enable the accused to know what he is charged with; but an information is not bad on a charge of obtaining money by false pretences in that two surnames are used conjointly without any Christian names to indicate the defrauded party, and without indicating whether or not the names represent a partnership or corporation or merely two individuals.

R. v. Harrison, 29 Can. Cr. Cas. 420, 25 B.C.R. 433.

(§ II—19)—Immunity from prosecution for different offence.

If an extradited prisoner intends to object that the indictment is for a different charge than that on which he was extradited, it is for him to prove the extradition warrant and so place on the record the fact of the variance, so that a court of criminal appeal may take cognizance of it on a case reserved.

R. v. McNamara, 16 D.L.R. 356, 22 Can. Cr. Cas. 351, 19 B.C.R. 175, 193, 27 W.L.R. 33.

Arrest of person charged with offence in another British territory.

R. v. Wishart, 22 O.L.R. 594, 17 O.W.R. 505, 967.

EXTRINSIC EVIDENCE.

See Evidence.

FACTORS.

See Brokers; Principal and Agent.

Commission on sales—Rendition of account.

In an action by a factor claiming a fixed sum as commission, and demanding, moreover, that his principal be condemned to render him an account for certain sales made by him and upon which he is entitled to a commission, the court may, if the plaintiff has already examined the defendant and his books during the trial, determine the amount due to the agent for his commission, without any reddition of account from the principal.

Holstead v. Sommer, 48 Que. S.C. 383.

FACTS.

Review of, see Appeal.

FALSE ARREST.

See False Imprisonment; Arrest; Malicious Prosecution.

FACTORIES.

See Master and Servant.

FALSE IMPRISONMENT.

I. In general.
II. Who liable.
A. In general.
B. Officer.
III. Defences; justification.

Measure of damages for, see Damages, III.

Burden of proof to shew authority of, see Evidence.

See Malicious Prosecution; Arrest: Security for costs in action against peace officers or public authority, see Costs, I—14.

Annotation.

False arrest; Reasonable and probable cause; English and French law compared: 1 D.L.R. 56.

I. In general.

Railway rules and regulations—Handcuffing.

McAllister v. Johnson, 40 N.B.R. 73.

II. Who liable.

A. In general.

(§ II A—5)—Mistake—Measure of damages.

A person arrested by mistake, although entitled to damages for being detained an unreasonable length of time, cannot recover for injury to his reputation or feelings if his arrest was justified.

Anderson v. Johnston, 38 D.L.R. 563, 29 Can. Cr. Cas. 24, 10 S.L.R. 352, [1917] 3 W.W.R. 353.

Liability of municipality for acts of constables.

A municipal corporation in the Province of Quebec may be held liable in damages for an unlawful arrest made by constables in the employ of the municipality where no information had been laid or warrant issued and where there were no circumstances to justify an arrest without warrant.

Lacombe v. Lachine, 27 Can. Cr. Cas. 313, 22 Rev. Leg. 528.

(§ II A—6)—Liability of municipality for false arrest—Respondeat superior.

A direction from the mayor and board of control of a city for the police department to prevent the erection of electric light poles on a city street is not in itself such an authority to the police to make an arrest of the electric company's employees attempting to put up the poles, as to render the city liable for a false arrest where the electric company's employees persisted in proceeding with the work of erecting poles against the directions of the police and one of them was arrested by a police officer having authority as a conservator of the peace upon a charge of disorderly conduct, which was afterwards dismissed.

[Kelly v. Barton, 22 A.R. (Ont.) 522, applied.]

Waters v. Toronto, 14 D.L.R. 477, 5 O.W.N. 210, 25 O.W.R. 173.

(§ II A—7)—Illegal arrest for perjury—What must be proven.

In an action for damages on account of an illegal arrest for perjury, it should be first proven that an oath was taken before a court in which the testimony was given. In such an action to ascertain if there has been perjury, it is necessary, in examining the deposition of the accused witness, to take not only a part of what he said, but also the qualifications which he added to his statement.

Lafontaine v. Fournier, 48 Que. S.C. 113.

(§ II A—8)—Principal or master.

Where the plaintiff, in an action for false arrest on capias from which he was discharged upon the quashing of the writ, alleged that the defendant acted with malice as the result of fraud and conspiracy, there is such a failure of proof as to the material allegations of the declaration which prevent a recovery by the plaintiff, where the evidence shewed that the defendant, a stenographer in the employ of a member of the Bar, took the action in which the capias issued in her own name in the usual course of her employment, and, no doubt, without the slightest malice, signed the affidavit for the writ on the strength of fact explained by her employer, and possibly acted on the strength of what she had heard in the former's office regarding the circumstances of the plaintiff's claim, as under such circumstances, the plaintiff should have amended his declaration by substituting for the allegation of malice, fraud and conspiracy one of mere imprudence on the part of the defendant, as well as want of probable cause for suing out the writ.

Serling v. Olsen, 3 D.L.R. 845.

B. Officer.

(§ II B—10)—Every peace officer who, on reasonable and probable grounds, believes that an offence for which the offender may be arrested without warrant has been committed, is justified in arresting such person without warrant.

Lalonde v. Lachine, 18 Rev. de Jur. 360.

The committal for trial for culpable homicide of a person arrested upon running down another with his vehicle and causing his death, and the subsequent finding by a grand jury of a true bill against him for that offence, completely negative the allegation of malice and want of probable cause on the part of the constable who made the arrest, even though the first charge by the latter was "of being drunk and loitering," upon which the prisoner was first detained, and, after trial before the recorder, found not guilty.

Dupuis v. Montreal, 44 Que. S.C. 169.

(§ II B—11)—Arrest.

In an action against a constable for false arrest and imprisonment the statute respecting the protection of constables, C.S. N.B. 1903, c. 64, s. 2, requiring demand for perusal and copy of the warrant on which the plaintiff was arrested does not apply where it is admitted that the constable was not acting "in obedience to a warrant of a justice."

Markey v. Sloat, 6 D.L.R. 827, 11 E.L.R. 295, 41 N.B.R. 234.

Abuse of authority by officer.

A peace officer who knows that he is acting illegally in taking a drunken man out of his home and placing him in jail without a warrant is liable in damages to the latter for his abuse of authority although he did not act with malice.

Asselin v. Davidson, 16 D.L.R. 285, 20 Rev. Leg. 193, 23 Que. K.B. 274.

(§ II B—12)—Magistrate.

An action for false imprisonment lies against a Justice of the Peace, when the liberty of a person has been restrained against his will without the authority of law.

Washburn v. Robertson, 8 D.L.R. 183, 3 W.W.R. 209.

Liability of Magistrate—Issuing warrant without sworn information—The Pedlers Act, C.S.N.B. 1903, c. 175.

McCatherin v. Jamer, Rolston v. Jamer, 9 D.L.R. 874, 41 N.B.R. 367, 11 E.L.R. 527.

(§ II B—13)—Constable's claim for indemnity against municipality.

A police constable paid by the city has no claim for indemnity against the city for damages awarded against him in an action for false arrest where a person charged with a criminal offence was arrested without warrant under circumstances in which a warrant was necessary, the warrant being afterwards granted, but the charge being finally dismissed.

Pon Yin v. Edmonton, 24 Can. Cr. Cas. 327, 31 W.L.R. 402, 8 W.W.R. 809.

III. Defences; justification.

(§ III—15)—Defences—Justification.

In an action against a justice of the peace for false imprisonment, where the defendant admits that the warrant under which plaintiff was arrested was his act, the onus is on him to plead and prove affirmatively the existence of reasonable cause as his justification. Where an action for false imprisonment is brought against a justice of the peace on an alleged unlawful warrant, he must shew that he was authorized by law to issue the warrant when he did in fact issue it. Where the warrant was issued in pursuance of the Master and Servants Act, R.S.S. c. 149, the defendant must shew that a complaint was made to him upon oath by an employee of the plaintiff, that he issued a summons commanding the plaintiff to appear at a time stated in the summons, which must be a reasonable time, that the plaintiff did not appear and that service

of the summons upon him was proved either by the oral testimony of the person effecting such service or by his affidavit purporting to be made before a justice of the peace. Where it must be shewn by the defendant that he had jurisdiction to issue the summons for nonattendance on which he had issued the warrant of arrest, such jurisdiction will not be presumed. In order for the defendant to take advantage of 11 & 12 Vict. c. 44 (Imp.), "An Act for the Protection of Justices of the Peace from Vexatious Actions," the defence must be pleaded. As soon as imprisonment is proved, the burden is upon defendant to prove that the imprisonment was not his act or was justified.

Washburn v. Robertson, 8 D.L.R. 183, 3 W.W.R. 209.

In an action for damages for false arrest and imprisonment against certain police authorities, the defendants justified on the ground that the plaintiff was the keeper of a bawdy house within the meaning of the Cr. Code, (ss. 30, 35), and the New Brunswick Statute, 11 Vict. c. 12, s. 7. The plaintiff, who was managing the hotel where the arrest was made, was charged in the arrest book of the police with being an inmate of a bawdy house. The plaintiff was arrested without warrant. The facts shewed that the plaintiff was not personally guilty of immoral conduct on the occasion of the arrest, but the jury being asked: "Might the plaintiff reasonably from her observation and opportunities of observation of the people resorting to the hotel have come to the conclusion that a number of such persons were of ill repute," answered: "We don't know." Held, that while the defendants could not justify without warrant upon the facts, under ss. 30, 35, Cr. Code, nor under the provincial enactment cited, yet because the jury had failed to answer the question stated, there should be a new trial.

Hopper v. Clark, 40 N.B.R. 568, 10 E.L.R. 305.

FALSELY WARRANTING BUSINESS AS FREE FROM DEBT—FALSE PRETENCES.

The arrest of a vendor for obtaining money under false pretences is not justified because the vendor declared in his deed of sale that he sold his restaurant "free and clear of all debts," while in fact he was in debt to his tradesmen. Such declaration is only a guarantee that the vendor will himself pay his debts.

Calogery v. Spencer, 47 Que. S.C. 12.

An action for damages for false arrest will not lie in favour of a party who has pleaded guilty to a charge in respect of which he was arrested.

Mignault v. G.T.R. Co., 10 E.L.R. 375.

ABSENCE OF PROBABLE CAUSE—NEGLECT TO INVESTIGATE SUSPICIONS OF WRONG DOING.

Waller v. C.P.R. Co., 39 Que. S.C. 240.

FALSE PRETENCES.

Sufficiency of indictment, see Indictment, II E—44.

Annotation.

False pretences: Crim. Code, s. 404: 34 D.L.R. 521.

(§ I—5)—OBTAINING CREDIT.

The president of a company is criminally liable for obtaining credit by false pretences, where goods were secured on credit by the company upon false representations contained in a report made by him for the benefit of the company, where he was the largest shareholder in the company and was benefited by the credit obtained and became thereby indebted himself as a shareholder.

R. v. Amos Campbell, 5 D.L.R. 370, 23 Que. S.C. 400.

PURCHASE OF GOODS—PREARRANGEMENT TO HAVE CHEQUE IN PAYMENT DISHONOURED—FRAUDS—INNOCENT AGENT.

Where goods are obtained on the faith of the buyer's cheque given in payment therefor, a charge of false pretence of an existing or present fact, as distinguished from a future event, is sustainable, although there may have been funds in the bank to the credit of the drawer at the precise time of delivery of the cheque or of the receipt of the goods, if it be shewn that the drawer issued other cheques at about the same time, the payment of which had been planned to so reduce the fund that the cheque in question would be dishonoured and that the drawer had no credit arrangements with the bank for an overdraft. The fact that the purchase was made through an agent who gave the worthless cheque in payment did not absolve the principal.

R. v. Garten, 13 D.L.R. 642, 29 O.L.R. 56, 22 Can. Cr. Cas. 21.

FALSE STATEMENT BY DIRECTOR AS TO FINANCIAL CONDITION.

The "prospectus, statement or account," the fraudulent issue of which by a director is made indictable under Cr. Code, s. 414, where done, inter alia, with intent to induce any person to advance any money to the company, does not include a statement made to a bank of his private affairs by a director offered by the company as its surety on obtaining a line of credit for the company, where the statement did not concern the financial standing or affairs of the company itself; but if the defendant obtained a credit for himself on his guaranty, although the money was actually paid to the company, and he benefited by it, a charge may be laid under Cr. Code, s. 405A, for obtaining such credit under false pretences, and, semble, that since the enactment of Code, s. 407A (Code Amendment of 1913), it is an indictable offence for a person knowingly to make any false satement in writing, with intent that it shall be relied upon, respecting his financial condition for the purpose of procuring a loan or credit for a company in which he is interested.

R. v. Cohen, 25 D.L.R. 510, 24 Can. Cr. Cas. 238, 33 O.L.R. 340.

Notwithstanding the distinction between "obtaining" and "procuring to be delivered to another person" made in s. 405, Cr. Code, and in English statute law, an accused person may, having regard to s. 69 of the Code, be found guilty of obtaining credit by false pretences in incurring a debt (Code, s. 405a), though the credit was obtained for a joint stock company in which the accused person was a shareholder and of which he was acting as manager in getting the credit.

The King v. Campbell, 18 Rev. de Jur. 317.

(§ I—6)—Elements of offence—Fraudulent contract—Pretended stock subscription.

A charge that the accused through false pretences induced the complainant to subscribe for shares and thereby obtained a promissory note and cash in payment therefor is within Cr. Code, s. 405 as charging that the security was obtained through the pretence of a contract fraudulent in fact.

R. v. Daigle, 18 D.L.R. 56, 23 Can. Cr. Cas. 92.

Elements of false pretences.

To make out a charge of obtaining money by false pretences it is not sufficient to prove that the false representation was made, and that the person making it got money from the person to whom he made it, but it also must be shewn that it was upon the strength of the representation thus made that the person wronged was induced to part with his money.

Re William Staggs, 8 D.L.R. 284, 5 A.L.R. 354, 22 W.L.R. 853, 3 W.W.R. 393.

Fraud of employee bidding for employer — Using trade name.

Where an employee makes representations to his employer to the effect that a tender for the supply of goods to the latter is an actual bona fide one from an independent tenderer, whereas it was in fact, although unknown to the employer, the employee's own tender, submitted in a different trade name through such employee's nominee, the employee may properly be convicted of obtaining by false pretences the additional money which, by means of such tender and his employer's reliance on the same as independently made, he obtained for the goods supplied over and above the amount for which the employer would have obtained them by acceptance of a competitive tender which the employee fraudulently caused to be rejected.

R. v. Leverton, 34 D.L.R. 514, 28 Can. Cr. Cas. 61, 11 A.L.R. 355, [1917] 2 W.W. R. 584.

Distinguished from theft.

The offence is false pretences and not theft when goods are obtained from the owner on a worthless cheque fraudulently drawn by the purchaser in a fictitious name, as the owner consented to the property and possession going to the purchaser whom he knew under no other name than the fictitious one.

R. v. Illsley, 29 Can. Cr. Cas. 105.

Sale of another's automobile.

A person who obtains a quotation of a price for a motor-car from the owner thereof and without making any payment or obtaining any legal right or title thereto, offers it for sale as his own while still held in the possession of the true owner, and as a part of the pretended sale transaction obtains money on the faith of his ability to make delivery and give a title to the car, is properly convicted of obtaining money by false pretences through the medium of a contract (Cr. Code, s. 405).

R. v. Provost, 29 Can. Cr. Cas. 247.

Fraudulent obtaining of one's own overdue notes.

A person may be convicted of obtaining the return to himself of his own promissory notes from the payee if such return is obtained under false pretences, and it is not a ground of defence that the notes were overdue when so obtained.

Abeles v. The King, 24 Can. Cr. Cas. 308, 24 Que. K.B. 260.

Elements of offence.

The offence of obtaining money by false pretences is complete if at the time they were made the accused knew them to be false and the money was obtained through such pretence, and this notwithstanding that the party defrauded was in the same transaction incurring an indebtedness to the accused for an amount in excess of that fraudulently obtained and that the accused intended to refund the amount out of the larger indebtedness when it became payable.

R. v. Martel, 27 Can. Cr. Cas. 216.

Evidence—Promissory guaranty.

A mere promise as to the future conduct of the promisor whereby he obtains money, is not a false pretence with Cr. Code, s. 404.

R. v. Gurofsky, 31 Can. Cr. Cas. 59.

Obtaining money with intent to defraud — Evidence — Sufficiency to sustain conviction.

The defendant was charged with obtaining money by false pretences with intent to defraud. The case for the Crown was that M. gave an order to the defendant for a suit of clothes to be made from cloth a sample of which was given to him by the defendant; that M. paid for a suit of clothes delivered to him by the defendant; and that the cloth of which the suit was made was inferior to the sample. The defence was that the sample which M. said had been given to him by the defendant had not been given to him; that there was no such cloth in the shop; and that the clothes were made from a piece of cloth which M. had himself selected. The defendant was tried by a judge without a jury and convicted upon conflicting evidence:—Held,

that there was evidence to warrant a conviction.

R. v. King, 46 O.L.R. 28.

(§ 1—10)—Fraudulently inducing execution of valuable security.

A cheque on a bank is a "valuable security" within the statutory definition of that term under Cr. Code, s. 2 (40), although not covering the entire fund against which it is drawn, as regards the offence under s. 406, of inducing the execution of a valuable security by fraud.

R. v. Prentice, 20 D.L.R. 791, 7 A.L.R. 479, 23 Can. Cr. Cas. 436, 29 W.L.R. 665, 7 W.W.R. 271.

Inferential pretence without express words.

False pretences may be founded on the false idea conveyed fraudulently by the accused; it is not requisite that the false pretence should be made in express words.

R. v. Holderman, 19 D.L.R. 748, 23 Can. Cr. Cas. 369, 7 S.L.R. 279, 30 W.L.R. 82, 7 W.W.R. 729.

FALSE REPRESENTATIONS.

See Fraud and Deceit.

As ground for rescission, see Contracts; Vendor and Purchaser; Sale.

In obtaining insurance, see Insurance.

FARM CROSSINGS.

See Railways.

FARM IMPLEMENTS ACT.

See Sale.

See Contracts, III G—295.

FATAL ACCIDENTS ACT.

See Death; Negligence; Master and Servant; Lord Campbell's Act.

FEES.

See Costs; Sheriff; Levy and Seizure.

Attorney's fees, see Solicitors.

FEE SIMPLE.

See Deeds; Wills, III.

FELLOW-SERVANTS.

See Master and Servant.

FENCES.

See Railways; Boundaries.

Adjoining owners—Construction and maintenance—Jurisdiction of land inspector.

Under art. 505, C.C. (Que.), every proprietor may require his neighbour to construct, at common expense, a fence dividing their properties. The division of the fence, to which each of the proprietors has a right under this article, can only be made by agreement between proprietors interested, and, in default of agreement, by a land inspector. Such division cannot result from the construction and maintenance, for more than 30 years, of definite part of the fence, as in such a case it cannot take effect from a right of ownership, but simply from a right of servitude, which cannot be acquired without title. Where the land inspector has jurisdiction to divide a line fence, or make a new division, he must divide the whole fence and not a part only. One who complains that the line fence has not been legally divided, or that the original division has, for any reason, become unfair, cannot claim to maintain the status in quo for one part only and repudiate it for the other. Held, in the absence of evidence of any agreement or municipal ordinance, the change which the plaintiff has made in operating his land, a change which he had the absolute right to make, entitled him to apply to the land inspector to have the fence divided, but the latter acted irregularly in dividing only a portion of the fence, namely the four arpents of the low ground, and under those circumstances the court cannot give effect to such proceedings and to such a division.

Poirier v. Ladouceur, 24 Rev. de Jur. 117.

FERRIES.

See Carriers; Shipping.

Ferry franchise—Municipal ferry.

North Vancouver Ferry & Power Co. v. Bunbury, 16 B.C.R. 170, 17 W.L.R. 450.

Contracts—Commutation tickets—Regulations—"Family."

Fort Erie v. Fort Erie & Buffalo Ferry Co., 9 O.W.N. 135.

FIDELITY ASSURANCE.

See Bonds; Insurance, VIII.

FIDUCIARY RELATIONS.

See Principal and Agent; Brokers.

Of trustees, see Trusts.

Between attorney and client, see Solicitors.

Of corporate directors, see Companies.

FIERI FACIAS.

See Execution.

FILING.

See Registry Laws; Chattel Mortgages; Bills of Sale; Mechanics' Liens; Land Titles; Pleading.

FINDER.

Rights of finder—Absence of claim as lost property.

A wallet intentionally placed by one of a bank's customers on a desk furnished for their use, and forgotten by him, is not lost within the meaning of the rule of law giving title to lost property to the finder, and was under the protection of the bank, and a clerk of the bank who picked it up and at once turned it over to a superior officer of the bank without stating that he would claim it if the owner were not found, is not,

as against the bank, entitled to the money in the wallet upon its remaining unclaimed for nearly four years.

Heddle v. Bank of Hamilton, 5 D.L.R. 11, 17 B.C.R. 560, 21 W.L.R. 514, 2 W.W.R. 560. [Affirmed, 19 W.L.R. 897.]

FINDINGS.

See Trials; New Trial.
Review of findings, see Appeal.

FINE.

See Summary Convictions; Certiorari; Criminal Law.

FIRE DEPARTMENT.

ESTABLISHMENT OF, BY MUNICIPALITIES.

The power given to cities and towns (Que. statute, 1903) to establish and maintain a fire department, is a faculative power and does not compel them to protect the property of its ratepayers in case of fire or make it responsible for fire losses.

Quesnel v. Emard and Montreal; Cote v. Emard and Montreal, 8 D.L.R. 537.

Bodies politic, such as municipal corporations, are governed as to their powers, rights and obligations, by public law, which, in Canada, is the law of England. Therefore, a city corporation, not bound by its charter or by the act under which it is constituted to supply means of protection in case of fire is not liable in damages for a death by asphyxiation at such a disaster.

Brousseau v. Quebec, 42 Que. S.C. 91.

FIRE INSURANCE.

See Insurance.

Annotation.

Insured chattels—change of location: 1 D.L.R. 745.

FIRES.

Liability of railway for, see Railways, II. (§ I—1)—NEGLIGENT USE OF.

Where servants employed to build a cabin on uncleared lands set out fire for the purpose of clearing a part of the land for the erection of the cabin, and the fire spread and caused damage, the employer will be liable for the resultant damage due to the failure of the servants to take reasonable means to prevent it spreading, even though he had forbidden the servants setting out any fires.

Derby v. Ellison, 2 D.L.R. 279, 20 W.L.R. 794, 2 W.W.R. 99.

COMMON LAW AND STATUTORY DUTIES, ONUS.

A contractor who is engaged in building operations on land is under no duty to watch a fire which has been started by another contractor on the land for the purpose of clearing it, although such fire necessarily endangers his lumber, since the duty to watch the fire at his peril is put upon the person starting it, both by the common law and under the provisions of s. 2 of c. 91, R.S.N.S. 1900.

McLean v. Rhodes, Curry & Co., 10 D.L.R. 791, 46 N.S.R. 491.

FAILURE TO WATCH—CONTRIBUTORY NEGLIGENCE.

Where a contractor built a fire for the purpose of clearing land for building operations, he is guilty of negligence, both at common law and under the provision of s. 2 of c. 91, R.S.N.S. 1900, in failing to watch such fire for the purpose of preventing it from spreading, where as the result of such failure the fire damaged lumber belonging to another contractor on the same land. The doctrine of contributory negligence does not apply where there is a violation of the provisions of s. 2 of R.S. N.S. 1900, c. 91, placing a duty on one who starts a fire for the purpose of clearing land to exercise "every reasonable care and precaution in the making and starting of such fire, and in the managing of and caring for and controlling the same."

McLean v. Rhodes et al., 10 D.L.R. 791, 46 N.S.R. 491.

NEGLIGENCE — SERVANT CLEARING LANDS—FOREST FIRES ACT.

Apart from the Forest Fires Act, R.S.B.C. 1911, c. 91, a person is liable for negligence on the part of his servant acting in the course of the master's business, in taking no steps to prevent fires set out for clearing lands from spreading to adjoining lands.

Gallon v. Ellison; Knowles v. Ellison, 20 D.L.R. 23, 20 B.C.R. 504, 7 W.W.R. 920.

HIGHWAY—LIABILITY OF FOREMAN FOR ACTS OF SUBORDINATES.

The foreman of a gang of workmen engaged in building a government road, who authorizes a subordinate to kindle a fire on the road for the purpose of making tea for the gang, is liable, even though the starting of the fire was not an unlawful act, for injury to adjoining property through the negligent failure of the workmen to extinguish the fire after the tea was made.

Bigras v. Tasse, 38 D.L.R. 651, 40 O.L.R. 415.

SETTING OUT ON DEFENDANT'S LAND—ESCAPE TO PLAINTIFF'S LAND—DESTRUCTION OF PLAINTIFF'S PROPERTY—FIRE SET OUT FOR PROPER PURPOSE—LACK OF REASONABLE CARE TO PREVENT IT SPREADING—NEGLIGENCE—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL—DAMAGES—QUANTUM.

Hassan v. Reynolds, 8 O.W.N. 136.

DESTRUCTION OF PROPERTY—NEGLIGENCE—EVIDENCE — DAMAGES — FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Nixon v. Nickerson, 8 O.W.N. 15.

RENT OF CHATTELS—FIRE—LIABILITY—TENANT—FAULT—PRESUMPTION—C.C., ART. 1629.

The presumption of blame, created by art. 1629 C.C. (Que.), against the tenant in case of fire in the house which he has

rented, is rebutted from the time that it is clearly proved that there was no fault on his part or on the part of his men. The tenant rebutted this presumption where he showed that the owner had strung electric wires for lighting the house without insulation, and that he had filled the wooden boxes enclosing the water pipes and the electric wires with sawdust and shavings.

Henry v. Ward, 28 Que. K.B. 159.

PLAINTIFF STARTING PRAIRIE FIRE—ORDINANCE COMPLIED WITH—NO NEGLIGENCE—SUBSEQUENT GALE—FIRE CATCHING ON DEFENDANT'S LAND—PLAINTIFF NOT LIABLE.

For the purpose of burning off for farming purposes plaintiff set a prairie fire on his land. All precautions were taken and the Prairie Fires Ordinance was complied with. The fire lasted about 21 minutes when, according to the evidence, it was "out." The weather was favourable at the time but about two hours afterwards a very violent gale occurred and a fire started on defendant's land about 30 or 35 feet from plaintiff's fire guard, no doubt from sparks from plaintiff's land, which fire spread and damaged defendant's land. The court found the plaintiff was not guilty of negligence.

Fallis v. Bolton, [1919] 1 W.W.R. 417.

(§ I—3)—ACTION FOR DAMAGES FOR INJURY TO PLAINTIFF'S PROPERTY BY FIRE ALLEGED TO HAVE SPREAD FROM FIRE SET OUT BY DEFENDANT—EVIDENCE—ONUS—NEGLIGENCE—PROOF OF CAUSE OF FIRE—DEMEANOUR OF WITNESSES—DELAY IN BRINGING ACTION—FINDINGS OF TRIAL JUDGE.

Misner v. Tyers, 17 O.W.N. 173.

SETTING OUT—NEGLIGENCE—DESTRUCTION OF NEIGHBOURING PROPERTY BY SPREAD OF FIRE.

Imperial Oil Co. v. Bashford, 18 W.L.R. 188.

(§ I—4)—BACK FIRE.

An action for damages to the plaintiff's property from a prairie fire must be dismissed where it appears that on the day the damage occurred, there were two fires burning, one of which was kindled by the defendant for the purpose of backfiring to save his property from the other fire which was coming in the direction of his farm and he kept his fire under control so far as his property was concerned and that the two fires merged on the farm of the defendant or very near it, and one or both of them ultimately terminated in the plaintiff's land, destroying his crop.

Sklariuk v. Whitehouse, 4 D.L.R. 327, 20 W.L.R. 654.

(§ I—6)—SPARKS FROM A THRESHING ENGINE—SETTING FIRE TO PROPERTY ON ADJOINING LAND—NEGLIGENCE.

Mikulasik v. Scouten, 7 D.L.R. 807, 21 W.L.R. 241, 2 W.W.R. 325.

FROM THRESHING ENGINE—FAILURE TO EXTINGUISH.

Where the defendant in removing his threshing engine from the plaintiff's premises, upon which he had been threshing grain under contract with the plaintiff, takes inefficient means to extinguish the ash pile from his engine, with the result that fire spreads therefrom, the omission constitutes negligence.

Butcher v. Stuckey, 16 D.L.R. 839, 26 W.L.R. 719, 5 W.W.R. 1171.

PRAIRIE FIRES ACT (SASK.)—NEGLIGENCE.

Failure by the person in charge of a threshing engine to extinguish the fires drawn from the engine, as required by the Prairie Fires Act, R.S.S. 1909, c. 129, constitutes negligence and renders such person liable for the damage done by the burning of a field of wheat to which the fire spread.

Bettger v. Turner, 16 D.L.R. 484, 7 S.L.R. 228, 27 W.L.R. 625.

NEGLIGENT OPERATION OF THRESHING ENGINE—OPEN SPARK ARRESTER—PLACING OUTFIT IN DIRECTION OF WIND—CLOSE PROXIMITY TO BARN—MANURE PILES.

Farb v. Nelson, 25 D.L.R. 729, 33 W.L.R. 308.

FROM THRESHING ENGINE.

An official of the government having the management of some branch of the government business is not responsible for any negligence or default on the part of other officials, not his servants or agents, in the same employment, but where he is himself guilty of a breach of duty imposed upon him by law he is personally responsible to any person who sustains injury thereby. The defendant, being the person having charge of the management and operation of the machinery in question, was charged with the responsibility of seeing that the statutory conditions respecting its operation were complied with, and not having done so, and such failure having been the cause of the damage, he was liable therefor.

Carter v. Nichol, 4 S.L.R. 382.

DAMAGE CAUSED BY SPARKS FROM THRESHING ENGINE—NONREPAIR OF SPARK-ARRESTER.

Carter v. Nichol, 19 W.L.R. 736.

THRESHING—ESCAPE OF SPARKS FROM ENGINE—NEGLIGENCE.

Spratt v. Dial, 16 W.L.R. 678, affirming 15 W.L.R. 185.

(§ I—7)—BURNING STUBBLE.

Where, for the purpose of getting rid of stubble, a person built a fire on his land in a heavy wind, and without having first taken the precaution prescribed by law to prevent its spread, and after burning off the stubble, left the land with no one to look after any smouldering matter, he is guilty of gross carelessness subjecting him to liability for the loss entailed upon the adjoining land by the spread of the fire thereto.

Ryan v. Gabriel, 2 D.L.R. 18, 20 W.L.R. 649.

(§ I—8)—Government railway locomotive—Government Railways Act, 9 and 10 Edw. VII. c. 24—"Modern and efficient appliances"—Presumption.

While, under the provisions of s. 61 of the Government Railways Act, as amended by 9 & 10 Edw. VII. c. 24, the facts may give rise to a presumption in favour of a person suffering damage by fire that such fire was caused by a locomotive although equipped with modern and efficient appliances, it does not amount to a conclusive presumption of law, so as to excuse the party seeking damages from proving that the fire was so caused.

Rioux v. The King, 14 Can. Ex. 485.

Traction engines.

The defendants, after operating a threshing machine upon the land of L., took the ashes out of the engine, and placed them in a heap upon L's land. Fire broke out on L's land, and spread to the plaintiff's land adjoining, and the plaintiff sued for damages for injury to his property by the fire: —Held, upon the evidence that the fire which caused the injury complained of was caused by hot ashes left by the defendants when the ashes were drawn from the engine on L's land. Held, also, that the defendants were not guilty of negligence. Held, nevertheless, that the defendants were liable both at common law and under the Prairie Fire Ordinance. One who brings fire into dangerous proximity to his neighbour's property does so at his peril. Held, also, that the plaintiff's action was properly brought against the operators of the engine, instead of the owner of the land upon which it was operated; the plaintiff has his election and can sue either.

Bettcher v. Turner, 25 W.L.R. 136.

Fire started by sparks from locomotive —Action for injury to land out of the jurisdiction.

Winnipeg Oil Co. v. C.N.R. Co., 21 Man. L.R. 274, 18 W.L.R. 424.

Government railway — Fire occasioned by cinders from engine.

Duclos v. The King, 13 Can. Ex. 452.

Fire caused by sparks from railway locomotive—Dominion Railway Act, s. 298—Policies payable to mortgagee.

Bunting v. Western Ass'ce Co., 17 W.L.R. 322.

(§ I—9)—Apart from statutory provisions, the defendant was guilty of negligence in setting the fire on a dry, windy day, when the surrounding grass was very dry and inflammable. The defendant was also liable in that he did not comply with the provisions of the Prairie Fire Ordinance by providing a guard 20 feet wide, and in not having the fire guarded throughout its continuance by three adult persons, and thereby must be deemed to have permitted the fire to escape.

Imperial Oil Co. v. Bashford, 4 S.L.R. 360.

Injury to property—Spread from fire not effectually extinguished — Prairie Fires Ordinance.

Whitehead v. McClaive, 19 W.L.R. 216.

FIREWORKS.

Fireworks display — Liability for injuries.

In order to establish liability in negligence against those lawfully conducting a fireworks display in a public park for injury received from an ignited fragment, a failure on their part to exercise due care must be shewn.

Halpin v. Victoria, 23 D.L.R. 333, 21 B.C.R. 14, 7 W.W.R. 1050.

Liability of municipal corporations.

A municipal corporation is not liable for the consequences resulting from the explosion of fireworks set off on one of its squares on the occasion of a political demonstration with no participation therein on its part except the presence of policemen sent to the square to maintain order and even though the fireworks had been set off contrary to the provisions of a by-law of the corporation requiring the same to be authorized.

Hughes v. Montreal, 21 Que. K.B. 32.

FISHERIES.

I. Public fisheries generally.
   A. In general.
   B. Regulations and protection.
II. Private rights.

See Waters for water rights in general.

Sea coast and inland fisheries, powers of province as to, see Constitutional Law, I G—140.

Illegal fishing, treaty, 3 mile limit, coast, island, see International Law, I—3.

Fisherman's wages, desertion, see Master and Servant, I C—13.

Annotations.

Public right of fishing in tidal waters; the 3 mile limit: 35 D.L.R. 28.

"Profits à Prendre:" 40 D.L.R. 144.

1. Public fisheries generally.

A. In general.

(§ I A—1)—The possessor of fishery rights who brings a possessory action against a person interfering therewith is not obliged to prove that the right had, by valid legislation, been withdrawn from the public to become part of the private domain. The provision of s. 35 R.S.C. 1860, c. 62, that those in possession of fisheries on the 15th of August, 1858, should be deemed owners thereof, has remained in force by virtue of s. 3 of 29 Viet. c. 11 (Que.), which repealed the remainder of said c. 62.

Robertson v. Grant, 3 D.L.R. 201, 21 Que. K.B. 279.

(§ I A—2)—Exclusive right—Specific grant.

A specific grant by the Crown, especially

expressed and clearly formulated, is necessary to create an exclusive right of fishing.

Bouillon v. The King, 31 D.L.R. 1, 16 Can. Ex. 443.

FEDERAL AND PROVINCIAL POWERS — SEA FISHERIES—TIDAL WATERS.

It is not competent to the Legislature of British Columbia to authorize the government of the province to grant by way of lease, license or otherwise, the exclusive right of taking fish (feræ naturæ) either in tidal waters or in nontidal navigable waters within the "railway belt" of British Columbia, nor to grant, as to the open sea within a marine league of the coast of that province, by way of lease, license or otherwise, the exclusive right of taking fish which as feræ naturæ are the property of nobody until caught; and the same restriction applies as to tidal waters in the gulfs, bays, channels, arms of the sea and estuaries of the rivers within the province or lying between the province and the United States.

Att'y-Gen'l, for B.C. v. Att'y-Gen'l of Canada; Re B.C. Fisheries (No. 2), 15 D.L.R. 308, 26 W.L.R. 347, 13 E.L.R. 536, 5 W.W.R. 878, affirming 11 D.L.R. 255.

(§ I A—3)—ILLEGAL FISHING—SEIZURE OF BOAT—FRESH PURSUIT BEYOND THREE-MILE LIMIT.

In the enforcement of the fisheries protection laws of Canada, a foreign vessel which is being used in infraction of that law and which sets out to sea to escape capture, may be freshly pursued beyond the three-mile territorial limit, and may lawfully be captured in the open sea by a cruiser of the Canadian fishery protection service.

The King v. "Valiant," 16 D.L.R. 824, 15 Can. Ex. 392, 19 B.C.R. 521, 27 W.L.R. 781, 6 W.W.R. 713.

THREE-MILE LIMIT — FOREIGN SHIP — EVIDENCE REQUIRED TO ESTABLISH JURISDICTION.

To justify the condemnation of a foreign ship seized for alleged infraction of the Customs and Fisheries Protection Act (Can.), R.S.C. 1906, c. 47, it must be established with accuracy and complete certainty that the boat was within the three-mile limit of the coast, at the time of the alleged offence, as such finding is essential to jurisdiction over the offence.

Carlson v. The King, 17 D.L.R. 615, 49 Can. S.C.R. 180.

RIVER NAVIGABLE AND FLOATABLE — EXCLUSIVE RIGHT OF CROWN TO FISHING — LETTERS PATENT IN RESPECT OF LANDS—CONSTRUCTION.

Wyatt v. Att'y-Gen'l of Quebec, [1911] A.C. 489.

B. REGULATIONS AND PROTECTION.

(§ I B—5)—VALIDITY OF REGULATIONS—CONFISCATION AND FORFEITURES.

The Fisheries Act (Can. 1914, c. 8), provides that the fish caught in violation of the Act or any regulation thereunder shall be confiscated; a regulation providing that the fish may go to certain persons is ultra vires; s. 1037 of the Cr. Code does not apply.

Christian v. Christian, 29 D.L.R. 102, 26 Can. Cr. Cas. 260, 50 N.S.R. 231.

MUNICIPAL REGULATION—LICENSE—MANDAMUS.

The right of a riparian owner or occupant under N.S. 1912, c. 18, as amended in 1916, to receive a license from the municipal authorities for an exclusive fishing right, upon tendering the statutory license fee, is absolute, and cannot be destroyed by municipal regulation; the issue of the license may be compelled by mandamus.

Archibald v. The King, 39 D.L.R. 166, 56 Can. S.C.R. 48, affirming 35 D.L.R. 569, 51 N.S.R. 549.

(§ I B—9)—TACKLE AND APPLIANCES.

Dories used with a fishing vessel are a part of the fishing tackle or appliances of the vessel and proof that the fish were being transferred from her dories to a vessel not permitted to fish in Canadian waters at the point within Canadian jurisdiction, at which the vessel was overhauled, is evidence of illegal fishing within the Customs and Fisheries Protection Act (Can.).

The King v. Chlopek, 1 D.L.R. 96, 17 B.C.R. 50, 19 Can. Cr. Cas. 277, 19 W.L.R. 837.

II. Private rights.

(§ II—10)—LICENSE TO SET NETS—FISHERIES ACT — OBSTRUCTING CHANNEL — TEST — PRIVATE RIGHTS — DESTROYING FISHING NETS—WILFUL NEGLIGENCE IN NAVIGATING.

Where a navigable river has two channels, nets and fishing apparatus may, under the Fisheries Act, R.S.C. 1906, c. 45, s. 47, be set across the one of them which is not the main channel, if they do not obstruct the latter, and if one-third of the course of the river (not being a tidal stream) is always left open and no fishing apparatus or material is used or placed in that one-third of the stream. Due care and skill must be used in navigating so as not wilfully to destroy fishing nets, whether lawfully set or not, of the position of which those in charge of the boat had notice.

Smith v. Northern Construction Co., 19 D.L.R. 380, 30 O.L.R. 494.

INTERFERENCE WITH RIGHTS—ACTIONABILITY.

A licensee of a fishing berth may maintain an action at common law against a person who unlawfully impedes or intercepts the passage of fish to or towards his berth.

Christian v. Christian, 29 D.L.R. 102, 26 Can. Cr. Cas. 260, 50 N.S.R. 231.

QUEBEC—FISHING RIGHTS IN NON-NAVIGABLE STREAM—TERMINATION—PROFITS À PRENDRE.

There is nothing similar in the law of the Province of Quebec to the profit à prendre

of the common law of England. The title of a riparian owner extends to the middle of a non-navigable and nonfloatable stream, and an indefinite grant by such owner of the right to catch fish in such stream is one of enjoyment only, and although assignable, is essentially temporary in its nature and cannot endure beyond the lifetime of the grantee.

Duchaine v. Mattamajaw Salmon Club, 47 D.L.R. 625, 58 Can. S.C.R. 222, reversing 27 Que. K.B. 196.

(§ II—12)—Fishing stations or stands (statutory rights).

1. The Act, reproduced in c. 62, Con. Stat. of Canada, was creative of title in favour of persons in possession of fisheries prior to the 16th August, 1858. 2. Where it is proved that, in consequence of the compensation of the coast line of a bay in which the plaintiff's post and fishery is situated and of the action of the rising and falling tidal waters therein, the settling up by the defendants of a new fishery in the same bay at a distance of 300 feet from the plaintiff's fishery has the result that the fish are intercepted and caught in the new fishery whereby the catch in the plaintiff's fishery is greatly diminished, the defendants will be adjudged to take down the new fishery and not to set it up nearer than 250 yards from the old fishery.

Robertson v. Grant, 3 D.L.R. 201, 21 Que. K.B. 279, 18 Rev. du Jur. 135.

Lobster canning without licence.

The King v. Berrigan, 17 Can. Cr. Cas. 329.

"Person not domiciled in the province" —Right of riparian owner to fish.

Belisle v. Mowat, 20 Que. K.B. 66.

FIXTURES.

I. General rules.
II. What are, generally.
III. Between vendor and purchaser.
IV. Between landlord and tenant.
V. Effect of mortgage.

Conversion of chattel into fixture by purchaser under conditional sale, see Sale, I C—15.

I. General rule.

(§I—1)—Essentials—Ownership.

In order to convert a movable object into an immovable, and attach it to the realty, the person converting must be the owner of both the movable and the realty. [Waterous Engine Works Co. v. Banque d' Hochelaga, 5 Que. K.B. 125, affirmed by 27 Can. S.C.R. 406, followed.]

Bernier v. Durand, 32 D.L.R. 768, 25 Que. K.B. 461, reversing 49 Que. S.C. 217.

The conversion of a movable, by incorporation, into an immovable, can only take place when both the movable and the immovable into which it is incorporated are the property of the same owner, and this rule applies, not only between the owner of the movable and that of the immovable, but also between the latter and third parties, e.g., hypothecary creditors.

Genois v. Larouche, 41 Que. S.C. 110.

Permanency—Intention.

Articles affixed to the land even slightly are to be considered as part of the land unless the circumstances are such as to shew that they were intended to continue chattels. [Stack v. Eaton, 4 O.L.R. 335, followed.] If the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used and, if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles and allowing an intention not of occasional but of permanent affixing them both as to the degree of annexation and as to the object of it, it may very well be concluded that the articles are become part of the realty at least in questions as between mortgagor and mortgagee.

D'Augigney v. Brunswick-Balke Collender Co., [1917] 1 W.W.R. 1331.

II. What are, generally.

(§ II—6)—What are—Weigh scales on wharf.

Where weigh scales for weighing coal are fastened to a coal wharf by bolts and have a scale-house built over a portion of the scale equipment so that a part of the building would have to be taken apart in order to remove the scales, the latter are presumably fixtures to the realty. [Haggart v. Brampton, 28 Can. S.C.R. 174; Ex parte Astbury, 4 Ch. App. 630, distinguished.]

Handrahan v. Buntain, 15 D.L.R. 117, 13 E.L.R. 377.

(§ II—7)—Buildings.

Buildings erected by a squatter on Crown lands become the property of the Crown and part of the realty and cannot, therefore, be seized and sold under an execution against the goods of the squatter.

Dixon v. Mackay, 21 Man. L.R. 762.

(§ II—8)—Machinery.

Coal towers forming part of a coal plant and dependent on the power house for power, are immovable objects by destination, although they may be moved over a short distance on tracks built for the purpose, seeing they were placed on the property for a permanency and incorporated therewith: C.C. Que. 379.

Nova Scotia Coal & Steel Co. v. Montreal, 3 D.L.R. 750.

Machinery and plant—Estate mortgage.

"In passing upon the object of the annexation, the purpose to which the premises are applied may be regarded; and if the object of setting up the articles is to enhance the value of the premises or improve its usefulness for the purposes for which it is used, and if they are affixed to the freehold even in a slight way, but such as is appropriate to the use of the articles, and showing an intention not of occasional but of permanent affixing, then, both as to the degree of annexation

and as to the object of it, it may very well be concluded that the articles are become part of the realty, at least in questions as between mortgagor and mortgagee." Said principle applied in adjudging certain specified articles to be, or not to be, fixtures such as to pass under a mortgage of the real estate on which they were placed, as against an assignee for the benefit of creditors of the mortgagors.

Royal Bank v. Coughlan, [1919] 2 W.W.R. 382.

(§ II—12)—Safety deposit boxes—Intention.

If an intention to make chattels part of the freehold is sufficiently established from all the circumstances of the particular case, they may be held to be part of the freehold, notwithstanding that they are not affixed otherwise than by their own weight to the freehold.

Dominion Trust Co. v. Mutual Life Ass'ce Co.; B.C. Securities v. Mutual Life Ass'ce Co., 43 D.L.R. 184, 26 B.C.R. 237, [1918] 3 W.W.R. 415, affirming [1917] 3 W.W.R. 941.

Maple sugar outfit—Immovables.

Peloquin v. Bilodeau, 39 Que. S.C. 388.

III. Between vendor and purchaser.

(§ III—15)—Theatre chairs — Conditional sale—Lien.

Theatre chairs sold under a lien agreement, whereby the vendor retains the ownership and possession until paid for, affixed permanently to the floor of the theatre, with the vendor's knowledge and consent, become part of the realty. A purchaser of realty is not bound to search for liens against goods which, under the law, have become part of the realty.

Berlin Interior Hardware Co. v. Colonial Investment & Loan Co., 38 D.L.R. 643, 11 S.L.R. 46, [1918] 1 W.W.R. 378.

Sale of land — Articles not affixed to freehold—Evidence—Intention.

Lahey v. Queenston Quarry Co., 11 O.W.N. 18, 120.

Between vendor and purchaser — Machinery.

Machines placed on an immovable in a way to be easily removed without damage to either the immovable or the machines are not incorporated with the immovable and do not become immovables by destination. One who hands over a plant for making beer to a brewer, who places it in his brewery and operates it, can seize it in revendication if the brewer does not comply with the conditions of his contract, the owner of the plant having reserved to himself the property in it.

Witterman v. Mongeau, 50 Que. S.C. 428.

One who leases a brewery, in which a machine has become immovable by destination and by being installed as a fixture, can, so long as the lease runs, resist seizure of the machine by the unpaid vendor. The seizure, however, can be kept in force to take effect after the expiration of the lease.

Bishop, etc., Co. v. Independent Brewery Co., 49 Que. S.C. 499.

IV. Between landlord and tenant.

(§ IV—20)—Building — Landlord and tenant.

A house not attached to the land upon which it rests is a chattel, not part of the realty. A provision between the owner of land and the builder of a house thereon, that the latter may remove the house, is not a mere license, but an essential part of a lease of the land.

Devine v. Callery, 38 D.L.R. 542, 49 O.L.R. 505.

Building — Erection upon land of stranger — Right of builder to remove within reasonable time — Failure to remove — Building becoming property of owner of land — Assertion of title by plaintiff — Action for trespass — Removal of building.

McKenzie v. Blue, 17 O.W.N. 183.

(§ IV—22)—Machinery — Rights of landlord and mortgagee.

An emulser in a boiler room, a cream separator, an ice chopper, fastened to the building by bolts imbedded in the cement floor, also a phase motor fastened by coach screws to a frame bracket, which is nailed to the wall, and the supports of the brackets embedded in the cement floor, are fixtures permanently annexed to the freehold and forming part thereof, and are not distrainable for rent as against the right of a mortgagee of the realty; but that does not apply to a vat used in connection with the same business which is not fastened to anything. [Hobson v. Gorringe, 12 Rul. Cas. 217; Stack v. Eaton, 4 O.L.R. 335, 338; Seeley v. Caldwell, 18 O.L.R. 472, applied.]

Assiniboia Land Co. v. Acres, 25 D.L.R. 439, 8 S.L.R. 426, 32 W.L.R. 580, 9 W.W.R. 368.

(§ IV—23)—Buildings — Landlord and tenant.

Thistlethwaite v. Sharp, 7 D.L.R. 801, 20 W.L.R. 474, 1 W.W.R. 946.

V. Effect of mortgage.

(§ V—27)—Effect of mortgage — Machinery — Conditional sale.

As the Real Property Act (Alta.) provides that a mortgage or encumbrance under the Act shall not operate so as to create the mortgagee a "grantee" of the land, a stipulation in the mortgage that machinery and improvements thereafter put upon the land shall become fixtures and form part of the security will not be effective as against the conditional vendor of machinery reserving title to himself under a conditional sale agreement made after the mortgage but before its registration and without notice

of same. [Holson v. Gorringe, 66 L.J. Ch. 114, distinguished.]

Purmal Brick Co. v. General Electric Co., 20 D.L.R. 124, 7 W.W.R. 143.

BOILER—RIGHT OF VENDOR.

A boiler placed in a building as one of its constituent parts instead of being placed there as an accessory, is an immovable by destination and can be seized by a third party with the building itself. If the vendors of a boiler and of other machinery incorporated with the immovables have filed oppositions to their seizure which have been allowed by the court without contestation, an hypothecary creditor cannot file an opposition on the principle that these movables have become immovables by destination without making the vendors parties in the cause.

Paradis v. Mongeau, 52 Que. S.C. 377.

REMOVAL OF HOUSE FROM MORTGAGED PREMISES — ACTION TO COMPEL RETURN — FIXTURE — ATTACHMENT TO FREEHOLD.

J. I. Case Threshing Machine Co. v. Berard, 17 W.L.R. 91.

FOOD.

Annotation.

Liability of manufacturer or packer of food for injuries to the ultimate consumer who purchased through a middle man: 50 D.L.R. 469.

MANUFACTURE OF CANDY — NEGLIGENCE — PURCHASE FROM MIDDLEMAN — INJURIES FROM EATING — DAMAGES — PRIVITY OF CONTRACT.

A manufacturer of chocolate bars for use as a food and supplied to the public through retail dealers, owes a duty to the public not to put on sale a chocolate bar filled with powdered glass or other injurious substance and is liable in damages to a purchaser who is made ill through eating the bar although there is no privity of contract between the manufacturer and the purchaser.

Buckley v. Mott, 50 D.L.R. 408.

FORCIBLE ENTRY AND DETAINER.

Assault in attempting to enter on one's own property in possession of a wrongdoer, see Assault and Battery.

(§ I—1)—WHAT CONSTITUTES.

An owner is not justified in entering upon premises to which he has undisputed title, but which are, at the time of entry, in possession of a lessee under a claim of right, and where such owner removes the lessee's property and locks out the lessee's wife, all without giving the requisite legal notice of 30 days, he is liable in damages to the lessee. [Lewis v. McInnes, 17 W.L.R. 309, distinguished.]

Nilan v. McAndless, 8 D.L.R. 169, 22 W.L.R. 685.

USING POLICE FORCE WITHOUT DUE PROCESS.

A person alleging ownership by purchase of chattels still in the possession and on the premises of the original owner is not justified, without due process of law, in using police force for the purpose of preventing the original owner from resisting the forcible taking of the chattels by the alleged purchaser.

Sanders v. Hedman, 18 D.L.R. 481, 7 W.W.R. 133, 29 W.L.R. 460.

THREATS — VIOLENCE — EVIDENCE OF TITLE.

To constitute the crime of forcible entry, actual violence is not necessary; if the threats were such as to create a terror which has induced the occupant to leave the premises, the offence is complete; evidence of title in the defendant is not admissible as an answer to the criminal charge.

R. v. Moisan, 32 D.L.R. 449, 27 Can. Cr. Cas. 34.

LANDLORD'S RE-ENTRY.

To constitute the offence of forcible entry upon land under Cr Code, ss. 102, 103, the entry must have been made under such circumstances of actual violence or terror. A breach of the peace or apprehension thereof under Cr. Code, s. 102, is not to be anticipated as a natural sequence to a re-entry by breaking in made by landlords upon office premises overheld by their tenant effected at night when neither the tenant nor any of his employees was present, so as to constitute the offence of forcible entry.

The King v. Campey, 20 Can. Cr. Cas. 492.

(§ I—2)—WHO MAY MAINTAIN ACTION FOR.

A person who is in rightful possession of land has a right to recover substantial damages from one who forcibly enters and ejects him from the land, but he cannot get judgment to restore the possession to him without setting up his title to possession in the statement of claim and proving it at the trial.

Gardiner v. Ware, 7 D.L.R. 480, 5 S.L.R. 268, 3 W.W.R. 24.

FORECLOSURE.

See Mortgage; Vendor and Purchaser.

As affected by moratorium, see Moratorium.

Annotations.

Effect of moratorium on foreclosure actions: 22 D.L.R. 865.

Remedies of alien enemies affected by war: 23 D.L.R. 375.

Reopening mortgage foreclosure: 17 D.L.R. 89.

AGREEMENT OF SALE — JUDGMENT FORECLOSING — TIME FOR REDEMPTION.

Subject to the right to apply for an extension on proper material, the ordinary judgment foreclosing the purchaser's rights under an agreement of sale of lands for default in meeting a deferred instalment of purchase-money should not allow a longer

time than two months to redeem after judgment.

Davis v. Alvensleben, 20 D.L.R. 112, 20 B.C.R. 74, 29 W.L.R. 296, 6 W.W.R. 1184.

FOREIGN COMMISSION.

See Depositions; Discovery.

Taking evidence ex juris: 13 D.L.R. 338.

FOREIGN JUDGMENT.

See Judgment.

Annotation.

Action upon, 9 D.L.R. 788, 14 D.L.R. 43.

FORFEITURE.

See Contracts, V; Taxes, III E—140; Sale, III A—50.

Of lease, see Landlord and Tenant, III D—95.

Relief against, see Vendor and Purchaser, I B—5; Mines and Minerals, I B—10.

Annotations.

Contract stating time to be of essence—Equitable relief: 2 D.L.R. 464.

Remission of, as to leases: 10 D.L.R. 603.

REFUSAL OF LOWEST BIDDER TO ENTER INTO CONTRACT — RECOVERY OF DEPOSIT ACCOMPANYING TENDER — ABSENCE OF DAMAGE.

Where, by reason of the subsequent abandonment of the building scheme by the property owner, no damage was caused by the refusal of the lowest bidder to enter into the construction contract in conformity with the terms of the advertisement for tenders, he may recover the whole of the deposit accompanying his tender, notwithstanding a stipulation for its forfeiture on his failure to enter into a contract in the event of his tender being the lowest.

Brandon Construction Co. v. Saskatoon School Board (No. 2), 13 D.L.R. 379, 6 S.L.R. 273, 25 W.L.R. 6, 4 W.W.R. 1243, reversing on other grounds, 5 D.L.R. 754.

RELIEF AGAINST — CONTRACT STIPULATION —ADMISSION OF LIABILITY.

Relief may be granted in respect of a stipulation for a penalty in not paying within a fixed time although there was a subsequent admission by the promisor of indebtedness in respect of the penalty; the liability for the latter may be repudiated up to, but not after, actual payment thereof.

Colgrove v. Gundy, 17 D.L.R. 45, 28 W.L.R. 731.

REMISSION OF — ABSENCE OF LACHES — REALTY SALE — SUBPURCHASER.

Relief may be granted the plaintiff as assignee of the original purchaser's interest against the cancellation of the agreement of sale if the plaintiff, as subpurchaser, used reasonable diligence in getting his title in such a condition as would entitle him to demand a transfer from the vendor defendant, and had, as soon as he found that his assignor was in default, offered to make the payments due the defendant.

Howlett v. Broder, 20 D.L.R. 576, 7 A.L.R. 149, 29 W.L.R. 718, 7 W.W.R. 397.

CONTINGENT DAMAGE — "VERY GREAT OR VERY SMALL."

Where there is a stipulation that if on a certain day an agreement remains either in whole or in part unperformed (in which case the damage may be either very large or very trifling) there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty.

Vansickler v. McKnight Construction Co., 19 D.L.R. 505, 31 O.L.R. 531.

OF PAYMENTS UNDER LAND CONTRACT ON DEFAULT—PENALTY—RELIEF AGAINST.

A provision in a contract for the sale of land, that in case the purchaser should make default in any of the payments the vendor shall be at liberty to cancel the agreement and to retain any payments made on account of it by way of liquidated damages, and to retain all improvements made on the premises, is in the nature of a penalty, against which the court will grant relief on proper terms.

Steedman v. Drinkle, 25 D.L.R. 420, [1916] 1 A.C. 275, 9 W.W.R. 1146, reversing 14 D.L.R. 835, 7 S.L.R. 20.

CONTRACT — SALE OF GOODS — FAILURE OF BUYER TO CARRY OUT CONTRACT — MONEY PAID ON ACCOUNT — "DEPOSIT" — INTENTION OF PARTIES — RETURN OF MONEY, LESS DAMAGES SUSTAINED BY SELLER.

Money paid by a purchaser who ultimately fails to carry out his contract belongs to the seller only if the purchaser has agreed that it shall; and, even in such a case, the court may relieve against a forfeiture. The measure of damages for breach of a contract is the loss directly and naturally resulting, in the ordinary course of events, from the breach: the court has no power to add a penalty. [Howe v. Smith (1884), 27 Ch.D. 89, and Walsh v. Willaughan, 42 O.L.R. 455, distinguished. Steedman v. Drinkle, 25 D.L.R. 420, [1916] 1 A.C. 275, and Brickles v. Snell, [1916] 2 A.C. 599, applied.]

Brown v. Walsh, 45 O.L.R. 646.

CONSENT JUDGMENT — PROVISION FOR PAYMENT OF MONEY ON DEFINITE DATE — DEFAULT — HONEST MISTAKE AS TO DATE—POWER OF COURT TO RELIEVE.

Lovejoy v. Mercer, 23 O.L.R. 29, 18 O.W.R. 176.

FORGERY.

Annotations.

Offence of forgery under the Criminal Code: 32 D.L.R. 512.

Law relating to questioned documents and proof of handwriting: 44 D.L.R. 170; 13 D.L.R. 565.

PROCURING WOMAN TO JOIN IN DEED — FRAUD ON DOWER—PRINCIPALS.

A deed of conveyance executed by a married man, who procured a woman with whom he cohabited as his common law wife, to join therein as his wife, in fraud of the dower rights of his lawful wife, is a "false document" and "forgery" within the meaning of ss. 335 (j) and 466 Cr. Code; under s. 69 both are parties to the offence, and extraditable under s. 18 of the Extradition Act (R.S.C. 1906 c. 155).

United States v. Ford & Frary, 29 D.L.R. 80, 26 Can. Cr. Cas. 430, 34 W.L.R. 912, 10 W.W.R. 1042.

ASSUMED NAME—PETITION.

To petition the provincial legislature, under assumed names, for an act of incorporation is not a criminal offence.

Marsil v. Lanctot, 28 D.L.R. 380, 25 Can. Cr. Cas. 223, 20 Rev. Leg. 237.

CORROBORATION — DUPLICATING TICKETS — SIGNATURE.

A conviction for forgery will be quashed if there is no corroborative evidence under Cr. Code, s. 1002; quere, whether the false duplication of tickets or due bills with the exception of the signature appearing on the valid tickets is in itself a forgery.

R. v. Magnolo, 32 D.L.R. 510, 26 Can. Cr. Cas. 419, 22 B.C.R. 359.

UTTERING OR ATTEMPTING TO UTTER FORGED PAPER.

A conviction for uttering or attempting to utter a forged document cannot properly be made unless it be shewn that the document in question was really forged; it is not enough to shew that the accused believed it to be forged and yet attempted to pass it.

R. v. Girvin, 34 D.L.R. 344, 27 Can. Cr. Cas. 265, 10 A.L.R. 324, [1917] 1 W.W.R. 907.

INDICTMENT—DESCRIBING THE OFFENCE.

A conviction on an indictment for forging a cheque on a bank is not bad by reason of the indictment charging that the forged cheque was one "made" by the person whose name was signed without authority, instead of describing the cheque as "purporting to be made" by him. The indictment sufficiently charged the crime of forgery to conform with Cr. Code, ss. 852, 853 as to stating the substance of the offence, and it was open to the prosecution to shew that the forgery consisted of making a false document (s. 335 (j)) and not by altering a genuine document (s. 466 (2)). [R. v. Stevens, 5 Ea t 244, 102 E.R. 1063, distinguished.]

R. v. Illsley, 41 D.L.R. 130, 29 Can. Cr. Cas. 107.

ALTERATION OF FIGURES UPON A CHEQUE.

The amount in figures which appears upon the margin of a cheque does not constitute an essential part of such instrument, and consequently its alteration without changing the writing in the body of the cheque does not constitute the crime of forgery.

R. v. Tremblay, 31 Can. Cr. Cas. 262.

ACCESSORY TO OFFENCE — PREJUDICE AND MENS REA—CR. CODE SS. 69, 70, 466.

R. v. Pariseault, 28 Can. Cr. Cas. 112.

THE LIQUOR ACT — PRESENTING SPURIOUS PRESCRIPTION TO DRUGGIST — UTTERING FORGED DOCUMENT.

Since the coming into force of the Liquor Act, the presentation of a spurious prescription by one knowing that the signature thereto is not genuine, to a druggist for the purpose of his procuring liquor from such druggist, is guilty of uttering a forged document.

R. v. X., [1919] 2 W.W.R. 998.

FORMER JEOPARDY.

See Criminal Law.

FORMER SUIT PENDING.

As ground for abatement, see Abatement and Revivor; Dismissal and Discontinuance.

FORTUNE-TELLING.

Annotation.

Pretended palmistry: 28 D.L.R. 278.

PRETENDED PALMISTRY.

An intent to deceive is essential to the offence of fortune-telling under Cr. Code, s. 443, but it is not necessary that the attempted deception should have been successful; a conviction may be supported, although the accused had taken from the persons whose fortunes were told a writing to the effect that they understood that what was being done was merely an examination of the lines of their hands and giving information in respect thereof in accordance with books on the subject of palmistry, if it be found that the taking of such writing was a mere sham and intended to evade the law. [R. v. Marcott, 4 Can. Cr. Cas. 437, 2 O.L.R. 105, followed.]

R. v. Monsell; R. v. O'Brien; R. v. Keller, 28 D.L.R. 275, 26 Can. Cr. Cas. 1, 35 O.L.R. 336.

FRANCHISES.

See Street Railways; Municipal Corporations, II.

FRAUD AND DECEIT.

I. IN GENERAL.
II. CONCEALMENT; FAILURE TO DISCLOSE FACTS.
III. MATTERS OF OPINION OR OF THE FUTURE.
IV. INTENT, KNOWLEDGE, BELIEF, AND RELIANCE OF PARTIES.
V. TO OBTAIN CREDIT.
VI. IN RESPECT TO NEGOTIABLE PAPER.
VII. MISINFORMATION BY THIRD PERSON.
VIII. REMEDIES.

As to subscription for shares, see Companies.

In application for insurance, see Insurance.

Of agent, see Principal and Agent; Brokers.

As ground for rescission, see Contracts; Sale; Vendor and Purchaser.

See also Fraudulent Conveyances; Creditor's Action.

Annotations.

Rescission of contract for fraud or misrepresentation: 21 D.L.R. 329.

Share subscription obtained by fraud or misrepresentation: 21 D.L.R. 103.

Rescission of contract for fraud and damages for deceit: 32 D.L.R. 216.

I. In general.

(§ I—1)—Failure of servant to enter transaction on books of employer with intent to defraud.

For a servant to omit to enter on the books of his employer an account of an agreement made by the former without authority, to set off his personal indebtedness to a third person against the latter's indebtedness to the employer, is not a violation of s. 415 (b) Cr. Code, relating to making or failing to make entries in the books of an employer with intent to defraud; since the servant could not bind his employer by such an agreement in the absence of express authorization to do so.

R. v. Wilson, 15 D.L.R. 168, 6 S.L.R. 348, 26 W.L.R. 148, 5 W.W.R. 620.

Company prospectus — False statement — Ownership of land — Holding option — Subsequent conveyance to company.

The fact that, at the time a company stated in its prospectus that it had taken up certain lands, it merely held an option for their purchase, does not render the statement false so as to permit one who subscribed for shares in reliance thereon to recover the amount paid by him, where the company acquired title to the lands before the subscriber repudiated his subscription. One who is induced to subscribe for company shares by false statements in the prospectus cannot recover the amount paid thereon where, with full knowledge of their falsity and without repudiating his original subscription, he subscribed for additional shares, since his conduct shewed that he did not consider that he had been misled to his prejudice by such statements.

Johnson v. Johnson, 14 D.L.R. 756, 18 B.C.R. 563, 26 W.L.R. 3, 5 W.W.R. 525.

False signature.

Where a purchaser refused to accept an offer for the sale of land without the signature of the wife of the seller, and the latter represented that a simulated signature in a feminine hand made by him, was that of his wife, it is a fraud that will vitiate the contract of sale.

Beckman v. Wallace, 13 D.L.R. 540, 29 O.L.R. 96.

Contract induced by fraud — Election to affirm — Misrepresentations by vendor's agent—Effect.

In order to shew an affirmance of a contract obtained by false representation it must appear that the person deceived elected, after full knowledge of the falsity of the representations, to carry out the contract. One cannot be held liable on a contract for the sale of land which he was induced to enter into by the misrepresentations of the agent of the vendor that the latter intended erecting a pavilion and bath house on lots reserved by him, and that other lots had been sold to one who intended building a large hotel on them.

Bowles v. Chatfield, 12 D.L.R. 773, 25 W.L.R. 32.

Material and false representation — Delay in discovering the falsity.

Where a party to a contract induces the other party to enter in by means of a material and false representation, the effect of such false representation cannot be got rid of on the ground that the person to whom it was made might have discovered the truth if he had used diligence, unless there is such delay as constitutes a defence under statutory limitations. [Aaron's Reefs v. Twiss, [1896] A.C. 273, applied.]

Sager v. Manitoba Windmill Co., 16 D.L.R. 577, 7 S.L.R. 51, 27 W.L.R. 656, 6 W.W.R. 265, affirming 13 D.L.R. 203.

Misrepresentation — Sale of land — Action for deceit — Evidence — Findings of fact of Trial Judge — Damages.

Heimbach v. Granel, 17 D.L.R. 835, 6 O.W.N. 334.

What constitutes.

Fraud is proved when it is shewn that a false representation has been made knowingly or without belief in its truth or recklessly careless whether it be true or false. [Derry v. Peek, 14 App. Cas. 337, applied.]

Bergh v. Frost, 23 D.L.R. 406.

Misrepresentation—Actionability.

Misrepresentation, even if it amounts to what is called legal fraud, is not sufficient to found an action for deceit: actual fraud must be proven.

Bank of Toronto v. Harrell, 39 D.L.R. 262, 55 Can. S.C.R. 512, [1917] 2 W.W.R. 1149, reversing 31 D.L.R. 440.

Sale of land — Action for damages for deceit—Failure of proof.

Wilson v. Suburban Estates Co., 4 O.W.N. 1488, 5 O.W.N. 182, 24 O.W.R. 825.

Contracts induced by — Action for rescission — Affirmance by disposing of property required.

Tucker v. Titus, 4 O.W.N. 1402, 24 O.W.R. 687.

SALE OF BUSINESS — DAMAGES FOR DECEIT.

Garrett v. Gibbons, 4 O.W.N. 981, 24 O.W.R. 247.

SALE OF FARM — ACTION BY PURCHASERS AGAINST AGENT FOR VENDOR — VALUE AND CHARACTER OF LAND.

Menary v. White, 5 O.W.N. 472.

SALE OF GOODS — MISREPRESENTATION — AGREEMENT TO ASSIGN LEASE.

Bates v. Little, 5 O.W.N. 180, 25 O.W.R. 156.

UNGROUNDED ALLEGATIONS — COSTS — EVIDENCE — EVIDENCE OF DECEITFUL REPRESENTATIONS — IMPORTANCE OF GETTING EXACT WORDS USED.

A party making unfounded allegations of fraud should be deprived of costs. There should be required from a party giving evidence of deceitful representations some attempt at least at recalling the exact words complained of. Where a witness is permitted at once to testify to the substance of a conversation there is grave danger that he is swearing merely to his own inferences as to what was meant.

DeVal v. Archibald, [1919] 2 W.W.R. 984.

FRAUD AND MISREPRESENTATION—PROCUREMENT OF TRADE AGREEMENT — FINDING OF TRIAL JUDGE—COUNTERCLAIM.

Wonder Rope Machine Co. v. Scott, 12 O.W.N. 270.

CONTRACT FOR TRANSFER OF INTEREST IN LANDS — ACTION TO SET ASIDE — MISREPRESENTATION.

Stewart v. Dickson, 1 O.W.N. 1083, 2 O.W.N. 614, 18 O.W.R. 281.

FRAUD AND MISREPRESENTATION — FALSE REPRESENTATIONS INDUCING PLAINTIFF TO PURCHASE LAND — ACTION FOR DECEIT.

Macfarlane v. Davis, 18 W.L.R. 498, 47 Can. S.C.R. 399.

ACTION FOR DECEIT — FALSE REPRESENTATIONS INDUCING PLAINTIFF TO LIVE WITH A MARRIED MAN AS HIS WIFE — BIRTH OF CHILD — DAMAGES — ACTION.

Widgery v. Dudley, 4 O.W.N. 733.

II. Concealment; failure to disclose facts.

(§ II—5)—LEADING PURCHASER TO BELIEVE THAT ENCUMBRANCE IS SATISFIED.

For the holder of a mortgage to lead a purchaser of land to believe that the encumbrance was satisfied and to conceal from him the fact that foreclosure proceedings were pending, is such a fraud, under the Land Titles Act, R.S.S. 1909, c. 41, as to defeat a title subsequently acquired by the former under the foreclosure proceedings.

Robinson v. Ford, 14 D.L.R. 360, 25 W.L.R. 669, 5 W.W.R. 542.

CONTRACT — OMISSION OF MATERIAL TERMS —CONCEALMENT OF.

It is a fraud for the agent of a vendor and the vendee in a contract for sale of land to conceal from the vendor the omission from the contract of a clause permitting the latter to recede from the bargain within ten days, which was to be embodied in the contract.

Sheardown v. Good, 11 D.L.R. 318, 24 O.W.R. 658, 4 O.W.N. 1344.

USE OF ANOTHER'S PROPERTY — INJUNCTION.

Where one person obtains the property of another upon the representation that he wishes to use it for a particular purpose, he is not entitled to use it for another purpose, and upon so doing will be restrained from further use, and the owner will be entitled to recover his property.

Lindsey v. Le Sueur, 11 D.L.R. 411, 27 O.L.R. 588.

Where it was not alleged that one who negotiated for the sale of land which was purchased for his benefit in the name of a stranger, was the vendor's agent, and he and the vendor acted at arm's length, false representations to the vendor that he knew of nothing that would enhance the value of the property, are not sufficient to justify setting aside the sale. A sale of land will not be set aside on the ground that a third person for whose benefit it was purchased in the name of a stranger, obtained an option giving a firm of real estate brokers the right to purchase it which option he intended to use for his own benefit and concealed from the vendor knowledge of facts tending to enhance the value of the property, where the real estate brokers were not interested in such purchase other than to receive the commission which the vendor had agreed to give them if the property was sold and all negotiations pertaining to the sale to the stranger were conducted by the person for whose benefit it was purchased on his own behalf and not as agent for the brokers.

Kelly v. Enderton, 5 D.L.R. 613, 22 Man. L.R. 277, 21 W.L.R. 337, 2 W.W.R. 453. [Affirmed, 9 D.L.R. 472, 23 W.L.R. 310.]

Where an agent of a vendor through whom a purchase of land was negotiated by the plaintiffs, a firm of real estate brokers, ostensibly for a customer, must have had knowledge of the fact that the purchaser was a member of such firm, the plaintiffs' failure to disclose such fact to the vendor did not make them the agent of the latter so as to invalidate the sale on the ground of nondisclosure of material facts.

Edgar v. Caskey, 4 D.L.R. 460, 5 A.L.R. 245, 21 W.L.R. 444, 2 W.W.R. 413.

Where a debtor transfers all his assets, consisting of his stock-in-trade and of an immovable property, to a third party in payment of such third party's claim on the latter, assuming all of such debtor's liabilities, and the third party calls on a business creditor of the debtor ostensibly as the debtor's agent, and obtains a compromise agreement of fifty cents on the dollar on the representation that the debtor is insolvent and that his stock-in-trade is

insufficient to meet his liabilities, but without disclosing that he is the transferee of the debtor's property, or mentioning the deed of transfer and the conditions therein mentioned, and without disclosing the fact that the debtor had an immovable property, such creditor on discovering the true state of affairs can have the deed of settlement he entered into with such third party set aside as being vitiated by fraud.

Liddell v. Lacroix, 8 D.L.R. 502.

MARKS ON MILITARY STORES—CR. CODE, S. 436A.

The dishonest application of a government inspection mark to military stores being manufactured for the government to indicate that they had passed the government inspectors whereas they had not in fact been passed, is an indictable offence under Cr. Code, s. 436A, although the stores were in no respect defective.

R. v. Rollings, 31 Can. Cr. Cas. 31.

It is a fraud, sufficient to vitiate the sale, for a real estate agent to lead the owner of land to confide in him as his agent to get the best possible price for the property and to allow him to close a bargain on his behalf when, as a matter of fact, he, the agent, was at the same time acting as agent for the purchaser in an endeavour to get the property at as low a price as possible, without disclosing that fact to the owner. The purchaser cannot, under such circumstances, although ignorant of the fraud, be allowed to retain the benefit of the transaction procured by his agent. Such conduct on the part of an agent is fraud within the meaning of that word as used in ss. 71, 76 of the Real Property Act, R.S.M. 1902, c. 148, and therefore the procuring by the purchaser of a certificate of title under that Act for the property would not prevent the vendor from having the sale set aside and the property ordered to be reconveyed to him upon payment of moneys received. [Pearson v. Dublin Corp., [1907] A.C. 351, followed.]

Wolfson v. Oldfield (No. 1), 22 Man. L.R. 159. [Affirmed, 2 D.L.R. 110, 22 Man. L.R. 170, 20 W.L.R. 484.]

SIMULATION — PROOF OF FRAUD — QUE. C.P. 191 — QUE. C.C. 991, 993.

Simulation is nothing else but fraud, and can be proved in every way.

Lambert v. Provost, 16 Que. P.R. 41.

(§ II—6)—SALE OF SHARES — SECRET PROFIT ON PURCHASE BY DIRECTORS.

When officers or directors of a company combine to dispose of all its property, the holding and disposal of which were the sole objects for which the company had been incorporated, under terms by which they would make a secret profit for themselves, the acquisition by them of shares at prices much below their real value obtained from various shareholders by suppressing the real terms of the offer received for the company's property is a fraud upon such shareholders in respect of which the court will grant them relief. [Hyatt v. Allen, 8 D.L.R. 79, applied; Percival v. Wright, [1902] 2 Ch. 421; Carpenter v. Darnworth, 52 Barb. (N.Y.) 581, distinguished.]

Gadsden v. Bennetto, 9 D.L.R. 719, 23 Man. L.R. 33, 23 W.L.R. 633, 3 W.W.R. 1109, reversing 5 D.L.R. 529.

MISREPRESENTATION IN COMPANY PROSPECTUS.

A statement in a prospectus that thousands were interested in a company, which guaranteed its financial success, when as a fact there were not over one hundred and twenty-five shareholders, is a false representation sufficient to invalidate a subscription for shares made in reliance thereon. An unfounded statement recklessly made by the company's agent in order to obtain a subscription for company shares, without any reasonable basis for his opinion, that the company would earn 30 per cent dividends on its shares, may be relied on as a misrepresentation avoiding the subscription.

Pioneer Tractor Co. v. Peebles, 15 D.L.R. 275, 6 S.L.R. 339, 26 W.L.R. 503, 5 W.W.R. 989.

ACTS OF DIRECTORS—CONCEALMENT.

Fraud may be predicated on the part of directors of a corporation, as against its shareholders, where transfers from the latter were obtained in favour of the directors and the true purpose of the transfers was either concealed or misrepresented or the transfers misapplied. [Percival v. Wright, [1902] 2 Ch. 421, distinguished.]

Allen v. Hyatt, 17 D.L.R. 7, 26 O.W.R. 215, affirming 8 D.L.R. 79.

(§ II—7)—CONCEALMENT BY AGENT—PERSONAL ADVANTAGE NOT DISCLOSED.

An option to purchase lands given the defendant, a real estate dealer, who had acted for the plaintiff in other sales, in order to facilitate a sale by the former, will be cancelled where obtained by the fraudulent representation that another agent had a purchaser for the land, without disclosing the fact that the defendant himself was the prospective buyer.

Starke v. Geriepy, 11 D.L.R. 430, 4 W.W.R. 539.

NAME WRONGFULLY DISPLAYED ON BUSINESS SIGN.

A former employee, who commences business for himself, has no right to use a sign which is calculated to deceive the public into believing that the business of his former employer is being carried on in the premises.

Beatty v. Mansfield, 42 D.L.R. 678, 54 Que. S.C. 145.

III. Matters of opinion or of the future.

(§ III—10) — Promises or assurances which might, or might not, happen to be realized, or to fail, in the future, do not amount to actual deception and cannot, therefore, avail as grounds to avoid a subscription to a memorandum of incorporation.

Bergeron v. Compagnie De Jonquiere, 22 Que. K.B. 341.

Where an agent of a vendor of land represented that the purchasers were buying a business lot in the business section of a proposed town and the vendees, who were buying on speculation, knew that no business section existed at that time, such a representation must be read in the light of existing circumstances, and must be considered as looking to the future development of the town, and hence is purely a matter of opinion and not a misrepresentation of a material ascertainable fact. It is merely an expression of opinion and not a misrepresentation of fact where an agent of a vendor of land represents to the purchaser that the latter would be able to dispose of the land at from two to three times the price before the third payment on the land was due. A representation to a purchaser by the agent of the vendor of land in a proposed town that the main street of the town would become a principal street, does not amount to a representation at law, but is only an expression of opinion.

Jackson v. People's Trust Co., 7 D.L.R. 384, 22 W.L.R. 325, 3 W.W.R. 99.

(§ III—12)—Estimates and valuation.

A statement by a vendor as to the acreage of land sold will amount to actionable fraud where recklessly made without any bona fide conviction of its truth, and without regard to the actual facts of the case, notwithstanding the price to be paid therefor was based upon the quantity of lumber produced therefrom.

Eaton v. Dunn, 5 D.L.R. 604, 46 N.S.R. 156, 11 E.L.R. 52.

Estimate of quantity.

An action for deceit in the sale of lands for the vendor's misrepresentation of the amount of timber thereon, will not lie where such estimate, as the purchaser must have known, was one of opinion only, and it was not found that the defendant either knew it to be untrue or knew that he had no ground for believing it to be the case.

Perry v. Downs, 11 D.L.R. 670, 24 W.L.R. 407.

Estimates and valuation — Land sale.

Rescission of an agreement for the sale of land will not be allowed for an alleged misrepresentation on the part of the vendor as to the value of the land, where it appears that it is doubtful whether the vendee understood the statement of the vendor as to the value to be anything more than an expression of opinion, and it further appears that the vendee, at all events, did not rely upon that statement in making his purchase, but that the idea of rescinding on that ground was merely an attempt to get out of what proved afterwards to be a bad bargain.

Knox v. Bunch, 11 D.L.R. 377, 24 W.L.R. 265.

IV. Intent, knowledge, belief, and reliance of parties.

(§ IV—15)—Sale of mercantile business — Innocent misrepresentations — Reliance on effect.

Misrepresentations, although innocently made by the seller of a mercantile business, as to the volume of business done in the past, and as to the probable future increases, will vitiate the sale, if the purchaser relied thereon.

Kidd v. Nelson, 12 D.L.R. 417, 18 B.C.R. 217, 24 W.L.R. 950.

Trader failing to keep books — Fraudulent intent.

The failure by a trader to keep books of account must have subsisted for five years before he became unable to pay his debts, otherwise, subs. (c) Cr. Code, s. 417, as amended by 4 Edw. VII. (Can.) c. 7, does not apply to make such neglect indictable; and an indictment under the subsection is bad, as disclosing no offence, if it omits all reference to the time for which the failure to keep books had continued.

R. v. Porter, 28 D.L.R. 555, 26 Can. Cr. Cas. 39, 35 O.L.R. 339.

Reliance of parties.

A deed of land by which an illiterate person is alleged to have sold and conveyed a substantial interest or equity in a farm in return for a lease given back by the grantee upon a "half-crop" rental will be looked upon with suspicion, and the transaction may be annulled, if the circumstances shew that the grantor misunderstood the nature of the transaction which he had been induced by the grantee to enter into without opportunity for independent advice.

Kokorutz v. Irwin, 1 D.L.R. 230, 19 W.L.R. 945, 1 W.W.R. 774.

Assignment of mortgage in exchange of personalty — False representations as to value of land—Materiality—Counterclaim to action for breach of contract to deliver personalty.

McKenzie v. Morris Motor Sales Co., 26 D.L.R. 751, 9 O.W.N. 479.

Fraudulent misrepresentation — Sale of business — Evidence — Declaration of copartnership — Failure to register — Remission of penalties —Costs.

Dixon v. Georgas, 4 O.W.N. 462, 23 O.W.R. 524.

(§ IV—16) — Intent — Innocent misrepresentation.

It is unnecessary that a representation made by the vendor that his land fronting upon a river had a sandy beach, should have been intentionally false to entitle the purchaser to repudiate the contract where the vendor in negotiations shewed to the purchaser land with a sandy beach as being the land for sale, whereas it was in fact part of a neighbouring tract; the party deceived by the misrepresentation, although

innocently made, is entitled in equity to have his contract set aside.

McMeans v. Kidder, 10 D.L.R. 480, 23 Man. L.R. 111, 23 W.L.R. 794, 4 W.W.R. 108.

KNOWLEDGE OF FALSITY — SALE OF LAND.

Scobie v. Wallace, 11 D.L.R. 841, 4 O.W.N. 1345, 24 O.W.R. 641.

OF PARTY DECEIVING OR MAKING STATEMENTS.

A sale of land will not be set aside on an allegation that a third person by falsely representing that he was acting as an agent or employee of a firm of real estate brokers and, mentioning the name of a probable purchaser, obtained from the vendor an option giving the firm the right to purchase his property, though it was his intention to deceive the vendor and to purchase the property in another name for his own benefit.

Kelly v. Enderton, 5 D.L.R. 613, 22 Man. L.R. 277, 21 W.L.R. 337, 2 W.W.R. 453. [Affirmed, 9 D.L.R. 472, 23 W.L.R. 310.]

Where one who has no bona fide claim against the estate files a caveat against the granting of probate of the will of his deceased father, and obtains from his sister, the principal beneficiary under the will, an agreement purporting to be a compromise of his claim, whereby she covenants to pay to him more than the amount which she receives under the will, and it appears that she was overmatched, overborne, and overreached by his superior shrewdness, and that, though she consulted her husband, he was, to the brother's knowledge, of no assistance to her, and that she had no independent or professional advice, and, further, that the agreement was obtained by misrepresentations as to the legal situation, and by threats to give publicity to a secret of her past life, the agreement cannot be enforced.

Underwood v. Cox, 4 D.L.R. 66, 26 O.L.R. 303, 21 O.W.R. 757, reversing 3 O.W.N. 765.

FRAUD — MEANING OF "OVERREACHED" — MISREPRESENTATION INDUCING SALE.

A finding in an action where the pleadings presented a question of actual fraud, that a vendee "was overreached" in a sale of land, and that the vendor "must or should have known that [his] representations were false," means that the vendor's representations were not merely false, but known by him to be false, and that he made them for the purpose of deceiving the vendee. Where one was induced to purchase a farm, together with the stock and implements thereon, through false statements of the acreage knowingly made by the vendor, for the purpose of inducing the prospective purchaser to close the sale, upon the vendor's assurance so given as to the quantity of land, and the purchaser is deceived by reliance thereon, the transaction will be set aside. [Campbell v. Fleming, 1 A. & E. 40, distinguished.]

Boulter v. Stocks, 10 D.L.R. 316, 49 C.L.J. 232, 47 Can. S.C.R. 440, affirming 5 D.L.R. 268.

SALE OF VEHICLE — RELIANCE ON FALSE REPRESENTATION—DAMAGES.

McCutcheon v. Penman, 2 D.L.R. 904, 3 O.W.N. 1154.

FALSIFICATION OF BOOKS — INTENT TO DEFRAUD CREDITORS—CR. CODE, S. 418.

A person who can neither read nor write may be guilty of falsifying books or making a false entry with intent to defraud creditors (Cr. Code s. 418) if he procured the commission of the offence or aided and abetted or counselled its commission (s. 69); it is a question of fact whether guilty knowledge shall be inferred from his subsequent act in filing an insolvency statement in which false debts were scheduled in accordance with the false entries made by another.

R. v. Lackman, 30 Can. Cr. Cas. 400.

(§ IV—17)—MISREPRESENTATION — RELIANCE ON OF PARTY DEFRAUDED.

The false representation of the seller of farm lands that two valuable springs of water were located thereon amounts to actionable fraud where the purchaser relied thereon.

Perry v. Downs, 11 D.L.R. 670, 24 W.L.R. 407.

An agent who purchased for himself property belonging to his principal, is not guilty of fraud, where the latter was aware of such fact and no advantage was taken of him.

Frith v. Alliance Investment Co., 5 D.L.R. 491, 4 A.L.R. 235, 20 W.L.R. 551, 1 W.W.R. 907. [Affirmed, 10 D.L.R. 765, 6 A.L.R. 197.]

FINDING OF TRIAL JUDGE — RECKLESS CARELESSNESS AS TO TRUTH OF REPRESENTATIONS—APPEAL.

A finding of fact by the Trial Judge that certain misrepresentations as to condition and capacity of goods sold, which induced the purchase of such goods were "at least made with reckless carelessness as to their truth" is a sufficient finding of fraud to sustain an action for deceit, and brings the case within the principle laid down in Derry v. Peek, 14 App. Cas. 337.

Devall v. Gorman, 45 D.L.R. 654, 58 Can. S.C.R. 259, [1919] 1 W.W.R. 836, reversing 42 D.L.R. 573, 13 A.L.R. 557.

KNOWLEDGE AND RELIANCE OF PARTY DEFRAUDED.

A representation by an agent of a life insurance company to the insured made at the time of the issuance of the policy, based on an innocent error in calculation, as to the surrender value of the policy, is not a promissory representation to the insured where the correct amount could have been ascertained by him by reference to a mortality table.

Shaw v. Mutual Life Ins. Co., 7 D.L.R. 637, 46 Can. S.C.R. 606, affirming 23 O.L.R 559.

Where there is great disparity in intelli-

gence between two persons, and the one, without proper information and advice, is overmatched and overreached by the other, so that he enters into an improvident bargain, he is entitled to have the bargain rescinded, even though there be no actual fraud. [Waters v. Donnelly, 9 O.R. 391, followed.]

Easton v. Sinclair, 3 D.L.R. 652, 3 O.W.N. 1103, 21 O.W.R. 994.

(§ IV—18)—Equal means of knowledge —Landlord and tenant — Lease — Action to set aside — Fraud and misrepresentation — Collateral agreement — Alleged breach of — Tenant in possession — Counterclaim—Costs.

Ruff v. McFee, 4 O.W.N. 501.

(§ IV—19)—Misunderstanding through want of care.

A charge of fraud, deception or misrepresentation by a vendor as to the income derived from property the defendant agreed to purchase, or as to any other matter inducing the contract, cannot be sustained where any misunderstanding by the purchaser in relation thereto was the result of his own stupidity or want of care, and was not induced by any act or representation of the vendor.

Reynolds v. Foster, 3 D.L.R. 506, 3 O.W.N. 983, 21 O.W.R. 838. [Affirmed, 9 D.L.R. 836, 4 O.W.N. 694.]

Misunderstanding through want of care —Mining venture—Breach of agreement — Return of money paid—Damages.

Chesseworth v. Davison, 2 D.L.R. 922, 3 O.W.N. 606, 20 O.W.R. 65.

(§ IV—20) — Absconding debtor — Intent to defraud.

The departure from the province of Quebec of a person domiciled in the United States (who has contracted a debt in Quebec while there for a temporary purpose) is not sufficient to shew intent to defraud the Quebec creditor without evidence of special intention to defraud.

MacKenzie v. O'Connell, 22 D.L.R. 537.

Sale of shares — Misrepresentation — Question of belief of evidence — Onus on plaintiff.

Allen v. Turk, 3 O.W.N. 364, 20 O.W.R. 627.

Fraudulent sale of land subject to equity of redemption — "Privilege."

R. v. McDevitt, 22 O.L.R. 490, 17 Can. Cr. Cas. 331, 17 O.W.R. 864.

Misrepresentation as to contents of contract.

Nichols v. Ross, 4 S.L.R. 194, 18 W.L.R. 398.

Fraud and misrepresentation — Sale of creameries—Measure of damages.

Lamant v. Wenger, 22 O.L.R. 642, 18 O.W.R. 170.

Fraud — Sales — Misrepresentation by vendor.

Long v. Smith, 23 O.L.R. 121, 18 O.W.R. 88.

VI. In respect to negotiable paper.

(§ VI—25)—Promissory notes given for stock subscription — Misrepresentations of agent — Action against company and agent.

Thomson v. International Casualty Co., 7 D.L.R. 944. [Affirmed 11 D.L.R.634.]

A note is properly held to have been obtained by fraud where the agent of one who sold a stallion to a number of persons, fraudulently obtained their signatures to a joint and several note, instead of one by which each was liable only for his proportionate part of the purchase-price, as was contemplated by the agreement entered into by the parties.

Hamilton v. Isaacson, 5 D.L.R. 114, 21 W.L.R. 333.

Invalid notes given in payment for automobile — Action to recover automobile.

Patterson v. Dodds, 2 O.W.N. 1054, 19 O.W.R. 152.

Undue influence — Father and son — Fraudulent, misrepresentations.

Lewis Furniture Co. v. Campbell, 21 Man. L.R. 390.

VII. Misinformation by third person.

(§ VII—30) — Newspaper circulation contest — Violation of rules by competitor — Misinformation by manager.

A competitor in a newspaper circulation competition, who sought to obtain an unfair advantage over other competitors by buying subscriptions for unwilling subscribers, can not recover the money so paid, because of an untrue representation by the manager of the contest that no other competitors were doing the same thing.

Comeau v. "News Sentinel," 14 E.L.R. 529.

(§ VII—31) — Certifying identity in good faith.

Where an applicant for a loan fraudulently represents himself to be the person named in the certificate of title which he produced to a firm of real estate brokers and thereby induced them to negotiate on his behalf a loan on the land upon a mortgage which was thereupon executed by the applicant in the name of the person whom he represents himself to be, the express and formal representation of the brokers to the lender as to the identity of the mortgagor with the person named in the certificate of title will make them liable for the loss occasioned by the fraud, although they were themselves imposed upon and were innocent of any intentional wrong.

Parker v. McAra, 10 D.L.R. 37, 6 S.L.R. 30, 23 W.L.R. 141, 3 W.W.R. 865.

(§ VII—32)—Notice of fraud.

Where a party entering into a contract is aware that the other party is being induced to enter into it by the false and fraudulent representations of a stranger, such misrepresentations will entitle the deceived party to the same remedy against the other party who takes the benefit of the misrepresentations with knowledge of their falsity, as if the latter had himself made them.

Prescott v. Hancox; Crosbie v. Prescott, 13 D.L.R. 332, 4 W.W.R. 681.

VIII. Remedies.

(§ VIII—35)—Delay in discovering the falsity as defence.

Where a party to a contract induces the other party to enter into it by a material and false representation, the effect of such false representation cannot be got rid of on the ground that the person to whom it was made might have discovered the truth if he had used diligence, unless there is such delay as constitutes a defence under statutory limitations. [Clough v. L. & N. W.R. Co., L.R. 7 Ex. 26, 41 L.J. Ex. 17, applied.]

Sager v. Manitoba Windmill & Pump Co., 23 D.L.R. 556, 7 W.W.R. 1213, affirming 13 D.L.R. 203, 16 D.L.R. 577; 7 S.L.R. 51.

Agent for both principals.

Where the plaintiff, the original owner, was rightfully entitled to land of which his agent had obtained from him a transfer made secretly for the agent's benefit and not in pursuance of the contract of the latter with a third party as the agent had represented, has obtained and holds a judgment against the agent and the latter's nominee in whose name the transfer had been taken, revesting the property in himself, the plaintiff's rights thereby declared wil be made effective in an action against such third party claiming under a decree which the latter had obtained against the agent and the agent's nominee declaring the retained property to belong to such third party as a part of the consideration for his contract, if the court in the action by the original owner against the latter finds that it was not in fact a part of the consideration and the third party had no equity as a bona fide purchaser or otherwise to call for a transfer of same to himself, and further finds that the original owner was not a third party to the action brought by the third party nor had he acquiesced therein by his conduct.

Tonneci v. Livingstone, 9 D.L.R. 659, 23 W.L.R. 20, 3 W.W.R. 770.

An executed contract will not be set aside merely on the ground of misrepresentation not amounting to fraud. [Angel v. Jay, [1911] 1 K.B. 666, followed.]

Abrey v. Victoria Printing Co., 2 D.L.R. 208, 3 O.W.N. 868, 21 O.W.R. 444.

The defendant was found liable in damages for representations made on the sale of a farm, as to its condition, upon which the plaintiff relied, and which proved to be untrue. Quære, whether the representation that the land was "all fit for cultivation" could be taken as wide enough to warrant the accessibility of a part of the farm which was cut off by a river.

Strome v. Craig, 17 W.L.R. 51, affirming 15 W.L.R. 197.

Purchase of land on faith of false representations of agent of vendor—Other possible contributing causes—Action against agent—Finding of fact of Trial Judge—Appeal—Damages—Measure of—Interest.

McCallum v. Proctor; Armstrong v. Proctor, 6 O.W.N. 556.

Recovering back purchase price of company shares.

Johnston v. Haines, 8 O.W.N. 551, 10 O. W.N. 46.

Sale of farm — Misrepresentation by agents of vendor—Responsibility of vendor—Damages.

Heynnek v. Sova, 10 O.W.N. 262.

Fraud and misrepresentation in sale of land—Damages.

Hocken v. Shaidle, 8 O.W.N. 619, 9 O.W.N. 303.

Fraud and misrepresentation — Exchange of lands—Collusion—Rescission — Reconveyance — Damages —Costs.

Gibbons v. Douglas, 3 O.W.N. 119, 20 O.W.R. 199.

FRAUDULENT CONVEYANCES.

I. In general.
II. Consideration.
III. Preferences; security.
IV. Notice; rights and liabilities of purchaser.
V. Reservation of interest; change of possession.
VI. Transactions between relatives.
VII. Subsequent creditors.
VIII. Remedies.

Annotations.

Deeds; conveyance absolute in form; creditor's action to reach undisclosed equity of debtor: 1 D.L.R. 76.

Right of creditors to follow profits: 1 D.L.R. 841.

I. In general.

(§ 1—2)—Validity as to parties.

An agreement for an absolute sale of the property of a debtor given to a creditor as security for past indebtedness and a further advance is not void under the statute 13 Eliz. in the absence of an intent to defraud other creditors though it does in fact delay and hinder the other creditors and was so intended by the debtor. [Mulcahy v. Archibald, 28 Can. S.C.R. 523, applied.]

Beliveau v. Miller, 1 D.L.R. 819, 4 A.L. R. 108, 20 W.L.R. 96, 1 W.W.R. 588.

Insolvency of grantor—Scheme to defeat claims of creditors — Findings of fact of Trial Judge.

Vansickle v. Ratcliffe, 9 O.W.N. 296.

Action to set aside conveyance—Fraudulent and void—Judgment creditor—Defendant's goods seized by sheriff.

Manley v. Young, 3 O.W.N. 400, 20 O.W.R. 659.

Voluntary transfer of land—Registration of, in fraud of prior transferee.

Coventry v. Annable, 19 W.L.R. 400.

II. Consideration.

See Contracts; Deeds.

(§ II—5)—Inadequacy of consideration—Family settlement.

Under a family settlement, mere inadequacy of consideration is not sufficient ground to set aside a transfer of property from a debtor to a third person at the instance of a creditor under the statute 13 Eliz., c. 5, unless there is such inadequacy as to induce the presumption of collusion, or such, in fact, as might have invalidated the sale as between the vendor and purchaser without the interposition of creditors.

Jack v. Kearney, 10 D.L.R. 49, 41 N.B.R. 293, 11 E.L.R. 401, reversing 4 D.L.R. 836.

Pre-existing debt—Pressure.

A pre-existing debt is not in general so good a consideration for a conveyance or mortgage by the debtor to the creditor as money actually paid at the time, although it may be a valuable consideration, if it be given under pressure or pursuant to an agreement between the parties.

Killips v. Porter, 26 D.L.R. 326, 33 W.L.R. 380.

A conveyance of land made by a trader to a solicitor who had no reason to consider him as being in insolvent circumstances, to secure to the solicitor the repayment of two judgments obtained by him in favour of his clients together with a small further sum of money advanced to enable the trader to preserve his credit and add to his stock, must be considered a bona fide transfer of property made for a valid consideration equivalent to a cash advance, and does not contravene the Assignments Act of Nova Scotia, R.S.N.S. 1900, c. 145 [Campbell v. Patterson, 21 Can. S.C.R. 645, applied; Burns v. Wilson, 28 Can. S.C.R. 207, distinguished.]

Cape Breton Wholesale Grocery Co. v. McDonald, 15 D.L.R. 807, 47 N.S.R. 505.

Action to set aside a transfer of mortgages for fraud—C.C. (Que.) 1577, 2202.

Plaintiff alleged that the defendant agreed to a transfer, with guaranty, of certain mortgages for the consideration of $4,000; that the defendant had then fraudulently concealed from the plaintiff that there were a number of mortgages incumbering the property of the debtor D., and which had priority over the transfer by the defendant to the plaintiff; and other allegations of deceit and fraudulent acts. Under art. 1577 C.C. (Que.), when a debtor or vendor has fulfilled the duty of transferring the debt which constitutes the legal bond between him and the purchaser, the latter may verify the solvency and the mortgage statement and the purchaser cannot then complain that the debtor is insolvent or that the mortgages given up are not of sufficient value. A warranty does not cover conditions arising subsequently to the transfer.

Caya v. Theroux, 25 Rev. de Jur. 255.

(§ II—8)—Agreement to support grantor—Consideration.

An agreement to support a grantor and his wife during their lives may constitute, as against the grantor's creditors, a consideration upholding a conveyance of land under a family settlement.

Jack v. Kearney, 10 D.L.R. 49, 41 N.B.R. 293, 11 E.L.R. 401, reversing 4 D.L.R. 836.

Renewal of note.

A hypothec deed given to a bank in the ordinary course of business to secure the renewal of a note which the bank refused to renew without security, is not based on a gratuitous title, and will not be set aside at the instance of creditors on mere proof of the grantor's insolvency where there is no proof that the bank had notice of such insolvency.

Eastern Townships Bank v. Picard, 13 D.L.R. 389, 23 Que. K.B. 488.

Voluntary conveyance.

A voluntary conveyance of all of a debtor's property in favour of his children is void against the grantor's existing creditors without any proof of an actual and express intent to defeat creditors.

Holmes v. Holmes et al., 13 D.L.R. 155, 6 S.L.R. 171, 25 W.L.R. 9, 24 W.L.R. 720, 4 W.W.R. 1065, 1335.

Usage as to recital of consideration — Absence of fraud.

Upon a purchase at a discount of the original vendor's interest in an agreement for the sale of land, where the actual cash consideration in the discounting agreement was $2,000, and the amount payable under the original agreement of sale was $2,650 in 10 semi-annual instalments at 6 %, the recital in the contract drawn by the discounting purchaser of a $2,650 consideration is not evidence of an intention to hide the true consideration, if it appears that such was the ordinary usage and practice.

Fisher v. Kowslowski, 13 D.L.R. 785, 23 Man. L.R. 769, 25 W.L.R. 417, 5 W.W.R. 91.

Agreement for support.

A conveyance in consideration of the support of the grantor for life is a voluntary one, and will be presumed fraudulent under

the Statute of Elizabeth as to his existing creditors.

Ouellette v. Albert, 13 D.L.R. 698, 42 N.B.R. 256, 13 E.L.R. 271.

VOLUNTARY SETTLEMENT.

To uphold a voluntary settlement the settlor must, at the time of making it, have property enough left out of the settlement to meet all his existing debts and liabilities. [Jackson v. Bowley, Car. & M. 97, followed.] If, after deducting the property which is the subject of a voluntary settlement, sufficient available assets are not left for the payment of the settlor's debts, the law infers that the intent is to defraud creditors. [Freeman v. Pope, L.R. 5 Ch. 538, followed.]

Killips v. Porter, 26 D.L.R. 326, 33 W.L.R. 380.

VOLUNTARY TRANSFER OF MERCHANDISE BY INSOLVENT — DOCTRINE OF CONFUSION AND MIXTURE OF GOODS.

Doucet v. Salem Sode & Co., 27 D.L.R. 731, 49 N.S.R. 492.

CONSIDERATION—VOLUNTARY CONVEYANCE—BY INSOLVENT TO WIFE.

A purely voluntary promise by the husband to transfer his property to the wife at a future time in default of his repaying money borrowed from her, cannot be relied upon to support as against his creditors, a subsequent conveyance of the property to her at a time when he is insolvent. [Harris v. Rankin, 4 Man. L.R. 115, followed.]

Kilgour v. Zaslavsky, 19 D.L.R. 420, 25 Man. L.R. 14, 30 W.L.R. 303, 7 W.W.R. 446.

VOLUNTARY — FORBEARANCE — CONCEALMENT OF REAL CONSIDERATION — TESTS OF VALIDITY.

Braddick v. Perky, 19 D.L.R. 870.

VOLUNTARY TRANSFER OF EXEMPT PROPERTY —TO EVADE AN EXECUTION — EFFECT.

A voluntary conveyance of property made by a debtor for the purpose of evading an execution although made with fraudulent intent has not the effect of defeating, defrauding or delaying creditors where such conveyance merely covers property already exempt by law from execution.

Scheuerman v. Scheuerman, 17 D.L.R. 638, 7 A.L.R. 738, 29 W.L.R. 246, 7 W.W.R. 522.

VOLUNTARY CONVEYANCE—"EFFECT TO DEFEAT"—ONUS—JUDGMENT AS ANTECEDENT DEBT—TEST.

The mere proof of the existence of particular debts prior to a voluntary settlement does not, without more, establish fraudulent intent and thus invalidate the settlement, but to have that effect it is necessary to shew such a state of the settlor's affairs at the time of the settlement as would lead the court to infer that the effect of the settlement was to defeat or delay creditors. As against a person not a party to the proceedings in which a judgment had been recovered and execution issued, proof of such proceedings does not prove that the debt is still unpaid: the person relying on such judgment as an antecedent debt to a voluntary convenience attacked in a creditors' action is bound to shew an unpaid debt.

Dancey v. Brown, 19 D.L.R. 862, 31 O.L.R. 152.

VOLUNTARY SETTLEMENT—SETTLOR NOT INDEBTED—SUBSEQUENT INDEBTEDNESS—ABSENCE OF PROPERTY OTHER THAN THAT SETTLED.

In the absence of actual fraud, a voluntary settlement made by a person who is not indebted at the time and not contemplating the incurring of debts, cannot be set aside merely because at some later date he happens to become indebted and has no other property wherewith to pay the debt.

Hogg v. Hogg, 7 W.W.R. 313.

BONA FIDES.

A transfer of property for the purpose of defeating an expected execution, although not necessarily a fraud, must, in order to be a valid conveyance, be made for full value, and as between debtor and grantee be a bona fide transaction.

Smith v. Orbean, 9 S.L.R. 113, 34 W.L.R. 105.

SERVICES — QUANTUM MERUIT — SETTING ASIDE CONVEYANCE — AMENDMENT — CREDITORS' CLAIMS.

Farley v. Farley, 11 O.W.N. 317.

VOLUNTARY CONVEYANCE — INSOLVENCY — CREDITORS.

A voluntary conveyance made by a person owing debts and having no means, other than the property which he voluntarily conveys, with which to pay such debts is bad, not only as against existing creditors, but also against future creditors. Such conveyance, made while the defendant was indebted to others than the plaintiff and after the defendant had sued the plaintiff for damages and the plaintiff had sued the defendant for malicious prosecution, set aside.

Ewachowski v. Marischuk, [1917] 3 W.W.R. 747.

SHAM CONSIDERATIONS—INTENT TO DEFRAUD CREDITORS—ACTION BY JUDGMENT CREDITOR TO SET ASIDE CONVEYANCE OF LAND AND ASSIGNMENTS OF MORTGAGES — JUDGMENT DEBTOR DIVESTING HIMSELF OF ALL HIS PROPERTY — FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

Karch v. Edgar, 12 O.W.N. 356.

HUSBAND AND WIFE—CONSIDERATION—ASSUMPTION OF MORTGAGE—BAR OF DOWER IN OTHER LAND—VOLUNTARY SETTLEMENT.

Ottawa Wine Vaults Co. v. McGuire, 24 O.L.R. 591.

III. Preferences; security.

See Assignment for Creditors; Insolvency. (§ III—10)—A mortgage taken in the name of the debtor's wife, and which is

alleged to have been so taken in fraud of creditors, will not be declared in a creditor's action to have been taken with intent to defeat, hinder or delay the husband's creditors, if it appears that all the wife did with the mortgage when she got it was to assign it to certain of her husband's creditors as security for his debt.

Canada Law Book Co. v. Fieldhouse, 11 D.L.R. 384.

UNJUST PREFERENCE — INSOLVENCY — MANITOBA ASSIGNMENTS ACT—INTENTION TO DELAY OR HINDER CREDITORS.

A transfer of land to a creditor as security for a debt will not be set aside under ss. 38 and 39 of the Assignments Act, R.S.M. 1902, c. 8, as a fraud on the grantor's other creditors, where the land was actually worth and was subsequently sold for more than the amount of all his indebtedness, notwithstanding that at the date of the transfer he did not have ready money enough to pay all his creditors. [Davidson v. Douglas, 15 Gr. 347, followed.] A conveyance by one in insolvent circumstances, which has the effect of giving one creditor a preference over others, will, under ss. 40, 41, 42 of the Manitoba Assignments Act, R.S.M. 1902, c. 8, be held void if attacked within 60 days, irrespective of the grantor's intent in making the conveyance, or of pressure, or notice on the part of the grantee of the debtor's financial circumstances, or his knowledge of the effect of the conveyance. [Schwartz v. Winkler, 13 Man. L.R. 493; Codville v. Fraser, 14 Man. L.R. 12; Stephens v. McArthur, 6 Man. L.R. 496, distinguished.] Under ss. 38 and 39 of the Assignments Act, R.S.M. 1902, c. 8, a conveyance of land as security for a debt of the grantor to a creditor who was not aware of the former's financial condition, and who did not knowingly obtain an unjust preference, will not be set aside in the absence of evidence shewing that both parties intended to prefer or defraud the grantor's creditors, unless it is attacked within the 60 days specified in the Act.

Robinson v. McCauley, 13 D.L.R. 437, 24 W.L.R. 617, 4 W.W.R. 930. [Affirmed, 14 D.L.R. 681, 23 Man. L.R. 781.]

A pre-existing agreement, to give security for goods, supplied to a person who is about to engage in a hazardous business, even though somewhat vague in its terms, where the finding is in favour of the making of such agreement, is sufficient to support conveyances which would otherwise be treated as made with intent to give an unjust preference.

Power v. Munro, 5 D.L.R. 577, 11 E.L.R. 508.

ADVANCES MADE BY ADMINISTRATOR TO HEIR ON ACCOUNT OF SHARE OF ESTATE — DEED TO ADMINISTRATOR.

Where the administrator of an estate advances money to one of the heirs on account of his share of the estate, taking a deed to himself on account of such advances, the advances made do not constitute the ordinary relation of debtor and creditor, and the deed taken is not open to attack as being in effect a fraudulent preference as against creditors in contravention of the Assignments and Preferences Act, R.S.N.S. 1900, c. 145.

Whidden v. McDonald, 9 D.L.R. 686, 47 N.S.R. 26.

CHATTEL MORTGAGE—KNOWLEDGE OF MORTGAGOR'S INSOLVENCY.

A chattel mortgage upon the property of an insolvent trader is void as to his subsequent assignee for creditors, because an unlawful preference in contravention of the Assignments and Preferences Act (Ont.), where the mortgagee at the time of taking the security had knowledge of the mortgagor's insolvency.

Cole v. Racine, 11 D.L.R. 322, 4 O.W.N. 1327, 24 O.W.R. 622.

TRANSFEREE'S NOTICE OF IMPENDING TORT ACTION AGAINST TRANSFEROR.

The preferring of one creditor, even though there be an impending action for tort of which both creditor and debtor are aware, is no ground for displacing the transaction as fraudulent and void under the Statute of Elizabeth. [Gurofski v. Harris, 27 O.R. 201; Ashley v. Brown, 17 A.R. (Ont.) 500, applied.]

Fisher v. Kowslowski, 13 D.L.R. 785, 23 Man. L.R. 769, 25 W.L.R. 417, 5 W.W.R. 91.

CONVEYANCE OF LAND IN SATISFACTION OF VENDOR'S LIEN.

The conveyance of land by the defendant to his grantor in satisfaction of the latter's lien as vendor for the unpaid purchase money, which amounted to about the full value of the property, is not an unjust or unlawful preference which is open to attack by the defendant's general creditors.

Kaulbach v. Jodrey, 13 D.L.R. 782, 13 E.L.R. 409.

CHATTEL MORTGAGE—INSOLVENCY.

The insolvency of a debtor is not established where the estimated value of his assets are sufficient, if sold under legal process, to meet all his debts at the time of his execution of a chattel mortgage for money advances, so as to render the transaction an unlawful preference under ss. 40, 42 of the Assignment Act (Man.) [Davidson v. Douglas, 15 Gr. 347; Rae v. McDonald, 13 O.R. 352; Clarkson v. Sterling, 14 O.R. 460; Empire Sash, etc. v. Maranda, 21 Man. L.R. 605; Bertrand v. Canadian Rubber Co., 12 Man. L.R. 27, followed.]

Richards & Brown v. Leonoff, 24 D.L.R. 180, 25 Man. L.R. 548, 31 W.L.R. 621, 8 W.W.R. 966.

INTENT.

To constitute a fraudulent preference under s. 39 of the Alberta Assignments Act, there must be a concurrence of intent to give and to accept the conveyance as a preference over other creditors, and the

transaction must be attacked within the statutory period.

Sutherland v. Clarke, 37 D.L.R. 518, 13 A.L.R. 330, [1917] 3 W.W.R. 672.

INSOLVENCY—BURDEN OF PROOF.

The burden of proving insolvency for the purpose of setting aside a conveyance as a fraudulent preference is upon the attacking creditor; there must be an inability to pay because of an insufficiency of assets.

Clarke v. Sutherland, 37 D.L.R. 368, 13 A.L.R. 132, [1917] 3 W.W.R. 624, affirming [1917] 3 W.W.R. 50.

SECURITY BY THIRD PERSON—SUBSTITUTION—RIGHTS OF "UNSECURED CREDITOR"—EXEMPT PROPERTY.

The holder of a security from a third person is in a position to attack a conveyance by his debtor to another creditor as a fraudulent preference. Section 47 of the Assignments Act, which provides that the substitution in good faith of one security for another security for the same debt, so far as the debtor's estate is not thereby lessened in value to the other creditors, shall not be affected by anything in s. 40 or 42 of the Act, did not save the chattel mortgage attacked even to the extent of the amount ($1,000) of the former chattel mortgage, although that formed part of the amount included in the new mortgage. It was not the substitution of one security for another for the same debt, nor was the mortgage taken in good faith. [Steeher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540, followed.] A chattel mortgage, in so far as it covers property declared free from seizure under execution by s. 29 of the Executions Act, R.S.M. 1913, c. 66, and which the sheriff is forbidden by s. 40 to seize or take in execution, cannot be set aside as a fraudulent preference under the Assignments Act. [Bates v. Cannon, 18 Man. L.R. 7, and Field v. Hart, 22 A.R. (Ont.) 449, followed.] A creditor who attacks a conveyance by his debtor to another creditor as a fraudulent preference under ss. 40, 42 of the Assignments Act, R.S.M. 1913, c. 12, is an "unsecured creditor" within the meaning of s. 42, if he holds no security upon the estate of the debtor, although he may hold a security for his claim given by some third party, the test being, would the estate available for distribution amongst the unsecured creditors be augmented if the particular security were discharged. [Ex parte West Riding Banking Co., 19 Ch. D. at 112; Bell v. Ottawa Trust, 28 O.R. 519, followed; Clark v. Hamilton, 9 O.R. 177; Sun Assur. Co. v. Elliott, 31 Can. S.C.R. 91, distinguished.]

Robinhood v. Maple Leaf, 26 Man. L.R. 238, 33 W.L.R. 776, 9 W.W.R. 1453.

ASSIGNMENT — FUTURE CROPS — SECURITY — EXECUTIONS.

An assignment of future crops by an insolvent as security for advances to put in and harvest the crops, and to pay off a debt due the assignee, is not fraudulent or preferential, and will prevail against executions in the hands of the sheriff prior to the assignment.

McKillop & Co. v. Royal Bank, 33 D.L.R. 268, 10 A.L.R. 304, [1917] 1 W.W.R. 1149, [Reversed on another point, 40 D.L.R. 556, 56 Can. S.C.R. 220.]

MORTGAGE ON EVE OF INSOLVENCY—"UNJUST PREFERENCE"—PRESSURE.

Gauley v. Bank of Montreal, 30 D.L.R. 483, 34 W.L.R. 1192, 10 W.W.R. 1359.

CROPS.

It would seem that a bona fide sale of a growing crop by an execution debtor would be protected by s. 45 and, perhaps, by s. 48 of the Assignments Act (Alta.), c. 6, 1907, from attacks on the ground that it gave the purchaser a preference over creditors.

Elves v. Pratt, 32 D.L.R. 670, 11 A.L.R. 134, [1917] 1 W.W.R. 1384.

MORTGAGE—SURETY.

A creditor holding security from a surety cannot by any dealing to which the surety is not a party change or prejudice the position of the surety without discharging him; but when a creditor holds other security which he is bound to retain for the benefit of the surety, he does not discharge the surety by improper dealing with or by releasing the security, but the surety is then entitled to a credit upon the account for the true value of the security improperly released. [Taylor v. Bank of New South Wales, 11 App. Cas. 596, followed.]

Union Bank v. Makepeace, 38 D.L.R. 361, 40 O.L.R. 368. [Reversed 46 D.L.R. 193, 44 O.L.R. 202.]

MORTGAGE—ASSIGNMENTS AND PREFERENCES ACT, R.S.O. 1914, c. 134.

Russell v. Kloepfer, 16 D.L.R. 874, 6 O.W.N. 102.

SETTING ASIDE—PARTIES.

In an action to set aside a conveyance as a fraudulent preference, the person complaining thereof, if not a judgment creditor, must bring the action on behalf of himself and all other creditors. [Thompson v. Nelson, 4 W.W.R. 712, distinguished.] But the omission to do so is a mere informality which may be amended by application during argument. [Seane v. Duckett, 3 O.R. 370, and Wooldridge v. Norris, L.R. 6 Eq. 410, followed.]

Drinkle v. Regal Shoe Co., 20 B.C.R. 314, 7 W.W.R. 194.

BILL OF SALE—FRAUDULENT PREFERENCE—EXEMPT PROPERTY—R.S.S. 1909, c. 142, s. 39.

A bill of sale covering goods which are exempt under the Exemptions Act should not be set aside on the grounds of fraudulent preference as to such goods. [Jones v. Jesse, 10 W.L.R. 627, distinguished.]

Bailey v. Howatt, 6 W.W.R. 1155.

KNOWLEDGE OF INSOLVENCY.

If bona fide pressure is exercised by the

transferee upon the debtors, and there is no fraud, the transfer should be upheld, even if the inference is that the debtor was at the time insolvent and the transferee knew of his financial condition.

Brown v. Bank of Montreal, 23 B.C.R. 68.

ASSIGNMENT TO SECURE PRESENT ADVANCE AND PRE-EXISTING DEBT—FRAUDULENT PREFERENCE.

Where a creditor receives an assignment of certain assets from a debtor as security for both a present advance and a pre-existing debt, and it appears from the evidence that the present advance was made to enable the creditor to afterwards plead the validity of the assignment under s. 4 of the Fraudulent Preferences Act; held, that the assignment is invalid both as to the present advance and the pre-existing debt.

Hazell v. Cullen, 20 B.C.R. 603.

ASSIGNMENTS ACT, R.S.M. 1913, c. 12, ss. 39, 48, 49—INTERPLEADER.

A sale of horses was made by the judgment debtor to the claimant in this interpleader issue, who was one of his creditors, at a time when both the debtor and the claimant knew that the former was in insolvent circumstances. The claimant paid no money to the judgment debtor at or after the time of the alleged purchase, but took the horses on account of moneys owing to him by the debtor and moneys for which he was surety on the debtor's behalf. Held, that the sale was void, under s. 32 of the Assignments Act, R.S.M. 1913, c. 12, as against the plaintiffs, judgment creditors, although their execution had not been placed in the sheriff's hands within 60 days after the sale in question, also that the sale or transfer could be impeached in interpleader proceedings under subs. 2 of s. 49 of the Act, notwithstanding anything in s. 48, the provisions of subs. 3 of that section being permissive only and not exclusive. [Brown v. Peace, 11 Man. L.R. 409, followed.] Semble, the claimant was bound by the directions in the interpleader order that the question of the validity of the sale should be tried by way of interpleader issue. Judgment in favour of the execution creditors with costs.

Canadian Bank of Commerce v. McAuley, 24 Man. L.R. 561, 28 W.L.R. 597.

ASSIGNMENTS AND PREFERENCES—CHATTEL MORTGAGE — MONEY ADVANCED TO INSOLVENT FIRM TO PAY CREDITOR—ABSENCE OF KNOWLEDGE OF INSOLVENCY—ACTION BY ASSIGNEE FOR BENEFIT OF CREDITORS—VALIDITY OF CHATTEL MORTGAGE—BONA FIDES—FINDINGS OF FACT OF TRIAL JUDGE.

Maher v. Roberts, 6 O.W.N. 380.

ASSIGNMENTS AND PREFERENCES—TRANSFER OF GOODS BY TRADER TO CREDITOR—INSOLVENCY OF TRANSFEROR—WAREHOUSE RECEIPTS — BILLS OF SALE AND CHATTEL MORTGAGES ACT — IMPEACHMENT OF TRANSFER AS FRAUDULENT PREFERENCE—RESPONSIBILITY OF TRANSFEREE—MEASURE OF—GOODS OF NO VALUE.

Langley v. Simons Fruit Co., 6 O.W.N. 449.

ASSIGNMENTS AND PREFERENCES—ASSIGNMENT OF POLICY OF LIFE INSURANCE—CONSIDERATION — BONA FIDES — ABSENCE OF NOTICE OR KNOWLEDGE OF CLAIM OF CREDITOR—INTERPLEADER ISSUE BETWEEN ASSIGNEE AND EXECUTION CREDITOR—FINDING OF TRIAL JUDGE AGAINST FRAUD—APPEAL.

Bingeman v. Klippert, 6 O.W.N. 552.

MORTGAGE MADE BY MINING COMPANY TO PROMOTERS AND OWNERS OF STOCK—ADVANCES MADE BY PROMOTERS.

Northern Electric & Mfg. Co. v. Cordova Mines, 5 O.W.N. 156, 25 O.W.R. 105.

CHATTEL MORTGAGE—INSOLVENCY OF MORTGAGOR—KNOWLEDGE OF MORTGAGEE — ANTECEDENT PROMISE—BILLS OF SALE AND CHATTEL MORTGAGE ACT, R.S.O. 1914, c. 135, s. 16—FOLLOWING PROCEEDS — ASSIGNMENTS AND PREFERENCES ACT, R.S.O. 1914, c. 134, s. 13 — AMOUNT FOR WHICH MORTGAGEE ANSWERABLE TO CREDITORS.

Crouch v. Wilford, 10 O.W.N. 169.

CHATTEL MORTGAGE—DURESS—INSOLVENCY — KNOWLEDGE — INTENT TO DEFRAUD CREDITORS — INSTRUMENT EXECUTED WITHIN 60 DAYS BEFORE ASSIGNMENT FOR CREDITORS — PRESUMPTION — ASSIGNMENTS AND PREFERENCES ACT, R.S.O. 1914, c. 134, s. 5—SALE OF CHATTELS BY ASSIGNEE—CONVERSION.

Clifton v. Towers, 10 O.W.N. 224, 11 O.W.N. 11.

CONVEYANCE OF LAND—MORTGAGE—ACTION BY JUDGMENT CREDITORS TO SET ASIDE — INTENT — JUDGMENT SETTING ASIDE CONVEYANCE — ACTION DISMISSED AS TO MORTGAGE.

Sovereign Bank v. McIntosh, 10 O.W.N. 410.

CHATTEL MORTGAGE MADE BY INSOLVENT DEBTOR—ACTION BY CREDITOR TO SET ASIDE—EVIDENCE—SUSPICION.

London Shoe Co. v. Levin, 11 O.W.N. 200.

CONVEYANCE OF LAND—SECURITY TO SURETY FOR GRANTOR'S INDEBTEDNESS TO BANK—ABSENCE OF FRAUD — DECLARATORY JUDGMENT—COSTS.

Ault v. Green, 12 O.W.N. 381. [Affirmed 13 O.W.N. 264.]

ASSIGNMENTS AND PREFERENCES — CONVEYANCES OF LAND BY INSOLVENT DEBTOR TO CREDITORS—PREFERENCES—ABSENCE OF INTENT TO PREFER.

Canadian Johns Manville, Ltd. v. Knight, 12 O.W.N. 211.

BANKS—KNOWLEDGE OF INSOLVENCY.

A demand by a bank to be put in possession of chattels, upon which it claims a lien, cannot be contested on the ground that the bank employed indirect and illegal means to secure, by the privilege, a

guarantee for a debt "already existing" to the prejudice of the other creditors of a company, without alleging and proving the insolvency of the company and knowledge thereof by the bank.

Valentine v. Bank of B.N.A., 25 Que. K.B. 47.

A sale of the stock in trade of a restaurant, effected without complying with arts. 1569a et seq., C.C. (Que.), may be set aside as illegal and void.

National Breweries v. Chapman, 25 Rev. de Jur. 254.

ACTION TO SET ASIDE FRAUDULENT CONVEYANCE—PREFERRED PAYMENT—AGENCY—DELIVERY OF GOODS—INSOLVENCY C. C., ARTS. 1023, 1035, 1036.

Delivery by a merchant, within a few weeks of bankruptcy, of merchandise, the price of which had been advanced by the purchaser especially to allow the former to obtain them, does not constitute a preferred fraudulent conveyance. It is a delivery carrying out a contract of agency.

Lefaivre v. Vermette, 28 Que. K.B. 193, affirming 53 Que. S.C. 27.

FRAUDULENT PREFERENCES ACT—NO "INTENT" TO PREFER—WHAT "CREDITOR" PROTECTED BY THE ACT—MORTGAGES—TRUSTEES—MORTGAGE GIVEN TO TRUSTEE—BENEFICIARIES SUBSEQUENTLY ASCERTAINED.

Mortgages of real estate given by defendant companies were attacked (after 60 days from their execution) as being void against creditors under the Fraudulent Preferences Act, but were held valid because from the extent and nature of the assets of the mortgagors, the surrounding circumstances and the nature of the indebtedness sought to be secured, there did not appear the "predominant intention" to prefer. Semble the "creditors" protected by said Act are only those existing when the instrument attacked was executed. [English Act distinguished.] The mortgages were given to plaintiffs as trustees, and some of the beneficiaries were named subsequently, to whom the plaintiffs became bound by a declaration of trust. Upon such ascertainment of beneficiaries the mortgage became a valid security in their favour.

Innes et al. v. Cameron Valley Land Co. et al., [1919] 1 W.W.R. 751.

FRAUDULENT PREFERENCE—ACTION BY JUDGMENT CREDITOR.

Gunn v. Vinegratsky, 20 Man. L.R. 311, 17 W.L.R. 54.

FRAUD — EQUIVALENT WORDS — ALLEGATIONS — THIRD OPPOSITION — ACTION PAULIENNE—LIMITATION—CREDITORS—CONNIVANCE—DECLARATION OF TRUSTEE.

Fraud may be alleged without making use of that particular word, which has numerous equivalents. Thus fraud may be charged by saying: (a) that a judgment rendered by default has been obtained by surprise and by illegal proceedings; (b) that the attorney for the defendant neglected to look after the case and only used the plaintiff's name; (c) that he had connived between the plaintiff and the defendant to obtain judgment by default; (d) that the plaintiff had obtained the judgment on an erroneous declaration of the trustee of an insolvent estate without being authorized either by the inspectors or by the court. A tierce opposition made to a judgment obtained by a creditor against a bankrupt, containing allegations of fraud, is of the nature of a pauliennne action, and is prescribed in one year by art. 1040 C.C. (Que.) as to the party or tiers opposant exercising the rights of the bankrupt and where he represents his simple contract creditors. Doctrine and jurisprudence state that simple contract creditors are bound by judgments given against their debtors, when such judgments only recognize the existence of one debt, carrying with it, by virtue of the law, a privilege or hypothec on the goods of the debtors. Nevertheless there is a difference of opinion where litigation is carried on solely on the existence of the privilege or hypothec. A judgment rendered on an attachment after judgment is without effect from the moment the principal judgment is itself reversed.

Touzin v. Peladeau, 25 Rev. Leg. 87.

CHATTEL MORTGAGE—UNJUST PREFERENCE.

Spotton v. Gillard, 18 O.W.R. 510.

ASSIGNMENTS AND PREFERENCES — AGREEMENT FOR SALE AND SUBSEQUENT TRANSFER OF LAND—TRUST—PREFERENCE.

Belivean Co. v. Miller, 16 W.L.R. 460.

IV. Notice; rights and liabilities of purchaser.

(§ IV—15)—ONUS ON PARTY ATTACKING THE TRANSFER, WHEN.

The onus is upon the party attacking the validity of a transfer made to a creditor as an unlawful preference under the Fraudulent Preferences Act (B.C.), and bringing his action more than 60 days after the transfer attacked, as to which special provision is made by s. 3 (2a) to establish the mala fides of the transferee; hence, in the absence of proof of notice or knowledge on the part of the transferee of the transferor's financial embarrassment, the plaintiff will fail to make out a case of intent on the transferee's part.

Koop v. Smith, 20 D.L.R. 440, 20 B.C.R. 372, 29 W.L.R. 872, 7 W.W.R. 416.

ASSIGNMENT OF DEBTS—DEFECT OF NOTICE TO DEBTORS—INSOLVENCY—EXECUTION JUDGMENT — C.C. ARTS. 1032, 1570, 1571, 1970 — C.C.P. ARTS. 113, 541 — FRAUDULENT TRANSFER.

A judgment in a paulienne action which ordered that an assignment of commercial debts be set aside, and that the debts so transferred be declared to be part of the assets of the transferor, are sufficient to

justify an execution judgment. An assignment of debts by a merchant to one of his creditors, and agreed to by the former some time before his bankruptcy, is void as regards third parties, especially creditors represented by the trustee of the insolvent, if the debtors had not been notified of the transfer before the failure. The assignee has no real possession against the debtors.

Gagnon v. Banque Nationale, 28 Que. K. B. 29.

(§ IV—16)—Knowledge of transferor's financial position.

Where an insolvent firm sells its property, subject to a right of redemption, to a person who is aware of its insolvency, and uses the proceeds to pay certain creditors to the prejudice of the others, the sale will be annulled at the suit of the latter as being in fraud of their rights.

Landry v. McCall, 6 D.L.R. 793, 21 Que. K.B. 348.

Preferences — Knowledge of transferor's insolvency—Indefiniteness of contract of sale.

Schlesinger v. Crowe, 16 D.L.R. 884, 14 E.L.R. 158.

Knowledge of transferror's financial condition — Chattel mortgages — Mortgage of land — Conveyance of land—Action to set aside—Evidence — Insolvency — Knowledge—Actual advances—Good faith.

Saturday Night v. Horan, 4 O.W.N. 832, 24 O.W.R. 80.

Action to set aside — Insolvency of grantor—Intent to defraud on part of grantor — Failure to shew knowledge of insolvency or intent to defraud of part of grantee.

Palangio v. Augustino, 10 O.W.N. 1, affirming 9 O.W.N. 244.

(§ IV—17)—Intent to delay and defraud —Intent of both parties.

A chattel mortgage made with intent on the part of both mortgagor and mortgagee to delay and defraud the mortgagor's creditors will be declared invalid as against a writ of execution against the mortgagor on the trial of an interpleader issue following the seizure of the mortgaged goods by the sheriff.

Clare & Bockest v. Evans, 14 D.L.R. 227, 25 W.L.R. 626.

Notice of transferrer's fraud.

A fraudulent conveyance in contravention of art. 1035 C.C. (Que.) is made where a clerk buys the stock in trade of his employer when he knows that the latter is financially embarrassed and that he is selling to pay his debts.

Constantineau v. Buist, 18 Rev. de Jur. 40.

(§ IV—19)—Recovery back of amount paid out.

The purchaser as against whom a sale by an insolvent is set aside as fraudulent to the purchaser's knowledge cannot demand that if the sale be annulled he should be refunded the purchase price from the estate, but as the purchaser's money, has gone to pay certain creditors, the court in annulling the sale will reserve to him any recourse which he may have after the affairs of the insolvent firm are wound up.

Landry v. McCall, 6 D.L.R. 793, 21 Que. K.B. 348.

V. Reservation of interest; change of possession.

(§ V—25)—Sale—Written acknowledgment as to retaining title.

Where there has been no delivery of the chattels and there is an absence of consideration on a pretended sale for value as to which each signed a written acknowledgment, the pretended seller in whose possession the acknowledgements were retained is not debarred from setting up his title and property in the chattels by the fact that the pretence of a sale was made up for the purpose of defrauding creditors, if the writing entered into was not in itself effective as a conveyance to transfer the ownership.

Sanders v. Hedman, 23 D.L.R. 833, 9 A.L.R. 18, 8 W.W.R. 664, affirming 18 D.L.R. 481.

VI. Transactions between relatives.

(§ VI—30)—Where a newly incorporated company claimed title to goods which up to its incorporation were in the possession or control of one of its shareholders as their apparent owner, but a formal transfer to the company was made by a bill of sale from a brother of the person so in possession and the company set up title solely under such bill of sale as against a levy made on the goods at the instance of an execution creditor of such apparent owner, the court will, in interpleader proceedings, on being satisfied that the transfer made by the bill of sale in the name of the brother to the company in exchange for shares was a part of a fraudulent attempt between the brothers and the company to put the goods out of the reach of creditors of the execution debtor, declare such goods to be still the property of the debtor and exigible under the execution.

Reindhardt Brewery v. Nipissing, etc., Bottling Works, 8 D.L.R. 261, 4 O.W.N. 366, 23 O.W.R. 377.

Where it appeared in a proceeding permitted by s. 5 of the Collection Act, R.S.N. S. 1900, c. 182, to be instituted by a judgment creditor for an examination of the financial condition, etc., of a debtor, the debtor in this case being one against whom judgment had been rendered in an action for slander, that a deed from the debtor executed to his wife was proved and recorded after he had received a letter calling for redress for the slander and that the debtor, after the action for slander had been brought, withdrew from the bank a fund over $600 deposited in the joint names of himself and wife, in which he had an in-

terest of his own, and replaced the fund on the same day in his wife's name alone, these transactions bring the debtor within sub-s. 1 (e) of s. 27 of the Collection Act, R.S.N.S. 1900, c. 182, providing that if it appears to the officer conducting the examination of a judgment debtor that the latter has made a fraudulent disposition of his property, the officer may commit him to jail.

Henn v. Smith, 6 D.L.R. 48, 11 E.L.R. 1.

Where a surety, to increase his security, plans and carries out in fraud of the other creditors, a scheme in which his brother is used as his mere instrument in the transactions, equity will sheer the transaction of the brother's name and substitute that of the surety when necessary to shew the true nature of the transaction.

Stecher Lithographic Co. v. Ontario Seed Co., 7 D.L.R. 148, 46 Can. S.C.R. 540, varying 22 O.L.R. 577, 24 O.L.R. 503.

FAMILY ARRANGEMENTS — USE OF FIRM MONEY BY PARTNER.

Property purchased with money advanced to a partnership firm for that purpose, but the conveyance of which in fraud of the partnership was obtained to be made at the instance of one partner to a relative of his, who paid nothing for it, may properly be held subject to a resulting trust in favour of the firm on its insolvency where such grantee could set up as a consideration for same only a family arrangement with the partner, and no consideration as to the firm on whose credit the money to buy the property was obtained.

Sharp v. McNeil, 15 D.L.R. 73, 47 N.S.R. 406, 13 E.L.R. 425.

SUSPICIOUS CIRCUMSTANCES—ONUS SHIFTED, WHEN.

If the circumstances are suspicious in transactions between relatives which have the effect of defeating the claims of creditors, the onus is shifted to the purchaser to establish the bona fides of the transaction by clear and satisfactory evidence, and for this purpose the uncorroborated testimony of the parties to the transaction is, in general, not sufficient.

Kilgour v. Zaslavsky, 19 D.L.R. 420, 25 Man. L.R. 14, 30 W.L.R. 303, 7 W.W.R. 446.

RES IPSA LOQUITUR—BURDEN OF PROOF.

The principle of res ipsa loquitur applies to assignments made between near relations under suspicious circumstances, and when impeached by creditors the burden of proof is upon the defendant to establish by corroborative evidence, other than the testimony of interested parties, the bona fides of the transaction.

Koop v. Smith, 25 D.L.R. 355, 51 Can. S.C.R. 554, 8 W.W.R. 1203, reversing 20 D.L.R. 440, 20 B.C.R. 372.

CHATTEL MORTGAGE—BONA FIDE ADVANCES.

A chattel mortgage executed by a father to his son for actual bona fide money advances, consisting of a present advance and a previous undischarged mortgage, for the purpose of enabling the mortgagor to pay his debts and continue in business, is within the protection of ss. 44, 47 of the Assignments Act (Man.), and valid against creditors.

Richards v. Leonoff, 24 D.L.R. 180, 25 Man. L.R. 548, 31 W.L.R. 621, 8 W.W.R. 966.

CONVEYANCE BY HUSBAND TO WIFE — RECONVEYANCE—RIGHTS OF WIFE'S CREDITORS.

A voluntary conveyance of land by a husband to his wife in anticipation of death, to be reconveyed to him upon his recovery from his illness, a reconveyance of the land in pursuance of such arrangement does not render the reconveyance fraudulent against the execution creditors of the wife.

Windsor Auto Sales Agency v. Martin, 25 D.L.R. 549, 33 O.L.R. 354.

CONVEYANCE TO WIFE IN TRUST—FRAUD—RIGHT TO TITLE.

Where property has been conveyed from husband to wife with intent to evade execution, the wife verbally agreeing to reconvey the land when the judgment was satisfied, the husband, because of his fraudulent intent, cannot recover the property after the satisfaction of the debt, though the land was by statute exempt from execution. It is impossible to say the creditor was not prejudiced—the onus of proving that was on the plaintiff. The conveyance of exempted lands could not prejudice creditors. The fraudulent intent was therefore not fraudulent as against them. [Muckleston v. Brown, 6 Ves. 52, applied.]

Scheuerman v. Scheuerman, 28 D.L.R. 223, 52 Can. S.C.R. 625, 10 W.W.R. 379, reversing 21 D.L.R. 593, 8 A.L.R. 417.

HUSBAND AND WIFE—GOOD FAITH—CORROBORATION.

On an application under r. 462, calling on the judgment debtor and his wife to shew cause why the property should not be sold to realize the amount to be levied under an execution, the burden of proof is on the defendants to shew that a transfer from the husband to the wife is not made to delay, hinder, or defraud creditors, and the judge should not consider that burden satisfied unless the evidence of the parties themselves is corroborated by some other evidence. [Green, Swift & Co. v. Lawrence, 7 D.L.R. 589; Koop v. Smith, 25 D.L.R. 355, followed.]

Killips v. Porter, 26 D.L.R. 326, 33 W.L.R. 380, 9 W.W.R. 949.

BONA FIDES.

A bonâ fide conveyance by husband to wife for a past indebtedness, not equal to the full value of the property conveyed is not void, as against creditors, under 13 Eliz. c. 5; the continuance in possession by the husband, in a case where he assisted the wife in conducting a hotel business on the property, is not a circumstance of fraud. But a conveyance to a child for past serv-

ices, presumably voluntary when rendered and partly paid for, is void under the statute.

Union Bank v. Murdock, 34 D.L.R. 150, [1917] 2 W.W.R. 112. [Reversed in part, 37 D.L.R. 522, 28 Man. L.R. 229, [1917] 3 W.W.R. 820.]

TRANSACTIONS BETWEEN RELATIVES—FAMILY SETTLEMENT—PARENT AND CHILD—PRESUMPTIONS AS TO FRAUD—CONSIDERATION.

A family settlement whereby a father conveys land to his son in consideration of the son transferring to his brother land belonging to him, reserving life support to the father and mother, where no actual fraud is shewn and there is no intent to hinder, delay or defraud creditors, is a valid transaction, as against a creditor seeking to set it aside as fraudulent under 13 Eliz. c. 5, especially where such arrangement was made before the debt upon which the creditor obtained his judgment was contracted; such a conveyance from the father to the son is based upon a good and valuable consideration and is an honest family arrangement which will be protected in equity where it appears to have been made bona fide. Services rendered by a child during minority may constitute a consideration in support of a conveyance of land by the parent to the child as against the creditors of the parent. In order to determine whether a disposition of property by a debtor, under a family settlement, is void as to creditors under 13 Eliz. c. 5, the state of circumstances at the time the conveyance is executed must be regarded and not subsequent events, except such as must have been in the contemplation of the transferor at the time of transferring the property, and from which a fraudulent intent at that time may be gathered. Where a conveyance of lands under a family settlement is attacked by creditors, for alleged inadequate consideration, deeds under such settlements are exempt to some extent from the ordinary rules which affect other deeds, the consideration being there composed partly of value and partly of natural love and affection, not easily estimated on a scale of dollars and cents, yet favoured by the courts.

Jack v. Kearney, 10 D.L.R. 48, 41 N.B.R. 293, 11 E.L.R. 401, reversing 4 D.L.R. 836.

CORROBORATION.

The bonâ fides of a conveyance by husband to wife cannot be established by the uncorroborated testimony of the parties thereto. [Koop v. Smith, 25 D.L.R. 355, 51 Can. S.C.R. 554, followed.]

Union Bank v. Murdock, 37 D.L.R. 522, [1917] 3 W.W.R. 820, reversing 34 D.L.R. 150, 24 Man. L.R. 229.

TRANSACTIONS BETWEEN HUSBAND AND WIFE—IMPEACHMENT BY CREDITORS—PROPERTY PURCHASED WITH WIFE'S EARNINGS.

O'Leary v. Ferguson, 24 D.L.R. 911.

TRANSACTIONS BETWEEN HUSBAND AND WIFE—PRESUMPTION OF FRAUD—BURDEN OF PROOF OF GOOD FAITH.

Doucet v. Side Sode, 27 D.L.R. 732, 49 N.S.R. 485.

TRANSACTION BETWEEN PARENT AND CHILD—ASSIGNMENT OF SHARE OF DISTRIBUTION—ABSENCE OF INTENT TO DEFRAUD—DELAY IN SETTING ASIDE.

Revillon v. Whalen, 24 D.L.R. 887, 32 W.L.R. 325.

CONVEYANCE FROM HUSBAND TO WIFE. ABSENCE OF INTENTION TO DEFEAT, HINDER OR DELAY CREDITORS—CIRCUMSTANCES NEGATIVING FRAUD — ACTION TO SET ASIDE CONVEYANCE.

Bank of Montreal v. Stair, 46 D.L.R. 718, 44 O.L.R. 79.

NEAR RELATIONS — SUSPICIOUS CIRCUMSTANCES—ONUS OF PROOF.

A transfer of land between husband and wife impeached as being in fraud of creditors, and the circumstances attending the transfer being suspicious, the onus is shifted to the transferee to establish the validity of the conveyance.

Imperial Bank v. McLellan, 12 S.L.R. 415, [1919] 3 W.W.R. 607.

TRANSACTIONS BETWEEN RELATIVES — SETTING ASIDE—PRIORITY OF MORTGAGE.

Bankcroft v. Milligan, 4 O.W.N. 1605, 24 O.W.R. 915.

HUSBAND AND WIFE—INSOLVENCY OF HUSBAND — VOLUNTARY CONVEYANCE TO WIFE — PRETENDED CONSIDERATION — EVIDENCE—INTENT.

Long Dock Mills Co. v. Dickey, 7 O.W.N. 692.

HUSBAND AND WIFE—PROPERTY CONVEYED TO WIFE BY STRANGER — INTEREST OF HUSBAND — RIGHTS OF CREDITOR OF HUSBAND—ABSENCE OF FRAUD.

Bateman v. Scott, 7 O.W.N. 722, 8 O.W.N. 256. [Appeal to Can. Sup. Ct. quashed, 29 D.L.R. 369, 53 Can. S.C.R. 145.]

HUSBAND AND WIFE — INTENT TO DEFEAT CREDITORS OF HUSBAND—CLAIM OF CREDITOR AGAINST HUSBAND — CONTRACT — NOVATION—EVIDENCE.

Canadian Pressed Brick Co. v. Cole, 8 O.W.N. 499, 9 O.W.N. 55.

HUSBAND AND WIFE—VOLUNTARY CONVEYANCES OF LAND—HAZARDOUS BUSINESS — INTENT TO DEFRAUD CREDITORS — FINDINGS OF TRIAL JUDGE.

Canadian Wood Products v. Bryce, 12 O.W.N. 409.

PURCHASE OF CHATTEL BY SON WITH MONEY GIVEN BY FATHER—SUBSEQUENT BILL OF SALE BY SON TO FATHER—ATTACK UPON, BY CREDITOR OF SON—CREDITOR'S CLAIM ARISING AFTER TRANSACTION—NO CREDITORS AT TIME OF TRANSACTION—FAILURE TO PROVE FRAUD—FINDING OF OFFICIAL REFEREE IN PARTNERSHIP ACTION—CLAIMANT UNDER BILL OF SALE NOT A PARTY—RES INTER ALIOS ACTA.

Davies v. Benson, 12 O.W.N. 295.

CONVEYANCE OF LAND BY HUSBAND TO WIFE —FRAUD UPON CREDITORS—EVIDENCE— FINDINGS OF FACT OF TRIAL JUDGE.

Hassard v. Allen, 15 O.W.N. 16. [Affirmed in 15 O.W.N. 141.]

ASSIGNMENTS AND PREFERENCES — AGREEMENT FOR SALE OF LAND—DEATH OF VENDEE—CONVEYANCE OF LAND TO CREDITOR—IMPEACHMENT BY ANOTHER CREDITOR—POWERS OF VENDOR—FORFEITURE AND RESALE UPON DEFAULT — ACTION BROUGHT WITHIN 60 DAYS — ONUS — INTENT TO DEFRAUD—PROMISSORY NOTE —EXECUTOR DE SON TORT—HUSBAND AND WIFE.

Parry v. Butland, 17 O.W.N. 122.

ACTION TO SET ASIDE CONVEYANCE OF LAND BY HUSBAND TO WIFE — EVIDENCE — NEW TRIAL.

Wanless v. Swartz, 17 O.W.N. 139.

HUSBAND AND WIFE—VOLUNTARY CONVEYANCE—INTENT—RIGHTS OF EXECUTION CREDITORS.

Campbell Flour Mills Co. v. Ellis, 10 O.W.N. 307.

TRANSFERRING PROPERTY TO ANOTHER TO PROTECT IT AGAINST CREDITORS—ASSISTANCE OF COURT IN RESTORATION.

Where it appears that the purpose of a person transferring property to his wife was to protect it against his creditors, though it did not result in any creditor being prejudiced, the court should not assist such person in obtaining the restoration of his property. [Scheuerman v. Scheuerman, 10 W.W.R. 379, followed.]

Trumbell v. Trumbell, [1919] 2 W.W.R. 198.

HUSBAND AND WIFE—PRESUMPTION AS TO GIFT—ACCOMMODATION ENDORSEMENT.

In an action to set aside a conveyance as fraudulent, the whole of the circumstances surrounding the execution must be looked at, and then the question asked, whether the conveyance was in fact executed with the intent to defeat and delay creditors. Upon the payment of income by a wife to a husband, a presumption arises that such payment is made by way of gift. The liability on an accommodation endorsement is not a debt, at most it is an obligation, which may in certain circumstances become a debt.

Union Bank v. Tyson, 7 W.W.R. 1117.

TRANSFER OF LAND BY HUSBAND TO WIFE—VOLUNTARY CONVEYANCE — INTENT TO DEFEAT CREDITORS — INSOLVENCY OF HUSBAND.

Raichlin v. Katz, 16 W.L.R. 1.

VII. Subsequent creditors.

(§ VII—35)—VOLUNTARY CONVEYANCE—SETTING ASIDE AT INSTANCE OF SUBSEQUENT CREDITOR.

A voluntary conveyance that is made with intent to effect future creditors only, may be set aside at the instance of one who subsequently became a creditor, although there were no creditors remaining whose debts arose before the date of the conveyance. [Mackay v. Douglas, L.R. 14 Eq. 106, followed.]

McGuire v. Ottawa Wine Vaults Co., 13 D.L.R. 81, 48 Can. S.C.R. 44, affirming 8 D.L.R. 229, 27 O.L.R. 319.

VOLUNTARY CONVEYANCE — SUBSEQUENT CREDITOR.

So far as a creditor's action to set aside his debtor's voluntary conveyance is dependent upon the creditor's own claim incurred after the conveyance was made and not upon the existence of prior debts, he must shew fraudulent intent.

Dancey v. Brown, 19 D.L.R. 862, 31 O.L.R. 152.

SURETY.

A surety is within the category of creditors within the purview of 13 Eliz. and the Assignments Act, 1907 (Alta.), c. 6, s. 44, in actions to set aside fraudulent conveyances.

Robertson v. Wilson, 24 D.L.R. 274, 8 W.W.R. 1068, 31 W.L.R. 708.

ACTION PAULIENNE.

A simulated sale does not withdraw the property sold from the patrimony of the vendor and can be attacked by the vendor's creditors more than a year after they obtained knowledge of it. In opposition to a paulienne action, an action for a declaration that the sale was simulated, can be brought by a creditor whose debt is subsequent to the simulated contract. [Confirmed in Review.]

Cloutier v. Giguere, 49 Que. S.C. 202.

VIII. Remedies.

(§ VIII—40)—Upon an application by a creditor, under the Assignments Act, R.S. N.S. c. 145, to set aside a deed of conveyance of property made by the insolvent debtor in contravention of s. 4 with intent to hinder and delay the creditor, the deed may be declared void as against the creditor without a finding of the precise amount of the creditor's claim, provided some amount is found to be due, an accounting to follow if necessary.

Whitford v. Brimmer, 7 D.L.R. 190. [Affirmed, 12 D.L.R. 702, 47 N.S.R. 275.

VOLUNTARY ASSIGNMENT BY INSOLVENT TO WIFE—FURTHER TRANSFER PREFERRING CERTAIN CREDITOR — REMEDY — ASSIGNMENT ACT (MAN.).

Where the husband conveys property to the wife under circumstances which would make the transfer void as against creditors and she conveys the property to a creditor having a claim of equal value therewith, the two conveyances may be attacked under ss. 39, 40 of the Assignments Act (Man.) as made with intent to prefer such creditor over the other creditors of the husband; that statute applies, not only to a conveyance by the debtor himself, but to a conveyance by another in whose name the title was held for the debtor, in case it was so treated by the preferred creditor as well as

by the debtor and his wife. [Smith v. Sugarman, 13 W.L.R. 671, distinguished.]

Kilgour v. Zaslavsky, 19 D.L.R. 427, 25 Man. L.R. 22, 30 W.L.R. 310, 7 W.W.R. 446.

PROCEEDINGS UNDER CREDITORS RELIEF ACT —PRIORITIES—MORTGAGES AND EXECUTIONS.

It is not obligatory upon the court to apply the scheme of distribution under the Creditors Relief Act, R.S.O. 1914, c. 81, in its entirety to moneys in court realized in equitable proceedings to set aside a fraudulent conveyance; so where there was a succession of mortgages registered at different dates with groups of executions during each interval, a fund so realized for the benefit of creditors and mortgagees will be distributed with reference to the priorities of the various mortgages, and by grouping the executions which intervened between any two mortgages so that each group of executions as a whole would rank ahead of mortgages afterwards placed on the land. [Roach v. McLachlan, 19 A.R. (Ont.) 496; Breithaupt v. Marr, 20 A.R. (Ont.) 689, followed.]

Union Bank v. Taylor, 23 D.L.R. 679, 34 O.L.R. 255.

VOLUNTEERS AND RESERVISTS ACT—INTENTION TO DEFRAUD.

In order to obtain an order permitting the commencement of an action under the Volunteers and Reservists Act (Alta. 1916, c. 6, s. 9), to prevent property from being disposed of, on the ground that it is being done fraudulently to defeat creditors, there must be clear and convincing evidence of an intention to so defraud.

Re Reservists and Volunteers Relief Act, 30 D.L.R. 220, [1917] 1 W.W.R. 44.

ACTION PAULIENNE.

A sale by an insolvent of all his assets to his cousin, under which no purchase money was passed at the time of the conveyance, though later some of the proceeds were used to pay some claims, is fraudulent and preferential, and may be successfully attacked, in an action paulienne, by a secured creditor, who was paid the secured amount, for a balance of an unsecured amount due him.

Banque Nationale v. Kennedy, 33 D.L.R. 714, 49 Que. S.C. 463.

REVOCATORY ACTION (PAULIENNE)—ESSENTIALS—FRAUD—INJURY.

It is essential to the success of a revocatory action that there should not only be fraud but also injury to the complaining creditor; if it appear that the debtor has no other assets, or that the creditor is deprived of his chance to realize on the remaining assets, the latter is prejudiced, and is entitled to succeed.

Raymond v. Rioux, 37 D.L.R. 370, 26 Que. K.B. 525, 23 Rev. de Jur. 519.

ACTION FOR TORT—JUDGMENT NOT GIVEN—SETTING ASIDE CONVEYANCE — FRAUDULENT CONVEYANCES ACT (R.S.O. 1914, c. 105, s. 1)—CREDITOR.

Where the fraudulent purpose in making a conveyance of land is plainly to defeat the expected execution in a pending action for tort, the conveyance may be set aside although judgment in the action for tort has not been delivered. It is not necessary under the Fraudulent Conveyances Act (R.S.O. 1914, c. 105, s. 1) that the plaintiff shall be a creditor at the time of bringing an action to set aside a conveyance as fraudulent.

Hopkinson v. Westerman, 48 D.L.R. 597, 45 O.L.R. 208.

ACTION TO SET ASIDE—EVIDENCE—INTENT—KNOWLEDGE OF GRANTEE—CLAIMS OF CREDITORS — COSTS — INTEREST — OPPRESSIVE BARGAIN—FINDINGS OF FACT OF TRIAL JUDGE—APPEAL.

McNairn v. Goodman, 14 O.W.N. 97, affirming 12 O.W.N. 374.

ACTION TO SET ASIDE—STATUS OF PLAINTIFF —SECURED CREDITOR — ADEQUACY OF SECURITY—HUSBAND AND WIFE.

Dolson v. Jones, 15 O.W.N. 53.

ACTION TO SET ASIDE—EVIDENCE—INTENT.

Stone v. Stander, 11 O.W.N. 315; 12 O.W.N. 59.

ACTIO PAULIENNE—PRESCRIPTION.

A donation of an immovable by a father to his son to indemnify the latter for advances made to the amount of the approximate value of the immovable, is a deed with an onerous title. If the father was insolvent at the time the contract was made the deed is only deemed to have been given with intention to defraud if the donee was at the time aware of this insolvency. The parties having an interest to demand the revocation of a contract by the actio paulienne, are presumed to have known of the day of its registry and the prescription under art. 1040 C.C. (Que.) begins to run from that date.

Syndics Forestiers v. Mignault, 51 Que. S.C. 419.

(§ VIII—41)—TO WHOM AVAILABLE.

Under the Quebec Bulk Sales Act, 1 Geo. V. c. 39, only the unpaid creditor whose goods are included in the bulk sale to a third party has the right to attack the sale made without the formalities required by law, i.e., without the purchaser having obtained from the vendor an affidavit containing the names, addresses of, and amounts due to the unpaid creditors whose merchandise is being transferred by the bulk sale. An ordinary unpaid creditor or one whose goods have not been disposed of by their debtor by means of a bulk sale have no interest in attacking a sale even though made without the due formalities, such creditors having their ordinary common law right guaranteed by art. 1033, et seq. C.C.

(Que.), in case the sale is made in fraud of their rights.

Ramsay v. Turcotte, 7 D.L.R. 27, 42 Que. S.C. 459.

One action to set aside as fraudulent as against creditors two successive conveyances of the same property may be brought against both grantees where it is alleged that both conveyances were part of the same fraudulent scheme and that both grantees were parties to the fraud.

Burns v. Matejka, 1 D.L.R. 837, 4 A.L.R. 58, 19 W.L.R. 863, 1 W.W.R. 431.

To whom available—Simple or judgment creditor.

Where a creditor is seeking, on behalf of himself and all other creditors, to have a conveyance declared fraudulent and void, it is only necessary to allege and prove that he had a claim against the debtor, and not that the claim had been carried to judgment.

McDermott v. Oliver, 43 N.B.R. 533.

Action by judgment creditor to set aside—Evidence—Absence of intent to defraud—Estoppel—Unregistered reconveyance to debtor—Cancellation—Dismissal of action.

Davidson v. Forsythe, 7 O.W.N. 762.

Action to set aside—Evidence—Intent to defraud.

Aspinall v. Diver, 7 O.W.N. 828.

Remedies—To whom available—Action by judgment creditor of grantor to set aside—Agreement—Consideration—Lien for services—Evidence—Finding of fact of Trial Judge—Appeal.

Ellis v. Ellis, 7 O.W.N. 283.

Alimony judgment—Voluntary conveyance.

A married woman who brings suit against her husband for separation from bed and board, on the ground of cruelty, and prays for a condemnation against him for alimony, and obtains judgment pursuant to her conclusions, becomes his creditor, and may bring an action paulienne against him and his donee in avoidance of a donation, made by him in the interval between the institution of her suit for separation and the judgment thereon, as being a gratuitous conveyance by her insolvent debtor of a nature to defraud and injure her.

Maxwell v. Halladay, 44 Que. S.C. 52. [Affirmed, 20 D.L.R. 981, 23 Que. K.B. 543.]

(§ VIII—42)—Injunction.

Where a debtor has fraudulently transferred property a nonjudgment creditor is entitled to have further transfers enjoined until he can obtain judgment in his action to impeach the conveyance. [Fairchild v. Elmslie, 2 A.L.R. 115, followed.]

Albertson v. Secord, 1 D.L.R. 804, 4 A.L.R. 90, 20 W.L.R. 64, 1 W.W.R. 657, 659.

(§ VIII—43)—The fact that a debtor applied some of his own money to the purchase of property in his wife's name would not render the whole property liable for payment of the creditors' claims, but such liability should be restricted to the amount so applied, with a proportional share of increase if the property has increased in value.

Burns v. Matejka, 1 D.L.R. 837, 4 A.L.R. 58, 19 W.L.R. 863, 1 W.W.R. 431.

FRAUDULENT PREFERENCES.

See Fraudulent Conveyances; Insolvency; Assignment for Creditors; Corporations and Companies; Banks.

Annotation.

Assignments for creditors—Rights and powers of assignee: 14 D.L.R. 503.

Attachment before judgment—Receiving—Contesting—C.C.P. arts. 919, 922, 931.

The payment of a debt by an insolvent creditor can be considered as a preferred payment, and can be annulled as such only where it has been done under circumstances which show an intention to defraud. When a creditor whose affairs are in disorder, realizes his assets as far as possible, and applies all his receipts to the payment of laborers without on each occasion paying the salary of his manager, so doing does not constitute a fraudulent preference. His conduct does not justify the issuing of an attachment before judgment.

Miner Lumber Co. v. Gagnon, 25 Rev. Leg. 126.

FREIGHT CARRIERS.

See Carriers, III.

FUGITIVE FROM JUSTICE.

See Extradition; Aliens.

GAME LAWS.

Game and fisheries laws.

The jurisdiction of the magistrate under the Ontario Game and Fisheries Act, 7 Edw. VII., c. 49, is not ousted unless the accused acted under a claim of right, which is reasonable as well as bona fide; it is not enough that the claim is honestly made, if it be in fact merely fanciful and imaginary. [Cornwall v. Sanders, 3 B. & S. 206, followed.]

R. v. Harran, 3 D.L.R. 753, 3 O.W.N. 1107, 20 Can. Cr. Cas. 72, 21 O.W.R. 951.

Provincial law—Indian reserve.

The regulation of Indian reserves being under the exclusive jurisdiction of the Dominion Parliament, a Provincial game protection law is not effective, as regards such Indian reserve, to prohibit an Indian there resident from hunting and killing a deer on the reservation for his own use; a conviction under the Game Protection Act (B.C.) on a charge brought against an Indian for having venison in his possession without a permit, was therefore quashed.

[Madden v. Nelson & Fort Sheppard R. Co., [1899] A.C. 626, applied.]

R. v. Jim, 26 Can. Cr. Cas. 236, 22 B.C. R. 106.

"Loaded gun."

A "pump" gun having shells in its magazine only is not a loaded gun within the meaning of s. 8 (a) of the Game Act, Sask. 1913, c. 58, s. 10.

Cunningham v. Hall, 33 W.L.R. 557.

GAMING.

See also Lottery.

As affecting validity of contract, dealing on margin, see Contracts, III D; Brokers, I.

Annotations.

Lottery offence under Criminal Code: 25 D.L.R. 401.

Betting house offences: 27 D.L.R. 611.

Use of automatic vending machines for gambling: 33 D.L.R. 642.

(§ I—1)—Imperial acts—Application to provinces.

As the English statutes passed in the reign of Geo. II. prohibiting gaming and lotteries deal with offences merely mala prohibita, and not mala in se, they do not extend proprio vigore to Canada.

R. v. Hung Gee, 13 D.L.R. 44, 21 Can. Cr. Cas. 404, 6 A.L.R. 167, 24 W.L.R. 605, 4 W.W.R. 1128.

Statutory presumption—Gaming implements used in game not unlawful per se—Obstructing search—Knowledge that person obstructed was officer—Fan-tan—"Banker."

In the absence of evidence that a constable was armed with a warrant when he was prevented from, obstructed or delayed in entering a place supposed to be used as a common gaming house, or that the person obstructing him knew that he was a constable, no presumption arises under ss. 985, 986, Cr. Code, that such place was used as a common gaming house. It is only implements used in playing such games as are unlawful per se that are within the purview of s. 985, which declares that certain paraphernalia and instruments used in playing any unlawful game found in a place suspected of being used as a common gaming house, shall, in a trial under ss. 228, 229, be primâ facie evidence of the fact that such place was used as a common gaming house. Although a bank is kept in the game of fan-tan, which is one of mixed chance and skill, it is not within the prohibition of ss. 226, 228, Cr. Code, unless one player acts as banker to the exclusion of the others. [The Queen v. Petrie, 3 Can. Cr. Cas. 439, not followed.]

R. v. Hung Gee, 13 D.L.R. 44, 21 Can. Cr. Cas. 404, 6 A.L.R. 167, 24 W.L.R. 605, 4 W.W.R. 1128.

Proving element of chance.

There must be evidence or admissions to shew that the game being played is one in which there was the element of chance before a magistrate can find the place to be a common gaming house under Cr. Code s. 226. The fact that money, buttons and chips were found on a police raid does not make out a primâ facie case where there was no proof that the game of fan-tan was an unlawful one. Where s. 985 of the Cr. Code is relied upon to create a statutory presumption from the finding of instruments of gaming used in playing any unlawful game, the search order or warrant should be proved by its production. The provisions of s. 226, par. (b) as to what constitutes a common gaming house notwithstanding that there is no proof of gain by the keeper, do not apply to a game in which, though a bank is kept, the chances of being banker are equal to all the players.

R. v. Hing Hoy, 36 D.L.R. 765, 28 Can. Cr. Cas. 229, 11 A.L.R. 518, [1917] 2 W.W. R. 958.

Gaming — Club — Liability — Return of money lost — C.C. (Que.) art. 1927.

The exception as to gaming, under art. 1927, C.C. (Que.) is a public order, and can be supplemented by the judge of his own accord. Article 1927 makes no distinction, and applies, from that time, to all gaming contracts prohibited or not by the criminal law, except in the case of fraud. One who plays cards in a club with other members, and who loses a considerable sum, has no way of getting his money back from the club. Even though a rake-off is taken from the players, the club is not made liable for any offence against the loser. An action brought for this purpose can be rejected on inscription in law.

Lavallée v. Sailors Club, 25 Rev. Leg. 423.

(§ I—2)—Bona fide club — "Keeper" — Personal gain.

A bona fide club where the members frequently play games of chance and skill, and from a pool from the money staked to espend for refreshments and for the upkeep of the club, is not a common gaming house within the definition of s. 226 Cr. Code, and the steward cannot be convicted as a "keeper" under s. 228.

R. v. Riley, 30 D.L.R. 584, 26 Can. Cr. Cas. 402, 23 B.C.R. 192, [1917] 1 W.W.R. 325.

Restaurant permitting gaming.

Playing at cards to determine who shall pay for drinks, food or cigars for the use of the players is gaming; and a restaurant keeper who knowingly permits such to be done in his restaurant is guilty of keeping a common gaming house.

R. v. Bloomfield, 27 Can. Cr. Cas. 45.

Common gaming house — Club admitting nonmembers — "Rake-off" for club's benefit — Place kept "for gain."

Where club premises are maintained chiefly for gaming and are open to both members and nonmembers, and the club gets the benefit of a "rake-off" collected from the games, the place is a common

gaming house under Cr. Code, s. 226. The place is kept "for gain" if the rake-off goes to reduce the members' expenses of operating the club. [R. v. Riley, 30 D.L.R. 584, 26 Can. Cr. Cas. 402, 23 B.C.R. 192 distinguished; R. v. Ham, 29 Can. Cr. Cas. 431, 25 B.C.R. 237 followed; R. v. Long Kee, 26 B.C.R. 78, was decided on the law prior to the Code amendment made by 1918 (Can.) c. 16, s. 2, effective May 24, 1918, whereby clause (1a) was added to s. 226 of the Code.]

R. v. Long Kee, 31 Can. Cr. Cas. 217, 26 B.C.R. 78.

Fan-tan — Club — Disorderly house.

Fan-tan is a mixed game of chance and skill, and when it is played in a club with others than members participating in the game and a rake-off is taken to the uses of the club from their winnings in like manner as from the winnings of members, the place is a disorderly house within Cr. Code, ss. 226A and 229. [R. v. Brady, 10 Que. S.C. 539, applied; R. v. Riley, 26 Can. Cr. Cas. 402, 30 D.L.R. 584, 23 B.C.R. 192, distinguished.]

R. v. Ham, 29 Can. Cr. Cas. 431, 25 B.C.R. 237.

Keeping gaming house—Playing cards.

Evidence that defendant was proprietor of a pool room and that he and others remained there after hours for the purpose of playing the game of chance known as poker, and that in the course of the game money was deposited in a box known as a "kitty" and used in part in paying for refreshments supplied by defendant, held sufficient to support a conviction for keeping and maintaining a disorderly house, to wit, a common gaming house.

The King v. Bertrand, 52 N.S.R. 127, 31 Can. Cr. Cas. 2.

(§ I—4)—Prize contests — Exhibition Association — Horse race — Conditions of qualification—"Trained" in specified district — Meaning of.

Where one of the conditions of a horse race held in connection with an exhibition or fair conducted by an incorporated Exhibition Association was that the race was open only to foals owned and foaled in western Canada raced and trained in that territory, the training referred to means the entire training of the horse, and if the horse which came in first was taken outside of the territory mentioned and trained elsewhere to any substantial extent, a disqualification resulted upon which the owner of the second horse in the race may recover by action the first prize awarded at the race to the owner of the disqualified horse, although the plaintiff's protest made to the race officials was overruled by them, if the contestants are not shewn to have been subject to any rule or racing regulations making the decision of the race officials final. [Jones v. Davenport, 7 B.C.R. 452, distinguished; Marryat v. Broderick, 2 M. & W. 371, applied.]

Sporle v. Edmonton Exhibition Assn., 18 D.L.R. 747, 7 A.L.R. 383, 29 W.L.R. 654, 7 W.W.R. 245, affirming 14 D.L.R. 769.

Pool selling — Betting — Jurisdiction of police magistrate.

A person charged before a police magistrate with a contravention of s. 235 Cr. Code (as re-enacted by 9 & 10 Edw. VII. c. 10, s. 3), dealing with betting, wagering, pool selling, etc., has the right to elect to be tried by a jury, and cannot without his consent be tried summarily by the police magistrate.

R. v. Helliwell, 18 D.L.R. 550, 30 O.L.R. 594, 23 Can. Cr. Cas. 146.

(§ I—5)—Grain transaction—Delivery.

Section 231, Cr. Code does not apply to a transaction for the purchase and sale of grain in which delivery is intended.

Smith Grain Co. v. Pound, 36 D.L.R. 615, 10 S.L.R. 368, [1917] 3 W.W.R. 516.

(§ I—6)—Search order — Finding of betting slips.

That the place was kept as a common betting-house may be inferred from the finding, as the result of a search order under Cr. Code, s. 641, of numerous betting slips on defendant's person when arrested and of bank books found on search of his personal belongings where he lived, which disclosed continuous deposits of large amounts from month to month, quite out of proportion to his cigar store business, and as to which the defendant offered no explanatory evidence, particularly where he had said, after his arrest, that he had been "too long in the game."

R. v. Johnson, 27 D.L.R. 607, 25 Can. Cr. Cas. 124, 35 O.L.R. 215.

Means of resisting police search—Common gaming house — Cr. Code, s. 641.

Where windows are barred and special efforts made to hide what is going on in a building used by Chinamen as a club-house in which it was rumored gambling was being carried on, such cause of suspicion may be shewn in justification of a warrant of search under Cr. Code, s. 641, in a civil action against the chief constable; it is not a sufficient ground for removing the suspicion or for shewing the grounds of suspicion unreasonable, to prove that only members of the club had access to the premises, and this apart from any necessity for finding that there had been any infraction of the law in the manner of conducting the club.

Wah Kie v. Cuddy, 19 D.L.R. 378, 28 W.L.R. 747, 23 Can. Cr. Cas. 325.

Common gaming house — Finding gaming implements — Necessity that entry be under warrant or order — Resisting entry of officer.

The primâ facie presumption that a place is a common gaming house created by s. 985 Cr. Code from the finding by officers of

certain implements of gaming therein, arises only when the officer enters the place under a warrant or order. Where the circumstances create no statutory presumption under ss. 985, 986, a conviction under s. 228 for keeping a common gaming house cannot be sustained in the absence of evidence that a "bank" was kept by one or more of the players exclusive of the others, or that there was a gain to accrue to the accused from permitting the gaming to be carried on. The fact that an officer on seeking admittance to a place suspected of being a common gaming house, finds the door locked does not constitute a wilful prevention, obstruction or delay of his entrance sufficient to raise the primâ facie presumption created by s. 986, Cr. Code that the place was used as a common gaming house; the presumption is created only when something active is done amounting to a wilful obstruction or prevention.

R. v. Jung Lee, 13 D.L.R. 896, 5 O.W.N. 80, 22 Can. Cr. Cas. 63, 25 O.W.R. 63.

KEEPING COMMON GAMING HOUSE.

R. v. Do Ling et al., 27 Can. Cr. Cas. 446.

"KEEPING" COMMON GAMING HOUSE.

A conviction for the indictable offence of "keeping" a common gaming house (Cr. Code s. 228) based upon the playing of a game of chance by others in a store operated by the defendant can be maintained against the latter only in the event of its being proved that he participated in the rake-off of the game or otherwise obtained a gain by permitting such gambling on his premises. See Cr. Code, s. 228a (Amendment of 1913) as to summary conviction of an occupier who knowingly permits premises to be used for the purposes of a disorderly house.

R. v. Charlie Yee, 27 Can. Cr. Cas. 441, 10 S.L.R. 62, [1917] 1 W.W.R. 1307.

BETTING HOUSE OR GAMING HOUSE.

Keeping a common gaming house and keeping a common betting house, either of which are declared to constitute the indictable offence of keeping a disorderly house by the same section of the Cr. Code (s. 228), are distinct offences.

The King v. Mah Sam, 19 Can. Cr. Cas. 1.

COMMON GAMING HOUSE — JURISDICTION OF POLICE MAGISTRATE — EXCESSIVE FINE — AMENDING CONVICTION.

R. v. Shing, 20 Man. L.R. 214, 15 W.L.R. 714.

KEEPING COMMON GAMING HOUSE—"GAIN" —PAYMENT FOR CARDS AND REFRESHMENTS.

R. v. Dubois, 17 W.L.R. 35.

INCORPORATED CLUB — OFFICERS AS "KEEPERS."

The secretary and treasurer in active control and management of an incorporated social club which maintains for gain a common gaming house for its members are punishable under Cr. Code, s. 228 (2), as amended in 1913, as keepers of a disorderly house, although the real owner and keeper was the incorporated club.

R. v. Merker, 27 Can. Cr. Cas. 113, 37 O.L.R. 582.

(§ I—7)—LOOKING ON.

Playing and looking on in a gaming house are separate and distinct offences under Cr. Code s. 229, and a conviction in the alternative is not validated by s. 725.

The King v. Toy Moon, 19 Can. Cr. Cas. 33, 21 Man. L.R. 527, 19 W.L.R. 480.

(§ I—20)—AUTOMATIC GUM-VENDING MACHINE — FREE TRADE CHECKS WITH PURCHASES.

An automatic vending machine is properly held to be a contrivance for unlawful gaming where, in addition to the chewing gum or other article obtainable from the machine on deposit of a coin, there is issued in some cases along with the article purchased one or more trade checks redeemable in goods at the store where the machine is kept and which may at the customer's option be replayed into the machine on the chance of more trade checks or a blank; the element of gaming remains notwithstanding the fact that the number of trade checks, if any, at the next operation of the machine is indicated in advance to the person using it, as, in addition to the fixed quantity of chewing gum given for the 5-cent coin, the operator obtains the opportunity of winning the trade checks indicated and the benefits incident thereto or in case of drawing a blank with his purchase he received the benefit of a fresh turn of the indicator and the chance that the machine would indicate trade checks along with the next purchase were he to repeat the operation with another coin. [R. v. Langlois, 23 Can. Cr. Cas. 43; R. v. Stubbs (No. 2), 25 D.L.R. 424, 24 Can. Cr. Cas. 303, disapproved; R. v. Stubbs (No. 1), 21 D.L.R. 541, approved.] Semble, that Cr. Code, s. 986, as amended 1913, has the effect of making it prima facie evidence that a room or place is a common gaming house if it is found fitted or provided with any means or contrivance for unlawful gaming, by a constable who enters by consent of the proprietor and without any search warrant or order under s. 641, as amended 1913; and it is not necessary for the prosecutor to prove there was any resorting to the place (s. 226 (a)) as part of their prima facie case where the provisions of s. 986, apply.

R. v. O'Meara, 25 D.L.R. 503, 25 Can. Cr. Cas. 16, 34 O.L.R. 467.

AUTOMATIC GUM-VENDING MACHINE — FREE CHECKS WITH PURCHASES — INDUCEMENT TO REPLAY EACH CHECK FOR MORE CHECKS OR BLANK — WHETHER GAMING ESTABLISHED.

To constitute gaming the result must be uncertain, and a charge of gaming is not established where a slot machine from which chewing gum is sold automatically at the ordinary cost of 5 cents per packet dis-

tributes in addition free checks varying in number with each sale but indicated to the customer before he deposits his coin although these checks are redeemable elsewhere for goods or may, at the customer's option, be replayed in a section of the machine on the chance of more checks or a blank. [R. v. Fortier, 17 Can. Cr. Cas. 423, applied.]

R. v. Langlois, 23 Can. Cr. Cas. 43.

AUTOMATIC VENDING MACHINE — TRADE CHECKS.

The maintenance of an automatic vending machine so contrived as to issue in irregular and varying quantities at intervals of its operation certain tokens called "trade-checks" which could be replayed into the machine with the chance of gaining more trade-checks, will make the person in charge of the premises criminally responsible for permitting the place to be used as a common gaming house (Cr. Code ss. 228, 228a) if such trade-checks have a value by reason of their being exchangeable for goods and the occupant of the premises permits two persons to repeatedly operate the machine by way of gaming and knowing that they have arranged that the trade-checks received by both in return for the coins each of them has deposited shall go to the one receiving the larger number of trade-checks. [R. v. Stubbs (No. 2), 24 Can. Cr. Cas. 303, 25 D.L.R. 424, 9 A.L.R. 26, distinguished.]

R. v. Berry, 34 D.L.R. 573, 27 Can. Cr. Cas. 278, 11 A.L.R. 236, [1917] 1 W.W.R. 817.

AUTOMATIC MACHINE—ELEMENT OF CHANCE.

Despite the fact that an automatic gum-vending machine, into which coins are placed and from which gum and trading checks are obtained, indicates in advance of each operation precisely what will be obtained, it is a gambling device, because the operator speculates each time he works it on the combination for the succeeding operation which will result.

R. v. Gerasse, 29 D.L.R. 523, 26 Can. Cr. Cas. 246, 34 W.L.R. 965.

The court was equally divided upon the question whether an automatic vending machine which indicates in advance exactly what the receipts from each drawing will be is a "contrivance for unlawful gaming," within the meaning of the Cr. Code.

R. v. Smith, 30 D.L.R. 587, 26 Can. Cr. Cas. 398, 23 B.C.R. 197, [1917] 1 W.W.R. 553.

The term "gambling, wagering or betting machine" as used in Cr. Code, s. 235, par. (b) (Code Amendment of 1913) is not restricted by its context to apparatus for the recording of bets or wagers or pool selling; any "gambling machine" is within the prohibition of par. (b) as enacted by 3 Geo. V., Can., c. 13, s. 13, and this will include an automatic gum-vending machine so contrived as to entice patrons to gamble by holding out the chance of getting, along with the gum for a 5-cent coin, something worth much more under a process of chance drawing. Where an automatic gum-vending machine is worked so as to give the customer along with a package of chewing gum a blank or a varying number of disks or trade-checks available for being replayed into the machine, and the manifest object is to induce people to gamble by enticing them with the chance of getting something of much larger value than the coin deposited by repeated operations of the machine, it is none the less a gambling machine because each operation of it causes to be displayed the chance result which will follow the next deposit of either coin or disk.

Bareham v. The King, 31 D.L.R. 431, 26 Can. Cr. Cas. 211, 25 Que. K.B. 354.

GUM-VENDING MACHINE — PREMIUMS.

A person does not keep a common gaming house under Cr. Code, ss. 228, 986, because of the maintenance of a chewing gum vending machine with a varying premium feature automatically operated in connection therewith whereby the exact result of the next operation of the machine is indicated immediately following its last operation; the fact that the inducement is thereby held out that in some future play of the machine the operator may receive something more than an adequate return for his money, does not introduce the element of chance essential to constitute the crime.

R. v. Stubbs, 25 D.L.R. 424, 24 Can. Cr. Cas. 303, 9 A.L.R. 26, 8 W.W.R. 902, reversing 21 D.L.R. 541.

EFFECT OF LICENSE.

The fact that slot machines are licensed in Quebec Province, under the authority of the Act 5 Geo. V. 1915, c. 23 (Que.), has not the effect of making the use of them legal if operated for gambling prohibited by criminal law.

R. v. Bernier, 33 D.L.R. 640, 27 Can. Cr. Cas. 225, 22 Rev. Leg. 258.

SUNDAY OBSERVANCE — GAMBLING — PLAYING CARDS — C.S.U.C. c. 104, s. 3.

The unrepealed Lord's Day Act, C.S.U.C. c. 104, s. 3, in force in Ontario, makes it a criminal offence to be engaged in playing cards for money in a private place, on a Sunday.

The King v. Quick, 17 Can. Cr. Cas. 61.

VAGRANCY—GAMING—EVIDENCE.

R. v. Kolotyla, 17 W.L.R. 398.

GARAGE.

See Automobiles.

GARNISHMENT.

I. WHEN GARNISHMENT LIES.
A. In general, before recovery of judgment.
B. Against whom.
C. What subject to garnishment.
D. Situs of debts.
II. EFFECT: RIGHTS, DUTIES, AND LIABILITIES OF GARNISHEE.
A. In general.

B. Duty as to exemptions; effect of failure to set up.
C. Effect of judgment.
D. Effect of payment.
E. Priorities.
III. Procedure.

See also Attachment; Execution; Levy and Seizure.

I. When garnishment lies.

A. In general, before recovery of judgment.

(§ I A—1)—Action for broker's commission—Refusal of principal to complete sale.

A claim for a commission earned for finding a purchaser for land of which the owner refused to complete the sale, is a "debt" sufficient to permit a garnishment summons to issue in the action, notwithstanding alternative claims for damages being prevented from earning the commission, or for remuneration as on a quantum meruit for work done at the request of the defendant.

Van Ripper v. Bretall, 13 D.L.R. 352, 6 A.L.R. 145, 25 W.L.R. 162, 4 W.W.R. 1289.

Allegations—Agreement.

Where an agreement is to purchase an entire property and the statement of claim shews that the first payment was payable only on delivery of the transfer, no cause of action is shewn upon which a garnishee summons can be issued until the statement of claim alleges that a transfer had been delivered or tendered.

Goose Lake Grain Co. v. Wilson, 40 D.L.R. 271, 11 S.L.R. 163, [1918] 2 W.W.R. 311.

Method of executing.

Seizure by garnishment cannot have the effect of putting into the hands of the garnishee goods which the defendant possesses in his own name.

Robertson v. Guilbault, 54 Que. S.C. 343.

Power of registrar — "Company" — "Bank."

Section 20 of the Attachment of Debts Act (B.C.) does not take away the power which is expressly given to the district registrar to issue a garnishee order under s. 3 of said Act. A company is not a bank, nor is a bank a company.

Hogue v. Leitch, 22 B.C.R. 10.

Liquidated demand—Liquidated damages or penalty.

Upon a summary application to set aside a garnishee summons the question whether the sum of money agreed to be payable as "liquidated damages" was or was not in its essence a "penalty" should not be entered into.

International Supply Co. v. Black Diamond Oil Fields, 8 W.W.R. 475.

(§ I A—3)—Quebec practice.

A creditor is not entitled to the saisie-arrêt before judgment for the reason that the debtor had received a considerable sum from the tiers-saisi and had not paid his creditors including the plaintiff when the debtor proves that he paid the whole sum to his creditors and has a good defense to the plaintiff's claim which he intends to contest.

Bode v. Eddy, 14 Que. P.R. 255.

B. Against whom.

(§ I B—5)—The test as to the liability of a fund to be attached in garnishment proceedings under r. 911 (Ont. Con. rr. 1907), is the ability to serve the garnishee within Ontario or the ability to bring the case within Ont. Con. r. 162, if service cannot be made in Ontario.

McMulkin v. Traders Bank, 6 D.L.R. 184, 26 O.L.R. 1, 21 O.W.R. 640.

Although the liability of two defendants to the plaintiff is a joint one, a debt due to one of them only may be attached by garnishment.

Nohren v. Auten, 3 A.L.R. 310.

(§ I B—7)—Nonresident.

When a company tiers-saisie has its head office at Montreal, the fact that the defendant works for it in another province under control of one of its branches does not withdraw the company from the jurisdiction of this court. When it affects the salaries mentioned in pars. 11, 12 of art. 599 C.C.P., the seizure is declared tenante by the law itself; a motion to have it so declared is unnecessary and will be dismissed.

Brandies v. East, 13 Que. P.R. 183.

When it is proven, in an attachment before judgment, that the defendant, who is a labourer, has left the country, the garnishee may be ordered, by the judgment rendered on the saisie-arrêt itself, to pay not only the seizable portion of the defendant's salary, but the whole of it. No further proceedings are necessary.

Carter v. Belmont, 13 Que. P.R. 231.

(§ I B—9)—Against corporate directors—Assignment of debts.

Funds in a bank transferred by a company to its directors for the purpose of disbursements, and paid out by them accordingly, cannot be garnisheed against the directors, as a "debt due from the garnishee to the judgment debtor," except in so far as the transfer or assignment may be fraudulent.

Brown v. Fidelity Oil & Gas Co., 35 D.L.R. 750, 12 A.L.R. 367, [1917] 2 W.W.R. 951.

(§ I B—12)—Assignee—Creditors Trust Deeds Act.

An assignee for the benefit of creditors appointed under the provisions of the Creditors Trust Deeds Act (R.S.B.C., 1911, c. 13) is an officer of the court, and subject to the summary jurisdiction of the court; his duty is to distribute the money in his hands in a particular way, and no debt is created which can be the subject-matter of attachment against him as garnishee.

Hoyes v. Fraternal Order of Eagles, 39 D.L.R. 516, 24 B.C.R. 505, [1918] 1 W.W.R. 873.

C. WHAT SUBJECT TO GARNISHMENT.

Of insurance, assignment, see Insurance, IV A—161.

(§ I C—15)—It is not essential to the binding effect of a garnishing order that the debt to be attached should be one for which action could be brought at the date of the order. [MacPherson v. Tisdale, 11 P.R. (Ont.) 263, followed.]

Empire Sash & Door Co. v. McGreevy; C.P.R. Co. (garnishees), 8 D.L.R. 27, 22 Man. L.R. 676, 22 W.L.R. 372, 3 W.W.R. 129.

BANK DEPOSIT OF INDIAN LIVING ON RESERVE.

Money deposited to his own credit in a bank beyond the Indian reserve by an unenfranchised Indian living on a reserve, is subject to garnishment as personal property outside of the reserve and not within the prohibition of s. 102 of that Act as to liens or charges on nontaxable property of Indians.

Avery v. Cayuga, 13 D.L.R. 275, 28 O. L.R. 517.

OF TAXES DUE MUNICIPALITY—"DEBT."

Royal Bank v. Hodgson, 36 D.L.R. 799.

RENT—EFFECT OF ASSIGNMENT.

An attaching order does not bind prior assigned rent unless such assignment is proved to be invalid because made with intent to defeat, delay or hinder creditors or to give an unjust preference. [Barnett v. Eastman, 67 L.J.Q.B. 517, followed.]

Holliday v. Bank of Hamilton, 38 D.L.R. 128, 40 O.L.R. 203.

RENT DUE FROM GOVERNMENT.

Rent due from the government of Manitoba is subject to garnishment under s. 2 of the Garnishment Act, c. 77, R.S.M. 1913.

Elliott v. Forrester, [1918] 2 W.W.R. 220.

OF FUNDS IN BANK.

A bank cannot be garnisheed for an unascertained sum accruing due, and payable to it on behalf of a customer already indebted to the bank, when only the happening of certain contingencies will make the bank owe a portion of the money when paid to the customer.

Rat Portage Lumber Co. v. Harty, 39 D.L.R. 425, 40 O.L.R. 322, affirming 12 O. W.N. 211.

PENSION—TORONTO POLICE BENEFIT FUND—ACT RESPECTING BENEVOLENT, PROVIDENT AND OTHER SOCIETIES, R.S.O. 1897 C. 211, S. 12—ONTARIO COMPANIES ACT, 7 EDW. VII. C. 34—INSURANCE ACT, S. 33.

Bell v. Bell, 15 O.W.N. 24.

WORKMEN'S COMPENSATION—COSTS—ATTORNEY'S FEES.

The compensation granted by the Workmen's Compensation Act not being transferable or seizable, a garnishment by the attorneys of the employer, for their costs, will be set aside upon an inscription in law.

Manchuck v. Rubber Regenerating Co., 19 Que. P.R. 371.

ATTACHMENT OF DEBTS—MONEYS NOT YET PAYABLE.

All debts due and accruing due are attachable under garnishee proceedings. [McPherson Fruit Co. v. Hayden, 2 W.L.R. 427, followed.]

Nichols & Shepard Co. v. Gailing, 19 D. L.R. 899, 6 W.W.R. 1328, reversing 6 W.W. R. 1235.

ATTACHMENT AFTER JUDGMENT—FUNDS IN HANDS OF WIFE—C.P. 667, 3 GEO. V. C. 50—TAXATION OF GARNISHEE.

A woman ordered, by default, to pay to the creditors of her husband the [illegible]th of his valued salary, will not be allowed, eight months afterwards, to declare that she has no moneys belonging to her husband, nor will she be taxed on such declaration.

Couture v. Lagace, 16 Que. P.R. 210.

WAGES.

It is in the interests of justice that a broad and reasonable interpretation should be given to art. 685 C.C.P. as amended. It should apply not only to those employees who receive no wages, but to those who receive inadequate wages for their services.

Labrecque v. Moisan, 18 Que. P.R. 81.

BANK ACCOUNT—NAME.

A garnishee order was taken out in an action in which Henri Gautschi was defendant, and served on a bank in which one Gautschi Henri had an account. The bank notified Gautschi Henri that his account was garnisheed, and paid the amount of the account to their solicitors for payment into court. The solicitors advised the bank that they should not pay the money into court, and it was thereupon put back into the defendant's account, from which it was subsequently paid out. Henri Gautschi kept his account in the bank in the name of Gautschi Henri. Held, that on the facts the bank has concluded that Henri Gautschi and Gautschi Henri were one and the same person and is liable for the amount garnisheed.

Smith v. Gautschi, 23 B.C.R. 455, [1917] 2 W.W.R. 225, reversing decision of McInnes, Co. J.

CHEQUE DRAWN BY THIRD PERSON ON BANK IN FAVOUR OF JUDGMENT DEBTOR—POSSESSION OF JUDGMENT CREDITORS.

Re Davis and Korn, 4 O.W.N. 1308, 24 O.W.R. 612.

WHAT SUBJECT TO—JUDGMENT DEBT—ENTRY OF JUDGMENT STAYED.

Scully v. Madigan, 4 O.W.N. 981, 1003, 24 O.W.R. 251, 368.

SEIZURE BY GARNISHMENT—VALUATION OF BOARD AND LODGING—JURISDICTION—C. C.P., ART. 685.

Where a garnishee declares that the defendant is in his service, and that part of his salary consists of board and lodging

for himself and his family, the plaintiff may ask the court to ascertain the value of that portion of defendant's remuneration, and the court has jurisdiction, under art. 685, C.C.P., to determine the money value of the board and lodging.

Schnaufer v. Nurnberger, 56 Que. S.C. 277.

MONEY IN BANK.

Moneys in a bank standing to the credit of two persons and against which cheques may be drawn by either or both, cannot be attached by a third person, who is the creditor of one of such persons exclusively.

Runk v. Jackson, [1917] 1 W.W.R. 485.

(§ I C—16)—QUEBEC PRACTICE—DEBTOR HUSBAND WORKING FOR HIS WIFE WITHOUT WAGES.

Couture v. Legace, 20 D.L.R. 959.

(§ I C—17)—MONEY IN HANDS OF AGENT—DEBTS DUE TRUSTEES.

Mortgage money transferred by a bank, at the mortgagee's instructions, to the credit of his agent to be paid to the mortgagor as trustee for a corporation, is not in the possession of nor constitutes a debt due by the agent to the mortgagor in his own right; and a debt due to a person who is merely a trustee, and who has no personal interest therein, cannot be garnisheed by his creditors.

Bailey v. Imperial Bank, 27 D.L.R. 484, 9 A.L.R. 315, 34 W.L.R. 141, 10 W.W.R. 317, varying 33 W.L.R. 387.

(§ I C—18)—INSURANCE MONEY.

Under Manitoba K.B. rr. 759, 761, the claim of the assured under a policy of fire insurance which provided that the loss should not be payable until after 30 days after the completion of the proofs of loss, cannot be attached by garnishing order before completion of the proofs of loss. [Lake of the Woods Milling Co. v. Collin, 13 Man. L.R. 154, followed.]

Brookler v. Security National Ins. Co. 23 D.L.R. 595, 25 Man. L.R. 537, 31 W.L.R. 460, 8 W.W.R. 861.

INSURANCE MONEY.

Defendant conveyed to a trust company, in trust for bondholders, all rights accrued or thereafter to accrue to it. Held, that the conveyance covered a sum of money paid by an insurance company to its agent, and that the money in the hands of the agent was not subject to garnishee process at the instance of a judgment creditor of the defendant. Also that, as against an attaching creditor, the equitable title of the trust company was perfect without notice, and, therefore, there was no fund upon which the attachment could operate. The mere circumstances that insurers, doing business outside the jurisdiction of the court, send money to their agent within the jurisdiction with instructions to pay it to the defendant, imposes no liability on the part of the agent to the defendant, in the absence of assent on the part of the agent to pay the money in accordance with the instructions received. The plaintiff in such case is not within the provisions of Ord. 43, r. 1, and has no right to the money in question.

Terrell v. Port Hood Richmond R. etc. Co., 45 N.S.R. 360.

MONEYS PAYABLE UNDER FIRE INSURANCE POLICY—"DEBT"—ELECTION OF INSURERS TO PAY MONEY TO INSURED—PAYMENT INTO COURT—CLAIM OF ASSIGNEE OF INSURED.

Jobin Marrin Co. v. Tyne, 11 O.W.N. 279.

(§ I C—18b)—FUTURE EARNINGS.

Judgment creditors who have obtained a garnishee order attaching all debts due the debtor from a partnership firm of which the debtor is an employee and from which in addition to his wages he receives a percentage of profits under an agreement lawful under the Ontario Masters and Servants Act, 10 Edw. VII. c. 73, s. 3, which does not create any relation in the nature of a partnership, have no right to enter into an inquiry as to the organization of the garnishee's firm for the purpose of shewing that the judgment debtor is partner therein.

Bartlett v. Bartlett Mines, 3 D.L.R. 289, 3 O.W.N. 958.

FUTURE RENT, AS DEBT OWING OR ACCRUING DUE.

Town of Morse v. Lyone, 37 D.L.R. 600, 10 S.L.R. 357, [1917] 3 W.W.R. 351.

(§ I C—19)—OF "DEBTS, LIABILITIES, OBLIGATIONS"—DAMAGES.

A sum of money agreed upon in settlement of a claim for damages arising out of breach of contract and tort is within the category of "debts, obligations and liabilities, owing, payable or accruing due" within the meaning of the Attachment Act (R. S.B.C. 1911, c. 14, ss. 3, 4), and subject to garnishment.

Lanning v. Klinkhammer, 35 D.L.R. 611, 23 B.C.R. 84.

CLAIM FOR UNLIQUIDATED DAMAGES.

An action for breach of warranty of quantity upon a sale of goods is a "claim for damages" within the meaning of section 146 of the Division Courts Act, 10 Edw. VII. (Ont.) c. 32, and the plaintiff in such an action cannot garnish before judgment.

McCreary v. Brennan, 3 D.L.R. 318, 3 O. W.N. 1052.

UNLIQUIDATED DAMAGES.

Where a person has a claim for damages against another which the latter admits, but there is no agreement between them fixing the amount thereof, the claim is not an ascertained debt or liquidated amount and, therefore, cannot support a garnishee summons. [Waterloo Mfg. Co. v. Allan, 36 D. L.R. 596, followed.]

Macfarlane v. Owen, [1917] 3 W.W.R. 271.

"CLAIM AVAILABLE UNDER EQUITABLE EXECUTION."

The expression "such claims and demands as could be available under equitable execution," in s. 4 of the Attachment of Debts Act, refers only to ascertained debts. [Lake of the Woods Milling Co. v. Collins, 13 Man. L.R. 154, followed.] Therefore moneys which will be payable if the holder of an option decides to exercise it are not attachable.

Ryall v. Nelson, [1917] 3 W.W.R. 647.

(§ I C—20)—MONEY DUE CONTRACTOR—BUILDING CONTRACT.

Moneys earned by a contractor under contracts for the erection of buildings, and payable by instalments as the work progresses on certificates of the engineer employed by the proprietor, should be deemed to be "accruing due" and therefore attachable by a garnishing order at the suit of a creditor, (a) in the case of a completed contract, at the date of completion, (b) in the case of a contract abandoned by the contractor before completion and subsequently completed by the proprietor, at the date of the abandonment; provided that, in both cases, the engineer has subsequently given his certificates shewing that the amounts were payable to the contractor, and the garnishee has paid the moneys into court, unless it has been proved affirmatively that the certificate of the engineer was to be a condition precedent to the moneys becoming payable.

Empire Sash & Door Co. v. McGreevy, C.P.R. Co. (garnishees), 8 D.L.R. 27, 22 Man. L.R. 676, 22 W.L.R. 372, 3 W.W.R. 129.

(§ I C—21)—DAMAGES FOR PERSONAL INJURIES.

Damages granted as compensation for bodily harm are subject to seizure, unless they are adjudged by the court as allowance for maintenance.

Vézina v. Clavet, etc., Co., 49 Que. S.C. 118.

(§ I C—22)—UNASCERTAINED LEGACY.

The claim of a residuary legatee against the executors is not a debt "due or owing" from the executors attachable under Con. r. 911 (Ont. Con. R. 1897). [Deeks v. Strutt, 5 T.R. 690; Jones v. Tanner, 7 B. & C. 542, applied.]

Gilroy v. Conn, 2 D.L.R. 131, 3 O.W.N. 732, 21 O.W.R. 526.

(§ I C—23)—MONEY OF CLIENT IN SOLICITOR'S HANDS.

Where a creditor seizes in the hands of solicitors money alleged to be due and owing to his debtor and the solicitors declare that such debtor is their client and owes them more than they owe him, the seizing creditor can have no more rights than his debtor, and in order to have such seizure maintained must bring certain and conclusive proof that the garnishees are really indebted to his debtor.

Bernard v. Pelissier, 8 D.L.R. 545.

(§ I C—24)—JOINT PAYEE OF PROMISSORY NOTE.

A debt to be attachable under garnishment process must be a debt due to the judgment debtor alone, and where the debt is due to the judgment debtor jointly with another, it cannot be attached.

Lekas v. Zappas, 10 D.L.R. 646, 6 S.L.R. 197, 23 W.L.R. 560, 3 W.W.R. 1148.

D. SITUS OF DEBTS.

(§ I D—30)—WAGES—WINDING-UP ACT—JURISDICTION.

A garnishee order nisi issued by the Supreme Court of Ontario at the suit of the liquidator of an insolvent company, under the provisions of the Winding-up Act (R.S.C. 1906, c. 144), is no answer to a workman's claim for judgment under the Master and Servant Act (R.S.S. 1909, c. 149), for wages earned in Saskatchewan. (Discussion as to the extraterritorial jurisdiction of provincial courts under the Dominion Winding-up Act, upon which the court was equally divided.)

Henderson v. C.P.R. Co., 30 D.L.R. 62, 9 S.L.R. 62, 34 W.L.R. 1147, 10 W.W.R. 1281.

Moneys paid into court in Manitoba by the garnishees could not be affected by any legal proceedings in the courts of another province.

Empire Sash & Door Co. v. McGreevy; C.P.R. Co. (garnishees), 8 D.L.R. 27, 22 Man. L.R. 676, 22 W.L.R. 372, 3 W.W.R. 129.

RENTS.

Debts are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced. Rent accrued due for a house in Alberta is situate in Alberta.

Beveridge v. Potter, [1917] 1 W.W.R. 702.

(§ I D—31)—NONRESIDENT GARNISHEE—INSURANCE COMPANY—AGENT.

By virtue of O. XLIII., r. 1 (N.S.), a judgment creditor has no right to garnishee the funds of the judgment debtor in the hands of a garnishee not within the jurisdiction of the court; the fact that the garnishee, an insurance company, has an agent within the jurisdiction, or the garnishee's assent thereto, cannot change the result. [Ferrell v. Port Hood R. & Coal Co., 45 N.S.R. 360; Ranney v. Morrow, 3 Pugs. (N.B.) 270; Canada Cotton Co. v. Parmalee, 13 P.R. (Ont.) 308; Parker v. Odette, 16 P.R. (Ont.) 69; Boswell v. Piper, 17 P.R. (Ont.) 257, followed.]

Taylor v. Tucker, 26 D.L.R. 646, 49 N.S.R. 469.

GARNISHMENT—ACTION FOR UNLIQUIDATED DAMAGES.

Hart v. Dubrule, 20 Man. L.R. 234, 15 W.L.R. 602.

AFFIDAVIT SWORN BEFORE ISSUE OF WRIT—INFORMATION AND BELIEF.

Stewart v. Ross, 3 S.L.R. 401, 15 W.L.R. 425.

ASSIGNMENT OF DEBTOR BEFORE JUDGMENT, OBTAINED—GARNISHEE PROCEEDINGS.

Williamson v. Woolliams, 16 B.C.R. 346.

AFTER JUDGMENT—WRIT NOT RETURNED.

If a writ of attachment after judgment is not returned into court, the garnishee cannot ask by motion "main levée" of said garnishment.

Cham Mou Yiu v. Hum Jack, 12 Que. P.R. 204.

II. Effect; rights, duties, and liabilities of garnishee.

A. IN GENERAL.

(§ II A—35)—OF FUNDS IN BANK—EFFECT AND VALIDITY OF ASSIGNMENT THEREOF BY JUDGMENT DEBTOR—TRUST.

Bank of Hamilton v. Black, 37 D.L.R. 801, 24 B.C.R. 394, [1917] 3 W.W.R. 909.

EFFECT OF SERVICE—DEBTOR'S RIGHTS AND LIABILITIES, HOW LIMITED.

The effect of the service of a garnishee summons is merely to stop or bind the debt, that is, to prevent the person who owes it, or the defendant, from dealing with it in any way so as to prejudice the rights of the attaching creditor, but subject to these rights being secure the defendant may deal with the debt as he chooses.

Stacey Lumber Co. v. Cazier, 17 D.L.R. 823, 8 A.L.R. 59, 28 W.L.R. 945, 6 W.W.R. 1382.

EFFECT OF ASSIGNMENT.

The assignment of a debt sought by garnishment prior to the taking out of the garnishee order, and without notice thereof, is in itself ground for setting aside the garnishee order, though no notice of the assignment had been given.

Taylor v. Tucker, 26 D.L.R. 646, 49 N.S. R. 469.

DEBTS—ASSIGNMENT TO BANK—SECURITY.

H., a customer of a bank, had contracts with a railway company, by which he was to cut and deliver to the company, by May, 1916, certain piling, for which he was to be paid a specified price per foot. In July he assigned to the bank, as security for all his existing or future indebtedness to the bank, all the moneys due or that might become due to him from the railway company under the contracts. The plaintiffs, who had a judgment against H. and execution in the sheriff's hands, obtained, in December, an order attaching all debts owing or accruing due from the railway company and the bank to H., and served the order on both garnishees:—Held that an application for payment to the judgment creditors of an unascertained sum said to be due by the bank to H. was properly dismissed. When the bank received payment from the railway company, the bank did not in any sense receive money belonging to the plaintiffs or money impressed with any trust in favour of the plaintiffs—the attaching order does not transfer the garnishor any property in the debt attached; the bank were not liable by reason of their taking the money from the railway company with knowledge that it had been attached in the hands of the railway company.

Rat Portage Lumber Co. v. Harty, 39 D.L.R. 425, 40 O.L.R. 322.

DISPUTE NOTE—DISCHARGE.

A garnishee, upon filing a dispute note as to his liability, may apply, under s. 15 of the Attachment of Debts Act, for the discharge of the garnishee order, and for his costs.

Chew Deb v. Davie, 24 B.C.R. 18.

ATTACHMENT OF DEBTS—GARNISHEE DISPUTING LIABILITY—ORDER DIRECTING TRIAL OF ISSUE—APPEAL.

Bank of Montreal v. McAlpine, 8 O.W.N. 402.

DECLARATION OF GARNISHEE—ABSENT CREDITOR.

A seizing creditor, who is absent at the time of the declaration of the garnishee, will not be allowed to compel the garnishee to appear again and produce his books, statements and documents, when the declaration is clear and exact.

Bastien v. Davis, 20 Que. P.R. 213.

WAGES—RETENTION.

An employer, who permits an employee whose wages have been seized to pay himself from the moneys he collected and so frustrates the one who attached them, will, if he does not deposit the seizable portion of the wages earned by the debtor since the seizure, be condemned as a personal debtor of the seizing creditor.

Garand v. Kastner, 20 Que. P.R. 268.

RIGHT OF RETENTION—LIEN.

A garnishee has a right of retention on the effects of the debtor which he has in his possession and on which he has a lien. Such right of retention may be opposed to third parties. A garnishee having a right of retention may contest the garnishment made in his hands, but if he does not contest it he may retain the effects given as security until he is disinterested.

Gingras v. Maher, 53 Que. S.C. 289.

DISCHARGE OF GARNISHEE—DEFAULT.

A garnishee has the right, on the day following the date on which the writ of garnishment should have been returned, to ask to be discharged of the writ by default.

Ballantyne v. Currie, 19 Que. P.R. 141.

WIFE AS GARNISHEE—AUTHORIZATION.

If a wife separate as to property is summoned as garnishee, her husband must be summoned to authorize her. A married woman cannot, on her default of appearing, be condemned as personal debtor in a summons of garnishment issued against her husband; but the creditors must produce evidence of the husband's claim against his wife.

Appleton v. Reynolds, 20 Que. P.R. 28.

DURATION.

An attachment by garnishment remains in force as long as it has not been declared perempted, or that the debtor or the gar-

nishee has not been discharged. It is not necessary to have the seizure declared binding. Such procedure is only required to prevent the peremption.

Shorey v. Dolloff & Manuf. Life Ass'ce Co., 25 Que. K.B. 482; 22 Rev. Leg. 7.

B. Duty as to exemptions; effect of failure to set up.

(§ II B—40)—Setting aside summons—Exemptions—Pendency of main action.

St. Gregor Mercantile Co. v. Roth, 12 D.L.R. 860, 24 W.L.R. 865.

C. Effect of judgment.

(§ II C—45)—Transfer of judgment—Renunciation—Service.

A transfer of a judgment, or a written renunciation to the judgment, made by one plaintiff in favour of his coplaintiffs, cannot be set up against a garnishment after judgment issued by another creditor, if such transfer or renunciation has not been served either on the seizing party or on the garnishee.

Paquette v. Labelle, 24 Rev. Leg. 501.

D. Effect of payment.

(§ II D—50)—Payment into court—Distribution under Creditor's Relief Act.

Money paid into the Supreme Court under a garnishee summons and ordered to be paid out under the Rules of Court is not subject to the orders of a Judge of the District Court to pay the money to the sheriff under the Creditors' Relief Act (Sask.).

Royal Bank v. Lee, 23 D.L.R. 219, 8 S.L.R. 17, 8 W.W.R. 338, affirming 23 D.L.R. 216.

Payment into court by garnishee—Defence of—Rights of unpaid vendor of goods—Disposition as to costs.

Saskatoon Hardware Co. v. Priel, 22 D.L.R. 911, 32 W.L.R. 1.

Discharge of garnishee—Jurisdiction.

Upon obtaining judgment the plaintiffs garnisheed certain debtors of the defendants. The defendants appealed from the judgment and obtained an order staying execution, pending the appeal, on condition that they pay into court $600,000 to be disposed of by the registrar in accordance with the result of the appeal. The defendants deposited with the registrar a marked cheque for $600,000, and moved for an order to discharge the garnishee order, which was granted. Held, on appeal that the order discharging the garnishee order was made without jurisdiction and must be set aside.

Mellwee v. Foley, 24 B.C.R. 1.

Debts — Payment into court by garnishee—Payment out to sheriff for distribution—Creditors Relief Act, R.S.O. 1914, c. 81, s. 5 (2)—Rule 594—Form 79—Practice.

Imperial Bank v. Boyd, 14 O.W.N. 240.

Garnishee execution after judgment—Note — Bail — Security — S. ree., [1906] c. 119, art. 156.

If a note is given by a debtor to his creditor in settlement of certain accounts, and the note is not paid at maturity, the creditor, before attaching property in the hands of a third party, must offer to return the note or furnish security that the debtor will not be molested.

Blais v. Valin, 25 Rev. Leg. 31.

(§ II D—51)—Garnishee—Effect of garnishment—Default in not depositing amount—Contrainte par corps not available.

Arrest by process of contrainte par corps is not available against a garnishee in respect of his default in depositing under the court's order the seizable portion of the debtor's salary due from him; the effect of the garnishment is only to transfer a debt to the plaintiff, and it is enforceable only as an order to pay money.

Bell Telephone Co. v. O'Dell, 20 D.L.R. 514.

E. Priorities.

(§ II E—55)—Priorities—Precedence of winding-up order against debtor corporation.

Swift Canadian Co. v. Island Creamery Assn., 10 D.L.R. 833, 17 B.C.R. 475.

Attaching creditor claiming lien on fund—Priorities.

The fact that the party claiming a lien on a fund paid into court by the garnishees in garnishee process was the execution creditor at whose instance and suit the garnishment process was served will not deprive him from claiming priority over other creditors in respect of his statutory lien on the fund when the rights of all claimants and creditors come to be adjudicated upon.

Pomerleau v. Thompson, 16 D.L.R. 142, 5 W.W.R. 1360, 27 W.L.R. 254.

Execution debtor — Money paid into court—Garnishors — Lien-holders—Assignees — Priorities — Creditors' Relief Act, R.S.S. c. 63, s. 8—Rules of Court, 514 and 515.

Money paid into court and belonging to an execution debtor should not be paid over to the sheriff until the priorities of garnishors, lien-holders, and assignees have been determined.

Mills v. Harris, 7 W.W.R. 968.

Priority of first attaching creditor—Creditors' Relief Act.

The right of a judgment creditor to an order for payment into court by a garnishee and payment out to himself after having served an attaching order on the garnishee is not affected by attaching orders subsequently served on the garnishee. [Ward v. Wilson, 13 B.C.R. 273, not followed.]

Slinger v. Davis, 20 B.C.R. 447.

ATTACHMENT OF DEBTS — CLAIM ARISING AFTER SERVICE OF ATTACHING ORDER.

Black v. Hohlstens, 9 O.W.N. 5.

SALARY—DEPOSIT IN COURT—SUBSEQUENT ATTACHMENT.

The voluntary execution of a judgment by a defendant who complies with the provisions of art. 1147 (a), C.C.P. renders him exempt from any further seizure upon his wages, whether the attachment issues from the Circuit Court or from any other tribunal.

Paquet v. Saint-Laurent, 53 Que. S.C. 32.

MONEY EARNED BY THRESHING — ASSIGNMENT—FARM IMPLEMENTS ACT.

Section 19 of the Farm Implement Act, c. 28, 1915, is not restrospective. Therefore, an assignment before the passing of the act of moneys to be earned by a threshing machine is good as against an attachment under a garnishee summons after the date of the enactment of money owing to the purchaser.

Canadian Bank of Commerce v. Nelson; J. I. Case Threshing Machine Co., claimant, [1917] 3 W.W.R. 190.

(§ II E—56)—DISTRIBUTION OF FUND PARI PASSU — CREDITORS' RELIEF ACT (ALTA.)

Where garnishment proceedings against the same fund are instituted by different attaching creditors and the fund which was thereupon paid into court by the garnishee under the Judicature Rules (Alta.) has been paid out to the sheriff pursuant to the Creditors' Relief Act (Alta.), the sheriff is to pay out on his first distribution to those only who have obtained judgment, but computing the distributive share on a collocation of all the claims upon which garnishee process had issued, including the pending claims as to which judgment had not yet been obtained against the debtor, and is to retain the distributive share in respect of the latter until after judgment thereon; and, in the event of an attaching creditor not succeeding in proving his debt and by reason thereof a surplus remains in the sheriff's hands, a second distribution is then to be made.

Canniff v. Chandler; Sargent v. Chandler, 15 D.L.R. 909, 7 A.L.R. 355, 27 W.L.R. 145, 5 W.W.R. 1357.

SAISIE-ARRÊT AFTER JUDGMENT—MOTION TO DISMISS.

Mace v. Tibbs, 12 Que. P.R. 192.

III. Procedure.

(§ III—60)—SETTING ASIDE—IRREGULARITY—DETERMINATION OF ISSUE.

Under the Alberta practice rules, the right to have a garnishee summons set aside or dismissed, by a garnishee who has filed his answer denying the debt, for a delay in prosecution, is within the court's discretion; it cannot be set aside for an irregularity; but an order should be made for the speedy determination of the issue either by fixing a time and place for deciding it summarily, or by directing a formal issue to be tried.

Calgary Brewing & Malting Co. v. McManus Liquor Co., 35 D.L.R. 508, 11 A.L.R. 424, [1917] 2 W.W.R. 1005.

Where judgment creditors have obtained a garnishee order attaching all debts due the debtor from a partnership firm of which the debtor is an employee and from which in addition to his wages he receives a percentage of profits under an agreement lawful under the Ontario Masters and Servants Act, 10 Edw. VII. c. 73, s. 3, which statute further provides that such agreement shall give to the employee no right to examine into the accounts of or interfere in the management of the business and that any statement of the employer of the net profits of the business on which he declares and appropriates a share of profits payable under such agreement shall be final and conclusive between the parties and all persons claiming under them except in the case of fraud, such creditors have no right to go into the books of the firm and its business transaction with a view of establishing that there were greater earnings than the amount shewn by the statements exhibited by the garnishees and that there ought to have been more carried to the credit of the debtor as his share of the profits.

Bartlett v. Bartlett Mines, 3 D.L.R. 289, 3 O.W.N. 958.

STEP IN THE ACTION—SMALL DEBT PROCEEDURE—JURISDICTION AS TO COSTS OR COUNSEL FEES.

Great West Life Ass'ce v. Whitchelow, 8 D.L.R. 1033.

There is nothing in the Alberta rules requiring a præcipe for a garnishee summons.

Nohren v. Auten, 3 A.L.R. 310.

DECLARATION — ADDITIONAL QUESTIONS — REFUSAL TO ANSWER—RULE NISI—EVIDENCE OF WIFE AGAINST HUSBAND — QUE. C.P. 314, 685, 834.

One cannot ask for the rejection of the declaration of a garnishee who refuses to answer additional questions put to her at the time of her declaration; the recourse is to obtain an order of the court compelling her to answer. When such an order has been given to the garnishee, wife of the defendant, to answer certain additional questions, she may not, in contesting the rule issued to have her declared guilty of contempt of court because she has not obeyed such order, allege that she cannot be compelled to give evidence against her husband; the interlocutory order to answer which was previously given cannot be changed otherwise than by the final judgment or on a subsequent appeal. If the garnishee objects that the order given is not res judicata because, being just an ordinary witness, she was not a party to the case and could not appeal from such a decision, then the court, having either to deprive her from protecting herself against the order issued, or to revise a judgment without jurisdiction,

should adopt the easier solution and maintain the judgment, and thereby give her the power to appeal from the two judgments at the same time, seeing that she is regularly a party to the case under the rule.

Cole v. Birchenough, 46 Que. S.C. 414.

LACOMBE LAW—DEPOSIT—AWARD OF COSTS.

A defendant who has taken advantage of art. 1147a, C.C.P. (Lacombe Act), has not the right to make only one deposit at the office of the clerk of the Circuit Court and then to continue depositing directly with his employer; if he does so, his other creditors may issue against him a writ of saisie arrêt. The fact that a creditor has caused such writ to be issued for an amount greater than that due him, does not render the seizure void, the only right the debtor has is to contest the seizure and obtain a reduction to the amount actually due. Although such seizure included costs due to attorneys ad litem, the latter have the right to sue in the plaintiff's name.

Ouimet v. Fleury, 24 Rev. Leg. 254.

The provisions of the Lacombe Act, art. 1147, C.C.P., cannot be opposed to a saisie arrêt, when the debtor made his deposits irregularly, e. g., when earning $120 to $140 a month he deposited only from $10 to $15 a month.

Giroux v. Martin, 24 Rev. Leg. 195.

(§ III—61)—AFFIDAVIT—DEFECT.

When an affidavit for a garnishee summons does not comply with r. 648 (Alta.), there is no jurisdiction to issue the summons; it is not a defect which can be cured under r. 273. [Mohr v. Parks, 3 A.L.R. 252, followed.]

Beaubier v. Lloyd, 39 D.L.R. 439, 13 A.L.R. 17, [1918] 1 W.W.R. 772.

DEFECTIVE AFFIDAVIT.

The omission in an affidavit for a garnishee summons before judgment under the Sask. Rules of Court to shew in what capacity whether as plaintiff, solicitor or agent for the plaintiff, the deponent makes his affidavit, is a ground for setting aside a garnishee summons issued thereon; the summons was a nullity as there was no proper affidavit and the defect in the latter was not a mere irregularity.

McGillivray v. Beamish, 23 D.L.R. 324, 8 S.L.R. 9, 7 W.W.R. 1188.

It is essential that the affidavit for a garnishee summons under Sask. R. 505 should comply strictly with the rule so that it may appear whether the action is for a debt or liquidated demand so as to warrant the issue of the summons. [Mohr v. Parks, 15 W. L.R. 250, followed.]

Clokey v. Huffman, 1 D.L.R. 679, 5 S. L.R. 127, 1 W.W.R. 1093.

AFFIDAVIT.

It is not material whether the affidavit, upon which a garnishing summons is issued, when made before the action is commenced, is or is not entitled in the cause about to be commenced. An affidavit required to be filed under Sask. Rules (1911) as a basis for the issue of a garnishing summons before judgment is not an affidavit for use on an interlocutory motion, and therefore does not require to have set out therein the grounds of belief but may be made on information and belief simply. [Nohren v. Auten, 15 W.L.R. 417; r. 505 of Sask. Jud. R. (1911), former Jud. Ord. R. 384, applied.] Held (following Marcy v. Pierce, 4 Terr. L.R. 186), the affidavit to lead to the issue of a garnishee summons may be sworn before the actual issue of the writ of summons in the action. That the rule providing as to the matters to be sworn to in such affidavit requires only that the deponent swear to the best of his information and belief as to the garnishee's indebtedness. An affidavit so framed is sufficient and need not shew the grounds of such information and belief.

Stewart & Matthews Co. v. Ross, 7 D. L.R. 378, 4 S.L.R. 469.

Rule 384, (Alta.) providing that a garnishee summons "may be issued by the clerk upon the plaintiff or judgment creditor, his advocate or agent filing an affidavit," must be construed as meaning upon the "plaintiff, his advocate or agent filing his affidavit," and a garnishee summons is irregular which is issued upon an affidavit made by a student-at-law with the plaintiff's solicitors. Where an affidavit for a garnishee summons does not comply with r. 384, there is no jurisdiction to issue the summons; and it is, therefore not a case of a defect which can be cured under r. 538. Semble, an affidavit for a garnishee summons which is not intituled as required by r. 294, may be cured under r. 538. On a motion to set aside a garnishee summons, where the affidavit for the summons is not one which gives the clerk jurisdiction to issue the summons, it is doubtful whether r. 540 (which requires the party moving to set aside proceedings for irregularity to set out his objections) has any application; at any event, r. 540 is within the terms of r. 538, and, if no prejudice has been caused by the failure to comply with r. 540, the motion to set aside should not be defeated thereby.

Mohr v. Parks, etc., Mfg. Co., 3 A.L.R. 252.

Rule 384 (Alta.), which requires the affidavit for a garnishee summons to shew the nature and amount of the claim, and the deponent to swear positively to the indebtedness and state to the best of his information and belief that the proposed garnishee is indebted to the defendant, is complied with by an affidavit in which the deponent, after swearing that he has a full and personal knowledge of the matters deposed to, states that the defendants and each of them are justly and truly indebted to the plaintiff in the sum of $2,080, being the amount due to the plaintiff for principal money and interest on a chattel mortgage, and that he is informed and verily believes that each of the proposed garnishees (who are named) is justly and truly in-

debted to the defendant (naming him) and that each is within the jurisdiction of the court.

Nohren v. Auten, 3 A.L.R. 310.

An affidavit upon which a general attaching order was obtained alleged an indebtedness by "The Prince Edward Island Agricultural Mutual Fire Ins. Co.," while the debt was actually owing by a corporate body styled "The Prince Edward Island Mutual Fire Ins. Co.:"—Held, that the affidavit sufficiently complied with the requirements of the Garnishments Act (44 Vict. (P.E.I.) c. 4), and that a general attaching order obtained thereon was valid and effectual to bind moneys attached thereunder in priority to a later attaching order.

Re Brace McKay & Co. and Prince Edward Island Mutual Fire Ins. Co., 12 E.L.R. 83.

If the affidavit refers to an account, that account must be served upon the defendant and annexed to the affidavit at the time it is filed.

Arnold v. Canadian Motors, 14 Que. P.R. 394.

CAPIAS—AFFIDAVIT FOR—PLACE OF DEBT.

The affidavit for capias is void unless it mentions when and where the claimed debt was contracted.

Weiss v. Wolff, 16 Que. P.R. 113.

STATUTORY DECLARATION — AFFIDAVIT OF MANAGER.

The affidavit of the manager of a company tiers-saisi, taken by a commissioner of the Superior Court, is not the declaration provided for by C.C.P. If the declaration of the tiers-saisi mentions subsequent writs of seizure there is ground for believing that the defendant is insolvent and for refusing to give judgment for the first seizing creditor for the whole of the sum due from the debtor.

National Bridge Co. v. Armstrong & Lytle Co., 18 Que. P.R. 399.

STOP ORDER—AFFIDAVIT SHEWING NATURE OF CLAIM—GENERAL CREDITOR.

An ordinary creditor, i.e., one not having any "title" to money paid into court under a garnishee summons, cannot apply under r. 646 (Alta.) for a stop order. An affidavit in support of a garnishee summons must shew the nature of the claim. The omission to do so is more than an irregularity capable of being cured under r. 273.

Smith v. Metzer, 7 W.W.R. 1386.

CONTENTS OF AFFIDAVIT — ENDORSEMENT — STATING NATURE OF EMPLOYMENT — AMENDMENT.

The omission to endorse on an affidavit leading to the issue of a garnishee summons a statement shewing on whose behalf it is filed is a mere irregularity curable by amendment. The requirement that the capacity in which defendant is employed must be stated in the affidavit is for the benefit of the garnishee-employer, and the omission of the statement cannot be complained of by the defendant.

Hart v. Greer, 9 W.W.R. 709, 33 W.L.R. 41.

PRACTICE—RULE 648—AFFIDAVIT TO SHOW THE NATURE OF THE CLAIM—REFERENCE TO STATEMENT OF CLAIM—INSUFFICIENCY OF AFFIDAVIT—STRICT COMPLIANCE WITH RULE NECESSARY — NONCOMPLIANCE FATAL.

The statement in the affidavit filed for the issue of a garnishee summons that "the defendant herein is justly and truly indebted to the plaintiff in the sum of $2,474.37 as shown by the statement of claim filed" is not sufficient to show the nature of the claim. Strict compliance with r. 648 (Alta.) is necessary and noncompliance is more than an irregularity; it is something which goes to the jurisdiction of the court to issue the summons.

Geffen v. Lavin, [1919] 2 W.W.R. 491.

PRACTICE.

Under r. 622 (B.C.) a garnishee order may issue although plaintiff's claim is to recover a specific sum for damages for breach of contract for delivery of goods, such claim coming within the term, "debt, claim or demand," in said section.

Wheeler v. McLean, [1919] 3 W.W.R. 310.

AFFIDAVIT FOR GARNISHEE SUMMONS — "GROUNDS" OF INFORMATION AND BELIEF AS TO INDEBTEDNESS.

The requirement of r. 648 (b) (Alta.) that an affidavit upon which a garnishee summons is founded must give the grounds of the deponent's information and belief as to the indebtedness of the proposed garnishee to the defendant is only for the purpose of disclosing that he really has some information on the subject and thus shewing that his oath has some foundation; the grounds need not be sufficient to shew the existence of an indebtedness. The statement that such grounds are that the defendant has a bank account with or that he transacts his banking business or a part of it with, the proposed garnishee, is sufficient for the purposes of the rule.

Gandara v. Davison, [1919] 3 W.W.R. 915.

(§ III—63)—SERVICE OF ORDER.

Though there is nothing in Order XLIII. (N.S.), which requires the service of a garnishment order on the judgment debtor, the preferable practice, in order to prevent difficulties and questions arising from want of notice, is to serve such order on him. [Ferguson v. Carman, 26 U.C.Q.B. 26, followed.]

Taylor v. Tucker, 26 D.L.R. 646, 49 N.S.R. 469.

Where summons is issued for payment out of moneys in court under a garnishee order, returnable on a certain date, but service of the garnishee order and summons is not effected on the defendant until after that date (the hearing in the meantime having been adjourned pending the return of serv-

ice) and after the return of the service an order for payment out is made at an adjourned hearing in the defendant's absence. Held, on appeal, that as the order was made without proper notice to the defendant of the date upon which the application was to be heard it must be set aside.

Patton v. Hartley, 24 B.C.R. 5.

PAYMENT.

Art. 685 C.C.P., as to garnishment, ceases to have application if the debtor receives from the tiers-saisie any remuneration whatsoever directly or indirectly for his services or his work. A motion to have the seizable portion of the salary of the defendant fixed should be served on the tiers-saisi as well as on the defendant.

Martineau v. De la Durantaye, 18 Que. P.R. 397.

The garnishee order required by s. 12 of the P.E.I. Garnishment Act may be validly served on the primary debtor while he is outside the jurisdiction of the court. [Creditis Gerundense v. Van Weede, 12 Q.B.D. 171, applied.]

Davidson v. Wilkinson, 12 E.L.R. 412.

(§ III — 66) — NONAPPEARANCE OF GARNISHEE—PRESUMPTIONS AS TO LIABILITY.

Where a garnishee fails to appear to a garnishee summons under the Saskatchewan practice, his failure raises against him and in favour of the creditor the presumption that he owes the debtor the amount of the claim sued for, but such failure cannot be considered an admission of liability as against any one except the creditor in the particular case in which he failed to appear.

Shierman v. Harris, 22 D.L.R. 694, 8 S.L.R. 165, 8 W.W.R. 514.

GARNISHEE NOT APPEARING—ADMISSION.

Where a garnishee does not appear to a garnishee summons under the procedure in force for Saskatchewan District Courts, his default should be taken as an admission that he owes the defendant an amount equal to the plaintiff's claim.

Dickson v. Van Hummell, 16 D.L.R. 774, 7 S.L.R. 88, 27 W.L.R. 642, 6 W.W.R. 307.

PROCEDURE—APPEARANCE BY GARNISHEE—ISSUE AS TO GARNISHEE'S INDEBTEDNESS.

Where the garnishee enters an appearance to the garnishee summons and besides denying the debt alleges in the appearance that the unpaid purchase money under his contract to purchase lands did not constitute an attachable debt as the sale had not been completed nor title accepted, it is not competent for the judgment creditor to take out a summons to shew cause why the garnishee's appearance should not be struck out and judgment entered against him on the ground that the debt is attachable; the creditor's proper procedure is under Alta. r. 654 to apply for an order fixing a time and place for summary trial or directing an issue.

Waters v. Campbell, 19 D.L.R. 772, 7 A.L.R. 398, 29 W.L.R. 721, 7 W.W.R. 254.

(§ III—68)—LIQUIDATED DEMAND—AGREEMENT FOR AMOUNT OF DAMAGES FOR INJURIES TO ANIMALS—SUFFICIENCY OF PLEADING.

Lloyd v. Ashdown, 22 D.L.R. 919, 8 S.L.R. 217, 32 W.L.R. 11.

FINDINGS—DEFINITE SUM.

Before an order for payment can be made in garnishment proceedings under Ont. Con. rr. 911, 915, the court must find some definite sum either as presently due, when it is to be paid forthwith, or as a debt payable at a future date.

Gilroy v. Conn, 2 D.L.R. 131, 3 O.W.N. 732, 21 O.W.R. 526.

TRIAL OF A GARNISHEE ISSUE—ASSIGNMENT OF LAND CONTRACT—RIGHTS OF JUDGMENT CREDITORS—PAYMENT OF CLAIM OF ASSIGNEE—RIGHT TO ATTACH SURPLUS.

Bank of Montreal v. Rogers, 7 D.L.R. 778, 2 W.W.R. 128.

(§ III—69)—AFTER JUDGMENT — DEBTOR WORKING FOR WIFE WITHOUT SALARY—VALUE OF SERVICES — EVIDENCE OF — QUE. C.P. 685.

When the defendant's wife declares, upon garnishment, that her husband works for her as a clerk in her restaurant, and that she does not pay him any salary, the plaintiff can bring proof of the value of the defendant's services for work.

Beauregard v. Beauregard, 15 Que. P.R. 430.

GARNISHEE SUMMONS — AFFIDAVIT SWORN BEFORE ACTION BEGUN — INFORMATION AND BELIEF—GROUNDS OF BELIEF.

Stewart and Matthews Co. v. Ross, 17 W.L.R. 179.

GAS.

I. IN GENERAL.

II. INJURIES FROM, NEGLIGENCE AS TO.

Negligence in general, see Negligence.

Gas leases, see Mines and Minerals.

As to contracts to furnish gas, see Contracts, II D—137.

As to municipal franchises, see Municipal Corporations, II F—174.

I. In general.

(§ I—1)—STATUTORY REGULATION — PUBLIC HEALTH OR SAFETY.

The statutory provision that a gas company shall locate and construct its gas works and all apparatus and appurtenances thereto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety intends to provide that the works shall be so located and constructed that no danger to the health or safety of the individuals making up the general mass known as the public shall ensue either dur-

ing the location, construction or operation of the works. [Midwood v. Manchester, [1905] 2 K.B. 579, and Charing Cross v. London Hydraulic, [1913] 3 K.B. 442, applied.]

Raffan v. Canadian Western Natural Gas, etc., Co., 8 W.W.R. 676.

(§ I—3)—Waste — Fraudulent use — Claim for gas supplied by company to customers of another company —Failure of proof.

United Gas Cos. v. Forks Road Gas Co., 2 D.L.R. 895, 3 O.W.N. 1079.

Conveyance of natural gas leases and wells — Reservation — Breach of contract—Damages.

Erie County Natural Gas & Fuel Co. v. Carroll, [1911] A.C. 105.

Fraudulent use of gas.

Where the wife being in charge of her husband's house fraudulently connects the gas stove with the gas company's service pipe without getting a meter installed and without the permission of the company, and uses the gas for cooking, the husband having profited by the offence committed by his wife is estopped from repudiating liability for the consequences of her act, and is liable for the statutory penalty.

Montreal Light, Heat & Power Co. v. Dechevigny, 40 Que. P.R. 233.

II. Injuries from, negligence as to.

(§ II—15)—Conduits — Duty of care —Negligence.

The right of the Provincial Hydro-Electric Department to lay pipes and conduits in public streets is subject to a continuing duty not to disturb the existing pipes and works of others who have similar rights; the latter are entitled to recover from a contractor of the department damages caused through his breach of such duty, but they cannot recover for losses which, by the exercise of reasonable care, they might have avoided.

Hamilton Gas & Light Co. v. Gest, 31 D.L.R. 515, 37 O.L.R. 132.

(§ II—16)—Escape of—Liability.

The owner of a gas works in connection with which gas pipes are laid under city streets is not liable for the escape of gas without his knowledge through the breaking of a street gas pipe by a third party not under his control, the consequence of whose act the defendant could not reasonably have anticipated.

Tidy v. Cunningham, 22 D.L.R. 151, 21 B.C.R. 53, 30 W.L.R. 547, 7 W.W.R. 1205.

Negligence as to escape of gas.

By application of the principle of the provisions of art. 1054 C.C. (Que.) that every person is responsible for injury caused by things which he has under his care, an action lies against a gas company to recover compensation for injury resulting from the escape of gas in a dwelling house owing to the defective condition of the pipes.

Van Telson v. Quebec Ry., Light, Heat & Power Co., 43 Que. S.C. 420.

(§ II—18)—Negligence — Explosion of escaped gas.

In an action against a natural gas company setting up personal injury from the escape and explosion of piped natural gas, the onus rests on the plaintiff to shew the cause of the injury and not a mere conjecture, and where the gas leak causing the explosion is not shewn to be attributable to any defect in the construction or laying of the pipes, nor to inefficiency in the system of operation or of inspection, and it is proved that there were probable causes unconnected with the possibility of negligence on the company's part the plaintiff must establish that the escape of gas was due to the company's negligence.

Karabelas v. Canadian Western Natural Gas Co., 16 D.L.R. 791, 28 W.L.R. 669.

GASOLINE.

Gasoline engine.

The seller of a gasoline engine is liable for injuries sustained by the purchaser as the result of the emission of dangerous fumes from the exhaust of the engine, which was installed by the former in a small building without conveying the exhaust pipe to the open air, the necessity of which must have been known to the seller, who did not warn the purchaser of the danger therefrom, notwithstanding it was explained in a book of instructions sent with the engine, which, however, the purchaser had not noticed or read. [Clarke v. Army & Navy Co-operative Society, [1903] 1 K.B. 155, followed.]

Tollington v. Jones, 4 D.L.R. 648, 4 A.L.R. 344, 21 W.L.R. 168, 2 W.W.R. 141.

GIFT.

I. In general.
II. Causa mortis.
III. Delivery.

See also Trusts; Wills.

Presumption as to undue influence, see Deeds, II F—65.

As affected by power of attorney, see Trusts, I D—24.

As to voidable gift, see also Infants, I D —20-32.

Annotation.

Necessity for delivery and acceptance of chattel: 1 D.L.R. 306.

I. In general.

(§ I—1)—Voluntary act — Attendant circumstances.

In order to establish a gift from a very old person when on a sick bed, of a large sum of money, which would leave the donor in improvident circumstances, it must be clearly shewn not only that it was the latter's intention to make a gift, but also

that it was a deliberate, well understood and voluntary act, the nature, effect and consequences of which were fully appreciated.

Kinsella v. Pask, 12 D.L.R. 522, 28 O.L.R. 393.

Between husband and wife — Intention — Improvidence.

A gift will not be inferred from the delivery of money to the husband by his wife who, by reason of illness and impaired mental incapacity, was unable to appreciate the nature of her act, which was one of improvidence, where the circumstances surrounding the transaction were more consistent with there being no gift than that there was a gift.

McDougall v. Paille, 13 D.L.R. 661, 4 O.W.N. 1602, 24 O.W.R. 912.

In general.

Money obtained by prostitution given to the defendant by the plaintiff, an infant, who lived with him as wife is a gift, and no trust arises in her favour as to entitle her to recovery of any of the proceeds thereof, or to any lien on any of the property acquired therewith.

Johnston v. Desaulniers, 46 Can. S.C.R. 620, reversing Desaulniers v. Johnston, 20 Man. L.R. 64.

Donation by a marriage contract — Interpretation — Remunerative donation reducible to a money value — Term — Potestative condition — C.C.

In a gift, the words "in case he should decide to cease living with the said B.M." does not impose a term, but a condition. This condition is potestative and purely personal, and can only be complied with by the donor himself, not by his heir.

Mercier v. Fortin, 25 Rev. Leg. 278.

Gift conditional on marriage — Condition rendered impossible by act of donee.

A gift by a young man to a young girl he is courting with a view to marriage, and who he wishes to have dismiss another suitor, given in accordance with a promise in these words: "If you will dismiss P. and marry me (en finir avec moi) I will give you a watch," is subject to the condition of marriage. If the marriage does not take place, through the refusal of the receiver of the watch who marries another man, the gift is voided, and the giver, or his representative, may attach the things given.

Joyal v. Saint Germain, 45 Que. S.C. 501.

(§ I—3)—Revocation — Ingratitude — Refusal of necessaries — Renunciation—Illicit agreement — C.C., arts. 6, 813.

The alimentary obligation against the donor is as strict as that resulting from marriage. The rule that the alimentary obligation is according to public order, is applicable to obligations arising from donations just the same as to those which arise from marriage. The donor cannot by a valid agreement free the donee from this obligation.

Loughrin v. Barke, 55 Que. S.C. 451.

Engagement ring—Return.

A diamond ring given upon a view of marriage and upon reasonable expectation of success must be returned upon the refusal of the donee to continue her engagement with the donor.

Fortier v. Brault, 10 W.W.R. 807.

(§ I—4) — Delivery of transfer and duplicate certificate — Revocation — Repossession of transfer before registration—Title.

Smith v. Smith, 21 D.L.R. 861, 8 W.W.R. 1077, 31 W.L.R. 607, 8 W.W.R. 1077.

Of land.

A burden imposed on the donee by a deed of donation of maintaining the donor during his life, guaranteed by hypothec of the immovables donated, does not create a life tenancy but is an agreement for maintenance, of a character purely movable. It therefore confers no right on the creditor to proceed by opposition a fin de charge to the seizure under execution of the immovable hypothecated in order to preserve the benefit of it. He is, however, entitled under his hypothec to be collocated on the proceeds for a sum, to be estimated, representing the value of future payments. The said hypothec is not extinguished by confusion when the donor resumes possession of the immovables pursuant to a judgment for resiliation of the deed of donation if the donee has charged them with other hypothecs while in possession and there is danger of eviction by the creditors.

Lebrun v. Sévigny, 41 Que. S.C. 140.

(§ I—5)—Substitution.

An event which causes the opening of a substitution, or the date on which it shall take place, is as provided and fixed by the deed creating it, with no power in the grevé, by renunciation of his rights or otherwise, of causing it to be anticipated. Therefore, the substitution of property donated to the children of the donee living at his death cannot be opened before that takes place, and the deed by which he renounces his rights does not cause it to be opened and gives to his children only the continued enjoyment but no seizure of the substituted property which would entitle them to an action as appelés for possession.

Arbec v. Pepin, 42 Que. S.C. 222.

(§ I—6)—Of notes or cheques—Cheque signed in blank by deceased — Alleged gift—Trust for creditors.

Munn v. Keyes, 6 D.L.R. 878, 4 O.W.N. 250.

VALIDITY—MENTAL CAPACITY OF AGED PERSON—COMPLETED GIFT OF MONEY—INCOMPLETE GIFT OF PROMISSORY NOTE—SALE OF LIVE STOCK—ACTION BY EXECUTORS — EVIDENCE — CORROBORATION.

McGuire v. Murtha, 9 O.W.N. 430.

NOTE.

A holder in due course of a note payable to order can dispose of it through a gift inter vivos, even with the intention of avoiding payment of the taxes which the law imposes on open successions.

Gingras v. Chaffee, 49 Que. S.C. 42.

(§ I—7)—BANK DEPOSIT TO JOINT ACCOUNT —RIGHT OF WITHDRAWAL BY EITHER—SURVIVORSHIP.

A written direction to the bank by 2 depositors, father and daughter, whereby each agrees with the other and with the bank that certain moneys, theretofore the sole property of the father, shall be deposited in the bank to their joint credit as their "joint property" subject to withdrawal by either of them and in the case of the death of one by the survivor, and which expressly authorizes the bank to pay to the survivor, is evidence of a completed gift to the daughter of so much as remained on deposit at the father's death. [Hill v. Hill, 8 O.L.R. 710, distinguished.]

Vogler v. Campbell, 14 D.L.R. 480, 5 O.W.N. 169, 25 O.W.R. 137, reversing 11 D.L.R. 605.

OF BANK DEPOSITS.

Where one who has a sum of money on deposit in the savings department of a bank, being ill in the hospital, signs a written memorandum instructing the bank to arrange her money in her daughter's name so that she can draw it, which she hands to her daughter to take to the bank, saying, "If anything should happen to me in the hospital, take my money and my furniture and do the best you can with it," and requesting the daughter to pay her funeral expenses, and the bank thereupon changes the heading of the account so as to make it appear as a joint account in the name of the mother and daughter, and the deposit book remains in the mother's possession until her death, and there is no evidence of any intention of the mother to do more than make an arrangement by which, for convenience, the daughter could draw the money, the daughter has no right to the money at her mother's death, either by survivorship or otherwise. [Re Ryan, 32 O.R. 224, and Schwent v. Roetter, 21 O.L.R. 112, distinguished.]

Everly v. Dunkley, 8 D.L.R. 839, 27 O.L.R. 414, 23 O.W.R. 415, affirming 5 D.L.R. 854.

Where a deposit in the bank, upon the refusal of the bank to permit the wife of the depositor to withdraw the interest earned thereon when the husband was by illness prevented from going himself to the bank, was, at the suggestion of the bank officers and with the consent of the depositor, placed in the joint names of the depositor and his wife as a matter of convenience in withdrawing money for household expenses, the wife upon the death of the husband who had made a testamentary disposition of all his property did not become vested with the title to such deposit. [Marshall v. Crutwell, L.R. 20 Eq. 328, and Re Daly, 37 N.B.R. 483, Daly v. Brown, 39 Can. S.C.R. 122, followed.]

Van Wart v. Synod of Fredericton, 5 D.L.R. 776, 42 N.B.R. 1.

MONEYS ON DEPOSIT IN BANK — DIRECTION TO BANK TO HOLD FOR BENEFIT OF DEPOSITOR AND WIFE AND DAUGHTER AND SURVIVOR — AGREEMENT FOR MAINTENANCE — VALIDITY AND EFFECT OF DIRECTION — MENTAL COMPETENCE — ABSENCE OF FRAUD OR DURESS.

Burkett v. Ott, 12 O.W.N. 309. [Affirmed 41 D.L.R. 676, 41 O.L.R. 578.]

PROPERTY STANDING IN NAMES OF MOTHER, SON, AND DAUGHTER — DEATH OF SON — ACTION BY EXECUTORS — PROPERTY FOUND TO BELONG TO MOTHER ONLY — ABSENCE OF EVIDENCE TO ESTABLISH GIFT TO SON AND DAUGHTER — CONFIDENTIAL RELATIONSHIP — MOTHER UNDER INFLUENCE OF SON.

Toronto General Trusts Corp. v. Lackie, 13 O.W.N. 243.

DEPOSIT OF MONEY IN SAVINGS-BANK ACCOUNT TO CREDIT OF INTENDED DONEE — INSTRUCTIONS TO BANK NOT TO NOTIFY DONEE UNTIL AFTER DEATH OF DEPOSITOR — EVIDENCE — INTENTION — PARTING WITH CONTROL OF FUND — PRESENT IRROVOCABLE GIFT, NOT GIFT OF TESTAMENTARY NATURE.

Horne v. Huston and Merchants Bank, 16 O.W.N. 173. [Affirmed, 17 O.W.N. 2.]

INFANT — VOIDABLE GIFT — REPUDIATION AFTER MAJORITY — ACTION FOR RETURN.

Murray v. McKenzie, 23 O.L.R. 287, 18 O.W.R. 747.

GIFT TO COMMUNITY — MORTGAGE BY HUSBAND — RESILIATION OF DONATION.

Lebrun v. Sévigny, 39 Que. S.C. 139.

GIFT MADE BY PRECONCERTED PLAN TO EVADE SUCCESSION DUTIES — RIGHT OF COLLECTOR TO SUE FOR ANNULMENT.

Desjardins v. Bastien, 41 Que. S.C. 49.

II. Causa mortis.

Corroboration of gift, see Evidence, XII I —965.

(§ II—10)—ABATEMENT.

A sum of money handed over by a person in last illness bidding the donee "to keep it as I have willed you nothing" is a gift causa mortis, not inter vivos, and will be treated as a legacy which will abate in the event of an insufficiency of personalty to pay the debts of the donor's estate.

McGuire v. McGuire, 33 D.L.R. 103, 50 N.S.R. 477.

DELIVERY.

Delivery is essential to a complete donatio mortis causa; a letter by a deceased to his solicitor directing him to pay a cheque drawn in favour of a patriotic fund which he left in his trunk, and that certain persons be given certain chattels, will not justify his executors, where there was no delivery of the cheque or the chattels, in carrying out these directions.

Re Aldridge Will (2), 28 D.L.R. 531, 9 A.L.R. 512, 34 W.L.R. 546, 10 W.W.R. 701. [See also 28 D.L.R. 527.]

ESTATE OF INTESTATE — EVIDENCE — CORROBORATION — DISCRETION OF TRIAL JUDGE—APPEAL.

Trusts & Guarantee Co. v. Smith, 8 O. W.N. 587.

PARENT AND CHILD — GIFT OR LOAN — INTENTION — EVIDENCE — DOCUMENTS — WILL.

In July, 1913, the testatrix lent her daughter a sum of money; and on that day two documents were executed. By the first, signed by the daughter, she acknowledged the receipt of the sum "as a loan to be used as a first payment upon the house . . . I also hereby agree to pay you interest . . . half-yearly, and further agree that the said loan is to be a lien upon my equity in the said house, until paid or otherwise satisfied, but repayment of said loan is not to be demanded of me so long as I pay interest, and provide for the aforesaid lien, or give equivalent security satisfactory to you." By the second document, signed by the testatrix, she declared that, notwithstanding any testamentary disposal of her estate, the sum lent to her daughter "is hereby given to her absolutely and unconditionally for her own use, benefit, and disposal, and . . . the said gift . . . is not to be considered a part of my estate or subject to any condition of my will." No interest on the loan was ever paid. The testatrix died in March, 1917. By her will, her daughter was appointed one of her executors. The 2 documents were found enclosed in an envelope with this endorsement: "In the event of my death, this envelope is to be delivered, unopened, to my daughter:"—Held, the intention to give being plain and absolute, being communicated to the donee, and continuing until the death of the testatrix, that "donatio in præsenti tradenda in futuro" was shewn, and that the daughter was not a debtor to her mother's estate in respect of the sum lent or interest thereon. [Re Goff, 111 L.T.R. 34, followed.]

Re Barnes, 42 O.L.R. 352.

GIFT INTER VIVOS — MINOR — ACCEPTANCE — "ASCENDANTS" — ILLNESS OF DONOR — WILL — VALIDITY — ACQUIESCENCE.

The words "other ascendants" used in arts. 303 and 789 C.C. (Que.), relating to the acceptance of a gift to a minor, ought to be taken in their widest sense, so as to give effect to the gift. The word "ascendants" can be understood to mean ascendants in collateral line as well as in direct line. The duty of courts is to apply the law so as to give it the whole effect, and not to make distinctions where the law has not done it. A gift by parents to their minor son may be accepted by the minor's aunt, namely his father's sister. The words "unless circumstances tend to render them valid," in art. 762 C.C. (Que.), enable the court to enquire into the circumstances surrounding a gift made during the illness of the donor. Such a gift may be upheld (a) if the illness of the donor, though serious, was not, at the moment of the gift, considered mortal either by the donor or by his children; (b) if in the deed itself there are clauses benefitting the donor which can be realized during the latter's life. The fact that a donor had made his will at the same time with the gift does not imply that he believed he was about to die. The heirs cannot attack the validity of a gift inter vivos and of a will in which they have acquiesced by receiving the benefits under those instruments, after giving quittance and discharge thereof to the donee by notarial deed, and their silence for 13 years, under pretence that they acted in error and ignorance of the nullity of the gift and of the will.

Pelletier v. Pilon, 24 Rev. Leg. 70.

CONDITION IN MARRIAGE CONTRACT.

A gift, in a marriage contract, by the husband to the wife of the furniture actually owned by him, or that he may own at the date of the solemnization of the marriage, or that he may acquire thereafter, the whole to be his property in case of the predecease of the wife, is a gift causa mortis, and only takes effect at his death if the wife survives.

Plamondon v. Larue, 43 Que. S.C. 18.

(§ II—11)—DEPOSIT OF MONEY IN SAVINGS-BANK ACCOUNT TO CREDIT OF DEPOSITOR AND INTENDED DONEE — TERMS OF DEPOSIT — "PAYABLE TO EITHER BUT ONLY ON PRODUCTION OF PASS-BOOK" — RETENTION OF PASS-BOOK BY DEPOSITOR—DEATH OF DEPOSITOR—IMPERFECT GIFT.

Horne v. Huston and Canadian Bank of Commerce, 16 O.W.N. 93. [Affirmed 17 O. W.N. 1.]

(§ II—12)—GIFTS CAUSA MORTIS AND INTER VIVOS DISTINGUISHED.

A clause in a deed for resiliation of a donation of immovables that if the donor, who retakes possession, should enjoy it until his death, they should then become the exclusive property of the donee (with the additional provision for a penalty in case of alienation) is not a donation in contemplation of death, but the consideration for the resiliation and, therefore, valid.

Plouffe v. Plouffe, 21 Que. K.B. 385.

GIFT INTER VIVOS—RESERVATIONS—INTERPRETATION OF ARTS. 177, 2192, C.C. (QUE.).

Morin v. Dejardins, 25 Rev. de Jur. 229.

MARRIAGE CONTRACT — DONATION MORTIS CAUSA — GIFT INTER VIVOS — ACCEPTANCE.

Future consorts may, by their marriage contracts, respectively make to each other, or one to the other, or to their future children, donations of property as well existing as to be acquired, the acceptance of which is to be inferred and presumed as well with respect to the consorts as to their prospective children, but they are not allowed to make to other persons donations of property to be acquired in the future. On account of the favour with which marriage is regarded, and of the interest which the future consorts should have in the arrangements made in favour of third parties, the ascendants of the future husband may make, in the marriage contract, donations mortis causâ to his brothers and sisters of the husband who is also benefitted by it, but other donations mortis causâ in favour of third parties are void. Although the donation inter vivos binds the donor, and has effect only, on account of its acceptance, such acceptance is presumed in a marriage contract as well in regard to the consorts as to the children to be born.

Tassé v. Goyer, 47 Que. S.C. 424.

CHEQUES ON BANKS — PRESENTMENT AND PAYMENT AFTER DEATH OF DONOR—NOTICE OF DEATH.

McLellan v. McLellan, 25 O.L.R. 214, 20 O.W.R. 673, affirming 23 O.L.R. 654.

CHEQUE—NOT SUBJECT OF DONATIO MORTIS CAUSA — DEATH OF DRAWER — REVOCATION OF BANKER'S AUTHORITY TO PAY.

Re Bernard, 2 O.W.N. 716, 18 O.W.R. 525.

III. Delivery.

(§ III—15)—HUSBAND AND WIFE—FURNITURE IN HOUSE—DELIVERY—INTENTION.

A gift may be made by a husband to his wife—there is now no difficulty by reason of the supposed unity of husband and wife; and, unless creditors can assert the provisions of the Bills of Sale Act, such a gift is valid. But there cannot be a gift unless there is a deed or an actual delivery of possession. Delivery may be symbolic, but it must be such as to give to the donee complete dominion over the subject. Review of the authorities. [Cochrane v. Moore, 25 Q.B.D. 57, followed. Kilpin v. Ratley, [1892] 1 Q.B. 582; Ramsay v. Margrett, [1894] 2 Q.B. 18, explained and distinguished.] The difficulty of making out a case of gift between husband and wife arises, not from the legal relation between them, but from the fact of their living together. The furniture in a house, in which house the defendant had a life-interest under the will of her husband, was claimed by her as having been given to her by her husband, when he brought her to live with him in his house. It was said that he used such words as, "The furniture is yours to do as you like with." The personal property of the husband was bequeathed to his son:—Held, that no intention to give was shewn by such words from a husband to his wife; and, for that reason, and also because no delivery was shewn, the wife's claim to the furniture, after her husband's death, could not be upheld.

Kingsmill v. Kingsmill, 41 O.L.R. 238.

(§ III—16) — ANIMALS — INSUFFICIENT PROOF OF DELIVERY—INVALIDITY OF UNATTESTED WILL.

Kelsey v. Varco; Kelsey v. Klein, 30 D.L.R. 561, 9 S.L.R. 294.

PRESUMPTION AS TO GIFT FROM DELIVERY OF MONEY.

A gift will not be presumed from the mere delivery of money by one person to another.

Johnstone v. Johnstone, 12 D.L.R. 537, 28 O.L.R. 334.

NECESSITY AND SUFFICIENCY OF DELIVERY.

An interlocutory injunction to restrain the transfer of shares of stock will be granted where it appears that the defendant's husband transferred them to her after he had given a guaranty, on which a liability subsequently arose, where, on the trial, it would be a question whether the transaction was a gift, and whether there was a sufficient delivery of possession to effectuate the gift, as such circumstances justify the application of the rule that corroboration is necessary where such a transaction affects third parties.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

A claim made by the wife of the debtor as against her husband's execution creditors to an automobile bought with the husband's money but which she claims was verbally given to her by him, is not substantiated as against the seizure under execution if there was not a bill of sale or other written evidence of the transfer by the husband to the wife, nor proof either of actual delivery to her or of constructive delivery by words of present gift accompanied by change of possession. [Kilpin v. Ratley, [1892] 1 Q.B. 583, distinguished.]

Huggard v. Bonnetto, 1 D.L.R. 305, 20 Man. L.R. 44, 20 W.L.R. 233, 1 W.W.R. 837.

FROM HUSBAND TO WIFE—CONSTRUCTIVE DELIVERY — CLAIM BY ADMINISTRATOR — COSTS.

White v. Canadian Guaranty Trust Co., 31 D.L.R. 560.

VOLUNTARY ASSIGNMENTS OF MORTGAGES BY DEED — INTENTION OF GRANTOR THAT DEEDS SHOULD NOT OPERATE UNTIL DEATH — TESTAMENTARY WRITINGS — ESCROW — ABSENCE OF DELIVERY — ADMINISTRATION ACTION — COSTS — COMMISSION—DISBURSEMENTS—R. 653.

Linck v. Gainsbeck, 11 O.W.N. 209.

SUFFICIENCY OF DELIVERY — VERBAL AGREEMENT FOR POSSESSION.

Gift of moveable property by verbal agreement is valid only when possession is given by the donor to the donee; and the common, private and equivocal possession of movables by a daughter whilst she was living alone with her father is not sufficient to admit verbal evidence of manual gift between them.

Hammond v. Nesom, 47 Que. S.C. 179.

GOODS.

See Sale; Bills of Sale; Chattel Mortgage.

GOODWILL.

See Trade name; Partnership; Contracts, III E.

SALE OF.

Where a trader sells his route in which he had previously supplied goods (e.g., milk) and binds himself not to sell to any of these customers under a forfeiture of $25 each, and he does subsequently sell, the penal clause can be immediately invoked by the purchaser and the vendor's plea to the effect that such customers had left the purchaser and solicited him to supply them again will be of no avail. [Lea v. Whitaker, 8 L.R.C.P. 70; Wallace v. Smith, 25 L.J. Ch. 145, applied.]

Fortin v. Perras, 9 D.L.R. 16, 43 Que. S. C. 313.

SALE OF BUSINESS — CANVASSING CUSTOMERS—INJUNCTION—DAMAGES.

Stewart v. Calbert, 8 O.W.N. 437.

UPON SALE OF BUSINESS—LEASE—RENEWAL —INJUNCTION.

Where a business carried on in leased premises is sold as a going concern, the taking by the seller of a new lease of the premises with the idea of returning them after the expiration of the existing lease, amounts to a direct solicitation of the old customers and consequently tends to depreciate that which was sold. The seller will be ordered to assign the new lease to the buyer, or if the lessor's consent to such assignment cannot be had, the seller will be restrained from carrying on business in the premises.

Pulos v. Demarco, [1917] 2 W.W.R. 1000.

GOVERNMENT CONTROL.

See Constitutional Law; Crown.

Of carriers, see Carriers; Railway Board.

Of corporations, see Companies.

Of lands, see Public Lands; Mines and Minerals; Waters.

GOVERNOR.

Extent of power of judiciary over executive, see Action, I B—5.

PREROGATIVE POWERS—CONTRACTS.

The Governor of Newfoundland has not full prerogative power of the Crown; his capacity is limited by his commission and instructions, and by the law of the colony contracts in his public capacity are subject to the constitutional practice of the colony; all contracts by him extending over a period of years and creating a public charge are, by statute, not binding until approved by the House of Assembly.

Commercial Cable Co. v. Government of Newfoundland (Imp.), 29 D.L.R. 7, [1916] 2 A.C. 610.

PREROGATIVE POWERS OF LIEUTENANT-GOVERNOR—INVESTIGATIONS—COMMISSIONS —CONSTRUCTION OF PARLIAMENT BUILDING.

The Lieutenant-Governor-in-Council, as the chief executive officer, has the prerogative power under the constitutional Acts, and under the Inquiries Act (Man.), to appoint investigation commissions and to clothe them with special powers to compel the attendance of witnesses and production of documents. The appointment of a commission by the Lieutenant-Governor-in-Council to investigate certain matters relating to the construction of a new Parliament building conforms to the powers enumerated in the Inquiries Act, R.S.M., c. 34, respecting commissions to any matter connected with the good government of the province.

Kelly v. Mathers, 23 D.L.R. 225, 25 Man. L.R. 580, 31 W.L.R. 931, 32 W.L.R. 33, 8 W. W.R. 1208.

POWERS OF LIEUTENANT-GOVERNOR — SUSPENSION OF ACTIONS BECAUSE OF WAR— CLASS PROCLAMATIONS — LIQUOR LICENSEES.

Chapter 2 of statutes 1914 (Sask.), authorizing the Lieutenant-Governor-in-Council to prohibit the issue of processes in all or any classes of civil actions, for the protection of persons whose interests may be jeopardized during a state of war, a proclamation prohibiting the taking of actions by creditors against liquor licensees as a class, whose interests are affected by the closing of bars for the proclaimed period, is not ultra vires and in conformity to the spirit of the statute. [Bywater v. Brandling, 7 B. & C. 643, applied.]

Imperial Elevator & Lumber Co. v. Kuss, 25 D.L.R. 55, 8 S.L.R. 360, 32 W.L.R. 941, 9 W.W.R. 606, varying 9 W.W.R. 164, 32 W.L.R. 378.

GRAIN.

Grain Act, see Sale, I B—5.

GRAND JURY.

Complainant as grand juror, see Indictment, IV—75.

CONDUCT OF PROCEEDINGS.

Where a grand jury improperly brought in a true bill without calling any witnesses merely upon perusal of the depositions taken at the preliminary enquiry before a magistrate, and such fact is brought to the notice of the court by the omission to in-

itial the names of any witnesses whose names were endorsed on the bill of indictment, the court has a discretionary power to remit the case to the same grand jury to find on the bill on proper evidence only, and the grand jury is not necessarily disqualified from acting because of having read and considered the depositions.

The King v. Thurstan, 20 Can. Cr. Cas. 505.

SUMMONING—NUMBER.

Under sch. B of the Jurors Act (R.S.B.C. 1911, c. 121), not more than 13 persons need be summoned by the sheriff to act as grand jurors.

R. v. Bonner, 13 D.L.R. 162, 21 Can. Cr. Cas. 442, 18 B.C.R. 454, 25 W.L.R. 112, 4 W.W.R. 1255.

IMPROPER COMMUNICATION TO JURORS.

Proof that an improper communication reflecting on the accused had been made to the grand jurors who returned the bill of indictment would not be a ground for quashing the indictment.

Veronneau v. The King, 31 D.L.R. 332, 26 Can. Cr. Cas. 278, 25 Que. K.B. 275. [Affirmed, 33 D.L.R. 68, 54 Can. S.C.R. 7.]

EXEMPTION.

Where the names of two persons drawn to serve upon the grand jury are dropped by the sheriff, on the ground that they are exempt from serving, but without requiring from them the affidavit prescribed by the act (R.S.N.S. 1900, c. 162, s. 43), and the names of two other persons, properly qualified to serve, are drawn upon a special panel to serve in the stead of those omitted, this is not an irregularity in connection with the constitution of the jury, or prejudicial to prisoners, for which an indictment will be set aside.

The King v. Brown, 45 N.S.R. 473, 19 Can. Cr. Cas. 237.

GUARANTY.

I. VALIDITY; CONSTRUCTION; EFFECT.
II. REVOCATION; CONDITION; DISCHARGE.

As to Statute of Frauds, see Contracts, I E.

As to suretyship, see Principal and Surety; Bonds.

I. Validity; construction; effect.

Powers of company as to, see Companies, IV D—79.

(§ I—1)—ILLITERACY—FRAUD.

The fact that a person signing a guaranty is a foreigner unable to read English, without the document being read over or the nature of the liability explained to him, will not, in the absence of fraud, relieve him from liability thereon; whether or not there was fraud is a question of fact ascertainable from the evidence by the Trial Court.

Kimball Lumber Co. v. Anderson, 27 D.L.R. 555.

COMPANY — INCORPORATED BY DOMINION AUTHORITY — GUARANTEE OF ACCOUNT OF ANOTHER COMPANY WITH BANK — SPECIAL CLAUSE IN CHARTER—ABSENCE OF DIRECT AUTHORIZATION OF DIRECTORS —LIABILITY OF COMPANY.

Bank of Ottawa v. Hamilton Stove & Heater Co., 46 D.L.R. 706, 44 O.L.R. 93.

SOLICITOR — UNDERTAKING — LIABILITY UNDER—"COSTS OF SALE."

In an action by a mortgagee for foreclosure of a mortgage of lands, a solicitor appeared on the motion for judgment in Chambers and asked for an order for sale on behalf of a defendant and guaranteed the "costs of sale." Held, that the solicitor was personally liable on the guarantee, and that by "costs of sale" are meant the extra costs incurred in proceeding by way of sale instead of foreclosure.

Standard Trust Co. v. Szlachetka, 12 S.L.R. 412, [1919] 3 W.W.R. 614.

An agreement by defendant company for the purchase of a quantity of salt, f.o.b., at San Francisco, to be delivered at Nanaimo, British Columbia, was signed by the president and secretary-treasurer. Under their signatures was added: "We, the undersigned, guarantee payment of the obligation as noted above, Imperial Fisheries, Ltd., J. O. Hearn, president; Saml. J. Levy, secretary-treasurer; William Kilroy, vice-president": —Held, that the three officers signing the guarantee following the execution of the agreement, were personally liable, and that judgment under Order XIV. was properly allowed.

Johnson, etc. v. Imperial Fisheries, 16 B.C.R. 445.

INDEBTEDNESS OF COMPANY TO BANK—ACTION AGAINST GUARANTORS—DEFENCES — INNOCENT MISREPRESENTATION BY BANK MANAGER AS TO SECURITY TO BE TRANSFERRED TO GUARANTORS — SECURITY NOT ACTUALLY TRANSFERRED — ELECTION, AFTER DISCOVERY OF MISTAKE AS TO SECURITY, TO STAND BY TRANSACTION—LEAVE TO ADDUCE FURTHER EVIDENCE UPON APPEAL.

Bank of Ottawa v. Carson, 15 O.W.N. 375.

BY AGENT TO PRINCIPAL—CONSIDERATION.

An agent's guaranty for the payment of rent by a tenant to whom he leased the property contrary to the principal's instruction, that the rent be payable in advance, which guaranty was not the inducing cause for the principal's acceptance of the tenancy, is without consideration and the agent is not liable for rent in default.

Lunt v. Perley, 35 D.L.R. 214, 44 N.B.R. 439.

(§ I—2)—WARRANTY—WHAT IS—AFFIRMATIVE WORDS—INTENTION OF PARTIES—EVIDENCE.

The question whether an affirmation made by the vendor at the time of the sale constitutes a warranty depends on the in-

tention of the parties, to be deduced from the whole of the evidence, and the circumstance that the vendor assumes to assert a fact of which the purchaser is ignorant, though valuable as evidence of intention is not conclusive of the question.

Gardner v. Merker, 44 D.L.R. 217, 43 O. L.R. 411.

INFANT'S DEBT—ORIGINAL UNDERTAKING.

A promissory note given by a third person for the purchase price of a business purchased by an infant is an original undertaking on which the maker is primarily liable and not a guaranty of the infant's debt. [Harris v. Huntbach, 1 Burr. 373, applied.]

Pearson v. Calder, 27 D.L.R. 478, 35 O. L.R. 524. [See also 30 D.L.R. 424, 36 O. L.R. 458.]

REALTY SALE—PROMISE "TO REALIZE" SPECIFIED PROFIT.

Where, on a realty sale the vendor promises his purchaser "to realize" for such purchaser, before the date of the next instalment of the original purchase price matures, a specified profit adding a hope to even double such specified profit, the promise as distinct from the hope goes beyond mere opinion and imports a legal obligation by way of guaranty enforceable by the original purchaser against his vendor.

Boivin v. Lessard, 14 D.L.R. 808, 7 A.L. R. 97, 26 W.L.R. 312.

SUBSTITUTION—CONSIDERATION.

Northern Crown Bank v. Elford, 30 D.L. R. 562, 9 S.L.R. 304, 34 W.L.R. 1185, 10 W.W.R. 1311.

CONSTRUCTION.

In a sale or transfer of a claim against the purchaser by a contractor for manufacturing certain quantities of lumber per year who had sublet part of the work, the agreement that the assignee "will be liable for, and indemnify the assignor against all costs, expenses and damages whatsoever in respect to any action by the subcontractors relating to the lumber furnished or to be furnished" applies not only to the sole action then pending which the assignee knew to be a test case, but also to all claims of the subcontractors capable of becoming litigious. It covers as well the capital sum as the costs and incidental damages.

Lavoie v. Laroche, 43 Que. S.C. 113.

(§ I—3) — INTENTION AS TO LIABILITY — ASSOCIATION—PARTNERSHIP.

A guaranty for the payment of all moneys which are now or shall at any time be due for lumber and building materials supplied to "The Ponteix Hotel Co." or "The Ponteix Hotel Co., Limited," manifests an intention to treat the association as a partnership and that the guarantee shall accordingly apply to liabilities prior to the incorporation.

Kimball Lumber Co. v. Anderson, 27 D. L.R. 555.

WIFE AS SURETY — SIGNING GUARANTY AT HUSBAND'S REQUEST.

In a transaction between a creditor and a limited liability company by which the indebtedness of the company was secured by a guaranty which was signed by a married woman at the request of her husband, the married woman cannot escape liability where it appears that she had a personal interest as the secretary and a shareholder in a company by pleading that she signed the guaranty at her husband's request without reading it over, where there was no misrepresentation and the creditor received it in good faith from the company as represented by the husband. [Bank of Montreal v. Stuart, [1911] A.C. 120, followed; Chaplin v. Brammall, [1908] 1 K.B. 233, doubted.]

Gold Medal Furniture Co. v. Stephenson, (No. 2), 10 D.L.R. 1, 23 Man. L.R. 159, 23 W.L.R. 664, 4 W.W.R. 7, varying 7 D.L. R. 811. [Affirmed, 15 D.L.R. 342.]

LIABILITY — DAMAGES — AUTOMOBILE ACCIDENT—DEFECTIVE ROADS—INCOMPETENCY OF CONDUCTOR — PRESCRIPTION — JOINT LIABILITY — INTERRUPTION AGAINST ONE OF THE CREDITORS—ACTION ON GUARANTEE—C.C., SS. 1054, 1106, 1117, 1118, 2231, 2232, 2236—S. REF. [1909], S. 1406—6 GEO. V., [1916] C. 43, S. 11—29 VICT. [1865], C. 57, ART. 33.

The liability for an injury caused involuntarily by the combined fault of two persons is a joint one. The victim can bring his action for all the damages from the accident, subject to a recourse in guarantee of the one who is sued, against the other for his share of the damages which he has been called upon to pay. A recourse in guarantee only existing by reason of a principal action, the prescription of this recourse does not commence to run until the moment that the principal action is brought and not at the moment when the right of action arises.

Bégin v. Richard; Richard v. Quebec, 55 Que. S.C. 114.

(§ I—6)—AGREEMENT TO GUARANTEE BANK OVERDRAFT—DURATION OF LIABILITY—BREACH OF CONTRACT.

In an action on a note made by a corporation in favour of defendant, who held practically all the company's stock, and endorsed by him to plaintiff, defendant was entitled to counterclaim for plaintiff's breach of agreement, on which defendant claims the note was endorsed by him, that plaintiff would continue to guarantee the company's overdraft at a bank up to a stated amount; the breach consisting in stopping payment on a cheque, rendering the company insolvent and defendant's shares worthless.

Sweet v. Archibald, 11 D.L.R. 570, 47 N.S.R. 35, 12 E.L.R. 486.

CONTINUING GUARANTY TO BANK—GENERAL CLAUSE AS TO "OTHER DEALINGS"—CLAIM AGAINST DEBTOR ASSIGNED TO BANK.

A contract of guaranty given to a bank and expressed to be for the debts of the company arising from dealings between it and the bank and from "any other dealings by which the bank may become creditor in any manner whatsoever" will not constitute a guaranty of debts incurred by the company in favour of third parties who transferred them to the bank without the concurrence of the guarantor; the guaranty must be limited, in protection of the guarantor, to claims in which the debtor participated in their creation and which have been recognized by him as to be secured by the guaranty.

Northern Crown Bank v. Herbert, 13 D.L.R. 304, 22 Que. K.B. 374.

DURATION OF LIABILITY — DEBT OF INSOLVENT COMPANY—DURATION OF LIABILITY — BANK ACT — SECURITIES — PAYMENT FOR TIMBER.

Quebec Bank v. Sovereign Bank (No. 1), 5 D.L.R. 879, 4 O.W.N. 22, 22 O.W.R. 966.

INDEBTEDNESS OF COMPANY AS CUSTOMER OF BANK—CONSTRUCTION OF INSTRUMENT—LIMITATION OF AMOUNT OF LIABILITY—BANK ALLOWING INCREASED INDEBTEDNESS OR LIABILITY—AGREEMENT FOR "ADDITION THERETO" — INTEREST—LIABILITY OF GUARANTORS.

Dime Savings Bank v. Mills, 17 O.W.N. 246.

NOTE SECURING ACCOUNT—SETTLEMENT—DELIVERY OF GOODS.

A third party giving a note in guaranty of a debtor's account cannot refuse payment of the note if the subject matter is delivered after the delay stipulated in the settlement of the account, the note not being intended to guarantee the amount that would become due for the work ordered, but relating to the account due at the time of the settlement, and the debtor has a right to be reimbursed the advances that he has made thereon.

Martin v. Bourdis, 49 Que. S.C. 247.

EXTENT OF — DAMAGE CLAIMS — ILLEGAL ACTS.

The extent of a warranty by which the warrantor binds himself to hold the warrantee harmless from any claims by a third person, does not cover demand of damages arising out of illegal act committed by the warrantee.

Mongrain v. Canadian Carbonate Co., 46 Que. S.C. 534.

NATURE, EXTENT AND DURATION OF LIABILITY — INDIVISIBILITY OF ADMISSION — SALE — DECEIT — CONCEALMENT — C.C. 1530.

Thibodeau v. Viau, 18 Rev. de Jur. 209.

(§ I—7)—CONTINUING LIABILITY.

As a contract of guaranty creates a continuing liability from its inception a subsequent voluntary transfer of the guarantor's property without consideration will be set aside where a liability afterwards arose on such guaranty.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

CONTINUING GUARANTY—PROMISSORY NOTE.

A guaranty note executed concurrently with a suretyship contract covering future advances, and in substitution of a prior continuing guaranty, is intended up to its face amount as continuing security for past, present and future indebtedness.

Standard Bank v. Alberta Engineering Co., 33 D.L.R. 542, 11 A.L.R. 96, [1917] 1 W.W.R. 1177, varying 27 D.L.R. 707.

MISTAKE OF GUARANTOR AS TO PERSON WHOSE INDEBTEDNESS TO BE GUARANTEED—INTENTION OF GUARANTOR—NEGLECT TO READ INSTRUMENT OF GUARANTY—EVIDENCE—FINDINGS OF FACT—APPEAL.

Bank of Toronto v. Morrison, 12 O.W.N. 288.

ACCOUNT OF CUSTOMER WITH BANK—ADVANCES — OVERDRAFT — OUTSTANDING NOTES — INTEREST — APPROPRIATION OF PAYMENTS—LIABILITY OF GUARANTOR.

Union Bank v. Makepeace, 12 O.W.N. 397, affirming 10 O.W.N. 28.

BANK—ACCOUNT OF CUSTOMER—LIABILITY OF GUARANTOR—FRAUD OF ASSOCIATE—FINDINGS OF FACT OF TRIAL JUDGE.

Bank of Nova Scotia v. Salter, 13 O.W.N. 145.

LIABILITY OF TRADING COMPANY TO BANK—BOND EXECUTED BY CERTAIN SHAREHOLDERS—ACTION ON—DEFENCE THAT BOND EXECUTED ON CONDITION THAT ALL SHAREHOLDERS SHOULD SIGN—ABSENCE OF KNOWLEDGE OF CONDITION BY BANK—ADMISSION OF ORAL EVIDENCE.

Dominion Bank v. Cameron, 13 O.W.N. 420.

(§ I—9)—LAND SALES.

Where a subpurchaser of one lot of a block of land sold by the owner to the original purchaser has been directed by his vendor to pay his purchase money to the owner and get title from him direct, but the owner declines to accept payment or to convey unless paid a bonus in addition, the original purchaser may be ordered to indemnify his subpurchaser in respect of a reasonable bonus paid to the owner in order to obtain title.

Duggan v. Wadleigh, 1 D.L.R. 871, 4 A.L.R. 114, 20 W.L.R. 102, 1 W.W.R. 595.

CONTRACT FOR SALE OF LAND—ABANDONMENT BY VENDEE—PAYMENT BY GUARANTOR—RIGHTS INTER SE.

The mere fact that a purchaser under an instalment contract, on becoming unable to pay an instalment overdue, went out of possession of the property is not evidence of an intention to abandon his rights thereunder to a surety, who thereupon paid the arrears and assumed possession; the lat-

ter's rights will be limited as to such purchase by the terms of the contract of suretyship, although the surety had procured the transfer of title to himself from the vendor.

Campbell v. Munroe, 12 D.L.R. 289, 6 A.L.R. 176, 24 W.L.R. 732, 4 W.W.R. 1007.

GUARANTY—INDIVIDUAL LIABILITY OF GUARANTORS.

Johnson Co. v. Imperial Fisheries, 16 D.L.R. 445, 19 W.L.R. 285.

GUARANTEE—INDEMNITY—ORAL PROMISE TO ANSWER FOR THE DEBT OF ANOTHER—STATUTE OF FRAUDS.

Shea v. Lindsay Co., 20 Man. L.R. 208, 15 W.L.R. 362.

ACTION ON — DEFENCE — MISREPRESENTATION.

Bank of Toronto v. Bier, 2 O.W.N. 897, 18 O.W.R. 844.

CONTRACT—GUARANTEE OF RAILWAY BONDS—3 EDW. VII. (CAN.) C. 71, AND 4 EDW. VII. (CAN.) C. 24.

G.T.P.R. v. The King, [1912] A.C. 204.

CONSTRUCTION—EXTENT OF LIABILITY—EXECUTION BY ATTORNEY FOR ONE GUARANTOR—ABSENCE OF AUTHORITY—REPRESENTATION OF AUTHORITY.

Gold Medal Furniture Co. v. Stephenson, 17 W.L.R. 651.

CONTRACT OF GUARANTY—SALE OF GOODS—CONTINUING GUARANTY—INTEREST.

Brock Co. v. Young, 8 E.L.R. 244.

II. Revocation; condition; discharge.

(§ II—10) — PURCHASER'S AGREEMENT — AGENTS—EFFECT OF WORDS IN TELEGRAM.

In an action claiming that real estate agents engaged in the purchase of "purchasers' agreements" on behalf of the plaintiffs had guaranteed in writing payment of the balance of the purchase price under an agreement for sale, reliance was placed on a telegram in the following words: "Value on title made low to reduce registration costs are getting declaration as to moneys received from Love who is a good man. Agreement good and guarantee it." Held, that the telegram taken with the other correspondence and circumstances did not guarantee payment of the agreement, but went no further than to guarantee that the agreement was a bonâ fide one and that the property and parties were good.

Schell v. McCallum, 42 D.L.R. 563, 57 Can. S.C.R. 15, [1918] 2 W.W.R. 735, affirming 38 D.L.R. 133, 10 S.L.R. 440.

(§ II—11)—REVOCATION—CHANGE OF CONTRACT — INTEREST — DISCHARGE — NOTICE.

An illegal increase in the rate of interest charged the principal debtor will not render a guarantee null and void, nor will the renewal made, after revocation of the guarantee, of notes made before the revocation, discharge the guarantor from liability therefor, but a condition will be read into the contract that the interest is not to exceed the rate allowed by statute. A clause that "this shall be a continuing guarantee, and shall cover all the liabilities which the customer may incur or come under until the undersigned, or the executors or administrators of the undersigned, shall have given the bank notice in writing to make no further advances on the security of this guarantee" stipulates that the guarantee is to remain in force until there is a notice given by each and all of the guarantors, the executors of any deceased cosignatory coming in his place.

Egbert v. Northern Crown Bank, 42 D.L.R. 326, [1918] A.C. 903, [1918] 3 W.W.R. 132, affirming 33 D.L.R. 367, 11 A.L.R. 1, sub nom Northern Crown Bank v. Woodcrafts.

OBTAINING SIGNATURE BY MISREPRESENTATION AS TO EXECUTION BY OTHERS—FAILURE OF CONSIDERATION — DISCHARGE OF GUARANTOR.

One who was induced to execute a contract of guaranty on the strength of the representation of the guarantee that it would be signed by certain other persons as well, is relieved from liability by the guarantee's concealment of the fact that one of such persons had refused to sign the contract. Where a guarantee agreed to make future advances to a principal debtor in consideration of a guaranty not under seal, of the payment of the former's existing indebtedness and of the advances to be made, which required a consideration to support it, the guarantee's refusal to make such advances amounts to a failure of consideration which will discharge the guarantor from liability. The discharge of a surety from liability on a contract of guaranty by reason of the release of a cosurety by the guarantee without the knowledge or consent of such surety, is not, governed by s. 39 (r) of the Manitoba King's Bench Act, R.S.M., 1902, c. 40, providing that the giving of time to a principal debtor will not discharge a surety, but shall be a defence only in so far as it is shewn that the latter has been thereby prejudiced. [Blackwell v. Percival, 14 Man. L.R. 216, distinguished.] Where the plaintiff was liable as guarantor for the whole amount secured by his guaranty, all of which was evidence by the principal debtor's notes, the delivery, without the former's knowledge or consent, by the guarantee on payment to him by a cosurety of the amount for which he was individually liable, which was less than the amount of the whole debt secured, of a portion of such notes to the amount of his payment, will relieve the plaintiff, pro tanto at least, from liability; since the guarantee by parting with some of the notes, put it out of his power to turn over to the plaintiff all of the notes to which he would be entitled on payment of the amount for which he was liable. The release by a guarantee of one surety from liability on a contract of

guaranty, on the payment of less than the amount for which he is liable, without the knowledge or consent of his cosurety, will release the latter from all liability on the contract.

Scandinavian American National Bank v. Kneeland, 12 D.L.R. 202, 24 W.L.R. 587, 4 W.W.R. 944.

(§ II—12)—To bank of indebtedness of company—Bank holding also other collateral security — Assignment for creditors—Bank proving claim and valuing securities—Subsequent conveyance by assignee to bank—Release of guarantor.

The plaintiff was the holder of a written guaranty given by the defendant to secure the repayment to the bank of part of the indebtedness of a manufacturing company. In addition to the defendant's guaranty the bank held as collateral security for its claim against the company, a mortgage against the lands of the company, a mortgage on the plant, machinery and chattels of the company and an assignment of book debts. The company made an assignment for the benefit of creditors. Thereupon the bank proved its claim and valued its securities at the amount of the claim as filed—subsequently the assignee with the approval of the inspectors, conveyed all his right, title and interest in the mortgaged property of the company to the bank and received from the bank a certain sum of money and a release of the book debts. The court held that the bank must be held to have accepted the conveyances in satisfaction of their claim against the company and to have thus determined any liability the defendant was under to pay any part of the debt.

Union Bank v. Makepeace, 46 D.L.R. 193, 44 O.L.R. 202, reversing 38 D.L.R. 361, 40 O.L.R. 368.

Variation—Increase of liability—Discharge—Estoppel.

A guaranty is not discharged because of a variation in the terms of the transaction which increased the liability, if the guarantor, at the time the change was made, knowingly acquiesced in it, and by his conduct subsequently ratified it.

K. & S. Auto Tire Co. v. Rutherford, 28 D.L.R. 357, 36 O.L.R. 26, affirming 27 D.L.R. 736, 34 O.L.R. 639.

Discharge—Impairment of security.

A failure to register a lien note, in consequence whereof a third person has acquired a good title to the property covered thereby, will discharge a guarantor from liability thereon.

Gray-Campbell v. Reimer, 36 D.L.R. 181, 11 A.L.R. 437, [1917] 2 W.W.R. 991.

A guarantor is not released, where after the guarantee is given the creditor fails to effectively secure additional security, which, of his own motion, he attempted to secure and which was not in the contemplation of either party when the guarantee was given. Cases of loss of security through failure to comply with the provisions of a statute considered.

Northern Crown Bank v. Walker et al., 24 B.C.R. 163, [1917] 2 W.W.R. 573.

Action on suretyship bond — Assurance of due performance of contract — Material alterations in proposed contract — Absence of assent of guarantors.

Richardson v. London Guarantee & Accident Co., 11 O.W.N. 223.

Bank overdraft—Action against guarantors — Defences — Execution of guaranty on understanding as to execution by others—Dealings with cosureties — Release — Pleading — Third party procedure—R. 170.

Bank of Ottawa v. Smith, 10 O.W.N. 394, 11 O.W.N. 374.

Directors of company guaranteeing account with bank—Alleged extinction of guaranty by payment—Finding of fact — Counterclaim — Judgment against executors of deceased directors—Limitation to estates in hand for administration.

Mather v. Bank of Ottawa, 15 O.W.N. 354. [Affirmed, 17 O.W.N. 249.]

Time for payment of debt guaranteed extended for definite period by arrangement between creditor and principal debtor—Release of guarantor.

North-Western National Bank v. Ferguson, 12 O.W.N. 15, affirming 11 O.W.N. 178. [Reversed, 44 D.L.R. 464, 57 Can. S.C.R. 420.]

Action of suretyship bond—Assurance of due performance of contract—Material alterations in proposed contract — Absence of assent of guarantors.

Richardson v. London Guarantee & Accident Co., 11 O.W.N. 223, 321.

Money embezzled — Cheques signed in blank—Material representation to guarantee company.

[Elgin Loan v. London Guarantee Co., 11 O.L.R. 330, followed.]

McDonald v. London Guarantee & Accident Insurance Co., 19 O.W.R. 807, 2 O.W.N. 1455.

Discharge — Judgment — Setting aside — Effect.

Where a guarantor is once relieved or discharged of his liability as such he cannot again be rendered liable upon his contract without his consent, therefore the setting aside at the instance of the plaintiff of a judgment against the principal debtor only and the restoration of the latter's original liability does not place the plaintiff in a position to obtain judgment against the guarantor.

Crown Life Ins. Co. v. Lendrum, [1917] 2 W.W.R. 1062.

GUARDIAN AND WARD.

I. Appointment; removal; discharge.

II. Powers; rights; duties; and liabilities of guardian.

Guardianship of infants, see Infants; Incompetent Persons.

Suit by foreign guardian, see Conflict of Laws, 1 C—71.

I. Appointment; removal; discharge.

(§ I—1) — Appointment and removal — Domicile.

Where the natural and legal guardian and the person seeking to be made the judicial guardian of an infant are both domiciled and resident within the province where the application is made, the court has jurisdiction to set aside the natural and legal guardian and appoint another guardian, although the infant is at the time residing outside the province.

Re McGibbon, 39 D.L.R. 177, 13 A.L.R. 196, [1918] 1 W.W.R. 579.

(§ I—2)—Minor not domiciled or resident.

Although a minor, neither domiciled nor resident in Quebec, has a tutor appointed by the court of domicile, the court may appoint a tutor resident in the province to represent and protect the minor in a matter to be judicially determined in the Quebec courts.

A. F. Byers Co. v. Bartolucci, 42 D.L.R. 486, 27 Que. K.B. 359.

(§ I—3)—Testamentary guardian — Appointment of new guardian — Ex parte order without notice—Erroneous jurisdiction of Probate Court.

No special form of words is necessary for the appointment of a testamentary guardian, and after such guardian has been appointed and the office is full, it is an erroneous exercise of jurisdiction in the Probate Court to appoint another guardian without serving notice on such testamentary guardian and taking evidence in support of the allegations contained in the petition for his removal.

Re Kelly, 47 D.L.R. 521.

II. Powers; rights; duties and liabilities of guardian.

(§ II—11a)—Investments.

It is the duty of a guardian (or tutor) of a minor, having charge of the latter's money awaiting investment, to deposit it in a chartered bank in an interest bearing account, instead of merely on safe deposit where it would earn no interest but would remain the property of the minor unaffected by the failure of the bank or other depository, and the tutor depositing in the savings department of a chartered bank is not liable for the loss occasioned by the failure of the bank.

A guardian who, in good faith and during the period by law allowed him to arrange for the investment of the funds of his ward, deposits thereof the sum of $225 in a bank, reputed solvent, will not for that reason be held responsible for the loss of such sum, if, after the deposit, such bank becomes insolvent.

Gervais v. Boudreau, 8 D.L.R. 802, 18 Rev. de Jur. 433.

Appointment for children—Investment—Guardian—Trustee—Duties.

Where the residuary estate of a testatrix is apportioned in equal shares amongst her children, the shares not to vest in the children until they respectively attain the age of 25, the income from the several presumptive shares to be paid by the trustees to the guardian of the children for maintenance, education and support until such shares are vested, the trustees are justified in paying the whole of the income to the guardian both before and after the majority of the children; and upon a child attaining his majority the guardian becomes a trustee for him.

Re Eliot, 11 D.L.R. 34, 4 O.W.N. 1198, 24 O.W.R. 494.

Income of fund—Surplus—Investment—Infants.

Where the income of a fund is paid to a guardian for the maintenance, education and support of a child, the guardian should invest the surplus income not required for that purpose, for the benefit of the child.

Re Eliot, 11 D.L.R. 34, 4 O.W.N. 1198, 24 O.W.R. 494.

Maintenance of infant out of funds in hands of guardian—Power of court to authorize payment to mother.

The court has power to enforce the duty of any guardian or other trustee to maintain and educate infant children according to their needs and means; and has power over the person and property of an infant, which power ought to be freely exercised for the benefit of the infant whenever necessary. An order was made by a Judge in Chambers, upon the application of the mother of two infants (girls), who resided with her, authorizing the guardians of the infants to pay to the applicant, out of the infants' moneys in their hands—largely out of the corpus, the income being insufficient—the same allowance for the infants' maintenance and education that had been paid for a limited time under a previous order, so long as past conditions as to maintenance and education should continue, up to the time of each infant, respectively, attaining the age of 21 years or marrying. Held, that the application was regularly made at Chambers, by way of originating notice of motion; and equally so whether the guardians were assenting or dissenting, there being no question involved respecting the power of the court, or the right of the infants to the property in question.

Re Adkins Infants, 33 O.L.R. 110.

Curator of absentee—Right to claim succession—Disbursements by.

A curator to the property of an absentee, who cannot prove that he was alive at the

time of the opening of the succession to which he is substitute, has no right to claim the succession in the name of the absentee or to retain it against those who are called upon to succeed him. A curator who, with no right to do so, has taken possession in the name of the absentee of immovables devised to him and has made out of his own money useful and necessary disbursements, cannot by a plea filed in his capacity of curator claim the amount of these disbursements nor avail himself of the right to retain the property.

Picard v. Picard, 48 Que. S.C. 316.

INVESTMENTS—GOOD FAITH.

In an action for an account of tutorship the defendant cannot plead that he, in good faith, made investments other than those provided for by arts. 981o, 981r, C.C. (Que.), nor oblige the plaintiff to accept the investments in settlement of the balance of the account.

Barrette v. Dumontet, 18 Que. P.R. 53.

(§ II—13)—LIABILITIES.

A minor on becoming of age may claim, by ordinary action, reimbursement of a fixed sum from his tutor; he is not obliged to resort to the action en reddition de compte especially if the sum is small, comprises all his possessions and he declares that he relieves the tutor from the necessity of rendering an account.

Brennan v. Benoit, 15 Que. P.R. 42.

CURATOR—QUE. C.P. 833, 834, 874—ADMINISTRATION—LIABILITY.

A curator is entitled to set up, on the presentation of a motion to issue a rule of coercive imprisonment, all the grounds he might set up against the rule itself. [Crevier v. Crevier, 9 Rev. Leg. 313.] The law does not oblige the curator to furnish security, and does not prescribe any penalty against him. Therefore a curator is liable to imprisonment only for what is due by reason of his administration.

Re Hebert & Hood, 16 Que. P.R. 97.

BENEFICIARY CERTIFICATE — APPOINTMENT OF GUARDIAN BY WILL.

Brooks v. Catholic Order of Foresters, 2 O.W.N. 771, 18 O.W.R. 397.

JUDICIAL GUARDIAN—VALUE OF THE MOVEABLES SEIZED.

Meresse v. Harris, 12 Que. P.R. 399.

HABEAS CORPUS.

I. IN PROVINCIAL COURTS.
- A. In general.
- B. Power to issue; who may demand.
- C. Scope of writ; questions considered; right to discharge.
- D. Procedure; judgment.

Review of proceedings, see **Appeal; Certiorari; Criminal Law.**

Annotations.

Habeas corpus, procedure: 13 D.L.R. 722.

Prosecution for same offence after conviction or commitment quashed: 37 D.L.R. 126.

Bail pending decision on writ of habeas corpus: 44 D.L.R. 144.

I. In Provincial Courts.

A. IN GENERAL.

Quashing conviction, discharge, rearrest for same offense, see Criminal Law, II G—79.

(§ I A—1)—JURISDICTION OF QUEBEC SUPERIOR COURT—EXCEPTION OF CRIMINAL MATTERS—C.C.P. QUE. ARTS. 50, 1114.

The Court of King's Bench alone, and not the Superior Court, can grant a habeas corpus in the province of Quebec to a person accused in a criminal matter.

Miller v. Malepart, 31 Can. Cr. Cas. 203.

JURISDICTION OF COURT OF KING'S BENCH (APPEAL SIDE)—QUASI-CRIMINAL MATTER—IMPRISONMENT FOR BREACH OF LICENSE LAW—C.C.P. ARTS. 43, 1114, 1125.

The Court of King's Bench, appeal side, in the Province of Quebec has no jurisdiction by way of appeal in habeas corpus arising from a summary conviction for a criminal or quasi-criminal matter under a provincial law. When a writ of habeas corpus was refused by a judge, a new application may be made to the Court of King's Bench, at its next sitting in appeal, conformably to the provisions of art. 1125 C.C.P. The Court of King's Bench, appeal side, acts, in that case, as a court of the first instance, and not as a Court of Appeal.

Du Perron v. Jacques, 31 Can. Cr. Cas. 183, 26 Que. K.B. 258.

CRIMINAL LAW—MAGISTRATE'S CONVICTION—WARRANT OF COMMITMENT — MISNOMER OF DEFENDANT—HABEAS CORPUS—PRODUCTION OF WARRANT BY GAOLER—ISSUE AND LODGING OF NEW WARRANT DESCRIBING DEFENDANT BY TRUE NAME—AMENDMENT—CR. CODE, S. 1124.

R. v. Bearden, 17 O.W.N. 68.

(§ I A—2)—ALIEN ENEMIES — MILITARY CUSTODY.

A prisoner held in military custody as an alien enemy must have the consent of the Minister of Justice before he can claim to be released in habeas corpus proceedings in support of which he adduces proof that he is a British subject by naturalization; he cannot be released upon bail or otherwise discharged or tried without the consent of the Minister of Justice under the War Measures Act, 1914, 5 Geo. V., Can. c. 2.

Re Beranek, 25 D.L.R. 564, 24 Can. Cr. Cas. 252, 33 O.L.R. 139.

INTERNMENT OF ALIEN ENEMY—REVIEW.

The judgment of a register of alien enemies as to the necessity of the internment of a resident alien enemy under the War Measures Act, 1914, and under the statutory regulations made thereunder, is not subject to review by the courts on habeas

corpus without the consent of the Minister of Justice. [Re Beranek, 24 Can. Cr. Cas. 252, followed.]

Re Gusetu; Gusetu v. Date, 24 Can. Cr. Cas. 427, 17 Que. P.R. 95.

PENITENTIARY SENTENCE — WARRANT OF COMMITMENT—INCOMPLETE DESCRIPTION OF OFFENCE—JURISDICTION EXCLUDED—SENTENCE BY COURT OF KING'S BENCH.

Habeas corpus does not lie in respect of a sentence and commitment in execution thereof by a Superior Court of criminal jurisdiction on the ground that the warrant or certificate of sentence does not disclose a criminal offence; and, in any case, the regularity of the warrant of commitment by a Superior Court of criminal jurisdiction should not be considered apart from the sentence itself. An error in the warrant will not invalidate the detention if the sentence be valid. The Superior Court of the Province of Quebec will not review on habeas corpus a sentence in a criminal case pronounced by the Court of King's Bench, Crown side. The proper mode of review is by appeal. [Re Sproule, 12 Can. S.C.R. 140, applied.]

Flaherty v. Malepart, 31 Can. Cr. Cas. 314, 20 Que. P.R. 68.

(§ I A—3)—Resort to the writ of habeas corpus should not be permitted where there is an complete a remedy by appeal under Cr. Code, s. 1014 et seq. from the conviction attacked. [R. v. Amyot, 11 Can. Cr. Cas. 232, 15 Que. K.B. 22, applied.]

R. v. Therrien (1), 28 D.L.R. 57, 25 Can. Cr. Cas. 275, 17 Que. P.R. 285. [See also 28 D.L.R. 462, 26 Can. Cr. Cas. 309.]

OTHER REMEDY—APPEAL—SUMMARY TRIAL.

The right of appeal by reserved case or by leave, as to questions of law arising upon the judgment of a magistrate upon a summary trial held by him under the extended jurisdiction conferred by Cr. Code, s. 777, does not bar the remedy of the accused to seek his discharge on habeas corpus on the ground of the magistrate's omission to give the statutory information required by Cr. Code, s. 778, as amended in 1909, on taking the prisoner's election of summary trial, the Summary Trial Court not being a court of record, although presided over by a Judge of the Court of Sessions constituted under R.S.Q. 1909, art. 3260.

R. v. Morgan; Morgan v. Malepart, 25 Can. Cr. Cas. 192, 20 Rev. Leg. 277.

VALIDITY OF COMMITMENT.

The court hearing a habeas corpus application without a certiorari, need not enquire into the validity of one of several commitments, in execution of several convictions, if the remaining commitments are found to be valid.

Ex parte Evans, 25 Can. Cr. Cas. 239, 48 Que. S.C. 469.

(§ I A—4)—CERTIORARI IN AID.

The regularity of a summary conviction for a vagrancy offence (Cr. Code, s. 238) is properly enquired into upon habeas corpus when the proceedings before the magistrate are brought up upon a writ of certiorari in aid of the habeas corpus writ.

The King v. Johnson, 1 D.L.R. 548, 22 Man. L.R. 426, 19 Can. Cr. Cas. 203, 21 W.L.R. 900, 1 W.W.R. 1045.

Neither a proceeding to quash a summary conviction by way of certiorari, nor a motion to discharge on habeas corpus with certiorari in aid constitutes an "appeal," and where the powers of amendment of a conviction under a provincial statute are limited to "appeals" from convictions and orders, a conviction which illegally imposed hard labour for an offence against the provincial liquor laws cannot be amended on the habeas corpus motion and the prisoner is entitled to be discharged. [The King v. Plante, 40 C.L.J. 125, applied.]

Re Ching How, 1 D.L.R. 275, 19 Can. Cr. Cas. 176, 5 S.L.R. 128, 19 W.L.R. 891, 1 W.W.R. 674.

B. POWER TO ISSUE; WHO MAY DEMAND.

As to minor enlisting without parental consent, see Militia, I—5.

(§ I B—5)—APPLICATION FOR—FUGITIVE OFFENDERS ACT—WARRANT OF COMMITMENT BY MAGISTRATE—STRONG PRESUMPTION OF GUILT—EVIDENCE AS TO OFFENCE.

Re Harrison, 41 D.L.R. 731, 30 Can. Cr. Cas. 150. [See 25 B.C.R. 433, 541, and 545.]

CUSTODY OF CHILD—FATHER.

A writ of habeas corpus can only be had in the case of persons imprisoned or deprived of their liberty. So it cannot be issued when children old enough to choose whom they wish to live with, indicate a desire to remain with their grandmother, with whom they are free and by whom they were brought up. In such circumstances, without denying to the father the right to obtain possession of his children in favourable cases, a writ of habeas corpus should be refused him, if, at the time of the application, he is at the war and does not shew any reasonable motive to take the guardianship of his children away from their grandmother.

Osmun v. Marin, 27 Que. K.B. 282, 24 Rev. de Jur. 251.

JURISDICTION — STATUTORY LIMITATION — ORDER OF BOARD OF INQUIRY UNDER IMMIGRATION ACT.

There is no jurisdiction on habeas corpus or certiorari to review any order of a board of inquiry under the Immigration Act, 9-10 Edw. VII., (Can.) c. 27, for deportation of a rejected immigrant unless he is a Canadian citizen or has Canadian domicile as defined by the Act, i.e., that acquired by at least five years' residence.

R. v. Schoppelrei, 31 Can. Cr. Cas. 255, [1919] 3 W.W.R. 322.

JURISDICTION IN QUEBEC.

A Judge of the Superior Court of Quebec has concurrent jurisdiction with a Judge of the King's Bench, on habeas corpus, re-

specting a commitment in a criminal matter.

R. v. Morgan; Morgan v. Malepart, 25 Can. Cr. Cas. 192, 20 Rev. Leg. 277.

POWER TO ISSUE.

Subject to any statutory restriction of the right, an application for a writ of habeas corpus for the discharge of a prisoner from custody may be renewed before another judge of co-ordinate jurisdiction, notwithstanding that a similar application upon the same grounds had been refused by the judge to whom the application was first made.

Re Baptiste Paul (No. 2), 7 D.L.R. 25, 5 A.L.R. 442, 2 W.W.R. 927.

LIBERTY OF THE SUBJECT ACT, R. S. N. S. 1900, c. 181—POWER UNDER, OF COUNTY JUDGE ACTING AS MASTER OF SUPREME COURT.

Rule 1 and subr. (a) of order 54b (N.S.) does not confer upon a judge of a County Court, when acting as a Master of the Supreme Court, power to discharge from jail, under the Liberty of the Subject Act, R.S. N.S. 1900, c. 181, a person confined for the violation of the Nova Scotia Temperance Act.

Re Noble Crouse; R. v. Crouse (No. 1), 11 D.L.R. 749, 47 N.S.R. 64, 21 Can. Cr. Cas. 231, 12 E.L.R. 416. [See 11 D.L.R. 759, 21 Can. Cr. Cas. 243, 12 E.L.R. 499.]

POWER TO ISSUE—MASTERS OF N.S. SUPREME COURT.

The effect of Nova Scotia practice r. 2 (b) of order 54, by which it is provided that Masters of the Supreme Court of Nova Scotia shall exercise the jurisdiction of a Judge in Chambers "except in causes or matters belonging to a prothonotary's office in the district for which he is a County Court Judge," is to exclude jurisdiction to order the release in habeas corpus proceedings of a prisoner held in custody under a commitment for violation of the Canada Temperance Act, R.S.C. 1906, c. 152, such commitment not being a matter belonging to a prothonotary's office.

The King v. Woodworth, 21 Can. Cr. Cas. 187, 12 E.L.R. 70.

CRIMINAL MATTER—SUPERIOR COURT—JURISDICTION — REFERENCE TO KING'S BENCH—C.C.P. ARTS. 48, 50, 170, 171, 1114.

The first duty of the Superior Court on an application for a habeas corpus, which has for its object the liberation of a prisoner sentenced by a Criminal Court, is to ascertain whether it is competent in the matter submitted to it. If not competent it should refuse the application of its own motion. The Superior Court, which receives its powers from the provincial legislature, has only jurisdiction in purely civil matters, since criminal law, and the procedure which relates to it, are reserved exclusively to Dominion authority. Accordingly the Superior Court has no jurisdiction to liberate, either by way of habeas corpus or certiorari, a person sentenced to imprisonment by a Criminal Court for having committed a criminal offence, such as keeping a common bawdy house. Quære. Can the Superior Court refer the case to the Court of King's Bench, the only competent court? Do arts. 170, 171 C.C.P., which authorize the referring of a case to another court having sole jurisdiction, relate to civil cases only?

Harris v. Landriault, 55 Que. S.C. 40.

(§ I B—7)—WHEN PROPER REMEDY.

Habeas corpus, and not an application to a magistrate for the release of a person remanded by him to custody, is the proper mode of inquiry as to whether his detention was illegal.

R. v. Bouchard, 4 D.L.R. 317, 20 Can. Cr. Cas. 95.

WHO MAY DEMAND.

Any person is entitled to institute proceedings to obtain a writ of habeas corpus for the purpose of liberating another from illegal imprisonment. [Hottentot Venus Case, 13 East's Reports 195, followed.]

Re Thaw; Boudreau v. Thaw (No. 2), 13 D.L.R. 712, 22 Can. Cr. Cas. 3, 15 Que. P.R. 47.

APPLICANT OUT ON BAIL—NONDISCLOSURE.

The essential and leading theory of habeas corpus procedure is the immediate determination of the right to the applicant's freedom; and when a habeas corpus is obtained without disclosing so material a fact as that the applicant was not in custody at the time of the application, as he had been released on bail, it will be set aside.

Re Bhagwan Singh, 17 D.L.R. 63, 19 B.C.R. 97, 23 Can. Cr. Cas. 5, 5 W.W.R. 1090.

WHO MAY DEMAND—WHEN PROPER REMEDY.

An objection that the prisoner is held on two warrants for conflicting offences (bigamy and refusal to maintain) cannot be raised on habeas corpus; if available at all, it is by a demurrer or analogous proceeding at the trial.

R. v. Beaudoin, 17 D.L.R. 273, 22 Can. Cr. Cas. 319.

BY PARENT—MILITARY SERVICE.

The military discipline and control to which a soldier enlisted for active service is subject, along with his fellow soldiers, is not in law a detention or restraint upon liberty upon which to base a habeas corpus application made by the soldier's parent or other person having civil control over him during his minority for the purpose of having the soldier released from military service which he had voluntarily entered during minority.

Re Fournier (Que.), 32 D.L.R. 720, 26 Can. Cr. Cas. 405.

ALIEN ENEMIES.

An alien enemy has no right at common law to a writ of habeas corpus. [R. v. Schiever, 97 Eng. R. 551, followed.]

Re Gusetu; Gusetu v. Date, 24 Can. Cr. Cas. 427, 17 Que. P.R. 95.

(§ I B—8)—Common law writ.

As regards summary convictions the jurisdiction to review commitments thereunder on habeas corpus is not limited to the statutory powers founded on Imperial Statute 31 Car. II., c. 2, and the writ may be supported also upon the jurisdiction at common law. [R. v. McEwen, 13 Can. Cr. Cas. 346, 17 Man. L.R. 477, distinguished.]

The King v. Johnson, 1 D.L.R. 548, 22 Man. L.R. 426, 19 Can. Cr. Cas. 203, 21 W. L.R. 900, 1 W.W.R. 1045.

Successive applications.

The restriction imposed by 23 Vict. c. 57, s. 27 (C.S.L.C., c. 95, s. 28) in habeas corpus matters in Quebec, whereby an application once refused should not be renewed before another judge, except on new facts, but the applicant might apply to the Court of Queen's Bench in appeal, applies to the statutory habeas corpus and not to the common law writ, consequently a writ of habeas corpus at common law to examine into the legality of detention under a conviction by an inferior court for a criminal offence may be issued by a Judge of the King's Bench, after the refusal of an application upon the same grounds, made before a Judge of the Quebec Superior Court.

R. v. Therrien (1), 28 D.L.R. 57, 25 Can. Cr. Cas. 275, 17 Que. P.R. 285. [See also 28 D.L.R. 462, 26 Can. Cr. Cas. 309.]

C. Scope of writ; questions considered; right to discharge.

(§ I C—10)—Person committed for trial but not indicted at next assize—Remedy.

A person committed for trial but not indicted at the following assize, is not entitled to his discharge on habeas corpus, under s. 7 of the B.C. Habeas Corpus Act of 1897, his only right under such act being to make application for release on bail.

R. v. Dean, 11 D.L.R. 598, 18 B.C.R. 18, 21 Can. Cr. Cas. 310, 3 W.W.R. 781.

Jurisdiction—Supreme Court Act, R.S.C., c. 139, ss. 39(c), 48—Amendment 8-9 Geo. V., c. 7, s. 3—Effect of person being at large.

An appeal to the Supreme Court of Canada from the court of final resort in any province except Quebec in the case of habeas corpus will not lie under s. 39 (c) of the Supreme Court Act unless the case comes under s. 48, as amended by 8-9 Geo. V. c. 7, s. 3. And when the person, the legality of whose custody was in question, has been released by the court below and is at large, the right of appeal given by s. 39 (c) does not exist. [Mitchell v. Tracey & Fielding, 46 D.L.R. 520, 58 Can. S.C.R. 640; Cox v. Hakes, 15 App. Cas. 506, followed.]

The King v. Jeu Jang How, 50 D.L.R. 41, [1919] 3 W.W.R. 1115, quashing 47 D.L.R. 538.

Exemption from civil arrest under Army Act—Soldier on active service—The Bastardy Act, R.S.N.S., c. 51.

Ex parte Hughes, 24 D.L.R. 898, 24 Can. Cr. Cas. 222.

Proceedings under Bastardy Act.

It is not a ground for discharge on habeas corpus where the accused was arrested for default under a filiation order under R.S. N.S. 1900, c. 51, that no depositions had been taken in the filiation proceedings, if he had consented to the filiation order for he thereby effectively waived the taking of evidence.

R. v. Locke, 24 Can. Cr. Cas. 337.

Review of commitment.

Habeas corpus proceedings will lie to review a justice's commitment of the accused for trial made on a preliminary enquiry.

R. v. Mackey, 29 Can. Cr. Cas. 167.

Extradition case.

The question before the court on a habeas corpus case under the Extradition Act (Can.) is whether the accused was in lawful custody at the time of the issue of the writ. The lawfulness of the custody must depend upon the question whether there was a sufficient compliance with the provisions of the Extradition Act and if there was evidence upon which the Extradition Judge could act in making a committal order; his discretion is not reviewable on habeas corpus.

Re Rosenberg, 29 Can. Cr. Cas. 309, 28 Man. L.R. 439, [1918] 1 W.W.R. 845.

Reducing imprisonment.

On the hearing of a habeas corpus to which a regular commitment and a regular summary conviction is returned, the court has no discretion to reduce the award of imprisonment lawfully made by the lower court.

O'Neil v. Carbonneau, 29 Can. Cr. Cas. 340, 54 Que. S.C. 417.

Scope of writ.

A conviction for selling liquor or keeping liquor for sale in contravention of a local option municipal by-law prohibiting the issue of liquor licenses is a conviction under the Liquor License Act for selling or keeping for sale "without a license," and is subject to the same limitations as to review on certiorari and habeas corpus as a conviction against a nonlicensee in a district in which licenses are issued.

Re Leach and Fogarty, 18 Can. Cr. Cas. 487, 21 O.W.R. 919.

Fire inquest.

The Superior Court has no right nor power to review, by means of the writ of habeas corpus, decision rendered during the course of an enquête by one of the Fire Commissioners of Montreal.

De Mazuel v. Vallée, 14 Que. P.R. 397.

CRIMINAL LAW—BAIL PENDING APPEAL FROM JUDGMENT REFUSING TO QUASH ON CERTIORARI.

R. v. Sally, [1919] 3 W.W.R. 427.

DISCHARGE — CONDITIONS — LEAVE TO FILE AMENDMENT COMMITMENT.

Where the warrant of commitment following a summary conviction awarding imprisonment for nonpayment of a fine and costs states the amount of the fine, and is conditional further upon payment of the complainant's costs, the amount of which are not stated, and of the costs of conveying to jail the amount of which have not been certified by the constable to the jailer, the prisoner would not be entitled to discharge on habeas corpus without tendering the fine as to which the commitment was valid and bringing the amount of same into court on the habeas corpus motion by way of renewal of the tender made to the jailer. The court may, however, on motion of the complainant shewing cause, refuse immediate discharge and direct under Cr. Code, s. 1120 that leave be given to file within a limited time an amended commitment correcting the defect and also the constable's certificate of the costs of conveying to jail. [R. v. Morgan, 5 Can. Cr. Cas. 63, R. v. Barr, 11 Can. Cr. Cas. 1, applied.]

Coté v. Morin; Morin v. Jailer of Kamouraska, 30 Can. Cr. Cas. 59, 53 Que. S.C. 124.

(§ I C—11)—VALIDITY OF ORDER-IN-COUNCIL. —DEPORTATION UNDER IMMIGRATION LAWS—ASIATICS FROM BRITISH TERRITORY.

A discharge on habeas corpus may be ordered in respect of a deportation order against Asiatics under an order-in-council which exceeds in its scope the powers conferred by Parliament: the orders-in-council P.C. 920, 926 are both invalid as exceeding the prohibition of the statute as to persons to be debarred from entering Canada.

Re Thirty-nine Hindus, 15 D.L.R. 189, 18 B.C.R. 506, 26 W.L.R. 319, 5 W.W.R. 686.

(§ I C—11a)—ORDERING FURTHER DETENTION NOTWITHSTANDING INVALID COMMITMENT.

Where the magistrate illegally proceeded to try the accused for an indictable offence for which he had no jurisdiction to hold a summary trial either with or without the consent of the accused, the court on habeas corpus may properly decline to order the further detention of the accused by remanding him to custody for a preliminary enquiry before such magistrate under s. 1120 Cr. Code, thus leaving it open for the prosecutor to take such steps as may be available to renew the prosecution after the discharge under the illegal commitment. [R. v. Blucher, 7 Can. Cr. Cas. 278, approved.]

R. v. Alexander; R. v. Shouldice, 13 D.L.R. 385, 21 Can. Cr. Cas. 473, 6 A.L.R. 227, 25 W.L.R. 290, 5 W.W.R. 17.

ORDER FOR FURTHER DETENTION—JURISDICTION.

While an order for further detention may be justified under Cr. Code, s. 1120 on a habeas corpus application allowed because of a technical error which rendered the conviction bad, it should not be made where the official who purported to make the commitment was not of the class of magistrates to whom extended jurisdiction had been given in respect of such offences as that on which the conviction was improperly made. [R. v. Blucher, 7 Can. Cr. Cas. 278; R. v. Breckenridge, 7 Can. Cr. Cas. 116; R. v. Benner, 8 Can. Cr. Cas. 398, followed.]

R. v. Kolember, 16 D.L.R. 146, 27 W.L.R. 37, 22 Can. Cr. Cas. 341.

POWER TO ORDER FURTHER DETENTION.

Apart from s. 1120, Cr. Code, as to ordering further detention on a habeas corpus motion, notwithstanding the irregularity of the commitment, the court has power to remand the accused to his former custody where there has been an abortive trial before a magistrate; but such power of remand is to be exercised only when it is necessary in the interests of justice.

Ex parte Carroll, 41 D.L.R. 196, 29 Can. Cr. Cas. 213.

FURTHER DETENTION.

The provisions of Cr. Code, s. 1120, as to ordering on habeas corpus the further detention of a "person in custody, charged with an indictable offence," do not apply to a person already sentenced, although the sentence was made without jurisdiction: and the prisoner will be discharged from imprisonment adjudged even upon a plea of guilty if the magistrate has proceeded with a summary trial under s. 778, on defendant's election of that mode of trial without informing him of his privilege of applying for bail should he choose to be tried in the ordinary way, by the court having criminal jurisdiction, in the manner directed by s. 778, subs. (2), as amended in 1909 by 8-9 Edw. VII. (Can.), c. 9.

R. v. Morgan; Morgan v. Malepart, 25 Can. Cr. Cas. 192, 20 Rev. Leg. 277.

GROUNDS—CERTIFIED COPY OF SENTENCE.

An applicant for a habeas corpus cannot urge grounds refused on previous applications. A copy of the sentence certified by the assistant clerk of the court constitutes a valid warrant for imprisonment.

Myers v. Malepart, 20 Que. P.R. 217.

(§ I C—12)—LACK OF JURISDICTION.

An application for the discharge of defendant from gaol, under an order in the nature of a habeas corpus, based upon the one ground that the committing magistrate, in sentencing defendant for a second offence against the provisions of the Nova Scotia Temperance Act, 1910, as amended by 1911, c. 33, s. 8, was under a misapprehension as to his powers and sentenced the defendant for a longer term than he would have done if he had any discretion in the matter as shewn by an affidavit of the magistrate, will

not be entertained as it was not competent for the magistrate to make such an affidavit, or for the court to consider such a question, the only question being whether or not the defendant was legally detained in custody. A prisoner is legally detained where a gaoler has returned a good warrant, based upon a conviction which was not attacked, and which was apparently regular, the law justifying the sentence imposed. The court cannot on an application for the discharge of a prisoner from custody by way of habeas corpus review the action of the magistrate on the merits, or send the prisoner back to the magistrate to impose a lighter sentence where the sentence actually imposed was not in excess of what the law authorized.

The King v. Fraser, 7 D.L.R. 496, 43 Que. S.C. 309, 19 Rev. Leg. 251.

An accused person, in an application on the return of a summons for a habeas corpus, may avail himself of an objection to the jurisdiction of a police magistrate to try him for an offence against the Liquor License Ordinance, on the ground that no sworn information had been lodged against him and that he was, therefore, improperly brought before the magistrate, under a warrant of arrest, where his objection before the magistrate was overruled, the trial proceeded with, and the accused found guilty. [Re Baptiste Paul, 7 D.L.R. 25, followed.]

R. v. Davis, 7 D.L.R. 608, 5 A.L.R. 443, 22 W.L.R. 837, 3 W.W.R. 1.

ARREST—COMMITMENT.

A prisoner whose attendance for trial by a magistrate in a summary conviction matter has been compelled by arrest without warrant in a case where a warrant is required by law, will be discharged upon habeas corpus from the commitment following conviction, if he protested before the magistrate against the illegal procedure. The fact that a person charged before a magistrate with an offence punishable on summary conviction had been brought before the magistrate under arrest without warrant, although a warrant was required by law, does not go to the jurisdiction of the magistrate, nor affect the validity of a conviction and commitment made at the hearing. [Reg. v. Hughes, 4 Q.B.D. 614, 48 L.J.M.C. 151, applied.]

Re Paul (No. 1), 7 D.L.R. 24, 5 A.L.R. 440, 20 Can. Cr. Cas. 159, 2 W.W.R. 892. [See 7 D.L.R. 25.]

A warrant of commitment is invalid which does not contain even a summary of the nature and gravity of the offence charged against a prisoner, nor give the name of the presiding magistrate who committed him.

Ladleur v. Vallee, 5 D.L.R. 57.

The fact that a warrant of committal for trial was illegally issued on a charge of assault and occasioning actual bodily harm after the justice before whom the accused had been brought to answer the charge had with his consent entered upon a summary trial thereof, which trial had proceeded to the close of the evidence for the defence, is a ground for discharge upon habeas corpus. Where the court has power upon habeas corpus, instead of discharging a prisoner from custody under an invalid commitment, to remit the case to the magistrate under s. 1120 Cr. Code, consideration will be given to the imprisonment already suffered and to the costs to which the accused has been put in moving against the illegal warrant of commitment.

R. v. Hicks, 7 D.L.R. 171, 5 A.L.R. 371, 22 W.L.R. 236, 2 W.W.R. 1100.

EXTRADITION—REVIEW OF, ON HABEAS CORPUS.

It is without the province of a court, to whom an application is made for writ of habeas corpus directing the discharge of a person to be extradited to a foreign country, to review on such proceedings the decision of the extradition commissioner if there is evidence justifying the issue of the warrant of extradition, the only duty of such court in that regard being to decide if any such evidence exists.

Re O'Neill, 5 D.L.R. 646, 19 Can. Cr. Cas. 410, 17 B.C.R. 123, 2 W.W.R. 368.

The function of a judge upon the return of a writ of habeas corpus in the case of one who has been committed for extradition is not to sit in appeal from the extradition commissioner, but simply to decide whether he had jurisdiction to order the committal, and evidence offering reasonable grounds of suspicion against the accused will be sufficient for a refusal of his discharge.

United States v. Webber (No. 2), 5 D.L.R. 866, 20 Can. Cr. Cas. 6, 11 E.L.R. 379.

SCOPE OF WRIT—RELEASE UPON RECOGNIZANCE BEFORE APPLICATION.

A writ of habeas corpus cum causa in respect of an alleged illegal arrest and a subsequent detention order made by a justice will not be granted when the accused has obtained a release upon giving bail and remains at liberty under the recognizance; such habeas corpus process is intended to give relief only to persons in actual custody under illegal process.

Ex parte Seriesky, 10 D.L.R. 612, 21 Can. Cr. Cas. 140, 41 N.B.R. 475, 12 E.L.R. 387.

SCOPE OF WRIT—REVIEW OF COMMITMENT FOR TRIAL.

The court has jurisdiction upon habeas corpus to examine into the legality of a commitment for trial made by a justice upon a criminal charge, and in a proper case to order the discharge of the accused.

R. v. Weiss; R. v. Williams, 13 D.L.R. 166, 21 Can. Cr. Cas. 438, 6 A.L.R. 163, 25 W.L.R. 286, 4 W.W.R. 1358.

PENITENTIARY REGULATIONS OF 1898—PARTIAL REMISSION OF SENTENCE FOR GOOD CONDUCT.

Prima facie the warden and officers of a penitentiary are to determine questions of

remission of part of sentence under the Penitentiary Regulations of November, 1898, for good conduct of the convict while in the prison, and also questions of the forfeiture of remissions earned, subject to review and sanction by the Minister of Justice under such regulations; it is not open to the court on habeas corpus to enquire into the validity of a direction contained in a report duly approved by the Minister forfeiting on the ground of misconduct the periods of remission previously earned by the convict.

R. v. Huckle, 19 D.L.R. 359, 6 O.W.N. 661, 23 Can. Cr. Cas. 73.

NOVA SCOTIA TEMPERANCE ACT—INFORMATION CHARGING MORE THAN ONE OFFENCE—POWER TO AMEND.

An information under s. 16 (4) of the N. S. Temperance Act charging more than one offence is bad, and the magistrate, at the commencement of the trial, refusing to amend, and then hearing the evidence to all the charges, has no power to make a conviction disclosing one offence only. [S. 724, Cr. Code, R. v. Alward, 25 O.R. 519, 522 applied.]

The King v. Keeper of Halifax Jail, Ex parte Simpson, 44 D.L.R. 136, 30 Can. Cr. Cas. 334, 52 N.S.R. 299.

WARRANT OF COMMITMENT—AMENDMENT.

The fact that a warrant of commitment is defective is not a ground for an application by way of habeas corpus for the release of the prisoner, if the conviction was validly made under a proper indictment; the warrant may be amended or replaced by another in due form.

The King v. Flaherty and Malepart, 43 D.L.R. 253, 27 Que. K.B. 555.

RIGHT TO DISCHARGE.

The right to discharge on habeas corpus does not depend on the legality or illegality of the prisoner's caption but on the legality or illegality of his detention. [R. v. Whiteside, 8 Can. Cr. Cas. 478, 8 O.L.R. 622, followed.]

R. v. Gage, 30 D.L.R. 525, 26 Can. Cr. Cas. 385, 36 O.L.R. 183.

IRREGULARITIES.

If the court of record making the conviction possesses the requisite jurisdiction, no matter what errors or irregularities occur in the proceedings or judgment, provided they are not of such a character as to render them void, its action cannot be reviewed or examined into on habeas corpus.

R. v. Therrien (1), 28 D.L.R. 57, 25 Can. Cr. Cas. 275, 17 Que. P.R. 285. [See also 28 D.L.R. 462, 26 Can. Cr. Cas. 309.]

ARREST—COMMITMENT—GROUNDS.

A prisoner in custody under two warrants of commitment for trial for different offences cannot set up the irregularity of a remand under s. 679 Cr. Code, because of an adjournment exceeding 8 days, during the preliminary inquiry on one of the charges, as a ground for a motion for his release on habeas corpus.

R. v. Beaudoin, 17 D.L.R. 273, 22 Can. Cr. Cas. 319.

An order for discharge on habeas corpus will not be made if a valid cause of detention is shewn at the time of the return to the writ, although it did not exist when the imprisonment commenced.

The King v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

COMMITMENT — BASTARDY — FORM OF WARRANT.

A warrant of commitment in default, which is drawn in strict conformity with a statutory form, will not be set aside on habeas corpus, although it does not fix the costs of conveying to jail which the defendant must pay as a condition of his release; so a commitment in default of giving security in filiation proceedings under the Illegitimate Children's Act, R.S.M. 1913, c. 92, is valid if issued in form 10 of that Act for the term of six months or until defendant gives the statutory bond or makes the cash deposit and pays "the costs and charges attending the commitment and conveying to jail."

R. v. Book, 25 Can. Cr. Cas. 89, 25 Man. L.R. 480.

COMMITMENT IN DEFAULT OF FINE.

When a warrant for committment to jail in default of paying a fine has been issued with an overcharge in the costs of conveyance to the common jail, it will be quashed on habeas corpus and the prisoner discharged as the warrant is indivisible.

Ex parte Msadaquis, 24 Can. Cr. Cas. 384, 16 Que. P.R. 26.

IRREGULAR PUNISHMENT.

Where a conviction imposes an absolute order for imprisonment and also a fine with imprisonment in default (Cr. Code, s. 781), the direction as to punishment is divisible, and the absolute term may stand notwithstanding the invalidity of that part of the conviction which conditionally orders imprisonment in default; and a discharge on habeas corpus will be refused where the detention can be justified by reason of the absolute term not having expired. [R. v. Carlisle, 7 Can. Cr. Cas. 470, followed.]

R. v. Miller, 25 Can. Cr. Cas. 151, 25 W.L.R. 296.

SUMMARY TRIAL—ILLEGAL ARREST—JURISDICTION.

It is a ground for discharge on habeas corpus that the accused was illegally arrested without a warrant, and not on view, for an indictable offence, and was summarily tried by the magistrate, notwithstanding a protest made that he had no jurisdiction because of the illegal arrest. [R. v. Miller, 25 Can. Cr. Cas. 151, followed.]

R. v. Wilson, 29 Can. Cr. Cas. 42.

REVIEW OF COMMITMENT FOR TRIAL.

If a committal for trial has been made without proof of an essential ingredient of the offence charged, it will be reviewed on habeas corpus and certiorari in aid, and the prisoner discharged if the depositions disclose no criminal offence.

R. v. Morency, 30 Can. Cr. Cas. 395.

That the magistrate proceeded with the hearing of the evidence on preliminary enquiries for two offences at the same time, against the same accused, is not a ground for habeas corpus in respect of his committal for trial.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

ARREST—COMMITMENT.

If an information under the Cr. Code is dismissed with costs, and the complainant condemned to imprisonment for default in payment of such costs, a warrant stating that he is committed to imprisonment with hard labour is illegal and he will be discharged by habeas corpus.

Yanosky v. Vallée, 14 Que. P.R. 198.

CRIMINAL PROCEDURE — PRELIMINARY INVESTIGATION — PERJURY — EVIDENCE AS TO ACCUSED TAKING OATH—RIGHT OF ACCUSED TO HAVE WITNESS HEARD ON HIS OWN BEHALF—CR. CODE, ARTS. 590, 596, 684, 686, 1120.

In the preliminary investigation on a charge of perjury, direct evidence of the accused having been sworn, when heard as witness is not necessary to warrant a commitment for trial, if it be shown that probable cause exists to believe that he committed the offence charged. The discretion exercised by the magistrate who found a prima facie case is not to be questioned on habeas corpus proceeding. Even though the accused might answer by error, at the preliminary investigation, that he has no evidence to offer, he must not be deprived of such right, if he wishes to have witnesses heard on his behalf and makes application therefor. Upon application for habeas corpus on such ground, the judge shall not release the accused, but may direct the magistrate to hear the witnesses called by the accused.

R. v. Payne, 28 Que. K.B. 468.

(§ I C—13)—TRIAL—SENTENCE.

A summary conviction by a city police magistrate under the vagrancy clauses, Cr. Code ss. 238, 239, may be quashed for irregularity on proceedings in habeas corpus and certiorari in aid taken on behalf of the defendant committed under such summary conviction, and is, in that respect, distinguishable from convictions made by city police magistrates for indictable offences under their extended jurisdiction under s. 777. [R. v. McEwen, 13 Can. Cr. Cas. 346, 7 Man. L.R. 477, distinguished.]

R. v. Johnson, 5 D.L.R. 523, 20 Can. Cr. Cas. 8, 22 Man. L.R. 426, 21 W.L.R. 900, 1 W.W.R. 1045.

A formal commitment of a person under art. 459, Cr. Code for house-breaking, on a trial and conviction under art. 464 with having a house-breaking instrument in his possession, is illegal as being upon a charge different than that which was tried, and the prisoner will be discharged on habeas corpus.

Hoolahan v. Malepart, 5 D.L.R. 479, 19 Can. Cr. Cas. 405.

SCOPE OF WRIT—SUMMARY TRIAL—FAILURE TO INFORM PRISONER AS TO MODE OF TRIAL.

A prisoner will be discharged on habeas corpus from imprisonment under a conviction on a plea of guilty in a summary trial proceeding where the magistrate did not, as required by s. 778, Cr. Code, inform the accused that he might, at his option, be tried forthwith without a jury, or remain in custody or under bail as the court might decide, to be tried in the ordinary way by a court having criminal jurisdiction.

The King v. Davis, 13 D.L.R. 612, 22 Can. Cr. Cas. 34.

SUMMARY TRIAL — FAILURE TO INFORM PRISONER AS TO MODE OF TRIAL—EFFECT —TRIAL DE NOVO.

On quashing on habeas corpus a conviction before a police magistrate on a summary trial, because of his failure to inform the prisoner, as required by s. 778 (b) Cr. Code, as amended by 8–9 Edw. VII. c. 9, of his option to be tried forthwith by the magistrate, or to remain in custody or under bail as the court might decide, for trial in the ordinary manner by a court having criminal jurisdiction, the discharge of the prisoner may be refused and he may be remanded to custody so that he may again be taken before the magistrate on proceedings de novo on which his election can be taken in proper form.

The King v. Fuerst, 15 D.L.R. 314, 26 W.L.R. 445, 22 Can. Cr. Cas. 183.

SENTENCE BY COURT OF KING'S BENCH.

The Superior Court will not revise on habeas corpus a sentence pronounced by the Court of King's Bench. In order that the Superior Court may revise a sentence, the sentence must be filed in that court.

Flaherty v. Malepart, 20 Que. P.R. 68.

(§ I C—14)—PROCEEDINGS FOR CUSTODY OF CHILD—PROCEDURE.

An application for a writ of habeas corpus to obtain the custody of an infant cannot be renewed before any judge while there is an order pending of another judge that no application shall be made by the petitioner until the infant attains the age of 7 years unless, if under the practice rr. 9, 10, adopted by s. 34 of the Infants Act (Alta.), 1913, c. 13, such judge is unavailable, another judge may exercise his jurisdiction. [Re Holt, 16 Ch. D. 115, followed.]

Re Davies, 25 D.L.R. 96, 9 A.L.R. 222, 32 W.L.R. 716, 9 W.W.R. 361.

A signed and sealed agreement by a father giving the custody of his infant daughter to her maternal grandparents until she

reaches her majority or marries under that age and covenanting that the father would not revoke the instrument, is not a bar to the father's application for a writ of habeas corpus to obtain the custody of his child.

Re Hutchinson, 5 D.L.R. 791, 26 O.L.R. 113 and 601, 22 O.W.R. 390, reversing 26 O. L.R. 113.

INFANT—REMOVAL OF, FROM JURISDICTION —FATHER'S APPLICATION.

Re Hilker, 16 D.L.R. 868, 6 O.W.N. 82, 50 C.L.J. 236.

PROCEEDINGS FOR CUSTODY OF CHILD—EVIDENCE, HOW TAKEN—ORDER OF JUVENILE COURT—CERTIORARI IN AID.

On the return of a writ of habeas corpus issued under the Ontario Habeas Corpus Act, 9 Edw. VII. (Ont.) c. 51, s. 7 (R.S.O. 1914, c. 84) to determine the lawful custody of an infant, the applicant may dispute both the validity of the return in law and its accuracy in fact, and evidence may be taken viva voce or by affidavit for that purpose. [Re Smart, 12 P.R. (Ont.) 2, approved; and see, on the question of custody of children on separation of parents, Smart v. Smart, [1892] A.C. 425, affirming the unreported decision of the Ontario Court of Appeal.] A parent desiring to contest by way of review the findings of a Commissioner of a Children's Court in proceedings taken under the statute 8 Edw. VII. (Ont.), c. 59, should have them brought up on a certiorari in aid of a writ of habeas corpus; but the Supreme Court of Ontario on an application in habeas corpus proceedings for the child's custody has jurisdiction to supersede the Commissioner's order on an independent consideration of the proper custody of the child as of the later date when the habeas corpus application is heard, by virtue of its general Chancery powers, and under the jurisdiction specially conferred by statute, although no certiorari in aid had been issued (see 3-4 Geo. V. (Ont.), c. 62, s. 27), and is bound by the order of the Commissioner only as to facts established by that order as existing at its date. [Re McGrath, [1893] 1 Ch. 143, applied.]

Re Kenna, 15 D.L.R. 844, 29 O.L.R. 590.

INFANT—ABANDONMENT BY FATHER.

R. had the custody of the infant daughter of S., who at the time of the application was seven years old. The infant's mother having died shortly after the infant was born, S. gave the custody and possession of the infant to R., who kept her for some two years, when S. retook possession of her, keeping her only for a very short time, when she was returned to the custody of R. at R.'s request. R. and his wife had in the meantime become much attached to the infant and were solicitous that they should have her in custody. The infant had been with R. ever since. S. made no further request for her return.

Smith v. Reid, 6 W.W.R. 145.

PROCEEDINGS FOR CUSTODY OF CHILD.

A child which had been placed by its grandparents in the care of B. and his wife was handed over by the latter, who had separated from her husband and was about to leave the province, to defendant. B. obtained an order from the court for the adoption of the child and went to defendant and demanded the possession of it, but, before such demand, and without notice of the application made by B. or the granting of the order, defendant, at the request of B.'s wife, had sent the child to her. B. thereupon applied for and obtained an order for a writ of habeas corpus, and upon a return being made setting out the facts, moved to quash the return and to commit defendant for contempt, or in the alternative, to have the return amended:—Held, following Barnardo v. Ford, [1892] A.C. 326, that the return was good, that there was no contempt and that the application must be dismissed.

R. v. Parsons; Ex parte Boomhauer, 45 N.S.R. 210.

FOR CUSTODY OF CHILD.

A wife who was awarded the custody of her child by the judgment granting her separation from bed and board, is entitled to a writ of habeas corpus to obtain possession thereof, and a rule nisi is not the proper remedy to enforce the judgment of the court.

Kastel v. Hampton, 18 Que. P.R. 363.

(§ I C—15)—POWERS OF AMENDMENT.

A prisoner confined under an informal warrant of commitment may be held in custody upon a proper warrant being subsequently issued.

Lafleur v. Vallee, 5 D.L.R. 57.

SUMMARY CONVICTION — PUNISHMENT — AMENDMENT—QUASHING.

An amended warrant of commitment and an amended conviction may be returned to a writ of habeas corpus, so as to omit an unauthorized imposition of hard labour which the justice, making the summary conviction, had no jurisdiction to impose for the particular offence, and this, notwithstanding that the adjudication imposing hard labour had been acted upon; but the unauthorized portion of original commitment and of the original conviction brought before the court may be quashed.

Re Muschik, 25 Can. Cr. Cas. 170, 9 S.L.R. 1, 33 W.L.R. 468, 9 W.W.R. 1285.

POWERS OF AMENDING COMMITMENT—COSTS.

Where it appears that several commitments in default of paying fines imposed for infraction of the Canada Temperance Act were all actually executed at the one time, the court hearing a habeas corpus application may amend the commitments by striking out of all but one of them the costs of conveying the prisoner to gaol which had been included in each commitment; but semble the commitments would not be had in that respect, inasmuch as the magis-

trate could not fortell that all the commitments would be executed at once.

Ex parte Richard R. v. Stevees, 24 Can. Cr. Cas. 183, 42 N.B.R. 596.

POWERS OF AMENDMENT.

A conviction under the summary trials clauses (Cr. Code, ss. 771-779) is not subject to amendment on a habeas corpus application as a summary conviction would be.

The King v. Stark, 19 Can. Cr. Cas. 67, 18 W.L.R. 419.

(§ I C—16)—PRELIMINARY INQUIRY ON ANOTHER CHARGE.

A prisoner convicted by a magistrate on a summary trial and remanded for sentence to a fixed date may be brought up in the meantime for preliminary inquiry upon another criminal charge by means of a writ of habeas corpus ad respondendum ordered by a Superior Court on the prosecutor's application. [Ex parte Griffiths, 5 B. & A. 730, followed.]

R. v. Henry, 25 Can. Cr. Cas. 86.

(§ I C—17)—COMMITMENT OR CONTEMPT—QUASHING—DISCHARGE.

A person undergoing sentence for contempt of court (for refusal to be sworn and testify) imposed upon him by a royal commissioner sitting by virtue of R.S.M., c. 34, was released from custody by Haggart, J.A., sitting in Chambers as a Judge of the Court of King's Bench. The order for release provided that all proceedings under the writ of habeas corpus should be adjourned. Held, that, inasmuch as the whole basis of proceedings by way of habeas corpus is that the applicant for the writ is actually detained in custody, the proceedings under the habeas corpus came to an end upon discharge of the prisoner. On habeas corpus proceedings there is no power to quash a warrant of commitment made by a royal commissioner sitting by virtue of R.S.M. c. 3. A Judge of the Court of Manitoba has power as an exofficio Judge of the Court of King's Bench to direct the issue of a writ of habeas corpus returnable immediately before himself in Chambers.

Re Beck, 32 D.L.R. 15, 27 Man. L.R. 288, [1917] 1 W.W.R. 657.

(§ I C—18)—EXTRADITION PROCEEDINGS—DEPORTATION.

Upon an application on habeas corpus for the discharge of a prisoner from custody, where it appears that in extradition proceedings he was committed upon the charge that he did "on or about the 8th day of February, 1912," obtain a promissory note from a certain party by false pretences with intention to cheat and defraud, and where the proceedings were begun by an information which stated that the offence had been committed on "the 8th day of February, 1911," and where throughout all the documents forwarded from the foreign jurisdiction up to the date of the present application the offence is alleged as of "the 8th day of February, 1911;" the warrant of commitment is invalid.

Re Wm. Staggs (No. 1), 7 D.L.R. 738, 5 A.L.R. 350, 23 W.L.R. 196, 3 W.W.R. 177.

On an application for a writ of habeas corpus for the discharge from custody of a person who was remanded by an extradition commissioner for extradition to France, the only question for examination is whether the extradition proceedings are in strict conformity with the requirements of the treaty of August 14th, 1876, between England and France, of the Imperial Extradition Act 1870, and the Canadian Extradition Act, R.S.C. 1906, c. 155. The justice or the propriety of the order of the commissioner in that regard cannot be inquired into. [United States v. Gaynor, 9 Can. Crim. Cas. 205; United States v. Gaynor, [1905] A.C. 128, followed.]

Re Darracq, 5 D.L.R. 771, 19 Can. Cr. Cas. 483.

The Superior Court of Quebec has no jurisdiction to revise, annul or modify an order made by the Minister of Agriculture or by a public officer pursuant to the provisions of the Immigration Act (Can.) respecting the deportation of an immigrant; and a writ of habeas corpus asked for that purpose will be refused.

Robinson v. Regimal, 18 Can. Cr. Cas. 478, 13 Que. P.R. 41.

CRIMINAL LAW — FUGITIVE OFFENDER — ESSENTIALS OF OFFENCE OF OBTAINING BY FALSE PRETENCE—EXTRADITION.

It is an essential ingredient of the crime of obtaining by false pretence that not only should the representation be false, but that it should be shewn to have operated on the mind of the party who paid over the money on the strength of such representation. A person charged, under a warrant issued under the provisions of the Fugitive Offenders Act, with the offence of obtaining by false pretenses, cannot be committed for the offence of attempting to obtain by false pretences when the evidence does not justify a committal for the full offence.

Re Harrison (No. 2), 25 B.C.R. 541.

(§ I C—19)—DISCONTINUANCE ON PRISONER'S APPLICATION.

A prisoner who applies for and obtains a writ of habeas corpus, alleging unjust detention, has the right to discontinue and desist from his petition, and the court will give effect to an application for the discontinuance of the proceedings, and order the prisoner's return to jail.

Ex parte Thaw (No. 1), 13 D.L.R. 710, 22 Can. Cr. Cas. 1, 49 C.L.J. 670.

D. PROCEDURE; JUDGMENT.

(§ I D—20)—JURISDICTION OF CO-ORDINATE JUDGES OF SAME COURT.

Each successive judge to whom a habeas corpus application is made must act upon his own view of the law applicable to it, and where an application of this character is made before a judge of the Alberta Supreme Court, the fact that the same application

had previously been dismissed by each of two other justices of the same court, all vested with co-ordinate jurisdiction, is in no sense a bar to the de novo hearing and determination of the third habeas corpus application on its merits.

R. v. Jackson, 15 D.L.R. 545, 5 W.W.R. 1286, 22 Can. Cr. Cas. 215, 27 W.L.R. 31.

Renewed application—Questions decided on prior motion—C.C.P. 1125 (Que.).

An applicant for habeas corpus in Quebec is not entitled to raise again on a renewed application the same grounds which were decided adversely to him on the prior motion. [C.C.P. art. 1125; R.S.L.C. c. 95, s. 28.]

Myers v. Malepart, 31 Can. Cr. Cas. 325, 20 Que. P.R. 217.

Return—Oath.

It is not necessary, though it may be customary, for a gaoler to make his return under oath in answer to a writ of habeas corpus.

Ex parte Evans, 48 Que. S.C. 469.

(§ I D—21)—Sufficiency of petition.

The term "on behalf of," when used in an application for a habeas corpus, means "in the name of," "on account of," "for the advantage of," or "in the interests of" another.

Re Thaw; Boudreau v. Thaw (No. 2), 13 D.L.R. 712, 22 Can. Cr. Cas. 3, 15 Que. P.R. 47.

Notice of motion—Alberta Crown rules—Serving notice on Attorney General—Status of local agent.

A motion for a writ of habeas corpus and a writ of certiorari in aid is properly instituted by serving a notice of motion under the Alberta Crown Practice Rules at least where the accused is in custody under a magistrate's conviction. A notice of motion for a writ of habeas corpus required under Alberta Crown Practice Rule to be served "upon the Attorney General" need not be served personally upon that official; it is enough that service is made at the Att'y-Gen'l's office in Edmonton, but service on his local agent elsewhere will not be allowed as its equivalent without proof of the local agent's authority to receive service in the particular case or a waiver by the Att'y-Gen'l of regular service.

R. v. Swett, 19 D.L.R. 694, 23 Can. Cr. Cas. 272, 29 W.L.R. 887, 7 W.W.R. 608.

The grounds upon which a motion for a habeas corpus and certiorari in aid is founded must be stated in definite terms and a mere statement that the magistrate "exceeded his jurisdiction in convicting and sentencing said prisoner" is too vague and general to be dealt with, and may be ignored.

The King v. Mali (No. 1), 1 D.L.R. 256, 48 C.L.J. 157, 22 Man. L.R. 29, 20 W.L.R. 217, 1 W.W.R. 766.

Affidavits entitled in the Supreme Court of Saskatchewan and in the matter of the conviction, specifying the particulars of same, sufficiently set out a style of cause for the purpose of a habeas corpus application under Sask. Crown Practice r. 39. [R. v. Harris, 6 Terr. L.R. 376, followed.] On an application for a writ of habeas corpus with certiorari in aid, it is primâ facie sufficient that the warrant be proved by an affidavit of the gaoler, and that the fact that the applicant is not detained for any other cause be proved by an affidavit of the applicant instead of proving both by the affidavit of the prisoner.

Re Ching How, 1 D.L.R. 275, 19 Can. Cr. Cas. 176, 5 S.L.R. 128, 19 W.L.R. 891, 1 W.W.R. 674.

Form of return.

A return in habeas corpus will not be quashed because addressed to "the chief justice and other justices of the court" instead of being addressed, in strict conformity with the habeas corpus order, to the judge who made the order.

R. v. Hall, 32 D.L.R. 236, 27 Can. Cr. Cas. 1.

Return to writ.

Although it is usual in Quebec for the goaler to make his return under oath to a writ of habeas corpus, a valid return may be made without its being sworn to.

Ex parte Evans, 25 Can. Cr. Cas. 239, 48 Que. S.C. 469.

Record—Contradiction.

Where a summary conviction is made by a Court of Record, e.g., by a Court of Sessions of the Peace in Quebec, for an offence punishable only on summary conviction, the same rule applies to exclude extrinsic evidence in contradiction of the record on a habeas corpus application in respect of the conviction as would apply in respect of other convictions made by a Court of Record; and if the record produced contains the recital of facts requisite to confer jurisdiction it is conclusive and cannot be contradicted by extrinsic evidence. [Re Sproule, 12 Can. S.C.R. 140, applied.]

O'Neil v. Carbonneau, 29 Can. Cr. Cas. 340, 54 Que. S.C. 417.

Sufficiency of petition or application.

An application for a writ of habeas corpus in a criminal matter will not be entertained without the production of the warrant of commitment, or a copy thereof, or proof that a copy could not be obtained for the prisoner.

Ex parte Aubin, 19 Can. Cr. Cas. 94, 13 Que. P.R. 27.

(§ I D—22)—Parties—Status.

Where the application for the issue of a writ of habeas corpus is made by the prisoner himself, the party who laid the information upon which the prisoner was originally arrested has no status to appear in the habeas corpus proceedings, and ask for the liberation of the prisoner, although such

party claims that the prisoner has been illegally arrested.

Ex parte Thaw (No. 1), 13 D.L.R. 710, 22 Can. Cr. Cas. 1, 49 C.L.J. 670. [See 13 D.L.R. 712.]

DEMAND BY PARTY WHO LAID INFORMATION UPON WHICH PRISONER WAS ARRESTED—PRISONER'S OPPOSITION TO HIS OWN LIBERATION.

The petition for a writ of habeas corpus issued under authority of c. 95 C.S.L.C. (which extend the provisions of the English Habeas Corpus Act to Quebec) can validly be made by the party who illegally caused the arrest of the prisoner, although the prisoner may by intervention oppose the application, and by affidavit declare the same is so made without his authority, the prisoner further declaring that he desires to remain in jail. [See Re Thaw (No. 3), 13 D.L.R. 715.]

Re Thaw; Boudreau v. Thaw (No. 2), 13 D.L.R. 712, 22 Can. Cr. Cas. 3, 49 C.L.J. 71, 15 Que. P.R. 47.

PROCEDURE—SERVING ORIGINAL WRIT.

A writ of habeas corpus can be properly served only by delivering the original writ to the person to whom it is addressed, or to the principal person where there are more than one; and where only copies of the writ had been served the irregularity is a ground for quashing the writ, although the original had been exhibited to the persons to whom it was addressed at the time when the copies were left with them.

Re Thaw; Thaw v. Robertson (No. 3), 13 D.L.R. 715, 22 Can. Cr. Cas. 8, 15 Que. P.R. 133, 49 C.L.J. 672.

(§ I D—23)—BURDEN OF PROOF.

The onus is upon the defendant on a habeas corpus application to disprove a recital of his consent to summary trial contained in a conviction following Cr. Code form 55 (s. 799).

The King v. Mali, 1 D.L.R. 484, 19 Can. Cr. Cas. 188, 22 Man. L.R. 29, 20 W.L.R. 601, 1 W.W.R. 1047.

(§ I D—24)—DISCHARGE OF PRISONER—JURISDICTION TO SET ASIDE.

The Supreme Court of Nova Scotia has no jurisdiction to set aside an order for discharge in the nature of habeas corpus. [Re Blair, 23 N.S.R. 225, followed.]

Re Mackey, 40 D.L.R. 287, 29 Can. Cr. Cas. 282, 52 N.S.R. 165.

DISCHARGE—APPEAL—REARREST.

Where an order discharging a prisoner on habeas corpus has been carried out but the order is reversed on an appeal taken by the Crown, the Appellate Court may direct that an order issue for the rearrest of the accused. Query whether a decision of the Appellate Division of the Supreme Court of Alberta, in a habeas corpus matter, reviewing under Alberta Crown r. 2, the decision of a single judge, may not itself be reviewed by the entire court.

R. v. Thornton, 30 D.L.R. 441, 26 Can. Cr. Cas. 120, 9 A.L.R. 163, 34 W.L.R. 178, 398, 9 W.W.R. 825, 968.

DISCHARGE OF PERSON COMMITTED FOR CONTEMPT—SCOPE OF JUDGMENT.

A Superior Court Judge, hearing a motion to discharge from custody a person who had been sentenced for contempt of court and brought before him on a habeas corpus writ, exceeds his powers when he directs that the warrant of commitment should be quashed, the only power he has on such an application is to discharge from custody the person produced before him under the writ, if in his opinion that person was unlawfully detained. Having made an interim order adjourning the application and discharging the applicant from custody without making any order for bail, the applicant was thereby discharged permanently, the purpose of the writ accomplished, the proceeding at an end, and the body of the person already released could not be retaken into custody for further enquiry under the habeas corpus writ. [Re Sproule, 12 Can. S.C.R. 140, distinguished.]

Re Beck, 32 D.L.R. 15, 27 Man. L.R. 288, 27 Can. Cr. Cas. 331, [1917] 1 W.W.R. 657.

(§ I D—25)—BAIL PENDING DISPOSAL OF MOTION—JURISDICTION.

The express provisions of the Cr. Code as to bail do not exclude the common law jurisdiction of a superior court having the inherent powers of the former English Court of King's Bench to order bail pending the disposal of habeas corpus and certiorari motions unless the commitment be one in execution on a criminal charge tried on indictment according to the course of the common law or unless the remedy by certiorari or by habeas corpus be excluded by statute.

R. v. Iwanachuk, 30 Can. Cr. Cas. 139, 13 A.L.R. 543, [1918] 3 W.W.R. 207.

JURISDICTION—IMMIGRATION ACT (CAN.)—DEPORTATION.

The Superior Court of Quebec has no jurisdiction to revise, annul or modify an order made by the Minister of Agriculture or by a public officer pursuant to the provisions of the Immigration Act (Can.) respecting the deportation of an immigrant; and a writ of habeas corpus asked for that purpose will be refused.

Robinson v. Regimbal, 18 Can. Cr. Cas. 478, 13 Que. P.R. 41.

OFFENCE — DISCHARGE ON HABEAS CORPUS WHERE REMAND FOR DEPORTATION ORDERED WITHOUT INDORSED WARRANT—FUGITIVE OFFENDERS' ACT.

The King v. Wishart, 18 Can. Cr. Cas. 146, 22 O.L.R. 594.

PARTY COMMITTED UNDER EXTRADITION ACT—IRREGULARITY OF ARREST.

A prisoner committed by a judge under the Extradition Act, cannot set up an ir-

regularity in his arrest as a ground for habeas corpus.

Stone v. Vallée, 18 Can. Cr. Cas. 222, 39 Que. S.C. 424.

JUSTICES' CONVICTION FOR INDICTABLE OFFENCE—ABSENCE OF JURISDICTION—DIRECTING FURTHER DETENTION.

R. v. Frejd, 22 O.L.R. 566, 18 Can. Cr. Cas. 110, 17 O.W.R. 991.

IMPRISONMENT UNDER MAGISTRATE'S CONVICTION—COMMITMENT FOR TRIAL AT ASSIZES.

R. v. Hazelwood, 20 Can. Cr. Cas. 488, 19 W.L.R. 706.

EXAMINING PROCEEDINGS ANTERIOR TO CONVICTION — THIRD OFFENCE — IRREGULAR CONVICTION FOR A PRIOR OFFENCE.

The King v. Broadfoot, 17 Can. Cr. Cas. 71.

INFORMATION OMITTING TO CHARGE KNOWLEDGE — CRIMINAL OFFENCE NOT DISCLOSED—PLEA OF GUILTY.

The King v. Lesheinski, 17 Can. Cr. Cas. 199.

HABEAS CORPUS PRACTICE—WRIT AT COMMON LAW AND UNDER THE HABEAS CORPUS ACT—AFFIDAVIT REQUIRED.

Re McMurrer (No. 1), 18 Can. Cr. Cas. 41.

IMPRISONMENT WITHOUT WARRANT—HABEAS CORPUS—SUBSEQUENT WARRANT—COSTS OF CONVEYING TO JAIL.

R. v. Degan, 17 O.L.R. 366, followed; R. v. Mitchell, 24 O.L.R. 324, 19 Can. Cr. Cas. 113, 19 O.W.R. 588.

PRELIMINARY ENQUIRIES UPON TWO OFFENCES AT THE SAME TIME—POWER TO ADJOURN A PRELIMINARY ENQUIRY.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

CRIMINAL PROCEEDINGS—ASSAULT OF POLICE OFFICER.

Ex parte Aubin, 19 Can. Cr. Cas. 94, 13 Que. P.R. 27.

HANDWRITING.

Annotations.

Comparison of; When and how comparison to be made: 13 D.L.R. 565.

Questioned documents and proof of handwriting: 44 D.L.R. 170.

HARBOURS.

See also Waters; Collision; Expropriation, III C—144; Constitutional Law.

Annotation.

"Public harbours," B.N.A. Act: 26 D.L.R. 69.

(§ I—1)—HARBOUR COMMISSIONERS—REGULATIONS — RIGHTS OF ANCHORAGE — TRANSOCEANIC VESSELS — VESSELS IN INLAND WATERS.

A regulation of the harbour commission, which imposes the rights of anchorage on "steam vessels navigating between Quebec and a place below Quebec, or between Quebec and a place above Quebec, but below Montreal, or a place on the river Richelieu or the river Saguenay," does not apply to transoceanic vessels. The following general clause cannot be invoked: "On all steamers and sailing vessels entering and using the said harbour of Quebec, not included in the foregoing provisions, and which do not pay tonnage dues to the commissioners under the by-laws hereinbefore cited," when the context of the regulation makes it evident that it does not apply to ocean-going vessels.

Quebec Harbour Commissioners v. C.P.R. Co., 23 Que. K.B. 92.

(§ I—2)—LEASE OF WHARF BY CROWN—RIGHT OF PUBLIC TO LOAD AND UNLOAD SHIPS—R.S.C. c. 35, AND c. 145, s. 34.

A lease assented to by His Majesty the King represented by the Minister of Railways and Canals acting by virtue of a statute and under the authority of an order in council, is an authentic deed which establishes its contents, and is a valid title of occupation by lease. A reservation, in a lease, of the right of the public to load and unload ships at a wharf does not entitle any one to occupy it by depositing thereon his own construction timber. Such an abuse gives to the lessee a right of action to recover damages against the one who commits such an act.

Turgeon v. Esplin, 23 Que. K.B. 116.

POWERS OF HARBOUR COMMISSIONERS—DEDICATION OF LAND TO MUNICIPALITY.

The Harbour Commissioners of Montreal have only the administration of the properties in their possession, the ownership pertaining to the Crown. They have then no right to make a donation of part of their land to a municipal corporation even for the purpose of enlarging a public street.

Chars Urbains de Montreal (Cie de) v. Commissaires du Hâvre de Montreal, 24 Que. K.B. 503.

(§ I—5)—PUBLIC HARBOURS B.N.A. ACT—PROVINCIAL GRANT—EXPROPRIATION.

Bedford Basin, being a public harbour at the time of Confederation and the property of the Province of Nova Scotia, passed to the Dominion by virtue of the provisions of the B.N.A. Act. A subsequent provincial grant of a water-lot thereon is therefore void and confers no title. [Fisheries case, [1898] A.C. 700; Att'y-Gen'l v. Ritchie (English Bay case), 52 Can. S.C.R. 78, 26 D.L.R. 51, followed.]

Maxwell v. The King, 40 D.L.R. 715, 17 Can. Ex. 97.

PUBLIC—WHAT CONSTITUTES.

A place does not necessarily become a "public harbour," within the meaning of s. 108 of the B.N.A. Act, because public moneys had been expended by the Federal Government at that place and several government wharves are situated there. [Fisheries Case, [1898] A.C. 700, applied.]

Pickels v. The King, 7 D.L.R. 698, 14 Can. Ex. 379.

PUBLIC, WHAT CONSTITUTES.

English Bay, which forms the outer approach to Burrard Inlet which leads to the City of Vancouver, is not a "public harbour" within the meaning of the term as used in the third schedule of the B.N.A. Act and is therefore not the property of Canada, and the Dominion Government cannot restrain the removal of sand and gravel therefrom. [Holman v. Green, 6 Can. S.C.R. 707; Fisheries Case [1898] A.C. 700, considered.]

Att'y-Gen'l for Canada v. Ritchie Contracting and Supply Co., 48 D.L.R. 147, [1919] A.C. 999, [1919] 3 W.W.R. 347, affirming 26 D.L.R. 51, 52 Can. S.C.R. 78, affirming 20 B.C.R. 333; which affirmed 17 D.L.R. 778.

HEALTH.

I. BOARDS OF HEALTH.
II. EPIDEMICS.
III. REGULATIONS TO PROTECT HEALTH.
A. In general.
B. Vaccination.
IV. DESTRUCTION OF PROPERTY TO PROTECT.
V. LIABILITY OF OFFICERS.

Representations as to application for insurance, see Insurance.

I. Boards of health.

(§ I—1)—Where a building is used or established as a hospital for all contagious diseases, its establishment and user as such must be in compliance with and governed by s. 43 (w) of the by-laws of the Board of Health of the Province of Quebec.

MacIntosh v. Westmount, 8 D.L.R. 820.

(§ I—2)—POWERS OF BOARD OF HEALTH—REGULATION OF WATER SUPPLY—JURISDICTION OF BOARD.

The provincial Board of Health, when entrusted by statute with the performance of a public duty, such as the approval or rejection of the plans and specifications for a city water supply scheme, is an inferior tribunal subject to the jurisdiction of a Superior Court exercising the jurisdiction formerly pertaining to the Court of King's Bench, in respect of its power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the board by law and also in respect of the board's refusal of its true jurisdiction by the adoption of extraneous considerations in arriving at its conclusion or deciding a point other than that brought before it. [R. v. Board of Education, [1910] 2 K.B. 165, followed; Graham v. Commissioners, 28 Ont. R. 1, distinguished.]

Re Ottawa and Provincial Board of Health, 20 D.L.R. 531, 33 O.L.R. 1.

MEDICAL OFFICER OF HEALTH — APPOINTMENT.

The Public Health Act, 2 Geo. V. (Ont.) c. 58, requiring municipalities to appoint medical officers of health, who should hold office during good behaviour and their residence in the municipality for which they are respectively appointed or in an adjoining municipality, and who should not be removed from office except for cause, did not continue in office as permanent officials, Medical Health Officers appointed under the old Act, holding office at the date of the coming into force of the new Act at the will of the council, and does not preclude a municipality from dismissing such a "Medical Health Officer" without cause being shewn, and appointing a "Medical Officer of Health" under the new Act.

Re Warren and Town of Whitby, 10 D.L.R. 222, 4 O.W.N. 1029, 24 O.W.R. 317.

EXERCISE OF STATUTORY POWERS BY THE PROVINCIAL BOARD OF HEALTH.

Layton v. Montreal, 39 Que. S.C. 520.

II. Epidemics.

(§ II—5)—CONTAGIOUS OR INFECTIOUS DISEASE—PRIMARY AND SECONDARY LIABILITY.

The municipality is primarily liable for obligations incurred by a local board of health under N.S. Acts 1910, c. 6, ss. 25, 29, in connection with the suppression of contagious or infectious disease with a remedy over against the patient or other person or persons liable for his support if able to repay. [Cameron v. Dauphin, 14 Man. L.R. 573, followed.]

Johnston v. County of Halifax, 9 D.L.R. 220, 46 N.S.R. 474, 12 E.L.R. 251.

III. Regulations to protect health.

A. In general.

(§ III A—10)—MUNICIPAL BY-LAW FIXING PERCENTAGE OF BUTTER FAT IN MILK ULTRA VIRES—DOMINION ADULTERATION ACT.

Regina (City) v. Sharley, 5 D.L.R. 877, 20 Can. Cr. Cas. 164.

EMPLOYMENT OF MEDICAL ATTENDANCE FOR EMPLOYEES ON PUBLIC WORKS — WHO LIABLE FOR—CONTRACTOR OR SUBCONTRACTOR.

The duty imposed by the Public Works Health Act, R.S.C. 1906, c. 135, and the regulations adopted thereunder by order-in-council, to provide medical and surgical attendance for men employed in the construction of any public work, rests on the company or person owning the work and not on a contractor or subcontractor employed in its construction.

Larose v. Webster (No. 2), 14 D.L.R. 80, 7 A.L.R. 6, 25 W.L.R. 517, 821.

(§ III A—11)—ORDERS OF BOARD—DISINFECTION—MUNICIPALITY.

A municipal council is bound to obey an order of the board of health directing the disinfection of houses on account of contagious diseases, whatever may be the personal opinion of the members of the council upon the necessity of doing so. The president of the board has the right, in the interval between meetings of the board, to have such order sent to the municipal council by the secretary of the board. It is not

necessary that the order should be in writing. The proof that the order was given can be made orally with the notice signed by the secretary as a commencement of proof in writing.

Quebec Board of Health v. Coteau Landing, 52 Que. S.C. 195.

(III A—13)—Smoke regulations — Non-application to government buildings.

As neither the Crown nor its servants are bound by a statute of a criminal nature unless expressly mentioned therein, an engineer in charge of the engines and boilers of a Government customs house is not within a provincial Act (1 Geo. V. c. 44 (Man.)) declaring the emission of dense, black smoke from chimneys to be a nuisance, [Cooper v. Hawkins [1904] 2 K.B. 164, and Gorton Local Board v. Prison Commissioners, [1904] 2 K.B. 165 (3), followed.]

The King v. Clark, 21 Can. Cr. Cas. 208.

B. Vaccination.

(§ III B—15)—Vaccine—Infected in its preparation — City supplying same, not liable, when.

Where a city supplies vaccine free for the general vaccination of its resident children, the onus is not on the municipality to shew that such vaccine was not infected in its preparation, it appearing that the city, with due care and prudence, buys the vaccine already prepared from a reputable Institute of Vaccination after examination and approval by the Provincial Board of Health.

Boilard v. Montreal, 18 D.L.R. 366, 21 Rev. Leg. 58.

Conviction.

An appeal lies to the Court of King's Bench (Crown side) from a conviction rendered by a justice of the peace against the appellant who had refused to allow himself to be vaccinated under the provisions of the Quebec Public Health Act.

Paradis v. Tp. of Dunham, 15 Que. P.R. 189.

IV. Destruction of property to protect.

(§ IV—20)—The Public Health Act of the Province of Quebec does not justify the destruction of goods seized as deleterious to the public health; and the power to destroy will not be inferred from a statute authorizing health officers "to dispose of them (the articles seized) so that they shall not be offered for sale or served as food for man."

Montreal v. Layton, 1 D.L.R. 160. [Affirmed, 10 D.L.R. 852, 47 Can. S.C.R. 514, 49 C.L.J. 231, 305.]

Municipal regulations—Sale of milk.

The City of Montreal has statutory authority under 14-15 Vict. 1851 (Can.) c. 128, s. 58, and under subsequent provincial statutes, to pass a by-law to prohibit under penalty the sale in the city of adulterated or unwholesome milk, or milk not conforming to a specified standard such by-law may be supported not only as a public health regulation but as warranted under the pre-Confederation statutes continued in force by s. 129 of the B.N.A. Act, 1867, until repealed or altered by competent legislative authority.

Savaria v. Geoffrion, 27 Can. Cr. Cas. 36, 22 Rev. Leg. 433.

Municipal law—Nonorganized territory—Contagious disease—Sanitary service—Medical case—Responsibility—C. mun. (old) art. 28—S. ref. [1909], art. 3861, 3894, 3969.

A corporation of a county is not liable for the costs of a sanitary service incurred to prevent the spread of a contagious disease in a nonorganized territory situated within its limits. Nonorganized territories are under the immediate control of the Provincial Board of Health; and the expenses of applying the Health Acts in these territories are part of the expenses of the Board of Health.

Corneau v. County of Champlain, 56 Que. S.C. 518.

Regulation of industries — Offences — Jurisdiction — Recorder's Court — Procedure — Notice — Security for costs—Penalties—Board of health.

An action for having kept an establishment for the melting of suet, constructed contrary to the rules of the trade and without the equipment required by the Act respecting industrial establishments of Quebec, can be taken only before a Judge of sessions or a police magistrate in Montreal or Quebec. The Recorder's Court of Montreal, although having the powers of two justices of the peace, is not competent to decide such an action. Before the accused can be considered in default he must have received 30 days' previous written notice, stating the offence complained of, to enable him to obtain the apparatus and instruments required by the Act. If the complaint is made by a person other than the inspector, such person must previously deposit with the one issuing the summons the sum of $20 to secure the costs. The statute imposing fines for offences under it and requiring that they shall be payable to the treasurer of the province, is of public order, and the provincial board of health of Quebec, although it has the right to pass by-laws concerning industrial establishments, cannot change that provision of the law and order that the fine be payable to the board.

Chaput v. Duquette, 54 Que. S.C. 399.

Public Health Act — Noxious or offensive trade.

R. v. Barber Asphalt Paving Co., 23 O.L.R. 372, 18 O.W.R. 778.

Employment of physician by local Board of Health to attend smallpox patients.

Ross v. Tp. of London, 23 O.L.R. 74, 18 O.W.R. 82, affirming 20 O.L.R. 578.

SEIZURE OF STORAGE EGGS—NOTICE—EXERCISE OF STATUTORY POWERS BY THE PROVINCIAL BOARD OF HEALTH.

Layton v. Montreal, 39 Que. S.C. 520.

HEARSAY.

See Evidence.

HEIR.

See Descent and Distribution; Wills; Executors and Administrators.

HIGHWAYS.

I. ESTABLISHMENT; WIDTH.
- A. Establishment.
- B. Width.

II. TITLE; USE; OBSTRUCTION.
- A. In general: title and property rights.
- B. Uses; what allowed in street generally.
- C. Obstruction generally.
- D. Use and obstruction by railroads.
- E. Rights as to trees or materials in street.

III. IMPROVEMENTS; DIVERSION; CHANGING GRADE.

IV. DEFECTS; LIABILITY FOR INJURIES TO TRAVELERS.
- A. Liability of municipality.
- B. Liability of others.
- C. Contributory negligence.
- D. Notice.

V. DISCONTINUANCE; ALTERATION; ABANDONMENT.
- A. Discontinuance.
- B. Alteration.
- C. Abandonment.

VI. HIGHWAY OFFICERS.

Municipal by-laws as to, see Municipal Corporations.

Use and obstruction by railways, see Street Railways; Railways.

Use of automobiles on, see Automobiles.

As to bridges, see Bridges.

Negligence generally, see Negligence.

As to expropriation, see Expropriation; Damages, III L.

Annotations.

Establishment by statutory or municipal authority; irregularities in proceedings for the opening and closing of highways: 9 D.L.R. 490.

Defects; notice of injury; sufficiency: 13 D.L.R. 886.

Duties of drivers of vehicles crossing street railway tracks: 1 D.L.R. 783.

Unreasonable user as negligence, nuisance: 31 D.L.R. 370.

Liability of municipal corporations for nonrepair of highways and bridges: 34 D.L.R. 589.

Liability of municipality for defective highways or bridges: 46 D.L.R. 133.

Private rights in, antecedent to dedication: 46 D.L.R. 517.

I. Establishment; width.

A. ESTABLISHMENT.

See also Dedication.

(§ I A—1)—EXPENDITURE OF PUBLIC MONEY.

Rideout v. Howlett (No. 2), 15 D.L.R. 634, 13 E.L.R. 562, affirming 13 D.L.R. 293.

SURVEY—ALTERATION OF STREET LINES.

The special survey which the Att'y-Gen'l may direct at the request of a municipal council under the Special Surveys Act, Sask., 3 Geo. V. c. 24, applies only for the correction of errors; and to justify the acceptance of a new survey altering the street lines it must be shewn that there was an error in those lines and that they did not carry out the intention of the former owner on whose behalf the original survey was made or that the expressed intention leads to an absurdity.

Smith v. Master of Titles, 21 D.L.R. 47, 8 S.L.R. 47, 32 W.L.R. 22, 7 W.W.R. 1105.

BORDER ROAD — ADJOINING LANDS — USAGE.

It has been the usage, if not the law, in Quebec, from time immemorial, that when a border road between two properties is opened, one half of the land necessary for the building of such road is taken from each of the two adjoining properties.

Cormier v. Vaillant, 24 Que. K.B. 161.

HIGHWAY COMMISSION — JURISDICTION — EXPROPRIATION — COMPENSATION — HEARING AND AWARD.

By the Toronto and Hamilton Highway Commission Act, 5 Geo. V., c. 18, s. 10 (Ont.), the Commission may expropriate land, and "shall have and may exercise the like powers and shall proceed in the manner provided by the Public Works Act, where the Minister of Public Works takes land or property for the use of Ontario and the provisions of that Act shall mutatis mutandis apply:"—Held, having regard to ss. 27, 29, 31, and 32 of the Public Works Act, R.S.O. 1914, c. 35, that when the Ontario Railway and Municipal Board acts in fixing compensation for land expropriated by the said Commission, it does so as a Board or court, exercising the powers given to it by the Ontario Railway and Municipal Board Act, R.S.O. 1914, c. 186; and there is no pretence for saying that the members of the Board act as arbitrators merely. Therefore, where two members of the Board, who had heard the evidence upon a proceeding before the Board for the purpose of fixing compensation for land expropriated for a new highway, allowed the third member, who had not heard the evidence, nor previously taken part in the inquiry, to read the evidence and express his views regarding the case to them, before giving their decision, it could not be said that the decision was thereby vitiated: Quære, whether the Board was within its powers under s. 9 or s. 52 of the Ontario Railway and Municipal Board Act. A Divisional Court of the Appellate Division refused

leave to appeal from the decision of the Board in regard to compensation, being of opinion, after a full discussion and consideration of the evidence, that the amount awarded was reasonable and just. Properties fronting on the new road and those benefited by it are to be assessed. Access is a special benefit, and its value may be set off as direct, while the advantage gained by proximity, though paid for by assessment, may still be general in its effect.

Re Toronto & Hamilton Highway Commission and Crabb, 37 O.L.R. 656.

PUBLIC ROAD — ROAD BY TOLERANCE — ACQUISITION BY THE MUNICIPALITY — WIDENING OF THE ROAD — LIMITATION — DONATION — C.C., ART. 2193 — C. MUN., ART. 464.

A public road is a means of communication from one place to another on public property and open to the public which can have access to it without passing on private property. Thus he who constructs a sidewalk in front of his estate, the length of a ditch, separating it from the public road, and who allows the public by tolerance during more than thirty years to pass there does not by this lose his right to the border. The municipality cannot claim the ownership of this property (a) either as an extension of the public road, seeing that the public road has been separated from the bordering ground by a large ditch (b) or to the title of dedication, seeing that the public has only made use of this walk by tolerance, and that the owner has prohibited the use of it for several years (c) or by prescription of ten or of thirty years, since the public never really owned this property.

The Parish of St. Hubert v. David, 25 Rev. Leg. 413.

LOCAL ROAD — ROAD BY TOLERANCE—MAINTENANCE — COUNTY ROAD — SECONDARY PROOF — PRESUMPTION — INTEREST — MANDAMUS — C.C.P., ART. 992, C. MUN., ART. 445, 464, 519.

There is nothing in law requiring a plaintiff for mandamus against a municipal corporation to reside in the limits of the municipality. It suffices to show that he has an interest to make his request. When following a fire which has destroyed the archives of the local municipal council it is impossible to furnish documentary proof that a road is municipal, secondary proof will be admitted. In this case the following presumptions form a sufficient proof; (a) the testimony of the first inhabitants of the place whose memories go back 37 to 40 years, who swear that this road was open to the public since that time and that it had been built with money supplied by the department of colonization; (b) the council of the parish in which the road is situated has always controlled and maintained it; (c) whatever registers saved from the fire shewn that the inspectors of highways were in charge of the road; (d) the road has already been sold à la corvée; (e) it has been maintained by the inhabitants of the upper ranks for at least 44 years. Against these presumptions, the facts that the road has not the width desired by law, that it is not registered, that the possession of the corporation is uncertain, do not count. Even if this road was only a road by sufferance, opened at both extremities, separated by neighboring estates and opened to public, the municipality has the supervision and maintenance of it. A road which passes across several municipalities is not necessarily a county road. If a municipal corporation refuses to maintain in good condition a municipal road opened to the public, the only efficacious remedy to force it to do so is "mandamus."

Lavoie v. Village of St. Siméon, 25 Rev. Leg. 349.

CITIES AND TOWNS — OPENING OF STREETS — WIDTH — ACQUIRING OF LAND — ABSENCE OF AVAILABLE LAND — RESOLUTION — ULTRA VIRES — INTEREST — MUNICIPAL ELECTOR — S. REF. [1909], ART. 5591, 5623, 5634, 5641, 5782, 5887.

When a municipal council acts ultra vires, every ratepayer has a direct right of action to have the impeached act declared void. This action is lost by prescription in three months from the demand for repeal by reason of illegality. When a corporation of a city or a town orders the opening of a street it must act by by-law and not by resolution under pain of nullity. Article 5887 S. ref. which prescribes that streets opened up by the subdivision of land into town lots must be sixty-six feet wide, does not apply to streets opened up by reason of the circumstances. A corporation of a city or a town cannot order the acquisition of lands for drainage purposes if it has not on hand the necessary funds to pay the price, unless it can make a loan in the manner prescribed by law. Otherwise its act is ultra vires.

Desbiens v. Town of la Tuque & Gauthier, 56 Que. S.C. 430.

OPENING AND MAINTENANCE — WHO SHOULD BE CHARGED — C. MUN. (OLD), ART. 782, 794, 795.

A municipality should not by ordinance or regulation bind itself to open or to maintain a road parallel to one which the interested tax payers had established and for the purpose of which, they had given part of their lands.

The District of Grantham v. Boisvert, 28 Que. K.B. 9.

A SIDEWALK MADE BY A BY-LAW OF THE CORPORATION AND NOT BY CONTRACT — REPORT NOT NECESSARY — GENERAL POWERS — MUNICIPAL CODE (OLD) 401, 376, 397, 796, 528 ET SEQ. 714 ET SEQ. 802, 828.

The corporation of the village of Rougemont, in virtue of a rule ordering the construction of sidewalk by certain owners, can after notice have a sidewalk made at the expense and cost of an owner in default. It is not necessary to have these

works done by contract, after having adopted a by-law to this end.

Village of Rougemont v. Carden, 25 Rev. de Jur. 504.

NATIONAL ROADS — MUNICIPAL CONTRIBUTIONS — HOW DIVIDED — NOTICE OF MOTION — TAXABLE GOODS — C. MUN. (NEW), ART. 350, 359, 697 — 3 GEO. V. [1912], c. 21.

In order to levy the amount of its contribution for the construction of national roads undertaken by the government, a municipal corporation does not need to adopt by-laws, or make official reports, or perform the ordinary formality decreed by the Municipal Code for the opening or the reconstruction of roads. It is sufficient to pass a resolution under the law called "good roads," said law decreeing that the contribution should be under the custody of the entire municipality or of the ratepayers who would profit by the new road, provided that in this latter case a request to that effect had been presented by the majority of the rate-payers thus benefited. In this particular event, the resolution might be passed even after the work had been performed. A resolution of the municipal council, charging the secretary treasurer to give public notice that at the next general session of the council an order to this effect would be adopted is equivalent to a preliminary notice required by C. mun. art. 359. A by-law decreeing that an assessment shall be imposed on the taxable goods of a certain class is sufficiently set out when the tax will lay exclusively on the land and not on taxable personalty.

Mathieu v. The Parish of St. Francois, 28 Que. K.B. 98.

(§ I A—2) — USER — PRESCRIPTION — "CHEMIN DE TOLERANCE" — DEDICATION — CANADA 18 VICT. 1855 C. 100 S. 41 — ARTS. 749 AND 750, QUE. MUNICIPAL CODE.

The subs. 8, 9, s. 41, c. 100, of 18 Vict. are still in force but apply only to roads in existence, and in public use for ten years prior to 1855. A road open at each end and having a fence on one side and a sidewalk on the other is not necessarily a public road under art. 749 Mun. Code.

Harvey v. Dominion Textile Co., 50 D.L.R. 746.

TOWNSHIP BY-LAW AUTHORIZING THE TAKING OF LAND FOR ROAD — VALIDITY — PRESUMPTION — TITLE TO LAND IN CROWN — SUBSEQUENT CROWN GRANT NOT RECOGNIZING LAND INDICATED BY BY-LAW AS ROAD-ALLOWANCE — BY-LAW INEFFECTIVE ALSO BECAUSE REQUIREMENTS OF MUNICIPAL ACT NOT COMPLIED WITH — DEDICATION — USER — ACQUIESCENCE — EVIDENCE — TITLE OF PLAINTIFF — ACTION FOR TRESPASS — DAMAGES — INJUNCTION.

Sawyer v. Sherborne, 14 O.W.N. 22.

PRIVATE ROAD — PUBLIC USER — ABANDONMENT — INTENTION OF OWNER — PRESCRIPTION.

A road laid out by an individual for the sole use of his estate does not become a public road by the sole fact of long public use. It is necessary, besides, that the owner has made a formal or presumed abandonment of it to the public. Abandonment may be inferred from acts of the owner and from particular circumstances in the particular case, but proof of his intention to give up his ownership should be unequivocal. Following the conclusions adopted by the majority of Judges of the Supreme Court in the case of Dominion Textile Co. v. Harvey, the ten year prescription for roads enacted by the Act 18 Vict. c. 41, only applies to roads open and used by the public ten years before the adoption of the act. In order to lay a basis for the prescription of a road possession by the public should unite all the conditions of the common law. A road of sufferance may always be closed by the owner.

Page v. Gauvreau, 27 Que. K.B. 490.

BY PRESCRIPTION OR USER — DEDICATION.

A public road was established by procès-verbal in 1808. The municipal council, in 1856, directed by by-law that this should be a private road to be used and maintained by the two owners of the lands from which the road had been taken. Nevertheless the public continued to use it without molestation for more than 10 years. This public use made it a public road. The road was not abolished by the by-law of 1856 in the sense of art. 753, mun. Code, and the ownership of the land did not return to the original proprietors, as provided in art. 753. It follows, therefore, that one of these proprietors had no right to close this road and cultivate the ground. The prescription for roads open to the public for 10 years provided for by 18 Vict. (1855), c. 100, s. 9, is based upon the presumption that a competent authority has so directed, but no order of such authority has been produced. Moreover, this prescription does not apply when such competent authority has formally declared that the road is not public. For a road to become public by dedication, expressed or implied, it is necessary that the intention of the owner to give his land for a road or a street should be established by evidence; it is necessary also that, to be effective, this dedication should be accepted by competent authority at least tacitly.

Nolin v. Gosselin, 24 Que. K.B. 289.

(§ I A—4) — MUNICIPAL SUCCESSION TO TOWNSHIP'S RIGHTS.

When a certain territory which formerly constituted part of a township became part of a town, the town succeeded to the rights and obligations of the township concerning land in that territory dedicated as a highway.

Larcher v. Sudbury, 11 D.L.R. 111, 4 O. W.N. 1289, 24 O.W.R. 659.

COMMON LAW METHOD OF ESTABLISHING DEDICATION — ACCEPTANCE AND USER — HIGHWAY ACT — MUNICIPAL ACT — EVIDENCE.

Section 13 of the Highway Act (R.S.B.C. 1911, c. 99), does not abrogate the common law method of establishing a highway by dedication, acceptance and user, and although a by-law to widen a municipal street may be invalid through lack of proper advertising as required by the Municipal Act, such by-law, and all the proceedings carried on under it, may be looked at as evidence of the establishment of such highway in this manner.

Att'y-Gen'l of B.C. v. Bailey, 44 D.L.R. 338, [1919] 1 W.W.R. 191.

DEDICATION — ACCEPTANCE BY CITY — ONTARIO SURVEYORS ACT.

A sufficient acceptance, under the Ontario Surveyors Act, 1 Geo. V. c. 42, s. 44, subs. 6, as amended by 2 Geo. V. c. 17, s. 32, of the dedication of land for a public highway and its assumption for public use by a municipality, is shewn by a memorandum endorsed on a plan, as filed in the registry office by the mayor, treasurer and clerk of the city, under its corporate seal, to the effect that the consent of the corporation is given to the registration of such plan.

Re Toronto Plan M. 188, 11 D.L.R. 424, 28 O.L.R. 41.

ACCEPTANCE — PLANS AND SURVEYS — EFFECT OF — SURVEYS ACT, R.S.O. 1897, c. 181, ss. 14, 15 — ESTOPPEL — MUNICIPAL BY-LAW DEFINING STREETS.

In an action to restrain the defendant corporation from trespassing upon a piece of land to which the plaintiff company set up title, but which was, according to the contention of the plaintiff, part of a street, it was held, after consideration of the plans and deeds, that, in accordance with the principles laid down in [Badgely v. Bender, 3 O.S. 221, as approved and acted upon in Kenny v. Caldwell, 21 A.R. 110, 24 S.C.R. 699], the designation of the locus in quo as part of a street in two plans prepared for public purposes before the corporation acquired its alleged title, was sufficient prima facie evidence of that fact; and, in the absence of direct evidence to the contrary, this designation was treated as conclusive. The predecessors in title of the plaintiff obtained from the Crown a confirmatory patent of the lands in question, and in the description one of the plans was referred to and public streets within the described tract were excepted:—Held, that this was a recognition and acceptance of the existence of the street, and that thereafter neither the patentees nor any successor in title could set up that the locus in quo was not a public street as shewn on the plan. The contention of the corporation was also held, to have been much strengthened by a subsequent survey shewing the street, confirmed by the Minister of Crown Lands under the Surveys Act, R.S.O. 1897, c. 181, ss. 14, 15, and adopted by by-law of the corporation, the plaintiff having been given notice of the proceedings and not having shewn cause against them.

Niagara Navigation Co. v. Niagara, 31 O.L.R. 17.

ACCEPTANCE — HIGHWAY — LIMITED ROAD — ACCEPTANCE BY PUBLIC — NEW BRUNSWICK HIGHWAY ACT, 1908.

Groundwater v. Waterman, 13 E.L.R. 317.

DEDICATION—EVIDENCE OF—STREET WIDENING BY-LAW — INSUFFICIENT PUBLICATION—INVALIDITY—ASSESSMENTS THEREUNDER — VICTORIA CITY RELIEF ACT, 1918 (NO. 2)—MUNICIPAL ACT, S. 141.

The judgment of Murphy, J., declaring that the city of Victoria was entitled to a certain strip of land requiring for street widening free from defendant's mortgage, and dismissing defendant's counterclaim for relief from assessment because of the invalidity of the street widening by-law, was upheld; Martin and McPhillips, JJ.A. refusing to disturb his finding as to dedication and the defendant mortgagee's assent thereto, and holding on the counterclaim that the assessment is not open to review because the special tribunal created in part V. of the Victoria City Relief Act, 1918 (no. 2) (c. 105) has jurisdiction and its "report and directions" to the council cannot be questioned; Galliher, J.A. agreeing with the trial judge that there was dedication and assent by defendant mortgagee, and holding that this finding disposed of the counterclaim or if not s. 141 of c. 52, 1914 (the Municipal Act) was a bar to the counterclaim.

Victoria v. Bailey, [1919] 3 W.W.R. 19, affirming [1919] 1 W.W.R. 191.

(§ I A—7)—CUL-DE-SAC—DEDICATION.

The existence of a public highway is not necessarily confined to a place which is a thoroughfare, and a cul-de-sac may properly exist as such and may be established by dedication. [Bateman v. Bluck, 18 Q.B. 870, followed.]

De Young v. Giles, 26 D.L.R. 5, 49 N.S.R. 398.

DEDICATION—BY USER.

The dedication of a road as a public highway may be inferred from thirty years' user by the public without objection or interruption, and by recognition of same as a highway by the municipal council which had closed portions of it during such period.

O'Neil v. Harper, 13 D.L.R. 649, 28 O.L.R. 635, reversing, on other grounds, 10 D.L.R. 433.

DEDICATION AND ACCEPTANCE — RESOLUTION —QUASHING.

The question whether a dedicated highway has been accepted by a municipality cannot be determined upon a motion to quash the resolution relative to the highway for illegality.

Re Sanderson and Sophiasburgh, 33 D.L.R. 452, 38 O.L.R. 249.

DEDICATION — INTENTION — EASEMENTS.

Dedication as a public street is not shewn in the absence of express grant as regards an unimproved strip forming a cul-de-sac in a subdivided tract by references to it in conveyances made by the common owner to purchasers of lots on one side thereof as a "street" over which an express right of way was granted to each, while no reference was made either to a street or right of way in the conveyance of land in one parcel abutting on the other side of such strip made by the common grantor.

Peters v. Sinclair, 18 D.L.R. 754, affirming 13 D.L.R. 468, 48 Can. S.C.R. 97.

MUNICIPAL LAW — ROAD — DEDICATION — ACCEPTANCE — PRESCRIPTION.

In order that a road be acquired by the public by dedication, it is not enough that the land has been offered to the municipal corporation for the purpose of a highway; it is also necessary that this offer be formally accepted by the corporation, or that the public has shown its acceptance of the dedication by a proper possession on which to found prescription.

Plante v. The Corp. of Princeville, 55 Que. S.C. 210.

DEDICATION — REGISTERED PLAN — SALE OF LOTS ACCORDING TO PLAN — USER OF ROAD BY PUBLIC — MUNICIPAL ACT, R.S.O. 1914, C. 192, S. 433 — SURVEYS ACT, R.S.O. 1914, C. 166, S. 44—AMENDMENT TO ORIGINAL STATUTE—RETROACTIVE EFFECT — APPLICATION TO TOWNSHIPS.

Burlington v. Coleman (No. 1), 12 O.W.N. 217.

VILLAGE STREET—ASSUMPTION BY BY-LAW OF COUNTY CORPORATION — HIGHWAY IMPROVEMENT ACT, R.S.O. 1914, C. 40, SS. 4 (1), 5 (1), 12—APPROVAL OF BY-LAW BY LIEUTENANT-GOVERNOR IN COUNCIL —ACTION TO SET ASIDE BY-LAW.

Merritton v. Lincoln, 12 O.W.N. 370. [Reversed, 39 D.L.R. 328, 41 O.L.R. 6.]

DEDICATION — BY-LAW OF MUNICIPALITY—WAIVER OF CONVEYANCES — EVIDENCE.

Reaume v. Windsor, 7 O.W.N. 647.

DEDICATION — ACCEPTANCE — SALE OF LAND INCLUDING PORTION DEDICATED — ACQUIESCENCE OF PURCHASERS.

Hislop v. Stratford, 11 O.W.N. 321, affirming 10 O.W.N. 430.

BOUNDARIES — ASCERTAINMENT — ENCROACHMENT ON LAND OF NEIGHBORING OWNER — HIGHWAY ACQUIRED BY PURCHASE — POSSESSION FOR MORE THAN 20 YEARS — LIMITATIONS ACT — ONUS — FINDING OF TRIAL JUDGE — APPEAL — PERMISSION FOR FURTHER LITIGATION — RIGHT TO FLOW OF WATER OF CREEK — AGREEMENT WITH MUNICIPALITY — DUTY OF MUNICIPALITY TO MAINTAIN FLOW — INTERFERENCE WHEN ROAD CONSTRUCTED — RESPONSIBILITY OF MUNICIPALITY — DEDICATION AND ACCEPTANCE — MUNICIPAL ACT, SS. 433, 460 (6) — BREACH OF DUTY — REMEDY — INJUNCTION — DAMAGES — COSTS.

Lockie v. North Monaghan, 12 O.W.N. 171.

(§ I A—8)—ESTABLISHMENT BY STATUTE STREETS ON REGISTERED PLANS.

The statute, 1 Geo. V. (Ont.) c. 42, s. 44 (1), providing that allowances for roads, streets or commons surveyed in a city, town, village, or township, which have been surveyed and laid down on the plans thereof, and upon which lots fronting on or adjoining such allowances, roads, streets or commons have been or may be hereafter sold to purchasers, shall be public highways, streets and commons, does not apply to an unregistered plan, because this section is subject to the provisions of the Registry Act as to the amendment or alteration of plans, and no plan can be altered or amended by a judge until it is registered.

Peake v. Mitchell; Mitchell v. Peake, 10 D.L.R. 140, 4 O.W.N. 988, 24 O.W.R. 291.

B. WIDTH.

(§ I B—15)—WIDTH — OVER RAILWAY — RESTRICTING TO PORTION DEVOTED TO HIGHWAY TRAFFIC.

The right of the public in a street over a railway right of way is not limited to the portion planked and gravelled for traffic by reason of the fact that no town by-law was adopted for opening the street, under s. 705 (b) of c. 57 of 8 & 9 Edw. VII. after the crossing was ordered by the Railway Board, where, prior to application to the Board, a by-law was passed authorizing the extension of such street across the right of way of the railway company; and the latter acquiesced in the opening of the road for its full width, and subsequently recognized its existence.

Campbell v. C.N.R. Co. (No. 2), 12 D.L.R. 272, 23 Man. L.R. 385, 15 Can. Ry. Cas. 357, 24 W.L.R. 447, 4 W.W.R. 914.

HIGHWAY ACT, 1908 — EXISTING HIGHWAYS — PRESUMPTION AS TO WIDTH — DEDICATION — TRESPASS.

Subsection 1 of s. 34 of c. 34, of 8 Edw. VII. providing that "all existing highways, except those heretofore laid out and recorded as two-rod highways, shall, until the contrary be proved, be deemed to have been laid out 4 rods in width, and all highways hereafter to be established shall be laid out not less than four nor more than 6 rods wide. All highways shall be worked out to such width as the Commissioners in their respective districts shall consider necessary," does not operate to make a road upon which expended and statute labour performed a four-rod highway when such road had been dedicated and accepted of a less width, and along the side of which an adjoining proprietor had erected his fence up to which he has held possession.

Groundwater v. Waterman, 42 N.B.R. 396.

TORONTO AND HAMILTON HIGHWAY COMMISSION — INCREASED WIDTH OF HIGHWAY — APPORTIONMENT AMONG MUNICIPALITIES OF ADDITIONAL COST — ORDER OF ONTARIO RAILWAY AND MUNICIPAL BOARD — APPLICATION FOR LEAVE TO APPEAL.—5 GEO. V., c. 18, s. 13 (O.).

Re Ontario Railway and Municipal Board and Toronto & Hamilton Highway Commission, 12 O.W.N. 335.

ENCROACHMENT — ACTION FOR MANDAMUS TO TOWNSHIP CORPORATION TO RESTORE ROAD TO ORIGINAL WIDTH — FENCES — NONFEASANCE—REMEDY.

Tompkins v. Harwich, 14 O.W.N. 325.

PURCHASE OF LAND BY TOWNSHIP CORPORATION — DEDICATION FOR ROAD — BY-LAW ASSUMING — DEFECT IN REGISTRATION — NOTICE TO GRANTEE OF VENDOR — WIDTH OF ROAD—ACTION FOR DECLARATION OF RIGHT.

Harvey v. Galvin, 11 O.W.N. 38.

CONSTRUCTION OF ROAD ON PLAINTIFF'S LAND — NO PROCEEDINGS FOR EXPROPRIATION.

Fodey v. South Qu'Appelle, 3 S.L.R. 412.

LAYING OUT STREETS AND EXPROPRIATION THEREFOR — SERVITUDES — EXTINCTION BY NONUSER.

Montreal v. Tiffin, 20 Que. K.B. 430.

TOWNSHIP BOUNDARY LINE — DEVIATION — SUBSTITUTED ROAD — ASSUMPTION BY COUNTY.

Wentworth v. West Flamborough, 23 O. L.R. 583, 19 O.W.R. 445.

II. Title; use; construction.

A. IN GENERAL; TITLE AND PROPERTY RIGHTS.

Prescriptive right as to user, stream, see Easements, II A—7; Parties, II A—70.

(§ II A—20)—DEDICATED BY OWNER — MUNICIPAL ACT — COMMON AND PUBLIC —EASEMENTS.

Section 433 of the Municipal Act (1913, 3 & 4 Geo. V., c. 43, Ont.), provides that "the soil and freehold of every highway shall be vested in the corporation of the municipality or municipalities," and by s. 432, "all roads dedicated by the owner of the land to public use" are declared to "be common and public highways." The effect of this legislation and of the repeal of 3 Edw. VII. c. 19, which was concurrent with it, is to remove any easement or reservation to which the vesting of the highway was subject, and to vest absolutely and without qualification the soil and freehold in the municipal corporations.

Abell v. Woodbridge et al., 46 D.L.R. 513, 45 O.L.R. 79, reversing 37 D.L.R. 352, 39 O.L.R. 382. [See 17 O.W.N. 55.]

MUNICIPAL ROAD — PRESCRIPTIVE RIGHTS.

A piece of land becomes a municipal road as soon as the corporation has taken possession of it for such purpose, even if the works for making the road have been done only on part of its width. When all the formalities required for the taking over of land for road purposes have been fulfilled by a municipal corporation, that land is no longer private; it becomes imprescriptible and cannot become the object of useful possession to base a possessory action.

Faucher v. Hébert, 54 Que. S.C. 316.

ACTION FOR POSSESSION — PATHS — PUBLIC DOMAIN — SETTLING LIMITS — POSSESSION — C.C.P. ART. 1064.

When a sidewalk is built on public land, and is in part destroyed by a neighbor claiming that it is on his property, a possessory action will not lie.

Seguin v. Turenne, 25 Rev. Leg. 453.

(§ II A—21)—RIGHTS AND TITLE OF PUBLIC.

Every municipal road or every part of the municipal road, wholly situate in one local municipality, is by law (755 mun. Code) a local road and preserves its character until the County Council or the board of delegates take advantage of the prerogatives conferred upon them by arts. 758, 759 Mun. Code.

Brunet v. Comte de Beauharnois, 18 Rev. de Jur. 141.

(§ II A—23) — OBSTRUCTION — ADVERSE CLAIM OF ABUTTING OWNER.

A purchaser taking under a plan upon which streets are shewn is not entitled to cut off access to these streets if dedication was intended, although they have not been accepted by the municipality.

Peake v. Mitchell; Mitchell v. Peake, 10 D.L.R. 140, 4 O.W.N. 988, 24 O.W.R. 291.

RIGHTS AND TITLE OF ABUTTING OWNER.

Where the facts do not establish an immediate necessity for opening and grading a public street, a municipal corporation will not be required to do so under the terms of an agreement between the municipal corporation and the dedicators of the right of way, whereby the municipality was to open and grade, "when necessary," certain streets in a subdivision in which the plaintiff was an owner under conveyance from the dedicators of lots abutting a new street so contracted for.

Hutchison v. Westmount, 3 D.L.R. 333, 4 O.W.N. 338. [Affirmed, 16 D.L.R. 853, 49 Can. S.C.R. 621.]

B. USES; WHAT ALLOWED IN STREET GENERALLY.

(§ II B—32)—USE OTHER THAN FOR PASSAGE — PRIVATE PURPOSES OF ADJOINING OCCUPANT.

Highways are dedicated primâ facie for the purpose of passage, but a person may, notwithstanding, use a highway for other purposes in conformity with the reasonable and usual mode (e.g., unhitching a horse to be stabled in adjacent premises) without being considered a trespasser in respect of such use as regards a claim for damages sustained by another's negligence. [Harrison v. Duke of Rutland, [1893] 1 Q. B. 142, applied.]

McLean v. Crown Tailoring Co., 15 D.L. R. 353, 29 O.L.R. 455.

(§ II B—34)—Bridges over.

A bridge crossing a river, connecting the separated parts of a public highway is part of the highway itself and is also a public place and is within the operation of s. 248, subs. 2 of the Railway Act, 1906.

Haldimand v. Bell Telephone Co., 2 D.L.R. 197, 25 O.L.R. 467, 21 O.W.R. 194.

(§ II B—35)—Automobiles and horses.

Drivers of automobiles and drivers of horses have equally a perfect right to use the highway, but the right of each is subject to the qualification that he must use it in conformity with any statutory requirements, and not so as to make its use dangerous to others.

Stewart v. Steele, 6 D.L.R. 1, 5 S.L.R. 358, 22 W.L.R. 6, 2 W.W.R. 902.

Driver of automobile — Colt running with mother on hay wagon — Collision — Death of colt — Negligence —Damages.

Stevens v. Saskatoon Taxicab Co., 45 D. L.R. 763, [1919] 1 W.W.R. 958.

(§ II B—47)—Poles — Consent of municipality to erection.

The fact that an electric company had previously acquired statutory power to erect poles and wires in the streets of a town does not prevent it coming within the provisions of a subsequent Act, c. 21 of N.S. Acts of 1911, declaring that poles shall not be erected except with the written permission of the street committee of the town under such terms as public safety may require. The right to erect poles and wires in the streets of a town conferred on an electric company by s. 6 of c. 130 of the N.S. Acts of 1889, can be exercised, under s. 7 of the Act, only under the direction and supervision of such person as the town may appoint, who, however, must exercise his power in a fair and reasonable manner.

Att'y-Gen'l and Truro v. Chambers Electric Light & Power Co., 14 D.L.R. 883, 13 E.L.R. 443.

Electric light wires, poles and conduits.

The powers conferred upon the Toronto & Niagara Power Co. by ss. 12, 13 of its Act of incorporation, 1902, remain intact notwithstanding the provisions of the Railway Act, 1906, and the company is entitled to erect poles for the purpose of stringing power of transmission lines along the streets of a municipality, without the consent of the municipality.

Toronto & Niagara Power Co. v. North Toronto, 5 D.L.R. 43, 14 Can. Ry. Cas. 392, [1912] A.C. 834, 23 O.W.R. 85, reversing 2 D.L.R. 120.

All doubt as to the power of a company to erect poles to carry electric wires through the streets and public places of a city is concluded by the fact that the city agreed to grant the company permits, under certain conditions, to erect poles therein, and requiring that it should permit the use thereof by other companies, and also by the city for wires of its fire alarm system, or for heat and light.

A city that has, under a general by-law, granted permits to a company to erect poles in its streets and public places cannot, after such permits have been acted upon, require the removal of such poles on the ground that the permits were void because issued without the adoption of a by-law in each instance.

Winnipeg Electric Co. v. Winnipeg, 4 D. L.R. 116, [1912] A.C. 355, 1 W.W.R. 964, reversing 20 Man. L.R. 337, 16 W.L.R. 62.

(§ II B—49)—Telegraph and telephone lines.

The powers conferred on the Bell Telephone Co. by its Act of incorporation authorizing it to erect its lines along the side and across or under any public highway, bridges, etc., are controlled by the Railway Act, 1906, s. 248, which imposes certain conditions precedent to the construction by any telephone company of its lines, and this notwithstanding that the word "bridges" is specially mentioned in the incorporating Act and omitted from the Railway Act.

Haldimand v. Bell Telephone Co., 2 D. L.R. 197, 25 O.L.R. 467, 21 O.W.R. 194.

(§ II B—52) — Voluntary license to abutting owner to put steps on highway—Revocation.

Where a city municipality, by way of mere license and voluntary concession, permits a property owner to put steps on the highway as an approach to his property, the city has the right at will to withdraw such license without the owner's consent or concurrence.

Forster v. Medicine Hat, 17 D.L.R. 391, 28 W.L.R. 685, 6 W.W.R. 548. [See 9 D. L.R. 555, 5 A.L.R. 36.]

C. Obstruction generally.

(§ II C—60)—Unopened road allowance —Obstruction by fences—Substantial injury to plaintiff—Deprivation of access to land—Right to maintain action—Surveys Act, R. S.O. 1914, c. 166, s. 19—Mandatory injunction—Trivial dispute—Costs.

Membery v. Smith, 15 O.W.N. 119.

(§ II C—67)—Of sidewalk.

A building contractor who, in the course of building operations, obstructs parts of streets and sidewalks after he has obtained a municipal permit so to do, is not liable in damages for the inconvenience and annoyance and even losses caused thereby to the public and neighbouring proprietors, provided every precaution be taken to prevent the aggravation of this servitude, and the public and neighbouring occupants are bound to suffer such temporary interference with their rights.

Cochenthaler v. Pauzé, 2 D.L.R. 234.

(§ II C—68) — Removing obstruction — Fence—Crime.

The defendant charged under Cr. Code,

s. 530, with breaking down a fence erected across a road which had been a public highway, may set up in answer that the proceedings by which the municipal council purported to order the diversion of the highway and the closing of that portion thereof were irregular and invalid, and on its so appearing is entitled to have the charge dismissed by reason of his lawful right to remove the obstruction.

R. v. Hatt, 27 D.L.R. 640, 25 Can. Cr. Cas. 263.

PRIVATE REMEDY FOR — SPECIAL INJURY SUFFERED BY PLAINTIFF—PARTIES.

One who, by the act of the defendant in obstructing a road, is prevented from passing along it to and from his property, suffers a special injury which entitles him, without the intervention of the Attorney-General, to maintain an action in his own name against the wrongdoer, for the removal of the obstruction, and a declaration that the road is a public highway.

O'Neil v. Harper, 13 D.L.R. 649, 28 O.L.R. 635, reversing 10 D.L.R. 433.

D. USE AND OBSTRUCTION BY RAILROADS.

(§ II D—70)—Application for leave to carry a street across the lands of the respondent. The street was not opened up to the right of way of the respondent on the south side, and there was a block of land owned by the respondent between its terminus and the said right-of-way:—Held, 1. That under s. 237 of the Railway Act, the Railway Board had jurisdiction to give leave to construct a highway across "any railway." 2. That under s. 2 (21) of the Act, the word "railway" included real property such as the said block of land. 3. That the application should be refused as not being in the public interest because the crossing would be dangerous and would almost at once require protection. Quære whether "railway," as used in s. 237, would include more than the full width of the right-of-way and not "property, real or personal and works connected therewith."

St. Thomas v. G.T.R. Co., 13 Can. Ry. Cas. 134, 22 O.W.R. 257.

TOLL ROAD ACQUIRED BY COUNTY — BY-LAW — TOLL ROADS EXPROPRIATION ACT — COUNTY ROAD—TRANSFER OF PORTION TO CITY—POWERS OF ONTARIO RAILWAY AND MUNICIPAL BOARD — ANNEXATION OF PART OF TOWNSHIP TO CITY—MUNICIPAL ACT, 1903, S. 34, SUBS. 2 (6 EDW. VII., C. 34, S. 1 (2)—AGREEMENT BETWEEN COUNTY AND RAILWAY COMPANY —ESTOPPEL—CHANGE FROM PROVINCIAL TO FEDERAL JURISDICTION—PAYMENTS FOR RUNNING RIGHTS MADE TO CITY—RECOVERY BY COUNTY FROM COMPANY—MISTAKE OF LAW—COSTS.

Wentworth v. Hamilton Radial Electric R. Co. & Hamilton, 31 O.L.R. 659.

(§ II D—71)—RIGHT TO CROSS STREET.

Where it appeared that a testator had for years used as a private road a strip of his lands and in his will reserved the same as a public road by words insufficient to amount to a dedication of such strip for such purpose, the reservation apparently being made for the purpose of widening a public road which was established many years after he had made his private road on a strip of land adjoining his by the owner thereof, and where an order of the Railway Board granted the application of a railway company for permission to cross the public road which was described in the plan accompanying the application somewhat inaccurately as the road between the testator's land and the adjoining land above mentioned which order was made after a contest which was confined to the terms upon which the railway company should be permitted to cross the public road, nothing being said about the private road and no question being raised as to whether it was or was not part of the public road, such order did not give the railway company any permission to cross the private road.

C.N.R. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504, 22 O.W.R. 659.

(§ II D—72)—RIGHT TO USE OR OCCUPY STREET GENERALLY.

A roadway running alongside a railway track used by vehicles and pedestrians is a highway within the meaning of the Railway Act.

G.T.R. Co. v. McSween, 2 D.L.R. 874.

(§ II D—81)—SUBWAY.

Upon an application by a town corporation for an order requiring a railway company to provide a suitable crossing where the railway crossed a street:—Held, that a right-angle subway was suitable and it was all that the Board should be required to contribute to; but, if the town corporation desired a straight subway, and was willing to pay the extra cost it should be so ordered, upon proper terms.

Re North Battleford and C.N.R. Co., 23 W.L.R. 584.

E. RIGHTS AS TO TREES OR MATERIALS IN STREET.

(§ II E—95)—RIGHT AS TO MATERIALS IN — UNOPENED ROAD ALLOWANCE — REMOVAL OF EARTH—NECESSITY OF BY-LAW AUTHORIZING—RIGHTS OF ABUTTING OWNER.

The removal of earth by an individual for his own use from an unopened road allowance can be authorized by a county council only by by-law, notwithstanding a portion of the earth was used in improving a near-by road. [Pratt v. Stratford, 14 O.R. 260, 16 A.R. 5, distinguished.] For a person to remove earth from an unopened road allowance without the authority of a municipal by-law is an actionable wrong where injurious to an adjoining owner as an interference with his means of access to or the drainage of his land.

Taylor v. Gage, 16 D.L.R. 686, 30 O.L.R. 75.

IRRIGATION WORKS — NUISANCE—OBSTRUCTION OF HIGHWAYS — DUTY TO BUILD AND MAINTAIN BRIDGES.

Alberta R. & Irrigation Co. v. The King, 44 Can. S.C.R. 505.

USE OF STREETS—PERMISSION FOR SPORTS.

Waterville v. Dudevoir, 20 Que. K.B. 306, affirming 37 Que. S.C. 381.

INCLOSURE OF PART OF ROAD—TAKING DOWN FENCES—ABATEMENT OF NUISANCE.

Waddell v. Richardson, 19 W.L.R. 531.

OBSTRUCTION — INJURY TO AUTOMOBILE — NEGLIGENCE—LIABILITY OF MUNICIPAL CORPORATION.

Tait v. New Westminster, 18 W.L.R. 470.

III. Improvements; diversion; changing grade.

As to protection of railway crossings, see Railways, III—45.

Precautions as to icy sidewalks, see Negligence, I D—70.

(§ III—100) — BOUNDARY ROAD BETWEEN TOWNSHIPS — DEVIATION — LIABILITY FOR MAINTENANCE.

Euphrasia v. St. Vincent, 30 D.L.R. 506, 36 O.L.R. 233. [Affirmed by Supreme Court of Canada; see 12 O.W.N. 367.]

HIGHWAY IMPROVEMENT ACT—POWERS OF COUNTY.

A county for the purposes of the Highway Improvement Act (R.S.O. 1914, c. 40, ss. 4 (1), 5 (1), 12 (2) and 22) in order to make a continuous good road, may assume a part of a road within a village corporation.

Merritton v. Lincoln, 39 D.L.R. 328, 41 O.L.R. 6, reversing 12 O.W.N. 370.

LOCAL AND COUNTY ROAD — VALIDITY OF PROCEEDINGS.

A road, whose side is entirely situated within one municipality, is a local road, even if one of its sides runs along a neighbouring municipality. The act of a county council which, by its minutes of proceedings, charged a local municipality with the costs of opening and maintaining a road which benefited only one taxpayer, constitutes an injustice and oppression sufficient to found an action to annul the minutes.

Nicolet v. Villers, 27 Que. K.B. 289.

CONSTRUCTION OF HIGHWAY ACROSS RAILWAY—MUNICIPAL LIABILITY AS TO COSTS.

The opening of a highway across the lands taken for right-of-way of a railway company is a new public right over it, and the cost of its construction and maintenance should be borne by the applicant municipality.

Mount Laurier v. C.P.R. Co., 18 Can. Ry. Cas. 387.

CARRYING SUBWAY UNDER RAILWAY—LIABILITY OF MUNICIPALITY AS TO COSTS.

The well-defined policy of the Railway Board in cases where there is no evidence of any dedication of a way of communication to the public by a railway company across its tracks, is that the entire expense of grade separation necessary to carry the subway under the existing tracks of a railway company should be borne by the applicant municipality. [Western v. G.T. and C.P.R. Cos. (Denison Avenue Crossing Case), 7 Can. Ry. Cas. 79; St. Pierre v. G.T.R. Co. (Simplex Avenue Crossing Case), 13 Can. Ry. Cas. 1; Montreal v. C.P.R. Co., 18 Can. Ry. Cas. 50, followed.]

Lachine v. G.T.R. Co., 18 Can. Ry. Cas. 385.

CONSTRUCTION OF SUBWAY UNDER RAILWAY —SENIOR AND JUNIOR RULE—APPORTIONMENT OF COST.

A street having been opened across the right-of-way of the respondent, the applicant was given permission by the Railway Board to construct and maintain a subway under the railway at its own expense and the respondent, under the senior and junior rule, was not ordered to contribute to the expense, but if the applicant agrees to close a neighbouring street, notwithstanding this rule and that the equities as well as the title are in the respondent's favour, the cost of the subway will be apportioned equally between the applicant and respondent.

Winnipeg v. C.P.R. Co., 18 Can. Ry. Cas. 381.

CONSTRUCTION OF SUBWAY BENEATH RAILWAY—POWER OF MUNICIPALITY.

The city of Regina has, by virtue of R.S.S., c. 84, s. 184, power to construct a subway beneath a railway track. [Forster v. Medicine Hat, 3 W.W.R. 618, dissented from.] (Semble.) A by-law authorizing the construction of the subway is unnecessary.

Armour v. City of Regina, 8 S.L.R. 368, 9 W.W.R. 928.

ENLARGEMENT—INTEREST OF OWNERS.

An Act which orders a municipal corporation to enlarge certain streets and to acquire for this purpose "the necessary land for the price of $13,000 so as to include the options given by the interested owner," does not create any privity between the municipality and those who have the option. If under the Act the incorporation is to enlarge the streets within a definite time, and this is found to be impossible on account of the refusal of the owners to sell the lands required, the municipality is relieved from its obligation and cannot be compelled to have the streets enlarged. Nevertheless it is lawful for it to proceed with the enlargement if it deems it expedient.

Prevost v. Montreal, 52 Que. S.C. 349.

SIDEWALKS — ABUTTING OWNERS — INVALID BY-LAW.

A by-law requiring an owner to construct a cement sidewalk, across land unoccupied, marshy and under cultivation over a surface of 56 arpents across which the public road passes, indicating a capricious course at a

very high cost and without benefit to the owner, does not conform to the principle that the expenses of construction and maintenance of watercourses, bridges and municipal roads should be borne by those who benefit by them, or be paid by the municipality itself. Consequently this by-law should be adjudged as unjust and oppressive to the owner and should be quashed. A delay of 15 days given to the owner to construct the sidewalk, with the declaration that if he does not do so within this delay the municipality will do it at his expense, is insufficient and therefore illegal.

Sisters of Charity of General Hospital of Montreal v. Chateauguay, 52 Que. S.C. 8.

COUNTY AND LOCAL ROADS.

Although a county council has the right, under art. 758, Mun. Code, to order that a county road, under the exclusive direction of the county council, shall in the future be a local road under the direction of the local corporation in which it is situated or which separates it from another municipality, it cannot put the maintenance of the road upon the local municipality. When a county council imposes upon a certain number of ratepayers the expenses of a by-law that is passed at their request, a local corporation has no interest to complain.

St. Jerome v. Terrebonne, 51 Que. S.C. 468.

IMPROVEMENTS — REPAIRS — FIXING AND CHANGING GRADE.

The fact that a special superintendent testified in the office of the counsel to an information which he had to make, two days after the expiration of the delay fixed for so doing, will not render the proceedings an absolute nullity if it does not result in any substantial injustice. The costs of opening and maintaining a road, which does not lead from one range to another, or which does not lead exclusively to a ferry or to a toll bridge, must fall on the corporation.

Frechette v. St. Maurice, 18 Rev. de Jur. 49.

(§ III—103) — IMPROVEMENTS — CONTRACT FOR EXEMPTION WITH DONOR OF LAND—"COST OF OPENING."

Under a grant by the landowner to the municipality of land for a public street, made upon condition that no special assessment should be levied upon the remainder of his land to defray the "cost of the opening" of the street and further providing that such condition should not be construed as exempting the lands from special assessments for drains and macadamizing such street, the words "cost of the opening" must be held to include all the work of whatever kind necessary to render the contemplated street fit to be used by the public for the traffic usual in that community and the grantor is exempt from assessments for grading, filling in, rock cuttings and levelling undertaken by the municipality in respect thereof. [As to irregular proceedings in compulsory openings of highways and streets, see Seguin v. Hawkesbury, 9 D.L.R. 487.]

Outremont v. Joyce, 9 D.L.R. 499, 107 L.T. 569, affirming 20 Que. K.B. 385.

(§ III—104)—CHANGING GRADE OF STREET —SUBWAY—DAMAGES TO LANDOWNER.

The fact that an order-in-council authorizing the construction of a subway at a railway crossing had directed that "all land damages" should be paid by the municipality on whose behalf the application had been made, in pursuance of the Nova Scotia Railways Act, R.S.N.S. 1900, c. 99, ss. 178 and 179, does not confer a right of action in damages for the change of grade against the municipality upon a landowner whose land fronted upon the opposite side of the street from that on which the subway was built and where there was consequently left to the landowner his original mode of access on his side of the street, although of diminished width.

Burt v. Sydney, 15 D.L.R. 429, 47 N.S. R. 480. [Affirmed in 16 D.L.R. 853, 50 Can. S.C.R. 6.]

FIXING AND CHANGING GRADE OF STREET.

In a complaint lodged before the Quebec Public Utilities Commission it is sufficient to allege an interference with the public right of travel or an obstruction to free access to a building in order to give such commission jurisdiction to proceed to the merits of the complaint, and an exception for such jurisdiction on the ground that the municipal corporation has alone jurisdiction to deal with the road complained of will be dismissed. (R.S.Q. 741 et seq.)

Canadian Light & Power Co. v. Julien, 2 D.L.R. 496, 21 Que. K.B. 476.

MUNICIPALITY RAISING ROADWAY—DITCH—DANGER—GUARD.

Where a municipality, in order more easily to perform its duty to repair, raises the roadway or lowers a ditch across it so as to create a substantial danger, it is its duty to provide a guard (e.g. a "wing wall") on the culvert so as to prevent vehicles going off the road into the ditch.

Ackersviller v. Perth, 22 D.L.R. 666, 32 O.L.R. 423, 33 O.L.R. 598.

CHANGING GRADE OF STREET.

Bergeron v. Hull, 2 D.L.R. 923.

TOWN ACT—CHANGING GRADE—DRAINAGE—NEGLIGENCE.

No action will lie for doing that which the legislature has authorized, if it be done without negligence. The fact that by altering the grade of a street under authority of the Town Act (1915, Sask. Stats., c. 19) the natural drainage was diverted would not constitute negligence, but where the raising of the grade has the effect of, not only diverting the drainage, but of damming it up, the town is liable for negligence in not providing proper means for

carrying off the accumulation. [Geddis v. Bann Reservoir, 3 App. Cas. 430, followed.]

Eakins v. Shaunavon, 42 D.L.R. 473, [1918] 2 W.W.R. 1077, affirming 11 S.L.R. 310, [1918] 1 W.W.R. 566.

CHANGE OF LEVEL — INCREASED VALUE — COMPENSATION.

The owner of a house fronting upon a public street the level of which is changed by the City of Montreal, can recover from the city the depreciation in value sustained by his real property; but the damages may be compensated for by the increased value given to the property by the change of level.

Boisjoly v. Montreal, 53 Que. S.C. 122.

GRADE SEPARATION — PAVEMENTS AND SIDEWALKS—APPORTIONMENT OF COST.

In grade separation proceedings the cost of pavements and sidewalks on highways carried over the railway should be borne by the municipality unless a permanent pavement already laid is destroyed by the work ordered by the Railway Board: in that case the cost of the substituted pavement is added to the cost of such work. A municipality making highway improvements for the convenience of the public, with the incidental grade separation, should, in addition to its own portion of the cost of the works, bear the portion of such cost from which an electric railway operating on the highway was relieved by the judgment of an Appellate Court.

Vancouver v. V.V. & E.R. & N. Co., 18 Can. Ry. Cas. 296.

In the matter of the local road, no taxpayer of a local municipality can be held to work on a road situated in a neighbouring local municipality, unless such road is a county road, and the only county roads which may exist, under the Mun. Code, are those by nature, by virtue of art. 755, and those by will of the County Council, by virtue of arts. 758, 761, 762.

Brunet v. Beauharnois, 18 Rev. de Jur. 141.

(§ III—111)—ROAD WORK—FRONT ROAD.

A front road is one which is laid out across the lots of a range and which does not lead from one range to another. Art. 801, Mun. Code, which provides that if, by reason of special circumstances, the works to be done on a front road by a ratepayer are in excess of half of the usual amount of such works to be done by owners of lands of the same value, such ratepayer may be excused from performing a part of such works, confers discretionary power on municipal councils which they may refrain from exercising without contravening the law.

Cacouna v. Thibault, 25 Que. K.B. 213.

(§ III—113)—DIVERSION—MUNICIPAL BY-LAW.

Where a by-law for closing a street at the instance of a railway company in exchange for new streets to be opened by them contained no provision for compensation as is required by s. 629 of the Ontario Municipal Act, the court will quash the by-law at the instance of the person to be compensated for the closing of the street unless the municipality agrees to pay such damage as may be awarded and to proceed in due course to have the amount fixed.

Re Seguin and Hawkesbury, 9 D.L.R. 487, 4 O.W.N. 521, 23 O.W.R. 857, varying 6 D.L.R. 903.

BOUNDARY LINE BETWEEN TOWNSHIPS — ORIGINAL ROAD ALLOWANCE — DEVIATION—COST OF OPENING UP AND MAINTAINING ORIGINAL ALLOWANCE—ARBITRATION—ORDER OF ONTARIO RAILWAY AND MUNICIPAL BOARD.

Re Middleton and Dercham, 10 O.W.N. 11.

DIVERTING—MUNICIPAL BY-LAW.

A municipal by-law, for the diversion and closing of certain highways and the transfer of the land to a railway company, provided that it should "come into force and effect" on the execution of a supplementary agreement between the municipal corporation and a railway company "duly ratified by council;" it also determined the classes of persons and property entitled to compensation in consequence of being injuriously affected by the diversion and closing of the streets. The stat. 3 & 4, Edw. VII., c. 64, s. 708, subs. c (1), conferring these powers, gave persons dissatisfied with the determination the right to appeal to a judge "within 10 days after the passage of the by-law." Another by-law was subsequently enacted by which the first by-law was "ratified and confirmed and declared to be now in force." The defendants, who had been excluded from the class of persons to receive compensation, appealed to a judge, under the section of the statute above referred to, within 10 days after the enactment of the second by-law:—Held, that the words "within ten days after the passage of the by-law" in the statute had reference to the date when the by-law affecting the streets and determining the classes entitled to compensation became effective; that the first by-law did not come into force and effect in such a manner as injuriously to affect the defendants until it was ratified and confirmed by the subsequent by-law; and, consequently, the defendants' appeal came within the time limited by the statute.

Winnipeg v. Brock, 20 W.L.R. 243, affirming 20 Man. L.R. 699, 18 W.L.R. 28.

(§ III—114) — SPECIAL SURVEY ACT (MAN.) — DEFINING BOUNDARIES OF STREETS.

A plan made pursuant to the Special Survey Act, R.S.M. 1902, c. 158, authorizing a survey by a municipality "for the purpose of correcting any error or supposed error in respect to any existing survey or plan, or of shewing the divisions of lands" is not an act of expropriation, but is simply intended as evidence of the position or location of the boundary lines

which have been obliterated, and when the plan is ratified by the Attorney-General, incorporated in and promulgated by the order of the Lieutenant-Governor-in-council, it is a substitute for the evidence which has been lost and for the landmarks which have been obliterated, and is conclusive on the owners of the lands in question.

Peterson v. Bitulithic & Contracting Co. (No. 2), 12 D.L.R. 444, 23 Man. L.R. 136, 24 W.L.R. 19, 4 W.W.R. 223, reversing 7 D.L.R. 586.

COMMUTATION WORK — TIME FOR PERFORMANCE—NOTICE.

Halifax v. Fredericks, 44 N.S.R. 418.

POWER TO ENTER LANDS AND TAKE MATERIAL FOR REPAIR OF HIGHWAY—ARBITRATION.

Cook v. North Vancouver, 16 B.C.R. 129, 18 W.L.R. 349.

EXPENDITURE ON ROADS IN TERRITORY SOON TO BE ANNEXED BY ADJOINING MUNICIPALITY.

Re Angus and Widdifield, 24 O.L.R. 318, 19 O.W.R. 709.

BY-LAW FOR WIDENING STREET—DESTRUCTION OF SIDEWALKS—STATUTORY OBLIGATION.

Todd v. Victoria, 15 W.L.R. 502.

MANDAMUS TO COMPEL A MUNICIPALITY TO REPAIR A STREET.

Farly v. Montreal, 39 Que. S.C. 13.

MAINTENANCE OF ROADS—APPEAL TO COUNTY COUNCIL—IRREGULARITY.

Groudines v. Portneuf, 40 Que. S.C. 289.

ROADWORK — ORDER OF INSPECTOR — TELEPHONE.

Bégin v. Crawford, 39 Que. S.C. 539.

MEANING OF "OPENING" A STREET AND OF "MACADAMIZING" A STREET.

Outremont v. Joyce, 20 Que. K.B. 385.

IV. Defects; liability for injuries to travelers.

A. LIABILITY OF MUNICIPALITY.

Duty to keep free from nuisances, defective electric light system, see Municipal Corporations, II G—195.

(§ IV A—115) — UNGRADED ROAD — UNKNOWN BODY OF WATER—DRIVING INTO —INJURY—NEGLIGENCE.

Where the effect of a statutory amendment is to cast upon a municipality the necessity of immediately constructing roads throughout the whole municipality, it is entitled to a reasonable time to construct the roads before it will be held liable for nonfeasance. A person who drives into an unknown body of water 100 feet wide and across which there is no indication of any one having traveled, in the centre of an ungraded road allowance, unless he has first ascertained the depth of the water and the character of the bottom of the slough, does not exercise that degree of care and prudence which he should exercise and cannot recover damages for injuries sustained in consequence.

Ogloff v. Sliding Hills, 44 D.L.R. 108, 12 S.L.R. 73, [1919] 1 W.W.R. 126.

RIGHTS OF TRAVELER TO WHOLE WIDTH—UNIMPROVED PORTION — ARTIFICIAL OBSTRUCTION—INJURY—LIABILITY OF CORPORATION.

In the case of an ordinary highway, although it may be of varying and unequal width running between fences, unless there is evidence to the contrary a traveler is entitled to use the whole space between the fences and is not confined to the part which is kept in repair for the more convenient use of carriages or foot passengers. A horseman on the unimproved part of the highway, although he cannot recover damages if his horse stumbles against a boulder, or steps into a depression in the ground in its natural state, is entitled to damages if he is injured by his horse coming suddenly in contact with an artificial obstruction of an unusual nature, and one which is practically invisible at the time of day when the accident occurs.

Salt v. Cardston, 46 D.L.R. 179, [1919] 1 W.W.R. 891; see also 49 D.L.R. 229, reversing above case but on another point.

REPAIR—NEGLIGENCE—ONTARIO MUNICIPAL ACT.

In an action for damages for injuries caused by the alleged negligence of a municipality to keep a highway in repair the onus is upon the plaintiff to prove that the road in question was not in a proper state of repair; and when the weight of evidence is such as to shew that the road was in a reasonable state of repair, and that those requiring to use it might do so with safety upon using ordinary care, the plaintiff has not proved "want of repair" to be the cause of the accident. [Foley v. East Flamborough, 29 O.R. 139, applied.]

Raymond v. Bosanquet, 50 D.L.R. 560, affirming 47 D.L.R. 551, which reversed 43 O.L.R. 434.

ACCIDENT—SOLE EFFECTIVE CAUSE—WHISKEY AND GASOLENE DON'T MIX—CORPORATION NOT RESPONSIBLE—CONTRIBUTORY NEGLIGENCE—R.S.Q. ART. 1427—36 GEO. III., C. 9, ARTS. 768, 771 AND 788, NOW 468, 470 AND 478, OLD MUNICIPAL CODE.

That the driver of the automobile was the sole effective cause of the fatal accident and consequently respondent has no legal claim against appellant, there being no contributory negligence. The width of roads means the width of right-of-way and not the traveled track.

Corp. of the Tp. of Shipton v. Smith, 25 Rev. de Jur. 476, reversing 25 Rev. Leg. 364.

IV A—120) — NONREPAIR — SNOW AND ICE ON SIDEWALK — INJURY TO PEDESTRIAN—GROSS NEGLIGENCE—MUNICIPAL ACT (ONT.)

Ashton v. New Liskeard, 47 D.L.R. 723, 45 O.L.R. 113.

DEFECTIVE BRIDGE — TRACTION ENGINE — ROUTE.

Loss sustained by the owner of a traction engine through traveling by another route, rather than cross a bridge not considered strong enough to carry his engine, and which the township has refused to strengthen, are not "damages" by "default," of the defendant township within the Municipal Act, R.S.O. 1914, c. 192, s. 460, and otherwise the damages were too remote.

Dick v. Vaughan, 34 D.L.R. 577, 39 O.L.R. 187.

DEFECTIVE BRIDGE — CONTRIBUTORY NEGLIGENCE.

The obligations of the municipality, under s. 158 of the Calgary (Alta.) Charter, which vests every public highway in the city, to keep every bridge or public highway "belonging to the city" in good repair, extends to a bridge forming part of a highway, notwithstanding the statutory obligation of a railway company under the Irrigation Act (R.S.C. 1906, c. 61, s. 25) for its safe maintenance, and a failure of the municipality to equip such bridge with proper railings will render it liable for injuries sustained by a vehicular traveler in consequence thereof. The absence of the railings being the real cause of the accident, the question of contributory negligence becomes immaterial.

Lusk v. Calgary; Wheatley v. Calgary, 28 D.L.R. 392, 10 A.L.R. 91, 33 W.L.R. 935, 10 W.W.R. 37, affirming 22 D.L.R. 50.

LIABILITY OF COUNTY FOR DEFECTIVE HIGHWAY—ROAD TAKEN OVER.

Where, under the Highway Improvement Act, 7 Edw. VII. (Ont.) c. 16, as amended by 2 Geo. V. (Ont.) c. 11, a county council has assumed highways in any municipality in the county in order to form or extend a system of county highways therein, the county is liable for the maintenance and repair of those roads, and for damages sustained by reason of the nonrepair of any of them.

Armstrong Cartage Co. v. Peel, 10 D.L.R. 169, 49 C.L.J. 336, 4 O.W.N. 1031, 24 O.W.R. 372.

WHAT IS PUBLIC HIGHWAY—DUTY TO KEEP IN SAFE CONDITION.

In order that a street may be considered public, so as to render a municipality liable for injuries resulting from a failure to keep it in a safe condition, it is not necessary that it should be indicated on the plan or the registry of the city; it is sufficient that it is free for public passage and that the public use it therefor.

Montreal v. Gamache, 25 D.L.R. 303, 24 Que. K.B. 312.

PRIVATE ROAD—DUTY AS TO REPAIRS.

A highway laid out by private persons, which had not been assumed by the municipality, does not impose a duty on the latter to keep it in repair, as to render it liable for injuries sustained in consequence of a ditch constructed thereon by private persons.

Jones v. Swift Current, 23 D.L.R. 11, 8 S.L.R. 310, 31 W.L.R. 899, 8 W.W.R. 1100.

DUTY TO REPAIR—ACCOMMODATION OF TRAFFIC.

The statutory duty of a municipality to keep its highways in repair may be limited by its financial ability in view of the limitation placed by statute upon its borrowing powers; the duty of the municipality is to keep the roads under its control in a reasonably sufficient state for traffic requirements.

Ackersviller v. Perth, 22 D.L.R. 666, 32 O.L.R. 423, 33 O.L.R. 598.

FAILURE TO REPAIR—INJURIES TO TRAVELER.

Where a statute vested in a municipality the public roads within its boundaries and empowered the municipality to repair, but did not purport to impose a duty to repair nor to create a liability on failure to repair, the municipality is not liable in damages for injuries sustained by a person driving on the road through its lack of repair, where the nonrepair was due to nonfeasance only as distinguished from misfeasance. [Macpherson v. Bathurst, 4 A. C. 257; Cowley v. Newmarket, [1892] A.C. 345; Geldert v. Picton, [1893] A.C. 524; Sydney v. Bourke, [1895] A.C. 433, 64 L.J. P.C. 140; Vancouver v. McPhalen, 45 Can. S.C.R. 194, distinguished.]

Von Mackensen v. Surrey, 22 D.L.R. 253, 21 B.C.R. 198, 8 W.W.R. 541.

WANT OF REPAIRS—INJURY TO TRAVELER.

Section 532 of the Halifax City Charter does not impose an absolute liability upon the city to keep the streets in good order and repair as under s. 522, the committee on works is to exercise a discretion as to the expenditure of the money at its disposal for the purpose of street repairs; and mere nonrepair, as distinguished from an act of misfeasance, does not give rise to an action on the part of the person injured in consequence thereof. [Vancouver v. McPhalen, 45 Can. S.C.R. 194, distinguished.]

Coleman v. Halifax, 22 D.L.R. 781, 48 N.S.R. 442.

NONREPAIR—INJURY TO TRAVELER—NOTICE TO CITY CORPORATION — CONTRIBUTORY NEGLIGENCE — FINDINGS OF FACT OF TRIAL JUDGE—EVIDENCE—CONFLICT BETWEEN WITNESSES—WEIGHT OF NEGATIVE STATEMENTS—DAMAGES.

Bradish v. London, 9 O.W.N. 296.

NONREPAIR — INJURY TO PERSON IN MOTOR VEHICLE — NEGLIGENCE — SPEED — CARELESSNESS — KNOWLEDGE — DRIVER UNDER AGE—MOTOR VEHICLES ACT.

In an action by a husband and wife to recover damages from a township corpora-

tion for injuries caused to the wife, by reason of a motor vehicle in which she was being driven along a road in the township dropping into a hole at the edge of a bridge forming part of the roadway, it appeared that the vehicle was owned by the husband, and was, at the time of the occurrence, being driven by the plaintiff's son, a boy under 16 years of age, and that the speed of the vehicle, as it descended a hill and passed off the bridge, was between 15 and 20 miles an hour. The son had driven the vehicle over the same place two days before, and he and the plaintiffs then felt a bump as they passed from the road to the bridge. Held, that the son's duty, having regard to the knowledge which he had of the condition of the road at the bridge, was to have driven with caution off the bridge; his carelessness was the cause of the injury to his mother; and, although the road was not in good repair for motor vehicle traffic, at the speed the plaintiffs were traveling, there was no negligence on the part of the defendants, and the plaintiffs were not entitled to recover damages. Held, also, that the plaintiffs were identified with their driver; his negligence was theirs; the father knew that his son, owing to his youth, was prohibited by the Motor Vehicles Act, R.S.O. 1914, c. 207, s. 13, as amended by 7 Geo. V., c. 49, s. 10, from driving a motor vehicle; and yet it was by the father's authority, and with the concurrence and sanction of his coplaintiff, that the boy was driving. The use of the highway which the son was making, at the instance of the plaintiffs, was unlawful—they were unlawfully upon the defendants' highway. [Review of the authorities.] A rural municipality is not bound to maintain its roads in such repair that they shall be safe for motor vehicles driven at the speed at which the plaintiffs were proceeding. [Dictum of Meredith, C.J.O., in Davis v. Usborne, 28 D.L.R. 397, 36 O.L.R. 148, 151, explained.]

Roe v. Wellesley, 43 O.L.R. 214.

NONREPAIR — OPENING IN ROADWAY — ABSENCE OF GUARD—INJURY TO BICYCLIST — DEFECTIVE EYESIGHT — NEGLIGENCE OF MUNICIPAL CORPORATION — NEGLIGENCE OF BICYCLIST — FINDINGS OF TRIAL JUDGE—APPEAL.

Westcott v. Woodstock, 14 O.W.N. 291, affirming 13 O.W.N. 480.

PARTIES — MUNICIPALITY — PROVINCE — PETITION OF RIGHT.

A corporation, sued in damages for an accident which happened in a road formerly under its control, but which, at the time of the accident, was under the control and direction of the government of the province, cannot call the Crown in warranty; the proper way to plead a claim against the government is by petition of right.

Turcotte v. St. Joseph, 20 Que. P.R. 250.

NONREPAIR — JUDGMENT AGAINST COUNTY CORPORATION — RIGHT OF COUNTY TO CHARGE DAMAGES AGAINST TOWNSHIP CORPORATION.

Toronto v. Peel, 5 O.W.N. 632.

NONREPAIR—INJURY TO MOTOR VEHICLE AND PERSON OF OWNER—LIABILITY OF TOWNSHIP CORPORATION—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — FINDINGS OF TRIAL JUDGE — WORK UPON ROAD DONE BY PROVINCIAL DEPARTMENT OF PUBLIC WORKS—CONSTRUCTION OF CULVERT—ROAD NOT PROPERTY OF PROVINCE BUT OF MUNICIPALITY — MUNICIPAL ACT, S. 460 (7).

Kankkunen v. Korah, 17 O.W.N. 273.

NONREPAIR—DEATH OF PERSON WALKING ON HIGHWAY—DANGEROUS CONDITION CONTINUED FOR LONG PERIOD—NEGLIGENCE—CAUSE OF DEATH—INFERENCE FROM FACTS FOUND BY TRIAL JUDGE—APPEAL.

Bowles v. Toronto, 16 O.W.N. 233.

NONREPAIR—INJURY TO TRAVELER—NOTICE TO CITY CORPORATION—CONTRIBUTORY NEGLIGENCE.

Bradish v. London, 9 O.W.N. 296, 10 O.W.N. 161.

WINTER ROADS IN QUEBEC.

Notwithstanding the provisions of art. 849, Mun. Code (Que.) when an accident results from the fact that a winter road over a river is laid out at a place where the ice is too thin, there is negligence on the part of the municipal corporation (or its officials) which makes it liable in damages therefor.

Morency v. l'Ange-Gardien, 43 Que. S.C. 537.

MUNICIPAL ROADS—EXTENSION OF THE RESPONSIBILITY OF MUNICIPAL CORPORATIONS IN REGARD TO ACCIDENTS—C.M. 778, 771, 788—REDUCTION OF AMOUNT OF DAMAGES BECAUSE OCCUPANTS OF THE AUTOMOBILE WERE INTOXICATED.

It is the duty of municipal corporations to see to the maintenance, in good order, of municipal roads under its control and when accidents occur from the defective condition of such roads the municipal corporation is responsible.

Smith v. The Tp. of Shifton, 25 Rev. de Jur. 194.

INJURY FROM IMPROVEMENTS.

Where a municipal corporation has made improvements on its streets and bridges, an individual who has sustained no special injury has not, on this account, recourse by an action for damages against the corporation; but, if he has sustained special injury which, so far as he is concerned, constitutes a permanent servitude which the other ratepayers of the municipality do not suffer, he is entitled to compensation.

Houle v. St. Louis de Gonzague, 49 Que. S.C. 136, 25 Que. K.B. 256.

A municipal corporation cannot free itself from liability for an accident caused by the bad state of one of its streets, by the

fact that in virtue of a contract sanctioned by a by-law the obligation to repair the roading of the street is imposed upon a tramway company. It cannot by a private agreement discharge itself from an obligation which falls upon it by virtue of the Act.

Begin v. Richard; Richard v. The City of Quebec, 55 Que. S.C. 114.

NONCOMPLIANCE WITH TRACTION ENGINES ACT.

The driver of a traction engine weighing less than eight tons was not disentitled by reason of his failure to lay down planks before crossing the bridge with the engine (R. S.O. 1914, c. 212, s. 5, subs. 4), to recover damages for injury, as the object of that section was not to strengthen the bridge, but to protect its flooring, and if such protection were not afforded, and the flooring were damaged, the owner would be liable. The question had been settled to the contrary by the Goodison Thresher Co. v. McNab case (19 O.L.R. 188, 44 Can. S.C.R. 187), which the court was bound to follow, but that the injured person in this action, being merely a passenger, though actually driving the engine at the time of the accident, was not identified with the owner of the engine, and was not disqualified from recovering damages.

Linstead v. Whitchurch, 30 D.L.R. 431, 36 O.L.R. 462, affirming 27 D.L.R. 770, 35 O.L.R. 1.

LATERAL SUPPORT—WITHDRAWAL BY OPERATIONS IN HIGHWAY—SUBSIDENCE.

Boyd v. Toronto, 23 O.L.R. 421, 18 O.W.R. 897.

(§ IV A—127)—SEWER—LEGISLATIVE SANCTION — NEGLIGENCE — CONSEQUENTIAL INJURIES.

Where the legislature has authorized or sanctioned the construction of a sewer under a roadway, and the sewer has been constructed without negligence, and every precaution has been observed to prevent injury arising therefrom, the sanction of the legislature carries with it this consequence, that if damage results which is the natural consequence of constructing such sewer independently of negligence, the city is not liable. [Vancouver v. Cummings, 2 D.L.R. 253; Jamieson v. Edmonton, 36 D.L.R. 465, followed.]

Douglas v. Regina, 42 D.L.R. 464, 11 S. L.R. 255, [1918] 2 W.W.R. 1000.

(§ IV A—132) — OBJECT FRIGHTENING HORSES—INDEPENDENT CONTRACTOR.

The negligence of a contractor for the repair of a highway, in leaving a scraper upon the roadway, and thereby causing a horse to run away, is not ascribable to the municipality for which the contractor is doing the repairs, even though the scraper belongs to the municipality, and is loaned to the contractor.

Lottine v. Langford, 37 D.L.R. 566, 28 Man. L.R. 282, [1917] 3 W.W.R. 778, affirming [1917] 3 W.W.R. 307.

WORK NECESSARILY DANGEROUS—INDEPENDENT CONTRACTOR WITH MUNICIPALITY.

An employer cannot divest himself of liability for negligence by reason of having employed an independent contractor, where the work to be done is, from its nature, likely to cause danger to others, unless precautions are taken to prevent such danger; so that a municipal corporation employing an independent contractor to lay cement sidewalks, where it is within the knowledge of the corporation that the contractor will have to use a mechanical mixer on the highway, will be liable for accidents to third parties arising from its use if no proper precautions have been taken to prevent accidents.

McIntosh v. Simcoe and Sunnidale, 15 D. L.R. 731, 5 O.W.N. 793.

(§ IV A—135)—MOTOR TRUCK WIDER THAN ALLOWED BY ACT—BREAKING THROUGH BRIDGE—NOT LAWFULLY ON HIGHWAY—MUNICIPALITY NOT LIABLE FOR INJURY TO MACHINE—OWNER LIABLE FOR DAMAGE TO BRIDGE.

The Load of Vehicles Act, 6 Geo. V., c. 49, s. 6 (Ont.) provides that "no vehicle shall have a greater width than 90 inches." A motor truck 96 inches wide, has, under this Act, no right to be upon the highway, and in respect thereof is a mere trespasser. The owner cannot recover damages for injuries to such truck caused by its breaking through a bridge on the highway, although the extra width may not have had anything to do with causing the accident. The owner is, however, liable to the municipality for the damage done by the truck, prohibited as it is from using the road.

Sercombe v. Tp. of Vaughan, 46 D.L.R. 131, 45 O.L.R. 142.

NONREPAIR—INJURY TO FOOT-PASSENGER BY SLIPPING ON SIDEWALK—DEPRESSION IN SIDEWALK—ACCUMULATION OF WATER—FROZEN SURFACE—MUNICIPAL ACT, S. 460(3)—"GROSS NEGLIGENCE"—LIABILITY OF TOWN CORPORATION — DAMAGES—PROSPECTIVE PROFITS.

Bingham v. Trenton, 17 O.W.N. 277.

(§ IV A—136)—DUTY TOWARD CHILDREN—STREET RAILWAY.

A tramways company or a municipal corporation using public streets are held to a strict responsibility in regard to children using these streets and should take the greatest precautions not to expose them to danger.

Montreal v. Turgeon, 26 Que. K.B. 496.

(§ IV A—142)—STATUTORY DUTY OF MUNICIPALITY TO REPAIR—MOTOR VEHICLES—DEATH OF TRAVELER BY REASON OF NONREPAIR.

In an action against a municipality under the Fatal Accidents Act for damages sustained because of the death of the plaintiff's husband, owing to alleged want of repair of a highway, the main witness for the plaintiff, when recalled at the close of the case, was asked by the presiding judge a

number of questions, and a judgment in the plaintiff's favour was based to some extent upon the answers to them. Some of the questions were, it was contended, leading and suggestive:—Held, that, even if they were, the judge was within his rights in putting them to the witness for the purpose of clearing up any point his former testimony had left doubtful, and indeed as to any relevant matter as to which information not brought out by counsel was desired; though, in considering the weight to be given to the testimony, the form of the questions was an element to be taken into account. The statutory duty to keep highways in repair is a duty which is owed to persons using motor cars, as well as to those using vehicles drawn by horses or other animals. [Judgment of Lennox, J., affirmed.]

Connor v. Brant, 31 O.L.R. 275.

SUITABILITY FOR AUTOMOBILE TRAFFIC—ACCIDENT.

The laws of the Province of Quebec do not impose upon municipal corporations the duty of constructing highways in a manner other than to provide for the uses thereof which were customary at the time of the passing of those laws. If municipal highways have been constructed and maintained in conformity with these laws, the corporation cannot be held to have been at fault on account of having failed to construct them in a manner suitable to the use of automobiles, and of having failed to provide for the dangers inherent to this new mode of locomotion. A municipal corporation is not liable in damages for injury caused in an automobile accident occasioned on one of its highways, theretofore in perfect condition, by reason of the fact that there was a turn at right angles in the road on the top of a hill.

Deguise v. Notre-Dame des Laurentides, 50 Que. S.C. 31.

Municipal corporations are not responsible for the natural dangers resulting from the fact that their streets run alongside precipices or adjoin them. They are not obliged to protect such streets with walls which are solid and capable of withstanding the shock from an automobile driven or carried outside of its highway, nor to provide more than the erection of barriers or ordinary palisades for the protection of persons traveling in dangerous places.

Fafard v. Quebec, 50 Que. S.C. 226. [Affirmed in 26 Que. K.B. 139.]

(§ IV A—145)—OBSTRUCTION IN STREET—LONG CONTINUANCE OF AS GROUND OF EXEMPTION FROM LIABILITY.

Long continuance of an obstruction in a street will not relieve a municipal corporation from liability for an injury sustained by a person falling over such obstruction. Knowledge on the part of a person injured by falling over an obstruction in a street of the existence thereof is not a defence per se to an action against a municipal corporation for the injuries sustained.

Roach v. Port Colborne, 13 D.L.R. 646, 29 O.L.R. 69.

REMOVAL OF SNOW AND ICE — NUISANCE — DAMAGES.

Where a statutory power has been conferred on a street railway company for the removal of snow from its tracks "so as to afford a safe and unobstructed passageway for carriages and vehicles" the company is liable in damages, if in the exercise of such power it renders the highway unsafe for traffic, thereby causing injury to a pedestrian.

Elliott v. Winnipeg Electric R. Co., 42 D.L.R. 106, 23 Can. Ry. Cas. 194, 56 Can. S.C.R. 560, [1918] 2 W.W.R. 820, reversing 38 D.L.R. 201, 28 Man. L.R. 363.

NUISANCE—SNOW AND ICE—REMOVAL.

The efficient removal of snow and ice from a highway, in accordance with statutory powers given, by a municipality, does not create a nuisance for which damages can be recovered. [Elliott v. Winnipeg Electric R. Co., 38 D.L.R. 201 (reversed in 42 D.L.R. 106, 56 Can. S.C.R. 560), followed.]

Clark v. Winnipeg and Winnipeg Electric R. Co., 40 D.L.R. 533, 28 Man. L.R. 609, [1918] 2 W.W.R. 457.

TELEPHONE WIRES — OBSTRUCTION — NUISANCE—DAMAGES.

Rural telephone wires so placed that a person driving on to the highway with a load of hay has to stoop when passing under them, constitute an obstruction in the highway and amount to a nuisance; where the position of the wires is the proximate cause of an accident the owner or trustee of the system is liable for damages under the Fatal Accidents Act; the fact that the line was erected and continued under statutory authority is no bar to the action.

Magill v. Moore, 41 D.L.R. 78, 41 O.L.R. 375, reversed in 44 D.L.R. 489, 43 O.L.R. 372.

NUISANCE—TELEPHONE POLES—REMOVAL—LICENSE—RIGHT OF SECOND COMPANY.

A private corporation should be careful in interfering with the property of others upon a highway to which it has obtained a limited right of user; where it seeks to justify the removal of such property on the ground that it was a nuisance, it must shew that it could not have constructed its works without so interfering therewith. [Bagshaw v. Buxton Local Board, 1 Ch. D. 220; Reynolds v. Presteign Urban District Council, 65 L.J.Q.B. 400, applied.] A telephone company which acquires from another company the latter's poles and wires, which have been on a highway for years without objection from the municipal council, is entitled to assume that such equipment is on the highway with the council's approval. Where a licensee of a highway, e.g., a telephone company, has placed its equipment thereon, a second

licensee of the same highway is not entitled to interfere with it or do any act to the injury thereof. [Bell Telephone Co. v. Belleville Electric Light Co., 12 O.R. 571, followed.]

Okanagan Tel. Co. v. Summerland Telephone Co., 25 B.C.R. 221, [1918] 1 W.W.R. 656.

REMOVAL—DAMAGES—CONCLUSIONS THAT A ROAD BE DECLARED PUBLIC—PARTIAL NONSUIT—C.C.P., ARTS. 49, 1130.

There is no ground for removing from the Circuit Court to the Superior Court an action to recover damages amounting to $10 based on the fact that the defendant obstructed a public highway, as long as the action does not put in question real rights or others susceptible to justify removal.

Beaudoin v. Durocher, 55 Que. S.C. 220.

(§ IV A—146)—OBSTRUCTION — CONCURRING CAUSES—NEGLIGENCE.

The rule in regard to negligence where a person is injured by coming in contact with an obstruction on a highway is that two things must concur to support the action, an obstruction in the road by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff.

Freedman v. Winnipeg, 43 D.L.R. 126, 29 Man. L.R. 134, [1918] 3 W.W.R. 479.

OBSTRUCTIONS—DEATH—LIABILITY — FORCE MAJEURE.

A municipality is responsible in damages for the death of a person caused by the bad state of a road under its care, that is (a) where the road had neither ditch nor culvert to carry off the surface water; (b) where the gully on the side of the road was not protected; (c) where sticks of timber were left alongside the road, projecting a few inches above its level; (d) where a considerable slope existed towards these sticks and gully without any guard rails to protect the traveling public. A municipality, sued in damages for the bad state of the road under its care, cannot plead cas fortuit or force majeure and climatic condition brought about by a great thaw which took place in the vicinity of the road and covered it with ice, when there has been ample time between the thaw and accident to remedy the condition of the road.

Denault v. Mansfield and Pontefract, 54 Que. S.C. 499.

(§ IV A—147)—DUTY OF REPAIR—TRAVEL SAFETY—UNGUARDED DITCH.

The statutory duty imposed upon a municipality by s. 460 of the Municipal Act, R.S.O. 1914, c. 192, to keep roads in good repair, requires it to make them reasonably safe for the purposes of travel, and so safe from any additional danger incident to the lawful use of the highways by motor vehicles. A municipality is liable for injuries sustained by a vehicular traveler, in consequence of her horse becoming frightened by an approaching motor vehicle and throwing her into a deep ditch beside the road, which was unguarded by any railing.

Davis v. Usborne, 28 D.L.R. 397, 36 O.L.R. 148.

OBJECT BY ROADSIDE FRIGHTENING HORSE—MUNICIPAL LIABILITY.

To permit a milkstand to be constructed upon the highway for the loading of milk cans close to the traveled portion of the road, does not of itself constitute a breach of a municipality's statutory duty to keep the road in repair, so as to make it liable for injuries sustained by a horse taking fright at the milkstand without coming into actual contact with it. [Maxwell v. Clarke, 4 A.R. 460; and O'Neil v. Windham, 24 A.R. 341, followed; Rice v. Whitby, 25 A.R. 191, distinguished.]

Colquhoun v. Fullerton, 11 D.L.R. 469, 28 O.L.R. 102.

POLE IN STREET—GUY WIRE—INJURY TO HORSEMAN — LIABILITY — MUNICIPAL ORDINANCE—TIME FOR BRINGING ACTION.

An action against a town municipality in Alberta for injuries sustained by the plaintiff's horse coming in contact with a guy-wire attached to an electric light pole on a highway in the municipality must be brought under the Municipal Ordinance (Con. Ord. N.W.T. 1898, c. 70, s. 87), and is barred if not brought within six months after the damages have been sustained. [Rylands v. Fletcher, L.R. 3 H.L. 330, distinguished.

Town of Cardston v. Salt, 49 D.L.R. 229, [1919] 3 W.W.R. 646, reversing on another point, 46 D.L.R. 179.

POLE IN STREET.

The negligent failure of a township to remove a pole erected in the highway by stranger is a nonfeasance not a misfeasance. An action against a township for injuries received by a person colliding with a pole erected upon the highway by a telephone company who had no statutory or other right to do so falls within subs. 1 of s. 606, of the Municipal Act, R.S.O. 1897, c. 223, and must be brought within three months after the damage has been sustained as required by such section.

Howse v. Southwold, 5 D.L.R. 709, 27 O.L.R. 29, 22 O.W.R. 797.

OBJECT FRIGHTENING HORSES — INJURY TO VEHICULAR TRAVELER—NUISANCE—LIABILITY OF CITY CORPORATION—DAMAGES—COSTS.

Poulin v. Ottawa, 9 O.W.N. 454.

INJURY TO TRAVELER—HORSE SHYING AT OBJECT LEFT BY TOWNSHIP CORPORATION AT THE SIDE OF A ROAD BUT OFF THE ROAD—CAUSE OF ACCIDENT AND INJURY—WEIGHT OF EVIDENCE—NEGLIGENCE—NONREPAIR—ABSENCE OF NOTICE UNDER MUNICIPAL ACT, S. 460 (4).

Garner v. Gosfield North, 16 O.W.N. 209.

(§ IV A—150)—Defects in — Placing gravel on road during winter—Liability of municipality.

To unnecessarily place gravel on a highway in repairing the same during the winter months in violation of s. 558 Con. Municipal Act, 1903, R.S.O. 1914, c. 192, so as to leave the middle of the road impassable, without giving notice of the danger, or closing the road, or providing a safe way for traffic, renders a municipality liable for an injury sustained by the upsetting of a sleigh as the result of the condition in which the road was left. The obligation to keep its highways "in repair" while traffic is permitted thereon is incumbent upon a municipality (Municipal Act, 1913 (Ont.) s. 460, and R.S.O. 1914, c. 192, s. 460), although work was being done thereon by way of rebuilding the road under the Public Highways Improvement Act, 7 Edw. VII. (Ont.), c. 16.

Weston v. Middlesex, 19 D.L.R. 646, 31 O.L.R. 148, affirming 16 D.L.R. 625, 30 O.L.R. 21.

Nonrepair—Injury to traction engine—Notice.

It is a sufficient compliance with R.S.O. 1914, c. 192, s. 460 (4) (Municipal Act), for the person making the necessary repairs to damaged machinery, to send to the reeve of the municipality, at the request of the owner, a statement of the account for making the repairs, with a request that the municipality pay the account; no formal notice is necessary.

Pipher v. Whitchurch, 34 D.L.R. 702, 39 O.L.R. 244.

Damage from sand deposits—Nonrepair—Notice.

An action for damages to land by a deposit of sand caused by the damming of water which naturally flowed across a highway to and over the plaintiff's land is not for nonrepair, although the sand came from a cutting in the road not kept in repair, and consequently a failure to give the notice required by s. 460 of the Municipal Act, R.S.O. 1914, c. 192, is not a bar to the action. [Strang v. Arran, 12 D.L.R. 41, distinguished.]

Ormsby v. Mulmur, 31 D.L.R. 76, 36 O.L.R. 566.

Commissioner of roads—Liability—Winter road on the rivers—Breaking of the ice—C. mun. (old), art. 849—C.C. art. 1053.

Under the new municipal code the liability of municipal corporations, as to accidents which happen on winter roads which they make on the ice, is regulated by the common law. If they are to blame they are responsible for accidents occasioned by the breaking of the ice just as they would be for those caused by the bad state of the road.

Cloutier v. The Corp. of the Parish of St. Jacques-des-Piles, 55 Que. S.C. 12.

(§ IV A—151)—Unguarded culvert—Injury to traveler — Motor vehicles Act—Sufficiency of notice to municipality—Amount of damages.

Smiley v. Oakland, 31 D.L.R. 566.

Nonrepair — Statutory obligation of township — Municipal Act, s. 460 — Injury to motorists—Liability.

A municipal corporation is not liable for damages under s. 460 of the Municipal Act, R.S.O. 1914, c. 192, when the particular highway in question is kept in such a reasonable state of repair that those requiring to use it may do so, with ordinary care, in safety.

Southwold v. Walker; Southwold v. Gosnell, 50 D.L.R. 176, 46 O.L.R. 265.

Ditch along—Municipal Drainage Act—Municipal work—Injury to automobile—Liability.

Where a ditch or drain has been constructed under the authority of the Municipal Drainage Act (1914 R.S.O., c. 198), along a highway, the boundary between two townships, for the purpose of draining the lands of an adjoining township, it is not a municipal work undertaken by the two townships; such townships are not bound to erect a rail or guard along the course of such drain. If the road is a good clay road for the locality having regard to the means at the townships' disposal for keeping it in repair, they are not guilty of negligence in the maintenance of the road, although in wet weather the surface of the road is slippery and there is danger of automobiles skidding into the ditch.

Anderson v. Rochester and Mersea, 46 D.L.R. 350, 44 O.L.R. 301.

Lack of guard rails—Injuries to travelers—Contributory negligence.

Contributory negligence of the driver of a democrat wagon in which the plaintiff's goods, consisting of commercial traveler's samples, were being conveyed for hire along with the commercial traveler as a passenger, is not attributable to the plaintiffs in answer to their claim against the municipality for damages to the goods on the wagon being upset and the trunks broken due to the neglect of the municipality to protect a narrow part of the roadway by a guard rail, if the plaintiffs' traveler in no way participated in or was responsible for the driver's alleged acts of negligence.

Robinson v. Dereham, 23 D.L.R. 321.

Lack of railing or barrier—Nonrepair—Insufficiency of guard-rail at curve of road — Dangerous hill — Negligence of municipal corporation.

Miller v. Wentworth, 5 O.W.N. 317, 25 O.W.R. 270.

Highway—Nonrepair—Municipal Act, s. 460 (1)—Injury to persons—Automobile going over side of bridge—Guard-rail — Sufficiency — Finding that township corporation not

NEGLIGENT—NEGLIGENCE OF PLAINTIFF, OWNER AND DRIVER OF VEHICLE—EVIDENCE—ONUS—MOTOR VEHICLES ACT, S. 23.

Johnston v. Korah, 16 O.W.N. 365.

NEGLIGENCE—UNSAFE CONDITION OF HIGHWAY—ABSENCE OF RAILING—DAMAGES.

Kelly v. Carrick, 19 O.W.R. 796.

(§ IV A—152)—ABSENCE OF WARNING—BARRICADE.

The plaintiff, a physician, was injured, while driving along a county road, early in the morning, by reason of a barricade being left without a light, or without a sufficient light, upon the road at a place where it was under repair:—Held, that the defendants, the county corporation, were liable.

Bateman v. Middlesex, 24 O.L.R. 84, 19 O.W.R. 442.

(§ IV A—154)—DEFECTS—SNOW AND ICE—AVOIDANCE OF DANGEROUS WALK.

A woman who is injured by falling on a slippery sidewalk is not guilty of contributory negligence as a matter of law because she failed (a) to walk on the other side of the street which was less dangerous, or (b) to take the arm of her escort for support, where it appears that she was perfectly able to walk unassisted. The mere existence of ice or snow on sidewalks in a city will not make the municipality liable so long as there is no danger, but it is the duty of the municipality to provide against a dangerous condition which may result from such accumulation of ice or snow, and the liability of the city is established if after the lapse of a reasonable time the sidewalk is not put into safe condition for pedestrians. Under a city charter requiring the municipality to keep in repair every street and sidewalk in the city, in default of which it is made "civilly responsible for all damages sustained by any person by reason of such default," it is the duty of the municipality, apart from its common law liability, to keep its sidewalks in such condition as not to be dangerous to pedestrians by reason of accumulation of snow or ice.

Touhey v. Medicine Hat (No. 2), 10 D.L.R. 691, 5 A.L.R. 116, 23 W.L.R. 880, 4 W.W.R. 176, affirming 7 D.L.R. 759.

BRIDGES—SNOW AND ICE.

A municipal corporation, although required by the Municipal Act (R.S.O. 1914, c. 192, s. 460) to keep highways and bridges in a reasonably safe condition, is not liable for injuries sustained on account of snow and ice thereon, unless a reasonable opportunity for removing the same has been afforded.

Palmer v. Toronto, 32 D.L.R. 541, 38 O.L.R. 20. [Affirmed by Supreme Court of Canada: see 12 O.W.N. 367.]

FROZEN WATERS—BREAKS—ROADS OVER ICE.

Municipal corporations are not responsible for accidents caused by the breaking of the ice on roads laid out and maintained by them on rivers or other bodies of water. A municipal corporation is liable for accidents due to the bad state of the roads across frozen waters, but not for accidents caused by the breaking of the ice on the roads; those who venture upon them take the risk of the danger.

Bédard v. Beaulieu, 32 D.L.R. 250, 50 Que. S.C. 479.

SNOW AND ICE ON SIDEWALKS.

Municipal corporations are bound to maintain their roads, streets and sidewalks in a safe condition so as to allow pedestrians to walk thereon without danger, and a city municipality which allows in winter time a dangerous piece of glare ice to remain without ashes or sand upon it, or other protection or warning to pedestrians on a sloping street in a central locality, is liable in damages to a person who falls thereon and suffers injury.

LeBlanc v. Fraserville, 9 D.L.R. 299, 42 Que. S.C. 539.

FALLING ON ICE-COVERED SIDEWALK—"GROSS NEGLIGENCE" DEFINED — MUNICIPAL ACT, R.S.O. 1914, c. 192, s. 460, SUBS. 3.

Gauthier v. Caledonia, 19 D.L.R. 879, 7 O.W.N. 171.

SNOW AND ICE—REPAIRS.

In determining whether a highway is in repair at the time an accident occurs, it is necessary to take into account the nature of the country, the character of the roads, the care usually exercised by municipalities in reference to such roads, the season of the year and the nature of the accident.

Clark v. Winnipeg and Winnipeg Electric R. Co., 40 D.L.R. 533, 28 Man. L.R. 609, [1918] 2 W.W.R. 457.

NONREPAIR—PITCH HOLE IN SNOW.

Oakville v. Cranston, 39 D.L.R. 762, 55 Can. S.C.R. 630, affirming 10 O.W.N. 315, 10 O.W.N. 175.

NONREPAIR—INJURY TO PEDESTRIAN BY FALL UPON SIDEWALK—LIABILITY OF MUNICIPAL CORPORATION—DAMAGES.

Lawrence v. Orillia, 13 O.W.N. 453.

NONREPAIR—INJURY TO PERSON FALLING ON SIDEWALK COVERED WITH ICE—MUNICIPAL ACT, S. 460—"GROSS NEGLIGENCE"—EVIDENCE.

McAfee v. Deseronto, 15 O.W.N. 98.

ICY SIDEWALK—INJURIES TO PEDESTRIAN.

The gross negligence required by s. 450, subs. 3, of the Municipal Act, R.S.O. 1914, c. 192, is established in an action for injury to a pedestrian by falling on an icy sidewalk in a town where the ice on a sidewalk in front of a store on a busy street was lumpy and formed a slope and it was shewn that within a period of five days three other persons fell at the same place, notwithstanding which the town corporation did nothing to remedy the dangerous condition of same.

Edwards v. North Bay, 22 D.L.R. 744, 8 O.W.N. 119.

SNOW AND ICE—INJURY TO PEDESTRIAN—GROSS NEGLIGENCE—DAMAGES.

Yates v. Windsor, 3 D.L.R. 891, 3 O.W.N. 1513, 22 O.W.R. 608.

NONREPAIR—ACCUMULATION OF SNOW AND ICE—INJURY TO PEDESTRIAN BY FALL—EVIDENCE — FAILURE TO ESTABLISH "GROSS NEGLIGENCE"—MUNICIPAL ACT, R.S.O. 1914, c. 192, s. 460.

Ellis v. Toronto, 12 O.W.N. 128, 205.

NONREPAIR—SNOW AND ICE ON PUBLIC WALK IN CITY — DANGEROUS CONDITION — INJURY TO PEDESTRIAN — GROSS NEGLIGENCE—MUNICIPAL ACT, S. 460 (3)—EVIDENCE—FINDINGS OF TRIAL JUDGE—DAMAGES.

Seames v. Belleville, 12 O.W.N. 414.

NONREPAIR—ICE ON SIDEWALK—INJURY TO PEDESTRIAN—LIABILITY OF MUNICIPAL CORPORATION — "GROSS NEGLIGENCE" — MUNICIPAL ACT, S. 460 (3).

McMillan v. Toronto, 13 O.W.N. 357.

NONREPAIR—INJURY TO TRAVELLER AT NIGHT —BUGGY OVERTURNED BY RIDGES OF ICE AND SNOW — CLIMATIC CONDITIONS — FINDING OF FACT—CREDIBILITY OF WITNESSES.

McKinnon v. Wellington, 9 O.W.N. 486.

SIDEWALKS—ICE AND SNOW.

A city is not an insurer of the safety of the pedestrians on its sidewalks, but is only obliged to take such care to keep them in good order as a prudent man takes of his own property. It is not responsible for damages suffered by one who fell when the climatic conditions do not require that ashes and sand should be sprinkled on it, as in the spring when the snow is almost all melted down, leaving the sidewalk almost bare.

Fee v. Montreal, 52 Que. S.C. 336.

NONREPAIR—SNOW AND ICE ON SIDEWALK OPPOSITE CHURCH PROPERTY USED AS RINK—INJURY TO PEDESTRIAN—CLAIM AGAINST CITY CORPORATION — FAILURE TO GIVE NOTICE REQUIRED BY MUNICIPAL ACT—CLAIM AGAINST TRUSTEES OF CHURCH PROPERTY OCCUPIED BY SEPARATE ORGANISED BUT UNINCORPORATED BODY—OWNER AND OCCUPIER—LIABILITY—NUISANCE CREATED BY SERVANTS OF CITY CORPORATION.

Grills v. Ottawa, 8 O.W.N. 313.

(§ IV A—154a)—DEPRESSION OR HOLE IN PAVEMENT.

Where personal injury results from negligent protection of a drain in a municipal corporation highway, opened by a gas company, the municipality is not relieved from liability for the injury resulting from breach of a statutory obligation to maintain them in a safe condition, by setting up that the authority to open the streets was given to the gas or water company by the Legislature, since that authority was subject to the consent of the municipality, nor by setting up that the municipality did not consent to the making of the excavation.

Vancouver v. Cummings, 2 D.L.R. 253, 22 W.L.R. 164, 45 Can. S.C.R. 194, 2 W.W.R. 66, affirming, 19 W.L.R. 322.

LACK OF REPAIR—FILLING UP HOLE WITH MANURE—NOTICE.

Filling up a hole in a highway with manure in an attempt by a municipality to remedy its dangerous condition, is actionable negligence which will render the municipality liable for injuries to a traveler resulting therefrom, unless by a failure to comply with the notice requirements under s. 21 Rural Municipalities Act, c. 87, R.S.S. 1909, the right to such recovery is defeated.

Carleton v. Sherwood, 25 D.L.R. 66, 8 S.L.R. 431, 32 W.L.R. 936, 9 W.W.R. 611, reversing 32 W.L.R. 177, 8 W.W.R. 562.

CITY OF MONTREAL—RESPONSIBILITY—SIDEWALKS—ACCIDENTS—MAINTENANCE OF SIDEWALKS—ASHES—NEGLIGENCE—C.C. ART. 1053.

The city of Montreal although not obliged to insure pedestrians against all possible accidents on sidewalks, ought nevertheless to take ordinary means to maintain them in a proper and safe state of repair, and is responsible if it neglects to carefully fulfill this obligation or if it only fulfills it imperfectly and negligently. Thus the negligence of the city of Montreal is established if it is proved that the sidewalk, with respect to where there had been an accident, was in a slippery and dangerous condition; and an employee of the city cannot say he put ashes thereon where generally he covered 50 to 60 feet of the sidewalk with a single shovel-full of ashes. Jurisprudence has established a rule to constitute a municipal corporation in fault, in the case of pedestrians falling on sidewalks, and this rule is that the dangerous condition of the sidewalks must exist only long enough for the said corporation to learn of it.

Lefebvre v. Montreal, 25 Rev. Leg. 18.

(§ IV A—155)—DEFECT IN SIDEWALKS — BROKEN PRISMS IN LIGHT GRATINGS.

Under s. 393 of R.S.S. 1909, c. 84, which requires cities to keep sidewalks in repair, and declares them to be responsible for all damages sustained by any person by reason of a neglect of such duty, a city is liable for injuries sustained by a pedestrian by his heel catching in a hole in a light area or grating containing glass prisms, from which a number of prisms had been missing for several years, notwithstanding that the grating, which was flush with the surface of the sidewalk, was, without the consent of the city, placed therein by an adjoining property owner for his own convenience, at the time the city built the sidewalk.

Hutson v. Regina, 14 D.L.R. 372, 6 S.L.R. 126, 25 W.L.R. 628, 668, 5 W.W.R. 395.

Where a person is injured by a fall as the result of a defective sidewalk bordering on a road managed by road commissioners

in Quebec, no liability whatsoever attaches to such trustees, and if action be taken against them the plaintiff will be nonsuited, as the duties of the road commissioners extend to the roadbed only, and the municipal corporation has control of the sidewalks.

Raby v. Road Commissioners; Road Commissioners v. St. Paul and Montreal, 2 D.L.R. 541, 42 Que. S.C. 26.

DEFECTIVE SIDEWALK—FAILURE TO ENFORCE BY-LAW.

A municipal corporation having, by its charter, power to maintain its highway in a reasonable state of repair, which permits continued vehicular traffic over a sidewalk, although no proper crossing had been provided, and although regulations had been enacted prohibiting such traffic, is charged with notice of a condition of disrepair, and having failed to remedy the defect within a reasonable time is guilty of negligence and liable for injuries caused thereby.

Jamieson v. Edmonton, 36 D.L.R. 465, 54 Can. S.C.R. 443, [1917] 1 W.W.R. 1510, reversing 27 D.L.R. 168, 9 A.L.R. 253.

DEFECT IN SIDEWALK IN POLICE VILLAGE—LIABILITY OF TOWNSHIP FOR.

A township is liable, under s. 606 of the Municipal Act, R.S.O. 1897, c. 223, for injuries sustained on a defective sidewalk, notwithstanding it was within the limits of a police village; as the fact that by sec. 741, of said Act, as amended, power to build and repair sidewalks is conferred on the trustees of such village, does not effect the primary liability of the township for the condition of all sidewalks within the village limits.

Smith v. Bertie, 12 D.L.R. 623, 28 O.L.R. 339.

EXCAVATION IN SIDEWALK—INJURY TO PEDESTRIAN.

A municipality is answerable for the death of a pedestrian resulting from his falling into an excavation on the sidewalk, around which there was no enclosure or safeguard to warn against the danger, although the street itself was partly closed by a barrier indicating dangerous operations thereon.

Montreal v. Gamache, 25 D.L.R. 303, 24 Que. K.B. 312.

NONREPAIR—INJURY TO PEDESTRIAN BY FALL ON DEFECTIVE SIDEWALK — NEGLIGENCE —LACK OF SYSTEM—FAILURE TO GIVE NOTICE TO MUNICIPALITY IN DUE TIME—MUNICIPAL ACT, R.S.O. 1914, c. 192, s. 460 (4), (5)—REASONABLE EXCUSE—ABSENCE OF PREJUDICE.

Wallace v. Windsor, 9 O.W.N. 100.

INJURY CAUSED BY FALL OF TREE AT SIDEWALK.

A tree which is situated on a slope upon the edge of a public sidewalk and the branches of which are trimmed by the municipal corporation is under the control of the latter, which is liable for the damages caused by a fall of an unsound branch.

Coaticook v. Laroche, 24 Que. K.B. 339.

NUISANCE—REPAIR OF SIDEWALKS—STATUTORY DUTY — NEGLIGENCE — NONFEASANCE.

Vancouver v. McPhalen, 45 Can. S.C.R. 194.

NONREPAIR—INJURY TO TRAVELER—NOTICE OF ACCIDENT.

Young v. Bruce, 24 O.L.R. 546.

NONREPAIR—INJURY TO PEDESTRIAN—HOLE IN SIDEWALK.

Cummings v. Vancouver, 16 B.C.R. 494, 19 W.L.R. 322.

NONREPAIR—DEFECTIVE SIDEWALK—INJURY TO PEDESTRIAN — NUISANCE OF LONG STANDING AMOUNTING TO MISFEASANCE.

McPhalen v. Vancouver, 15 B.C.R. 367, 14 W.L.R. 424.

(§ IV A—156)—DEFECTIVE SIDEWALK—CORRUGATED SURFACE—LACK OF REPAIR—LIABILITY OF MUNICIPALITY FOR INJURIES.

Huth v. Windsor, 24 D.L.R. 875, 34 O.L.R. 245.

INJURIES FROM DEFECTS—DEFECTIVE CROSSING PLACE.

While a city municipality is not obliged to keep the whole street surface in a condition safe for foot passengers, yet, if it so deals with a portion of the street adjoining a public building as to invite the public to use that part of the street as a crossing place for foot passengers, the city is under an obligation to make it safe for that purpose, although the place so used is not a continuation of any sidewalk and was not paved in the manner usual for street crossings in that locality.

Wong Ling v. Montreal, 10 D.L.R. 558, 44 Que. S.C. 329.

It is actionable negligence for a municipal corporation, in rebuilding a sidewalk, to cover an opening therein with an old, defective grating, through which a person fell and was injured.

MacPherson v. Vancouver, 2 D.L.R. 283, 17 B.C.R. 264, 20 W.L.R. 926, 1 W.W.R. 1114.

NONREPAIR—FALL ON SIDEWALK—FINDINGS OF FACT — LIABILITY OF MUNICIPAL CORPORATION.

Deutschmann v. Hanover, 6 D.L.R. 860, 4 O.W.N. 134.

OBSTRUCTION IN ROADWAY—CITY PERMIT FOR ALTERATIONS—BRINGING IN PARTY RESPONSIBLE—MONTREAL CHARTER, S. 548.

Rosenthal v. Montreal, 20 D.L.R. 982.

NONREPAIR OF SIDEWALK.

In the absence of a statutory enactment, imposing such liability, no action will lie against a municipal corporation for injuries caused by mere nonfeasance, such as failure to keep a sidewalk in repair where there is no suggestion that the sidewalk was defectively or negligently constructed in the first instance. [Cowley v. New Market Local Board, [1892] A.C. 345, and Geldert v. Pictou, [1892] A.C. 524, followed.]

Cullen v. Glace Bay, 46 N.S.R. 215.

NONREPAIR—CAP OF PIPE PROJECTING ABOVE SIDEWALK — INJURY TO PEDESTRIAN — NEGLIGENCE — ABSENCE OF CONTRIBUTORY NEGLIGENCE—DAMAGES.

Trombley v. Peterborough, 11 O.W.N. 62.

Municipal corporations are obliged to maintain their streets and sidewalks in a safe state of repair, so as to allow their use without danger; default in so doing makes them liable for damages which result of such neglect.

Leblanc v. Fraserville, 42 Que. S.C. 539.

SIDEWALKS — OBLIGATION TO MAINTAIN THEM—ABSENCE OF BY-LAW—JURISDICTION OF THE CIRCUIT COURT—C. MUN. ARTS. 411, 453, 478, 803—S. REF., [1909] ART. 7538.

It is not necessary, in order that a sidewalk existing and undertaken de facto by the corporation be considered as a municipal sidewalk, when its construction has been ordered by a by-law of the council. A municipal corporation which neglects to reconstruct with care a sidewalk which it has maintained for several years, incurs the penalty of $20 laid down by the Municipal Code. Although the new Municipal Code does not expressly name the tribunal having jurisdiction to try penal actions, the Circuit Court is still a competent tribunal.

Breton v. The Village of Charlesbourg, 55 Que. S.C. 424.

ACTION AGAINST MUNICIPALITY — NONREPAIR OF SIDEWALK—SURFACE OF BOULEVARD BELOW CURB.

Brown v. Toronto, 2 O.W.N. 982, 19 O.W.R. 906.

OBSTRUCTION OR NONREPAIR—INJURY TO PEDESTRIAN — BOULEVARD FORMING PART OF CITY STREET.

Breen v. Toronto, 2 O.W.N. 690.

LACK OF REPAIR.

The owner of a house in a municipality whose by-laws oblige him to maintain the street and sidewalk opposite it in a specified manner is liable in damages for injury to a passer-by who breaks a limb owing to the defective condition of such street or sidewalk. When the by-law states what means shall be used to obviate danger to passers-by it is not sufficient to conform to its letter; it is necessary, in addition, to use the usual means for safety, e.g., if there is glare ice to cover it with salt, ashes or sawdust or other proper material.

Vidal v. John D. Ivey Co., 42 Que. S.C. 509.

NONREPAIR OF SIDEWALK AT CROSSING—INJURY TO PEDESTRIAN—KNOWLEDGE—INFERENCE FROM TIME OF CONTINUANCE.

Innes v. Havelock, 2 O.W.N. 205, 871, 18 O.W.R. 310, 508.

APPROACH TO WEIGH SCALE—OUT OF REPAIR —PERSON INJURED IN USING SAME—LIABILITY OF MUNICIPALITY—LIABILITY OF OWNER OF SCALES.

O'Neil v. London, 3 O.W.N. 345, 20 O.W.R. 573.

MANHOLE—DEFECTIVE STRUCTURE AND CONDITION—INJURY TO PERSON.

Skewis v. Kamloops, 19 W.L.R. 612.

(§ IV A—157)—IMPERFECT CONSTRUCTION OF SIDEWALK—MISFEASANCE.

To leave an unfinished gap in a cement sidewalk at the crossing of another sidewalk and to finish the grading at such gap with loose earth or ashes on a hillside where it would soon wash away and leave a dangerous hole is misfeasance for which the municipality is liable to a person injured by falling into the hole so made.

Tobin v. Halifax, 16 D.L.R. 367, 47 N.S.R. 498.

HOLE IN—NONREPAIR—INJURY TO PEDESTRIAN.

Armstrong v. Barrie, 6 D.L.R. 851, 4 O.W.N. 64, 23 O.W.R. 243.

(§ IV A—158)—DEFECTS IN SIDEWALK—DEVIATION FROM LEVEL — PROJECTING WATER PIPE.

For the municipality to maintain a water pipe projecting above the level of a cement sidewalk so as to be the cause of a pedestrian tripping over it, is a want of repair rendering the corporation liable for the injuries sustained where the pipe could easily and inexpensively have been lowered to the level when the walk was so constructed as to include the pipe as a part thereof, but rising two inches above the level of the walk. [Redford v. Woburn, 176 Mass. 520; O'Brien v. Woburn, 184 Mass. 598, followed; Ray v. Petrolia, 24 U.C.C.P. 73; Ewing v. Toronto, 29 O.R. 197; Ewing v. Hewitt, 27 A.R. (Ont.) 296, distinguished.]

Roach v. Port Colborne, 13 D.L.R. 646, 29 O.L.R. 69.

NONREPAIR—INJURY TO PEDESTRIAN BY FALL ON ICY SIDEWALK—NEGLIGENCE OF MUNICIPAL CORPORATION—DANGEROUS CONDITION DUE TO EXCESSIVE SLOPE AND BROKEN CONCRETING AS WELL AS ICE—"GROSS NEGLIGENCE"—MUNICIPAL ACT, S. 460 (3), (4)—CAUSE OF INJURY—ABSENCE OF CONTRIBUTORY NEGLIGENCE—NOTICE OF INJURY—DAMAGES.

Hutchison v. Toronto, 16 O.W.N. 372.

B. LIABILITY OF OTHERS.

Unlawful user, dog kennel on, see Animals, I C—30.

(IV B—160)—POLES—COLLISION—LIABILITY OF COMPANY.

Authority by statute to erect poles along the side of a highway, and municipal supervision of such erection, will not excuse a company from liability for injury by collision therewith, if they unreasonably interfere with the free use of the highways by the public.

McIsaac v. Maritime Telegraph & Telephone Co., 33 D.L.R. 31, 50 N.S.R. 331.

NEGLIGENCE—OBSTRUCTION IN HIGHWAY—INJURY TO CONDUCTOR OF STREET CAR—MUNICIPAL CORPORATION—CONTRACTORS—ABSENCE OF AUTHORITY—LIABILITY OF CONTRACTORS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—FINDINGS OF TRIAL JUDGE—APPEAL.

Tessier v. Ottawa, 40 D.L.R. 12, 41 O.L.R. 205, 13 O.W.N. 234.

EXCAVATION—INJURY TO PASSER-BY—NEGLIGENCE OF GAS COMPANY—FINDING OF JURY—POSSIBLE REMEDY AGAINST MUNICIPAL CORPORATION LOST BY FAILURE TO GIVE NOTICE UNDER MUNICIPAL ACT—JOINT TORT-FEASORS—EFFECT OF RELEASE OF ONE—RIGHT OF CONTRIBUTION—MISFEASANCE—NONFEASANCE.

King v. Consumers Gas Co., 8 O.W.N. 494.

EXCAVATION OF EARTH—INJURY TO ADJOINING LAND—DEPRIVATION OF ACCESS.

Taylor v. Gage, 4 O.W.N. 947, 24 O.W.R. 263.

WIRES—DRAINS.

One who places drains, wires, etc., in the streets of a town where there is continual traffic assumes thereby the risks appertaining to this dangerous vicinity.

Meilleur v. Montreal Light, Heat & Power Co., 52 Que. S.C. 366.

(§ IV B—161)—OBSTRUCTIONS—MINING OPERATIONS—POWER OF COMMISSIONER OF YUKON.

The powers conferred upon the Commissioner of the Yukon in Council by the Yukon Territory Act of laying out, building or closing up any public road or highway within the Territory, do not extend so as to enable the Commissioner-in-Council to permit a mining company to dredge up and destroy, during its operations, any such public road or highway, by legislative enactment or otherwise, and the mining company is liable in damages to an owner of land adjoining the highway for injuries caused to his land by such wrongful dredging up and destroying of the highway, and for trespass upon his land occasioned thereby.

Moreau v. Can. Klondyke Mining Co., 31 D.L.R. 411.

SAND HEAP LEFT IN FRONT OF HOUSE IN COURSE OF ERECTION—INJURY TO VEHICLE RUNNING INTO IT—OBSTRUCTION—NUISANCE—LIABILITY OF SUBCONTRACTORS FOR BUILDING—CONTRIBUTORY NEGLIGENCE—EVIDENCE—ONUS—FINDING OF TRIAL JUDGE—APPEAL—COSTS.

Robinson v. Campbell, 8 O.W.N. 537, 9 O.W.N. 184.

OBSTRUCTING ACCESS AND EGRESS TO PUBLIC ROADS—LIABILITY OF MUNICIPAL CONTRACTORS.

When a municipality causes public works to be done on its streets and agrees with the contractors, among other things, that the latter will not close the streets nor obstruct them further than necessary and will make sure and sufficient passages through the lanes, roads, houses and properties bordering on the works, a ratepayer who has a place of business upon one of such streets and who has suffered damages by the fact that the contractors have completely closed all access to his business, when they could at some expense obtain for the plaintiff a passage over the neighbouring properties, has a recourse for damages against the contractors.

Brunet v. Beauchamp, 47 Que. S.C. 409.

(§ IV B—164)—LIABILITY OF TENANT—ICY TRAP DOOR.

No climatic condition can absolve the party responsible for the maintenance of a sidewalk or highway from damages for accidents sustained on it, if there was fault or carelessness in the removal of the danger. A tenant of a store, who maintains a detective iron trap door in the sidewalk in front of his property, is responsible for damages suffered by a person falling on account of its slippery condition.

Feiczewicz v. Valiquette, 49 Que. S.C. 481.

(§ IV B—176)—DEFECTS IN SIDEWALKS.

If subs. 20 of art. 5641 of the Cities and Towns Act, R.S.Q. 1909, providing that every owner of land situated on any street, public way, etc., established in a municipality (which owner of land is obliged by the municipal council under the authority of subs. 3 of said art. 5641 to make and maintain a sidewalk in front of his property) shall be responsible towards the municipality for the damages resulting from his neglect and may be called in warranty by the municipality in all cases brought against it for damages, renders such owner not only liable in warranty to the municipality but also to the public, he can be so only jointly and severally with the corporation, and therefore no action for injury to a person resulting from a defective sidewalk can be maintained against the abutting owner alone.

Batsford v. Laurentian Paper Co., 5 D.L.R. 306, 41 Que. S.C. 367, 18 Rev. de Jur. 70.

An adjoining property owner is exempt, under subss. 149-154 of Vancouver Incorporation Act (1900), c. 54, from liability over on a judgment against a municipal corporation for personal injuries sustained by a defect in a sidewalk due to the negligence of the agents or servants thereof. A property owner does not "leave" or "maintain" an excavation under an adjoining sidewalk, within the meaning of subs. 149-154 of Vancouver Incorporation Act (1900), c. 54, so as to render him liable over on a judgment against a municipal corporation for injuries sustained by falling through an old, defective grating, placed in the sidewalk by the servants or agents of the city over an opening therein, notwithstanding such excava-

tion was for the use and convenience of the adjoining owner.

MacPherson v. Vancouver, 2 D.L.R. 283, 17 B.C.R. 264, 20 W.L.R. 926, 1 W.W.R. 1114.

(§ IV B—179)—DEFECTS—LIABILITY OF ABUTTING OWNER—GRATING IN SIDEWALK.

Relief over against the adjoining owner will be granted a city municipality in respect of damages recovered against it for injury caused a pedestrian through a defective prism light grating in the city sidewalk maintained in connection wth the basement of the owner's building, although the defect had existed prior to his acquiring the property, particularly if a municipal by-law required the owner from time to time to keep it in repair.

Hutson v. Regina, 14 D.L.R. 372, 6 S.L.R. 126, 25 W.L.R. 628, 668, 5 W.W.R. 395.

(§ IV B—182)—ACTS OF INDEPENDENT CONTRACTOR.

One who, as an independent contractor and for his own profit, agrees with a municipal corporation to do work upon a highway within the municipality, is liable in damages to persons who, without fault on their part, are injured by reason of any obstruction to the highway caused by him.

Hawkins v. McGuigan, 3 D.L.R. 307, 3 O.W.N. 564.

(§ IV B—191)—CONTRACTOR WITH MUNICIPALITY.

A municipal corporation which is having work done under contract is not liable for the acts of the contractor, but is guilty of negligence, and liable for injury caused thereby, if it leaves open for traffic a street on which the contractor has done work which produces a condition of danger, such as an excavation.

Scott v. Quebec, 44 Que. S.C. 184.

(§ IV B—195)—OBSTRUCTION BY RAILWAY —ABUTTING OWNERS—FORM OF REMEDY.

A railway company with which a municipal corporation agrees to close a certain street, and which is authorized by the Railway Board to construct a level crossing thereon, is liable in damages to the owners of lots on said street, if, before the street is closed by the city, the company obstructs the street by constructing a railway across it; such damages may be recovered in an action, although a claim for compensation is pending under the Railway Act, 1906, for trespass on land of the plaintiff actually taken for the purposes of the railway, or for portions of lots of which parts have been so taken.

Holmested v. Moose Jaw and C.N.R. Co., 29 D.L.R. 761, 9 S.L.R. 327, 22 Can. Cr. Cas. 169, 34 W.L.R. 1135, 10 W.W.R. 1265.

CHANGES OF GRADE—INJURY TO ABUTTING LAND—REMEDY—COMPENSATION UNDER MUNICIPAL ACT, S. 325—COUNTY AND TOWNSHIP CORPORATION PERMITTING STREET RAILWAY COMPANY TO OBSTRUCT ACCESS TO HIGHWAY—60 VICT. c. 92, SS. 2, 7 (9)—LAYING RAILS IN CONFORMITY WITH GRADE OF HIGHWAY—SLIGHT CHANGES IN ELEVATION OF RAILS—ABSENCE OF APPRECIABLE DAMAGE.

Watson v. Toronto & York Radial R. Co. 10 O.W.N. 362.

RAILWAY TUNNEL—ABUTTING OWNER.

A railway company under an agreement with a municipal corporation having, with the authority of the Railway Board, obtained the consent of the city, and built a tunnel under a street, is liable as well as the city for damages suffered by an abutting owner.

Daoust v. Montreal, 51 Que. S.C. 241.

(§ IV B—203)—OBSTRUCTION BY STREET RAILWAY—SNOW REMOVED FROM TRACKS —DUTY TO LEVEL.

The failure of an electric railway company on removing snow and ice from its tracks into a highway, to level it to a uniform depth as required by R.S.N.S. 1900, c. 71, s. 194, is negligence rendering it liable for injuries sustained as a result of such neglect.

Wright v. Pictou County Electric Co., 11 D.L.R. 443, 15 Can. Ry. Cas. 394, 47 N.S.R. 166, 13 E.L.R. 47.

(§ IV B—204)—STREET RAILWAYS—LIABILITY FOR PROTRUDING RAILS.

Where a city by-law declared that a street railway company should be responsible for all damages occasioned by the construction, maintenance and operation of its railway, it is answerable for injuries sustained by the plaintiff who was thrown from a vehicle by the striking of a wheel against a rail that was four inches above the surface of the street, notwithstanding the rail had originally been laid flush with the street and its elevation was due to acts of the city in repairing the street. [Alldred v. West Metropolitan Tramway Co., L.R., [1891] 2 Q.B. 398; and Howit v. Nottingham Tramway Co., 12 Q.B.D. 16, distinguished.]

Montreal Street R. Co. v. Bastien, 12 D.L.R. 342, 23 Que. K.B. 7.

C. CONTRIBUTORY NEGLIGENCE.

(§ IV C—210)—DEFECTS IN—LIABILITY OF MUNICIPALITY—INJURY TO TRAVELER—CONTRIBUTORY NEGLIGENCE.

It is not contributory negligence where a person injured by the upsetting of a sleigh by reason of the gravelling of a highway during the winter months in violation of s. 558 of the Ontario Consolidated Municipal Act of 1903, R.S.O. 1914, c. 192, continued on the same side of the road after knowledge of its condition, and did not attempt to break a new track in the snow on the opposite side, where to have done so would have been extremely dangerous where such person did not get off and walk until unsafe places were passed, it does not amount to contributory negligence, if his conduct, under the circumstances, was that of a reasonably prudent man. To

drive a properly loaded sleigh on a much-traveled highway, the middle of which had been rendered impassable by gravel placed thereon during the winter months, is not contributory negligence, sufficient to prevent a recovery for an injury sustained by the upsetting of the sleigh where the municipality neither gave warning as to the condition of the road, nor provided a safe way for traffic.

Weston v. Middlesex, 16 D.L.R. 325, 30 O.L.R. 21.

SIDEWALKS—FAILURE TO LOOK.

Mere failure to keep one's eyes rivetted upon the sidewalk while walking thereupon is not proof of such contributory negligence as would preclude recovery from a municipality for damages resulting from the defective condition of the sidewalk.

Robertson v. Montreal, 30 D.L.R. 312, 50 Que. S.C. 208.

DRIVING UNBROKEN HORSES—VIOLATION OF BY-LAW.

The driving of an unbroken team of horses, in contravention of a by-law prohibiting the act, precludes recovery for injuries sustained by reason of a defect in the highway.

Jones v. Swift Current, 23 D.L.R. 11, 8 S.L.R. 310, 31 W.L.R. 899, 8 W.W.R. 1100.

(§ IV C—211)—MAINTENANCE OF, BY MUNICIPALITY—DEGREE OF CARE REQUIRED—LOCAL CONDITION — CONTRIBUTORY NEGLIGENCE—KNOWLEDGE OF DANGER.

Williams v. North Battleford, 4 S.L.R. 75.

(§ IV C—222)—ALTERNATIVE HIGHWAY.

Where an obstruction has been placed upon a highway, failure on the part of one using the highway to avail himself of an alternative road provided by the person responsible for the obstruction does not of itself disentitle him to recover damages for injuries sustained by reason of the obstruction, but the question of contributory negligence may still be left to the jury.

Hawkins v. McGuigan, 3 D.L.R. 307, 3 O. W.N. 564.

D. NOTICE, OF DEFECTS; OF INJURIES.

See also Municipal Corporations, II G —260.

(§ IV D—225)—Failure to give the notice of intention to bring an action for damages required by special statutes, for instance, notice required for the protection of municipal corporations, should be invoked by a preliminary plea. Filing a defence to the action is aw aiver of want of notice.

Scott v. Quebec, 44 Que. S.C. 184.

(§ IV D—230)—OBSTRUCTION—NOTICE OF —LIABILITY OF MUNICIPALITY.

Notice of the existence of a milkstand close to the traveled portion of a highway is not sufficient to render a municipality answerable for damages sustained by a horse taking fright at it without actual contact therewith, where it appeared that the stand had been erected but two or three weeks before the injury without the knowledge of the municipal council or of the municipal officers other than the pathmaster, and it did not appear either that it was his duty to guard or remove the stand or to notify the municipal council of its existence.

Colquhoun v. Fullerton, 11 D.L.R. 469, 28 O.L.R. 102.

NOTICE OF DEFECTS.

King v. Limerick, 25 O.W.R. 87.

(§ IV D—231)—NECESSITY OF.

Lack of notice of the existence of a defect in a sidewalk will not avail a municipal corporation as a defence to an action for injuries thereby sustained, where the defect was caused by a contractor employed by the year by the city to build, under the direction of the city officials, all sidewalks required.

MacPherson v. Vancouver, 2 D.L.R. 283, 17 B.C.R. 264, 20 W.L.R. 926, 1 W.W.R. 1114.

(§ IV D—232)—IMPLIED.

Where a hole has been opened in a municipal street, a court may infer that it would attract the attention or notice of municipal officials entrusted with the oversight or guarding of the street, and further, that the failure of such an official to report the existence of the hole, was in itself a breach of duty by said official for which the municipal corporation is liable. [McClelland v. Manchester, [1912] 1 K.B. 118, followed.]

Vancouver v. Cummings, 2 D.L.R. 253, 22 W.L.R. 164, 46 Can. S.C.R. 457, 2 W.W.R. 66.

DEFECTS—IMPLIED NOTICE OF—NEGLIGENCE OF MUNICIPALITY—WORK DONE BY PRIVATE PARTIES.

Where it must be inferred from the nature of the work on a city sidewalk and the length of time it was carried on before the accident to a pedestrian that the city officials having supervision of streets must have been aware of the work, the fact that it was not done under their authority but by private parties interested in adjacent lands without a permit which the terms of the city charter required, will not absolve the city from responsibility for the unsafe condition of the sidewalk. [Vancouver v. Cummings, 46 Can. S.C.R. 487, 2 D.L.R. 253, applied.]

Tweeddale v. Calgary, 20 D.L.R. 277.

(§ IV D—235)—NOTICE OF INJURY—PERSONAL INJURY FROM REPAIR OPERATIONS.

An action brought against a municipality for personal injuries from negligence in the operations under way for making repairs to its streets, but not due to any defect in the condition of the street itself, is not within the Ontario Municipal Act, 3 Edw. VII. c. 19, s. 606, so as to require a preliminary notice of injury.

Waller v. Sarnia, 9 D.L.R. 834, 4 O.W.N. 890, 24 O.W.R. 204.

OF INJURIES.

The failure to give notice to the clerk of a municipality within sixty days of an injury sustained on a defective sidewalk, without an explanation sufficient to justify the court to permit the maintenance of the action after the expiration of such period, or the failure to begin action for injury against the municipality within six months of the date of the accident as required by art. 5864 of the Cities and Towns Act, R.S.Q. 1909, will bar an action not only against the municipality but also against the property owner who is answerable to the municipality under s. 20 of art. 5641 of said Act for failure to maintain such sidewalk in a safe condition as required by a municipal by-law, whether the liability created by such subs. 20 rendered the property holder liable to the public as well as to the municipality or only gave a right to the municipality to call him in as warrantor.

Batsford v. Laurentian Paper Co., 5 D.L.R. 306, 41 Que. S.C. 367, 18 Rev. de Jur. 70.

NONREPAIR—INJURY TO TRAVELER—NOTICE OF INJURY—MUNICIPAL ACT, R.S.O. 1914, c. 192, s. 460(4)—TIME FOR SERVICE—EXPIRY ON SUNDAY—SERVICE ON NEXT DAY—INTERPRETATION ACT, s. 28 (H).

Ellis v. Toronto, 10 O.W.N. 146.

(§ IV D—236)—DEFECTS—INJURY TO TRAVELER—LIABILITY OF MUNICIPALITY—NOTICE OF INJURY—SUFFICIENCY.

In the absence of a reasonable excuse for the plaintiff's failure to give a municipality notice of injuries sustained on a defective highway, in the manner required by s. 606 (3) Consolidated Municipal Act, 1903, R.S.O. 1914, c. 192, the want of notice, although not prejudicial to the municipality, is a full defence to an action for damages.

Egan v. Saltfleet, 13 D.L.R. 884, 29 O.L.R. 116.

SUFFICIENCY OF NOTICE.

If in the notice required to be given to the city of Montreal in an action in damages for a defective sidewalk, there is a slight variance with the real place where the accident occurred, there is no prejudice to the defendant, especially when the latter had the fullest opportunity to make its defence and to call in its warrantor.

West v. Montreal and Rector of St. Martin's Church, 14 Que. P. R. 238.

V. Discontinuance; alteration; abandonment.

A. DISCONTINUANCE.

Closing, loss of access, compensation, see Damages, III. L—275.

Obstruction by railway, compensation, see Expropriation, III. E—180.

(V A—240)—LANES—CLOSING BY CITY—LEASING FOR PRIVATE USE.

Under the Vancouver Incorporation Act, 1900, ss. 125 (52) and 215, the city of Vancouver may pass a by-law diverting a public lane, and may without a vote of the ratepayers lease the portion thereof closed by such diversion for building purposes for the period of twenty-five years limited by s. 8 of the amending act of 1907; the decision of the City Council that such closing and diversion is in the interest of the general public must prevail notwithstanding the lease of the closed portion to adjoining owners at a nominal rental, where the evidence does not support a charge of mala fides against the City Council.

United Buildings Corp. v. Vancouver, 19 D.L.R. 97, [1915] A.C. 345, 6 W.W.R. 1335, affirming 13 D.L.R. 593, 18 B.C.R. 274.

(§ V A—245)—CLOSING—POWER OF RAILWAY COMMISSION.

The jurisdiction of the Railway Board as to the closing of a highway is limited to the extinguishment of the public right to cross the railway; and this power is ordinarily exercised by first granting permission to divert the highway and afterwards making the order to close the road allowance within the limits of the company's right-of-way after the construction of the new grade crossing on the diverted highway.

Re Applications to close Highways, 12 D.L.R. 389, 49 C.L.J. 550, 15 Can. Ry. Cas. 305.

CLOSING — POWERS OF MUNICIPALITY — DEDICATION — RIGHTS OF ABUTTING OWNERS—EASEMENT.

Jones v. Tuckersmith, 23 D.L.R. 569, 33 O.L.R. 634, 8 O.W.N. 344. [Reversed by Supreme Court of Canada. 47 D.L.R. 684, 45 O.L.R. 67; see 13 O.W.N. 383.]

A municipal by-law to close a public highway, the passage of which is authorized by statute, is ultra vires, unless passed in compliance with the provisions of the statute, including such requirements as notice to the owners of lands abutting on the highway in question and public notice by advertisement. [Town Act, 2-3 Geo. V. (Alta.), c. 2, s. 163, subs. 17, construed.]

Re Bassano, 7 D.L.R. 601, 3 W.W.R. 189.

CLOSING—NOTICE.

The notice which must be published by a municipality of its proposed by-law to close part of a public street under the Municipal Act, R.S.O. 1914, c. 192, s. 475, must state a time when the by-law will be considered so that those interested may then attend and be heard. [Re Birdsall and Asphodel, 45 U.C.R. 149, followed.]

Re Rogers, 22 D.L.R. 590, 7 O.W.N. 717

REVERSION OF LAND UPON ABOLITION OF ROAD.

According to the principles of our municipal law, the land of an abolished road returns to the lot from which it has been

detached, and if the land of such road has not been taken from the adjoining lot, it belongs to the lots between which it is situate—half of it to each lot.

Cormier v. Vaillant, 24 Que. K.B. 161.

CLOSING AND SALE OF PART OF HIGHWAY IN CITY—MUNICIPAL ACT, R.S.O. 1914, c. 192, ss. 325 (1), 433, 472 (1) (c)—PIPES OF GAS COMPANY LAID UNDER SOIL OF HIGHWAY—STATUTORY AUTHORITY (29 VICT. c. 88, s. 2)—REMOVAL OF PIPES AND RELAYING IN SUBSTITUTED STREET—RIGHTS OF COMPANY AND CITY CORPORATION IN HIGHWAY—EXPENSE OF REMOVAL OF PIPES—COMPENSATION—RIGHT TO—AWARD SET ASIDE—AMOUNT OF AWARD.

A gas company, having power by 29 Vict. c. 88, s. 2, to lay down gas pipes in the highways of a city, and at all times, and from time to time, to open up and dig up the highways for the purpose of repairs and renewals, and laying down new plant and pipes, had laid down their pipes under the surface of a street in the city. The city, under s. 472(1) (c) of the Municipal Act, R.S.O. 1914, c. 192, and pursuant to a by-law passed by the council, stopped up and sold a part of the street and substituted for that part land which they had acquired for the purpose. The company then took up their pipes and relaid them on the new line:—Held, that they were not entitled to compensation from the city for the cost of taking up and relaying the pipes. The gas company took no permanent right in the land—their rights in the highway ended when the highway's existence ended. There was no right to compensation under s. 325 (1) of the Municipal Act, the company were deprived of nothing, and no injurious effect was caused to any of their property. [Metropolitan R. Co. v. Fowler, [1893] A.C. 416, and Toronto Corp. v. Consumers' Gas Co., [1916] 2 A.C. 618, distinguished.] The pipes, being laid by statutory authority, became partes soli: [Toronto Corp. v. Consumers' Gas Co., supra.] There were thus two freeholds—that of the company in their pipes, with all the incidents thereto either at the common law or by statute, and that of the city in the soil, etc., which was limited by the rights of the company. s. 433 of the Municipal Act. The city could not by any act affect the rights of the company—whatever rights the company had before the by-law it still had. But the company had no right to compensation, for their own purposes they took up the pipes from the old position and laid them down in the new street; they did not do this upon the compulsion or request of the city, which simply did not interfere with the company doing it.

Re Ottawa Gas Co. and Ottawa, 45 O.L.R. 617.

(§ V A—246)—CLOSING FOR BENEFIT OF PRIVATE PERSON—PUBLIC INTEREST—VALIDITY OF BY-LAW.

Though the operation of a by-law benefits one or more persons more than others, it does not follow that by enacting it, a municipal corporation must be taken to give "any bonus" within the B.C. Municipal Act, 1906, s. 194; nor can a by-law be said to be outside the powers conferred by the Vancouver Act, 1900, s. 125, merely because steps taken in the public interest are accompanied by benefit specifically accruing to private persons.

United Buildings Corp. v. Vancouver, 19 D.L.R. 97, 111 L.T. 663, [1915] A.C. 345, 6 W.W.R. 1335.

(§ V A—250) — DEDICATION BY PLAN — HOW LOST — RIGHT-OF-WAY — NONUSER —CONVERSION TO PUBLIC HIGHWAY—CLOSING — OBJECTIONS TO — OPPORTUNITY OF HEARING—POWERS OF MUNICIPAL COUNCIL—RIGHTS OF ABUTTING OWNERS—MEANS OF ACCESS—SALE OF CLOSED HIGHWAY—AUTHORITY OF COUNCIL—BY-LAW AUTHORIZING—VALIDITY.

Jones v. Tuckersmith, 47 D.L.R. 684, 45 O.L.R. 67, reversing 23 D.L.R. 569, 33 O.L.R. 634.

CLOSING BRIDGE — DAMAGES — ABUTTING OWNER.

A municipality having the power to close a bridge forming part of a highway is responsible for the immediate damage caused thereby to an abutting owner. The latter is entitled to be indemnified for the loss of access and the losses directly resulting therefrom in connection with the working of his farm.

Bedard v. Lochaber West, 29 D.L.R. 312, 49 Que. S.C. 459.

B. ALTERATION, DIVERSION OF STREET.

By railway, nuisance, see Expropriation, III E—186.

(§ V B—255)—ALTERATION BY MUNICIPAL CORPORATION—EXCHANGE OF LOTS—VALIDITY OF BY-LAW—ARTS. 16, 527, 794, 799, M.C. ART. 1081, C.C.

Daoust v. Chantal, 25 D.L.R. 852, 47 Que. S.C. 236.

An abutting owner cannot claim a right to possession of an original road allowance unless he can establish that he or his predecessors in title had laid out and opened a new public road in lieu of the original road allowance, without having received compensation therefor.

Mills v. Freel (No. 2), 5 D.L.R. 679, 4 O.W.N. 79, 23 O.W.R. 45, affirming Mills v. Freel, 2 D.L.R. 923, 3 O.W.N. 1240.

UNOPENED STREET—ALTERATION.

Where a dedication of land for a highway was duly accepted by a city, but the highway was not opened, the dedicators cannot proceed under s. 44 of the Surveys Act, 1 Geo. V. c. 42, s. 44, subs. 6, to secure the change of the plan, as filed in the registry office on which the highway was dedicated,

in order to close such highway and open another in its stead.

Re Toronto Plan M. 188, 11 D.L.R. 424, 28 O.L.R. 41.

Where it was impracticable, because of physical obstacles therein, to open a part of a road allowance between 2 townships, and, to take its place, another road running parallel thereto, but wholly within one township, was opened through private lands and dedicated by their owner to public use and his dedication was accepted by the council of the county in which the townships were located, and, in lieu thereof, the old unopened part of the boundary line allowance was conveyed to him by the council, and the public for more than 50 years used the new road to reach points which would have been reached over the original allowance if it had been opened, such road was, and is, a deviation of a town line road within the meaning of s. 622 of the Ontario Municipal Act, 1903, giving jurisdiction to adjoining townships over a road lying wholly or partly between them, "although the road may so deviate as in some places to be wholly or in part within either of them," notwithstanding the fact that the new road did not actually terminate in the old line, if by means of some other public road, the old original line might be conveniently reached and its main purpose—a way into a certain city—accomplished. [Fitzroy v. Carleton, 9 O.L.R. 686, distinguished.]

Wentworth v. West Flamborough, 3 D.L.R. 479, 26 O.L.R. 199, 21 O.W.R. 876.

MUNICIPAL POWERS AS TO NARROWING.

A municipality, empowered by the Municipal Act, R.S.B.C. 1911, c. 170, s. 52, subss. 176, 193, to alter, divert or stop up public thoroughfares, has power to close up a portion of a highway for the purpose of narrowing it.

West Vancouver v. Ramsay, 30 D.L.R. 602, 53 Can. S.C.R. 459, 10 W.W.R. 1184. [See also 22 D.L.R. 826, 21 B.C.R. 401.]

(§ V B—256)—PUBLIC SERVICE CORPORATION CROSSING—SUBSTITUTION.

Where in the exercise of a right conferred by statute upon a public service corporation, a public highway is interrupted by the work which the public service corporation is authorized to construct, there is an implied obligation that the public service corporation shall maintain an adequate substitute for the highway by a bridge or other means. [The King v. Alberta R. & Irrigation Co., 3 A.L.R. 70, affirmed on appeal; Alberta R. & Irrigation Co. v. The King, 44 Can. S.C.R. 505, reversed on appeal.]

R. v. Alberta Railway & Irrigation Co., 7 D.L.R. 513, [1912] A.C. 827.

(§ V B—257)—STREET WIDENING—BUILDING RESTRICTIONS — EXPROPRIATION — COMPENSATION.

Upon an arbitration to determine the compensation to which a land owner is entitled for the expropriation under a city by-law of a strip of his land for the widening of a contiguous street, the arbitrator may properly consider (a) the damage suffered by the owner in being precluded from erecting commercial buildings on the expropriated strip, (b) that, although the city had passed a prior by-law rendering the property residential and restricting the erection of any building within a fixed distance of the street, such by-law might later on be repealed and the property might thereupon become commercial.

Re Gibson and Toronto, 11 D.L.R. 529, 28 O.L.R. 20.

C. ABANDONMENT; CLOSING.

(§ V C—260)—ABANDONMENT.

Where an original road allowance was opened up and actually used by the public throughout its entire length, the fact that, for a short distance, it is only traveled occasionally does not amount to an abandonment; the road opened up by an abutting owner across his land not "in lieu" or "in place" of the original road allowance is in addition to and not in substitution thereof, and the abutting owner cannot claim the benefit of the provisions of 3 Edw. VII. (Ont.), c. 19, s. 642, by which an abutting owner who encloses an unopened road allowance with a lawful fence where he has provided a substituted road, is legally possessed thereof against any private person.

Mills v. Freel, 5 D.L.R. 679, 4 O.W.N. 79, 23 O.W.R. 45, affirming 2 D.L.R. 923, 3 O.W.N. 1240.

DEDICATION—ACCEPTANCE BY CITY—ABANDONMENT—FAILURE TO OPEN—TITLE OF DEDICATORS TO.

Upon the failure of a city to open and use as a public highway the land dedicated therefor on a plan filed in the land titles office, and duly accepted by the city as a highway, the title thereto is not revested in the dedicators, under s. 44 of the Ontario Land Surveyors Act, 1 Geo. V. c. 42, as amended by 2 Geo. V. c. 17, s. 32, subject to the land Titles Act, 10 Edw. VII. c. 60, s. 85, for the amendment or alteration of plans, notwithstanding that the city ignored such dedication and acceptance, and that the city council subsequently adopted by-laws looking towards the opening of such highway, but under which nothing was ever done.

Re Toronto Plan M. 188, 11 D.L.R. 424, 28 O.L.R. 41.

ABANDONMENT OF ROAD BY ROAD COMPANY.

A road company incorporated under the provisions of the General Road Companies Act, taking a conveyance of a road from a county corporation upon terms requiring the company to keep and maintain the road in repair is not debarred thereby from exercising its statutory right to abandon the whole or any part of the road, as contemplated by that statute.

Ottawa & Gloucester Road Co. v. Ottawa, 10 D.L.R. 218, 4 O.W.N. 1015, 24 O.W.R. 344. [Affirmed, 13 D.L.R. 944.]

Where in pursuance of a municipal by-law a portion of a public road was diverted to run a different course and the use to the former piece of road was granted to certain mill-owners, but on which public traffic continued, does not operate as an abandonment or as a change of the public character thereof so as to entitle one through whose land it traversed to fence it in or to erect any barriers thereon.

Nolin v. Gosselin, 18 Rev. de Jur. 306.

MUNICIPAL CORPORATION—CLOSING STREETS —"PASSAGE OF BY-LAW"—COMING INTO FORCE OF BY-LAW—TIME FOR APPEALING.

Winnipeg v. Brock, 45 Can. S.C.R. 271.

(V C—263)—CLOSING OF STREET—WORK DONE BY RAILWAY COMPANY—POWERS OF DOMINION RAILWAY BOARD—INJURY TO NEIGHBOURING LANDOWNERS—DAMAGES.

Seguin v. Hawkesbury, 11 D.L.R. 843, 4 O.W.N. 1409, 24 O.W.R. 695.

STREET—ACCEPTANCE AND IMPROVEMENT BY CITY—DISCONTINUANCE OR CLOSING.

A street that has been conveyed to and taken over as such by a city and in which a sewer has been constructed can be closed only by appropriate action on the part of the municipality, and not by an application by landowners to amend the registered plan under the Ontario Registry Act, 10 Edw. VII. c. 60, s. 85, or the Land Titles Act (Ont.), 1 Geo. V. c. 28, s. 110, by closing the street as laid out on the plan.

Re Toronto Plan M. 188, 11 D.L.R. 424, 28 O.L.R. 41.

MUNICIPAL CORPORATION — CLOSING OF STREET — INJURY TO NEIGHBOURING LANDS — COMPENSATION — AWARD — AMOUNT OF—APPEAL—VALUE OF PROPERTY DEPENDENT UPON EXISTENCE OF ACCESS BY CLOSED STREET.

Re Neal and Port Hope, 7 O.W.N. 264.

COUNTY—APPROVAL.

A municipal corporation may by by-law order the abolition of a road established by a process verbal. As a general principle a process verbal can always be repealed or amended by a process verbal or by-law. A by-law ordering the closing of a road serving for passage to and from a neighboring local municipality, can only be put in force after approval by the county council.

Morrissette v. Canton Tremblay, 52 Que. S.C. 474.

MUNICIPALITY—BY-LAW TO CLOSE STREET—MEANING OF "PASSAGE OF THE BY-LAW" —DELEGATION OF POWERS OF COUNCIL.

Winnipeg v. Brock, 20 Man. L.R. 669, 18 W.L.R. 28.

VI. Highway officers.

(§ VI—265)—Road Commissioners in the Province of Quebec are entrusted with the management, making and repairing of roads; but this trust comprises the roadbed only and does not extend to the construction and maintenance of sidewalks, which fall exclusively, under the jurisdiction of the municipal corporations within which they are situate.

Raby v. Road Commissioners; Road Commissioners v. St. Paul and Montreal, 2 D.L.R. 511, 42 Que. S.C. 26.

(§ VI—266)—PATHMASTERS.

A pathmaster acting within the scope of his instructions from a municipality is not liable to an abutting owner for the removal of a fence erected by the latter enclosing a portion of a road allowance.

Mills v. Freel, 5 D.L.R. 679, 4 O.W.N. 79, 23 O.W.R. 45, affirming 2 D.L.R. 923, 3 O.W.N. 1240.

HOLIDAYS.

CRIMINAL LAW—WARRANT OF COMMITMENT —FORM OF CONVICTION—HABEAS CORPUS — NEW WARRANT — STATUTORY HOLIDAY — THE SASKATCHEWAN TEMPERANCE ACT.

The defendant was, on Labor Day, a statutory holiday, convicted of an offence under the Saskatchewan Temperance Act and sentenced to imprisonment with hard labor. The conviction and also the warrant of commitment described the offence in accordance with form "F" of the Act. On an application for a writ of habeas corpus the crown filed by way of substitution a new warrant of commitment omitting the penalty of hard labor. Held, that the new warrant of commitment was good. That the conviction of the accused on a statutory holiday was legal. That the conviction being in the form prescribed by the statute was sufficient notwithstanding an apparent discrepancy between the wording of the form and that of the offence in the statute.

R. v. Hengartner, 12 S.L.R. 391, [1919] 3 W.W.R. 320.

HOMESTEAD.

I. THE EXEMPTION GENERALLY.
  A. In general; who may claim.
  B. In what property.
  C. Establishment by occupancy.
II. CREDITORS' RIGHTS.
III. LOSS; ABANDONMENT.
IV. ALIENATION, ENCUMBRANCE AND TRANSMISSION OF EXEMPT PROPERTY.
  A. Sale, lease, or mortgage.
  B. Transmission in case of death.
V. ALLOTMENT AND SETTING APART.

I. The exemption generally.

A. IN GENERAL; WHO MAY CLAIM.

(§ I A—1)—IN GENERAL.

Land acquired as a homestead under the Dominion Lands Act and exempt from execution under the Exemptions Act, c. 47, R.S.S. 1909, will become liable to execution immediately upon the land ceasing to be a "homestead." Though an execution is registered against land which is really a homestead acquired under the Dominion Lands Act, and hence exempt from execution un-

der the Exemptions Act, such registration does not constitute a cloud upon title, but is merely an "apparent charge," since the land may at any time cease to be a "homestead" by the act of the debtor and it would then immediately become liable to the execution. Whether a piece of land is a homestead under the Dominion Lands Act, and hence exempt from execution under the Exemptions Act, is a question for the court and not for the registrar to decide.

Trottier v. National Mfg. Co., 8 D.L.R. 138, 5 S.L.R. 244, 22 W.L.R. 615, 3 W.W.R. 383.

B. In what property.

(§ I B—5)—Extent of—Caveat filed by wife—Husband only half interest.

The protection given to a wife by an Act respecting Homesteads (1915, c. 29), is limited to the quarter-section (not exceeding 160 acres) upon which the home is situate, and her right to claim the protection of the Act is not affected by the fact that the husband owns only an undivided half interest therein.

McDougall v. McDougall, 12 S.L.R. 289, [1919] 2 W.W.R. 637.

Proceeds of forced sale — Voluntary transfer.

The surplus proceeds after the involuntary or forced sale of a homestead under process of law still retain their exempt character. The 1913 Amendment to s. 118 (2) of the Land Titles Act does not affect a voluntary transfer, if made by the debtor to a member of his family.

National Trust Co. v. Stancul, 7 W.W.R. 1389.

Registered owner—Alienation—Consent—Caveat.

A "homestead" under the Act respecting Homesteads, c. 29, 1915 (Sask.), against the alienation of which without her consent a wife may file a caveat, may be land of which the husband is not the registered owner.

Re Land Titles Act and Homestead Act; Re Wolter, [1917] 3 W.W.R. 573.

C. Establishment by occupancy.

(§ I C—10) — Actual occupancy — Temporary absence — Intention to return—Exemption.

"Actual occupancy" of a homestead to satisfy the requirements of the Alberta Exemption Ordinance, N.W.T. 1911, c. 27, does not necessarily imply constant personal presence there, and a temporary absence necessitated by some casualty or for the purposes of business or pleasure may be consistent with "actual occupancy," provided there is a constant and abiding intention to return. The "homestead" which, as against execution creditors, is under s. 2 of the Alberta Exemption Ordinance, protected as exempt, means the "home residence" or "home place" or "actual residence" of the debtor and his family. [Re Claxton, 1 Terr. L.R. 282; Re Hetherington, 3 S.L.R. 232, applied.]

Hart v. Rye, 16 D.L.R. 1, 5 W.W.R. 1280, 27 W.L.R. 9.

II. Creditor's rights.

Fraudulent conveyances.

A transfer of a homestead exempt from seizure under execution cannot be set aside on the ground that it was made to defeat prospective creditors.

Wonderburg v. Fulmer, [1919] 3 W.W.R. 183.

III. Loss; abandonment.

(§ III—20)—Abandonment—Right to recover back—Agreement—Amendment.

One cannot succeed in an action for the recovery of homestead lands, which he abandoned in favour of a company to enable it to erect a smelting plant, after the latter had ceased to operate and later went into liquidation, in the absence of an agreement for the reconveyance of the land upon such event; if, however, such agreement can be gathered from the subsequent dealings by the parties, the Court will direct an amendment of the pleadings for the purpose of establishing it.

Drumm v. Fowler, 26 D.L.R. 1, 33 W.L.R. 142, 9 W.W.R. 766.

(§ III—23)—Waiver.

The right of exemption of a homestead from seizure under execution under Rev. Ord., 1911 (Alta.), c. 27, although once complete, may cease by reason of some act or conduct on the part of the owner forfeiting his claim to exemption.

Love v. Bilodeau, 7 D.L.R. 175, 5 A.L.R. 548, 22 W.L.R. 689, 3 W.W.R. 81.

IV. Alienation; encumbrance and transmission of exempt property.

A. Sale, lease or mortgage.

(§ IV A—25)—Alienation.

Whether land on which an execution was levied was a homestead, or whether a sale thereof to another rendered it liable to an execution registered in the land titles office prior to such sale, are mixed questions of law and fact.

Re Price, 4 D.L.R. 407, 5 S.L.R. 318, 21 W.L.R. 299, 2 W.W.R. 394.

Alienation—Before patent.

The provision of the Dominion Lands Act rendering void assignments or transfers of homesteads or purchased homesteads before the issue of letters patent does not apply to land as to which the locator had obtained the cancellation of his homestead entry and the substitution of a location upon half-breed scrip. [See R.S.C. 1906, c. 55, s. 142.]

Gladu v. Edmonton Land Co., 19 D.L.R. 688, 8 A.L.R. 80, 29 W.L.R. 685, 7 W.W.R. 279.

(§ IV A—30)—Transfer of — Parties — Signature of wife.

Overton v. Gerrity, 30 D.L.R. 282, 9 S. L.R. 262, 34 W.L.R. 875, 10 W.W.R. 1113.

Execution against—Mortgage—Priority.

A homestead in Saskatchewan is free from the operation of any writ of execution, and the owner is entitled to dispose of it as he sees fit. A mortgage takes priority over an execution registered against the homestead although registered subsequently.

Pollock v. Holitski, 42 D.L.R. 491, 11 S.L.R. 352, [1918] 3 W.W.R. 41.

Exchange — Parent and child — Crown grant—Agreement—New bargain.

A father entered into an agreement to exchange his homestead for that of his son's. At the time of the agreement the son had not obtained a Crown grant for his homestead. After the son had received his Crown grant two letters passed between them with reference to the exchange that contained all the elements necessary to create a binding agreement. On the death of the son, his wife, who became administratrix of his estate, brought an action to enforce the agreement. Held, that the original agreement was void under s. 142 of the Dominion Lands Act, but that as the letters that passed between father and son after the son obtained a Crown grant to his homestead, contained all the elements necessary to create an enforceable contract, they should be treated as a new bargain, and the exchange of the properties should be enforced.

Cotton v. Leighton, 24 B.C.R. 253.

General release by wife of her rights — Registration—Necessity of Judge's order—Homestead Act, as amended by s. 2 (2), c. 27, 1916 (Sask.).

Re Land Titles Act; Re Homesteads Act, [1918] 1 W.W.R. 504.

Right of alienation — Bona fide purchaser.

The father and mother of 12 children who, as such, have benefited by the free grant of a lot of land under 55-56 Vict. c. 19, can only dispose of it in favour of one or more of their children by gift inter vivos or by will. Any other alienation is fundamentally void. A subsequent purchaser of a lot of this kind who does not know the origin of it, is a holder in good faith, and has the right of retention for his improvements and outlay.

Naud v. Lambert, 53 Que. S.C. 403.

Lease—Nullity—Right to crop.

A lease of homestead or pre-emption lands is void as being in contravention of the Dominion Lands Act, s. 31; but corn grown at the sole expense of the person taking the void lease is the property of that person, and not of the lessor.

Bunce v. Galvin Walston Lumber Co., 10 W.W.R. 797.

Husband and wife—Act respecting homesteads, 1915, c. 29—Application by husband for order dispensing with wife's signature — Whether wife living apart under circumstances disentitling her to alimony—Necessity of establishing such case beyond question — Preferably decided by action rather than by issue raised on application under Homestead Act—Inference from wife not bringing action.

The provision of the Act respecting Homesteads, 1915, c. 29, as amended by c. 27 of 1916, that where the wife of the owner is living apart from her husband under circumstances disentitling her to alimony a judge may dispense with her signature and acknowledgment, is only intended to apply to those cases in which it is shewn beyond all question that the wife is disentitled to alimony. The question whether a wife is or is not entitled to alimony should and could more properly be decided in the ordinary action with the usual procedure than in an issue raised by the husband on an application under said Act for an order dispensing with her signature. The husband's application for such an issue was dismissed without prejudice to his making a further application, the court expressing the view that if no action were brought for alimony within a reasonable time it would be cogent evidence that the wife abandoned any real intention to claim alimony and the court might conclude that the circumstances under which she was living apart from her husband were such as disentitled her to alimony.

Re Homestead Act, C's Case, [1919] 3 W.W.R. 30.

Real property—Husband and wife—An Act respecting homesteads — Signature by wife necessary to mortgage of homestead—Affidavit of attestation of her signature unnecessary.

Under s. 2 of the Act respecting homesteads, the registrar cannot register a mortgage of homestead land if it is not signed by the mortgagor's wife, although in a paper attached to the mortgage she purports to have relinquished her homestead rights in favour of the mortgagee. Semble an affidavit of attestation by the witness to her signature is not necessary, due compliance with the forms required by the Act being sufficient.

Re Land Titles Act, [1919] 1 W.W.R. 711.

B. Transmission in case of death.

(§ IV B—35)—Order authorizing sale by administrator—Nullity.

The holder of a homestead entry in the railway belt died without obtaining a Crown grant or recommendation for patent. The official administrator obtained an order for the administration of the estate and a further order, under the Intestate Estates Act, R.S.B.C. 1897, c. 106, authorizing him to

sell deceased's real estate. He then executed an agreement for sale of the homestead to the plaintiff. In an action for specific performance of the agreement, held, that the agreement for sale was null and void under the provisions of s. 28 of the regulations affecting Dominion Lands in Railway Belt in British Columbia. [American Abell Engine & Thresher Co. v. McMillan, 42 Can. S.C.R. 377, followed.]

Johnson v. Anderson, 20 B.C.R. 471.

V. Allotment and setting apart.

(§ V—40)—Patent—Period of residence.

A residence for 6 months, though not continuous, in each of 3 years between the date of entry and the application for patent, is sufficient to prevent the setting aside of a patent to a homestead.

R. v. Connaught and McDougall, [1917] 2 W.W.R. 830.

Transfer to wife while exempt—Execution against transferor—Registration against land.

Hamilton v. McCuaig, 4 S.L.R. 193, 18 W.L.R. 84.

Homestead—When it ceases to be exempt—Intention of debtor.

Re Dallin, 4 S.L.R. 158, 17 W.L.R. 557.

Homestead exemption—Registration of executions in land titles office.

Gilmore v. Callies, 19 W.L.R. 545.

HOMICIDE.

I. In general.

II. What reduces crime to manslaughter.

III. Excusable or justifiable homicide.

A. In general.

B. Self-defence.

Confession, justification, self-defence, see Evidence, VIII—674.

I. In general.

(§ I—2)—Manslaughter—Criminal neglect of infirm father.

A son who has received his aged father into his household and undertaken his care and support may be convicted of manslaughter if the father dies from exposure while under the son's charge and from insufficient care and food where the son had the means to supply the food and the means to prevent the father from suffering from exposure, but was reckless whether the father died or not and was wickedly negligent with respect to the duty owed to the father who was incapacitated by old age, infirmity and illness from looking after himself or from withdrawing himself from the son's charge; the charge is one imposed upon the son "by law" within the meaning of Cr. Code, s. 241, under such circumstances.

The King v. Dalke, 27 D.L.R. 633, 25 Can. Cr. Cas. 98, 33 W.L.R. 113.

(§ I—4)—Intent—Act calculated to cause death—Shooting.

If a person deliberately does an act which was calculated to cause the death of another, he will be presumed to have intended the death of that other, although he may have hoped that death would not result; and, where death results, he will be liable to be convicted of murder unless he proves extenuating circumstances which may reduce the act from murder to manslaughter or to justifiable or excusable homicide. If the firing of the fatal shot was done for the purpose of facilitating the commission of robbery or the flight of the robber, but not with the intention of doing grievous bodily harm, the offence is manslaughter and not murder.

R. v. Krafchenko, 17 D.L.R. 244, 24 Man. L.R. 652, 22 Can. Cr. Cas. 277, 28 W.L.R. 76, 6 W.W.R. 836

(§ I—5)—Manslaughter — Evidence — Neglect of husband to provide medical attendance.

R. v. Sanderson, 31 Can. Cr. Cas. 60.

(§ I—6)—Negligence—Collision of ships—Findings—Depositions.

If a commitment for trial for manslaughter, based on alleged negligence, is found on a habeas corpus application to be entirely unsupported by evidence, the prisoner will be discharged on the ground of want of jurisdiction in the magistrate to commit.

R. v. Mackey (N.S.), 29 Can. Cr. Cas. 167. [See 40 D.L.R. 287, 29 Can. Cr. Cas. 282, 419.]

Engaging in unlawful act—Constructive homicide.

Where defendants are charged with homicide as resulting from the physical act of the deceased himself, but alleged to have been caused by the unlawful acts in which the accused were then engaged towards the deceased, not involving physical force or compulsion on their part against him, they are not guilty of culpable homicide unless the act of the deceased from which death resulted (i.e., in this case using as a club a gun reversed) was induced by threats or fear of violence, or by deception.

Graves v. The King (No. 4), 9 D.L.R. 589, 47 Can. S.C.R. 568, 12 E.L.R. 332, reversing 9 D.L.R. 175, which affirmed 9 D.L.R. 30.

While engaged in unlawful act—Prize fight or boxing contest—Death of contestant in ring.

On a trial for manslaughter against one of the contestants in a so-called boxing contest in respect of the death of the other contestant in the ring following a knockout blow, the jury in considering whether the contest was one prohibited by the provisions of the Cr. Code, as to prize fights, may take into consideration the weight of the gloves as bearing on the intention that the fight should terminate by one or the other being incapacitated, although limited to ten rounds.

R. v. Pelkey, 12 D.L.R. 780, 21 Can. Cr. Cas. 387, 6 A.L.R. 103, 24 W.L.R. 804, 4 W.W.R. 1055.

ACTION AGAINST OWNER OF MOTOR VEHICLE FOR RUNNING OVER AND KILLING A PERSON—NEGLIGENCE—PARTICULARS.

Cuperman v. Ashdown, 20 Man. L.R. 424, 16 W.L.R. 687.

(§ I—8)—MANSLAUGHTER—SEDUCTION FOLLOWED BY DEATH.

A man engaged in a criminal act is liable for its indirect as well as for its direct consequences, and a verdict of manslaughter for the death of a young girl under the age of consent will be supported if it appears that the accused had induced her to go alone with him to a secluded apartment and there had criminal sexual intercourse with her, following which she had jumped from the window to the street to get away from him anad was instantly killed by the fall.

R. v. Valade, 26 Can. Cr. Cas. 233, 22 Rev. de Jur. 524.

(§ I—12)—WILFUL EXPOSURE OF CHILD—EVIDENCE AS TO CAUSE OF DEATH—SUFFICIENCY.

That the accused took his new-born illegitimate child out of doors on a cool day and left it exposed with no covering other than a little straw on the day of its birth and that it died shortly afterwards, is sufficient to shew that death resulted from or was hastened by his failure to properly care for the child so as to make him guilty of culpable homicide. [See Cr. Code, R.S.C. 1906, ss. 256, 259, 262.]

R. v. Hammond, 14 D.L.R. 804, 6 S.L.R. 363, 26 W.L.R. 153, 5 W.W.R. 704.

MATERIAL QUESTION AS TO NUMBER OF PERSONS PRESENT AT QUARREL—CONFLICTING TESTIMONY OF SAME WITNESS—JUDGE'S CHARGE—ERROR IN REVERSING THE ORDER OF WITNESS' STATEMENTS.

The King v. De Marco, 17 Can. Cr. Cas. 497.

II. What reduces crime to manslaughter.

(§ II—15)—MURDER — EVIDENCE POINTING TO MANSLAUGHTER—COURT'S DUTY TO INSTRUCT.

On the trial of an accused on a charge of murder, when the evidence shews that the jury may reasonably infer a case of manslaughter, there must be a direction on that point. Semble, a judge ought to be slow to arrive at the conclusion that there are no circumstances that would justify a verdict of manslaughter.

R. v. Jagat Singh, 25 Can. Cr. Cas. 281, 32 W.L.R. 637, 9 W.W.R. 514.

(§ II—17)—PROVOCATION.

If the defendants had no intention, when they assembled in front of the residence of the deceased, beyond that of annoying him and his family, against whom they had some ill feeling, and if, being drunk, their passions were inflamed by the production by the deceased of a loaded gun, and the deceased used the gun as a club and was mortally wounded by its accidental discharge, and if the death was hastened by the subsequent battery of the deceased by defendants in sudden and uncontrollable passion on seeing the gun and hearing its discharge, which caused them to think they had been shot at and that one of them had been wounded by the shooting, although in fact he had only been hit with the stock of the gun, the crime of the defendants, if any, was manslaughter, and not murder.

R. v. Graves (No. 2), 9 D.L.R. 30, 46 N.S.R. 305, 20 Can. Cr. Cas. 384, 12 E.L.R. 1. [But see R. v. Graves (No. 3), 9 D.L.R. 175; and Graves v. The King (No. 4), 9 D.L.R. 589, 21 Can. Cr. Cas. 44, 47 Can. S.C.R. 568.]

PROVOCATION — DIRECTING JURY — MANSLAUGHTER ON MURDER CHARGE.

Where there are no circumstances in evidence which could reduce the charge of murder to manslaughter, such as sudden provocation, the Trial Judge need not direct the jury that they have the alternative power to find a verdict of manslaughter. [Eberts v. The King, 7 D.L.R. 538, 20 Can. Cr. Cas. 273, applied.]

R. v. Sparkes, 41 D.L.R. 102, 51 N.S.R. 482, 29 Can. Cr. Cas. 116.

(§ II—18)—DRUNKENNESS.

Homicide is reduced from murder to manslaughter where the accused, at the time he committed the act, was so under the influence of liquor that his reason was dethroned and he did not know what he was doing or know that he was liable to cause grievous bodily harm.

R. v. Studdard, 26 D.L.R. 271, 25 Can. Cr. Cas. 81.

III. Excusable or justifiable homicide.

A. IN GENERAL.

(§ III A — 20) — EXCUSE — ABUSE AND THREATS.

It is no justification of homicide that the deceased had on previous occasions abused and threatened the accused so as to make the latter apprehensive either of being killed or of receiving grievous bodily harm, if, at the time of the shooting, the accused was well armed and he was in no immediate danger from the other who was neither armed nor in a position threatening attack.

R. v. Moke, 38 D.L.R. 441, 12 A.L.R. 18, 28 Can. Cr. Cas. 296, [1917] 3 W.W.R. 575.

(§ III A—21)—EXCUSE—DURESS AND COMPULSION.

Compulsion by threats of immediate death or grievous bodily harm from a person actually present at the commission of the offence, does not in point of law acquit of the crime the party so under compulsion to assist in a murder, where no actual physical force is exercised upon the person of the compelled party, nor is the nature of the offence thereby reduced; so, where matter relied upon as a confession of the accused included an exculpatory statement by him that he had been forced by an alleged third party to hand over a razor to

him, with which then and there to cut the throat of the murdered person under a threat by the third party that if the accused did not give up the razor the third party would forthwith shoot the accused, and that the noise of the shooting would bring the police, it is not error for the Trial Judge to instruct the jury that such part of the prisoner's story, even if believed, formed no excuse in law and that his participation would make him an accessory liable as for the principal offence under s. 69 Cr. Code.

R. v. Farduto, 10 D.L.R. 669, 21 Can. Cr. Cas. 144, 19 Rev. Leg. 165.

(§ III A—22) — ACCIDENTAL SHOOTING — HUNTING IN CLOSE SEASON.

The criminal liability of the accused, who while hunting with his friend accidentally shot the latter while aiming at what he believed to be a moose, is not sufficiently enhanced by the circumstances that the hunting took place in the close season (the latter infringement being merely malum prohibitum and not malum in se) to warrant a conviction for manslaughter on that ground alone, and the jury may be directed to acquit unless they find that the accused was criminally negligent in discharging the gun without exercising due care and precaution.

R. v. Oxley, 19 D.L.R. 721, 23 Can. Cr. Cas. 262.

(§ III A—24)—DEFENCE OF BROTHER—JUSTIFIABLE OR EXCUSABLE HOMICIDE—CR. CODE, SS. 52 AND 55.

R. v. Callahan, 26 Can. Cr. Cas. 93.

B. SELF-DEFENCE.

(§ III B—25)—BURDEN OF PROOF.

When on a murder trial, homicide by the accused is proved, it is for the latter, if he claims to justify his act as one of self-defence, to prove that the mode of defence that he employed was necessary.

R. v. Shayanez, 26 Can. Cr. Cas. 438, 25 Que. K.B. 316.

(§ III B—28)—DANGER—PLACING IN FEAR OF VIOLENCE—COUNTER ATTACK.

Where the deceased took a gun to drive away several persons who had unlawfully congregated and were causing a disturbance in front of his house, and in handling the gun, took it by the barrel and used it as a club, its accidental discharge upon himself when so used, although resulting in his death, is not sufficient, where it does not appear that the deceased had been placed in any fear of violence from the accused, to charge the disturbers with murder, even if their acts prior thereto technically constituted an assault.

R. v. Graves (No. 2), 9 D.L.R. 30, 46 N.S.R. 305, 20 Can. Cr. Cas. 384, 12 E.L.R. 1. [But see R. v. Graves (No. 3), 9 D.L.R. 175; and Graves v. The King (No. 4), 9 D.L.R. 589, 21 Can. Cr. Cas. 44, 47 Can. S.C.R. 568.]

BAIL FOR PRISONER COMMITTED TO TRIAL—JUSTIFIABLE HOMICIDE—SELF-DEFENCE.

R. v. Monvoisin, 20 Man. L.R. 568, 18 Can. Cr. Cas. 122, 17 W.L.R. 633.

HOMOLOGATION (QUE.).

See Motions and Orders.

HORSE RACE.

EXHIBITION ASSOCIATION — HORSE RACE — CONDITIONS OF QUALIFICATIONS.

A condition in a horse race for a prize donated by an exhibition association that each horse contesting should be "trained" in a specified district implies that the training should have taken place wholly in such district and a horse is disqualified from the contest, and its owner disentitled to the prize money on his horse taking first place, where the horse, although trained partly in such district, had been taken out of it and trained elsewhere within a few months prior to the race.

Sporle v. Edmonton Exhibition Association Ltd., 14 D.L.R. 769, 26 W.L.R. 100. [Affirmed, 18 D.L.R. 747, 7 A.L.R. 383.]

BOOK-MAKING — ACTION, CAUSE OF — CONSPIRACY—BOOKMAKER—EXCLUSION OF, FROM RACE TRACK—INTERFERENCE WITH BUSINESS.

Scully v. Madigan, 4 O.W.N. 394, 23 O.W.R. 876.

HORSES.

See Animals; Highways; Negligence; Railways; Street Railways; Automobiles.

HOSPITALS.

Election of trustees, powers, charter, by-law, see Companies, IV A—35.

Municipal statutory liability for maintenance of resident sick, see Municipal Corporations, II A—30.

The "trust fund doctrine," under which the funds of a public hospital were deemed exempt from liability for damages, has no longer any application, and on the principle of respondeat superior such hospital is liable for the negligence of a nurse who in the course of her duty had inflicted burns on a patient after an operation not under the orders of the surgeons or physicians.

Lavere v. Smith's Falls Public Hospital, 26 D.L.R. 346, 35 O.L.R. 98, reversing 24 D.L.R. 866, 34 O.L.R. 216.

A patient in an apparently normal condition, and in no apparent need of any special attention who, during a short absence of the nurse in charge, leaves the room and is on the following day found drowned in a creek in the proximity of the hospital, presents no case from which a jury could reasonably find the physician or his nurse guilty of want of reasonable care in discharging their duties and should therefore be withdrawn from their consideration; the fact that the defendant failed to timely notify the authorities of the patient's dis-

appearance is immaterial in the absence of evidence that such failure was the cause of the patient's death.

Brandeis v. Weldon, 27 D.L.R. 235, 22 B.C.R. 405, 10 W.W.R. 45.

MEDICAL SUPERINTENDENT — WRONG DIAGNOSIS.

Where a workman pays a monthly sum out of his wages to an institution in order to secure hospital treatment and medical attention, a contract is created and an action for damages for negligence will lie against the institution as well as the medical attendant where the workman has occasion to use the hospital and receives unskilful treatment amounting to malpractice whereby he suffers injury. [Hillier v. St. Bartholomew's Hospital, [1909] 2 K.B. 820; and Evans v. Liverpool Corporation, [1906] 1 K.B. 160, distinguished.]

Thomson v. Columbia Coast Mission, 15 D.L.R. 656, 20 B.C.R. 115, 26 W.L.R. 861, 5 W.W.R. 999.

The obtaining of the consent of the municipality within which certain lands lie, to the use of said lands by another municipality for an isolation hospital required under s. 104 of the Public Health Act, R.S.O. 1897, c. 248, is not a condition precedent to the acquiring municipality's power to make the purchase.

Verner v. Toronto, 1 D.L.R. 530, 3 O.W.N. 586, 21 O.W.R. 170.

LIABILITY TO MUNICIPALITY FOR CARE AND MAINTENANCE—PARENT AND CHILD.

Where a child taken to a municipal hospital by its father is not brought there of the father's own free will, but because he believes he is compelled to do so by officials whom he believes to be authorized to so compel him and the hospital authorities receive the child in the belief that the superintendent of neglected children will be responsible for the expense of its care, the father cannot be held liable for such expense.

Prince Albert v. Sturgill, [1917] 3 W.W.R. 451.

HOTELS.

As to sale of liquors, see Intoxicating Liquors.

Hotel Act, loan by-law, validity, see Municipal Corporations, II C—60.

HOUSE OF ILL-FAME.

See Disorderly Houses.

HUSBAND AND WIFE.

I. RIGHTS, LIABILITIES AND DISABILITIES GENERALLY.
A. Of husband.
B. Of wife.
C. Joint liabilities.
II. PROPERTY RIGHTS; TRANSACTIONS BETWEEN.
A. In general.
B. Estate by entireties.
C. Community property.
D. Wife's separate estate or business.
E. Contracts with or conveyances to each other.
F. Conveyances or mortgages to third persons.
G. Trusts.
H. Partnership.
I. Antenuptial contract.
J. Fraud on marital rights.
K. Rights of husband's creditors.
III. ACTIONS.
A. By husband.
B. By wife.
C. By both husband and wife.
D. Between husband and wife.
IV. ABANDONMENT OF WIFE.
V. WIFE'S AUTHORITY TO SUE OR DEFEND.

As to validity of marriage, separation, see Marriage; Divorce and Separation.

Custody of children, see Divorce and Separation; Infants, I C.

As to domicile, see Domicile; Conflict of Laws.

Transactions between, see Fraudulent Conveyances.

Recovery by wife of chattels and gifts in husband's house, see Judgment, I F—46.

Annotations.

Wife's competency as witness against husband; criminal nonsupport: 17 D.L.R. 721.

Married women; separate estate; property rights as to wife's money in her husband's control: 13 D.L.R. 824.

Enemy alienage as affecting status of married women: 23 D.L.R. 375, 380.

Validity of foreign divorce; domicile: 33 D.L.R. 146, 156.

Foreign common-law marriage; Validity: 3 D.L.R. 247.

I. Rights, liabilities and disabilities generally.

A. OF HUSBAND.

As affected by War Relief Act, see Moratorium; Volunteers and Reservists Relief Act.

Power of husband to indorse for accomodation under wife's general power of attorney, see Principal and Agent, II A—7.

(§ I A—15)—LIABILITY OF HUSBAND FOR WIFE'S SUPPORT — NEEDY CIRCUMSTANCES — ALIMENTARY ALLOWANCE — LAW OF QUEBEC.

A decree of separation from bed and board obtained by the husband against his wife in the Superior Court of Quebec absolves him from the obligation to receive the wife into his house but it does not relieve him when resident in that province from the obligation of paying for her support when in needy circumstances in an action brought by her for an alimentary allowance while also resident in the Province of Quebec. The law of Quebec applies in deciding the question of alimentary allowance to a wife separated from bed and board, where the parties reside in that

province although they were married elsewhere.

Church v. Hamilton, 20 D.L.R. 639.

LIABILITIES.

The father of a woman voluntarily living away from her husband cannot recover from his son-in-law the moneys he disbursed for the board and lodging, travels and medical attendence of his daughter, even though the husband knew thereof and had even visited his wife at her father's residence. Creditors of the wife cannot urge against the husband any greater rights than the wife herself could have brought forward.

Gladstone v. Slayton, 3 D.L.R. 27, 21 Que. K.B. 440.

(§ I A—16)—ON CONTRACTS BY, OR FOR SUPPORT OF, OR NECESSARIES FURNISHED TO, WIFE — ESTOPPEL.

Where a man represents a woman to be his wife, and a third party acts upon that representation to the extent of selling necessaries to the alleged wife, the man is estopped from saying that she is not his wife, in an action to recover the purchase price of the goods. [Munro v. De Chemant, 4 Camp. 215, 216; Hawley v. Ham, Tay. 386, followed.]

Redferns v. Inwood, 8 D.L.R. 618, 27 O.L.R. 213.

NECESSARIES — LUXURIES — WHAT ARE — POSITION OF HUSBAND — HUSBAND'S PROMISE TO PAY.

Dresses at $150 and $135 for a wife whose husband earns $225 a month are not necessaries but luxuries. The fact that the husband said to send the bill over and he would see to it, is not a promise to pay if the husband at the time did not know what goods had been sold to his wife but believed them to be necessaries for which he would have paid.

Jacobs v. Colt, 46 D.L.R. 245, 55 Que. S.C. 298.

Where a deed of separation entered into by a husband and wife contains no covenant on the part of the wife to maintain herself and no covenant not to institute alimony proceedings against the husband, the wife not having released her right to be maintained, the mere agreement to live separate, and the payment of the sum of $250 by the husband to the wife, together with several debts referred to in the deed, does not relieve the husband from his liability to support and maintain the wife, even though the deed stipulated that each party should not take any proceedings against the other for the restoration of conjugal rights and each agreed not to annoy or interfere with the other in any manner whatsoever, the wife further agreeing to pay her own debts and support the two children. A husband by the act of marriage undertakes to support and maintain his wife so long as she remains faithful to him, and where the wife is living separate from the husband under circumstances which justify her so doing, the husband is bound to support her unless she has expressly renounced her rights to such support and maintenance or has means of her own which renders it unnecessary for the husband to maintain her.

Frémont v. Frémont, 6 D.L.R. 465, 26 O.L.R. 6, 21 O.W.R. 644.

LIABILITY FOR NECESSARIES—CREDIT.

The liability for necessaries furnished is determined by the question whether credit was given to the husband or the wife and when credit is extended to one of them, it cannot later be altered by varying the heading of the account.

Boland v. Skead, 24 D.L.R. 543, 48 Que. S.C. 244.

LIABILITY FOR GOODS SUPPLIED TO WIFE.

The defendant's wife purchased goods from plaintiffs from time to time during 3 years to an amount of more than $1,000. The price of the goods was charged to the wife, who occasionally made payments on account. Finally this action was brought against the husband to recover a balance of account amounting to $346. The plaintiffs had no dealings with defendant until he issued a notice that he would not be responsible for his wife's debts, when they sought to fix the debt upon him. It was proven at the trial that defendant had always furnished his wife with sufficient money to clothe and feed herself and her children, and that he knew nothing about the goods having been obtained from plaintiffs, and had expressly forbidden his wife to pledge his credit. Held, that the husband has rebutted the presumption placed upon him by law that he authorized his wife to purchase the goods.

Finch v. Minnie, 20 B.C.R. 331.

NECESSARIES CONTRARY TO HUSBAND'S CHOICE.

The husband is not liable for the price of goods ordered or accepted by his wife contrary to the choice that he himself made, though they were movables necessary for the household.

Casavant v. Ciccin, 47 Que. S.C. 412.

HUSBAND'S FAILURE TO PROVIDE MAINTENANCE — DUTY OF FATHER-IN-LAW.

A wife, whose husband does not furnish herself nor her children the necessaries of life, has a right to demand maintenance from her father-in-law if she is incapable of working. It is no defence of the latter that the husband is able to maintain his wife and children, and that, if he does not do so, it is owing to the fault of the latter.

Laporte v. Brunet, 48 Que. S.C. 74.

SEPARATION DE CORPS—MAINTENANCE.

A voluntary separation de corps between consorts does not cause the wife to lose her right to maintenance and to care necessary for her life for which her husband is under an obligation towards her as well by virtue of law as under the marriage contract. Whatever may have been the misconduct of a wife so voluntarily separated, she does

not lose her recourse against the husband for assistance and support so long as the marriage ties exist or so long as it has not been declared dissolved on special grounds by a competent authority.

Bilodeau v. Chartrand, 47 Que. S.C. 249.

LIABILITY FOR MAINTENANCE AS AFFECTED BY SECOND MARRIAGE.

A second marriage does not deprive a mother of the right to a claim for the maintenance of her children. The community as to property between consorts is obliged to furnish maintenance to one of them even married a second time. The husband, as the head of the family, can be sued for a debt of the community without his wife being made a party.

Dorion v. Robert, 47 Que. S.C. 207.

NECESSARIES — HUSBAND'S LIABILITY.

The husband who after assaulting his wife, expels her from the conjugal domicile and forbids her return, cannot set up, against an action to recover advances of money to her and the cost of providing for her maintenance, that no decree en séparation de corps had previously been made against him.

Tyles v. Miner, 44 Que. S.C. 395.

ALLOWANCE — HUSBAND AND WIFE — CAPACITY TO WORK — DISCONTINUATION OF ASSISTANCE — C.C., ARTS. 173, 202.

That person alone, who in a real case of destitution cannot supply his needs by his work, has a right to allowances. The judge in order to determine these facts ought to take into consideration the age, sex, state of health, social position, and the previous occupation of the plaintiff. A woman of 31 years of age without children, a dressmaker by occupation, by which she earned her living before her marriage, capable of working but who has made no serious effort to secure work, and who only relies on the pension which she demands from her husband, has no right to allowance.

Martel v. Page, 25 Rev. Leg. 254.

SALE — FOOD — RESPONSIBILITY — C.C., ARTS. 1317, 1423.

The rule recognized by jurisprudence that a married woman has a tacit authority to bind her husband in the purchase of necessaries; and the rule that it is necessary to examine in order to know who is responsible for food which has been given in credit to the husband or the wife, should not be applied in an absolute manner. The particular circumstances of the opening of the account by the merchant, can prevent the application of the above rules. Thus the wife will be held responsible for payment for food stuffs when the husband is insolvent, and when she herself is a public merchant having two stores, and when the groceries and meats sold on credit have been given at her repeated requests. It does not matter that the husband recognizes his responsibility and has even given his note in payment, if the note has not been paid at maturity.

Debien v. Dumoulin, 56 Que. S.C. 271 and 542.

PRESUMPTION OF AGENCY — NECESSARIES.

The presumption of law is that a wife in purchasing necessaries acts as agent for her husband and the onus is on him to rebut that presumption. [Vopni v. Bell, 8 W.L.R. 205, followed.]

Gaetz v. Jarvis, [1918] 3 W.W.R. 888.

NEGLECTING TO PROVIDE NECESSARIES FOR WIFE — PREVIOUS ACQUITTAL ON LIKE CHARGE — LAWFUL EXCUSE — INABILITY OF PRISONER.

R. v. Yuman, 22 O.L.R. 500, 17 Can. Cr. Cas. 474, 17 O.W.R. 859.

NECESSARIES OF LIFE SOLD TO FAMILY AND DEBITED TO HUSBAND — LIABILITY OF THE WIFE.

Gloutnay v. Davignon, 40 Que. S.C. 228.

(§ I A—17)—FOR TORTS OF WIFE.

A wife separate as to property, the owner of the farm on which she lives with her husband, is liable for the damage caused by a dog that belongs to him, and that she allows to remain on her property.

Theoret v. Allen, 43 Que. S.C. 401.

FRAUDULENT CONVERSION OF GAS — HUSBAND PENALLY LIABLE FOR ACT OF WIFE.

Montreal Light, Heat & Power Co. v. Dechévigny, 40 Que. S.C. 233.

(§ I A—18)—AGENCY OF WIFE.

Where a wife is living apart from her husband, by mutual consent or in any case other than that of separation duly pronounced by the court, she will not be presumed to have her husband's authority to pledge his credit, and no consent can be inferred on the husband's part to pay for his wife's expenses. [Johnson v. Summer, 27 L.J. Exch. 341, followed.]

Gladstone v. Slayton, 3 D.L.R. 27, 21 Que. K.B. 440.

AGENCY OF WIFE FOR HUSBAND — WHEN ESTABLISHED — SIGNING NOTE.

That a signature was properly affixed to a note by the wife of the maker may be inferred where the former was not called as a witness, and her husband would not deny that she had authority to sign for him.

Langley v. Joudrey, 13 D.L.R. 563, 13 E.L.R. 135. [Affirmed, 15 D.L.R. 10, 47 N. S.R. 451.]

It is a presumption of law that a wife living with her husband has his implied authority to pledge his credit for such things as fall within the domestic department ordinarily confided to her management and as are necessary to the style in which her husband chooses to live, though the presumption may be rebutted by shewing that she had no such authority.

Scott v. Allen, 5 D.L.R. 767, 26 O.L.R. 571, 22 O.W.R. 597.

LIABILITY FOR WIFE'S NOTE NOT "REGISTERED" — AGENCY.

A husband carrying on business for his

wife as her attorney and who, by error, for her benefit, signs notes in her name without adding the word "registered," is not liable to the holder of the notes if the latter was aware that they were given on account of the wife.

Finlay v. Boileau, 48 Que. S.C. 444.

(§ I A—19)—CRIMINAL LIABILITY OF HUSBAND FOR FAILURE TO PROVIDE "NECESSARIES."

It must be established, in order to convict a husband under s. 242 Cr. Code, for failing to provide necessaries for his wife or children, whereby their death resulted, that the articles or things which, without lawful excuse, he omitted to furnish were "necessaries" within the meaning of such section of the Code, and also that the death of his wife or children followed as a result of his omission to provide them. A husband's failure to follow his wife and bring her back to his house, which she left in anger, on a bitterly cold night, and, being thinly clad, was frozen to death, does not render him criminally liable under s. 242 Cr. Code, for failure to furnish her with "necessaries," where he provided a home according to his station in life and supplied his wife, who was in possession of all her faculties, with plenty of warm clothing, and, when she left his home, he had reason to believe that she had gone to a neighbour's but instead she got lost on the way.

The King v. Sidney, 5 D.L.R. 256, 20 Can. Cr. Cas. 376, 5 S.L.R. 392, 21 W.L.R. 853, 2 W.W.R. 761.

B. OF WIFE.

(§ I B—20)—IN GENERAL.

The wife under control of her husband is subjected to the preliminary proceedings of conciliation under the provisions of art. 7613, R.S.Q. 1909.

Morrissette v. Auger, 14 Que. P.R. 65.

(§ I B—24)—DEBTS OF HUSBAND — PROPERTY OWNED BY WIFE — TRANSFER — UNDUE INFLUENCE — CONSIDERATION — VALIDITY OF TRANSFER.

Proof of false and misleading statements and undue influence on the part of a husband in whom the wife had confidence in order to obtain a transfer of land by the wife who had no independent advice, is sufficient to set aside the transfer. [Wingrove v. Wingrove, 11 P.D. 81; Bank of Montreal v. Stuart, [1911] A.C. 120 followed.]

Ashdown v. Milburn, 50 D.L.R. 523.

(§ I B—25)—AUTHORITY OF REPUTED WIFE —LEASE.

A married woman has implied authority to rent an immovable for the habitation of her family just as she has for the usual and ordinary affairs of the household, when the circumstances justify it. It is the same when the woman is not married but living with the man as his wife, when they present themselves to the landlord as married and allow him by their actions, by their visit together at the premises they wish to lease, by their common habitation of another house belonging to the same owner, to believe that they are really married. A verbal lease entered into by the woman renders the man responsible for the rent and for the damages incurred under the said verbal lease.

Dufresne v. Brousseau, 49 Que. S.C. 67.

(§ I B—26)—LIABILITY OF WIFE ON PROMISSORY NOTE AND AGREEMENT SIGNED FOR BENEFIT OF HUSBAND — DURESS — THREAT OF PROSECUTION — IMPLIED PROMISE NOT TO PROSECUTE — AGREEMENT MADE — ESTOPPEL — EVIDENCE — APPEAL — UNDUE INFLUENCE OF HUSBAND — WANT OF INDEPENDENT ADVICE.

McCallum v. Cohoe, 46 D.L.R. 733, 44 O.L.R. 497, reversing, in part, 42 O.L.R. 595.

NOTE BY WIFE — HUSBAND'S DEBT — INDEPENDENT ADVICE.

A married woman is liable on a promissory note signed by her as security for a debt of her husband, without any independent advice, if no undue influence was exercised upon her and the solicitor acting in the matter has done so merely as a friend and not on behalf of either husband or creditor. [Bank of Montreal v. Stuart, [1911] A.C. 120, distinguished.]

Macdonald v. Fox, 35 D.L.R. 198, 39 O.L.R. 261.

AGENCY OF HUSBAND—TO EMPLOY BROKER FOR WIFE'S PROPERTY.

A husband managing a hotel belonging to his wife has no implied authority to employ a real estate broker to lease the property, and she is not liable for the brokerage commissions, in the absence of proof that she adopted the broker's work.

McCormack v. Gallagher, 36 D.L.R. 711, 44 N.B.R. 630.

PROMISSORY NOTE SIGNED BY WIFE AT REQUEST OF HUSBAND — ABSENCE OF INDEPENDENT ADVICE — FAILURE TO SHEW MISREPRESENTATION OR MISCONDUCT.

Medland v. Cowan, 28 D.L.R. 371, 10 O.W.N. 4.

ERECTION OF BUILDING ON WIFE'S LAND — CONTRACT MADE WITH HUSBAND — AGENCY OF HUSBAND FOR WIFE—EVIDENCE — ELECTION — RATIFICATION —ESTOPPEL.

East v. Harty, 14 O.W.N. 126, affirming 12 O.W.N. 413.

(§ I B—27)—PROMISSORY NOTE — CONSIDERATION — ADVOCATE — FEE — CONTRACT — C.C. ARTS. 984, 1013, 1301.

A wife, separate as to property, who signs a note, is not responsible if she proves that she has taken no benefit under the note, the husband alone benefiting.

Cordasco v. Garneau, 56 Que. S.C. 1.

(§ I B—31)—Power to employ agent to sell land—Consent of husband.

A wife separated as to property cannot authorize a real estate agent to sell her property and undertake to pay him a commission if he sells it, without special authority in writing from her husband.

Jacques v. Léonard, 47 Que. S.C. 344.

Liability for servant's wages.

A wife who engages a domestic servant is liable for the latter's wages, although by the contract of marriage between said wife and her husband, it is stipulated that said husband undertakes to pay the expenses of marriage.

Johnson v. Hudson & Vir, 24 Rev. de Jur. 570.

Powers of wife — Appointment of curators — Filing of claim — Authorization of husband.

The filing of a claim by a woman separate as to property and the appointment of an attorney to represent her at the meeting of the creditors without the authorization of her husband is valid, being a pure act of administration. In the appointment of a curator, unsecured claims should receive more consideration than those secured, even by notes. In the absence of special reasons, only one curator should be appointed to a small insolvent estate, and as far as possible, he should reside in the district of the insolvent.

Savard v. Gagnon, 15 Que. P.R. 386.

(§ I B—35)—Liability of wife as surety — Independent advice — Change of position of parties.

A creditor, without notice of any undue influence on the part of the husband in procuring his wife's signature to a security for the amount of an indebtedness due by a company of which the wife was secretary and also a shareholder, given at the instance of the husband who was manager of the company, is not bound to see that she understood the document and had proper independent advice, particularly in a case where in consideration of the delivery of the security, the creditor extended the time of credit to the debtor, advanced other goods and materially changed his position. [Bischoff's Trustees v. Frank, 89 L.T. 188; Talbot v. Van Boris, [1911] 1 K.B. 854, followed; Turnbull v. Duval, [1902] A.C. 429, distinguished.]

Gold Medal Furniture Co. v. Stephenson (No. 2), 10 D.L.R. 1, 23 Man. L.R. 159, 23 W.L.R. 664, 4 W.W.R. 7, varying 7 D.L.R. 811. [Appeal quashed, 15 D.L.R. 342, 48 Can. S.C.R. 497.]

(§ I B—36)—Promissory notes made by wife as security for loan to husband — Knowledge of wife of nature of transaction — Absence of undue influence — Want of independent advice.

Shilton v. Michie, 8 O.W.N. 571.

(§ I B—40)—Agency of husband—Scope—Contract for sale of wife's land.

A husband has no original or inherent power to act as his wife's agent; and, where he purports to sell his wife's lands without due authority, she is not bound unless she has ratified his act after obtaining full knowledge of the transaction.

Beck v. Duncan (No. 2), 12 D.L.R. 762, 25 W.L.R. 11, 4 W.W.R. 1319, affirming 8 D.L.R. 648.

Power of attorney to husband to execute note—Scope.

A husband signed a note to a bank to secure an advance to himself in his wife's name under a power of attorney containing a clause permitting him to sign notes "in which I shall be interested or concerned which shall be requisite." The power of attorney was not produced to the bank at the time the note was given and the advance made. Held, that the signing of the note by the attorney put the bank on enquiry, and, there being no evidence that the wife was interested or concerned in the note, she was not liable on the note.

Bank of Nova Scotia v. Hawkins, 31 W.L.R. 505.

Wife's liability for husband's services—Power of attorney.

Article 685, C.C.P., which declares that if the debtor is in the employ of a tiers-saisi or works for him, but without receiving any salary or remuneration, the judge can order proof to be made of the value of the services or his work, does not apply to the case of a husband who, though holder of general power of attorney from his wife, only engages in her business occasionally, as he feels inclined, for receipt of her revenues, the wife being an owner of immoveables and carrying on no business or industry.

Latour v. Lefebvre, 48 Que. S.C. 447.

Agency of husband for wife—Findings of master on reference—Variation.

Brady v. Ranney, 10 O.W.N. 390.

(§ I B—41)—Agency of husband—Ratification — Signature of wife to agreement as condition precedent.

Where, as a condition precedent, the signature of the wife of a seller was required to an offer of sale, and the latter fraudulently passed off a simulated signature made by himself as that of his wife, the latter's subsequent ratification of the signature will be of no avail, since ratification is not equivalent to a prior mandate.

Beckman v. Wallace, 13 D.L.R. 541, 29 O.L.R. 96.

Ratification.

The acceptance by consorts of a proposal made to the husband alone to purchase land owned by his wife constitutes an agreement to sell by the latter the nonfulfilment of which makes her liable to action.

Dubeau v. Greffe, 44 Que. S.C. 113.

C. Joint liabilities.

(§ I C—45)—Use of wife's property by husband for use of himself and family — Presumption of gift by wife.

When husband and wife are living together and he uses her property or the income therefrom, for the joint use of himself and family, she is presumed to have made a gift of the same to him.

Adolf v. Adolf, 47 D.L.R. 525, [1919] 2 W.W.R. 908, reversing 12 S.L.R. 109.

Salary — Garnishment after judgment —C.C. arts. 1031, 1034—C.C.P. art. 685.

New laws, especially Rules of Procedure, must be interpreted in the light of the principles of the Civil Code. Married people owe each other assistance, and for this reason, they have no right to any remuneration for services rendered mutually to each other. A creditor can, by attachment, enforce his rights against his debtor, or annul any transfers or fraudulent gifts made by him; but he cannot by means of this attachment create a debt in a case where the law declares that a debt cannot exist. Thus art. 685 C.C.P. can only be applied to the case where a workman had not made an agreement as to his salary or to the case where, being insolvent, he had given up the salary which he had a right to receive; and not to the support which during marriage, the husband gives to his wife or the latter to her husband. Without explicit wording of a law the court cannot interpret it in such a way as to destroy the principles of civil rights relating to rights and duties of married people and to rights of creditors under a garnishment.

Duquette v. Dion, 56 Que. S.C. 480.

Breach of trust by husband — Knowledge and benefit of wife—Liability.

Harrison v. Mathieson, 9 O.W.N. 170.

Liability for hospital expenses—Charge on estate.

Homewood Sanitarium v. Parker, 8 O.W.N. 402.

II. Property rights; transactions between.

A. In general.

Presumption as to ownership from possession of property, see Interpleader, I—10.

Ownership of property for taxation purposes, see Taxes, III B—110.

(§ II A—50)—Purchase of land by wife with money furnished by husband for investment for joint benefit.

A married woman who purchases land in her own name with money furnished her from time to time by her husband from his wages and other sources, will be required to convey a half interest therein to her husband, where the money was given her for the express purpose of being invested in land for their joint benefit, share and share alike.

McKissock v. McKissock, 13 D.L.R. 822, 18 B.C.R. 401, 25 W.L.R. 95, 4 W.W.R. 1327.

Presumption — Undue influence — Independent advice—Onus.

There is no presumption of undue influence in regard to a mortgage made by a married woman as security for her husband's indebtedness to a bank, and no burden is cast on the person sustaining such transaction to prove that the wife had independent advice; the onus is upon the person attacking the transaction to prove undue influence by the husband and knowledge thereof by the creditor. [Bank of Montreal v. Stuart, [1911] A.C. 120, distinguished.]

Hutchinson v. Standard Bank, 36 D.L.R. 378, 39 O.L.R. 286.

Separation agreement — Power of wife to sell land at fixed price — Mortgage—Liability of husband's surety.

Van Aalst v. Van Aalst, 30 D.L.R. 471, 10 A.L.R. 34, 34 W.L.R. 1222, 10 W.W.R. 1105.

Lease by wife—Boarding-house.

Women keeping boarding houses are not public merchants. A married woman common as to property cannot enter into a personal obligation by leasing a building for a boarding-house even when her husband is absent, but she can be expelled from the premises that she occupies under the lease.

Biron v. Laprade, 51 Que. S.C. 462.

Sale — Transfer — Evidence — Foreclosure — C.C. arts. 770, 1265, 1483 —C.C.P. art. 207.

The prohibition of sales between husband and wife laid down by art. 1483 C.C. is strict law and should not be extended from one case to another. The onus is on him against whom a transfer of a debt is pleaded to prove that this act has been done between husband and wife, if he desires to ask that it be set aside. Every procedure made by a party who has been duly foreclosed, should be accompanied by the consent of the adverse party in order to be received by the prothonotary.

Arthur v. Baillargeon, 55 Que. S.C. 360.

Married Women's Home Protection Act —Caveat—Dower Act.

A caveat filed under the provisions of the Married Women's Home Protection Act, c. 4, 1915, while that Act was in effect, may be maintained until it is disposed of in the manner provided by s. 7 thereof, notwithstanding the repeal of said Act by the Dower Act, c. 14, 1917, at least in a case, where before the Dower Act came into force, the husband entered into an agreement for the sale of the land in question to a third party.

Russell v. Russell, 12 A.L.R. 111, [1917] 3 W.W.R. 549.

PRESUMPTIVE TRUSTS—CONSIDERATION.

A husband is entitled to the help and assistance of his wife, and the profits of a business carried on by them jointly, accrue to the husband solely. Where a husband deeds property to his wife without consideration, no presumption of trust arises, but the presumption is that a gift is intended. Down to the passing of 6 Geo. V., c. 29, the common-law rights of a husband in his wife's real estate were unaffected as regards property received by her from him.

Garnett v. Garnett, 45 N.B.R. 466.

SEPARATION OF PROPERTY — GIFT — USUFRUCT — HEIR — CREDITOR — REGISTRATION — HYPOTHEC.

One who, in a marriage contract, makes his wife a gift of $1,000, reserving to himself the usufruct during his life, is entitled, at his wife's death, to claim from her heir a separation of the property, and to register a notice against a property belonging to her estate, in order to secure his privilege against creditors of the heir. The fact that the donor might have sued his wife's heir to recover 1 year's interest on the said $1,000 has not given rise to novation, or made him lose the benefit of the separation of the assets, or rendered void the hypothecary registration.

Roi v. Pelodeau, 53 Que. S.C. 97.

JUDICIAL ABANDONMENT OF GOODS—AUTHORIZATION.

When the refusal of a husband to authorize his wife to make a judicial abandonment of property is not without good grounds marital authority should be respected.

Paltiel v. Paltiel, 54 Que. S.C. 517.

REAL PROPERTY — PAYMENT — AUTHORIZATION OF HUSBAND.

When a contract is in writing, the demand for payment, in execution of the contract, must also be in writing. A demand of payment made by an advocate's letter is not sufficient. A married woman cannot renounce her rights to real property, and give real property in payment without the authority of her husband.

Dufresne v. Antonacci, 53 Que. S.C. 36.

GRAIN AND OTHER CHATTELS SEIZED ON WIFE'S FARM UNDER EXECUTION AGAINST HUSBAND — CLAIM BY WIFE — INTERPLEADER ISSUE — EVIDENCE — FINDING OF TRIAL JUDGE IN FAVOUR OF WIFE AS TO GRAIN GROWN ON FARM — FINDING IN FAVOUR OF EXECUTION CREDITOR AS TO OTHER CHATTELS — REVERSAL ON APPEAL.

Robinson v. Robinson, 15 O.W.N. 285, reversing 14 O.W.N. 199.

TRANSACTIONS BETWEEN — LAND PURCHASED IN NAME OF WIFE — ACTION BY JUDGMENT CREDITOR OF HUSBAND TO ESTABLISH TRUST.

Macdonell v. Thompson, 5 O.W.N. 654.

HOUSE AND LAND PURCHASED BY HUSBAND —ACTION BY WIFE TO ESTABLISH CO-OWNERSHIP — EVIDENCE — CONTRIBUTIONS TO PURCHASE PRICE — SEPARATE EARNINGS — GIFT — PAYMENT OF TAXES—POSSESSION.

Kaakee v. Kaakee, 7 O.W.N. 648.

CLAIM OF EXECUTRICES OF DECEASED WIFE TO INTEREST IN PROPERTY OF HUSBAND — EVIDENCE — FAILURE TO ESTABLISH PARTNERSHIP OR TRUST — CLAIM FOR MONEY LENT — DISMISSAL OF ACTION — COSTS.

Faye v. Roundgous, 42 O.L.R. 435.

(§ II A—52)— JOINT BANK DEPOSIT.

Where a deposit in a bank, upon the refusal of the bank to pay the wife of the depositor the interest earned thereon when the husband was prevented by illness from going himself to the bank, was at the suggestion of the bank officers and with the consent of the husband, placed in the joint names of himself and wife to be withdrawable by either of them or the survivor of them, as a matter of convenience for obtaining money for household expenses, the wife upon the death of the husband who made a testamentary disposition of all his property did not become vested with the title to such deposit.

Van Wart v. Synod of Fredericton, 5 D.L.R. 776, 42 N.B.R. 1.

C. COMMUNITY PROPERTY.

(§ II C—65) — CONTINUATION — INVENTORY—INSOLVENCY.

A husband's failure to make inventory of community property, which has been in a state of insolvency at the time of the wife's death, does not, by virtue of arts. 1223, etc., have the effect of causing a continuation of the community. [King v. McHendry, 30 Can. S.C.R. 450, followed.]

Laroche v. Laroche, 28 D.L.R. 709, 52 Can. S.C.R. 662, affirming 24 D.L.R. 909, 24 Que. K.B. 138.

SEPARATION FROM BED AND BOARD — COMMUNITY PROPERTY — MORTGAGE OF — FRAUD—CONTESTATION.

Lafontaine v. Guindon, 25 D.L.R. 858, 48 Que. S.C. 332.

RIGHT OF ACTION.

By Quebec law, a wife common as to property has no right of action against her husband to recover a debt due by him to her as long as the community exists.

Reid v. Pinault, 39 D.L.R. 152, 53 Que. S.C. 156, 24 Rev. de Jur. 59.

COMMUNITY PROPERTY.

A universal donation by the husband alone of the property of the community which puts in jeopardy the matrimonial rights and advantages of his wife gives to the latter a right to demand for séparation de biens.

Boldue v. Bouchard, 21 Que. K.B. 6.

As a matter of form there is nothing to prevent a married woman, even if in community as to property with her husband,

from taking judicial proceedings with his authority. It is by demurrer (exception de fond) and not by exception to the form that the defendant should object that the claim set up by the plaintiff belongs to the community. Notice must be given to the adverse party of the deposit made when an exception to the form is filed. If such notice is given after the expiration of the delay for filing the exception it is too late.

Bellefeuille v. Billard, 13 Que. P.R. 331.

RIGHT TO SELL.

A married woman in community of property with her husband cannot, even authorized by a judge, sell the usufruct of an immovable, which usufruct belongs to the community.

Durnin v. Heney, 51 Que. S.C. 515.

ENFORCING RIGHTS AGAINST HEIRS.

A wife common as to property, who has the right to claim her half of the community in properties which are in possession of her husband's heirs, cannot bring against them an action for debt; her recourse is to enforce her right as heir.

O'Meara v. O'Meara, 49 Que. S.C. 334.

DOMICILE—LEASE.

A lease signed at Montreal by a married woman, who as well as her husband is then residing in that place, it is presumed until the contrary is proved, that the domicile at the time of their marriage was in the Province of Quebec, and that, therefore, the wife who signed the lease was common as to property and under the control of her husband when she signed it.

Bolté v. Brière, 49 Que. S.C. 229.

JUDGMENT AGAINST WIFE — SEIZURE OF PROPERTY OF COMMUNITY — PROCEEDS OF ILLEGAL SALE.

Dorval v. Morin, 39 Que. S.C. 494.

(§ II C—68) — DONATION TO MARRIED DAUGHTER — ACCEPTANCE — COMMUNITY AS TO PROPERTY — NO AUTHORIZATION BY HUSBAND — FAILURE OF INTENDED GIFT — ARTS. 177, 183, 776, C.C. QUE.

The appellant, by deed of cession for good and valuable consideration, gave a sum of money to his daughter, the respondent's wife, common as to property, and she accepted without the authorization of her husband. Some years later the appellant brought an action to set aside the deed as null and void. The court held that the donation required acceptance by the wife on her own behalf in the form prescribed by art. 776 C.C. (Que.) given with the authorization of her husband, evidenced either by his execution of the deed itself or otherwise in writing (art. 177 C.C. (Que.) and that for lack of such authorization the intended gift failed under art. 183 C.C. (Que.).

Pesant v. Robin, 46 D.L.R. 369, 58 Can. S.C.R. 96, reversing 27 Que. K.B. 88.

INTERDICTED HUSBAND — CONVEYANCE BY WIFE—AUTHORIZATION.

A notarial deed by which a wife transfers to one of her children all the rights in the community as to property existing between her and her interdicted husband of whom she is the curatrix, as well as her future and eventual rights in an immovable belonging to her husband in case of his death, is void, and the wife, either personally or as curatrix of her husband, can demand that it be annulled. This nullity proceeds from three causes: (a) The deed is prohibited by the statute which forbids alienation of eventual rights in the succession of a living man unless provided by marriage contract; (b) as curatrix of her husband, or personally, the wife, being subject to her husband's control, cannot execute a deed of alienation without the authority of her husband, or, failing that, the authority of a judge.

Dunn v. Wheatley, 48 Que. S.C. 245.

SEIZURE BY CREDITORS — OPPOSITION AFIN DE DISTRAIRE.

When lots of land belonging to community property between consorts are seized by a creditor, and an opposition is made by one of the heirs of the deceased wife, setting up his undivided rights and "that he intends to take proceedings in partition and licitation," this opposant has a right to demand a suspension of the seizure until after the partition and licitation of the said immovables. It is immaterial that the opposant has only a bare title in the lots seized.

Martel v. Vigneault, 47 Que. S.C. 53.

D. WIFE'S SEPARATE ESTATE OR BUSINESS.

(§ II D—70) — TITLE TO ANIMALS ACQUIRED BY HUSBAND MANAGING WIFE'S PROPERTY — EXECUTION AGAINST HUSBAND — MARRIED WOMEN'S PROPERTY ACT, R.S.S. 1909, c. 45.

Minaker v. Hadden, 37 D.L.R. 795, [1917] 3 W.W.R. 774.

POWER TO SELL—AUTHORIZATION OF JUDGE.

The authorization of a judge, under art. 181 C.C. (Que.) to a married woman, to sell her immovable property, given in general terms, without mentioning the price of the sale and the name of the buyer, is illegal, and gives no power to her to dispose of her real property.

Durnin v. Heney, 51 Que. S.C. 515.

NOTE — WANT OF AUTHORIZATION—NULLITY.

A married woman, separate as to goods, who gives a note for part of the price of property, does not do an act of administration; and if she is not authorized to sign this bill, it is void. It would be otherwise if the husband had authorized the purchase of the property for a sum which would cover the note.

Beaulieu v. Pearson, 54 Que. S.C. 361.

ANIMALS BOUGHT BY HUSBAND FOR WIFE WITH WIFE'S MONEY — PURCHASE MADE IN SASKATCHEWAN — ANIMALS AFTERWARDS BROUGHT TO ALBERTA AND BRANDED WITH WIFE'S BRAND — BILLS OF SALES ORDINANCE, C.O., c. 43 — APPLICATION OF — WHETHER TRANSACTION BONA FIDE.

Live stock branded with the registered brand of the plaintiff was seized under executions against the plaintiff's husband. The stock, except such as was obtained by increase or exchange, was bought for the plaintiff by the husband in Saskatchewan with money which had been given, either as a gift or in payment of a debt, by the husband to the plaintiff, and the stock was afterwards brought to Alberta. In an interpleader issue between the wife and execution creditors of the husband. Held, that the Bills of Sales Ordinance, C.O., c. 43, did not apply and that, there being no evidence that such investment by the husband of the wife's money was not bona fide, the issue should be decided in favour of the plaintiff.

Herr v. Craigmyle Trading Co., 14 A.L.R. 331, [1919] 1 W.W.R. 679, reversing Denison D.C.J.

HOUSEHOLD GOODS PURCHASED BY WIFE OUT OF SAVINGS FROM MONEYS PAID TO HER BY HUSBAND AS HOUSEKEEPING ALLOWANCE — MARRIED WOMEN'S PROPERTY ACT, R.S.O. 1914, c. 149 — SEPARATE PROPERTY OF WIFE — CHATTEL MORTGAGE MADE BY HUSBAND.

Conway v. St. Louis, 12 O.W.N. 264. [Affirmed, 13 O.W.N. 45.]

(§ II D—71)—WIFE'S BUSINESS MANAGED BY HUSBAND — HUSBAND'S CREDITORS — TRUST.

Where a wife, with her own money, purchases a drug business and employs her husband at a nominal salary as manager to carry on the business in her name, the profits of the business are hers, and cannot be reached under a personal judgment against the husband, even though the drugs sold were labelled with the husband's name. The transaction discloses no fraudulent design to defeat the husband's creditors. With regard, however, to shares in a wholesale drug business purchased by the husband with his own money, and standing in the wife's name, she is merely a trustee for the husband, and the shares and profits upon the shares are liable for satisfaction of a judgment debt against the husband.

Walker v. Brown, 30 D.L.R. 204, 36 O.L.R. 287.

(§ II D—72)—RIGHTS OF HUSBAND AS TO.

There is no obligation on a wife to pay her husband any salary for his services given by him in relation to her separate business as a contracting carpenter for which there was no agreement to pay, and no execution proceedings can issue at the instance of a judgment creditor to seize any salary or wages purporting to be due by the wife of the judgment debtor to him under such circumstances.

Pion v. Fortier, 6 D.L.R. 136, 14 Que. P.R. 74, 42 Que. S.C. 407.

SEPARATE ESTATE — INCOME EXPENDED FOR JOINT BENEFIT — HUSBAND'S LIABILITY.

Where income of the wife's separate estate came to the hands of the husband and was expended for their joint purposes and advantages, the onus is upon the wife to shew by conclusive evidence that such income was dealt with by way of loan or under circumstances requiring him to repay.

Ellis v. Ellis, 12 D.L.R. 219, 24 O.W.R. 846, 4 O.W.N. 1461. [Affirmed 15 D.L.R. 109, 5 O.W.N. 561.]

MARRIED WOMAN CARRYING ON SEPARATE BUSINESS — LIABILITY OF HUSBAND — CERTIFICATE REQUIRED — MARRIED WOMEN'S PROPERTY ACT.

When a married woman carries on or proposes to carry on business as a trader, separately from her husband the husband is liable on all contracts made by her so long as the certificate required by s. 18 (1) of the Married Women's Property Act (R.S.N.S. 1900, c. 112), is not filed, but is not liable on contracts made by her after such certificate has been filed. [Browning v. Carson, 163 Mass. 255, followed.]

Brock v. Allen, 44 D.L.R. 463, 52 N.S.R. 403.

WIFE'S SEPARATE ESTATE — INTERMIXING WITH HUSBAND'S PROPERTY.

Where a testator during his lifetime has had the handling of his wife's estate as well as his own and the two estates have to some extent been mixed, the moneys of the wife being transferred into his name or their joint names, the husband is presumed to be a trustee for the wife, at least with respect to the corpus, though the presumption of a gift is raised with reference to the income unless a contrary intention is proved.

Bartlett v. Bull, 16 D.L.R. 82, 5 W.W.R. 1207, 26 W.L.R. 831.

(§ II D—73)—LOAN OF, TO HUSBAND.

Leave to adduce further evidence as to the circumstances under which a married woman executed a mortgage upon her separate property to secure a debt of her husband so as to shew that she acted without independent advice, was properly denied where it appeared that the money secured by such mortgage was applied largely to building a number of houses upon the wife's property, and that she had knowledge as to the condition of such indebtedness, and that, on account of the husband's ill-health, she took an unusually active part in looking after his business while the account secured by such mortgage was current. [Stuart v. Bank of Montreal, 41 Can. S.C.R. 516, and Bank of Montreal v. Stuart, [1911] A.C. 120, distinguished.]

Union Bank v. Crate, 3 D.L.R. 686, 3 O.W.N. 1018, 21 O.W.R. 871.

LOANS—HUSBAND'S AUTHORITY.

A married woman separate as to property can, without authorization from her husband, lend money and be repaid from the proceeds of the sale of a restaurant.

Chevalier v. Montreal, 50 Que. S.C. 418.

(§ II D—74) — LIABILITY FOR HUSBAND'S DEBT.

Where there is no contradiction of the defendant's evidence that shares of stock which were transferred to her by her husband after a judgment had been rendered against him, were purchased by the latter in his own name with the proceeds of lands owned by her, in an action against her by the judgment creditor to set aside such transfer, an interlocutory injunction restraining the disposal of such shares will be denied.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

PARTNERSHIP—PAROL EVIDENCE.

Pulos v. Lazanis, 49 D.L.R. 697, affirming 24 Rev. Leg. 482.

SEIZURE OF WIFE'S PROPERTY FOR HUSBAND'S DEBTS—FURNITURE.

Furniture purchased by a wife separated as to property with a sum of money which had been given to her by her father-in-law as a wedding gift, like those bought by her with her savings as mistress of the house from a moderate sum that her husband gave her each week for the maintenance of the household and payment of the rent, belongs to the wife and cannot be seized by the creditors of the husband. The payment of this sum each week by the husband to his wife for the necessary household expenses cannot be regarded as one of the advantages forbidden between consorts.

Goulet v. Gratton, 47 Que. S.C. 465.

SEPARATE BUSINESS CARRIED ON BY WIFE—INSOLVENCY — UNREGISTERED BILL OF SALE OF STOCK MADE BY HUSBAND — SALE OF STOCK BY MORTGAGEE — FRAUD ON CREDITORS.

Bentley v. Morrison, 9 E.L.R. 135, affirming 8 E.L.R. 456.

GRAIN AND OTHER CHATTELS SEIZED ON WIFE'S FARM UNDER EXECUTION AGAINST HUSBAND — CLAIM BY WIFE — INTERPLEADER ISSUE — EVIDENCE — FINDING OF TRIAL JUDGE IN FAVOUR OF WIFE AS TO GRAIN GROWN ON FARM — FINDING IN FAVOUR OF EXECUTION CREDITOR AS TO OTHER CHATTELS — REVERSAL ON APPEAL.

Robinson v. Robinson, 15 O.W.N. 285.

CROP GROWN ON LAND OF A MARRIED WOMAN — SEIZURE FOR DEBTS OF HUSBAND — FRAUD.

Karst v. Cook, 3 S.L.R. 406, 15 W.L.R. 679.

(§ II D—76)—LIABILITY FOR WIFE'S DEBT.

Under art. 1301 C.C. (Que.), as amended 1904, in order to be able to recover upon a security given by a wife upon her separate estate a creditor must have contracted in good faith and such good faith can only exist in case the amount of the loan is paid directly to the wife and the lender has no suspicion that the money will be used for the benefit of any one but the wife; if these two conditions exist then the lender is not obliged to verify the use made by the wife of the money loaned to her.

Lebel v. Bradin, 7 D.L.R. 470, 19 Rev. Leg. 16.

MARRIAGE LAW OF RHODE ISLAND — RENTING ROOMS — COMMERCIAL ACT — WIFE'S ADMINISTRATION — QUE. C.P. 174—QUE. C.C. 1318.

According to the laws of Rhode Island, the husband and wife are separated as to property, unless contrary ante-nuptial conditions have been stipulated. If a woman separated as to property is engaged in renting rooms, she carries on a trade. Moreover, if she rents a house to occupy it with her children she then does only an act of administration, and she is responsible.

Lechance v. Lebeouf, 16 Que. P.R. 37.

E. CONTRACTS WITH OR CONVEYANCES TO EACH OTHER.

Bona fides of transactions, Corroboration, see Fraudulent Conveyances, VI—30.

(§ II E—80)—CONTRACTS WITH OR CONVEYANCES TO EACH OTHER.

Where a marriage contract provides that the community property of the proposed husband and wife shall during the marriage be used for their joint benefit, and that upon the death of either, the use and benefit shall go to the survivor for life, and that after the survivor's death the property goes in moieties to the two families of the proposed husband and wife; such a marriage contract creates a substitution in moieties in favour of the heirs of the two families of the contracting parties as to the community property. Where a marriage contract creates a substitution, as to the community property of the proposed husband and wife, under which such property goes to the heirs of the two families of the husband and wife, upon the death of the survivor of them, such substitution prevents either the husband or wife from disposing of any of such property by will in derogation of the rights of the heirs of the two families, and any such testamentary disposition will be declared null and void.

Houde v. Marchand, 8 D.L.R. 431.

SEPARATION AGREEMENT—WORDS RELEASING HUSBAND FROM LIABILITY—CONSTRUCTION.

In construing a separation agreement between husband and wife, there is no justification for treating the words, releasing the husband from all claims of the wife, as meaning anything different from what the language indicates, unless it can be gathered from the evidence of the expressed intention of the parties, or of their conduct or of the circumstances that a special

meaning different from the ordinary meaning was intended.

Wineland v. Audett, 45 D.L.R. 406, 14 A.L.R. 314, [1919] 1 W.W.R. 665.

PROHIBITED ADVANTAGES — SECURITY FOR HUSBAND—COMMUNITY.

The transfer by a married woman as collateral security of a debt she has against her insolvent husband, to a creditor of the latter, in order to obtain his consent to a deed of compromise, is not an advantage prohibited between consorts by art. 1265 C. C. (Que.) but falls within art. 1301 C.C. (Que.) by the terms of which the wife can only obligate herself, with or for her husband, in her capacity as a member of the community, and is in consequence void and of no effect.

Joubert v. Turcotte, 51 Que. S.C. 152.

A sale or benefit between consorts is not radically null; those whose rights are or can be affected alone are allowed to set up this nullity. In the case of the donation of a debt by the husband to his wife the debtor cannot set up this nullity as a ground for refusing payment.

Nadeau v. Prevost, 52 Que. S.C. 387.

GIFT BY HUSBAND TO WIFE DURING COVERTURE—ANTENUPTIAL GIFT—EVIDENCE—INTENTION—WORDS OF GIFT—ACTUAL DELIVERY—MARRIED WOMEN'S PROPERTY ACT.

Elliott v. Elliott, 15 O.W.N. 218.

SEPARATION DEED—COVENANT BY WIFE—MORTGAGE.

A covenant in a separation deed whereby the wife covenanted to indemnify the husband against all debts and liabilities contracted by her held not to cover a covenant in a mortgage made by him, notwithstanding the facts that he had conveyed the mortgaged land to her and she had, subsequently to the execution of the separation deed, covenanted with the mortgagee to pay him principal and interest.

Walker v. Lees, 25 B.C.R. 511, [1918] 3 W.W.R. 586.

EASEMENT—RIGHT-OF-WAY—BENEFITS.

The owner of real property cannot establish on his property a servitude of right-of-way in favour of an adjoining lot belonging to his wife, since art. 1265 C.C. (Que.) prevents a husband and wife conferring benefits inter vivos upon each other.

Desautels v. Laramée, 53 Que. S.C. 519.

CONTRACTS WITH OR CONVEYANCES TO EACH OTHER.

A husband may validly lend his wife, who is separate from him as to property, the purchase price of an immovable that is sold to her, and he, thereby, becomes her creditor for the amount. His heirs, if he dies, or his creditors, if he becomes insolvent, have no other action arising from the transaction, but a personal one to recover the money lent.

Saint-Armour v. Lalonde, 44 Que. S.C. 39.

LANDS BOUGHT BY HUSBAND AND CONVEYED TO WIFE—PRESUMPTION OF GIFT—EVIDENCE TO REBUT—ACTION FOR DECLARATION OF TRUST.

Slater v. Slater, 13 O.W.N. 429.

LAND VESTED IN WIFE—ORAL AGREEMENT BETWEEN HUSBAND AND WIFE—EVIDENCE—CORROBORATION—STATUTE OF FRAUDS, R.S.O. 1914, c. 102, s. 10—TRUST—JOINT TENANCY—SURVIVORSHIP—ACTION BY HUSBAND AFTER DECEASE OF WIFE—DECLARATORY JUDGMENT—PARTIES—COSTS.

Fulton v. Mercantile Trust Co., 12 O.W.N. 139.

GIFT OF FURNITURE IN HOUSE BY HUSBAND TO WIFE—DEVISE OF HOUSE TO WIFE FOR LIFE—BEQUEST OF PERSONAL PROPERTY TO SON—FAILURE TO PROVE GIFT OF CHATTELS—EVIDENCE—INTENTION.

Kingsmill v. Kingsmill, 41 O.L.R. 238.

CONVEYANCE OF LAND BY HUSBAND TO WIFE—RIGHT OF WIFE TO CONVEY WITHOUT ASSENT OF HUSBAND—TENANCY BY CURTESY—INCHOATE RIGHT—MARRIED WOMEN'S PROPERTY ACT, ss. 4 (1), 6 (3).

Re Budd & Tripp, 16 O.W.N. 68.

CONTRACT BETWEEN—ASSIGNMENT BY WIFE TO HUSBAND OF BENEFICIAL INTEREST IN POLICIES OF INSURANCE ON LIFE OF HUSBAND — CONSIDERATION — PROMISE TO MAKE WILL IN CERTAIN WAY—WILL MADE BUT REVOKED—DEATH OF HUSBAND LEAVING WILL DISPOSING OF ESTATE OTHERWISE THAN AS AGREED—ACTION BY WIFE AGAINST EXECUTORS—RIGHT TO PROCEEDS OF INSURANCE POLICIES—JOINT POLICY ON LIVES OF SPOUSES—DOWER—ELECTION.

O'Connor v. Fitzgerald, 16 O.W.N. 171.

PURCHASE BY HUSBAND IN WIFE'S NAME—REAL ESTATE—ORAL AGREEMENT FOR LIFE LEASE.

Nelson v. Nelson, 2 O.W.N. 1043, 19 O.W.R. 225.

MORTGAGE OF WIFE'S LAND—ALLEGED BENEFIT OF HUSBAND—ABSENCE OF INDEPENDENT ADVICE.

Smith v. Doll, 3 A.L.R. 383, 16 W.L.R. 471.

SALE OF GOODS TO HUSBAND—CONDITIONAL SALE—CONTRACT—REPOSSESSION BY VENDORS IN DEFAULT OF PAYMENT—WIFE JOINING IN MORTGAGE AS SECURITY FOR PRICE.

Reeves & Co. v. Friel, 18 W.L.R. 539.

LAND PURCHASED BY HUSBAND CONVEYED TO WIFE—MORTGAGE BY WIFE TO PAY DEBT OF HUSBAND—LACK OF INDEPENDENT ADVICE.

Great West Permanent Loan Co. v. Badenoch, 18 W.L.R. 1.

LAND PURCHASED BY HUSBAND IN NAME OF WIFE—JUDGMENT RECOVERED AGAINST HUSBAND.

Toronto General Trusts Corp. v. Estlin, 18 W.L.R. 11.

MARRIAGE SETTLEMENT — CONSTRUCTION — GIVEN ITS LITERAL MEANING—"HEIRS." [Lozier v. Robertson, 27 A.R. (Ont.) 117, distinguished.]

Re Cummer Marriage Settlement, 2 O.W.N. 1486, 19 O.W.R. 882.

DEED BY HUSBAND TO WIFE — VOLUNTARY SETTLEMENT — NOT FRAUDULENT AND VOID AS AGAINST CREDITORS—13 ELIZ.

Ottawa Wine Vaults Co. v. McGuire, 3 O.W.N. 143, 18 O.W.R. 159.

AGREEMENT AS TO LANDS—ACTION TO RECOVER AN UNDIVIDED HALF INTEREST IN CERTAIN LAND—STATUTE OF FRAUDS.

Burrows v. Burrows, 20 O.W.R. 63.

WIFE PLEDGING SEPARATE PROPERTY FOR HUSBAND'S DEBT—INDEPENDENT ADVICE —UNDUE INFLUENCE.

Bank of Montreal v. Stuart, [1911] A.C. 120, 27 T.L.R. 117.

AGREEMENT BY HUSBAND TO CONVEY WIFE'S LAND—CONVEYANCE BY HIM, WIFE BARRING DOWER—MISTAKE.

Lacroix v. Longtin, 22 O.L.R. 596.

(§ II E—81) — SEPARATE ESTATE — TRUST OF CORPUS IN HUSBAND'S POSSESSION— GIFT.

The husband claiming that there has been a gift from his wife to himself of any of the corpus of the wife's separate estate must make out the gift by clear and conclusive evidence, or he will be held to be still a trustee for his wife of any of such corpus of which he has obtained possession.

Ellis v. Ellis, 15 D.L.R. 100, 5 O.W.N. 561, 25 O.W.R. 539, affirming 12 D.L.R. 219, 4 O.W.N. 1461.

MARRIAGE CONTRACT—SEPARATE ESTATES.

Where in a marriage contract the future consorts have stipulated that there should be no community of property between them and that the wife should have the free and absolute administration of her property, without any authorization being necessary, there is separation as to property.

Duclos v. Dagenais, 50 Que. S.C. 333.

(§ II E—82)—CONVEYANCES OF WIFE'S SEPARATE ESTATE.

A married woman may effectually pay a debt owing to by her husband. She can, therefore, transfer to him a promissory note made payable to her in order that he may set it off in compensation of a claim for which he is sued by the maker.

Bastien v. David, 14 Que. P.R. 253.

(§ II E—83)—CONVEYANCE BY HUSBAND TO WIFE—TRUST FOR SURVIVORSHIP—STATUTE OF FRAUDS.

The Statute of Frauds affords no defence to an action by the husband against the personal representative of his deceased wife to enforce an agreement made between the husband and wife that the survivor of them should become the owner of certain lands on his conveyance of same to her, where the wife on her part had at the same time made her will in his favour for the purpose of carrying out such agreement; such agreement is enforceable as against a later will made by the wife in contravention of the agreement.

Breitenstein v. Munson, 16 D.L.R. 458; 6 W.W.R. 188, 27 W.L.R. 303, 19 B.C.R. 495.

PURCHASE IN WIFE'S NAME—INTENTION— ONUS OF PROOF — ACCOUNTING — EVIDENCE—ADMISSIBILITY OF LETTER.

Where land purchased by a husband as a home for himself and wife was by his direction conveyed to her and a house was built thereon with his money, but the facts and surrounding circumstances established an intention that it was to be held by her for him, it was held that there was a resulting trust in the husband's favour. Where, in such a case the wife claims that the money with which the property in question was purchased, and the house built, was her money, the burden of proof to the contrary is upon the husband. A letter to the wife from her mother, since deceased, is not, without more, admissible in proof of the wife's claim. An accounting and payment ordered of the moneys in the wife's possession belonging to the husband.

Palmer v. Palmer, 42 N.B.R. 23.

The gift of $500, in the form of a cheque, made 13 days before his death, by a husband to his wife, separate as to property, is a benefit prohibited between husband and wife and is of no effect; such an amount so given cannot be considered as a manual gift.

Courville v. Paquette, 50 Que. S.C. 94.

PROHIBITED GIFTS—MAINTENANCE.

Sums of money given monthly by a husband to his wife separated as to property, for the support of herself and the family, constitute payment of marital expenses and are not a donation prohibited between consorts.

Jodoin v. Thériault, 50 Que. S.C. 347.

PRESUMPTION OF GIFT.

Property purchased or investments made by a husband in his wife's name, a gift to the wife is thereby presumed; the presumption is not rebutted by the uncorroborated evidence of the husband.

Bachand v. Bachand, 9 W.W.R. 1184, 33 W.L.R. 743.

MONEY PAID BY WIFE TO HUSBAND—ACTION TO RECOVER AS MONEY LENT—PLEADINGS—DECLARATION OF RIGHT TO PAYMENT OUT OF PROCEEDS OF SALE OF LAND.

Biggar v. Biggar, 11 O.W.N. 145.

TRANSACTIONS BETWEEN IN REGARD TO LANDS — ACTION BY HUSBAND AGAINST WIFE AND ACTIONS BY WIFE AGAINST HUSBAND — MORTGAGE — LIEN — EVIDENCE—APPEALS—NEW TRIAL—COSTS.

Rosenbes v. Rosenbes, 17 O.W.N. 137.

(§ II E—84)—CONTRACTS AND LIABILITIES INTER SE—MANAGING WIFE'S PROPERTY.

A husband living with his wife on a farm

of which she has the beneficial interest and working the farm to earn a living for them both, is presumed to do so by virtue of the relationship and duties resulting from their marriage and is not entitled to claim wages from his wife in respect of such services on her subsequently leaving the farm and living separate from him.

Towns v. Towns, 10 D.L.R. 448, 23 W.L.R. 958, 4 W.W.R. 196.

F. Conveyances or mortgages to third persons.

(§ II F—90)—Presumption of ownership from possession — Bona fide purchaser.

Plaintiff purchased from a married woman certain furniture and other personal property contained in buildings erected by her husband upon land, the deed of which was taken in the name of the wife. The property in question was claimed by the wife as having been purchased out of her own earnings. In the absence of evidence to shew that the wife ever had any title to the property or any possession of it other than what must be construed to be the possession of the husband. Held, that plaintiff, although a bona fide purchaser for value, could not recover as against an attaching creditor of the husband.

Nicholls v. McNeil, 50 N.S.R. 67. [Affirmed, 39 D.L.R. 763, 55 Can. S.C.R. 632.]

Property rights — Conveyances by — Agreement for exchange of lands — Validity of — Married women — Professional advice — Approval of husband — Evidence — Findings of Trial Judge—Appeal — Misrepresentations — Evidence — Pleading — Amendment—New trial.

Waurhope v. Hobbs, 7 O.W.N. 294.

Promissory note signed by wife at request of husband—Absence of independent advice — Failure to shew misrepresentation or misconduct of pressure or undue influence—Mortgage—Validity.

Bank of Ottawa v. Martin, 10 O.W.N. 157.

Conveyance of land by husband to wife—Presumption of gift—No evidence to rebut—Failure to shew agreement to hold in trust—Discharge of mortgage upon promise to execute new mortgage—Equitable mortgage—Statute of Frauds—Performance of contract on one side—Interest—Charge on land—Costs.

Peel v. Peel, 15 O.W.N. 297.

(§ II F—95) — Conveyance of real estate by married woman—Effect of devise free from control of husband.

Only on the termination of coverture may a married woman alienate her real estate acquired by a devise of it, although expressed to be free from the interference, control or management of her husband, if it be also expressed to be for her maintenance and support with a direction against any alienation or mortgage thereof.

Re Harrison, 12 D.L.R. 60, 4 O.W.N. 1455, 24 O.W.R. 824.

(§ II F—96)—Wife's contract to purchase property—Husband's consent.

Hines v. Park Realty Co., 10 D.L.R. 840.

Loan to wife separated as to property—Presumption of purpose of loan.

The amendment to art. 1301, C.C. (Que.) made by c. 42 of 4 Edw. VII. (Que.) gives rise to the presumption that a loan made to a woman separated as to property, although authorized by her husband, was for her own use. Consequently, if she pleads the nullity of her obligation, for violation of the said article, it is on her that the burden must rest of proving that the loan was for the use of her husband, and that the lender knew this. [Societe de Construction des Artisans & Lemieux, 15 Q.L.R. 35, followed.]

Leclerc v. Bedard, 45 Que. S.C. 129.

(§ II F—99)—Wife's mortgage to bank—Husband's debt—Consideration—Pressure—Acknowledgment by telephone.

Simmons v. Royal Bank, 27 D.L.R. 723, 22 B.C.R. 369, 33 W.L.R. 363.

Mortgage of wife's separate property—Consideration—Husband's benefit.

A mortgage given by the wife to secure her husband's debt may be supported as to consideration by the extension of time and further credit given to the husband by the mortgagee or the creditors whom he represents.

Doll v. King, 10 D.L.R. 518, 24 W.L.R. 476.

Mortgage by wife to secure loan to husband—Lack of independent advice—Undue influence — Application of payments in discharge of mortgages.

Royal Trust Co. v. Lloyd, 25 D.L.R. 802, 9 W.W.R. 122, 32 W.L.R. 354.

G. Trusts.

(§ II G—100)—Conveyances between—Trust—Delivery of deed—Registration.

Anning v. Anning, 31 D.L.R. 193, 38 O.L.R. 277, affirming 10 O.W.N. 415.

H. Partnership.

(§ II H—105)—Business carried on by husband—Execution creditors.

Where a business has been begun and carried on by a husband in his own name on capital supplied by his wife, there being no agreement as to shares, the exertions of both helping to increase and make the business profitable, the husband has a proprietary interest in such business and he and his wife are partners in equal shares: the husband's interest is liable to satisfy his execution creditors.

Reid v. Morwick, 42 D.L.R. 244, 42 O.L.R. 224.

DEED—PAROL EVIDENCE—RIGHTS OF CREDITORS.

A notarial deed of partnership cannot be contradicted by parol evidence in an action by a creditor to shew that a married woman is only nominally a partner in the interest of her husband. A husband may represent his wife in her trade, without being considered as carrying the trade himself or in partnership with his wife; his creditors cannot, for such reason, seize the wife's assets under the pretence that she is only lending her name.

Kladis v. Pulos, 24 Rev. Leg. 482. Motion to quash dismissed, 44 D.L.R. 523, 57 Can. S.C.R. 337.

MERCANTILE BUSINESS.

When a husband and wife, separate as to goods, have together a mercantile establishment without special agreements, it forms between them a partnership in which each has an equal share, even though a third of the business should be considered as that of the wife. It is usually customary, in actions between husband and wife, for each party to pay their own costs, unless, for special reasons, the court decides otherwise.

Guertin v. Brunet, 27 Que. K.B. 123, 24 Rev. de Jur. 2.

I. ANTENUPTIAL CONTRACT.

(§ II I—110)—PROPOSED MARRIAGE—REPRESENTATIONS MADE BY HUSBAND'S FATHER AS TO PROPERTY—MARRIAGE—DEATH OF HUSBAND—REPRESENTATIONS NOT CARRIED OUT.

Representations made by the father as to the state of property of his son who is about to contract marriage, upon the faith of which such marriage is subsequently contracted must be carried out by the person who made them. [Montefiori v. Montefiori, 1 Wm. Bl. 363; Jordan v. Money, 5 H.L. Cas. 185, followed.]

Heichman v. National Trust Co., 50 D.L.R. 401, [1920] 1 W.W.R. 220.

DONATION CAUSA MORTIS—FUTURE PROPERTY—THIRD PARTY—NULLITY.

A donation in a marriage contract, by which the husband gives to his wife a third of the assets which he may possess in full ownership at the death of the first of the two consorts, to her and to her legal or testamentary estate, is a donation of future assets and "causa mortis." Such a donation is, as such, and seeing that it is made by one of the consorts to third parties, in contravention of art. 820 C.C. (Que.), void as to those parties. The words "legal or testamentary estate" contained in that donation can legally apply only to the children of said consorts and not to collateral heirs of the wife, who, as far as the donator is concerned, should be considered as third parties. Such donation becomes void by the wife predeceasing without leaving any children.

Marceau v. Tassé, 53 Que. S.C. 425.

GIFT BY MARRIAGE CONTRACT — ENFORCEMENT.

A donation inter vivos by a husband to his wife, in their marriage contract "d'une somme de $1,000, qu'il s'oblige de lui payer à demande," constitutes a claim which may be the basis of a demand of abandonment. Such demand need not be founded upon a commercial claim.

Robitaille v. Fiset, 51 Que. S.C. 248.

MARRIAGE CONTRACT — MUTUAL GIFT OF USUFRUCT — CONDITION CANCELLING — RETURN OF GOODS TO ISSUE—REMARRIAGE.

In a mutual gift, to the survivor, of the usufruct of their goods made by the husband and wife in their marriage contract under the condition of cancellation in the case of remarriage, the clause "the said usufruct being extinct, to return the said goods to the heirs of the said intended spouse of the side or line from which they shall issue," is not an obstacle to a legacy, made by the will of one spouse to the other, of the property of the same goods. The word "heirs" in the clause applies equally to residuary legatees under the will as to legal heirs, and the words, "from the side from which they shall issue," have no force. Consequently, if the husband dies first, after having constituted his wife his residuary legatee, this latter becomes the owner of the goods, and, even if she contracts a second marriage, the legal heirs of the husband are unable to take them from her.

Tasse v. Gover, 45 Que. S.C. 65.

The clause in a marriage contract whereby the parties mutually make donation of the usufruct of their property "to the survivor . . . to enjoy it as a good tenant for life and careful owner . . . in order that the said property . . . may return in good condition to the heirs of the two families after the death of the survivor . . . and this in equal proportions" is a donation, in contemplation of death, of the property of the one dying first to the survivor with substitution to the heirs of the latter. Therefore, the subsequent disposal of the same property by will is void. The heir of a part of the succession has a right of action against the party in possession to have his right to the succession recognized without concluding for a partition and an account. He may also demand payment of the value of his part if the succession is composed of debts, money, securities, or other things essentially divisible in their nature.

Houde v. Marchand, 21 Que. K.B. 184.

COMMUNITY — PROPERTY — MARRIAGE CONTRACT — INTERPRETATION — C.C. ARTS. 1273, 1275, 1305, 1306, 1385, 2251.

In including the following clause in their marriage contract: "The goods of each party will belong to that party his relations and to those on his side of the line," the parties have shown their intention to reserve as their own the property which shall

be acquired in future, except movables and immovables which will be acquired together during their future marriage.

Duhamel v. Hubon, 56 Que. S.C. 445.

MINORITY—MARRIAGE CONTRACT—GUARDIAN — FAMILY COUNCIL — GIFT INTER VIVOS — NULLITY—ORDINARY OBLIGATION OF SUPPORT—C.C., ARTS. 122, 1267.

Dufresne v. Dufresne, 28 Que. K.B. 318.

ANTE-NUPTIAL CONTRACT—GIFT TO WIFE—PAYMENT AT DEATH OF HUSBAND.

Garland v. O'Reilly, 44 Can. S.C.R. 197.

MARRIAGE SETTLEMENT — CONSTRUCTION — POWER OF APPOINTMENT—EXERCISE OF —DEATH OF APPOINTEE—LIFE ESTATE —VESTED REMAINDER—RIGHTS OF REPRESENTATIVE OF DECEASED.

Re Plumb, 8 O.W.N. 284.

(§ II I—112)—"MÉNAGE"—FURNITURE—PIANO.

In a donation by a marriage contract from the husband to the wife of a "ménage" to the value of $400 the word "ménage" comprises the whole of the furniture and other articles necessary or useful for the houshold, but not furniture that is not a necessity, such as a piano.

Blouin v. Cantin, 49 Que. S.C. 154.

(§ II I—113)—BENEFIT OF SURVIVAL—RENUNCIATION.

A marriage contract by which the husband declares that, in the case of his death leaving children living, his wife "will have the enjoyment of all the estate, moveable and immovable, of him the said future consort until the time of her death or until such time as she may contract a second marriage," constitutes a benefit of survivorship which cannot become effective until the death of the donor, and only effects the property of which the husband is possessed at the time of his death. The wife may make a renunciation thereof in favour of a creditor of the husband.

Hope v. Leroux, 25 Que. K.B. 130.

REVOCATION.

The clause in a marriage contract by which "the future husband donates to the future wife a sum of $4,000, one-half of which at his death shall belong to the children born of the marriage and in failure of children, the total of the said sum shall return to the future husband" constitutes a donation in contemplation of death and gives the wife no right of action to recover it during her husband's life.

Martel v. Fignault, 44 Que. S.C. 542, reversing 44 Que. S.C. 68.

(§ II I—114)—MARRIAGE CONTRACT—ENFORCEMENT OF.

Fortier v. Brunet, 20 D.L.R. 979.

J. FRAUD ON MARITAL RIGHTS.

(§ II J—115)—HYPOTHEC—ASSIGNMENT.

The abandonment by the wife of a hypothec, which her husband had agreed to in the marriage contract to secure the payment of a sum donated, constitutes a derogation from their marriage obligations prohibited by art. 1265 C.C. (Que.) on pain of absolute nullity.

Bank of Montreal v. Roy, 26 Que. K.B. 549.

(§ II J—127)—DECLARATION OF VALIDITY OF MARRIAGE — DOWER ACT — "HOMESTEAD"—CAVEAT CLAIMING UNDER DOWER ACT—ORDER CONTINUING CAVEAT—ALIMONY—HUSBAND LEAVING FOR MILITARY SERVICE AND SUBSEQUENT INTENT TO DESERT INFERRED FROM LETTERS AND CONDUCT—DESERTION FOR TWO YEARS AND UPWARDS WITHOUT REASONABLE CAUSE—SOLDIER'S RELIEF ACT—WHEN "LIABILITY" AROSE—COSTS—DATE FROM WHICH GIVEN — INJUNCTION AGAINST DISPOSITION OF LAND AND CHATTELS—DOMICILE—STATEMENT OF CLAIM (UNDEFENDED) ALLEGING DEFENDANT'S ALBERTA DOMICILE BUT DEFENDANT'S LETTERS EXHIBITED ALLEGING HIS REASSUMPTION OF FRENCH DOMICILE.

Ancelle v. Ancelle, [1919] 1 W.W.R. 620.

K. RIGHTS OF HUSBAND'S CREDITORS.

(§ II K—130)—The wife of a debtor may purchase property in her own name and the debtor may assist her in the transaction if he does not thereby withdraw from the reach of his creditors any portion of his estate which should be applied in payment of their claims.

Burns v. Matejka, 1 D.L.R. 837, 4 A.L.R. 58, 19 W.L.R. 863, 1 W.W.R. 431.

RIGHTS OF HUSBAND'S CREDITORS AS TO HIS EARNINGS.

A gift, in a marriage contract, by the husband to the wife, of the furniture actually owned by him, or that he may own at the date of the solemnization of the marriage, or that he may acquire thereafter, the whole to be his property in case of the predecease of the wife, is a gift causa mortis and only takes effect at his death, if she survive him. The goods, therefore, remain his property as long as he lives, and if seized at the suit of his creditors the wife cannot claim them by an opposition. A wife separate as to property cannot claim as her own, nor convert to her own use, money saved by her out of the allowance made her by the husband to meet the cost of housekeeping.

Plamondon v. Larue, 43 Que. S.C. 18.

(§ II K—132)—SEIZURE OF AUTOMOBILE GIVEN TO WIFE—LICENSE IN NAME OF HUSBAND.

An automobile given by a husband to a wife, which remains in the disposition and the license for which is in the name of the husband, can be seized under execution against the husband.

Standard Trusts Co. v. Little, 7 W.W.R. 1285.

CONVEYANCES TO WIFE.

Where a husband mortgagor, without any new consideration, voluntarily transferred to his wife, the mortgagee, the property the subject of the mortgage, at a time when

he is insolvent, and it appeared that he believed the property to be of a higher value than the amount of the mortgage debt:—Held, the conveyance was void as against creditors. Held, further, that the transfer should not be set aside, but that the judgment should be declaratory to the effect that the transfer was void as against creditors, leaving it to the plaintiffs to realize their claim under their execution.

Union Bank v. Johnson, 3 A.L.R. 207.

SEPARATE BUSINESS—LICENSE—CONTINUATION OF NAME UNDER WHICH HUSBAND PREVIOUSLY CARRIED ON BUSINESS—BILL OF SALE—FRAUD.

Bentley v. Morrison, 8 E.L.R. 456.

DIVISION COURTS—JURISDICTION—PERSONAL JUDGMENT AGAINST MARRIED WOMAN BEFORE 1897.

Re Hamilton v. Perry, 24 O.L.R. 38, 19 O.W.R. 370.

PAYMENTS FOR TAXES, ETC.—WIFE'S LANDS — HUSBAND'S VOLUNTARY PAYMENTS WITHOUT THE WIFE'S KNOWLEDGE—LIABILITY OF HUSBAND FOR WIFE'S FUNERAL EXPENSES.

Re Montgomery; Lumbers v. Montgomery, 20 Man. L.R. 444.

WIFE SEPARATE AS TO PROPERTY—AGENCY OF HUSBAND — INTERRUPTION OF PRESCRIPTION.

Granger v. Sicotte, 40 Que. S.C. 247.

MORTGAGE BY WIFE TO SECURE ADVANCE TO HUSBAND — ABSENCE OF INDEPENDENT ADVICE—UNDUE INFLUENCE.

Euclid Avenue Trusts Co. v. Hohs, 24 O.L.R. 447, affirming 23 O.L.R. 377, 18 O. W.R. 787.

MARRIAGE CONTRACT—DONATION—EVIDENCE.

Lusher v. Decary, 39 Que. S.C. 469.

RIGHT OF ACTION BY HUSBAND SEPARATE AS TO PROPERTY FOR INJURY CAUSED TO HIS WIFE.

Caron v. Kleinberg, 39 Que. S.C. 121.

CONFESSION OF JUDGMENT—CONFESSION BY THE WIFE—AUTHORIZATION.

A wife separate as to property may, without her husband's authority, admit, by a confession of judgment, that some property attached in her hands belongs to the plaintiff; she does not thereby alienate any of her property but simply does an act of administration.

Picher v. Gaumont, 12 Que. P.R. 391.

EXECUTION OF MORTGAGE BY WIFE AT REQUEST OF HUSBAND—NO INDEPENDENT ADVICE.

Reeves v. Friel, 4 S.L.R. 198, 18 W.L.R. 539.

PROPERTY REGISTERED IN NAME OF WIDOW UNDER DEED FROM DECEASED — CROSS DEED FROM WIFE TO HUSBAND NOT REGISTERED—SALE BY WIDOW AS ADMINISTRATRIX.

Re Howard, 16 B.C.R. 48, 16 W.L.R. 246.

III. Actions.

A. BY HUSBAND.

COMMUNITY — ACTION — DEFORMATION AND VERBAL INJURY — C.C., ARTS. 183, 1059, 1202, 1298—C.C.P., ARTS. 76, 77, 78.

A married woman in community, authorized by her husband, has the right to bring an action alone for damages for verbal injuries. This action is personal and does not fall within the community.

Sabourin v. Barrette, 55 Que. S.C. 460.

PRINCIPAL AND AGENT — AUTHORITY OF AGENT — HUSBAND AND WIFE — ACTION AGAINST BOTH — ELECTION TO TAKE JUDGMENT AGAINST WIFE ONLY—AMENDMENT.

Simcoe Construction Co. v. McMurtry, 7 O.W.N. 515.

(§ III A—140)—DEPRIVAL OF RIGHT OF WIFE, SUMMONED IN AN ACTION FOR SEPARATION, TO SUE FOR HER SHARE OF COMMUNITY OF GOODS—C.C. 209.

By art. 209 C.C. (Que.), the wife preserves, in a case where she accepts community, the right to sue for her share of it, unless she has been declared to be deprived of this right. A wife sued for separation should be authorized to commence a cross action for separation.

Coote v. Rick, 25 Rev. de Jur. 333.

(§ III A—141)—ALIENATION OF WIFE'S AFFECTIONS—WAR RELIEF ACT.

The War Relief Act (Man.) 5 Geo. V., c. 88, refers only to matters arising out of contract; its benefits cannot be claimed in actions for tort.

Stokes v. Leavens, 40 D.L.R. 23, 28 Man. L.R. 479, [1918] 2 W.W.R. 188.

LOSS OF WIFE'S SERVICES—COMPANIONSHIP.

In an action by husband and wife for injuries done to the wife the husband was held entitled to recover damages for the loss of his wife's services, past and future medical and surgical expenses, hospital charges and charges for nurses, but nothing for the loss of his wife's companionship.

Lawrence v. Edmonton, [1917] 2 W.W.R. 940.

WRONGFUL HARBOURING.

The refusal to allow a husband (whose wife has left him without sufficient justification) to visit the house where the wife is staying on the part of the owner thereof is sufficient evidence of a wrongful harbouring.

Homewood v. Beaton, [1917] 1 W.W.R. 1308.

ACTION BY HUSBAND AGAINST PARENTS OF WIFE FOR INDUCING HER TO LEAVE HIM AND ALIENATING HER AFFECTIONS — FINDINGS OF TRIAL JUDGE—DAMAGES.

Webb v. Bulloch, 13 O.W.N. 343.

(§ III A—142)—REVENDICATION—SEIZURE.

The action for revendication of a sum of money paid in court by a married woman separate as to property cannot be taken by

her husband; it must be by herself. A creditor seizing the money has a sufficient interest to contest this action by setting up the above defence.

Dastous v. Girard, 52 Que. S.C. 431.

(§ III A—143)—Parents inducing wife to leave husband—Best interest of wife—Lack of malice—Harbouring—Damages.

Parents who act without malice and believing it to be in the best interest of their daughter who is ill, take her with her consent from her husband to their own home, where she voluntarily remains, in order to be relieved from domestic worry, and as the best means of restoring her to mental and physical health, are guilty of no actionable wrong. The refusal of the parents to allow the husband to see his wife if honestly done in the best interests of the wife while she is ill does not constitute a harbouring for which the parents are liable. [Discussion of the law and authorities upon alienation of affections, loss of consortium, the respective rights of husband and parents enticing away and harbouring.]

Osborne v. Clark, 48 D.L.R. 558, 45 O.L.R. 594.

Action by husband—Alienation of affection — Proof of adultery unnecessary.

An action for enticing away and alienating the affections of plaintiff's wife is maintainable without proof of adultery, and notwithstanding that the wife continues to live with her husband. [Winsmore v. Greenbank, Willes R. 577, followed.] Notwithstanding the fact that a wife still remains in her husband's house though occupying separate apartments and that adultery has not been proved, an action will lie in damages for the enticing away and alienation of her affections. [Smith v. Kaye, 20 Times L.R. 261, followed.]

Bannister v. Thompson, 15 D.L.R. 733, 29 O.L.R. 562.

Alienation of wife's affections—Damages.

Brizard v. Heynen, 16 D.L.R. 859, 24 Man. L.R. 127, 27 W.L.R. 308.

For inducing wife to abandon husband.

A married man has a right of action against his wife's parents, who receive and harbour her in their house and encourage her to disregard the duty of cohabitation, to recover the damages thereby suffered. The court on such an action may order the defendants to return their daughter to her husband within a fixed period, reserving, for the interval, the adjudication as to damages.

Lafontaine v. Poulin, 42 Que. S.C. 292.

Alienation of affections—Condonation of offence.

A husband, having complained of the bad conduct of his wife, who continues to live with her, cannot maintain an action for damages against one whom he accuses of having alienated his wife's affections any more than he could have taken proceedings against her, since he is presumed to have condoned her offence.

Roberge v. Sylvestre, 47 Que. S.C. 118.

Liability for receiving and harbouring wife living apart from husband.

The defendant was found liable in damages for having, without good cause, received and harboured the plaintiff's wife while the latter was living apart from her husband without her husband's consent.

McKillop v. Kennedy, [1919] 1 W.W.R. 186.

Hiring for service—Husband leaving employment—Wife refusing to leave—Receiving and harbouring—Loss of society and services—Damages.

Van Dorn v. Felger, 42 D.L.R. 760, 14 A.L.R. 110, [1918] 3 W.W.R. 295.

(§ III A—144)—Criminal conversation—Husband's right of action for criminal conversation—Measure of compensation—Defendant's failure to testify—Presumption of admission.

Herve v. Dominique, 7 D.L.R. 787, 2 W.W.R. 235.

In a criminal conversation action there need not be evidence of the validity of the marriage ceremony, but there must be strong evidence of the marriage itself going beyond mere evidence of cohabitation and reputation, and the best proof that could be given of an actual marriage is by some person actually present at the solemnity.

Zdrahal v. Shatney, 7 D.L.R. 554, 22 Man. L.R. 521, 22 W.L.R. 336, 3 W.W.R. 239.

B. By wife.

(§ III B—145)—The wife may not appear in court to sue for recovery of damages resulting from an accident wherein she herself was the victim, seeing that the point in question is a right of action which belongs exclusively to the husband as head of the family. When the husband is debarred or prohibited on account of being interned in an asylum for the insane, judicial authorization may replace marital authorization.

Dore v. Outremont, 25 Rev. de Jur. 70.

Authorization to appear and plead—Appellate Judge.

Authorization to appear in judicial proceedings, which a judge may grant to a wife upon the refusal of the husband, can be granted only by a judge of the court of original jurisdiction, and not by a Judge of an Appellate Court except in the case of authorization for a particular proceeding.

Aubry v. Allard, 27 Que. K.B. 86.

Action against sureties—Authorization.

A wife, separate as to property, and who has the entire administration of her property, may, without being authorized by her husband à ester in justice, exercise her recourse against the sureties for the purpose

of recovering the amount of a judgment obtained against the principal debtor.

Duclos v. Dagenais, 54 Que. S.C. 71. [See also 50 Que. S.C. 333.]

SERVICE OF WRIT — DOMICILE — JUDICIAL AUTHORIZATION.

A husband absentee, who has never had his domicile at the place of ordinary residence of his wife, is not summoned in judicial proceedings for the purpose of authorizing his wife, by the service made on the wife of an action taken against her, and designating the husband as mis-en-cause. The judicial authorization to be party to a case, which can be granted to the wife only if the husband refuses to authorize her, cannot be granted by the court until the husband has been validly summoned in the case. Proceedings taken by a wife under her husband's control, who has not been regularly authorized to be a party to the case, are absolutely null. Such nullity can be invoked at any time in the course of the proceedings, and as soon as it is established the parties will not be entitled to proceed further.

Lafleche v. Laroche, 53 Que. S.C. 214.

OPPOSITION—COMMUNITY—PRESUMPTION.

If a married woman, styling herself as a widow, files in her capacity of owner an opposition to withdraw to a seizure of movables, and later amends her opposition to describe herself as a married woman authorized by her husband, there is a legal presumption that she is common as to property with her husband. In such a case the opposition should have been made by the husband as head of the community, and the opposition will be dismissed.

Banque Nationale v. Bourdeau, 54 Que. S.C. 446.

AUTHORITY TO SUE.

A complete absence of judicial authority in default of authority from her husband, renders a married woman absolutely incapable of taking judicial proceedings. It is not the same when there is authority but it is irregular; the irregularity only involves nullity if it causes prejudice. In the second case an excepton to the form will be dismissed without costs.

Paris v. Montreal Tramways Co., 18 Que. P.R. 91.

CRIMINAL PROSECUTION FOR NEGLECT TO PROVIDE.

A wife, separated as to bed and board by a judgment of the court, is not obliged to renounce such a judgment and to go back and live with her husband before bringing a criminal prosecution against him for his neglect to provide her with necessaries.

Buteau v. Hamel, 24 Can. Cr. Cas. 53.

(§ III B—147)—ACTION FOR PERSONAL INJURIES—AUTHORITY TO SUE.

A married woman, separated as to property, may bring an action to recover damages caused to her automobile as the consequence of a collision with a tramcar, without alleging that she has been authorized to sue by her husband, such an action being simply an act of administration.

Corbeil v. Montreal Tramways Co., 50 Que. S.C. 196.

EFFECT OF FOREIGN MARRIAGE.

A woman married in the State of New York, without any marriage contract, her husband and herself having at that time their domicile and residence in that state, are separated as to property and she had the right to sue, in her own name, in damage for personal injuries.

Gest v. Berghauser, 25 Que. K.B. 200.

EFFECT OF ADULTERY ON RIGHT OF ACTION.

Marson v. Coulter, 3 S.L.R. 485, 16 W.L.R. 157.

IV. Abandonment of wife.

(§ IV—160)—NONSUPPORT—CRIMINAL LIABILITY.

For the purposes of a prosecution under Cr. Code, s. 242A (Amendment of 1913), for the summary conviction offence of nonsupport of a wife living in destitute or necessitous circumstances, it is no answer that the wife is being provided for by her parents, if she has no legal claim against her parents for her support, and if they are little able to provide that support.

Algiers v. Tracey, 30 D.L.R. 427, 26 Can. Cr. Cas. 178, 22 Rev. Leg. 240.

NONSUPPORT OF WIFE OR CHILDREN—SUMMARY PROCEEDINGS—WIFE AS A WITNESS.

Sections 242A and 242B Amendment to Cr. Code, 1913 (3-4 Geo. V., c. 13), will not affect the interpretation of the words "the three last preceding sections" used in s. 244; the three sections intended are 241, 242, 243, and these relate to indictable offences as to criminal omission of duty, while the added sections relate to summary convictions for neglect to provide for wife or children; the reference in the Canada Evidence Act, R.S.C. 1906, c. 145, s. 4, to offences against s. 244, does not constitute the wife of the accused a competent witness against him on a summary hearing of a charge under the added s. 242A.

R. v. Allen, 17 D.L.R. 719, 23 Can. Cr. Cas. 67, 50 C.L.J. 543.

ABANDONMENT OF WIFE (CRIMINAL).

Where the deserted wife had been compelled to work continuously at menial labour to support herself and child and required rest and surgical treatment for organic disease to stop the breaking down of her health, but was unable to obtain such surgical treatment and rest without being dependent on charity, such facts will support a special finding by the jury that the wife's health is likely to be permanently injured from the husband's neglect to provide necessaries for her which neglect in such event is an indictable offence under Cr. Code, s. 242.

The King v. Wood, 19 Can. Cr. Cas. 15, 20 O.W.R. 576.

LIABILITY FOR WIFE'S MAINTENANCE.

The obligation to furnish maintenance not being a joint responsibility but a subsidiary one, the wife must first apply for it to her husband and it is only in case the latter is unable to provide her with it that she may apply to her mother-in-law.

O'Brien v. Berger, 49 Que. S.C. 278.

NONSUPPORT OF WIFE—OMISSION TO SUPPLY NECESSARIES—FORMER ACQUITTAL ON SIMILAR CHARGE—FINANCIAL INABILITY OF HUSBAND TO SUPPORT WIFE.

The King v. Yuman, 17 Can. Cr. Cas. 474, 22 O.L.R. 500.

OMITTING TO PROVIDE NECESSARIES FOR WIFE.

R. v. Wood, 25 O.L.R. 63, 20 O.W.R. 399.

V. Wife's authority to sue or defend.

(§ V—170)—MARRIED WOMEN'S RELIEF ACT—TESTATOR DYING PRIOR TO PASSING OF ACT.

A widow may apply under the Married Women's Relief Act although the testator died some years prior to the passing of the act, where there is property of the estate still unadministered.

Re Hourston Estate, [1919] 1 W.W.R. 521, reversing judgment of Harvey, C.J.

(§ V—171)—WIFE'S AUTHORITY TO DEFEND—WHEN IMPLIED—HUSBAND'S DEFAULT OF APPEARANCE.

A summons to a married woman with her husband makes the latter a party to the action, and if he does not appear he tacitly authorizes his wife to appear in judicial proceedings. Such a tacit authorization also applies if, later, the case is inscribed before the Court of Review.

Ducasse v. Montgrain, 46 Que. S.C. 511.

ACTION AGAINST WIFE—HUSBAND MIS-EN-CAUSE.

Hebert v. Arnold, 12 Que. P.R. 180.

COMMUNITY—WIFE'S RIGHT OF ACTION.

Coté v. Richardson, 39 Que. S.C. 1.

HYDRO-ELECTRIC POWER COMMISSION.

Actions against, see Action.

HYPOTHEQUE (QUE.).

I. In general.
II. Rights and liabilities.
III. Class of property.
IV. Discharge.
V. Hypothecary action.

See also, Mortgage.

On fixtures subject to conditional sale, see Sale, I C—15.

I. In general.

(§ I—1)—INSOLVENCY—PREJUDICE TO CREDITORS.

The nullity attached by art. 2023, C.C. (Que.) to the hypothec acquired upon the immovables of a person notoriously insolvent is not absolute but relative. The hypothec is valid against the debtor and against all creditors who are unable to prove that it is prejudicial to them. In order to obtain the annulment of the hypothec it is not sufficient to prove the notorious insolvency of the debtor and to cause an eventual prejudice to be presumed; the creditor who claims it must establish a real prejudice from the judicial liquidation of the property of the debtor and from an order of distribution.

Raymond v. Rioux, 50 Que. S.C. 467.

(§ I—10)—IN GENERAL.

In certain circumstances the hypothecation of a property is tantamount to its alienation, and under art. 1092 C.C. (Que.) would give the creditor the right to demand the immediate return of his money, as being in diminishment of his security.

Frank v. Forman, 13 Que. P.R. 29.

II. Rights and liabilities.

(§ II—20)—Though as between a creditor and the debtor the former may reserve the privilege which attached to an ancient debt so as to make it attach to a new debt substituted by novation to the old one, nevertheless if the immovable affected has passed into the hands of a third holder, the hypothec cannot be so reserved and attached to a new debt without the consent of such third holder.

Marcoux v. Guay, 18 Rev. de Jur. 133.

DONATION INTER VIVOS—VENDOR'S HYPOTHEC.

A donation inter vivos constitutes a vendor's hypothec in favor of all the obligations imposed on the donee either in favour of the donor or of third parties without the necessity of an agreement providing for that purpose. The provision of art. 2044, C.C. (Que.), which declares that the conventional hypothec is only valid in so far as the sum agreed upon in it is certain and fixed by the deed does not extend to the payment of a sum of money imposed as a charge in a donation inter vivos.

Drouin v. Gaudet, 48 Que. S.C. 137.

PAYMENT BY PURCHASER—EXTENSION OF TIME.

When a purchaser, who is obliged to pay a debt guaranteed by a hypothec upon the property sold and another immovable belonging to the vendor, at the maturity of the debt obtains from the hypothecary creditor an extension of time without the vendor's consent, the latter is entitled to judgment against him for the amount of the debt.

Bédard v. Hurtubise, 48 Que. S.C. 285.

DEMOLITION OF IMPROVEMENTS—RIGHTS OF THIRD PARTY.

The holder of a hypothecated immovable has no right to demolish constructions on it even to replace them by others of greater value. Such demolitions, by diminishing the security of the hypothecary creditor, subject the third party holder to the application of art. 1092, C.C. (Que.), which

causes him to lose the benefit of the term. (Inscribed in review.)

Demers v. Strachan, 48 Que. S.C. 71.

DEMOLITION OF BUILDING—DISTRIBUTION OF PROCEEDS.

The demolition merely of a building causes it to lose its character as an immovable. Therefore, if a building which has been hypothecated and, without the knowledge or consent of the hypothecary creditor, it has been removed from its foundation and transported without being demolished, to other lands, the judicial sale of the latter property does not deprive the hypothecary creditor of his right to be collocated by preference on the proceeds of the sale for the amount of capital and interest owing to him.

Laprise v. Morin, 50 Que. S.C. 11.

IMPAIRMENT OF SECURITY—RIGHTS OF CREDITORS.

In order that the benefit of the term provided for by art 1092 C.C. (Que.) be lost, it is necessary that the security given to the creditor has been diminished by the act of the debtor. The article does not apply to one to whom a delegation of payment has been made but not accepted and who consequently is only a third party in possession, if the diminution of the security is the act of the latter. A third party in possession, who demolishes a building erected upon the land which he has bought and upon which there is a hypothec, is liable in damages to the hypothecary creditor by virtue of arts. 2054-5 C.C. (Que.) which the latter may recover even when his debt is not yet exigible. But the hypothecary creditor must prove that the immovable has been deteriorated. When there are several hypothecary creditors upon an immovable, and one of them sues in damages a third party in possession, accusing him of having caused deterioration in the immovable mortgaged, he should ask that the amount to be awarded him by the judgment be deposited in court for distribution among the hypothecary creditors according to their respective rights. He cannot demand that this money should be paid directly to himself. A creditor whose debt becomes exigible by virtue of art. 1092 C.C. (Que.), through the fault of his debtor, can not only sue the latter personally but he can also bring an hypothecary action against the third party in possession.

Chenier v. Rosentzweig, 52 Que. S.C. 463.

III. Class of property.

(§ III—30)—CLASS OF PROPERTY.

The hypothec upon an undivided part of an immovable is valid and the creditor may maintain an action en déclaration d'hypothèque against the party in possession thereof without first having recourse to partition and sale. If the defendant is in possession of the whole of the immovable the action may be brought in respect to an undivided part. If the plaintiff is himself in possession of one undivided part he may maintain an action en déclaration d'hypothèque against the other without abandoning his portion under the provisions of art. 2069 C.C. (Que.).

Cartier v. Boudreault, 41 (Que.) S.C. 127.

The vendor of an immovable, part of the price of which is secured by a hypothec on another immovable of the purchaser, who agrees to discharge the hypothec on receipt of a reconveyance of the immovable sold, can validly stipulate in the deed of reconveyance for retention of the hypothec by way of damages only if the immovable which had been hypothecated remains the property of the purchaser. Therefore, in an action en déclaration d'hypothèque against a third party in possession of this immovable, he is obliged to prove that fact. The provision in art. 1176, C.C. (Que.), that privileges and hypothecs attached to a debt pass to another debt substituted for it does not apply in such a case.

Marcoux v. Guay, 21 Que. K.B. 162.

V. Hypothecary action.

(§ V—50)—The exception resulting from a privileged claim or prior hypothec provided for by s. 1073, Cr. Code, for the benefit of a third party holder of the hypothecated immovable can only be invoked by the latter to compel the party suing to give security that it will bring a price that will pay his claim or hypothec in so far as the same amounts to or exceeds the value of the immovable. The right to payment of sums expended on the immovable cannot be claimed by dilatory exception, but recourse must be had to s. 2072, Cr. Code. The third party sued en déclaration d'hypothèque has a right to call in his vendor and may exercise it by dilatory exception.

McIntyre v. Wilson, 14 Que. P.R. 45.

An hypothecary action can be brought only against the party in possession of the immovable and if taken against the debtor personally it must be alleged that he is in possession just as if taken against a third party. The deposit note given to a mutual fire insurance company, as provided in art. 7009, R.S.Q. 1909, although essential to the formation of the contract, does not constitute the title to the legal hypothec of art. 7023. The issue of the policy describing the property insured is necessary and this involves, as a consequence, the hypothec, the assessment by-law of art. 7011, the fixing of the proportions under art. 7017 and the other formalities evidenced by the certificate of the secretary-treasurer according to art. 7021. Hence, the production of the deposit note alone, in an action en déclaration d'hypothèque against the assured, will not support the conclusions. When a mutual fire insurance company is placed in liquidation the liquidator only can collect the amounts due on deposit notes which are not transferable. A deposit note on which the words "deposit note" are not

"printed in conspicuous type at the head" is a nullity. When a defendant, summoned before a court incompetent ratione personæ does not appear and the action is remitted to a competent court, he is entitled to notice and to be put en demeure to defend.

Clement v. Dodier, 41 Que. S.C. 289.

The registration of the transfer of an hypothecary claim is necessary in order that the discharge of the debtor by the assignor may be registered and the hypothec erased from the registry. The expenses of a voluntary or judicial assignment of the hypothec claim is not to be borne by the debtor nor are those of the registration of the transfer.

Corbiere v. Stuart, 13 Que. P.R. 374.

REMEDY FOR DETERIORATING PROPERTY SUBJECT TO HYPOTHEC—INTENTION TO DEFRAUD.

In order to be able to exercise the remedy given by arts. 2054, 2055 C.C. (Que.), it is not sufficient for the creditor to allege and prove an act of deterioration committed by the debtor or by another holder, for the law does not make damages depend on a simple physical fact of deterioration, whether great or small, but the intention to defraud must be added to the act of deterioration.

Guindon v. James Maclaren Co., 24 Rev. de Jur. 483.

PRIORITIES — HYPOTHECARY CREDITOR CONSENTING TO REHYPOTHECATION—CONDITION—VALIDITY.

A creditor, who expressly or impliedly consents that real property hypothecated in his favour be hypothecated in favour of another, is deemed to have ceded the preference to the latter. But if the first creditor gives his consent, subject to the accomplishment of several conditions, the second creditor, in order to obtain priority and retain it, must see that each one of those conditions be fulfilled. A condition which cannot be accomplished in its entirety is not void and does not invalidate the obligation which depends on it; but such a condition is then reduced to so much of it as can be carried out.

Lenghan v. Nicole, 53 Que. S.C. 392.

OPPOSITION TO ANNUL—HYPOTHECARY CREDITOR — INTEREST — JUDGMENT — AMOUNT.

An hypothecary creditor has not, as such, a sufficient interest to make an opposition to annul the seizure of an immovable upon which he has his hypothec. Neither can he, without invoking the right of another, allege as reasons for his opposition: (a) that there is no valid executory judgment against the defendant; (b) that the allegations in the writ of execution are false; (c) that even if there was a judgment, it did not amount, in principal, interest and costs, to $40.

Michaud v. Destrempes, 54 Que. S.C. 152.

REGISTRATION—BONA FIDE HOLDER—TITLE—SIMULATION—RES JUDICATA.

One in possession of land under a title apparently regular and valid, can give a third party in good faith an hypothec upon the land; and such hypothec, duly registered, cannot be set aside even if the courts have afterwards cancelled the title of the vouchee of the hypothec as being only a donation inter vivos disguised in the form of a deed of sale by private deed. The presumption of res judicata holds only against parties to the action; a debtor does not represent his hypothecary creditor.

Little v. Reaycraft, 24 Rev. Leg. 8.

EXECUTION — SALE — REGISTRATION — TIERS OPPOSANT—DEPOSIT IN COURT.

One who has acquired real property and has assumed the payment of an hypothec upon such property, has not the right, if the property is subsequently seized by the hypothecary creditor, to make a tierce upon position and to ask for the voidance of the seizure proceedings, if his deed of sale was only registered after the seizure, and he does not put in court the amount of the hypothecary debt with interest and costs.

Dubuc v. Pigeon, 53 Que. S.C. 58.

OPPOSITION TO JUDGMENT—SECURITY.

An opposition to judgment filed in an hypothecary action by a third party in possession, based upon the fact that he paid the hypothecary debt prior to that for which the action was brought by the plaintiff, and alleging that he has a right to demand that before he can be obliged to deliver up the property the plaintiff should be compelled to give him security that the immovable will be sold at such a price that his hypothecary debt will be paid in full in preference to that of the plaintiff, is not frivolous; on the contrary it raises a serious question of law and the judge should permit it to be filed.

Lemieux v. Dickman, 52 Que. S.C. 347.

CONTESTATION—PRIOR WARRANTORS.

A person who loans money upon the security of a hypothec is not bound by transactions made by the borrower affecting the immovable hypothecated, and he is not obliged to appear and answer in actions instituted by the warrantors and prior warrantors of his debtor. In matters of simple warranty it is not permissible for a prior warrantor to intervene for the purpose of defending the principal debtor and contesting the principal action; such a defence may be set aside on motion.

Décarie v. Archambault, 50 Que. S.C. 83.

HYPOTHECARY ACTION—OPTION—C.C.P. ART. 176, S. 6 — COMMERCIAL DEBT — PRESCRIPTION—C.C., ARTS. 2081, 2226, 2247, 2267—ACCESSORY.

A hypothecary action against "the tiers-detenteur" and a personal action against the debtor cannot be united and are incompatible; the plaintiff, on a dilatory exception, may be ordered to declare his option between the two. A commercial debt is

prescribed, by five years, even when a hypothecary action is pending for the same debt, as a "tiers detenteur" is never presumed to owe the debt personally. When the debt is prescribed, a pending hypothecary action for the same debt is extinguished, as hypothec is merely an accessory to, and subsists no longer than the original claim. A deed of hypothec for future advances which contain no fixed amount of indebtedness is not valid and the hypothec is without effect.

McCaskill v. Lariviere, 46 Que. S.C. 289.

ICE.

Liability for icy condition of highways, see Highways, IV A—154.

FROZEN BAY—PUBLIC DOMAIN—RIGHT TO CUT—NEGLIGENCE IN REMOVING—INSUFFICIENT GUARD.

When a bay forming part of the public domain is frozen over, the public right to cut ice thereon is subordinate to the public right of travel over the entire bay, and the person who insufficiently guards the place where he has been cutting ice is liable in damages for the loss of a horse which ran away while being driven by its owner and without any negligence on his part, and leaving the regularly travelled ice track fell through on the newly formed thin ice at the place which defendant had left without the protection required either by Cr. Code, s. 287, or by the common law.

Little v. Smith, 20 D.L.R. 399, 32 O.L.R. 518.

ILLEGAL CONTRACTS.

See Contracts, III.

ILLEGITIMATE CHILD.

See Affiliation; Bastardy.

As to right to custody of illegitimate child, see Infants, I C.

IMITATION.

Passing off, see Trade-marks; Trade-name; Copyright; Patents.

IMMIGRATION.

See Aliens, I—3.

IMPLIED AGREEMENT.

See Contracts.

Implied covenant in lease, see Landlord and Tenant.

Implied warranty in sale of goods, see Sale.

IMPLIED POWERS.

Of corporation, see Companies.

IMPRISONMENT.

See Criminal Law.

Liability for false imprisonment, see False Imprisonment; Malicious Prosecution; Arrest.

IMPROBATION.

See Cancellation of Instruments.

IMPROVEMENTS.

Lien for, see Liens; Mechanics' Liens.

Local improvements, see Taxes; Municipal Corporations.

ALLOWANCE TO PURCHASER FOR IMPROVEMENTS—LIEN FOR ON SETTING ASIDE SALE IN FAVOUR OF PRIOR PURCHASER.

Where a vendor, who had contracted to sell land to a vendee who went into possession, subsequently on such vendee absconding sold it to another person who was aware of, or who had notice sufficient to put him on inquiry as to, the original vendee's rights, although they were not disclosed by the records in the land titles office, the sale may be set aside at the instance of the original vendee's assignee, but the purchaser is entitled to a return of his purchase money, and if charged with occupation rent he is also entitled to interest on his purchase money; he will also be allowed for the value of improvements made by him and for taxes paid; and if a balance is found in his favour, he is entitled to a lien on the land therefor.

Allan v. Riopel, 14 D.L.R. 811, 7 A.L.R. 65, 26 W.L.R. 248, 5 W.W.R. 712.

COMPENSATION—WHAT ARE IMPROVEMENTS.

Where the owner of farm lands, by stating that he intends to give them to the defendant, induces him to spend money thereon, such statement being made by the owner in expectation that he will receive the benefit of any improvements so made, and where the defendant is subsequently awarded a lien for the increased value resulting from such expenditure, an allowance will be made for the value of improvements of a permanent nature, such as fencing and draining, but not for mere repairs to the dwelling-house which do not properly come under the caption of permanent improvements.

McBride v. McNeil, 9 D.L.R. 503, 27 O.L.R. 455, 23 O.W.R. 558.

COMPENSATION FOR WHERE BENEFIT IS TAKEN ADVANTAGE OF.

Where plaintiffs are entitled by reason of a prior "oil lease" to enter upon and prospect for oil and gas upon land subsequently leased to defendants and upon which defendants have already done work and made improvements, if the plaintiffs wish to take the benefit of this work done and improvements made, defendant is entitled to compensation therefor. [McIntosh v. Leckie, 13 O.L.R. 54, followed.]

Maple City Oil & Gas Co. v. Charlton, 7 D.L.R. 345, 3 O.W.N. 1629.

INCEST.

ESSENTIALS.

Evidence of penetration and emission is not essential to the proof of a charge of incest.

R. v. Lindsay, 30 D.L.R. 417, 26 Can. Cr. Cas. 163, 36 O.L.R. 171.

INCOMPETENT PERSONS.

I. Who are.
II. Contracts; deeds.
III. Torts.
IV. Confinement; support in asylum.
V. Suits by or against.
VI. Powers of committee and administration of estate.

See also Infants.

Annotation.

Irresistible impulse; Knowledge of wrong; Criminal law: 1 D.L.R. 287.

I. Who are.

(§ I—1)—Lunatic—Petition—Evidence.

Re Yeo, 4 O.W.N. 734, 23 O.W.R. 961.

Lunatic—Application for order declaring incompetency — Necessity for notice to supposed incompetent—Proper material upon application.

Re Morrison, 15 O.W.N. 338.

Examination of defendant on sanity of mind—Long time between signing of the note and interdiction—C.P. 286.

A motion to have a medical examination of a defendant who has pleaded insanity will be dismissed if many months elapsed between the signing of the note sued upon and the interdiction of the defendant.

Belleau v. Paquet, 15 Que. P.R. 291.

(§ I—2)—What constitutes incompetency.

The policy of the law is that the liberty of no man shall be interfered with on the ground of mental infirmity, if he have sufficient understanding for the handling of his business according to the ordinary usages of the neighbourhood where he lives. One who is free from any mental disease cannot be regarded as of unsound mind within the meaning of the Lunacy Act, 9 Edw. VII. (Ont.) c. 37, s. 7, if, notwithstanding his lack of mental acuteness, he has sufficient understanding for the handling of his business according to the ordinary usages of the neighbourhood in which he lives. The Act, 1 Geo. V. (Ont.) c. 20, amending the Lunacy Act, 9 Edw. VII. (Ont.) c. 37, deals with cases on the border line between sanity and insanity, and mental disease need not be established in an enquiry under that Act, but the test is whether the person is so weak-minded as not to be able to manage his affairs.

Peel v. Peel, 3 D.L.R. 696, 3 O.W.N. 1127, 21 O.W.R. 945.

On an application for the appointment of a guardian of the estate of an alleged lunatic, in order to determine whether or not he is of unsound mind, evidence of the facts and circumstances which go to shew insanity must be submitted. A petition for the appointment of a guardian of the estate of a supposed lunatic must, under r. 753 (Sask. rr. 1911) be addressed to the judge of the court. On an application for the appointment of a guardian of the estate of a supposed lunatic, the fact that he was committed to a hospital for the insane by a justice of the peace and that he is there at the time of making the application, is not evidence of insanity, for he may have been committed improperly. The affidavit of persons that, in their opinion, a supposed lunatic is of unsound mind is not sufficient upon which to base an application for the appointment of a guardian for his estate, since it is necessary to state such facts from which the court itself may judge whether the person is of unsound mind or not.

Re George, 8 D.L.R. 731, 22 W.L.R. 885, 3 W.W.R. 743.

An issue as to lunacy under s. 77 of the Lunacy Act, 9 Edw. VII. (Ont.) c. 37, is to be conducted in the same manner and according to the same rules of law and procedure as any other trial. Power to examine an alleged lunatic is conferred by subs. (4), of s. 7 of the Act, only upon the judge presiding at the trial of the issue as to his soundness of mind, and cannot be exercised by an Appellate Court.

Re Fraser; Fraser v. Robertson; McCormick v. Fraser, 8 D.L.R. 955, 26 O.L.R. 508, 22 O.W.R. 353, reversing Re Fraser, 24 O. L.R. 222.

Before a declaration of lunacy will be made on a summary inquiry under s. 11 of the Lunacy Act, R.S.M. 1902, c. 103, the following rules must be strictly complied with: (a) The petition must be endorsed as required by r. 772 of The King's Bench Act, and should be signed by the petitioner. (b) It must be personally served upon the supposed lunatic: [Re Miller, 1 Ch. Ch. 215] unless service has been dispensed with. (c) Personal service will only be dispensed with when it would be dangerous to the lunatic to serve him and, to prove that, the affidavit of the medical superintendent of the asylum in which the party is confined is not sufficient without corroboration: [Re Newman, 2 Ch. Ch. 390; Re Mein, 2 Ch. Ch. 429.] (d) The petition should be presented by the nearest relative and, where the petitioner is out of the jurisdiction, some person within the jurisdiction should be joined as copetitioner: [Heywood & Massey's Lunacy Practice, 20.] (e) It should be supported by the affidavits of at least two medical men: [Re Patton, 1 Ch. Ch. 192.] and such affidavits must show all the facts evidencing the lunacy from which the court may judge for itself whether or not the prisoner is of unsound mind: [McIntyre v. Kingsley, 1 Ch. Ch. 281; Ex parte Persse, 1 Moll. 219.] (f) There should also be affidavits from members of the family of the alleged lunatic and other persons who know him, not merely giving their opinions, but stating with particularity the material facts pointing to unsoundness of mind and incapacity to manage himself and his affairs: Nothing can be inferred against the supposed lunatic from the fact that he is confined in a lunatic asylum. He may be there improperly. If, however, proper evidence is produced that the person has been found

a lunatic by a foreign tribunal having jurisdiction to so find, the court would generally act upon such finding, though not binding upon it. It is doubtful whether there is any power to serve the petition out of the jurisdiction. Leave to do so was given in Re Webb, 12 O.L.R. 194, but that was under the Ontario rules, which are not the same as those in force here.

Re Bulger, 21 Man. L.R. 702.

PETITION FOR ORDER ADJUDICATING LUNACY —FAILURE TO MAKE CASE.

Re Pherill, 10 O.W.N. 429.

An applicant for interdiction for imbecility should, on pain of nullity of the proceedings, be interrogated by the judge in presence of the clerk of the court or his deputy, or by the prothonotary and the examination should be put in writing and communicated to the family council. Therefore, the decree for interdiction when the prothonotary who interrogated the applicant did not report the examination but contented himself with declaring his view of the mental state of the interdict is null and should be set aside.

Chatelle v. Chatelle, 21 Que. K.B. 158.

(§ I—3)—PERSON ALLEGED TO BE INCOMPETENT TO MANAGE HER OWN AFFAIRS—CONTRADICTORY EVIDENCE—PREPONDERANCE—DISMISSAL OF APPLICATION FOR APPOINTMENT OF COMMITTEE.

Re Thomas, 15 O.W.N. 185.

INTERDICTION—VALIDITY OF PROCEEDINGS—POWERS OF NOTARY.

No provision of the law respecting interdiction gives the right to a tribunal, judge, or prothonotary, to authorize a notary or any other person to hold meetings of a family council called to give its advice upon an interdiction asked for. An interdiction is of public order and a court should ex officio, take knowledge of illegalities with which the proceedings in interdiction are tainted even if the interdicted party had not pleaded them.

Legault v. Legault, 20 Que. P.R. 53.

INTERDICTION—CHOSE JUDGÉE.

Where a second demand for the interdiction of a person for imbecility is asked for the same reasons as those contained in a first petition rejected 5 months before, after contestation, and no new facts of insanity are alleged, the last petition will be dismissed on the ground of chose judgée. The judge has the power to name an alienist for the purpose of examining a person whose interdiction is sought, but it is for him a matter of discretion.

Goltman v. Davidson, 53 Que. S.C. 437.

COSTS—HUSBAND AND WIFE.

Nothing in the law authorizes a wife, whose husband asks her interdiction for lunacy, to claim from him provision for her costs of defence.

Goyette v. Clermont, 20 Que. P.R. 224.

LUNATIC — APPLICATION FOR APPOINTMENT OF COMMITTEE—REFUSAL AS UNNECESSARY.

Re Taylor, 9 O.W.N. 110.

(§ I—4)—APPLICATION BY SON FOR DECLARATION OF FATHER'S INCOMPETENCE — EVIDENCE — CONFLICTING AFFIDAVITS — DISPOSITION OF PROPERTY OF SUPPOSED INCOMPETENT — APPREHENSION AS TO —CARE AND CUSTODY—DISMISSAL OF APPLICATION.

Re Howell 17 O.W.N. 47.

(§ I—6)—LUNATICS—RESTORATION TO CAPACITY—EFFECT OF DEATH.

Where a person was by an order of court adjudged a lunatic and his affairs and estate placed in charge of a committee, the court has no jurisdiction, after the death of the lunatic, to enter by virtue of s. 10 of the Lunacy Act, R.S.O. 1914, c. 68, upon an inquiry with a view of ascertaining whether the lunatic had in fact, some years before his death, become of sound mind and capable of managing his own affairs, and that certain payments, in the nature of gifts, made by the committee out of the lunatic's property, with his knowledge and approval, might be validated.

Re Rourke, 22 D.L.R. 830, 33 O.L.R. 519.

INSANITY OF ACCUSED—TRIAL AND CONVICTION WITHOUT PRELIMINARY TRIAL AS TO SANITY.

The King v. Leys, 17 Can. Cr. Cas. 198.

LUNACY—ORDER DECLARING—PETITION FOR.

Re Brown, 2 O.W.N. 924, 18 O.W.R. 919.

II. Contracts; deeds.

(§ II—10)—CONTRACTS—DEEDS.

Where the endorser of a promissory note was at the time of the endorsement mentally incapable of making a contract, and where it appears that the note was merely a renewal of certain subsisting and enforceable notes, upon which the endorser was jointly and severally liable with others, such circumstances will govern, and the plaintiff holder may revert to the earlier notes and recover upon them, upon the ground that the renewal endorsement was made under a mistake of fact, especially where it does not appear that the plaintiff had knowledge of the mental incapacity of the endorser.

Bank of Ottawa v. Bradfield, 8 D.L.R. 722, 4 O.W.N. 333, 23 O.W.R. 818.

DEED—SETTING ASIDE.

A deed of land will not be set aside on the grounds that the grantor was insane, unless it is proved that he was insane, to the knowledge of the grantee, at the time the negotiations were being carried on and the deed executed.

Conrad v. Halifax Lumber Co. 41 D.L.R. 218, 52 N.S.R. 250.

AGREEMENT—NULLITY.

An agreement made by a person interdicted as insane, by which he bound himself to pay $100 to another party, should the latter succeed in freeing him from the asy-

lum in which he was interned, is valueless and nonexistent in law. The freedom of an insane person, interned for his own good in an asylum, is not violated, even admitting that all the formalities required for his internment have not been carefully fulfilled. The administration of some one else's business, in order to create obligations in favour of the administrator against that one whose business is managed and who is unable to contract, owing to his age or insanity, should be taken up "usefully" and bring some advantage to the person whose business has been thus managed.

Craig v. Gibault, 53 Que. S.C. 488.

Upon an action by the curator to a person interdicted for insanity, against the purchaser of an immovable property, it being alleged that said property had been bought by defendant a month only before the interdiction of the vendor and when the latter was insane, defendant pleaded denying the material allegations of plaintiff's action and alleging specially that said interdiction was irregular and null, and prayed that the same be avoided. Plaintiff, es-qual., thereupon filed an inscription in law against that portion of said plea containing said last allegations and conclusions:—It was held that the interdiction of the vendor being set forth in the declaration as one of the principal reasons of the action, defendant was entitled to attack its legality, but that said interdiction having been adjudged on the petition of plaintiff who was not personally en cause, herein, the nullity of such interdiction could not be declared by the court. Under such circumstances, the court will maintain such inscription in law in part, and reject from the conclusions of the plea the words praying for the annulling of the ordinance of interdiction, with costs against defendant. On the merits of the case the court maintained defendant's plea and dismissed plaintiff's action with costs.

Charland v. Bissonnette, 18 Rev. de Jur. 56.

(§ II—11)—Deeds.

Where a conveyance is attacked on the ground of the insanity of the grantor, and a condition of insanity which is not merely temporary is proved to have existed from a time prior to the execution thereof, the onus is upon those supporting the conveyance to shew that such execution took place during a lucid interval such that the grantor was capable of understanding the nature of the act he was performing. [Russell v. Lefrancois, 8 Can. S.C.R. 325, followed.]

Hoover v. Nunn, 3 D.L.R. 503, 3 O.W.N. 1223, 22 O.W.R. 28.

Settlement of property—Application to court to confirm—Capacity of settler—Lunacy Act, R.S.O. 1914, c. 68, s. 37.

Re Bromley, 10 O.W.N. 286.

Lunatic's will—Copy.

The curator of a person interdicted for insanity has the right to obtain a copy of a notarial will made by the interdict.

Gauthier v. Filiatrault, 49 Que. S.C. 260.

Agreement — Capacity of contracting party—Drunkenness and mental debility—Onus probandi.

Murray v. Weiler, 3 A.L.R. 180, 14 W.L.R. 677.

Action by inspector of prisons and public charities — Partition and sale of lunatic's lands—Recovery to capacity—Motion to stay proceedings.

McCabe v. Boyle, 2 O.W.N. 695, 18 O.W.R. 551.

Capacity to contract—Sale of standing timber—Contract fair and bona fide.

Fyckes v. Chisholm, 3 O.W.N. 21, 19 O.W.R. 977.

IV. Confinement; support in asylum.

(§ IV—20)—Detention of dangerous insane.

The court has a discretion to refuse the discharge of a person from an insane asylum, if he appears dangerous to be at large, however irregular the proceedings under which he is detained.

Re Oliver King, 30 D.L.R. 599, [1917] 1 W.W.R. 132.

Order declaring lunacy—Application by lunatic to supersede—Lunacy Act, 9 Edw. VII. c. 37, s. 10.

Re Annett, 5 O.W.N. 331, 25 O.W.R. 311.

Person of weak mind—Confinement in asylum — Habeas corpus — Return —Finding of fact—Discharge—Ontario Habeas Corpus Act, R.S.O. 1914, c. 84, s. 7.

Re Davidson, 8 O.W.N. 481.

Lunatic—Contribution by relatives to support of—Asylums.

The determination, by the Provincial Secretary of the sum which the relatives ought to pay towards the support of a lunatic under art. 4108 R.S.Q. 1909 only applies to the amount paid by the Government under art. 4137. Therefore the payment of the sum so determined does not release the relatives from the amount they are obliged to pay to the county municipality or the local municipality under arts. 4148, 4149. A municipality may demand, from the relatives, the amount payable under arts. 4148, 4149 only from the time they became liable for the support of the lunatic under the common law (e.g., for a son-in-law only from the time of his marriage) and according to his means.

Nicolet v. Beaulac, 46 Que. S.C. 1, affirming judgment of Superior Court.

Fresh proceedings after absence.

When a patient in a lunatic asylum leaves it and is absent for more than fourteen days, in this case more than three months, the same proceedings must be taken for his retention when he does return as were necessary for his original commitment. If he is

retained without these proceedings he may be discharged on habeas corpus.

Dubeau v. Brothers of Charity, 14 Que. P.R. 258.

(§ IV—21)—Maintenance in asylum—Lunatic — Maintenance — Insufficient material.

Re Barley and Fawcett, 4 O.W.N. 426.

Assisting escape of criminal insane person committed to insane asylum.

The King v. Trapnell, 17 Can. Cr. Cas. 346, 22 O.L.R. 219, 17 O.W.R. 274.

V. Suits by or against.

(§ V—25)—Demand for interdiction—Death—Costs—Revival of action.

An application for interdiction for insanity, interrupted by the death of the person sought to be interdicted, cannot be revived or continued against the heirs of that person in so far as to arrive at an adjudication upon the costs.

Juneau v. Bergeron, 42 D.L.R. 468, 27 Que. K.B. 300.

Action on mortgage—Stay of proceedings.

The mere fact that a mortgagor is a lunatic and the mortgagee is proceeding to realize upon his mortgage is not a ground for a stay of proceedings moreover, the rule that in lunacy matters the welfare of the lunatic must be given first consideration, even to the injury of his creditors, does not apply to such a proceeding.

Re Smith, [1918] 2 W.W.R. 540.

Recourse of municipality against alimentary debtor.

Alimentary payments for which the debtor is bound only at his domicile are convertible into a pecuniary pension when, for an overpowering cause, life in common has become impossible between the alimentary creditor and debtor. A municipal corporation which has paid the pension of a lunatic confined in an asylum can, in default of payment by the lunatic, bring a direct action for the purposes indicated against the person who is obliged to make these alimentary payments to the lunatic.

Montmorency v. Guimont, 48 Que. S.C. 378.

Suits against—Lunatic—Incendiarism.

Otter Mutual Fire Ins. Co. v. Rand, 5 O.W.N. 653.

Guardian ad litem — Notice must be served on applicant.

A guardian ad litem will not be appointed until notice of application has been served on the party on whose behalf application is being made.

Bank of Ottawa v. Bradfield, 2 O.W.N. 1014, 19 O.W.R. 18.

VI. Powers of committee and administration of estate.

(§ VI—30)—Before a guardian of a lunatic's estate can be appointed, it must appear that the alleged lunatic is at the time of the application of unsound mind and that he has property and is incapable of managing such property. A petition for the appointment of a guardian of the estate of a supposed lunatic must pray specifically for a declaration of lunacy. The petition will be refused where no facts are set out from which the Court can determine whether or not the alleged lunatic is of unsound mind, or whether or not he is incapable of managing himself and affairs. A petition must be supported by the affidavits of at least two medical men, containing not only the conclusions at which they arrive but also the facts upon which these conclusions are based.

Re George, 8 D.L.R. 731, 22 W.L.R. 885, 3 W.W.R. 743.

Lunatic discharged from asylum—Gifts.

So long as the order declaring a person a lunatic stands unrevoked and his committee undischarged, that person, though discharged from the insane asylum, is not legally capable of dealing with his estate; gifts of money made by the committee upon the orders of such persons may be recovered back and can be followed into lands purchased therewith.

Rourke v. Halford, 1 D.L.R. 371, 37 O.L.R. 92, varying 9 O.W.N. 347.

Expenditures—Charitable purposes

The Court has, under s. 12 of the Lunacy Act (R.S.O. 1914, c. 68), no power to sanction the disbursement of large amounts for the benefit of charitable and philanthropic schemes.

Re D., 39 D.L.R. 368, 40 O.L.R. 365.

Lunatic's estate—Investments.

The property of persons not sui juris should not be left for private investment, but should be paid into or lodged in Court and become subject to the general system of administration, by which the interest is punctually paid and the corpus is always forthcoming when needed.

Re Rourke, 22 D.L.R. 830, 33 O.L.R. 519.

Lunatic's estate—Payment of debts.

Before the Court will make an order for the payment of debts of a lunatic, an inventory of the lunatic's estate must be presented in order that the Court may be informed of the nature and extent of the estate. A claim for maintenance of a lunatic while confined in an asylum has priority over the claims of creditors.

Re Main, 7 W.W.R. 1152.

Lunatic—Sale of land—Approval of—Disposition of purchase-money — Costs—Payments to committee for maintenance — Payment of balance into court.

Re McDonnell, 13 O.W.N. 320.

(§ VI—31) — Aged person — Unable to care for himself—Deemed insane—Appointment of guardian under Lunacy Act.

A person who by reason of mental impairment due to old age is unable to take care of himself or his property, is an in-

sane person within the meaning of s. 2 of the Lunacy Act (R.S.N.S. 1900, c. 125).

Re Tupper, 44 D.L.R. 85, 52 N.S.R. 385.

LUNATIC—POWERS OF COMMITTEE—REMOVAL OF COMMITTEEMAN.

Re Lees, 14 D.L.R. 495, 5 W.W.R. 662.

STATUTORY COMMITTEE.

Re Montgomery Estate, 6 D.L.R. 912, 4 O.W.N. 308.

INTERDICTION — MENTAL DERANGEMENT — OPINION OF FAMILY COUNCIL—FATHER—C. C. ART. 282, 329, 332.

The father, unless he is judged unfit, has the right to be named curator over his widowed daughter who is of unsound mind, to the exclusion of every other person, and even in spite of the opinion of the family council, of which he was not one.

Vannalton v. Vannalton, 56 Que. S.C. 288.

APPOINTMENT OF TRUST COMPANY—INVESTMENT.

A trust company appointed committee of the estate of a lunatic can, under its statutory powers, act without giving security; but this does not enlarge its powers in dealing with the funds of the lunatic's estate. Yearly balances must be paid into Court: s. 11 (d) of the Lunacy Act, R.S.O. 1914, c. 68; and this rule must be strictly followed. [Re Norris and Re Drope, 5 O.L.R. 99, 101; Re Rourke, 22 D.L.R. 830, 33 O.L.R. 519, followed.] The report of a Master authorizing the investment and reinvestment by a company-committee of the lunatic's funds and the application of the interest and part of the capital for his maintenance, was varied, upon motion for its confirmation, by directing payment into Court.

Re Hunter, 37 O.L.R. 463.

APPOINTMENT OF COMMITTEE—NONRESIDENT.

The court will not appoint as sole committee of the estate of a lunatic a person resident out of the jurisdiction of the court. [Ex parte Ord, Re Shields, Jac. 94, followed.]

Re Swain, 35 O.L.R. 613.

STATUTORY COMMITTEE—HOSPITALS FOR THE INSANE ACT, R.S.O. 1914, c. 295, ss. 40, 45—INSPECTOR OF PRISONS AND PUBLIC CHARITIES—ESTATE OF PATIENT—DISCHARGE FROM TRUST—DIRECTION AS TO ACCOUNT AND COSTS—APPOINTMENT OF INSPECTOR AS COMMITTEE OF ESTATE.

Re Hillam, 9 O.W.N. 373.

(§ VI—33)—SALE OF PROPERTY OF INCOMPETENT.

Where, under an order of the Court, lands of a lunatic are sold, and a mortgage thereon taken in part payment, Ont. Con. r. 66 applies, and the mortgage should be taken in the name of the accountant of the Court, unless otherwise ordered, but it is the duty of the committee to look after the mortgage investment as though the mortgage had been taken in his own name.

Re Gibson, 3 D.L.R. 448, 22 O.W.R. 8.

RECOVERY OF SANITY—MOTION TO QUASH ADJUDICATION—MORTGAGE BY COMMITTEE WITH APPROVAL OF COURT—PROOF OF SANITY—AFFIDAVITS—RULE 226—PROTECTION OF MORTGAGEE—JUDICATURE ACT, R.S.O. 1897, c. 51, s. 58(11)—ORDER SUPERSEDING DECLARATION OF LUNACY—LUNACY ACT, R.S.O. 1914, c. 68, s. 10(5).

Re Annett, 10 O.W.N. 280.

PARTITION AND SALE—WIFE CURATOR.

A wife who is the curator of her interdicted husband, may, without any special authority, as an act of administration, cause herself to be represented in an action for partition and auction sale against her husband, to look after the interests of the interdict in all proceedings and bind the latter by receiving his share of the inheritance.

Archambault v. Maher, 25 Que. K.B. 436.

LUNATIC'S ESTATE—SALE OF LAND.

The administrator of a lunatic appointed by the Lieut.-Gov.-in-Council has power to deal with the real estate of the lunatic without application to the court, whereas in the case of a guardian appointed by the court, the rules of court provide that the real estate can only be sold by order of the court after application made to the court by the guardian.

Re Polgreen, 7 W.W.R. 1184.

LUNATIC—FOREIGN DOMICILE—FOREIGN ASYLUM FOR INSANE—SALE OF LANDS IN ONTARIO.

Re Carr, 2 O.W.N. 680, 18 O.W.R. 205.

PETITION FOR DECLARATION THAT PARTY IS A LUNATIC — MATTER COMES WITHIN 9 EDW. VII. c. 37, s. 7(1).

Re Peel, 19 O.W.R. 511, 2 O.W.N. 1275.

RECORDS IN WRITING—PAROL TESTIMONY—LOSS OF WRITTEN EVIDENCE—DEVOLUTION OF ESTATE—LEX LOCI—NATIVE OF QUEBEC—FOREIGN DOMICILE—PROPERTY IN QUEBEC—LANDS SOLD BY LICITATION—CURATOR—RENDERING ACCOUNTS.

Hawthorne v. O'Borne, 40 Que. S.C. 503.

INCORPORATION.

See Companies.

INDECENCY.

INDECENT ACT — PUBLIC PLACE — INFORMATION—"WILFULLY"—AMENDMENT—"PRESENCE OF ONE OR MORE PERSONS"—SEC. 205 OF THE CRIMINAL CODE.

R. v. Clifford, 26 D.L.R. 754, 26 Can. Cr. Cas. 5, 35 O.L.R. 287.

CRIMINAL PROCEEDINGS—SUMMARY CONVICTION—UNCERTAINTY AND MULTIPLICITY.

A summary conviction for that the accused did "at various times and in public places unlawfully commit acts of indecency" at a named city within a period of 2 months specified is invalid for uncertainty and as including several offences, and no amendment is permissible on certiorari, if the evidence at the hearing included several

distinct offences within the period named in the conviction and the magistrate had neither indicated any particular occasion regarding which he found the accused guilty nor found him guilty in respect of all of such occasions.

R. v. Roach, 19 D.L.R. 362, 6 O.W.N. 630, 23 Can. Cr. Cas. 28.

INDECENT EXPOSURE—INTENT TO INSULT.

On the trial of summary conviction proceedings for an indecent act charged to have been wilfully committed with intent to insult the informant and his friends who were with him, and also charged to have been committed in a public place, the proof of the former makes it immaterial whether the place specified was one to which the public had access or not, and the defendant may be convicted under subs. (b) of Cr. Code, s. 205; the latter subs. refers to an offence committed in any place, whether public or private, where there is the intention to insult or offend one or more persons as distinguished from the public generally.

Berman v. Kocurka, 25 Can. Cr. Cas. 44.

INDEMNITY.

See Contracts, II D—152; Bonds; Guaranty; Principal and Surety; Insurance; Master and Servant, V—34a.

ACTION FOR—JUDGMENT.

In an action for indemnity, law and equity now being administered by the same court, a plaintiff may have judgment for the full amount against which he is indemnified, although he has paid no part of it and may never pay any part of it, in cases where the defendant is not concerned in the application of the money. A claim for an indemnity cannot be made the subject of a special endorsement, but where the whole merits of the case have been gone into, the trial should not be set aside and a new trial ordered, r. 183 being broad enough to enable the court to make all necessary amendments and to give judgment according to the rights and merits of the case.

McDonald v. Peuchen, 41 D.L.R. 619, 42 O.L.R. 18.

COVENANT IN DEED — AGAINST WHOM ENFORCEABLE.

A purchaser's covenant for indemnifying a vendor against all claims, actions, or demands in respect of a mortgage of the lands conveyed, similar in terms to a prior covenant on the part of the vendor in the conveyance of lands to him, may be enforced by the vendor, notwithstanding that he has not paid the principal interest and costs due on the mortgage; but the judgment will direct payment into court by the defendant of the amount to be applied in satisfaction of the mortgage debt. [Re Richardson, Ex parte Governors of St. Thomas's Hospital, [1911] 2 K.B. 705, followed.]

Shaver v. Sproule, 9 D.L.R. 641, 4 O.W.N. 968.

AGAINST WHOM.

A defendant who is liable to the owner of a building for damages caused by the fall of a water tank erected by the former on the roof of the building, as a result of the faulty construction of the supports thereof, is entitled to indemnity from a defendant in warranty from whom the former obtained the tank and its supports.

Wilson v. H. G. Vogel Co.; H. G. Vogel Co. v. Gardiner; Gardiner v. Locomotive & Machine Co., 4 D.L.R. 196.

CASH INDEMNITY—TELLER'S RISK MONEY—RECOVERY—BREACH OF CONTRACT FOR SERVICES.

An indemnity fund furnished to a bank by a clerk, under an agreement separate from his contract of employment, may be recovered by him, notwithstanding his breach of the contract of employment prevents his recovering compensation for his services.

Ashmore v. Bank of B.N.A., 13 D.L.R. 73, 18 B.C.R. 257, 24 W.L.R. 840, 4 W.W.R. 1014.

INDEPENDENT ADVICE.

See Husband and Wife; Deeds.

INDEPENDENT CONTRACTORS.

Liability for acts of, see Highways; Municipal Corporations; Master and Servant.

INDIANS.

I. In general.
II. Lands of.
III. Goods of.

As to supplying intoxicating liquors to, see Intoxicating Liquors.

As to lease of Indian lands, see Landlord and Tenant.

See also Public Lands; Incompetent Persons.

I. In general.

(§ I—1)—OFFENCES OUTSIDE RESERVATION.

An Indian is punishable as other persons are for offences outside a reservation against provincial legislation.

R. v. Martin, 39 D.L.R. 635, 41 O.L.R. 79, 29 Can. Cr. Cas. 189, affirming 40 O.L.R. 270.

(§ I—2)—STATUS—BRITISH SUBJECTS WITH CIVIL RIGHTS, LIMITED HOW.

Indians in Manitoba are British subjects enjoying full civil rights as such, except as specially limited by statute.

Prince v. Tracey, 13 D.L.R. 818, 25 W.L.R. 412.

INDIAN ACT—SUSPENSIVE SALE.

Under the Indian Act (R.S.C. 1906, c. 81) any person who sells anything to a non-treaty Indian can take security on that article for any part of the price thereof which has not been paid. In this case the question arose from a conditional sale, and sales of that nature are valid in law. The action and attachment of goods of the plain-

tiff is allowed following these conclusions with costs.

Rousseau v. Nolette, 25 Rev. de Jur. 210.

II. Lands of.

(§ II—5)—Judgment against—Execution—"Property" on reserve—"Person."

Section 102 of the Indian Act (R.S.C. 1906, c. 81) which prohibits any "person" from taking any security whether by judgment, mortgage or otherwise, upon the property of any Indian applies also to a judgment recovered by an Indian as indorsee of a promissory note given by an Indian to one not an Indian, and is therefore not enforceable against the property on the Reserve; the word "person" in s. 102, includes an Indian.

Atkins v. Davis, 34 D.L.R. 69, 38 O.L.R. 548.

Indians — Reserve — Occupation — Construction—General superintendent—Injunction—C. proc. art. 957 R.S. C. 1906, c. 81, ss. 33, 34.

Under the Indian act (R.S.C. 1906, c. 81) no other than an Indian of the band can, without the authority of the superintendent general, reside in the limits of a reserve belonging to this band or occupied by it. Nevertheless in the case of such illegal residence the superintendent alone can expel him from it, and the mayor of this reserve, a member of the band alone has the right of demanding an injunction to prevent him from building on his land.

D'Ailleboust v. Bellefleur, 25 Rev. Leg. 50.

Seigniorial grant.

The grant of fief by the Governor and Intendant of New France in the usual form and confirmed by the King passes a proprietary title in which are specified all the obligations imposed on the grantee. No others can be added drawn from the circumstances under which the grant was made or from the negotiations and correspondence preceding or accompanying it. An Act passed before the abolition of the seigniorial tenure, confirming the grant and declaring that it was made "for the moral and religious instruction of the Indians, etc.," does not affect the title conferred and gives no real rights in the fief to the Indians named. The religious instruction mentioned in the Act is that to be given by the grantees when it was passed and does not oblige them to resort to any other kind whatever change may since have taken place in the religious belief of the Indians.

Corinthe v. Seminary of Ste. Sulpice, 21 Que. K.B. 315, affirming 38 Que. S.C. 268. [An appeal to the Privy Council was dismissed, Corinthe v. Seminary of Ste. Sulpice, 5 D.L.R. 263, 28 Times L.R. 549, [1912] A.C. 872.]

(§ II—8)—Tribal lands and property.

The effect of 2 Vict. (Can.) c. 50 (see now C.S.L.C. 1861, c. 42), is to place beyond question the title of the Seminary of St. Sulpice of Montreal to the Seigniory of The Lake of Two Mountains, and to make it impossible for the Indians of Oka to establish an independent title either to possession or control in the administration of the seigniory, either by prescription or aboriginal title or on the theory that the title of the seigniory was merely as trustees for the Indians; any benefits to which the Indians were entitled as upon a statutory charitable trust enforceable by legislation or possibly in an action by the Attorney-General were not such as to support an action for recovery of the land by the elected chiefs of the bands of Indians concerned.

Corinthe v Seminary of St. Sulpice, 5 D.L.R. 263, 28 Times L.R. 549, [1912] A.C. 872.

Location and extent—Plan—Possession.

Where oral evidence of acts of possession by the Indians extending the boundaries of their reserve beyond the limits of a plan of reserve in the public records of the province, was unsatisfactory, the boundaries laid down on such plan were adhered to.

R. v. Heisler, 13 E.L.R. 375.

Removal to new reserve—Expediency—Compensation.

The Exchequer Court, pursuant to the provisions of s. 49a of the Indian Act, will recommend the removal of Indians from their Reserve to a new site, if, in the interest of the public and the welfare of the Indians, such removal seems expedient. Under s. 2 (4) of the Act, they are to be compensated for the special loss or damage in respect of their buildings or improvements upon the Reserve.

Re Indian Reserve, Sydney, N.S., 42 D. L.R. 314, 17 Can. Ex. 517.

Committal under judgment debtor procedure — Contempt — Execution — Division Courts Act—Indian Act—Exemption — Powers of province — B.N.A. Act.

Sections 190 et seq. of the Division Courts Act, R.S.O. 1914, c. 63, relating to the imprisonment of debtors, are not intended to apply to Indians. An Indian who has no property other than what is, by virtue of s. 102 of the Indian Act, R.S.C. 1906, c. 81, exempt from seizure under execution, cannot be committed to gaol by a Division Court Judge, after examination as a judgment debtor, even though the Judge be of opinion that the Indian has sufficient means and ability to pay the debt: the Indian Act preventing the judgment creditor from taking the assets of the Indian in execution, they cannot be reached indirectly. There can be no contempt in withholding that which is by law exempt from seizure; and the person of an Indian—a ward of the Dominion Government and subject to the legislation of the Dominion Parliament by the B.N.A. Act, s. 91 (24)—

cannot be taken in execution under a provincial statute.

Re Caledonia Milling Co. v. Johns, 42 O.L.R. 338.

INDIAN LANDS—EXTINGUISHMENT OF INDIAN TITLE—PAYMENT BY DOMINION—LIABILITY OF ONTARIO.

The Province of Ontario is not liable to pay a proportion of the annuities and other moneys which the Dominion of Canada bound itself in the name of the Crown to pay to the Salteaux tribe of the Ojibeway Indians under the Treaty of October 3, 1873.

Dominion of Canada v. Province of Ontario, [1910] A.C. 637, 26 Times L.R. 681, affirming 42 Can. S.C.R. 1.

INDIAN LANDS — B.N.A. ACT — CROWN GRANT — CONSTRUCTION — ADVERSE POSSESSION.

The Crown, in right of the Dominion Government, as having the management, charge and direction of Indian affairs, claimed the ownership of St. Nicholas Island as part of the Seigniory of Sault Saint Louis as conceded in the year 1680 by the King of France and the Governor of Canada to the Jesuit Order for the Indians. Neither in the grant by the King nor in that by the Governor was the island conveyed by express words to the Jesuits. Held, (applying the rule that a Crown grant must be construed most strictly against the grantee and most beneficially for the Crown, so that nothing will pass to the grantee but by clear and express words), that the Dominion Government as representing the Indians, had no title to the island in question. Held (following St. Catherine's Milling & Lumber Co. v. The Queen, 14 A.C. 46), that only lands specifically set apart for the use of the Indians are "lands reserved for Indians" within the meaning of s. 91, item 24 of the B.N.A. Act. The evidence shewed that some of the Indians residing on the Caughnawaga Reserve had erected a small shack and sown at different times some patches of corn and potatoes on the island. Held, that no title by adverse possession could be founded upon such facts, as no ownership or property can be founded upon possession of land or prescription by Indians. The island in question in this case having been the property of the province at the time of Confederation, under the provisions of s. 109 of the B.N.A. Act, it must be held to belong to the province subject to the provisions of the said section.

The King v. Bonhomme, 38 D.L.R. 647, 16 Can. Ex. 437. [Affirmed, 49 D.L.R. 690.]

INDIAN LANDS — SCRIP — GIFT — ESTOPPEL —INFANT.

The suppliant, when a minor of 18 years of age, gave to his father a scrip in satisfaction of half-breed claim arising out of the extinguishment of Indian title, which was issued to him in November, 1900. In 1913 he filed a petition of right to recover the scrip which in due course had found its way back into the hands of the Crown after location, and failing the Crown to return the same he asked the value thereof. Held, that although an infant he had full power to dispose by gift of this scrip to his father. The gift might be voidable but not void. He could for cause, repudiate within a reasonable time after having attained majority. A period of 10 years having elapsed since then he is now estopped by his laches having acquiesced by his conduct in all that has taken place.

On October 20, 1900, a scrip, in satisfaction of half-breed's claim arising out of the extinguishment of Indian title, was issued to the suppliant, who gave it to his father. The latter sold the same for consideration, and the scrip, after acreage had been located, apparently in due form, found its way into the hands of the Crown, and the suppliant now, 13 years after, sues the Crown to have the scrip certificate returned to him and that failing to do so, he asks to recover the value thereof. Held, as there was no covenant running with the scrip and the suppliant having parted with the same, there was no privity as between the Crown and himself, and furthermore he is barred by his laches having, by a period of 12 to 13 years, acquiesced in what had taken place.

L'Hirondelle v. The King, 16 Can. Ex. 193.

III. Goods of.

(§ III—15)—ENFRANCHISEMENT DE FACTO —SEIZURE—R.S.C., C. 81, SS. 107–123—QUE. C.P. 645.

An enfranchised Indian is only such de facto. No Indian is enfranchised unless he has first conformed to the requirements of ss. 107 to 123 of the Indian Act, and has received letters patent which proclaim and authorize his enfranchisement. The movable and immovable goods of unenfranchised Indians are exempt from seizure.

Brossard v. D'Aillebout, 15 Que. P.R. 412.

INDICTMENT, INFORMATION AND COMPLAINT.

I. FORM; REQUISITES.
II. SUFFICIENCY OF ALLEGATIONS.
  A. In general.
  B. Intent; knowledge.
  C. Negation of defences or exceptions.
  D. Duplicity; repugnancy.
  E Description of offence.
  F. Amendment.
  G. Sufficiency to support conviction.
III. JOINDER OF COUNTS OR PERSONS.
IV. QUASHING.

Annotation.

Criminal information; functions and limits of prosecution by this process: 8 D.L.R. 571.

I. Form; requisites.

See Criminal Law; Intoxicating Liquors;

Summary Convictions; Certiorari; Habeas Corpus; Extradition.

Of warrant, see Justice of the Peace, I—2.

(§ I—1)—C. signed an information for an offence against the Canada Temperance Act, leaving the date and a place for the magistrate's name in blank, and mailed it to magistrate J. J., being ill, handed the information to Magistrate M. C. then requested Magistrate M. over the telephone to take the information and to issue a summons thereon. Summons was issued and at the hearing, after the evidence was all in, the defendant's counsel appeared and objected to the magistrate's jurisdiction, but took no further part in the proceedings. Held, that the information was improper, because not laid and signed before the magistrate and that the magistrate acted without jurisdiction. Held, also, that the appearance of defendant's counsel merely to object to the jurisdiction did not operate as a waiver.

The King v. Murray, ex parte Copp, 40 N.B.R. 289.

Where an information under the Canada Temperance Act was laid within 3 months after the offence, but no summons was issued thereon for a year and 14 days after information laid, the delay in issuing summons did not deprive the magistrate of jurisdiction. The Act 7-8 Edw. VII., c. 71, takes effect wherever Part II. of the Canada Temperance Act is in force, without being voted upon.

The King v. Peck, ex parte Beal, 40 N. B.R. 320.

(§ I—2)—Verification.

A conviction for an offence against the Liquor License Ordinance cannot be sustained under an information and warrant describing the accused as "Big Boy of Calgary, Alberta," where, before the accused pleaded to it, the information was amended, without being resworn to, by striking out the words "Big Boy" and substituting therefor the name of the accused, William Davis, and where his objection to the jurisdiction of the police magistrate to try him on the ground that no sworn information had been laid against him, was overruled and the trial proceeded with. [R. v. Crawford, 6 D.L.R. 380, distinguished.]

R. v. Davis, 7 D.L.R. 608, 5 A.L.R. 442, 3 W.W.R. 1.

Information on summary trial.

A conviction by two justices sitting together and having the powers of a magistrate for summary trial without the consent of the accused for an offence under Cr. Code, s. 773, is not invalid because the information was taken before one only of the 2 justices, as by s. 796, one justice has power to remand before 2 justices for the purposes of a summary trial under Part XVI. of the Cr. Code.

R. v. James, 25 D.L.R. 476, 25 Can. Cr. Cas. 23, 9 A.L.R. 66, 32 W.L.R. 528, 9 W.W. R. 235.

Amendment of information—Reswearing.

It is not essential that an information before a magistrate should be resworn after being amended at the hearing, if the amendment merely gives greater particularity or certainty to the charge without changing the charge to an offence of a different kind or alleging it as of a time or place materially different from that first alleged.

R. v. Tally, 21 D.L.R. 651, 23 Can. Cr. Cas. 449, 8 A.L.R. 453, 30 W.L.R. 396, 7 W.W.R. 1178.

Information before justice—Statement of belief.

If the reasonable or probable grounds for believing that an offence has been committed are anything less than the actual knowledge of an eye-witness, the written and sworn information under Cr. Code, s. 654, should be worded accordingly, and the informant not allowed to take a positive oath that the offence was committed.

White v. Dunning, 21 D.L.R. 528, 8 S.L. R. 76, 24 Can. Cr. Cas. 85, 30 W.L.R. 585, 7 W.W.R. 1210.

Verification.

Since 8 & 9 Edw. VII. (Can.), c. 9, s. 2, amending s. 655 of the Cr. Code, a magistrate may issue a summons under the Canada Temperance Act upon a written and signed information alleging information and belief only, without examining witnesses. He must, however, be reasonably satisfied that a summons ought to issue. The defendant, by appearing without objection, waived any defect in the procedure upon issuing the summons.

The King v. Kay, ex parte Dolan, 41 N. B.R. 95.

(§ I—3)—Consent of official or court.

Only in rare cases will the court grant leave to prefer an indictment for criminal libel at the instance of a private prosecutor who has not been bound over at the preliminary inquiry.

R. v. Daniel, 4 D.L.R. 443, 17 B.C.R. 150, 21 W.L.R. 563.

An "acting Attorney-General" is the Attorney-General pro tem., and as such may give a direction to Crown counsel for the preferment of a bill of indictment under Cr. Code, s. 873. Such direction to prefer an indictment may be in general terms written upon the bill authorizing counsel acting for the Crown at a specified Assize sitting to prefer the same.

The King v. Faulkner, 19 Can. Cr. Cas. 47, 16 B.C.R. 229.

Powers of Attorney-General—Extradition.

Cr. Code, s. 873, which permits the Attorney-General to prefer a bill of indictment for any offence, is of general application as to persons, and is not limited to persons already committed for trial or otherwise brought before the court. The

fact that the Attorney-General had caused extradition proceedings to be taken in a foreign country to bring the accused back to Canada and that such proceedings are still pending, is no bar to the Attorney-General preferring a bill of indictment for the same offence under the powers conferred by s. 873.

R. v. Kelly, 27 Can. Cr. Cas. 94, 10 W.W.R. 1345. [Affirmed, 34 D.L.R. 311, 54 Can. S.C.R. 220, 27 Can. Cr. Cas. 282, [1917] 1 W.W.R. 46.]

LEAVE TO PREFER.

Leave to prefer an indictment may properly be refused the Crown when the accused has been discharged on a habeas corpus reviewing a magistrate's commitment for trial in respect of the same charge and holding the evidence insufficient on the merits to justify a committal for trial.

R. v. Mackey, 29 Can. Cr. Cas. 419. [See 40 D.L.R. 287, 29 Can. Cr. Cas. 167, 282, 52 N.S.R. 165.]

(§ I—4)—FORM AND REQUISITES — ADULTERATION ACT (CAN.).

Where a summary prosecution under the Adulteration Act, R.S.C. 1906, c. 133, is permissible, only when brought at the instance of an inland revenue officer, the information must correctly designate his official capacity or it will be void; nor can an amendment be permitted to add his official designation to the information as such would be equivalent to substituting a new information.

Beland v. Boyce, 13 D.L.R. 147, 21 Can. Cr. Cas. 421.

DISCRETION OF ATTORNEY-GENERAL—LEAVE TO PREFER FORMAL CHARGE.

In exercising the discretion given to the provincial Att'y-Gen'l in Saskatchewan and Alberta, under Cr. Code 873 A, as to whether a formal charge shall be preferred on the depositions on which there has been a committal for trial, the Att'y-Gen'l has practically to perform what would be Grand Jury functions in provinces where there is a Grand Jury system. Leave to a private prosecutor to prefer a charge in Saskatchewan upon which, in lieu of an indictment, the accused would in that province be triable should be refused if the Att'y-Gen'l has instructed his agent not to prefer a charge although there has been a committal for trial for the offence, unless such a strong primâ facie case is disclosed on the depositions as to suggest an attempt to stifle a proper prosecution.

R. v. Weiss, 23 D.L.R. 710, 23 Can. Cr. Cas. 460, 8 S.L.R. 74, 30 W.L.R. 458, 7 W.W.R. 1160.

UNDER WAR REVENUE ACT.

A summary prosecution under the Special War Revenue Act, 1915, can only be instituted in the name of the Minister of Inland Revenue; and where the complaint is laid by an excise officer it should specially allege the authorization of the Minister, and in default the complaint cannot be amended, as there is no power to substitute a complainant where the original complainant had no status. [Béland v. Boyce, 21 Can. Cr. Cas. 421, 13 D.L.R. 147, applied.]

Ex parte Richard, 30 D.L.R. 364, 26 Can. Cr. Cas. 166.

NEW INFORMATION ON THE SAME FACTS.

The discharge of the accused upon a preliminary enquiry for an indictable offence is not a bar to fresh proceedings upon a new information based upon the same facts.

The King v. Burke, 19 Can. Cr. Cas. 141.

WHO MAY PREFER.

Where an indictment has been preferred by counsel acting on behalf of the Crown at a court of criminal jurisdiction, it will not be presumed that he would not have preferred it but for the direction of the Att'y-Gen'l or acting Att'y-Gen'l written thereon, and the indictment may be sustained under the general powers conferred upon Crown counsel under Cr. Code, s. 872, if for the same charge as that upon which the accused was committed for trial, whether or not the Attorney-General's direction under s. 873 was regularly given.

The King v. Faulkner, 19 Can. Cr. Cas. 47, 16 B.C.R. 229, 18 W.L.R. 634.

SIGNATURE BY CROWN PROSECUTOR — CR. CODE, S. 872.

A bill of indictment preferred by the Crown prosecutor under Cr. Code, s. 872, for a charge founded on the evidence taken before the committing justice, need not in addition to the signature of the Attorney-General's representative include a statement that he was in fact such representative.

Gagnon v. The King, 24 Can. Cr. Cas. 51.

SIGNATURE BY ACTING ATTORNEY-GENERAL NOT A BARRISTER—VALIDITY.

An indictment preferred by an "acting Attorney-General" in Manitoba, under Cr. Code, s. 873, will not be quashed because the member of the provincial government who acted pro tem. as Attorney-General under a provincial order-in-council passed in pursuance of R.S.M. 1913, c. 112, s. 12, was not a member of the Bar.

R. v. Nyczyk, 31 Can. Cr. Cas. 240, [1919] 2 W.W.R. 661.

WHO MAY PREFER—ACTING ATTORNEY-GENERAL.

An "acting Attorney-General" in Manitoba has authority to prefer an indictment under Cr. Code, s. 873, although there may not have been a properly conducted preliminary enquiry.

R. v. Nyczyk, 31 Can. Cr. Cas. 240, [1919] 2 W.W.R. 661.

DISQUALIFICATION — RELATIONSHIP — INFORMATION—OMISSION TO STATE PLACE OF OFFENCE—SIGNING.

Campbell v. Walsh, 18 Can. Cr. Cas. 304, 40 N.B.R. 186.

ORIGINAL INDICTMENT LOST OR MISLAID—JUDGE'S DIRECTION TO PREFER NEW INDICTMENT BEFORE GRAND JURY.

The King v. McAuliffe, 17 Can. Cr. Cas. 495, 7 O.W.R. 704.

SPECIAL LEAVE OF ATTORNEY-GENERAL—PREFERRING INDICTMENT WITHOUT A PRELIMINARY ENQUIRY AND COMMITMENT.

The King v. Houle, 17 Can. Cr. Cas. 407.

VENUE—INDICTMENT OR CHARGE—LOCALITY OF THE CRIME—RIGHT OF ACCUSED TO LOCAL VENUE—CHARGE IN LIEU OF INDICTMENT.

The King v. Lynn (No. 1), 17 Can. Cr. Cas. 354, 3 S.L.R. 339, 15 W.L.R. 336.

WITNESSES ON APPLICATION FOR WARRANT.

R. v. Johnston, 17 Can. Cr. Cas. 369, 44 N.S.R. 468.

II. Sufficiency of allegations.

A. In general.

(§ II A—5)—INFORMATION FOR SEARCH WARRANT.

A search warrant issued under the Canada Temperance Act, R.S.C. 1906, c. 152, will be quashed, upon certiorari, where no grounds of suspicion are stated in the information.

The King v. Nickerson, ex parte Weston, 40 N.B.R. 382.

(§ II A—6)—AS TO FALSE DECLARATIONS—SURPLUSAGE.

A conviction under Cr. Code, s. 175, for making a false solemn declaration in an extra judicial proceeding, may be supported in respect of a statutory declaration authorized by the Canada Evidence Act, and taken with the formalities which the latter Act requires, although the formal charge was that the accused "being required or authorized by law, to wit, by the Alberta Insurance Act, Alta., 1915, c. 16, to make a solemn declaration," made the false statement with knowledge, etc., "contrary to s. 175, Cr. Code," the reference to the Alberta Insurance Act being treated as surplusage.

R. v. Nier, 28 D.L.R. 373, 25 Can. Cr. Cas. 241, 9 A.L.R. 353, 33 W.L.R. 180, 9 W.W.R. 838.

(§ II A—7)—TIME.

Where the accused is committed under a warrant of commitment for extradition based on an information alleging the offence as of a year prior to the date shewn by the commitment, the information is not a sufficient basis for the commitment, and the prisoner will be discharged in a habeas corpus proceeding.

Re William Staggs (No. 1), 7 D.L.R. 738, 5 A.L.R. 250, 3 W.W.R. 177.

VIOLATION OF TEMPERANCE ACT—TIME—STATING ALTERNATIVELY.

A conviction for selling intoxicating liquor in violation of law on one of the days mentioned is good under an information charging illegal sale on the 24th or 25th days of December inclusively.

Ex parte Teed, 11 D.L.R. 743, 21 Can. Cr. Cas. 255, 41 N.B.R. 555, 12 E.L.R. 497.

TIME OF OFFENCE.

The term of limitation for summary prosecution for vagrancy is six months after the offence (Cr. Code, s. 1142); therefore a complaint is invalid in which the only mention of the time of the offence is that it was within 2 years last past.

R. v. St. Armand, 25 Can. Cr. Cas. 103.

(§ II A—8)—PLACE.

An objection on the ground that the information for an indictable offence did not mention the place where the offence was committed is not a ground for habeas corpus upon the committal of the accused for trial.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

B. Intent; knowledge.

(§ II B—10)—KNOWLEDGE.

In an information for exposing for sale and selling obscene books under s. 207, Cr. Code, as amended by 8 & 9 Edw. VII., c. 9, it is necessary to allege that it was knowingly done, and an allegation that it was done "contrary to law" and "contrary to the form of the statutes," is not sufficient.

R. v. Britnell, 4 D.L.R. 56, 26 O.L.R. 136, 20 Can. Cr. Cas. 85, 21 O.W.R. 800.

D. Duplicity; repugnance.

(§ II D—20)—DUPLICITY.

The particular acts referred to in the subss. of s. 490, Cr. Code, are the ingredients of the single offence of the unlawful use of a beverage trademark, and the fact that more than one of such particular acts are included in the statement of the offence as contained in an information or summons, does not invalidate such information or summons.

The King v. Coulombe, 6 D.L.R. 99, 20 Can. Cr. Cas. 31.

SUFFICIENCY OF ALLEGATIONS—DUPLICITY—"COMMON PROSTITUTE OR NIGHT-WALKER."

A conviction and warrant of commitment issued by a police magistrate charging a woman with vagrancy in that she is "a common prostitute or night-walker" without stating to which of these 2 classes she belongs, is not void of duplicity, since at most this is a mere defect in form within the meaning of the curative provisions of s. 724, Cr. Code, especially where the offence is described in the words of s. 238 (i).

Re Brady, 10 D.L.R. 423, 21 Can. Cr. Cas. 123, 5 A.L.R. 400, 23 W.L.R. 333, 3 W.W.R. 914.

VAGRANCY—MULTIFARIOUSNESS.

It is a ground for dismissing a charge of vagrancy on a summary hearing under Part XV. of the Cr. Code that the complaint alleges distinct offences under different

subss. of s. 238, and is, therefore multifarious. [R. v. Code, 13 Can. Cr. Cas. 372, followed.]

R. v. St. Armand, 25 Can. Cr. Cas. 103.

ASSAULT—DUPLICITY.

Where a charge of assaulting a Crown land surveyor concluded with a statement that accused had prevented the surveyor from performing his official duties, a summary conviction made by a justice reciting the offence in the same words is bad, as the justice had no jurisdiction to deal with the alleged offence of obstructing the surveyor; the conviction was in effect for 2 separate charges, although they were tried as one and a single penalty was imposed, which, however, was excessive even for the assault because of the unauthorized order for payment of damages in addition to the fine, and the conviction could not be amended by the court under Cr. Code, s. 1124, on certiorari.

Ex parte Aylward; R. v. Dugas, 26 Can. Cr. Cas. 144, 43 N.B.R. 443.

SIMILARITY OF COUNTS—ALTERNATIVE MATTER.

It will not be assumed on a motion to quash a count of an indictment for duplicity that a charge of theft of money between stated dates with an interval of 2 years refers to more than a single act or transaction, nor that the money in question is identical with a like sum charged in another count to have been unlawfully received during the same period by the accused as to which particulars delivered by the Crown shew it to be the aggregate of 19 different amounts. An indictment should not charge in the alternative, different offences in the same count in averring the specific act which particularly constitutes the offence, but a count will not be quashed because it charges in the disjunctive merely as to the subject-matter of the offence, e.g., in a charge of theft that it was of "money, valuable securities or other property."

R. v. Kelly, 27 Can. Cr. Cas. 94, 10 W.W.R. 1345. [Affirmed, 34 D.L.R. 311, 27 Can. Cr. Cas. 282, [1917] 1 W.W.R. 46.]

(§ II D—22) — DISCREPANCY BETWEEN COUNT AND PARTICULARS.

An objection to a count of an indictment that there is discrepancy between it a.d the particulars furnished under it and that the averments of the count are not borne out by the particulars, is not matter to be considered on a motion to quash the count, but may be raised at the trial.

R. v. Kelly, 27 Can. Cr. Cas. 94, 10 W.W.R. 1345. [Affirmed, 34 D.L.R. 311, 27 Can. Cr. Cas. 282, [1917] 1 W.W.R. 46.]

E. DESCRIPTION OF OFFENCE.

(§ II E—25)—THEFT.

An information or charge which, in addition to the date of the alleged offence and the name of the local municipality, gives only the following particulars of the nature of the offence: "did steal a certain quantity of towels, the property of the Dominion Textile Co.," is insufficient because of its vagueness; and such insufficiency being a matter of substance is not amendable by the court on the trial so as to charge theft of goods in process of manufacture under Cr. Code, s. 388.

R. v. Leclerc, 31 D.L.R. 615, 26 Can. Cr. Cas. 242.

EXTRADITION.

Where the accused has been brought from a foreign country, under extradition proceedings, to answer an alleged extraditable crime, an indictment against him which does not shew an extraditable crime cannot be sustained until after the accused has been returned to or had the opportunity of returning to the foreign country from which he was extradited (Extradition Act, R.S.C. 1906, c. 155, s. 32).

R. v. Nesbitt, 11 D.L.R. 708, 21 Can. Cr. Cas. 250, 28 O.L.R. 91.

IN LANGUAGE OF STATUTE.

The effect of subss. 2, 3, s. 852, is to permit the use in an indictment of the popular word under which the offence is known instead of setting forth in detail all of the legal elements of the offence which such word indicates; for example, a charge of theft by fraudulent conversion without color of right may be laid simply as theft by charging that the accused "did steal" a specified article and naming as the owner the person in fraud of whom the accused converted the article to his own use.

R. v. Trainor, 33 D.L.R. 658, 27 Can. Cr. Cas. 232, 10 A.L.R. 164, [1917] 1 W.W.R. 415.

VAGUENESS—PARTICULARS.

A charge against a company director under Cr. Code, s. 414, for concurring in the making of a false statement with intent to induce the public to become shareholders will not be quashed for failure to set out the alleged false statement; but such details may properly be made the subject of an order for particulars under ss. 859, 860.

R. v. Buck, 35 D.L.R. 55, 27 Can. Cr. Cas. 427, 10 A.L.R. 437. [Reversed in 55 Can. S.C.R. 133, [1917] 3 W.W.R. 117, 29 Can. Cr. Cas. 45, 38 D.L.R. 548.]

(§ II E—26)—INMATE OF BAWDY HOUSE—STATING LOCATION OF HOUSE.

A charge of being an inmate of a common bawdy house under Cr. Code, s. 229 A, which is tried by a magistrate under s. 774, without the consent of the accused, is not invalid because the precise locality of the house is not designated in addition to the town or territory over which the magistrate had jurisdiction, but the magistrate may order the prosecution to give particulars. [R. v. Crawford, 6 D.L.R. 380, 20

Can. Cr. Cas. 49, and R. v. Mickleham, 10 Can. Cr. Cas. 382, applied.]

R. v. James, 25 D.L.R. 476, 25 Can. Cr. Cas. 23, 9 A.L.R. 66, 32 W.L.R. 528, 9 W.W.R. 235.

(§ II E—27)—Particulars of offence.

The requirement of s. 852, Cr. Code, that a count shall contain in substance that the accused has committed "some indictable offence therein specified" has reference to the particular kind of offence charged as distinguished from other kinds of offences recognized by the law; it is not directed to the specific acts and things which constituted the offence alleged to have been committed, and while by s. 853 particulars should be included with reasonable details to identify the transaction a count cannot be quashed for their absence.

R. v. Kelly, 27 Can. Cr. Cas. 94, 10 W.W.R. 1345. [Affirmed, 34 D.L.R. 311, 27 Can. Cr. Cas. 282, [1917] 1 W.W.R. 46.]

(§ II E—30)—Statutory offences and language.

Where the information and the conviction follow the language of the statute under which the conviction was made, that is all that is required, even though the information and the conviction charged two offences and the evidence was not confined to one offence. [R. v. Leconte, 11 Can. Cr. Cas. 41, 11 O.L.R. 408, applied.]

R. v. Riddell, 4 D.L.R. 962, 19 Can. Cr. Cas. 400, 3 O.W.N. 1628, 19 Can. Cr. Cas. 400, 22 O.W.R. 847.

Sufficiency of—Conspiracy to procure abortion.

An indictment for conspiracy to procure an abortion is sufficient under ss. 303, 852, Cr. Code, where it alleges that the defendants did, at a place in the Province of Ontario, at a given time, conspire, combine, confederate, and agree together to commit a certain indictable offence, to wit, the crime of abortion, by then and there conspiring, combining, confederating, and agreeing together to procure the miscarriage of a named woman, thereby committing an indictable offence, contrary to the Criminal Code.

R. v. Bachrack, 11 D.L.R. 522, 28 O.L.R. 32, 21 Can. Cr. Cas. 257.

Unlawful practice of medicine.

It is not an objection to an information under the Medical Profession Act, 1906, Alta., c. 28, for practising medicine without being licensed, that the acts which constitute the practising are not set out in the information, since the Alberta laws make s. 723, Cr. Code, applicable to offences under the provincial statutes, makes a description of the offence sufficient if it is in the words of the section of the statute which creates it. [Re Effie Brady, 10 D.L.R. 424, 21 Can. Cr. Cas. 123, 5 A.L.R. 400, applied.]

Re Wagner, 25 Can. Cr. Cas. 406, 33 W.L.R. 415, 9 W.W.R. 1000.

Statutory offences—Summons disclosing lack of jurisdiction by lapse of time.

Where a summons calls upon the defendant to answer an information under the Canada Temperance Act recited therein to have been laid at a date more than three months after the offence charged, and the statute limits the time for laying the information to three months, the defendant is not bound to appear as the summons shews on its face that the justice has no jurisdiction to hear the charge; such a defect is not within the curative provisions of the Cr. Code, ss. 723, 724, or of the Canada Temperance Act, R.S.C. 1906, c. 152.

The King v. LeBlanc, 21 Can. Cr. Cas. 221, 12 E.L.R. 66.

Date—Limitations.

A summary conviction founded on a proper information charging the offence under the Canada Temperance Act as having been committed within specified dates both within the three months' limitation of the act will not be set aside because the summons to the accused upon which he failed to attend erroneously described the date of the information so as to make it appear that the time limitation had already expired as to a part of the period specified as the time of the offence. [R. v. LeBlanc, 21 Can. Cr. Cas. 221, 41 N.B.R. 99, distinguished.]

Ex parte Johnson; R. v. Limerick, 27 Can. Cr. Cas. 421, 44 N.B.R. 353.

Unlawful exhibition.

An information for that the defendant "did conduct and give a concert without obtaining a license so to do from the provincial authorities" is insufficient in form to charge an offence under the Quebec License Law, arts. 1292a, 1292b, imposing a penalty upon the manager of any traveling troupe or organization giving concerts or minstrel shows; and a summary conviction made on defendant's default of appearance to such charge will be quashed on certiorari.

Lamontagne v. Lanctot, 25 Can. Cr. Cas. 449.

Statutory language.

It is sufficient to describe in an information an offence in the words of the section of the act which creates it.

Re Wagner, 9 W.W.R. 1000, 25 Can. Cr. Cas. 406.

(§ II E—38)—For obscene language—Particulars.

An information for using obscene language is defective if it does not set out the language used, but the defect may be cured by defendant's appearance and plea without taking exception thereto at the hearing.

R. v. Ballentine, 22 Can. Cr. Cas. 385.

(§ II E—40)—Obscenity.

A person cannot be summarily convicted by a magistrate under s. 207, Cr. Code,

which declares that it is an indictable offence to "knowingly . . . sell, or expose for sale" any obscene book, upon an information which did not charge that he "knowingly" exposed for sale or sold such book.

R. v. Britnell, 4 D.L.R. 56, 26 O.L.R. 136, 20 Can. Cr. Cas. 85, 21 O.W.R. 800.

COMMON BAWDY HOUSE.

An information in a summary proceeding charging the keeping of "a bawdy house" and omitting to describe such as a "common" bawdy house, is bad as not disclosing a legal offence, and the charge thereon should be dismissed; that it is a "common bawdy house" is an essential ingredient of the offence under Cr. Code, s. 228, which declares a "common bawdy house" to be a disorderly house, the keeping of which is punishable thereunder, and the omission of the description in that particular is not cured by a plea to the charge nor is there power in the magistrate to amend such a defect of substance.

R. v. Jousseau, 24 Can. Cr. Cas. 417.

(§ II E—44) — CONSPIRACY — ASSISTING ALIEN ENEMY.

A conviction against the husband only upon an indictment of husband and wife, upon which the wife was acquitted, for conspiracy to aid and comfort a public enemy at war with the King by inciting and assisting a subject of the enemy country to leave Canada and join the enemy's forces, is not sustainable where there was no evidence of the husband conspiring with any person other than the person named in the indictment as the person incited and assisted, although the indictment charged that the two defendants did maliciously and traitorously conspire, confederate and agree with each other "and with others," for if it had been intended to cover a charge of a conspiracy with the assisted alien he should have been specifically named; the words "with others" must, in that connection, be construed as excluding the person specifically named as the alien who was assisted to leave Canada and as referring to persons unknown.

R. v. Nerlich, 25 D.L.R. 138, 24 Can. Cr. Cas. 256, 34 O.L.R. 298.

COMMON ASSAULT.

An information charging that the accused "threatened" the complainant with an axe, "contrary to s. 291 of the Criminal Code," is sufficient to charge the offence of common assault for which that section of the Code provides.

R. v. Tally, 21 D.L.R. 651, 23 Can. Cr. Cas. 449, 8 A.L.R. 453, 30 W.L.R. 396, 7 W.W.R. 1178.

FALSE PRETENCES.

An indictment or charge for obtaining money under a false pretence is not bad for not setting out what the false pretence was or stating to whom it was made. (Cr. Code, ss. 852, 1152, Form 64 (c).

R. v. Leverton, 34 D.L.R. 514, 28 Can. Cr. Cas. 61, 11 A.L.R. 355, [1917] 2 W.W.R. 584.

OMISSION OF WORD "MATERIAL" FROM CHARGE AGAINST SERVANT FOR OMITTING ITEMS FROM EMPLOYER'S BOOKS.

It is error to omit the word "material" from an indictment or formal charge against a servant under s. 415 (b) Cr. Code, relating to the fraudulent making of a false entry in, or the fraudulent omission to make entry in, a book of account of the employer in any material particular.

R. v. Wilson, 15 D.L.R. 168, 6 S.L.R. 348, 26 W.L.R. 148, 5 W.W.R. 620.

(§ II E—49)—SUFFICIENCY — OFFENCES BY BANK OFFICERS.

A variance in charging the offence of making a wilfully false statement in a bank return as fraudulently making such statement will not be permitted where it is necessary, in order to sustain the indictment under extradition laws, that the offence should be one of fraud, and the statute under which the prosecution is based does not make fraud an essential ingredient of the offence thereunder.

R. v. Nesbitt, 11 D.L.R. 708, 28 O.L.R. 91, 21 Can. Cr. Cas. 250.

F. AMENDMENT.

(§ II F—55) — DIRECTION OF ATTORNEY-GENERAL.

When an amendment is made at the request of the Att'y-Gen'l to a charge brought in Alberta where there is no grand jury system, the amended charge has the same validity as the former charge, unaffected by a consideration as to whether an indictment could be similarly amended by the court in a matter of substance.

R. v. Wallace, 24 D.L.R. 825, 8 A.L.R. 472, 24 Can. Cr. Cas. 95.

IRREGULARITY OR INSUFFICIENCY.

An indictment purporting to charge an offence under Cr. Code, s. 536, para. (b), in laying out poison, but which charged that the poison was wilfully placed in such a position as to be easily partaken of by "animals" instead of by "cattle" (s. 536), should not have been quashed on defendant's motion, but should have been amended or a new indictment in due form preferred.

Richard v. Goulet, 19 D.L.R. 371, 23 Can. Cr. Cas. 327, 45 Que. S.C. 374.

SPEEDY TRIALS CHARGE — SUBSTITUTING NEW COUNT NOT COVERED BY PRELIMINARY ENQUIRY — AMENDMENT — ATTACHING NEW COUNT TO FORMAL CHARGE.

In Saskatchewan where a charge in lieu of indictment may be laid by the Att'y-Gen'l's agent without any preliminary enquiry, it is not a valid objection to a substituted count added by leave of the district judge holding a criminal trial under the Speedy Trials clauses (Cr. Code, s. 827, as amended 1909), that the new charge being one for fraudulently omitting to make entries in his employer's books (s. 415b)

was not covered by the preliminary enquiry which was held only upon a charge of theft. Annexing a new count written on a separate paper to the formal charge brought under the Speedy Trials clauses (Cr. Code, s. 827) which had been duly signed by the prosecuting counsel is sufficient, where done by such counsel, to incorporate the new count in the formal charge so amended by consent of the Trial Judge, and so validate a speedy trial on the new count upon which the trial proceeded when the original count was quashed.

R. v. Wilson, 15 D.L.R. 168, 26 W.L.R. 148, 6 S.L.R. 348, 5 W.W.R. 620.

Upon the summary trial of a charge of keeping a disorderly house, the magistrate has power to amend the information during the course of the trial, by changing the street number of the alleged disorderly house, without having the information re-sworn. The powers of amendment granted by s. 1124 Cr. Code, are not confined to summary convictions, but may be exercised in the case of convictions for indictable offences. [R. v. Shing, 17 Can. Cr. Cas. 463, dissented from.]

R. v. Crawford, 6 D.L.R. 380, 20 Can. Cr. Cas. 49, 5 A.L.R. 204, 22 W.L.R 107, 2 W.W. R. 952.

A complaint under c. 35 of 1 Geo. V. of Quebec, which prohibits the sale of cocaine, morphine or their compounds, except to wholesale dealers, physicians, druggists, dentists, veterinary surgeons, or the holders of physicians' prescriptions, cannot be amended, upon such acts, being held void because in conflict with the subsequent enactment of the Dominion Parliament, 1 & 2 Geo. V. c. 17, which makes it a crime to sell, take, or have in one's possession cocaine, without lawful excuse, so as to set out an offence under the Dominion Act, since the effect of allowing such amendment would be to change the nature and gravity of the offence charged in the original information.

Dufresne v. The King, 5 D.L.R. 501, 19 Can. Cr. Cas. 414.

A conviction for a common assault may be sustained under an indictment for shooting at a person with intent to kill, where an accused person, when within shooting distance, pointed a gun at another, the bullet from which struck a horse the latter was riding. [Regina v. St. George, 9 C. & P. 483, followed.]

The King v. Chartrand, 4 D.L.R. 397, 20 Can. Cr. Cas. 116, 6 S.L.R. 184, 21 W.L.R. 850, 2 W.W.R. 773.

An indictment charging an offence under s. 405 Cr. Code, of obtaining money by false pretences, upon which a true bill has been found by the grand jury, cannot be amended at the close of the case for the Crown so as to charge an offence under s. 405a of obtaining credit by false pretences, inasmuch as the two offences are not substantially of the same nature. An indictment cannot be so amended, after having been passed upon by the grand jury, to charge an offence substantially different from that charged in the original indictment.

R. v. Cohen, 5 D.L.R. 437, 19 Can. Cr. Cas. 428, 26 O.L.R. 497, 22 O.W.R. 456.

A conviction under the Canada Temperance Act was erroneously drawn up in the "District of Chipman Civil Court." It was in fact made by the stipendiary magistrate for the district of Chipman. Upon certiorari the court amended the conviction by striking out the words "Civil Court."

Ex parte Weston; Ex parte Dykeman, 40 N.B.R. 379.

(§ II F—56)—OF NAME OF ACCUSED.

The true name of the person against whom the offence was alleged to have been committed may be substituted by the court in an indictment after the grand jury has found a true bill, where the name originally in the indictment was that by which the same party was commonly known.

The King v. Faulkner, 19 Can. Cr. Cas. 47, 16 B.C.R. 229.

(§ II F—57)—CHANGING DATE OF OFFENCE.

Where the particular offence laid in the indictment is not of the class as to which a change of date would be tantamount to charging a different offence, the court may order an amendment of the date of the offence to conform to the evidence even after the close of the evidence. [R. v. Lacelle, 10 Can. Cr. Cas. 229, 11 O.L.R. 74, distinguished.]

Veronneau v. The King, 31 D.L.R. 332, 26 Can. Cr. Cas. 278, 25 Que. K.B. 275. [Affirmed, 33 D.L.R. 68, 54 Can. S.C.R. 7, 27 Can. Cr. Cas. 211.]

SUMMARY CONVICTION PROCEEDINGS — TIME OF OFFENCE NOT DISCLOSED.

When neither the summary conviction nor the information on which it was based mentioned the time of the offence, an appeal from the conviction will be allowed, there being no power on the hearing of the appeal to remedy the defect by an amendment, although the magistrate might have amended the information under Cr. Code, s. 669.

R. v. Dunlop, 22 Can. Cr. Cas. 245, 27 W. L.R. 121, 6 W.W.R. 3.

G. SUFFICIENCY TO SUPPORT CONVICTION.

(§ II G—60)—DATES.

An information charging the keeping of a disorderly house between certain dates, the last which was the date of the information, excludes the latter date and, semble, also the first date mentioned.

R. v. Emery, 33 D.L.R. 556, 27 Can. Cr. Cas. 116, 10 A.L.R. 139, [1917] 1 W.W.R. 337.

LACK OF PARTICULARS—SEDITION.

On an indictment for speaking seditious words with intent, etc., an objection that neither the words nor their purport were set out in the count, will not be made the

subject of a reserved case where no objection was taken at the trial and where no application had been made to the Trial Judge to order particulars; failure to supply reasonable particulars if demanded might have constituted a mistrial, but, where not demanded, the objection was cured by verdict. [The Queen v. Stroulger, 17 Q.B.D. 327, followed.]

R. v. Trainor, 33 D.L.R. 658, 27 Can. Cr. Cas. 232, 10 A.L.R. 164, [1917] 1 W.W.R. 415.

Several persons may be convicted of the one offence of keeping a house of ill-fame, and that either jointly or severally.

R. v. Bloom, 15 D.L.R. 484, 7 A.L.R. 1, 26 W.L.R. 459, 5 W.W.R. 897.

SUFFICIENCY — LATITUDE AS TO PARTICULARITY.

While fair information and reasonable particularity as to the nature of the offence under the summary conviction sections of the Cr. Code, must be given in informations and convictions, this merely means that such particulars as to the time, place and subject matter of the charge must be given, as, with the statutory description of the offence, will shew upon the face of the conviction exactly what it is for; especially since such sections are administered generally by a body of men without special legal training or experience.

Re Effie Brady, 10 D.L.R. 424, 21 Can. Cr. Cas. 123, 5 A.L.R. 400, 23 W.L.R. 333, 3 W.W.R. 914.

An information charging, under the Motor Vehicle Act (Alta.), the offence as driving "at a greater speed than 15 miles per hour" instead of in the words of the statute "at a greater speed than one mile in 4 minutes," charges the identical offence covered by the words of the statute and is sufficient, although it may be the better practice in such cases to follow the words of the statute itself.

R. v. Ley, 7 D.L.R. 764, 20 Can. Cr. Cas. 170, 2 W.W.R. 849.

The information for the warrant upon which defendant was arrested stated an offence under the Indian Act, R.S.C. 1906, c. 81, s. 135. At the hearing the informant admitted that his knowledge was based on information and belief only. Upon certiorari:—Held, the magistrate acquired jurisdiction by the information, which was sufficient on its face, and even if the warrant was bad, the conviction would not therefore be set aside. The conviction purported to follow Form 62 Cr. Code, but omitted to adjudge costs of commitment, and also omitted to order that the costs should be paid to the informant. Held, the court would amend the conviction by adding the parts omitted.

The King v. Matheson; Ex parte Belliveau, 40 N.B.R. 368.

(§ II G—61)—PARTICULARS.

The proviso in s. 853 (1) Cr. Code that the absence or insufficiency of details shall not vitiate an indictment, does not dispense with the right of the accused to demand particulars of the time, place and matter of the offence sufficient to identify the transaction complained of; the count will not be quashed for the absence of these details, nor is there any mistrial on that account where no objection was raised at the trial and where the indictment followed a preliminary inquiry, the depositions upon which gave reasonable information to enable the accused to know what he had to answer.

R. v. Trainor, 33 D.L.R. 658, 27 Can. Cr. Cas. 232, 10 A.L.R. 164, [1917] 1 W.W.R. 415.

III. Joinder of counts or persons.

(§ III—65)—The Crown prosecutor may prefer indictments for as many different offences as he finds disclosed by the depositions, and also for the charge set out in the commitment for trial.

The King v. Montminy, 3 D.L.R. 483, 20 Can. Cr. Cas. 63, 18 Rev. de Jur. 309.

Upon more than one information for separate offences of a similar character being lodged against a person, a magistrate should not hear evidence at the same time as to all the charges, where some of it would be relevant to one, but not to the others. [Hamilton v. Walker, [1892] 2 Q.B. 25; Reg. v. Fry, 67 L.J.Q.B. 67; Reg. v. McBerny, 3 Can. Cr. Cas. 339, 29 N.S.R. 327, and R. v. Burke (No. 2), 8 Can. Cr. Cas. 14, followed; R. v. Dunkley, 1 O.W.N. 861, and R. v. Sutherland, 2 O.W.N. 595, distinguished.]

R. v. Lapointe, 4 D.L.R. 210, 3 O.W.N. 1469, 20 Can. Cr. Cas. 98, 22 O.W.R. 601.

HUSBAND AND WIFE.

A husband and wife may be charged jointly with keeping a house of ill-fame.

R. v. Bloom, 15 D.L.R. 484, 7 A.L.R. 1, 26 W.L.R. 459, 5 W.W.R. 897.

PERJURY.

A conviction for perjury which shews but one conviction on a charge of making several false statements in the course of a trial, will be construed and treated as a charge and conviction for a single offence only, notwithstanding that each false statement might have been charged as a distinct offence.

R. v. Yee Mock, 13 D.L.R. 220, 21 Can. Cr. Cas. 400, 6 A.L.R. 231, 4 W.W.R. 1342.

JOINT OR SEPARATE CHARGES.

When the depositions taken before the committing magistrate disclose the fact that on the preliminary inquiry evidence had been given of statements made by each of the accused in the absence of the other, which tended to implicate the one but not the other, and which might work an injustice to such other if introduced at a joint trial, the prosecuting counsel desiring to use such statements in evidence when the trial shall take place should see to it either that separate indictments are laid

against the two accused or that an application to the Trial Judge for a separate trial is not opposed by the prosecution.

R. v. Murray, 33 D.L.R. 702, 27 Can. Cr. Cas. 247, 10 A.L.R. 275, [1917] 1 W.W.R. 404. [See also R. v. Murray (No. 1), 28 D.L.R. 372, 25 Can. Cr. Cas. 214, 9 A.L.R. 319. For later decision, see 38 D.L.R. 395, [1917] 2 W.W.R. 805, 11 A.L.R. 502, 28 Can. Cr. Cas. 247.]

ADDED COUNTS FOR CHARGES NOT BEFORE MAGISTRATE — RIGHT TO SUMMARY TRIAL.

Where the indictment has been preferred at the direction of the Att'y-Gen'l (Cr. Code, s. 873), in a form which includes counts for other offences as well as the offence charged in the information before the magistrate, and for which he committed the accused, the latter cannot object to plead on the ground that he elects trial before the magistrate on such of the charges as are subjects of summary trial if the magistrate had no jurisdiction of summary trial on the information before him, at least where the defence does not shew that the magistrate was one of the class acquiring jurisdiction under s. 777, subs. 2, as amended 1909.

R. v. Pawliski, 25 D.L.R. 527, 24 Can. Cr. Cas. 147, 31 W.L.R. 675.

MISJOINDER OF PERSONS.

There is a misjoinder which nullifies the information and the summons thereon where 3 persons are jointly charged with a vagrancy offence as being a night walker.

R. v. Lachance, 24 Can. Cr. Cas. 421.

(§ III—66)—DIRECTION OF ATTORNEY-GENERAL.

The inclusion in the indictment of a count which is not supported by the depositions taken on the preliminary inquiry is validated by obtaining the direction of the Att'y-Gen'l to the preferring of the indictment in that form.

R. v. Pawliski, 25 D.L.R. 527, 24 Can. Cr. Cas. 147, 31 W.L.R. 675.

(§ III—67)—IN EXTRADITION.

The onus lies upon the accused to show on a motion to quash an indictment that the offences therein charged are not offences for which he was extradited and that the indictment is consequently proceeded with in contravention of the Extradition Act; the record in the extradition proceedings may be looked at, as well as the warrant of surrender, to determine the precise offence for which the extradition was ordered.

R. v. Kelly, 27 Can. Cr. Cas. 94, 10 W. W.R. 1345. [Affirmed, 34 D.L.R. 311, 27 Can. Cr. Cas. 282.]

CUMULATIVE OFFENCE—PARTICULARS.

R. v. Michaud, 17 Can. Cr. Cas. 86, 39 N.B.R. 418.

INDICTMENT — SEPARATE COUNTS — DISCRETION AS TO SEPARATE TRIAL.

The King v. Hughes, 17 Can. Cr. Cas. 450, 22 O.L.R. 344.

IV. Quashing.

(§ IV—70)—Where an indictment, upon which a true bill has been found by the grand jury, has been amended at the close of the case for the Crown so as to charge an offence substantially different from that charged in the original indictment, and the accused has been convicted of the offence charged in the amended indictment, a substantial wrong or miscarriage has occurred at the trial, inasmuch as the accused has been convicted upon a charge which has not been dealt with by the grand jury, and s. 1019 Cr. Code, is, therefore, inapplicable, and the conviction must be quashed.

R. v. Cohen, 5 D.L.R. 437, 19 Can. Cr. Cas. 428, 26 O.L.R. 497, 22 O.W.R. 456.

The absence of a properly proved transcript of the depositions is not a ground for quashing the indictment, provided such indictment sets out the same charge as the one contained in the commitment.

The King v. Montminy, 3 D.L.R. 483, 20 Can. Cr. Cas. 63, 18 Rev. de Jur. 309.

JOINDER OF PERSONS — WANT OF JURISDICTION AGAINST ONE.

Where a joint information for keeping a house of ill-fame is laid before a police commissioner in Alberta whose jurisdiction under Alta. statutes 1907, c. 5, is subject to the limitation that the first tribunal of justices having cognizance of the fact in any particular case shall have exclusive jurisdiction, the jurisdiction of the commissioner is ousted as to one of the two parties, from the fact that a prosecution is pending before a police magistrate having jurisdiction over the offence upon a prior information which included the same offence, the trial of which had been adjourned by the police magistrate; and the charge on the joint information before the commissioner must fall as to both because of such want of jurisdiction.

R. v. Bloom, 15 D.L.R. 484, 7 A.L.R. 1, 26 W.L.R. 459, 5 W.W.R. 897.

INFORMATION TREATED AS FORMAL CHARGE OR INDICTMENT—SPEEDY TRIAL.

Where the information on which the preliminary enquiry proceeded is used in place of a formal indictment or "charge" on a speedy trial, and the accused moves to quash it as such, he thereby treats it as a de facto indictment and cannot object to the lack of a formal document, at least where no prejudice is shewn.

R. v. Daigle, 18 D.L.R. 56, 23 Can. Cr. Cas. 92.

CONCURRENT INDICTMENTS FOR SAME OFFENCE—CROWN TO ELECT—DEPOSITIONS —SIGNATURE.

Where a second grand jury was summoned and a second indictment brought in for the same offence because of the prosecution being in doubt as to the regularity of the first indictment, it is the privilege of the accused to compel the Crown to elect upon which of them it will proceed, but if the accused was tried only upon one of

the indictments and made no motion to compel the Crown to elect, no prejudice is shewn which will invalidate the conviction made on such trial. Irregularities in the signature of the depositions on which the commitment for trial was founded will not invalidate the bill found by the grand jury where no objection on account thereof has been raised until after electing a jury trial when arraigned under the speedy trials clauses, Part XVIII. Cr. Code, s. 827.

R. v. Morin, 38 D.L.R. 342, 26 Que. K.B. 428, 28 Can. Cr. Cas. 269.

MOTION TO QUASH — DEFECTS IN DEPOSITIONS — INDICTMENT WHICH MIGHT HAVE BEEN PREFERRED WITHOUT A PRELIMINARY ENQUIRY.

Alleged defects in the taking of the depositions on the preliminary enquiry cannot be raised on a motion to quash an indictment preferred under Cr. Code, s. 873, by the Att'y-Gen'l or by his direction or under the consent of a judge or of the Attorney-General.

R. v. Nyczyk, 31 Can. Cr. Cas. 240, [1919] 2 W.W.R. 661.

FOR MISJOINDER OF DEFENDANTS.

An objection to summary conviction proceedings for misjoinder of 3 persons accused under one complaint for an offence several in its nature will be maintained even after plea as it forms a ground of nullity of the proceedings and not a mere irregularity which might be waived.

R. v. Lachance, 24 Can. Cr. Cas. 421.

MOTION TO QUASH INDICTMENT—REFUSAL—RENEWAL AFTER DISAGREEMENT OF JURY—CR. CODE, SS. 216, 872, 873, 898.

R. v. Perkins, 8 O.W.N. 600.

(§ IV—71)—GRAND JURY—NUMBER REQUISITE TO TRUE BILL—OMISSION TO INSTRUCT.

Where a true bill was brought in by a grand jury consisting of 12 jurors which number, as the law then stood for that district, was the minimum for bringing in a bill, the proceedings will not be invalidated because the grand jury had not been instructed by the court as to the number required for that purpose, where no proof is produced that the 12 were not unanimous.

R. v. Spintlum (No. 1), 15 D.L.R. 778, 22 Can. Cr. Cas. 483, 18 B.C.R. 606, 26 W.L.R. 849, 5 W.W.R. 977, 1199.

INTERPRETER TRANSLATING FOR GRAND JURY—PRESENCE DURING DELIBERATIONS.

Where it is necessary to have an interpreter to translate the testimony of witnesses before a grand jury, the presence of such interpreter in the grand jury room during the grand jury's deliberations will not invalidate an indictment.

Gagnon v. The King, 24 Can. Cr. Cas. 51.

SELECTION AND QUALIFICATION OF JURORS.

An information will not be quashed on the ground that the jury which returned it was illegally constituted because the sheriff, in drawing it, struck from the panel the names of 2 regularly drawn jurors, who, to his own knowledge, were exempt from jury duty, and substituted therefor 2 other duly qualified jurors, without having before him the affidavit of exemption required by ss. 43, c. 162, R.S.N.S. 1900, as such requirement is not imperative, although a disregard thereof is a dereliction of the sheriff's duty.

The King v. Brown and Diggs, 19 Can. Cr. Cas. 237, 45 N.S.R. 473.

(§ IV—72)—CONSTABLES ACCOMPANYING GRAND JURY — PRESENCE AT DELIBERATIONS.

An indictment will not be quashed because of the presence in the grand jury room of the constables sworn to accompany the grand jury to secure the secrecy of its deliberations.

Gagnon v. The King, 24 Can. Cr. Cas. 51.

(§ IV—75)—QUASHING INDICTMENT—IRREGULARITY IN GRAND JURY PROCEEDINGS.

R. v. Birchenough, 16 D.L.R. 394, 22 Can. Cr. Cas. 483.

COMPLAINANT BEING GRAND JUROR.

If in fact he took no part in the proceedings of the grand jury which found and presented an indictment, it is not a ground for quashing the indictment that the complainant in the proceedings which led up to the grand jury was himself a grand juror, and was summoned, sworn and attended at the hearing by the grand jury, and that he made statements to another who repeated them to other jurors, with reference to the conduct of the accused.

Veronneau v. The King, 33 D.L.R. 68, 54 Can. S.C.R. 7, 27 Can. Cr. Cas. 211, affirming 31 D.L.R. 332, 26 Can. Cr. Cas. 278, 25 Que. K.B. 275.

(§ IV—80)—FAILURE OF COMMITTING JUSTICE TO AGAIN READ DEPOSITIONS.

An indictment founded upon a committal for trial is subject to be quashed for failure of the committing justice to ask the accused after the examination of the witnesses for the prosecution whether he wishes the depositions to be read again, even where the depositions were taken in shorthand (Cr. Code, ss. 683, 684), if the rereading of the depositions was not waived by the accused (s. 684) and did not take place; the direction of s. 684 in that respect is imperative and not merely permissive. [McDonald v. The King, 30 D.L.R. 738, 26 Can. Cr. Cas. 175, 25 Que. K.B. 322, applied.]

R. v. Beaulieun, 28 Can. Cr. Cas. 336, 26 Que. K.B. 151.

SPECIFIC GROUNDS.

On a motion to quash an indictment on the ground that the grand jury finding it was not properly constituted, the objecting party must specifically set forth his grounds of objection, and will not be given the benefit of a ground not specified.

R. v. Morrow, 24 Can. Cr. Cas. 310.

GRAND JURY RETURNING TRUE BILL UPON DEPOSITIONS WITHOUT HEARING EVIDENCE.

R. v. Thurstan, 16 B.C.R. 326, 20 Can. Cr. Cas. 505.

MOTION TO QUASH—QUASHING OF FORMER INDICTMENT — NEW INDICTMENT PREFERRED BY ATTORNEY-GENERAL.

The King v. Robert (No. 2), 17 Can. Cr. Cas. 196.

INFORMATION—LOCALITY OF OFFENCE—INFORMATION BY TELEPHONE MESSAGE.

R. v. Harrington, 17 Can. Cr. Cas. 62, 16 O.W.R. 169.

INFORMATION—CRIMINAL OFFENCE DISCLOSED—REFUSAL OF MAGISTRATE TO ISSUE PROCESS.

The King v. Graham, 17 Can. Cr. Cas. 264.

COMMON GAMING HOUSE—UNLAWFUL PLAYING OR LOOKING ON—WHETHER SEPARATE OFFENCES.

The King v. Toy Moon, 21 Man. L.R. 527, 19 Can. Cr. Cas. 33, 19 W.L.R. 480.

An objection on the ground that the information for an indictable offence did not mention the place where the offence was committed is not a ground for habeas corpus upon the committal of the accused for trial.

Dick v. The King, 19 Can. Cr. Cas. 44, 13 Que. P.R. 57.

JUSTICE OF THE PEACE—RELATIONSHIP—INFORMATION—OMISSION IN TO STATE PLACE OF OFFENCE—SIGNING.

Campbell v. Walsh, 40 N.B.R. 186, 18 Can. Cr. Cas. 304.

EVIDENCE NOT TAKEN BEFORE SUMMONS ISSUED—SUFFICIENCY OF INFORMATION—PREVIOUS CONVICTION — "AUTREFOIS CONVICT."

R. v. Mitchell, 19 Can. Cr. Cas. 113, 24 O.L.R. 324, 19 O.W.R. 588.

INDORSEMENT.

See Bills and Notes.

See also Pleading; Writ and Process.

INFANTS.

I. IN GENERAL; CONTROL; SUPPORT; RIGHTS AND LIABILITIES.

A. In general.

B. Support of, and care for.

C. Custody.

D. Disabilities and liabilities.

II. SALE, LEASE OR MORTGAGE OF REAL ESTATE.

III. ACTIONS.

As to proceedings for custody of child, see also Habeas Corpus, I C—14.

See also Parent and Child; Husband and Wife; Incompetent Persons.

Liability of parent for tort of imbecile child, see Parent and Child, I.

Annotation.

Disabilities and liabilities; contributory negligence of children: 9 D.L.R. 522.

I. In general; control; support; rights and liabilities.

A. IN GENERAL.

(§ I A—1)—ADMINISTRATION OF ESTATE—LETTERS OF GUARDIANSHIP—NOTICE—COUNSEL.

Under c. 19, 1917 (Alta.), an act to provide for an administrator of the estates of infants and an official guardian of said estate, the official guardian is not entitled to notice of, or representation by counsel on, an application by a widow for letters of guardianship of the estate of an infant child.

Re Nicholls, [1917] 3 W.W.R. 652.

B. SUPPORT OF, AND CARE FOR.

(§ I B—5)—COURT ALLOWANCE FOR MAINTENANCE OUT OF INFANT'S ESTATE—INSURANCE MONEY.

The general rule is that, on an application to get in the shares of infant children under a policy of insurance, the fund must be brought into court; but under its discretionary power as to allowances for maintenance, the court in a proper case may dispense with payment in and permit the trustee to expend the entire sum for maintenance under an undertaking so to apply.

Re Havey, 14 D.L.R. 668, 29 O.L.R. 336.

PERSON IN LOCO PARENTIS—BOARD AND LODGING OF INFANT—ABSENCE OF AGREEMENT—PRESUMPTION.

In the absence of an express agreement with a person acting in loco parentis that he is to be remunerated for board, lodging and maintenance, the presumption is that these are rendered gratuitously.

George v. Peart, 44 D.L.R. 569, 52 N.S.R. 436.

MONEY IN HANDS OF TRUSTEES—PAYMENT FOR MAINTENANCE.

Re Carnahan, 6 D.L.R. 857, 4 O.W.N. 115, 23 O.W.R. 97.

INFANT'S ESTATE.

The court does not sanction the use of the corpus of an infant's estate for maintenance unless satisfied that such use will be more beneficial to the infant than preserving his property intact until he comes of age; there should be no encroachment on the principal except for unavoidable reasons falling little short of necessity. [Goodfellow v. Rannie, 20 Gr. 425, and Crane v. Craig, 11 P.R. 236, approved.]

Re Rundle, 32 O.L.R. 312.

FUND IN HANDS OF TRUSTEES—PAYMENTS OUT OF CORPUS FOR ADVANCEMENT IN LIFE OF INFANT—SAFEGUARDS.

Re Chapman, 15 O.W.N. 3.

NIECE IN CUSTODY OF UNCLE—PRESUMPTION AS TO GRATUITOUS MAINTENANCE—SUCCESSION RIGHTS.

In the case of a child brought up by a relation, the court may, according to the circumstances, decide that the relation has no right to make a claim for the expenses of board, maintenance or education; neverthe-

less, gratuitous maintenance is never presumed. Where a young girl, an orphan, is adopted by her uncle, with whom she lives for a number of years having in the meantime inherited $300, which she gives to him, and afterwards dies intestate, her heirs have no right to claim that amount, which should remain in the possession of the defendant for payment of the expenses for her illness, care and maintenance.

Joly v. Piche, 47 Que. S.C. 9.

MAINTENANCE AND EDUCATION—DIRECTIONS OF WILL—APPLICATION OF INTEREST UPON SHARE OF ESTATE—ENCROACHMENT UPON CORPUS—REFUSAL TO ALLOW.

Re Vidal, 9 O.W.N. 115.

(§ I B—8)—CRIMINAL LIABILITY FOR FAILURE TO PROVIDE NECESSARIES.

A father is not criminally liable under s. 242 Cr. Code, for failing to provide necessaries for a child 10 years of age, who was taken by its mother, in anger, from the father's house on a bitterly cold night, and who was, with its mother, frozen to death, where the father, who had provided a home according to his station in life, had reason to believe that the mother and child had gone to a neighbour's, but, instead, they were lost on the way, since the father did not have reason to anticipate that the mother would expose the child to such danger.

The King v. Sidney, 5 D.L.R. 256, 20 Can. Cr. Cas. 376, 5 S.L.R. 392, 21 W.L.R. 853, 2 W.W.R. 761.

"NEGLECTED CHILD" — CHILDREN'S PROTECTION ACT—CONVICTION OF MOTHER'S PARAMOUR—JURISDICTION OF JUVENILE COURT—POWERS OF PROVINCIAL LEGISLATURE.

Under s. 18 (d) of the Children's Protection Act (Ont.), which enacts that any person who is guilty of an act or omission which contributes to a child being or becoming a neglected child, shall incur a penalty and be liable to imprisonment, there is no right to punish unless it is shewn that there was an actual injury to the child; when the child is of such tender years as to be unable to appreciate the moral quality of its mother's conduct, her adultery does not ipso facto make the child a neglected child within the meaning of the act; and the adulterer cannot be convicted of contributing to making the child a neglected child. [R. v. Owens, an unreported decision of Clute, J., followed.] Conviction by the Commissioner of the Juvenile Court for Toronto, under s. 18 (d), quashed on the ground that the evidence did not disclose an offence against the statute. Semble, that in this enactment the Ontario Legislature has exceeded its powers, has made a statutory crime, and has made it punishable before a tribunal of its own creation, although the provincial authorities have not the power to appoint judges.

R. v. Davis, 40 O.L.R. 352.

CRIMINAL CHARGE OF CONTRIBUTING TO DELINQUENCY OF JUVENILE.

No legal offence is disclosed in an information charging a woman with knowingly and wilfully "keeping company with" a man and thereby depriving him from keeping his children under proper parental control and contributing to their being or becoming juvenile delinquents; s. 29 of the Juvenile Delinquents Act, 1908, 7 & 8 Edw. VII. (Can.) c. 40, does not support such a charge.

R. v. Curry, 24 Can. Cr. Cas. 340, 8 O. W.N. 512.

C. CUSTODY.

(§ I C—10)—POWER OF FATHER TO DISPOSE OF, TO PREJUDICE OF MOTHER.

Section 14 c. 59, 8 Edw. VII. (Ont.), applies only to validate an agreement surrendering the custody of a child to a children's aid society as against the parent signing the agreement, and, where signed by the father only, the mother is not debarred from claiming the custody.

Re Maher, 12 D.L.R. 492, 28 O.L.R. 419.

ABANDONMENT BY PARENT PRECLUDING ASSERTION OF RIGHT—ADOPTION AGREEMENTS—RIGHTS OF FOSTER-PARENTS—COMPENSATION.

Re Clarke, 31 D.L.R. 271, 36 O.L.R. 498.

CHILD'S INTEREST.

The custody of a child will not be given to a mother against the child's interest.

Re Taggart, 39 D.L.R. 559, 41 O.L.R. 85. [Affirmed by Supreme Court of Canada, not reported.]

APPLICATION OF MOTHER—CHILD IN CUSTODY OF GUARDIAN APPOINTED BY WILL OF DECEASED FATHER—WELFARE OF INFANT—ABILITY OF MOTHER TO UNDERTAKE CARE AND CUSTODY — INFANTS ACT, R.S.O. 1914, c. 153, ss. 2, 3, 28.

Re Smith, 15 O.W.N. 4.

ACTION BY FATHER—REFUSAL OF DEFENDANT TO ANSWER QUESTIONS ON EXAMINATION FOR DISCOVERY—CONTEMPT OF COURT—ORDER FOR REATTENDANCE—DEFENCE TO BE STRUCK OUT UPON DEFAULT.

Link v. Thompson, 11 O.W.N. 282, 390.

ILLEGITIMATE CHILD—RIGHT OF MOTHER—INTEREST OF INFANT—EVIDENCE.

Re Jeanes, 11 O.W.N. 365, 12 O.W.N. 28.

RIGHTS OF MOTHER—DESERTION—ABANDONMENT—NEGLECTED CHILD — CHILDREN'S AID SOCIETY — FOSTER-PARENTS—WELFARE OF INFANT—ACCESS BY MOTHER—CHILDREN'S PROTECTION ACT OF ONTARIO, R.S.O. 1914, c. 231.

Re Sinclair, 12 O.W.N. 79.

NEGLECTED CHILD—CHILDREN'S AID SOCIETY — RIGHTS OF PARENTS — ACQUIRED RIGHTS OF FOSTER-PARENTS—WELFARE OF CHILD.

Re Butcher, 12 O.W.N. 197, 238.

SEPARATION OF PARENTS—DISPUTE BETWEEN—INTERESTS OF INFANT—DETERMINATION IN FAVOUR OF FATHER—COSTS.

Cronk v. Cronk, 12 O.W.N. 236.

RIGHT OF MOTHER—NEGLECTED CHILD—CHILDREN'S AID SOCIETY—CHILDREN'S PROTECTION ACT OF ONTARIO, R.S.O. 1914, C. 231—INVESTIGATION BY JUVENILE COURT — APPLICATION TO JUDGE IN CHAMBERS UPON HABEAS CORPUS—DISCRETION—WELFARE OF INFANT.

Re Cox, 12 O.W.N. 347.

APPLICATION BY MOTHER ON RETURN OF HABEAS CORPUS — PECULIAR CIRCUMSTANCES—HUSBAND AND WIFE LIVING APART—CHILDREN PLACED IN BOARDING-SCHOOL—ORDER FOR PAYMENT BY HUSBAND OF EXPENSES OF WIFE VISITING CHILDREN—TERMS.

Re Fitzpatrick, 13 O.W.N. 176.

APPLICATION OF FATHER—CHILDREN'S AID SOCIETY.

Re Rendle, 13 O.W.N. 179.

WELFARE OF CHILDREN—ORDER UNDER CHILDREN'S PROTECTION ACT OF ONTARIO, S. 9—ABSENCE OF EVIDENCE TO SUPPORT—"NEGLECTED CHILD"—ORDER QUASHED—TEMPORARY ARRANGEMENTS FOR CUSTODY OF CHILDREN.

Re H, 16 O.W.N. 210.

NEGLECTED CHILD—CHILDREN'S AID SOCIETY—FOSTER HOME FOUND BY SOCIETY—APPLICATION BY PARENTS FOR CUSTODY OF CHILD—WELFARE OF CHILD—RIGHTS OF FOSTER-PARENTS.

Re Driscoll, 17 O.W.N. 144.

DISPUTE AS TO PARENTAGE—TRIAL OF ISSUE—EVIDENCE—FINDING AS TO BIRTH OF CHILD.

Matters v. Ryan, 17 O.W.N. 232.

ILLEGITIMATE CHILD—INABILITY OF MOTHER TO MAINTAIN — CUSTODY — ORDER OF COMMISSIONER OF JUVENILE COURT—JURISDICTION — "NEGLECTED CHILD" — COMMITTAL TO CARE OF CHILDREN'S AID SOCIETY—JUVENILE DELINQUENTS ACT, 7 & 8 EDW. VII. C. 40 (DOM.)—CHILDREN'S PROTECTION ACT OF ONTARIO R. S.O. 1914, C. 231, SS. 2 (1) (H), 9, 28 —CHILDREN'S PROTECTION AMENDMENT ACT, 1916, 6 GEO. V. C. 53, SS. 3 (4b), 4 (2)—NOTICE TO PERSON HAVING ACTUAL CUSTODY OF CHILD—IRREGULARITIES IN PROCEDURE—MOTION TO QUASH ORDER—"ANGLICAN" — "PROTESTANT" — DISCRETION—WELFARE OF CHILD.

"An illegitimate child whose mother is unable to maintain it" is declared by s. 2 (1) (h) of the Children's Protection Act of Ontario, to be a "neglected child" within the meaning of that act:—Held, that A.S., an illegitimate child of Mary S., who was unable to maintain him, was a "neglected child" to whom the act applied, although he was not in fact neglected, having been adopted by persons who fully and faithfully cared and provided for him. Under the combined effect of the Juvenile Delinquents Act, 7 & 8 Edw. VII. c. 40 (Dom.), and the Children's Protection Act of Ontario, R.S.O. 1914, c. 231, the Commissioner of the Juvenile Court, Toronto—the boy being found in Toronto—had jurisdiction to investigate and to declare that the boy was a neglected child and a Protestant, and to order that he should be made a ward of the Children's Aid Society of Toronto. The statute does not void proceedings resulting in an adjudication so long as the Commissioner is satisfied that the parents or the person having the actual custody of the child have been notified of the investigation before he proceeds to dispose of the matter: Children's Protection Amendment Act, 1916, 6 Geo. V. c. 53, s. 3 (4b). Trifling irregularities in the procedure in the Juvenile Court, none of them affecting the merits, were not considered in determining whether the order of the Commissioner should be quashed. By s. 4 (2) of the Act of 1916, the illegitimate child of a Protestant mother shall be deemed to be a Protestant; and the Commissioner did what the law required in making the boy a ward of the aforesaid society: ss. 9 and 28 of the principal Act. A distinction is made in the statute between "Roman Catholic" and "Protestant;" "Protestant" must be taken to include "Anglican." The plain directions of the statute must be followed—the court had no discretion to exercise in regard to the custody of the child.

Re S, 45 O.L.R. 46.

CUSTODY—CHILDREN'S AID SOCIETY—CHILDREN'S PROTECTION ACT OF ONTARIO, R. S.O. 1914, C. 231.

Re Wardle, 8 O.W.N. 517.

POWER TO CHANGE CUSTODY AWARDED BY EXTRA-TERRITORIAL DECREE.

A father may be given the custody of his child, notwithstanding the existence of an order of an Extra-territorial Court awarding such custody to the mother upon a decree for divorce obtained by misleading and fraudulent testimony of the mother (no personal service having been made of the petition), at any rate where it is impossible for the court to say that it is to the benefit of the child that she should remain with the mother.

Ryser v. Ryser, 7 W.W.R. 1275.

HUSBAND AND WIFE—CUSTODY OF INFANT.

The guiding principle for the court in awarding the custody of an infant between parents living apart is the interest of the child. On infant 3 years old was given to the custody of the mother. Matters considered in so deciding were: the need of its mother's attention, the desirability of keeping the child with its 2 sisters, children of the mother by a former marriage who were with the mother, and the lack of companionship for the child on its father's farm. The father to have access to the child at all times.

Wood v. Wood, [1919] 3 W.W.R. 246.

Wilful refusal of parent to maintain—Non-residence with father.

The King v. Barthos, 17 Can. Cr. Cas. 459.

(§ I C—11)—Religious instruction—Welfare of child.

Where the children concerned are too young to have a real religious preference they may be given into the custody of their mother, who is a protestant, without condition as to the faith in which they shall be brought up, notwithstanding their deceased father was a Roman Catholic, and the Juvenile Court had placed the children with a Roman Catholic Children's Aid Society.

Re Maher, 12 D.L.R. 492, 28 O.L.R. 419.

A father will not necessarily be deprived by the court in an alimony action of the custody of minor children, although the mother was given the right to visit them weekly, where it appeared that he was a fit and proper custodian for the children, and that he was willing and able to care for them, and that for several years the personal care of the younger child had fallen to him, although the wife is granted a decree for alimony.

Karch v. Karch, 4 D.L.R. 250, 3 O.W.N. 1446, 22 O.W.R. 534.

The custody of a 14 year old girl was denied her father, where it appeared that for 8 years she had lived with her maternal aunt, and that the child, who was extremely nervous, greatly feared her father and had a strong aversion to her stepmother, and the court found that they were not proper custodians for the child, whose welfare required that she should remain with the aunt.

Re Hart, 4 D.L.R. 293, 22 O.W.R. 200.

Parent's right to.

Notwithstanding a widowed father's prima facie right to the custody of his child, it will be permitted to remain with its maternal grandparents, until the age of 6 years, where its welfare will thereby be best secured, the father, in the meantime, having reasonable access to the child at all times.

Re Hutchinson (No. 2), 11 D.L.R. 827, 28 O.L.R. 114, reversing 5 D.L.R. 791, 26 O.L.R. 601, reinstating 26 O.L.R. 113.

Father's agreement relinquishing custody—Validity—Repudiation.

Section 3 of 1 Geo. V. (Ont.) c. 35, providing that the father of a minor child may at any time by deed dispose of its custody and education for any length of time while the child remains under the age of 21 years and that such disposition shall be good and effectual against every person claiming in any way the child's custody or education, does not apply to make irrevocable an agreement signed by a widower relinquishing the custody of his infant daughter to her maternal grandparents until she reaches her majority or marries under that age, and covenanting that the father will not revoke the instrument. [Fidelity Trust Co. v. Buchner, 5 D.L.R. 282, 26 O.L.R. 367, followed.]

Re Hutchinson, 5 D.L.R. 791, 3 O.W.N. 1552, 22 O.W.R. 390, 26 O.L.R. 113 and 601.

Parents' right to custody—Welfare of child to govern.

In determining whether the father or mother, who are living apart, shall have the custody of a minor child, the wishes of the mother are to be considered, as well as the wishes of the father, but the primary consideration is the welfare of the child. In awarding the custody of infants to their mother as against the father, the order should provide that the latter shall have reasonable access to them.

Re Baylis Infants, 13 D.L.R. 150, 7 A.L.R. 54, 25 W.L.R. 181, 4 W.W.R. 1357.

Right of guardian appointed by father—Right of mother.

Infant children will not be taken from the custody of a guardian appointed by their father and given into the care of their mother, who was living apart from her husband, where the welfare of the children will be best conserved by remaining with such guardian, with a right of access by the mother at reasonable times.

Re Chisholm, 13 D.L.R. 811, 47 N.S.R. 250, 13 E.L.R. 182.

Condition as to providing home.

The court exercising its discretion as to awarding the custody of children aged 6 and 4 respectively to the father as against the mother living apart from him, may require the father to provide a suitable house with a relative in charge to look after the children.

Ney v. Ney, 12 D.L.R. 248, 4 O.W.N. 1536, 24 O.W.R. 873, affirming 11 D.L.R. 100, 4 O.W.N. 935.

Children's Protection Act—Welfare of child.

The custody of a child having been awarded under the Children's Protection Act R.S.O. 1914, c. 231, will not be granted to a parent unless it is shewn that the welfare of the child would enure therefrom.

Re D'Andrea, 31 D.L.R. 751, 37 O.L.R. 30.

Neglected child—Children's Protection Act, 7-8 Geo. V. 1917, N.S., c. 2—Application by father—Father unsuitable person—Interests of child.

An infant who has been declared a neglected child and sent under the authority of the Children's Aid Society to a suitable home, will not be allowed to return to the custody of his father, when the latter has been found to be an unsuitable person.

Re Buckley, 49 D.L.R. 646.

Parent's claim — Consent to another's custody.

A father prima facie has a right to the custody and control of his children and this right will ordinarily be accorded where there is no evidence (a) of his abandoning the child, (b) of his moral turpitude or

misconduct, or (c) that the best interests of the child stand in the way. [R. v. Gyngall, [1893] 2 Q.B. 232, applied.] Parents cannot enter into an agreement, legally binding, to deprive themselves of the custody and control of their children, and if they elect to do so, can at any moment resume their control over the infants provided the best interests of the child, which are always the determining factor, do not conflict.

Smith v. Reid, 17 D.L.R. 59, 7 A.L.R. 143, 27 W.L.R. 671, 6 W.W.R. 486.

PARENT'S RIGHT TO CUSTODY—RIGHTS OF FATHER—INABILITY TO FURNISH SUITABLE HOME—WELFARE OF CHILD.

Re Evans, 16 D.L.R. 851, 28 W.L.R. 203, affirming 15 D.L.R. 218, 26 W.L.R. 468, 5 W.W.R. 919.

PARENT'S RIGHT TO — BEST INTERESTS OF CHILD.

Re Castle, 20 D.L.R. 955.

RIGHT OF FATHER—WELFARE OF INFANT—CONDUCT AND CHARACTER OF FATHER.

Re Phillips, 12 D.L.R. 854, 24 O.W.R. 709, 4 O.W.N. 1408.

FATHER'S RIGHT TO—WELFARE OF CHILD—MOTHER LIVING APART.

The court, empowered under the Infants Act, R.S.O. 1914, c. 153, s. 2 (1), to award the custody of an infant, having regard to the welfare of the infant and to the conduct of the parents, will not deprive the father of his immemorial right to the control of his child, where he has done no wrong and is able and willing to support the mother and child, merely because the mother chose, without valid reasons, to live apart from him. [Re Mathieu, 29 O.R. 546, followed.]

Re Scarth, 26 D.L.R. 428, 35 O.L.R. 312.

UNLAWFUL DETENTION—CRIME.

Where husband and wife have separated and the wife and young child had become domiciled with the accused without objection on the part of the husband, a demand by the latter on the wife's death for the custody of the child, so as to change its domicile, should not be prosecuted by means of a criminal charge under Cr. Code, s. 316, for unlawful detention until the question of the rightful custody under the changed conditions had first been submitted to and decided by the competent Civil Court. [R. v. Hamilton, 17 Can. Cr. Cas. 410, distinguished.]

Cummings v. The King, 26 Can. Cr. Cas. 304, 25 Que. K.B. 237.

APPLICATION OF FATHER—FACTS NOT SUFFICIENTLY SHEWN — LEAVE TO RENEW UPON FURTHER MATERIAL.

Re Richardson, 9 O.W.N. 142, 10 O.W.N. 75.

SEPARATION OF HUSBAND AND WIFE—AGREEMENT AS TO CUSTODY OF CHILD—WELFARE OF CHILD.

Re Armstrong, 8 O.W.N. 567.

CUSTODY — CONTEST BETWEEN PARENTS — MISCONDUCT OF FATHER—WELFARE OF INFANT—INFANTS ACT, SEC. 2.

Upon a contest between the father and mother of a child, a girl of 11 years, as to her custody, it was held, that the mother was justified by the misconduct of her husband, the father, in leaving him, and that, having regard to the welfare of the child, the custody should be awarded to the mother: s. 2 of the Infants Act, R.S.O. 1914, c. 153. [Re A. and B. (Infants), [1897] 1 Ch. 786, followed; Re Scarth, 35 O.L.R. 312, distinguished.]

Re Wilkites, 45 O.L.R. 181.

PARENT'S RIGHT.

Under s. 32 of the Infants' Act, R.S.M. 1902, c. 79, an order was, under the circumstances of this case, made for the delivery of the children into the sole custody of the mother, notwithstanding the prima facie common law right of the father. Liberty to the father to apply again should he desire to do so, because of circumstances arising hereafter.

Re Tomlinson, 21 Man. L.R. 786, 19 W. L.R. 522.

CUSTODY — APPLICATION OF PARENTS — REMOVAL OF BOY FROM INDUSTRIAL SCHOOL.

Re Brunner, 17 O.W.N. 235.

PATERNAL POWER — GUARDIANSHIP OF INFANT CHILD — EDUCATION — C.C. ARTS. 214, 215.

Article 214 C.C. (Que.) is only concerned with one of the prerogatives of paternal authority: the guardianship of children. When the court gives the children to the care of the mother, or to a third person, the power of the father is slightly altered, but this alteration does not prevent the paternal authority, with regard to the supervision of the education and advancement of the children, from existing in all lawful respects according to art. 215. By "education" is meant not only material and intellectual education but the moral and religious education of the children. A judgment which, in decreeing the separation of the husband and wife, gives to the wife or to a third person the guardianship of the children born of the marriage, does not take away from the husband all the rights attached to paternal authority, and especially the right to supervise the religious education of the children, which is the greatest of all their interests, even when the husband and wife profess different religions.

Blytheway v. Lile, 56 Que. S.C. 196.

TUTORSHIP—FAMILY COUNCIL — SUBROGATE TUTOR—NOMINATION—C.C., ARTS. 251, 267.

It is not necessary that the subrogate tutor be chosen from one line in preference to another, nor must he be chosen from among the relatives in the paternal line when the guardian is taken from among those in the maternal line.

St. Jacques v. Lafaille, 25 Rev. Leg. 244.

PARENT'S RIGHT TO.

When there is an action in separation pending between husband and wife, the care of a girl of 12 years, who is very bright and intelligent, will be left to the mother, pending the suit, if the child declares that she wants to remain with the mother.

Acton v. Larsen, 14 Que. P.R. 231.

PARENT'S RIGHT TO.

On a writ of habeas corpus to recover the custody of a child of tender years, the welfare of the child must be considered in determining the rights of the parties. The right of the father to the care of his child is not absolute, and, in certain cases, the child may be given to the mother even if the courts have not pronounced a separation.

Woollven v. Aird, 14 Que. P.R. 165.

EMBITTERING CHILD AGAINST PARENT AS AFFECTING.

When children are remitted to their father's custody in preference to that of their mother, on the ground that his stronger disposition would be a better safeguard for their proper upbringing, attempts made by him to destroy their love for their mother would be ground for rescinding the order.

Re Crux Infants, 33 W.L.R. 932.

(§ I C—12)—RIGHT OF TESTAMENTARY GUARDIAN—INFANT ALLOWED TO VISIT GRANDMOTHER ON UNDERTAKING TO RETURN — VIOLATION OF UNDERTAKING — CUSTODY AWARDED TO GUARDIAN PENDING LITIGATION AS TO WILL—COSTS.

Re Coward, 17 O.W.N. 105.

(§ I C—13)—DISPOSAL OF—RIGHT OF BASTARD'S FATHER.

The custody of an illegitimate child cannot be controlled by its putative father. [Re C., 25 O.L.R. 218, followed.]

Re Maher, 12 D.L.R. 492, 28 O.L.R. 419.

RIGHT OF MOTHER OF ILLEGITIMATE CHILD—WELFARE.

In awarding the custody of an illegitimate child, the desire of the mother is a primary consideration, but the child's welfare, in view of all surrounding circumstances, is the determining factor.

Re Gefrasso, 30 D.L.R. 595, 36 O.L.R. 630.

(§ I C—14)—JUVENILE COURT — INTERIM DETENTION PENDING HEARING.

On the arrest of a juvenile under 14 years of age, in respect of whose support a delinquency charge against the parent is pending before a Juvenile Court, the Judge of the Juvenile Court may make an interim order for the detention of the child in a detention home pending the hearing of the charge.

Re Stenhouse, 10 D.L.R. 560, 21 Can. Cr. Cas. 182.

RIGHT OF PARENT TO CUSTODY OF CHILD—WELFARE OF CHILD.

The Child's Protection Act (Ont.), 8 Edw. VII. c. 59, s. 30, as amended by 3 Geo. V. c. 62, s. 28, R.S.O. 1914, c. 231, directing that a Roman Catholic child shall not be placed in a foster home in a Protestant family does not compel a change of custody at the instance of the father of a child of tender years so as to take it from its Protestant foster parent with whom it was placed by the Children's Aid Society under the authority of the Children's Court Commissioner acting on the statement of the child's mother that she was a Protestant, where the Commissioner had adjudicated that the mother, who seemingly was in sole control and charge of the child, was unfit to have the child's future custody, it appearing that the applicant had abandoned or abdicated control of the child whose temporal and moral welfare was opposed to the change of custody. [Re Faulds, 12 O.L.R. 245, followed.]

Re Kenna, 15 D.L.R. 844, 29 O.L.R. 590, affirming 11 D.L.R. 772, 4 O.W.N. 1395.

ORDER OF COURT.

A husband cannot refuse to obey the judgment of the court on the ground that years have elapsed since the case was tried, that conditions have changed, and that the child (aged 12) prefers to remain with him.

Kastel v. Hampton, 18 Que. P.R. 363.

CUSTODY OF—AGREEMENT BY FATHER TO SURRENDER CHILD—RESTORATION TO FATHER—PATERNAL RIGHTS.

Re Porter, 15 B.C.R. 454.

ILLEGITIMATE CHILD—CUSTODY—RIGHTS OF MOTHER AND PUTATIVE FATHER.

Re C., an infant, 25 O.L.R. 218.

CUSTODY OF — CHILDREN'S AID SOCIETY — FOSTER PARENT—MAGISTRATE'S ORDER.

Re Pilkington, 15 B.C.R. 456.

DIVORCE DECREE AWARDING CUSTODY OF CHILD TO MOTHER — FATHER ENTICING CHILD FROM THE MOTHER'S CUSTODY.

The King v. Hamilton, 17 Can. Cr. Cas. 410, 22 O.L.R. 484.

D. DISABILITIES AND LIABILITIES.

(§ I D—16)—MISREPRESENTATION AS TO BEING OF AGE—CONVEYANCE OF LAND.

A minor, making a conveyance of land by means of a fraudulent representation that he is of full age, cannot afterwards have the conveyance set aside and thus take advantage of his own fraud.

Gregson v. Law, 15 D.L.R. 514, 19 B.C.R. 240, 26 W.L.R. 576, 5 W.W.R. 1017.

DÉLITS—MISAPPROPRIATION OF FUNDS—SETTLEMENT FOR AS AFFECTED BY INFANCY.

A minor is not exempt from liability for obligations arising from his délits and quasi-délits. Thus the minor who commits frauds on his employer by appropriating the money which he was ordered to collect, and, being discovered, settles with and repays his employer, cannot afterwards claim repayment of the money on the ground of his minority alone.

Lachapelle v. Guay, 47 Que. S.C. 346.

(§ I D—20)—MARRIAGE CONTRACT—NULLITY—EFFECT ON OTHER PROVISIONS.

A minor, a party to a marriage contract,

must be assisted by his tutor, and in order to be valid, the matrimonial conventions adopted must have been approved by the family council. Otherwise the marriage contract is null. Such nullity only extends to the matrimonial conventions properly so called, and not to those bound to exist apart from the marriage contract, to which the minor may be a party if represented by his tutor. So, a donation inter vivos, made by a third party to the minor in the marriage contract, is not null, notwithstanding the nullity of the marriage contract itself.

Dufresne v. Dufresne, 54 Que. S.C. 255.

PURCHASE OF GOODS — RENT OF BUSINESS PREMISES—CONSIDERATION — RIGHT TO RECOVER MONEYS PAID.

Sturgeon v. Starr, 17 W.L.R. 402.

(§ I D—22)—DEPOSITS IN BANK.

Section 95 of the Bank Act, R.S.C. 1906, c. 29, does not impose upon a bank in Ontario, which has more than $500 on deposit in the name of an infant, without knowledge of his infancy, a liability to repay to the infant the amount of a cheque for over $500 drawn by him upon his account.

Freeman v. Bank of Montreal, 5 D.L.R. 418, 26 O.L.R. 451, 22 O.W.R. 276.

(§ I D—23)—INSURANCE.

A minor, having attained his majority, can be sued for the recovery of the amount of a promissory note, made by him while a minor, in payment of the first premium on a policy of insurance on his life, where the defendant retains the insurance policy and where he has not taken any procedure to annul the insurance contract; and, the insurance premium having been so paid, the insurance stands in force for all purposes as of right; and a minor, having attained his majority, can avoid a contract entered into during his minority in so far only as he proves legal injury or prejudice.

Simoneau v. Hebert, 18 Rev. de Jur. 363.

(§ I D—25)—ASSIGNMENT OF INTEREST IN LAND — DISAFFIRMANCE — REASONABLE TIME.

An assignment by an infant of his interest in a purchase of land not prejudicial to the infant's interest is merely voidable; but a lapse of 3 years after his attainment of majority is not a reasonable time for the exercise of his right of avoidance, so as to entitle him to the enforcement of a parol trust founded thereon. [Bromfield v. Smith, 2 T.R. 436; Edwards v. Brudenell, [1893] A.C. 360, applied.]

Shepard v. Bruner, 24 D.L.R. 40, 31 W.L.R. 721, reversing 19 D.L.R. 869.

PURCHASE OF LAND—REPUDIATION—VENDOR'S REFUSAL TO ACCEPT INFANT'S MORTGAGE.

An infant, who enters into a contract for the purchase of land of a vendor who is unaware of his infancy, cannot compel the vendor to accept a mortgage, under the terms of the contract, for the balance of unpaid purchase price which has been executed by the infant; nor may infancy be set up as a ground for the repudiation of the contract to recover the moneys paid thereon by the infant after the latter has assumed potential ownership of the sold premises. [Short v. Field, 32 O.L.R. 395, followed.]

Robinson v. Moffatt, 25 D.L.R. 462, 35 O.L.R. 9.

PURCHASE OF LAND — PREJUDICE — FORFEITURE—VOID CONTRACT.

A contract for the purchase of land entered into by an infant, with a forfeiture clause as to the land and payments prejudicial to the infant's interests, is wholly void, not merely voidable, and the infant is entitled to recover the payments made thereunder.

Phillips v. Greater Ottawa Dev. Co., 33 D.L.R. 259, 38 O.L.R. 315.

A lease of a farm with the right to purchase, entered into by an infant unassisted by his guardian, subject to a forfeiture of the land and payments in case of default, under which the infant apparently has derived no benefit, is prejudicial to his interests, and if not ratified by him after attaining majority it will be annulled by the court.

Bernier v. Chouinard, 35 D.L.R. 648, 23 Rev. de Jur. 318.

REPUDIATION OF PURCHASE—BENEFITS.

An infant on attaining majority has the right to repudiate a contract for the purchase of personal property of which he had not taken possession, and to recover the payments made by him thereon, not having received any benefit under the contract.

Nicklin v. Longhurst, 31 D.L.R. 393, 27 Man. L.R. 255, [1917] 1 W.W.R. 439.

RATIFICATION OR DISAFFIRMANCE.

An infant who has made a sale of real property, and afterwards during infancy repudiated the contract, may, after attaining majority, maintain an action to cancel the contract, although such action is not brought immediately; provided that he has done nothing since attaining full age to avoid the previous avoidance; but in order to succeed in the action he should return any money received from the purchaser.

Phillips v. Sutherland, 22 Man. L.R. 491.

CONTRACT — ACCORD AND SATISFACTION — EVIDENCE—COMPENSATION FOR INJURIES — JOINT TORTFEASORS — PAYMENT INTO COURT—JURY.

Horton v. Leonard, 12 O.W.N. 67.

SALE OF HORSE—INFANT—RESCISSION.

McDonald v. Baxter, 46 N.S.R. 149, 9 E.L.R. 316.

CONTRACT—LAND—TRADER—LESION.

The purchase of an immovable by a minor in business is not a commercial matter—and under the title nonrescindable on account of lesion—unless the purchase is made by the minor in the exercise of his profession or business. Lesion in contracts of exchange of property results for the minor from the differences existing between

the value of that which he undertakes to deliver and the lesser value of that which he receives in return. The disproportion between the means of the minor and the value of what he receives does not constitute lesion.

Parc St. Louis v. Jobidon, 52 Que. S.C. 499, affirming 51 Que. S.C. 112.

VOIDABLE GIFT—REPUDIATION AFTER MAJORITY—ACTION FOR RETURN—RELEASE OF EXECUTRIX.

Murray v. McKenzie, 23 O.L.R. 287, 18 O.W.R. 747.

(§ I D—26)—LIABILITY AS CONTRIBUTORY—FAILURE TO DISAFFIRM.

An infant who, within a reasonable time after attaining majority, fails to repudiate a contract respecting bank shares purchased during infancy and standing in the infant's name, thereby assumes the statutory liabilities in respect thereto on the ground of laches and acquiescence: receiving dividends on the shares after attaining majority amounts to a ratification of their ownership, and upon insolvency of the bank the statutory double liability of shareholders under s. 125 of the Bank Act, R.S.C. 1906, c. 29, will therefore attach.

Re Sovereign Bank; Clark's Case, 27 D.L.R. 253, 35 O.L.R. 448.

LIABILITIES OF COMMERCIAL CONTRACTS—RATIFICATION.

A minor cannot be released from his commercial engagements or from those which he has ratified on his majority. [Banque du Peuple d'Halifax v. Gauthier, 14 Que. S.C. 18, followed.]

Grenier v. Simoneau, 45 Que. S.C. 329.

(§I D—28)—PURCHASE OF LAND—REPUDIATION—RIGHT TO REPAYMENT.

Although an infant is not compellable to complete a contract, yet when he has paid money under it he cannot recover it back unless he can shew that fraud has been practised upon him. Wilson v. Kearse (1800), Peake Add. Cas. 196, and Holmes v. Blogg, 8 Taunt. 35, 2 J.B. Moore, 552, approved and applied to a case where the plaintiff, an infant, agreed to purchase from the defendant a house and lot and paid a deposit at the time the agreement was signed, and where the evidence negatives any misrepresentation on the part of the defendant, and shewed that the plaintiff took possession of and controlled the property.

Short v. Field, 32 O.L.R. 395.

(§ I D—30)—ACTION IN APPEAL—EMANCIPATED MINOR—TESTAMENTARY EXECUTOR—C.C., ARTS. 919, 991, 1001.

An action for cancellation on account of prejudice suffered is a privilege personal to minors, and cannot be instituted by testamentary executors, even when they have the powers of administration extended for a period of a year and a day.

Charbonneau v. Boileau, 56 Que. S.C. 295.

(§ I D—31)—REPAYMENT OR RESTORATION BY INFANT.

An infant who, during minority, repudiates his contract to sell land, must, in order to maintain an action to cancel the contract, after arriving at majority, return or offer to return any money received from the purchaser, and unless he does so a nonsuit will be granted, with a direction, however, that it shall not have the same effect as a verdict on the merits for the defendant.

Phillips v. Sutherland, 22 Man. L.R. 491.

REPUDIATION OF SALE—RETURN OF DEPOSIT.

A deposit paid to an infant may be recorded notwithstanding his infancy. Lord Tenterden's Act is in force in the province of Saskatchewan.

Molyneux v. Traill, 32 W.L.R. 292, 9 W.W.R. 137.

II. Sale, lease or mortgage or real estate.

(§ II—35)—APPLICATION TO SELL PROPERTY AND DIVIDE PROCEEDS — PROSPECTIVE RIGHTS OF INFANT — SUGGESTED PAYMENT INTO COURT.

Re Laws, 6 D.L.R. 912, 4 O.W.N. 304, 23 O.W.R. 408.

PURCHASE OF OUTSTANDING INTEREST FOR BENEFIT OF INFANT LANDOWNER.

It is a ground for the court to exercise its discretion in refusing to authorize the purchase of an outstanding interest in land for the benefit of an invalid infant owner, a girl of tender years, where, by reason of an existing lease, the effect would be materially to reduce her income until she became 35 years of age, notwithstanding that at that time her fortune would be greatly increased as a result of making the purchase.

Collier v. Union Trust Co., Re Leslie, 12 D.L.R. 4, 4 O.W.N. 1465, 24 O.W.R. 761.

AGREEMENT FOR PURCHASE OF LAND — PAYMENT OF SUM AS DEPOSIT — RIGHT TO RECOVER — ABSENCE OF FRAUD.

Although an infant is not compellable to complete a contract, yet when he has paid money under it, he cannot recover it back unless he can shew that fraud has been practised upon him. Wilson v. Kearse, Peake, Add. Cas. 196, and Holmes v. Blogg, 8 Taunt. 35, 2 J.B. Moore 552, approved and applied to a case where the plaintiff, an infant, agreed to purchase from the defendant a house and lot and paid a deposit at the time the agreement was signed, and where the evidence negatived any misrepresentation on the part of the defendant, and shewed that the plaintiff took possession of and controlled the property.

Short v. Field, 32 O.L.R. 395

(§ II—37)—SALE OF LANDS — EXAMINATION OF WITNESSES.

An application on petition for an order for the sale of the land of an infant will not be heard under the Ontario practice, where the procedure prescribed by Con. rr. 960 to 970 has not been followed in that one of the guardians of the infant has not been made a party to the application and no explanation of such absence is given, and neither the witnesses to the petition nor the infant herself (being over the age of 14

years) have been examined viva voce as to the consent of the infant to the sale as the practice rules require. On an application on petition for an order for the sale of land belonging to an infant, under the power conferred by the Infants Act, 1 Geo. V. (Ont.) c. 35, the merits of the application cannot be taken into account until the court is satisfied that the mode of procedure prescribed by Ont. Cons. rr. 960 to 970 and 1308 has been complied with.

Re Sugden, 10 D.L.R. 780, 4 O.W.N. 924, 24 O.W.R. 212.

SALE OF LANDS — ORDER FOR — DEVOLUTION OF ESTATES ACT.

The provisions of the Devolution of Estates Act, 10 Edw. VII. (Ont.) c. 56, are not applicable on an application on petition for an order for the sale of land of an infant, where the estate has been wound up by the executors and the land has been conveyed by them to the infant or to some one in trust for her, and where the executors are not in any way parties to or represented on the application.

Re Sugden, 10 D.L.R. 780, 4 O.W.N. 924, 24 O.W.R. 212.

UNDIVIDED INTEREST IN LAND — MOTION FOR AUTHORIZATION BY COURT OF CONVEYANCE — SECURITY FOR PURCHASE-MONEY — OFFICIAL GUARDIAN — REFUSAL OF MOTION.

Re Mack, 8 O.W.N. 74.

III. Actions.

(§ III—40)—ACTION TO PROTECT INFANT'S PROPERTY—RECEIVERSHIP.

A receiver will be appointed to a decedent's estate where it appears to be necessary in order to protect the interests of an infant.

Re Beaird, 9 D.L.R. 842, 4 O.W.N. 720, 23 O.W.R. 955.

MARRIED WOMAN—SEPARATION—CURATOR.

A wife who is a minor, whether plaintiff or defendant in an action for separation from bed and board, should be assisted by a curator in order to appeal in judicial proceedings.

Verret v. Robitaille, 54 Que. S.C. 228.

PARTNERSHIP — MINOR IN BUSINESS UNDER FIRM NAME — DAMAGE TO THEIR BUSINESS — QUE. C.P. 174, QUE. C.C. 320, 323.

If several minors do business together under a firm name, they are deemed to be emancipated for business purposes. Such a partnership can sue for damages a third person who would have depreciated the quality of their goods.

St. Julien v. Quesnel, 16 Que. P.R. 35.

ACTIONS—QUEBEC PRACTICE.

An action for annulment of marriage is well brought against the wife, though herself a minor, if her husband is made a party with her to the suit, and is himself assisted by a curator.

Hagen v. Stewart, 44 Que. S.C. 121.

(§ III—41)—ACTION — APPOINTMENT OF GUARDIAN AD LITEM.

In an action for cancellation of a deed against the widow and infant children of the grantee, the appointment of a guardian ad litem for the children is necessary.

Leblanc v. Leblanc, 15 D.L.R. 773, 14 E. L.R. 150.

ACTION BY — APPOINTMENTS OF NEXT FRIEND — WORKMEN'S COMPENSATION CLAIMS.

In proceedings in a District Court under the Workmen's Compensation Act (Alta.) the practice of the District Court is applicable where not inconsistent with the act; and, therefore, an amendment may be made during the trial so as to add a next friend in a proceeding thereunder to recover compensation of an employee under the age of twenty-one.

Barrie v. Diamond Coal Co., 17 D.L.R. 385, 7 A.L.R. 138, 28 W.L.R. 701, 6 W.W. R. 651.

DEFENCE BY INFANT — EXCEPTION ON GROUND OF MINORITY — STATUTORY PROTECTION—SERVICE OF PROCESS.

If a minor is named as defendant in an action for malicious arrest brought under the Quebec law, and excepts on the ground of his minority (C.C.P., art. 174), the court may summon such defendant to appear and support his exception on issue being joined thereon, but by so appearing he does not affect the generality of the veto under art. 78 C.C.P., whereby no person can be a party to an action either as claimant, or defendant in any form whatever unless he has the free exercise of his rights, saving where special provisions apply. Under the law of Quebec the incapacity of minors to sue or be sued is absolute, subject only to certain exceptions; and when it has once been established that the so-called defendant in an action for malicious arrest is a minor, he ceases ab initio to be a defendant, and he cannot be treated as if he were a defendant by summons or order in such action.

Levine v. Serling, 19 D.L.R. 108, [1914] A.C. 659, 23 Que. K.B. 289, reversing 7 D. L.R. 266, 47 Can. S.C.R. 103, 12 E.L.R. 216.

SUIT BY NEXT FRIEND — ADDING AT TRIAL.

The bringing, by an infant under twenty-one of an action to recover damages for personal injury without joining a next friend is a mere irregularity which may be cured by adding a next friend at the trial, when the circumstance of the original plaintiff not being of age was then first disclosed without objection having previously been taken.

Durie v. Toronto R. Co., 15 D.L.R. 747, 5 O.W.N. 829, 16 Can. Ry. Cas. 334, 25 O.W. R. 789.

ACTIONS BY — WORKMEN'S COMPENSATION ACT — GUARDIAN — QUE. C.P. 174 — QUE. C.C. 304.

A minor over 14 years of age, authorized by the court to take proceedings under the

Workmen's Compensation Act, does not require the assistance of a guardian.

Touchette v. Dominion Textile Co., 15 Que. P.R. 298.

APPEAL TO PRIVY COUNCIL — REPRESENTATION OF INFANT LITIGANT — COUNSEL FEE — ADVANCE — SUITORS' FEE FUND —PRACTICE — GUARDIAN AD LITEM.

Re Farrell, 5 O.W.N. 455.

GUARDIAN AD LITEM—NAMING.

If a tutor is appointed to a minor to represent him in an action in nullity of marriage, it is of no importance that he be named tutor or tutor ad hoc.

Guttman v. Goodman, 26 Que. K.B. 270.

ACTION AGAINST—HEIRS—GUARDIAN.

An action against the heirs of one who died less than six months previously is valid notwithstanding the incapacity of the defendants; but upon declaration and proof of their minority the action will be stayed until they are provided with a tutor.

Desrochers v. Frechette Heirs, 50 Que. S.C. 436.

(§ III—44)—COMPROMISE OR SETTLEMENT OF.

If the widow agrees to divide with her children the damages awarded under the Workmen's Compensation Act (Que.) for the death of her husband it is not necessary for a family council to be called to authorize the tutor of the minors to accept their share which is a mere donation.

Re Turner, 13 Que. P.R. 261.

(§ III—55)—SUSPENDING THE PAYMENT OF DAMAGES TO INFANT DURING MINORITY.

The court has the power, by its judgment, to order that a sum assessed by a jury as the amount of damages sustained by the plaintiff, a minor suing through his tutor in an action of tort or ex quasi delicto, be paid, in part at once, the remainder when he becomes of age, and not at all if he dies before, and that the interest on such remainder be paid to the tutor until he comes of age or dies during minority.

Montreal Street R. Co. v. Girard, 21 Que. K.B. 121.

PERMISSION TO SUE BY NEXT FRIEND IN FORMA PAUPERIS.

Re Sturgeon, 20 Man. L.R. 284.

ACTION AGAINST MINOR — SUBSEQUENT MAJORITY—MOTION FOR CONTINUANCE.

Paquette v. Auclair, 12 Que. P.R. 403.

INFORMATION.

See Indictment; Summary Conviction; Criminal Law; Intoxicating Liquors.

INFRINGEMENT.

See Copyright; Trademark; Tradename; Patents.

INHERITANCE.

See Descent and Distribution; Wills, Executors and Administrators.

As to taxation, see Taxes

INITIATIVE AND REFERENDUM.

See Constitutional Law, 1 D—90.

INJUNCTION.

I. RIGHT TO AND WHEN GRANTED.
- A. In general.
- B. Contract rights; covenant.
- C. Transfer or disposition of property.
- D. Illegal or tortious acts; crimes.
- E. Taking of, injury to, or trespass upon, real property.
- F. Water rights.
- G. As to corporate matters; associations.
- H. As to office; elections.
- I. Against legal proceedings.
- J. Against officers generally.
- K. Against taxes or assessments.
- L. As to parks, highways and railroads.
- M. As to patents, copyrights, trademarks, tradenames and imitations.

II. INTERLOCUTORY AND INTERIM INJUNCTIONS.

III. PROCEDURE.

Annotation.

Injunction; when injunction lies: 14 D.L.R. 460.

I. Right to and when granted.

A. IN GENERAL.

As not proper remedy where appeal is provided, see Drains and Sewers, II—10.

As restraining in personam, acts in foreign country, see Patents, IV A—35.

(§ I A—1)—PRESERVING ASSETS — APPOINTMENT OF RECEIVER.

When the circumstances are such as to justify the granting of an injunction against the disposition of goods and it appears that an injunction is likely to be ineffective, the court may go the further step of appointing a receiver to take actual possession of the goods.

Kay v. Ratz, 44 D.L.R. 145, 14 A.L.R. 72, [1918] 3 W.W.R. 885.

PECUNIARY INTEREST TO BE COMPENSATED IN DAMAGES ONLY, WHEN — QUEBEC AND ENGLISH LAW AND PROCEDURE COMPARED.

An injunction will not be granted to restrain a railway company from repudiating its contract with the construction company for the building of the railway by employing anyone else to complete it after the construction company had entered upon the work where the latter's interest under the contract was pecuniary only and could be compensated in damages. Injunctions are not authorized to be given under C.C. (Que.) in cases where a similar remedy would not be given under English law, from which the procedure of injunction was adopted.

Wills v. Central R. Co., 19 D.L.R. 174, 24 Que. K.B. 102.

BY APPELLATE COURT—TO PRESERVE ASSETS PENDING APPEAL.

The Court of Appeal will, in a proper case, grant an injunction to prevent dis-

position of the assets in dispute, pending the hearing of the appeal.

A. R. Williams Machinery Co. v. Graham, 23 B.C.R. 481.

INJUNCTION — RECEIVER — SALE OF OIL WELLS—COMPANY.

McCormack v. Carman, 15 O.W.N. 350.

TO RESTRAIN ILLEGAL ACT.

When the act which one wishes to prevent by an injunction has been performed the injunction cannot be granted.

McCann v. Pontiac, 51 Que. S.C. 440.

(§ I A—2)—ANTICIPATED OR THREATENED INJURY.

Where a right at law is clearly or fairly made out it is the duty of the court to interfere by interlocutory injunction to prevent effect being given to an illegal vote at a meeting of company shareholders.

Elliot v. Hatzic Prairie, 6 D.L.R. 9, 21 W.L.R. 897.

WHEN GRANTED — ANTICIPATED INJURY — RATEPAYERS' REMEDIES ON CHANGE OF SCHOOL-SITE — CHANGE OF SCHOOL-SITE.

If ratepayers complain of the injustice done to them by change of the site of a schoolhouse, their remedy is by appeal to the Circuit Court and not by application for an interlocutory injunction.

Chainé v. School Commissioners of St. Sévère, 15 Que. P.R. 103.

(§ I A—4)—REFUSAL ON GROUND OF INCONVENIENCE TO DEFENDANT — REMEDY IN DAMAGES.

The court may decline to award a mandatory injunction for the removal of an obstruction to plaintiff's riparian rights where the plaintiff had sustained, and would sustain, a comparatively trifling injury as compared with which the defendant would be placed at a large expense to remove the obstruction which had remained in place for a number of years.

Haggerty v. Latreille, 14 D.L.R. 532, 29 O.L.R. 300.

INJURY OR INCONVENIENCE TO DEFENDANT.

Where a railway company had agreed in building its road to erect permanent bridges over plaintiff's irrigation ditches and it appeared that, without first erecting temporary bridges, and maintaining them for some months, the agreement could only be performed with great difficulty and considerable delay and consequent loss to the company and there was no proof that plaintiff would sustain more than nominal damages, the court has a discretion to refuse an interim injunction to restrain the railway company from erecting the temporary structures, leaving it open for the court at the trial to make a mandatory order for their removal or to award damages or to do both, and this particularly in view of an express statutory power to award damages in lieu of, or in addition to an injunction for breach of contract. The ordinary rule is to grant damages in lieu of an injunction in cases where (a) the injury to plaintiff's legal rights is small, and (b) is capable of being estimated in damages, and (c) can be adequately compensated by a small money payment, and (d) where it would be oppressive to defendant to grant an injunction. [Shelfer v. City of London Electric Lighting Co. (No. 1), [1895] 1 Ch. 287, at 322, approved.]

C.P.R. Co. v. C.N.R. Co., 7 D.L.R. 120, 5 A.L.R. 407, 22 W.L.R. 289, 3 W.W.R. 4.

DANGER AND INCONVENIENCE FROM QUARRYING STONE.

One who leases his immoveable for the taking out stone from a quarry by dynamite, may, if the lessee carries on his operations in an imprudent and dangerous manner, be subject to an injunction from exploiting the quarry, and by taking means to prevent all danger and inconvenience to the petitioner, his family and his property. This principle has a stronger application if the owner directly participates in the exploiting of the quarry by receiving a fixed price on each ton of stone taken out.

Lachance v. Cauchon, 24 Que. K.B. 421. [Appeal to Canada Supreme Court quashed, unreported.]

(§ I A—6)—TITLE IN DISPUTE — EFFECT OF INJUNCTION PROCEEDINGS, HOW LIMITED.

Where, in a pending action between the plaintiff and the defendant involving title to certain property, an injunction order is made restraining the defendant in his disposal of such property and subsequently a motion to commit the defendant for contempt of court based on an alleged breach of the order is launched, the question of contempt is one between the offender and the court and ordinarily has no legal effect upon the rights of the litigants in their issue as to title in the original action.

Snowball Co. v. Sullivan, 14 D.L.R. 528, 42 N.B.R. 318, 13 E.L.R. 349.

(§ I A—7)—MUTUALITY OF REMEDY.

Where a statutory proceeding to quash a municipal by-law (as under s. 242 of the City Act, R.S.S. c. 84) would practically serve every purpose that an injunction could serve, an injunction to restrain the passing of the by-law ought not to be granted even if the by-law is ultra vires.

Keay v. Regina, 6 D.L.R. 327, 5 S.L.R. 372, 22 W.L.R. 185, 2 W.W.R. 1072.

AS TRADE OR COMMERCE—MUTUAL COMPANIES—POWERS.

The business of insurance, carried on by a mutual benefit association not for the sake of profit, is neither trade nor commerce, and therefore, the common law powers of agents of trading corporations are not applicable to a company or association of that kind. [Citizens Ins. Co. v. Parsons, L.R. 7 App. 96; Paul v. Virginia, 75 U.S. 163, applied.]

Richardson v. Urban Mutual Fire Ins. Co., 28 D.L.R. 12, 26 Man. L.R. 372, 34 W.L.R. 586, 10 W.W.R. 733.

MUNICIPAL WORKS—OTHER REMEDY.

An interlocutory injunction to restrain proceedings on municipal works, on the ground of changes made in the specifications, will not be granted when the changes are not of a nature to cause a serious or irreparable wrong, and when there exists several legal remedies effective and sufficient if the works cause damage to the petitioner.

Montreal v. Maisonneuve, 18 Que. P.R. 95.

(§ I A—9)—RESTRAINING DEFENDANT FROM ALLOWING DUST, ETC., TO ESCAPE — ADJOURNED TO TRIAL.

Montreuil v. Ontario Asphalt Block Paving Co., 19 O.W.R. 942, 2 O.W.N. 1512.

RESTRAINING BARBER FROM CARRYING ON BUSINESS—INCONVENIENCE.

Sexton v. Brockenshire, 2 O.W.N. 800, 18 O.W.R. 640.

(§ I A—10) — RESTRAINING MAYOR'S ORDERS FOR EXCLUSION FROM CITY HALL—NEWSPAPER REPORTERS.

A newspaper reporter has a right of entry into the city hall of the city in which the newspaper is carried on, both as a representative of the publishers and as a resident of the city, and the enforcement of an order given by the Mayor of the city to the city hall officials excluding newspaper reporters from the city hall will be restrained by injunction.

Journal Printing Co. v. McVeity, 21 D.L.R. 81, 33 O.L.R. 166.

(§ I A—14)—AGAINST TRANSFER OR COLLECTION OF NOTE.

The right to grant an injunction is not limited to cases in which irreparable mischief may otherwise result and in which the plaintiff could not be compensated in damages; and the transfer of a promissory note may be enjoined in an action for cancellation thereof if the court is satisfied that it is just and convenient to grant the same.

Thompson v. Baldry, 1 D.L.R. 32, 22 Man. L.R. 76, 19 W.L.R. 773, 1 W.W.R. 461.

B. CONTRACT RIGHTS; COVENANT.

(§ I B—20)—WRONGFUL DETENTION OF GAS —REMEDY FOR DAMAGES.

The right to an injunction for wrongful withholding a supply of natural gas detrimental to the rights under a contract depends upon the situation and abilities of the parties, as to their plants and connections, and a company may be enjoined from allowing such gas to be taken from a sufficient area of the lands if it still owned them; but after it had parted with the lands to others not bound by the covenant or not having notice thereof, a remedy for damages may be sufficient.

Tilbury Town Gas Co. v. Maple City Oil & Gas Co., 27 D.L.R. 199, 35 O.L.R. 186. [Affirmed, 32 D.L.R. 771.]

A contract entered into by the proprietor of a country newspaper to accept and use exclusively every week the "ready prints" furnished by a publisher may be enforced by an injunction restraining the defendant during the period covered by it from using or publishing any ready prints except those published by the plaintiff, who should not be limited to the recovery of damages for the breach of the contract. [Metropolitan Electric Co. v. Ginder, [1901] 2 Ch. 799, followed; Whitwood Chemical Co. v. Hardman, [1891] 2 Ch. 417, distinguished.]

Winnipeg Saturday Post v. Couzens, 21 Man. L.R. 562.

INTERFERENCE WITH SALE BY PLAINTIFFS OF GOODS MANUFACTURED BY DEFENDANTS—DEFAMATORY STATEMENTS — CLAIM MADE IN BAD FAITH — EVIDENCE — INTERIM INJUNCTION—SPEEDY TRIAL.

McKenzie v. Auto Strop Safety Razor Co., 17 O.W.N. 150. [Affirmed, 17 O.W.N. 375.]

NONCOMPLIANCE WITH TERMS — INTERIM INJUNCTION — MOTION TO CONTINUE — EXCLUSIVE LICENSE — BALANCE OF CONVENIENCE.

United Nickel Co. v. Dominion Nickel Co., 4 O.W.R. 480, 23 O.W.R. 619.

AS TO POSTING BILLS.

A grantee of a right to bill-sticking conceded by the lessee cannot obtain an injunction or damages from one, having obtained a similar right from the proprietor, posting on the house.

Asch v. Haney, 49 Que. S.C. 131.

CONTRACT FOR CONSTRUCTION OF RAILWAY—ENFORCEMENT—CONDITION PRECEDENT.

One who contracts with a railway company to build its railway on the condition of not being bound to begin the work until he has been assured that the company has the funds required to proceed with the work and to pay him the amounts stipulated, and who, by a subsequent writing obtains from it the admission of such a right by a writing expressed as follows: "If you should commence the execution of the works, you shall be at liberty at any time, to refuse to proceed with the works, if you are not absolutely satisfied that there are funds available for the payment of your monthly contract estimates, etc." cannot, if the company, after his refusal to proceed with the work, the said refusal being based on the above agreement, cancels the contract and declares its intention to give it to others, take an action against the company to have the contract declared in force and to obtain a permanent injunction preventing the company from giving the contract to others.

Central R. Co. v. Wills, 23 Que. K.B. 126.

CONTRACT — SUPPLY OF GAS — ORDER OF ONTARIO RAILWAY AND MUNICIPAL BOARD — POWERS OF BOARD — VALIDITY OF LEGISLATION CONSTITUTING BOARD — INTERPRETATION OF STATUTES — RETROSPECTIVE OPERATION — ORDER OF BOARD MADE WITHOUT HEARING PLAINTIFFS AS TO THEIR CONTRACT — RIGHT

TO SHUT OFF GAS IN DEFAULT OF PAYMENT OF DEMANDS — INJUNCTION — RIGHT TO MONEY PAID INTO BANK.

Dominion Sugar Co. v. Northern Pipe Line Co., 16 O.W.N. 249. [See 17 O.W.N. 95.]

(§ I B—21) — ULTRA VIRES CONTRACT OF CORPORATION.

A question of ultra vires as to a lease made of the company's entire undertaking will not ordinarily be decided upon an interlocutory application for an injunction and receiver, but will be left to be decided at the trial, where it is not plain that all the material facts which might be brought out at the trial are before the court on the interlocutory application.

Newhouse v. Northern Light, Power & Coal Co., 15 D.L.R. 249, 26 W.L.R. 532.

(§ I B—22) — CONTRACT FOR PERSONAL SERVICE.

One who contracts to give an exclusive sale agency within a specified area and for a specified time will not, where there is no express negative stipulation, be enjoined from giving others the right to sell within that area before the expiration of the specified period.

Macdonald v. Casein, 35 D.L.R. 443, 24 B.C.R. 218, [1917] 2 W.W.R. 1132.

RESTRAINT OF TRADE — AGREEMENT BETWEEN MASTER AND SERVANT—SELLING GOODS.

Lovell v. Pearson, 17 D.L.R. 856, 6 O.W.N. 357.

CONTRACT FOR PERSONAL SERVICE.

When the services of an employee are of no special or peculiar value and are of such a nature that they can readily be duplicated, relief by injunction will be denied, since the injury in such a case is not of an irreparable nature. [Pitre & L'Association Athletique d'Amateurs Nationale, 11 Que. P.R. 336, followed.]

Aird v. Birss, 14 Que. P.R. 285.

INJUNCTION — QUEBEC LAW — PERSONAL SERVICES.

Pitre v. Amateur Athletic Assn., 20 Que. K.B. 41.

(§ I B—23)—RESTRICTION UPON SERVANT'S EXERCISE OF TRADE FOR LIMITED PERIOD —TRADE SECRETS — RESTRAINT OF TRADE.

William Shannon Co. v. Crane, 25 D.L.R. 843, 9 O.W.N. 293.

(§ I B—24)—CONTRACT RIGHTS — COMPETING BUSINESS.

Canada Law Book Co. v. Butterworth (No. 2), 12 D.L.R. 143, 23 Man. L.R. 352, 24 W.L.R. 124, 4 W.W.R. 237, reversing 9 D.L.R. 321, 23 W.L.R. 505, 3 W.W.R. 1014. [Appeal to Privy Council dismissed, 16 D.L.R. 61, 26 W.L.R. 937, 5 W.W.R. 1217.]

CONTRACT RIGHTS — COVENANT NOT TO COMPETE IN BUSINESS — MODE OF PLEADING.

An order enjoining the breach by defendant of a covenant in restraint of trade may be in general terms conforming with the restriction and need not set out specifically the acts from the doing of which it was intended to restrain; it will be left to the party enjoined to find out how to comply with its terms. [Dysart v. Hammerton, [1914] 1 Ch. 822, and Wood v. Conway, [1914] 2 Ch. 47, applied.]

Parkers Dye Works v. Smith, 20 D.L.R. 500, 32 O.L.R. 169.

CONTRACTS NOT TO ENGAGE IN OR AID COMPETING BUSINESS.

On transferring to the plaintiffs his shares in a company dealing in automobiles and their accessories, the defendant covenanted that he would not engage in, carry on, be interested in, have money invested in or hold shares in any business similar to or in competition with the business carried on by the said company in the Province of Manitoba, Saskatchewan or Alberta for a period of five years. The company had power to engage in other lines of business. Held (1) the covenant only extended to the business actually carried on by the company at the time of the signing of it and was, therefore, not too wide to be enforceable. [Maxim v. Nordenfeldt, [1893] 1 Ch. 630, [1894] A.C. 535, distinguished.] 2. Extrinsic evidence might be given to show what was the business carried on by the company at the time. (3) The plaintiffs were entitled to an injunction in the terms of the covenant against the defendant who had accepted the position of manager for another company carrying on, at Winnipeg, the business of dealers in automobiles, limited to dealing in automobiles.

Kelly v. McLaughlin, 21 Man. L.R. 789.

(§ I B—26)—SCHOOL BUILDING — INJUNCTION TO RESTRAIN PAYMENT.

The expenditure of money for the erection of a school building having received the sanction of the Local Government Board and a majority of the ratepayers, and the erection of the building having been completed under a contract entered into by the trustees of the school district, and the contractors, the court has no power to restrain the trustees from proceeding to obtain, if necessary, further authority from the ratepayers to borrow and expend on the contract such further sum as may be necessary to pay the contractor the balance due him on the building.

Lawrence v. Beaver Valley School Dist., 43 D.L.R. 318, 11 S.L.R. 429, [1918] 3 W.W.R. 607, reversing, [1918] 3 W.W.R. 71.

BREACH OF COVENANT—RESTRICTION UPON USE OF LAND—ERECTION AND OPERATION OF FOUNDRY — UNREGISTERED AGREEMENT — PURCHASER FOR VALUE WITHOUT NOTICE — TECHNICAL AND OBSOLETE RESTRICTION—STATUS OF PLAINTIFF TO INVOKE RESTRICTION — NO DAMAGE OR LIKELIHOOD OF DAMAGE SHEWN.

Cowan v. Ferguson, 14 O.W.N. 303. [Affirmed, 48 D.L.R. 616, 45 O.L.R. 161.]

(§ I B—27) — RESTRAINING PROCEEDING WITH BUILDING CONTRACT, AFTER CANCELLATION.

As the owner may, at will, resiliate a contract for construction of a building the contractor who continues the work after notice of resiliation will be stopped by injunction.

Ettenberg v. Desroches, 13 Que. P.R. 279.

C. TRANSFER OR DISPOSITION OF PROPERTY.

(§ I C—30) — INTERIM INJUNCTION RESTRAINING DEFENDANTS FROM SELLING MORTGAGED LANDS, UNTIL THE TRIAL OF THE ACTION GRANTED ON TERMS.

Carson v. Middlesex Mills Co., 16 O.W.N. 144.

SALE — RACE TRACK — C.C. ARTS. 406, 414, 2016, 2053, 2054, 2055.

A vendor of real property cannot compel the purchaser, by way of injunction, to cease carrying on a race-track which is on the sold property even when the purchaser has not complied with the conditions of the deed of sale.

Paradis v. Wharton Co., 55 Que. S.C. 353.

(§ I C—31)—SUPPLEMENTARY TO RECEIVERSHIP.

The executors are not necessary parties to a motion to continue an injunction restraining a judgment debtor legatee from dealing with his legacy and appointing a judgment creditor receiver thereof.

Gilroy v. Conn, 1 D.L.R. 580, 3 O.W.N. 899, 21 O.W.R. 526.

As shares of stock may be easily lost to judgment creditors, the court will, as an exercise of discretion, grant an interlocutory injunction restraining their transfer by one to whom it was alleged they were fraudulently transferred, notwithstanding it did not appear on the application that there was imminent danger that they would be transferred and lost to the judgment creditor if the writ were denied. Upon an application by a judgment creditor for an interlocutory injunction to prevent the disposal of shares of stock by the wife of the judgment debtor, to whom it is alleged the latter transferred them in his lifetime with intent to defraud his creditors, the judgment debtor's examination in the suit in which the judgment was rendered cannot be considered.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

(§ I C—32)—BETWEEN HUSBAND AND WIFE.

An injunction is improperly granted to restrain a debtor and his wife from using or in any way transferring certain funds placed to the credit of the wife upon the mere ground that such funds had been and still were the property of the husband but had been deposited in the wife's name in the absence of any allegation that the money had been given to the wife and that the same was fraudulent and void as to creditors.

Albertson v. Secord, 1 D.L.R. 804, 4 A.L.R. 90, 20 W.L.R. 64, 1 W.W.R. 657.

D. ILLEGAL OR TORTIOUS ACTS; CRIMES.

Ice falling from roof, sufficient remedy for damages, see Negligence, I C—37.

(§ I D—37)—PUBLICATION OF CONFIDENTIAL INFORMATION—IMPLIED CONTRACT UNDER WHICH HISTORICAL DATA OBTAINED.

Where an author is given access to and permission to make extracts from a collection of private documents of historic interest as to the life of a deceased public man by one of his descendants for the purpose of obtaining information for use in preparing under contract with a publisher, a biographical sketch to be included in a series of appreciative biographies of public men as indicated by the title given in advance to the series, it is an implied term of the arrangement between the public man's descendant and the author that the latter should not make use of the documents for any other purpose; and where the article written was adverse in view and was in consequence rejected by the publisher the author may be restrained from publishing the extracts and may be ordered to deliver them up to the plaintiff on its being shewn that he had threatened to use them in breach of the implied condition upon which he had obtained them.

Lindsey v. Le Sueur, 15 D.L.R. 809, 29 O.L.R. 648, affirming 11 D.L.R. 411, 27 O.L.R. 588.

E. TAKING OF, INJURY TO, OR TRESPASS UPON, REAL PROPERTY.

(§ I E—40)—TRESPASS TO REAL PROPERTY —ADEQUACY OF LEGAL REMEDY.

An injunction will not be granted to prevent the erection of a building alleged to encroach on the plaintiff's land, if his remedy by an action for damages is adequate.

Douglass v. Bullen, 12 D.L.R. 652, 4 O.W.N. 1587, 24 O.W.R. 890. [See 3 D.L.R. 898, 3 O.W.N. 1619.]

An injunction will not be continued against a landlord for trespass on the demised premises where the plaintiff has not made out a case of actual damage, present or future, there being a sufficient remedy in an action for damages if any were sustained.

Taylor v. Pelof, 1 D.L.R. 212, 3 O.W.N. 571, 20 O.W.R. 927.

(§ I E—42)—An action by a lessor for an injunction restraining a lessee from using the land demised in a manner contrary to the lease, may be maintained as an independent action, without the addition of a prayer for the cancellation of the lease. [McArthur v. Coupal, 16 Que. S.C. 521, distinguished, and dictum therein disapproved.]

Audet v. Jolicoeur, 5 D.L.R. 68, 22 Que. K.B. 35.

INJURY TO REAL PROPERTY — RIGHT OF LANDLORD TO RESTRAIN TENANT — INJURY TO REVERSION.

The removal of sand from a water lot by a lessee will be enjoined, where it amounts to an injury to the reversion, and the lessee's covenants restrict his use of the demised premises except as a mooring place for vessels and obtaining access to a clubhouse by the construction of wharves and approaches.

Toronto Harbour Commissioners v. Royal Canadian Yacht Club, 15 D.L.R. 106, 29 O.L.R. 391.

ALLEGED OBSTRUCTION AND NUISANCE — INJUNCTION RESTRAINING — FORFEITURE OF LEASE.

Appelbe v. Douglas, 4 O.W.N. 389, 23 O.W.R. 396.

(§ I E—43) — TRESPASS — STATUTORY RIGHT.

Damages are not assessable in a trespass action where the defendants have by statute a right to do legally (on complying with certain prerequisites) the very thing which constitutes the trespass. The proper course is by injunction restraining the defendants from continuing the trespass unless they acquire title and proceed to have the compensation or damages determined under the provisions of the Railway Act, within a reasonable time.

Holmested v. C.N.R. Co., 22 D.L.R. 55, 31 W.L.R. 896, 19 Can. Ry. Cas. 105, varying 20 D.L.R. 577.

COMMISSION OF TRESPASS OR WASTE.

In an ordinary case of trespass where there is an adequate legal remedy in the nature of damages, an injunction will only be granted by a Court of Equity when special circumstances are shewn.

Godard v. Godard, 4 N.B. Eq. 268.

PRIVATE WAY — LANE — TRESPASS — EVIDENCE—INJUNCTION.

White v. Anderson, 6 O.W.N. 144.

SUBDIVISION OF LAND ACCORDING TO REGISTERED PLAN — STREETS SHEWN ON PLAN BUT NOT OPENED ON GROUND — PURCHASE OF BLOCKS ACCORDING TO PLAN—RIGHT OF ONE PURCHASER TO RESTRAIN ANOTHER FROM PLOUGHING LANDS SHEWN AS STREETS — SPECIAL AND PECULIAR DAMAGE — COSTS.

Bragg v. Oram, 16 O.W.N. 222.

(§ I E—44)—WRONGFUL SEIZURE OF GOODS INJUNCTION AGAINST.

An injunction will not be granted to restrain a person from seizing, or from keeping possession of, or from selling, or from advertising for sale, a carriage and three cows claimed by the plaintiff, where he has a full, complete and adequate remedy at law in replevin or in an action for damages. [Moren v. Shelburne Lumber Co., Russell's Equity Decisions, N.S. 134, applied.]

Prairie Stock Farm Co. v. McFatridge, 3 D.L.R. 749, 11 E.L.R. 514.

INTERIM ORDER — JUDICATURE ACT, S. 58 (9), JUST AND CONVENIENT — LANDLORD AND TENANT—DISTRESS FOR RENT —INJUNCTION AGAINST—GROUNDS FOR — REMEDY BY REPLEVIN — RENT NOT PAYABLE AT A TIME CERTAIN.

Neal v. Rogers, 22 O.L.R. 588.

(§ I E—46) — UNLAWFUL ERECTION OF BUILDING—ESSENTIALS NECESSARY TO OBTAIN INJUNCTION — MUNICIPAL BY-LAW.

In order to obtain an injunction, on the quia timet principle, the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury (if it does come) will be irreparable, and affidavits that a building: (1) is erected in defiance of a municipal by-law, and (2) amounts to a menace to the public, are insufficient to support such an application. [Fletcher v. Bealey, L.R. 28 Ch. D. 688, followed.]

Oak Bay v. Gardner, 17 D.L.R. 802, 19 B.C.R. 391, 27 W.L.R. 960, 6 W.W.R. 1023.

INJURY TO REALTY—INTERFERING WITH PARTY WALL.

An application by a realty owner for an injunction against an adjoining owner interfering by additional construction work with a party wall already erected and maintained between the two properties, will be refused where no real danger from such additional work is shewn and where the expense of protecting the applicant without restraining the proposed interference would be trifling with the inconvenience, cost and delay which an injunction would occasion, especially where the application is dilatory.

Monadnock Realty Co. v. Quebec Bank, 18 D.L.R. 250, 24 Man. L.R. 763, 28 W.L.R. 339.

ERECTION OF BUILDING OR OTHER STRUCTURE —TRESPASS—BOUNDARY.

Douglas v. Bullen, 3 D.L.R. 898, 3 O.W.N. 1619, 22 O.W.R. 837.

(§ I E—47)—EXTRACTION OF GAS, PETROLEUM OR OTHER MATERIALS — MINING RIGHTS — MANDAMUS.

Curry v. Wettlaufer, 3 D.L.R. 900, 3 O.W.N. 1641.

(§ I E—48)—RIGHT TO REMEDY—DAMAGES AND INJUNCTION—ENCROACHMENT.

Peterson v. Bitulithic & Contracting Co. (No. 2), 12 D.L.R. 444, 23 Man. L.R. 136, 24 W.L.R. 19, 4 W.W.R. 223, reversing 7 D.L.R. 586, 23 Man. L.R. 136, 22 W.L.R. 398, 3 W.W.R. 377.

MUNICIPAL CORPORATIONS — INTERFERENCE BY TOWNSHIP CORPORATION WITH PRIVATE WAY — DAMAGES—INJUNCTION—COSTS.

Hostetter v. Grantham, 17 O.W.N. 218.

F. Water rights.

(§ I F—56)—Vendor and purchaser—Agreement for sale of land—Agreement not executed by co-owner, wife of vendor—Purchaser going into possession of part of premises—Shutting off supply of gas and water — Injunction — Payment for articles used.

MacGillivray v. Davis, 16 O.W.N. 366.

(§ I F—58)—Pollution.

The owner of land on the bank of a river can maintain an action to restrain the fouling of the water by municipal drainage works without shewing that the fouling is actually injurious to him, if it appears that there is a probability that in summer the stream would thereby be made dangerous to health. [Crossley v. Lightowler, L.R. 2 Ch. 478, and Young v. Bankier, [1893] A.C. 691, applied.]

Crowther v. Cobourg, 1 D.L.R. 40, 3 O.W.N. 490, 20 O.W.R. 844.

Restraining pollution of stream—Delay to make changes in mining concentrator plant.

On decreeing a permanent injunction in favour of riparian owners against the pollution of the stream by a mining company in the working of its concentration plant, a reasonable stay of the injunction may be granted to enable defendants to make alterations to their works to obviate the damage to riparian rights.

Nipisiquit Co. v. Canadian Iron Corp., 14 D.L.R. 752, 42 N.B.R. 287.

Not only will damages be awarded for past injuries, but an injunction will be granted to restrain the defendant from dumping debris from a quarry upon a steep declivity on land owned by or under his control, from which earth was washed into a mill pond owned by the plaintiff, which not only fouled the waters thereof but threatened as well to fill the pond itself, notwithstanding it did not appear that the plaintiff had title, either by deed or right of possession, to the bank of the pond at the place where such debris washed into it.

Fisher v. Doolittle, 5 D.L.R. 549, 3 O.W.N. 1417, 22 O.W.R. 445.

Restraining discharge of water and oil upon plaintiff's lands—Damages.

Bell v. Superior Portland Cement Co., 19 O.W.R. 941, 2 O.W.N. 1513.

(§ I F—59)—Streams — Obstructions — —Tightening dam—Increased flooding of land.

Where, for many years, a 7-foot water level was maintained by a dam only during spring freshets and late in the fall and winter, the maintenance, by tightening the dam, of water at such level during the entire year, in the absence of a prescriptive right, will be enjoined so as to prevent the flooding of the land of the plaintiff during the summer months.

Cardwell v. Breckenridge, 11 D.L.R. 461, 4 O.W.N. 1295, 24 O.W.R. 569.

Defective drainage.

The provisions of s. 166 of the Railway Act (B.C.) 1911, c. 44, authorizing the Minister of Railways to make orders in cases of defective drainage, do not deprive the courts of jurisdiction in a proper case to grant an injunction.

McCrimmon v. B.C. Electric R. Co., 24 D.L.R. 368, 19 Can. Ry. Cas. 329, 22 B.C.R. 76, 32 W.L.R. 81, 8 W.W.R. 1289, affirming 20 D.L.R. 834, 7 W.W.R. 137.

Obstructions.

Riparian owners have a right of action to compel the removal of a dam which seriously interferes with their riparian rights and to compel the restoration of the former status in quo so that the waters may escape from the lake at their natural level, and this without prejudice to their claim for damages.

Marbleton v. Ruel, 1 D.L.R. 624, 21 Que. K.B. 434.

Railway construction—Obstruction of waterways—Injury to business of express company—Remedy in damages.

The plaintiff company applied in Chambers for a mandatory injunction to compel the defendant company to cease obstructing certain rivers, and to remove a temporary bridge built by it across a river, and to make openings in 2 permanent steel bridges crossing a river constructed by it under statutory authority:—Held, upon the evidence, that all the requirements of the Railway Act of Canada had been complied with, and that the Public Works Department of Canada had sanctioned the temporary obstruction of these streams. That the plaintiff company was not obstructed in its navigation of the streams, nor was its business jeopardized thereby. The interim injunction was refused; the plaintiff company having a remedy in damages if its business should be injured by the operations of the defendant company.

B. C. Express Co. v. G. T. P. R. Co., 20 B.C.R. 215, 18 W.L.R. 460.

G. As to corporate matters; Associations.

To restrain invalid issue of school debentures, see Schools, IV—70.

(§ I G—60)—As to corporate matters.

An injunction should not be granted to restrain the president of the board of directors of a church corporation from proceeding with a sale of pews to the church members, where plaintiffs set up as a ground for the injunction that two-thirds of the members are opposed to the proposed sale, but where the constitution of the church corporation is not being infringed by the defendant officer.

Gold v. Maldaver, 6 D.L.R. 333, 4 O.W.N. 106, 23 O.W.R. 75.

Diversion of property of voluntary association.

Injunction lies to prevent the diverting of the property of a voluntary society by

a majority of the members thereof to uses alien to and in conflict with the fundamental principles of the society, contrary to the wishes of the minority, who contributed toward its acquisition.

Vick v. Toivonen, 12 D.L.R. 299, 4 O.W.N. 1542, 24 O.W.R. 802.

ULTRA VIRES ACT OF MUNICIPALITY—CARRYING ON MOVING PICTURE BUSINESS—INTEREST OF RATEPAYERS.

An injunction will be granted at the instance of a ratepayer having a special interest as a competitor in the moving picture business, who sues on behalf of himself and all other ratepayers, to restrain a municipal corporation from carrying on a moving picture business in the township hall under the guise of a lease to the township's agent made with the intention of evading the law; and the action may be maintained without first quashing the township by-law under which the illegal lease purported to be made.

Crichton v. Chapleau, 22 D.L.R. 796, 8 O.W.N. 67.

INTERNAL MANAGEMENT OF ASSOCIATION—MEDICAL COLLEGES—ELECTION OF COUNCIL — VALIDITY — PARTIES — STATUTORY REMEDY — MEDICAL PROFESSION ACT, C. 28.

Park v. MacDonald, 25 D.L.R. 792, 8 W.W.R. 431.

MUNICIPAL MATTERS—ULTRA VIRES ACTS—INTEREST OF RATEPAYER.

The fact that a complaining ratepayer is the agent of a rival company, and that he would receive a commission if his company gets the contract, is too remote an interest to entitle him to an injunction against a municipality to prevent its execution of a contract ultra vires.

Dubuc v. Montreal & Aztec Oil, etc., Co., 48 Que. S.C. 366.

A resolution to sell part of the assets of a company passed by the directors and to be confirmed at a meeting of the shareholders will not be suspended by an interlocutory injunction, the petitioner having an action at common law to rescind the same. The courts of justice should not interfere by interlocutory injunction with the internal management of a joint stock company acting within its powers.

Eldredge v. Calumet Metals Co., 14 Que. P.R. 260.

WAR RELIEF ACT—INJUNCTION RESTRAINING DEFENDANT FROM DEALING WITH FUNDS OF UNION—ACT NOT APPLICABLE.

Hunt v. Royal Bank, [1919] 2 W.W.R. 547.

RESTRAINING PUBLIC CORPORATION FROM PERFORMING PUBLIC WORK.

Maisonneuve v. Harbour Commissioners of Montreal, 39 Que. S.C. 36.

(§ I G—61)—LOCAL OPTION BY-LAW—SUBMISSION OF—INJUNCTION TO RESTRAIN.

Where an injunction is sought by a ratepayer to restrain the submission of a local option by-law on the ground of a defective affidavit of execution of the petition for the by-law, he must shew something more than the incidental and comparatively trifling expense by the municipality for taking a public vote to establish his individual status to sue in a matter affecting the public generally—where no special damage to himself more than to other citizens is shewn. [Shrimpton v. Winnipeg, 13 Man. L.R. 219, and Davis v. Winnipeg, 17 D.L.R. 406, 24 Man. L.R. 480, followed.]

Stephenson v. Cowan, 20 D.L.R. 605, 25 Man. L.R. 67, 30 W.L.R. 297, 7 W.W.R. 772.

JURISDICTION TO DEAL WITH ACTS OF THE CORPORATION — CONDITIONS PRECEDENT TO THE SALE OF MUNICIPAL PROPERTY UNDER 1 GEO. V. 95, S. 10.

Parsons v. London, 25 O.L.R. 172, 19 O.W.R. 878.

ACTION TO RESTRAIN MUNICIPALITY FROM INTERFERING WITH ERECTION OF POLES AND TRANSMISSION WIRES AND FOR DAMAGES — CONDITION PRECEDENT TO BEGINNING CONSTRUCTION.

Toronto & Niagara Power Co. v. North Toronto, 3 O.W.N. 77, 20 O.W.R. 57.

(§ I G—62)—ILLEGAL RESOLUTIONS.

In an action to restrain a company from acting upon a resolution said to have been illegally passed at a shareholders' meeting, it need not be shewn that application was first made to the company to begin proceedings, if it appear that such an application would have been futile.

Elliot v. Hatzic Prairie, 6 D.L.R. 9, 21 W.L.R. 897.

(§ I G—64)—FINANCIAL INSTITUTIONS—BANKS.

The Courts of Justice should interfere with the business of a financial institution only for the most weighty reasons; an injunction which would suspend the business of a bank should not be granted on the sole ground of apprehension of a call on the shareholders to make payments on their stock unless there are specific allegations of fraud or bad management.

Ducout v. Forget, 14 Que. P.R. 42.

H. AS TO OFFICE; ELECTIONS.

(§ I H—65)—RETURN OF ELECTION MADE BY RETURNING OFFICER — INJUNCTION — BREACH OF, BY AGENT OF DEFENDANT—CONTEMPT.

Davis v. Barlow, 20 Man. L.R. 158.

I. AGAINST LEGAL PROCEEDINGS.

(§ I I—70)—POLICE-COURT PROCEEDINGS—INFRACTION OF CITY BY-LAW—MOTOR VEHICLES—LEGISLATION ALLOWING CITY TO PROHIBIT USE OF—APPLICATION TO STAY PENDING DETERMINATION OF VALIDITY OF ACT—B. C. STATS. 1918, c. 104, s. 7.

Before an injunction will be granted to restrain police-court proceedings for infraction of a city by-law until the validity of the legislation upon which it is

founded, and the municipal enactment is first finally determined, it is necessary that the court should be satisfied that there is a serious question to be tried at the hearing, and that on the facts before it there is a probability that the plaintiffs are entitled to relief. Public bodies invested with statutory powers must take care to keep within the limits of the authority committed to them, and in carrying out their powers must act in good faith and reasonably and with some regard to the interest of those who may suffer for the good of the community.

Blue Funnel Motor Line v. Vancouver, 26 B.C.R. 142.

(§ I 1—75)—Restraining action.

Fundamentally, as well as under s. 57, subs. 9, of the Judicature Act (Ont.), the law is that no cause pending in the High Court of Justice or before the Court of Appeal shall be restrained by a prohibition or injunction, but that the remedy, if any, must be by an application for a stay in the original action. Where in contravention of s. 57 subs. 9 a motion in a new action is made for an injunction against a judgment in a prior action between the same parties seeking the identical remedy already sought and refused in the original action, the court in dismissing the motion for injunction may broaden it into a motion for judgment and also dismiss the substantive action, where its decision of the injunction motion in effect disposes of the whole action.

Boeckh v. Gowganda Queen Mines, 6 D.L.R. 292, 4 O.W.N. 27, 23 O.W.R. 4.

(§ I 1—78)—Condemnation proceedings.

Where an order appointing an arbitrator for the purpose of assessing compensation under the Victoria Water Works Act has been made by a Judge of the Supreme Court, an interim injunction to restrain such arbitration will not be granted upon the motion of the municipality in the absence of evidence that the municipality is likely to suffer damages if the arbitration proceeds.

Healey v. Victoria, 5 D.L.R. 704, 17 B.C.R. 345, 21 W.L.R. 966.

Restraining sheriff from selling under execution — Interpleader issue to determine ownership of goods.

Nipissing Coca Cola Bottling Works v. Wisse, 2 O.W.N. 677, 18 O.W.R. 270.

Judgment creditor's rights—Difference between legal and equitable interest.

The courts will not enlarge a judgment creditor's rights, nor by way of an injunction motion will they assist him in reaching property of the judgment debtor which is not liable to execution.

Reilly v. Doucette, 2 O.W.N. 1053, 18 O.W.R. 51.

An action for an injunction restraining a board of education from proceeding with an arbitration under the School Sites Act, 9 Edw. VII. (Ont.) c. 93, to fix the value of lands desired by the board for a school site, and from taking possession of the lands, and for a declaration that the board has no right to arbitrate and that the arbitration and award are irregular and void, and to set aside the award, is not maintainable in the High Court of Justice, but such relief can be obtained only upon a summary application to the County Judge under s. 20 of the Act.

Sandwich Land Improvement Co. v. Windsor Board of Education, 3 D.L.R. 423. [Affirmed, 6 D.L.R. 854, 4 O.W.N. 112.]

Condemnation proceedings—Restraining application to Governor-in-council for leave to expropriate land.

The court will not enjoin a proposed application by a company to the Governor-in-council for permission to expropriate land or an easement for the purposes of its business, as permitted by its charter, c. 113 of N.S. Acts, 1911, on the ground that the property sought was not such as could be acquired by expropriation, because affected with public rights, or rights already acquired by others under statutory grants; since the Court cannot assume in advance that the Governor-in-council will exceed his jurisdiction or act illegally and grant permission to take land not subject to expropriation.

Miller v. Halifax Power Co.; Thompson v. Halifax Power Co., 13 D.L.R. 844, 47 N.S.R. 334, 13 E.L.R. 394.

Sale of lands to water commissioners—Disagreement as to price—Eminent domain.

Gerry v. London Water Commissioners, 19 O.W.R. 64, 2 O.W.N. 1016.

J. Against officers generally.

To restrain illegal exercise of municipal powers, see Municipal Corporations, II F—165.

(§ I J—80)—An injunction will lie to restrain a municipality from proceeding to confiscate and destroy articles (e.g., eggs) which have been neither inspected nor seized.

Montreal v. Layton, 1 D.L.R. 160. [Affirmed, 10 D.L.R. 852, 47 Can. S.C.R. 514.]

Judicial investigation—School board—Contracts.

Section 214, Vancouver Incorporation Act is wide enough to enable the city council to request by resolution a Judge of the Supreme Court to enquire into contracts which had been entered into by the School Board. Such an enquiry is not a judicial process, and, therefore, even if the above section were not wide enough to support it, the court would not restrain it by injunction.

Vancouver School Trustees v. Vancouver 10 W.W.R. 1330.

(§ I J—83)—As to ordinances—By-laws.

Injunction will not lie to prevent the passing of a town by-law after it had been carried by a majority of the rate-payers

when there is an appropriate remedy in a motion to quash the by-law.

London v. Newmarket, 2 D.L.R. 244, 3 O.W.N. 565, 20 O.W.R. 929.

Upon an application by a person (not in the name of the Atty-Gen.) for an injunction, restraining a city corporation from passing a certain twice-read by-law respecting an agreement between the defendant city and a certain railway company, renting to it, for 99 years at a nominal rental, a valuable portion of a city park, for hotel purposes, and granting a partial exemption from taxation, and thereby in effect bonusing the company in contravention of ss. 185 and 210 to 240 of the City Act, c. 84, R.S.S., the application for the injunction will be refused, in view of s. 242 of the Act, which expressly provides a method available to any elector of the city, to apply to the court within 2 months after the passing of any ultra vires by-law to quash the same.

Keay v. Regina, 6 D.L.R. 327, 5 S.L.R. 372, 22 W.L.R. 185, 2 W.W.R. 1072.

MUNICIPAL CORPORATION—SUBMISSION OF QUESTION TO VOTE OF ELECTORS—MUNICIPAL ACT, S. 398 (10)—PROCEEDING PREVIOUSLY DETERMINED TO BE ILLEGAL—MOTION FOR JUDGMENT.

Gaulin v. Ottawa, 6 O.W.N. 38.

(§ I J—84)—MUNICIPAL EXPENDITURES—USE OF PUBLIC FUNDS.

A municipal council may be enjoined from acting upon a resolution passed for the making of expenditures which could be legally made only on the passing of a by-law voted upon and passed by the burgesses.

Howson v. Medicine Hat; Ynill v. Medicine Hat, 22 D.L.R. 72, 30 W.L.R. 319.

AS TO USE OF MUNICIPAL FUNDS—ADVERTISEMENT—TAX SALE.

Dickson v. Edmonton, 34 D.L.R. 183, 10 A.L.R. 525, [1917] 1 W.W.R. 1489.

ILLEGAL SCHOOL BUILDING CONTRACT.

In case of noncompliance with statutory requirements a permanent injunction may issue against the school commissioners restraining them from commencing the work of building so long as they have not received the approval required by statute.

Desjardins v. School Commissioners of Maisonneuve, 51 Que. S.C. 450.

(§ I J—85)—SCHOOL OFFICERS.

An injunction will be granted restraining the trustees of a school district from preventing the child, of a parent whose permanent and principal place of residence is within the school district, from attending the school without the payment of a fee chargeable only against "non-resident" pupils.

Inkster v. Minitonka School District, 6 D.L.R. 57, 22 Man. L.R. 487, 22 W.L.R. 57.

(§ I J—88)—PROHIBITION BY-LAW—CONSTITUTIONALITY.

An interlocutory injunction will be granted suspending the bringing into force of a prohibition by-law attacked as unconstitutional, the petition making it appear that there would be more inconvenience to the petitioner if the by-law was put in force than for the respondent if it was suspended. The injunction, however, will not prevent the holding of the meeting of the electors summoned to approve or disapprove the by-law.

Gingras v. Longueuil, 17 Que. P.R. 352.

K. AGAINST TAXES OR ASSESSMENTS.

Illegal tax, remedy by appeal, see Taxes, III D-135.

(§ I K—90)—WRONGFUL SEIZURE FOR TAXES—REMEDY FOR DAMAGES.

The court will not continue an interim injunction restraining the seizure for taxes of property claimed by another where there is an adequate remedy at law. [Dominion Express Co. v. Brandon, 19 Man. L.R. 257, followed.]

Smart Hardware & Contracting Co. v. Melfort, 24 D.L.R. 540, 32 W.L.R. 382, 9 W.W.R. 134.

In an action for a declaration that the school district was not properly incorporated, that the trustee defendants were not legally elected and that the rate struck and assessment made by them were illegal, held that the plaintiff was entitled to an injunction restraining the district from levying against his property the taxes payable under the rate and by reason of the fact that the trustees had acted in bad faith to a personal judgment against the trustees for amount of his taxes paid by him into court in the action with his costs; but that the secretary-treasurer, having signed the warrant in his official capacity, was not by reason thereof personally liable.

Muirhead v. Bullhead Butte S.D., 4 A.L.R. 12.

ILLEGAL MUNICIPAL ASSESSMENTS.

When a municipal council illegally contracts obligations without power or in excess of its powers, the rate payers cannot be compelled to pay the resulting debts on the sole ground that they are accomplished facts. They are entitled to an injunction to have the illegality stopped.

St. Jerome Power & Electric Lighting Co. v. St. Jerome, 26 Que. K.B. 534.

RESTRAINING SEIZURE OF COMPANY'S PLANT FOR TAXES—PAYMENT INTO COURT.

Ontario & Minnesota Power Co. v. Fort Frances, 18 O.W.R. 514.

L. AS TO PARKS, HIGHWAYS AND RAILROADS.

(I L—100)—ROAD BUILDING—BENEFIT TO PUBLIC—QUE. C.P. 957—3 GEO. V. C. 21—4 GEO. V. 19.

If, by ordering the installation, on a lot opposite that of the petitioner, of a stone-crusher used for building public roads, a corporation acts within its discretionary and administrative powers, the resolution passed to that effect can be set aside only if

it constitutes a real oppression of the petitioner.

La Palme v. St. Basile Le Grand, 16 Que. P.R. 84.

(§ I L—104)—As to highways—Telephone and electric poles—Lowering wire to interfere with those of competitor.

An electric company will be restrained from arbitrarily and unreasonably lowering its wires for the sole purpose of compelling a competitor which otherwise could string its wires below the first company's wires and still leave a clear space of 3 feet as required by s. 6 of c. 139 of N.S. Acts of 1889, and had begun operations accordingly, to rearrange its entire plan and go above the first company's wires.

Att'y-Gen'l and Truro v. Chambers Electric Light & Power Co., 14 D.L.R. 883, 13 E.L.R. 443.

Telephones and electric light poles.

Where a public service corporation proceeds with its undertaking without complying with the statutory requisites as to its use of the highway, it is deemed a trespasser upon the highway and may be enjoined from further continuance of such trespass.

Haldimand v. Bell Tel. Co., 2 D.L.R. 197, 25 O.L.R. 467, 21 O.W.R. 194.

(§ I L—107)—Street railway—Injury to adjoining owner—Restricting access.

A property owner on the street affected who would sustain special damage because of restricted access to his property if an electric railway line were extended along the adjoining street, may sue the railway company to restrain the construction, although authorized by the municipality, if no permission has been obtained from the Ontario Railway and Municipal Board by the company subject to its authority under the Ontario Railway Act, 3 & 4 Geo. V. c. 36, s. 250.

Mitchell v. Sandwich, Windsor, etc., R. Co., 22 D.L.R. 531, 32 O.L.R. 594, 19 Can. Ry. Cas. 300.

(§ I L—109)—As to railway tracks—Construction by Dominion railway on right-of-way of provincial railway.

A Dominion railway company will not be enjoined from expropriating and building tracks on a right-of-way acquired by a provincial railway company, where the latter has not yet utilized it for railway purposes; the rights of a Dominion railway company being in such case superior to those of the provincial company.

Can. Northern Western R. Co. v. C.P.R. Co., 13 D.L.R. 624, 6 A.L.R. 147, 25 W.L.R. 212, 5 W.W.R. 9.

Right of city to question power of railway company.

An injunction will be denied a city to enjoin the operation of an electric railway on the ground that the company has no power to do so by reason of an irregularity in the proceedings of the municipality purporting to confer the franchise on the company, where it does not appear that the railway is a nuisance, or that the city suffered special damages from its operation, although it crossed some public streets under an order made by the Dominion Railway Board.

Burnaby v. B.C. Electric R. Co., 12 D.L.R. 321, 3 W.W.R. 628.

M. As to patents, copyrights, trademarks, trade names and imitations.

To restrain use of corporate name or trade name, see Companies, I D—15.

(§ I M—116)—Sufficient remedy—Damages.

The court will not issue an injunction when the mischief complained of can be fully and adequately compensated by a pecuniary sum, or where the granting of the injunction would not do the petitioner any practical good.

Marconi Wireless Telegraph Co. v. Canadian Car & Foundry Co., 43 D.L.R. 382, 54 Que. S.C. 535. [See 44 D.L.R. 378, 18 Can. Ex. 241.]

(§ I M—117)—To prevent notice or claim of infringement.

The fact that a foreign corporation has written letters from its head office in the foreign country addressed to and received by merchants in Ontario, threatening actions for damages for infringement of its Canadian trademark in respect of sales of goods of plaintiff's manufacture bearing a similar name, does not alone bring the foreign corporation within the jurisdiction of an Ontario Court for the purposes of plaintiff's action for an injunction to restrain the continuance of such notices; nor will the jurisdiction attach in respect of such injunction action from the additional circumstances that the foreign corporation, while not maintaining any branch in Ontario, transacts business in the province in respect of which an order for service out of Ontario would be permissible under Ont. Con. R. 162 in an action relating to such business.

Capital Mfg. Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.R. 920.

(§ I M—118)—Copyright.

An injunction will be granted to protect a copyright and to restrain infringement although in the infringing work the protected literary matter has been inseparably mixed up with the defendant's own compilation so that the injunction will have the indirect effect of restraining the publication of both. [Mawman v. Tegg, 2 Russ. 385, followed.]

Cartwright v. Wharton, 1 D.L.R. 392, 25 O.L.R. 357.

Interim injunction—Infringement of copyright—Damages—Costs.

Hawkes v. Whaley Royce, 4 O.W.N. 394, 23 O.W.R. 404.

(§ I M—119)—When granted—Trademark infringement.

Further infringement of a trademark registered in Canada may be restrained by the Exchequer Court of Canada in a decree awarding damages for past infringement, where both remedies are claimed on the pleadings.

Canadian Rubber Co. v. Columbus Rubber Co., 14 D.L.R. 455, 14 Can. Ex. 286.

Trademark.

When a company incorporated under the name of "H. Vineberg & Co. Limited," owns a registered trademark, consisting of the words "Progress Brand," and another company, subsequently incorporated under the name "Vinebergs Limited," publish advertisements under the heading, "Progress Proclaimed," such advertisements amount to a dishonest attempt to get possession of part of the first company's business, and an injunction will lie to restrain the offending company from advertising in that form.

H. Vineberg & Co., Ltd. v. Vinebergs, Ltd., 43 Que. S.C. 406.

(§ I M—121)—Protection of tradename—Descriptive term—Unfair use of.

The use by a clothes cleaning establishment of the descriptive terms "Fort Rouge Cleaners," with the last word prominently displayed in the form of an inverted crescent and the first two in smaller type will be enjoined as a wrongful imitation of the tradename "The Cleaners," previously adopted by a competitor, with the word "The" in small letters and the word "Cleaners" prominently displayed in the peculiar form adopted by the defendant, where the defendant's use of such name results in confusion between the two establishments so as to mislead a number of the plaintiff's customers.

Matthews v. Omansky, 14 D.L.R. 168, 24 Man. L.R. 85, 25 W.L.R. 603, 5 W.W.R. 382.

Protection of tradename by injunction—Attempt to "pass off."

The use of the word "My New Valet" as a tradename is properly enjoined as an attempt to pass off the business of the user as the businuess of one who has for many years used the words "My Valet" as a tradename in the same city, where the latter's customers are shewn to have been frequently misled by the similarity of name and it is found that the defendant attempted to trade unfairly and to represent his business as identical with the plaintiff's.

"My Valet" v. Winters, 13 D.L.R. 583, 29 O.L.R., affirming 9 D.L.R. 306, 27 O.L.R. 286.

Tradename — Infringement — Soliciting customers — Information obtained by former officer of company—Grounds for injunction—Relative convenience or inconvenience.

York Publishing Co. v. Coulter, 10 D.L.R. 824, 4 O.W.N. 1091, 24 O.W.R. 384.

II. Interlocutory and interim injunctions.

(§ II—130)—Granting or refusing—Adequate remedy at law.

Before the court will interfere by interlocutory injunction with the conduct of business of companies operating and supplying public utilities, there must be a very strong urgent reason shewn, and in the absence of any irreparable injury or any injury so material that it cannot be adequately remedied in damages, such relief will not be granted.

Canadian-Klondyke Power Co. v. Northern Light, Power & Coal Co., 27 D.L.R. 134.

To restrain disposition of property—Alimony—Costs.

The power of the court under s. 26 (o) of the King's Bench Act (R.S.M. 1913, c. 46) to grant an injunction in alimony cases restraining the husband from disposing of his property, "whenever it appears just and convenient," in protection of the wife's interests, does not extend to enable such injunction being granted before judgment is obtained. Such injunctions having been granted, wrongfully, a motion by the wife that she be allowed costs in connection with such injunctions improperly granted cannot be allowed.

Ferguson v. Ferguson, 29 D.L.R. 364, 26 Man. L.R. 269, 33 W.L.R. 923, 10 W.W.R. 113. [See also 34 W.L.R. 804, 836.]

Where there is a bona fide dispute by the defendant of the plaintiff's title to riparian rights in an action for interference, an interlocutory injunction will not be granted, unless the interim injury sustained by the plaintiff is clearly greater, in case he succeeds in the action, than the interim injury which the defendant would sustain, by the interlocutory injunction.

Minnesota & Ontario Power Co. v. Rat Portage Lumber Co., 1 D.L.R. 95, 3 O.W.N. 502, 20 O.W.R. 876.

It is not usual to grant an interim injunction ex parte after the defendant has entered an appearance in the action, although it may be done in pressing cases; and then the plaintiff applying ought to inform the judge of the fact. [Mexican Co. v. Maldonado, [1890] W.N. 8, approved.] On an ex parte application for an injunction, the fact that a prior interim injunction had been granted and that a motion made to continue same had been dismissed for irregularity, should be disclosed to the judge to whom the second application for a similar injunction is made, and the fact of such disclosure should at least be evidenced in the order itself by a statement or recital that the prior orders had been read on the last application.

Capital Mfg. Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.R. 920.

INTERIM — GRANTING — BALANCE OF CONVENIENCE—COMPENSATORY DAMAGES.

An interim injunction will not be granted where the preponderance of convenience, both public and private, does not require it, and a proper inference can be drawn from the undisputed facts only on the trial; and the damages, if any, which are not irreparable, may be compensated in money.

Breed v. Rogers, 12 D.L.R. 620, 4 O.W.N. 1576, 24 O.W.R. 864.

IRREPARABLE DAMAGE—NO CASE—REFUSAL OF.

An interlocutory injunction should be refused where the plaintiff makes out no case for irreparable damage stronger than that made out for damage which the defendant would suffer by the injunction if he should establish his defence.

Great Northern Film Co. v. Consolidated Film Co., 20 D.L.R. 601, 45 Que. S.C. 464.

LESSOR AND LESSEE—REPAIRS.

When an owner, during the existence of a lease, makes considerable improvements to the property, which, however, detract from its enjoyment by the tenant he can be restrained by interlocutory injunction, and this injunction can only be suspended for very grave reasons. [Haycock v. Pacaud, 7 Que. P.R. 249, followed.]

Morgan v. Provost, 15 Que. P.R. 299.

POWERS OF PROTHONOTARY—QUE. C.P. 957, 961, 962, 963, 970.

A judge alone has the right to grant and to suspend an interlocutory injunction, to regulate the proceedings and the time for contestation, and to prescribe the security. Consequently, an interlocutory injunction signed by a prothonotary is ultra vires of the powers given him by law.

Morgan v. Provost, 15 Que. P.R. 282.

INTERIM ORDER—INQUIRY AS TO DAMAGES—FORUM—DISCRETION—SPECIAL CIRCUMSTANCES.

An application for an order directing an inquiry as to and payment of the damages occasioned to the defendant by reason of an interim injunction obtained by the plaintiff upon the usual undertaking as to damages, and dissolved by the judgment in the action, should be made to the Trial Judge. [Smith v. Day, 21 Ch. D. 421, 427; Gault v. Murray, 21 O.R. 458, followed.] Such an application is in the discretion of the judge. In this case—where the chief point at issue was, whether or not the plaintiffs were liable to assessment and taxation for local improvements—the good faith of the plaintiffs, their duty as trustees to assert what they conceived to be their rights, the importance of the issue as to assessment (involving, as it did, the right of the defendants, a city corporation, to pass the by-law under which they acted), the arbitrary, though legal, conduct of the defendants in laying out the work to the manifest disadvantage of the plaintiffs, and the equally manifest benefit of interested property owners on the opposite side of the street, and the fact that the dismissal of the action was without costs, were held to be circumstances which warranted the conclusion that, if the defendants had suffered damages by reason of the injunction, they were not such damages as the plaintiffs ought to pay; and the defendants' application for an order for an inquiry and payment was dismissed with costs. Review of the authorities.

Upper Canada College v. Toronto, 40 O.L.R. 483. [See 32 D.L.R. 246; 38 D.L.R. 523, 55 Can. S.C.R. 433.]

INTERIM ORDER — IRREPARABLE LOSS — CONTRACT FOR SUPPLY OF ELECTRIC ENERGY — THREATENED CANCELLATION — BONÂ FIDE DISPUTE AS TO AMOUNT DUE—TERMS OF GRANTING INJUNCTION — PAYMENT INTO COURT OF AMOUNT IN DISPUTE.

Ontario Power Co. v. Toronto Power Co., 14 O.W.N. 274.

MOTION FOR INTERIM ORDER—SOLVENCY OF DEFENDANT—PREPONDERANCE OF CONVENIENCE — ADJOURNMENT TILL THE TRIAL.

Boutet v. Thibideau, 15 O.W.N. 26.

DELAY IN BRINGING ACTION — INCREASE IN RATES OF BENEFIT SOCIETY—ALLEGATION OF ILLEGALITY—MOTION REFUSED—BALANCE OF CONVENIENCE — SOCIETY TO KEEP AN ACCOUNT—SPEEDY TRIAL.

Noel v. L'Union St. Joseph du Canada, 13 O.W.N. 427.

CUTTING AND REMOVAL OF TIMBER—MOTION TO CONTINUE—ORDER CONFINED TO REMOVAL — BALANCE OF CONVENIENCE — PRESERVATION OF RIGHTS UNTIL THE TRIAL.

McGirr v. Standeven, 15 O.W.N. 467.

CONTRACT — MINING COMPANY — IMPROVEMENT OF MINING PROPERTY—NOTICE—PREJUDICE.

Connell v. Bunker, 12 O.W.N. 380.

STYLE—TEMPORARY—INTERLOCUTORY.

There is nothing sacramental in descriptive terms used in matters of procedure; it is no cause of nullity that an injunction should be styled "temporary injunction" in lieu of "interlocutory injunction."

Martin v. Tourangeau, 25 Que. K.B. 358.

SOLICITING CUSTOMERS.

A petition for an interlocutory injunction against a bread driver for soliciting bona fide customers of his exemployer contrary to an agreement between them, will be dismissed if the facts are not clearly established before the court. Quaere, whether an agreement by a bread driver not to engage in bread business during a year after his departure is valid or not?

Aird v. Birss, 14 Que. P.R. 285.

NONRESIDENT—POWER OF ATTORNEY.

A person applying for an interlocutory injunction to be served at the same time as the writ of summons must, if he resides

out of the province, produce a power of attorney.

Lecene v. Guay, 18 Que. P.R. 426.

By-law—Quashing.

An interlocutory injunction will not be granted to suspend the enforcement of a municipal by-law while a petition to quash such by-law is pending.

Lukis v. Beaconsfield, 18 Que. P.R. 15.

(§ II—131)—Novel and difficult question.

A novel and difficult legal question should not be dealt with upon a motion for an interim injunction, but the plaintiff will be left to his remedy at the trial.

Rickart v. Britton Mfg. Co., 4 D.L.R. 366, 3 O.W.N. 1272, 22 O.W.R. 81.

(§ II—134)—Continuance—Balance of convenience — Compensatory damages.

An interlocutory injunction will not be continued where the balance of convenience, as well as avoidance of loss by both parties, does not require it, and any injury may be remedied by an award of damages, and the status quo of the parties restored when the case is tried.

Baldwin v. Chaplin, 12 D.L.R. 387, 4 O.W.N. 1574, 24 O.W.R. 860.

Stay pending appeal — Discretion — Municipal contract.

Though the court is given absolute discretion under art. 969 C.C.P. to temporarily suspend an interlocutory injunction pending an appeal, no such relief will be granted where it has the effect of completely destroying the object of an interlocutory injunction against a municipality to prevent the execution of a contract which has been wrongfully awarded, through favoritism, as against the rights of a lowest bidder.

Warner-Quinlan Asphalt Co. v. Montreal, 26 D.L.R. 72, 24 Que. K.B. 499, 17 Que. P.R. 188, 25 Que. K.B. 147.

Dissolution and continuance—Alberta practice.

While in England the usual practice in granting an interim injunction on an ex parte application is to grant the injunction for a definite period, the practice has become quite common in Alberta to grant it "until further order," since this method avoids the necessity of a second application where there are no real grounds of objection to the injunction; but where a motion is made to dissolve the injunction, the burden of supporting the injunction is still on the party who applied for it, in the same way and to the same extent as if the motion were one by him to continue the injunction.

Hart v. Brown, 9 D.L.R. 560, 23 W.L.R. 295.

Nuisance — Restraining nuisance — Locus standi of plaintiffs—Enlargement of motion — Leave — Speedy trial.

Smith v. Harris (No. 1), 6 D.L.R. 861, 4 O.W.N. 134, 23 O.W.R. 100.

Application to continue—Wrongful exercise of power of sale—Notice.

Sackville v. Can. Permanent Mortgage Co., 27 D.L.R. 790, 9 S.L.R. 161.

Dissolution and continuance—Claim to hay—Remedy in damages.

Hewitt Allen v. Adams, 1 D.L.R. 907, 3 O.W.N. 750.

Necessary allegations—Dissolution of.

A plaintiff seeking ex parte an interim injunction is bound to disclose on the affidavits and material submitted to the court all the material facts within his knowledge without either misrepresentation or concealment, and failure to do so is in itself a ground for dissolving the injunction; the plaintiff may, however, be given leave to apply for another injunction on the merits. [Fitch v. Rochford, 18 L.J. Ch. 458, applied.]

Mickelson Shapiro Co. v. Mickelson Drug Co., 23 D.L.R. 451, 8 W.W.R. 153, 30 W.L.R. 798.

Motion to continue—Failure to disclose material facts.

In an appeal from an order continuing an interim injunction on the ground of failure to disclose material facts on the ex parte application for the interim injunction, the court, where all the material facts were before the judge, on the motion to discontinue, dismissed the appeal without considering whether or not all the material facts had been disclosed on the ex parte application.

McDermott v. Oliver, 43 N.B.R. 533.

Interim injunction — Company — Purchase of property—Action by shareholder to restrain—Evidence—Refusal to continue injunction — Speedy trial.

Hawkins v. Miller, 7 O.W.N. 752.

Action to set aside sale of property—Fraud and misrepresentation — Interim injunction — Continuance — Terms—Payment into court—Speedy trial.

Peppiatt v. Reeder, 7 O.W.N. 753.

Preservation of assets subject to execution — Judgment set aside — Continuance of interim injunction pending appeal—Practice—Costs.

Levinson v. Gault (No. 2), 9 O.W.N. 16.

Contract — Removal of machinery — Interim injunction — Motion to continue—Unnecessary party.

Commissioners of Transcontinental R. v. G.T.P. Co. and Commissioners of Temiskaming & Northern Ontario R., 4 O.W.N. 495, 23 O.W.R. 624.

PAYMENT OF INSURANCE MONEYS—INJUNCTION DISSOLVED UPON TERMS—UNDERTAKING.

McMillan v. McMillan, 9 O.W.N. 430.

MOTION TO CONTINUE—AFFIDAVITS—SERVICE.

Tourbin v. Ager, 4 O.W.N. 1405, 24 O.W.R. 748.

REFUSAL TO CONTINUE — BREACH — CONTEMPT OF COURT—IGNORANCE—COSTS.

Casey v. Kansas, 4 O.W.N. 1581.

TRIAL—PLEADINGS DELIVERED DURING VACATION.

Baugh v. Porcupine Three Nations Gold Mining Co., 19 O.W.R. 938, 2 O.W.N. 1508.

ACTION TO RESCIND CONTRACT—ELECTION TO AFFIRM—LEAVE TO AMEND.

Boothe v. Rattray, 18 W.L.R. 61.

III. Procedure.

(§ III—135) — CONSENT JUDGMENT — MOTION TO SUSPEND—JURISDICTION.

The defendants, in 1918, sought an order to suspend for a few weeks the operation of an injunction contained in a consent judgment pronounced in January, 1916:—Held, that the court had no jurisdiction to make the order. There is no law which enables the court to sanction the breach of a contract or the violation of a judgment granting an injunction. There is jurisdiction to alter a judgment once entered only when it does not express the real intention of the court or when it has been obtained fraudulently. The judgment can be attacked only upon grounds upon which a contract can be attacked—and emphatically so when the judgment is a consent judgment.

Lewis v. Chatham Gas Co., 42 O.L.R. 102.

EX PARTE ORDERS — MISSTATEMENTS AND SUPPRESSION OF MATERIAL FACTS—DISSOLUTION OF INJUNCTIONS—COSTS.

Clergue v. Lake Superior Dry Dock, etc., Co.; Hodge v. Clergue, 12 O.W.N. 411.

The procedure to obtain an injunction is a petition and this petition constitutes an action. Therefore, a petitioner who does not reside in Quebec must give security for costs and furnish a power of attorney.

Thomas v. Fish, 13 Que. P.R. 406.

UNDER QUEBEC CODE.

Under the new C.C.P. there is no longer a writ of injunction; an injunction is only an incident in the action with which it is connected, and the class of an action is not changed because it is accompanied by an application for an injunction or in the course of the action an interim injunction has been asked for.

Desjardins v. Maisonneuve School Commission, 18 Que. P.R. 302.

(§ III—137)—PARTIES.

Upon a motion by an owner of realty for an injunction to restrain an adjoining owner from interfering by additional work with a party wall already erected and maintained between the two properties, a third party for whose benefit and under whose instructions the additional work is being done as well as the building contractor doing it may properly be joined as codefendants. [Dalton v. Angus, L.R. 6 App. Cas. 740, applied.]

Monadnock Realty Co. v. Quebec Bank, 18 D.L.R. 250, 24 Man. L.R. 763, 28 W.L.R. 339.

PARTIES — BLASTING IN STREETS — SKILL AND CARE—ADDITION OF PARTIES.

Bell Tel. Co. v. Avery, 6 D.L.R. 852, 3 O.W.N. 1664, 22 O.W.R. 963.

(§ III—138)—AFFIDAVIT FOR—WILL—ACTION TO SET ASIDE—RESTRAINING EXECUTORS FROM DEALING WITH ESTATE.

Thompson v. Thompson, 17 D.L.R. 831, 7 O.W.N. 23.

AFFIDAVITS—FALSE.

A preliminary injunction obtained ex parte on an affidavit which the applicant knew was false, or which he stated to be true as of his own personal knowledge, while as a matter of fact it was false, will be dissolved on motion of the defendant.

Hart v. Brown, 9 D.L.R. 560, 23 W.L.R. 295.

It is within the discretion of a judge sitting in Chambers to act upon an affidavit to which exhibits have been annexed, contrary to Ord. 38, r. 23, but the party offering such affidavit may be deprived of costs, under Ord. 38, r. 3, or Ord. 65, r 27 (20).

D'Israeli Asbestos Co. v. Isaacs, 40 N.B. R. 431.

ENDORSEMENT ON WRIT OF, SUMMONS — AMENDMENT.

Loveland v. McNairney, 4 O.W.N. 680, 23 O.W.R. 972.

(§ III—139)—DELAY IN APPLYING FOR FORMAL ORDER.

An application to commit the defendant for contempt of court based on an alleged breach of an interim injunction order will be refused where there has been a delay of several months after the order was made before any formal order was applied for or taken out. [James v. Downes, 18 Ves. 522, 34 Eng. R. 415, applied.]

J. B. Snowball Co. v. Sullivan, 14 D.L.R. 528, 42 N.B.R. 318, 13 E.L.R. 349.

Where delay in applying for an interlocutory injunction is satisfactorily explained the writ will not be denied.

Toronto Carpet Co. v. Wright, 3 D.L.R. 725, 22 Man. L.R. 294, 21 W.L.R. 304.

(§ III—141)—NOTICE—SECURITY.

If after obtaining an interlocutory injunction the petitioner does not cause it to be issued but contents himself with giving notice to the defendant of the judgment granting it and furnishing the requisite security, the defendant cannot set up this ground after the proceedings are at an end and a permanent injunction has been granted.

Lachance v. Cauchon, 24 Que. K.B. 421.

(§ III—142) — Bonds — Enforcement — Damages.

Where an order declared that "an issue be and is hereby directed as to what damages, if any, have been sustained by the defendant . . . by reason of the injunction herein which the plaintiff, according to the practice of this court, ought to pay" and sent the issue for trial and directed the parties to file pleadings, and upon the trial of the issue the court dealt only with the amount of damages and did not consider the question whether any damages should be assessed and it appeared that the judge issuing the order did not intend to decide the latter question, the duty devolves upon the court to do so. The undertaking of a plaintiff in an injunction suit to abide by any judgment the court may make as to damages suffered by the defendant by reason of the injunction is not a contract with the defendant but a conditional obligation to the court which becomes absolute only when the court finds as a condition precedent to liability that the case in view of all the circumstances is a proper one in which to direct an enquiry as to damages. The mere vacating of an interlocutory injunction is not sufficient to entitle the defendant to an enquiry as to the damages sustained by him in the absence of a shewing on his part that the injunction was improperly granted upon a consideration of the facts involved in the action. Where an injunction against a debtor and his wife restraining them from using funds deposited in the wife's name stopped the use also of money to which the husband had no claim, but which was used in another business in which the wife was a partner, and it was shewn that such business had been profitable but that the injunction suspended the same for a time and caused the wife and her partner great inconvenience she was entitled to damages therefor. A claim for damages upon an injunction undertaking is not established on shewing only that the defendant by reason of being restrained from withdrawing his bank deposit account lost the opportunity of securing an assignment of an option for the purchase of lands, the contents of which were not offered in evidence.

Albertson v. Secord, 1 D.L.R. 804, 4 A.L.R. 90, 20 W.L.R. 64, 1 W.W.R. 657.

(§ III—147)—Anticipated injury—Nuisance.

Where a city corporation violates subs. 2 of s. 12 of the Public Health Act (Alta.) which inhibits the maintaining of a system of sewerage without a connecting system of sewage purification and disposal, an injunction order against discharging the sewage into the passing river without purifying it, will lie against the city, but, an adequate delay may be allowed in the public interest, so that the sewage may be otherwise disposed of without further menace to the public health. [Att'y Gen'l v. Birmingham, 4 K. & J. 528, 70 Eng. R. 220, applied.]

Clare v. Edmonton, 15 D.L.R. 514, 5 W. W.R. 1133, 26 W.L.R. 678, 5 W.W.R. 1133.

Decree — Formal requirements — Time limit—Endorsement—Issuing solicitor's name.

Rule 5, Order 41, Judicature Rules of Practice (N. B.) does not apply to merely negative orders and it is no objection on a motion to commit for breach of an injunction prohibiting a trespass that the injunction decree was not endorsed with a memorandum and the name of the issuing solicitor under that rule, nor is it an objection that no time was limited for compliance; a time limit is essential only where the judgment or order is to do an act as distinguished from a merely prohibitive order.

Turnbull Real Estate Co. v. Segee, 19 D.L.R. 525, 42 N.B.R. 625.

(§ III—150)—Local judge — Interlocutory injunction—Granting ex parte.

Under Con. r. 357 an interlocutory injunction may be granted by a local judge on an ex parte application only when delay may entail serious mischief.

Baldwin v. Chaplin, 12 D.L.R. 387, 4 O. W.N. 1574, 24 O.W.R. 860.

Local judge—Interim injunction.

A local judge has no power under Ontario Con. r. 46 to grant an interim injunction except in cases of emergency and on proof to his satisfaction that the delay required for an application to the High Court is likely to involve a failure of justice; and this power is not to be exercised without notice of the application being given, unless the court is satisfied that the delay caused by proceeding by notice of motion might entail serious mischief. An interim injunction for a period not exceeding 8 days may be granted by a local judge under r. 46, and after the expiry of an 8 day injunction granted by one local judge a second 8 day injunction should not be granted by another local judge to the same effect as the first injunction.

Capital Mfg. Co. v. Buffalo Specialty Co., 1 D.L.R. 260, 3 O.W.N. 553, 20 O.W.R. 920.

(§ III—155)—Discretion of court—When to become operative.

In an action by a railway company, which had the right to expropriate the land in dispute, to restrain the defendant from interfering with the construction by the company of its railway across a certain road, in which action a counterclaim was made by the defendant for a declaration of his right to the road as a private way and for an injunction restraining the company from trespassing thereon, the ex parte injunction granted the company should not be dissolved and the injunction awarded the defendant upon the merits in accordance with his counterclaim should not be made operative until an opportunity is given to the company to take expropri-

ation proceedings. [Sandon Water Works & Light Co. v. Byron N. White Co., 35 Can. S.C.R. 309, followed.]

C.N.R. Co. v. Billings, 5 D.L.R. 455, 3 O.W.N. 1504, 22 O.W.R. 659.

(§ III—160)—AMENDMENT OF INJUNCTION ORDER.

Upon an application to amend an injunction, in an action in which the plaintiff (a sublessee) claimed against the defendant (assignee of the fee in the demised premises) damages for wrongful distress, and an injunction limiting the right to distrain, and where the injunction, statement of claim, lease and sublease, all erroneously described the demised premises as "lot 7, block 150" instead of "lot 7, block 152;" leave to amend will be granted, but with the proviso that no process for contempt shall lie against the defendant for any act in the interval between the service of the original injunction order and the amendment, with respect to "lot 7, block 152."

Pigeon v. Preston, 6 D.L.R. 399, 22 W. L.R. 181, 2 W.W.R. 1080.

AGREEMENT TO POSTPONE INTERIM INJUNCTION HEARING—NECESSITY FOR FORMAL CONTINUANCE BY COURT UNDER THE CONSENT.

Where an injunction order restraining the defendant in his disposal of certain property is made ex parte for a period ending on a certain day and hour, or "until such time as any motion to be on that day made to continue it should be heard and disposed of," such order will not be held in the absence of any direction by the court for its continuance, to extend the injunction period "until a date to be agreed upon by both parties," merely because of an agreement between counsel for their convenience to that effect, and the injunction will be strictly construed to expire with the original injunction period.

J. B. Snowball Co. v. Sullivan, 14 D.L.R. 528, 13 E.L.R. 349.

COURT OF KING'S BENCH—JURISDICTION OF TWO JUDGES—C.P., ART. 969.

Two judges of the court of King's Bench may, on application made out of term, provisionally suspend any injunction, but they cannot authorize the issue of an interim injunction when it had already been refused.

Davis v. Jacobs Asbestos Mining Co., 28 Que. K.B. 480.

ACTS OF INTIMIDATION BY STRIKING EMPLOYEES — RESTRAINING ORDER — ASSOCIATION OR CLASS—REPRESENTATIVES.

Cumberland Coal & R. Co. v. McDougall, 44 N.S.R. 535.

INNKEEPERS.

I. RIGHTS OF AND LIABILITIES TO GUESTS.

II. LIABILITY FOR LOSS OF PROPERTY OF GUEST.

INNKEEPER—WAYFARER—BOARDING HOUSES—LOSS OF PROPERTY OF GUEST—LIABILITY—INNKEEPERS ACT, R.S.O. 1914, C. 173.

An innkeeper is liable quâ innkeeper only when he keeps a common inn and the guest is a wayfaring traveller using the inn as a wayfarer. Where a contract is made by the hotelkeeper to take a person in as a guest for a long time paying at a weekly or monthly rate, the relationship is that of boarding house keeper or lodging house keeper and not of innkeeper, and while not liable as an insurer because of that distinction, the hotelkeeper must take reasonable care for the safety of the property brought by the guests to the hotel. The onus is upon an innkeeper claiming the benefit of the Innkeepers Act, R.S.O. 1914, c. 173, c. 4, limiting his liability for loss of a guest's goods in certain cases to $40, to prove his compliance with the statute by posting up the statutory notice to that effect throughout the hotel.

MacDonell v. Woods, 20 D.L.R. 366, 32 O.L.R. 283.

NEGLIGENCE.

The baggage of a hotel guest placed in the room assigned to him is under the charge of the innkeeper when the guest is temporarily out of the room, and he is liable at common law for its loss as for breach of duty unless the guest was himself guilty of negligence and such negligence conduced to the loss; it is not negligence on the part of the guest to leave the room unlocked without further inquiry at the hotel office for a key on being informed by the bell-boy conducting him to his room that there was no key.

Vicars v. Arnold, 20 D.L.R. 838, 7 W.W. R. 676, 7 S.L.R. 298, 30 W.L.R. 70.

"GUEST" AND "BOARDER" DISTINGUISHED.

The defendant, a resident of Midland, made a special agreement with the plaintiff, a hotelkeeper, to board at his hotel for a certain sum per day. He remained there about 10 months, paying at the agreed rate. A few days before leaving, his overcoat was stolen from his room by a person who was not in the employ of the plaintiff. The plaintiff brought action to recover $40 the balance due by defendant for board and lodging, and the defendant counterclaimed for damages for loss of his coat to the same amount. Held, that the defendant was a boarder and not a guest, and therefore, the plaintiff was not liable for the loss of the coat. The distinction between a "boarder" and a "guest" discussed.

Katz v. Noland, 50 C.L.J. 193.

LIEN ON BAGGAGE—TRAVELER'S SAMPLES.

The lien on and right to sell the baggage and property of their guests, boarders or lodgers given to hotelkeepers by art. 1816a C.C. (Que.), does not extend to samples

taken to a hotel by a traveler who is not the owner of such goods.

Computing Scale Co. v. Fortin, 41 D.L.R. 136, 53 Que. S.C. 268, 24 Rev. de Jur. 148.

EFFECTS OF STRANGER—R.S.O. 1914, c. 173.

The provisions of the Innkeepers Act, R.S.O. 1914, c. 173, are supplemental to the common law and an innkeeper still has his common law lien on the property of a stranger brought to the inn by the guest as part of his personal effects; the hotelkeeper may be justified in retaining under such right of lien against a transient guest a typewriting machine brought by him to the hotel, although the property in the machine was in a typewriter company. [Huffman v Walterhouse, 19 O.R. 186, and Newcombe v. Anderson, 11 O.R. 665, followed.]

United Typewriter Co. v. King Edward Hotel Co., 20 D.L.R. 519, 32 O.L.R. 126.

It is within the ostensible authority of a hotel clerk to take charge of the luggage of a departing guest who says he intends to return, and even if the service is without charge, the hotel proprietor is in the position of a gratuitous bailee. In an action by the owner for the value of the luggage, the nonproduction of the property, except perhaps in extraordinary cases, is prima facie evidence of negligence, and upon proof of nonproduction the onus is shifted to the proprietor to shew that the luggage was lost without negligence on his part.

Sutherland v. Bell, 3 A.L.R. 497.

HOTEL NECESSARY REFUGE — AGREEMENT — BURDEN OF PROOF—C.C. ART. 1814, 1815.

A hotelkeeper who, during a rush of travellers, rents some beds placed in the corridors of the hotel, because all his rooms are taken, can make an agreement with his guests that he will only be answerable for goods expressly confined to his care. In such case the common law presumption of responsibility ceases, and the traveler whose goods have been lost or stolen must prove that the theft or loss is due to the fraud or fault of the hotelkeeper.

Julien v. Lapointe, 55 Que. S.C. 27.

LUGGAGE LEFT IN ROOM BY GUEST—ABSENCE OF GROSS NEGLIGENCE.

Warner v. Cameron, 19 W.L.R. 461.

INSANE PERSONS.

See Incompetent Persons.

See also Descent and Distribution; Homicide.

INSCRIPTION (QUE.).

See Appeal; Pleading.

INSCRIPTION DE FAUX—LOSS OF ORIGINAL.

If the depositary in the office of the notary, by whom the copy of the document, the signature of, which is alleged to be false, is signed, declares that he has been unable to find the original of this document and that the defendant en faux has declared that he wishes to make use of it, the plaintiff who has not filed his reasons for his allegation cannot by motion demand that the document be declared false.

Sylvestre v. Boucher, 18 Que. P.R. 428.

INSOLVENCY.

I. IN GENERAL.
II. UNLAWFUL PREFERENCES.
III. WHAT PASSES TO ASSIGNEE OR TRUSTEE.
IV. CLAIMS AGAINST AND DISTRIBUTION OF ESTATE.
V. DISCHARGE.
VI. PROOF OF.

What constitutes, burden of proof, see Fraudulent Conveyances, III—10.

Fraudulent preferences, see also Fraudulent Conveyances; Assignment for Creditors.

I. In general.

(§ I—3)—WHAT CONSTITUTES INSOLVENCY.

A person who operates a factory in which he manufactures cheese and butter out of materials belonging to other parties and who sells the product in his own name, receiving a commission thereon, is a trader, and is subject to C.C.P., regarding abandonment of property.

Blanchette v. Levesque, 5 D.L.R. 481, 41 Que. S.C. 477.

A person is to be deemed insolvent within the meaning of the Assignments Act, (Alta.) if he does not pay his way and is unable to meet the current demands of his creditors and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent.

Walter v. Adolph Lumber Co., 23 D.L.R. 326, 8 W.W.R. 351.

WHAT CONSTITUTES — "NOTORIOUS" INSOLVENCY—EMBARRASSMENT KNOWN TO BUT FEW.

A person is not so notoriously insolvent as to render a hypothec deed void against creditors where his insolvency was known to but a few people, and most of his creditors, including the grantee in the deed, were unaware thereof.

Eastern Townships Bank v. Picard, 13 D.L.R. 389, 23 Que. K.B. 488.

A debtor should be held to be "in insolvent circumstances" within the meaning of s. 40 of the Assignment Act, R.S.M. 1902, c. 8, if he does not pay his way and is unable to meet the current demands of his creditors and if he has not the means of paying them in full out of his assets realized upon a sale for cash or its equivalent, or when he is not in a condition to pay his debts in the ordinary course as persons carrying on trade usually do.

Empire Sash & Door Co. v. Maranda, 21 Man. L.R. 605.

A trader who has actually ceased payment of the bulk of his debts becomes a debtor who has suspended payment. A trader who has faithfully paid all his acknowledged debts cannot be deemed insolvent because he left unpaid some that can reasonably be disputed, especially when the

creditor who demands an assignment admits that his claim is litigious.

Ward v. Proulx, 14 Que. P.R. 133.

Insolvency, or cessation of payments, results from successive protests, law suits, condemnations, and from all circumstances serious enough to infer that the debtor has ceased to meet his business obligations. Financial difficulties or temporary tightness is a cessation of payments. There is no possible distinction between suspension and cessation of payments. A creditor who has not a claim of sufficient amount to make a demand of assignment to a debtor, cannot legally have another creditor's claim transferred to him to complete the amount of his claim.

Perron v. Drouin, 16 Que. P.R. 121, 46 Que. S.C. 336, affirming 14 Que. P.R. 7.

INSOLVENT ESTATE—ACTION BY THE CURATOR —AUTHORIZATION.

Lamarche v. Montreal, 12 Que. P.R. 153

ABANDONMENT OF PROPERTY—CESSATION OF PAYMENTS—NOMINAL ASSETS IN EXCESS OF LIABILITIES.

Mondou v. Paulet, 39 Que. S.C. 504.

II. Unlawful preferences.

(§ 11—5)—CONVEYANCE BY PERSON NOT "NOTORIOUSLY" INSOLVENT—KNOWLEDGE OF INSOLVENCY.

Where, at the time a deed of hypothec was given, the grantor was not notoriously insolvent, in order to set it aside in favour of a creditor it must positively appear that the grantee was aware of the insolvency of the grantor.

Eastern Townships Bank v. Picard, 13 D. L.R. 389, 23 Que. K.B. 488.

AGREEMENT FOR EXTENSION—SECRET PREFERENCE—PUBLIC POLICY.

Where at a meeting of creditors an agreement for extension of time provided that the debtor will not give a preference, a prior secret agreement by which one of the creditors obtains security and more favourable terms is against public policy and void as against the other creditors.

Hochberger v. Rittenberg, 36 D.L.R. 450, 54 Can. S.C.R. 480, affirming 31 D.L.R. 678, 25 Que. K.B. 421.

CHATTEL MORTGAGE—UNJUST PREFERENCE—INTENT.

A chattel mortgage obtained by a creditor from an insolvent debtor, within 60 days before an assignment for creditors, whether voluntarily or under pressure, is prima facie an unjust and intentional preference under s. 5 (4) of the Assignments and Preferences Act (R.S.O. 1914, c. 134).

Clifton v. Towers, 35 D.L.R. 623, 39 O. L.R. 292.

WHAT CONSTITUTES — PREFERENCES—SECURITY FOR PRE-EXISTING DEBT.

International Harvester Co. v Campbell, 27 D.L.R. 715, 33 W.L.R. 726, 9 W.W.R. 1183.

ASSIGNMENTS AND PREFERENCES—BILLS OF SALE—INSOLVENT BARGAINOR—CONSIDERATION—PAYMENT OF COMPOSITION TO CREDITORS — INVALIDITY AGAINST NON ASSENTING CREDITORS — ASSIGNMENTS AND PREFERENCES ACT, R.S.O. 1914, c. 134, s. 5 (1).

Herzig v. Hall, 8 O.W.N. 242.

CONCEALMENT OF EFFECTS.

Preferential payments by an insolvent debtor constitute in law a concealment of effects within the meaning of art. 895 C. C.P. The defendant who declares, in speaking of a transaction he had carried through "I passed near the gates but did not enter," gives evidence of a fraudulent intention meaning to say that he had been able to dispose of his property without incurring the danger of arrest by his creditors.

Chapleau v. Auger, 15 Que. P.R. 25.

PAYMENT IN GOODS—KNOWLEDGE OF INSOLVENCY.

An allegation in a statement of claim to recover articles given in payment, to the prejudice of an estate in bankruptcy, on the very day on which the debtor made an assignment of all his goods is sufficient to allow the plaintiff to prove that the creditor so paid had knowledge of the insolvent state of the debtor. Accordingly, the defendant cannot make an inscription in law to set aside the action by reason of the omission of a more express allegation that the creditor was aware of the state of insolvency in question.

Chartrand v. Dominion Paper Co., 23 Que K.B. 43.

PREFERENTIAL PAYMENT—DILATORY EXCEPTION.

A creditor who takes proceedings against a cocreditor and a debtor who owes both of them, in order to have a preferential payment annulled, can by one and the same action, ask judgment against the debtor for the sum due, and also against the cocreditor to make him return to the estate the goods receeived by him, or to pay their value. A dilatory exception asking suspension of proceedings until the plaintiff has made his option between the two demands, and declared which of the two he abandons, reserving his recourse, and which of them he will continue now, will be dismissed as ill-founded.

Moore v. Rousseau, 46 Que. S.C. 399.

MONEY ADVANCED TO INSOLVENT COMPANY TO PAY ONE CREDITOR—PREFERENCE.

Stecher Lithographic Co. v. Ontario Seed Co., 24 O.L.R. 503; 20 O.W.R. 1.

CREDITOR PURCHASING FROM INSOLVENT — AUCTION SALE—CASH DISCOUNT—PREFERENCE.

Curry v. Kirkpatriek, 8 E.L.R. 455.

HYPOTHEC—INSOLVENCY OF DEBTOR — DEBT TO MUNICIPAL CORPORATION.

Cowansville v. Duggan, 20 Que. K.B. 105.

INSOLVENT—PAYMENT TO CREDITOR.

Lallemand v. Harne, 39 Que. S.C. 218.

III. What passes to assignee or trustee.

(§ III—10)—PURCHASE OF LICENSE UNDER SUSPENSIVE CONDITION — DEFAULT IN PAYING INSTALMENTS — EXISTENCE OF CONSIDERATION AND ABSENCE OF FRAUD.

Turgeon v. St. Charles, 15 D.L.R. 298, 48 Can. S.C.R. 473, 13 E.L.R. 521, reversing 7 D.L.R. 445.

(§ III—11)—WHAT PASSES TO RECEIVER—LIABILITY OF INSURED ON PREMIUM NOTES.

The fact that a permanent fund required by the charter of a mutual insurance company to be maintained for the security of its policyholders was depleted and nonexistent when a policy of insurance was issued, does not render the contract null and void so as to relieve the insured from liability on a note given for the premium thereon for an insurance upon the "mutual" plan. [China Mutual Ins. Co. v. Smith, 3 D.L.R. 766, affirmed on appeal.]

Pickles v. China Mutual Ins. Co., China Mutual Ins. Co. v. Smith (No. 2), 10 D.L.R. 323, 47 Can. S.C.R. 429, 12 E.L.R. 300.

(§ III—12)—RIGHTS OF CURATOR UNDER QUEBEC LAW — RECOVERY OF MONEYS PAID AS FRAUDULENT PREFERENCE.

Recovery may be had under art. 1036 C.C. (Que.) by the curator of an insolvent broker's estate for the benefit of the general body of creditors of a sum repaid by the insolvent with the alleged profits, on the eve of insolvency and under circumstances proving the customer's belief that the broker was then insolvent as he was in fact, where the customer had handed over moneys to the insolvent broker to be used by him along with moneys of other customers in his alleged speculations in stocks on a "blind pool" in which there was no segregation of each customer's money nor control thereof by anyone but the broker; and such recovery is not barred by art. 1927, even if the transactions between the customers and the broker were to be considered as gaming contracts.

Wilks v. Matthews, 16 D.L.R. 746, 49 Can. S.C.R. 91, 50 C.L.J. 118, reversing 7 D.L.R. 395, 22 Que. K.B. 97.

VACANT SUCCESSION—SALE.

If the succession of an insolvent trader has been declared vacant, and an immovable offered for sale after advertisement has not found a purchaser at the price fixed, the curator will be allowed to sell it whenever he deems it expedient.

McGowan v. Lamarre, 18 Que. P.R. 390.

PRINCIPAL AND AGENT—ADVANCE OF FUNDS FOR SPECIAL PURPOSE.

Vermette v. Gagnon, 20 Que. K.B. 466.

ASSIGNMENT OF ANOTHER PERSON'S PROPERTY—REVENDICATION.

Leskas v. William, 12 Que. P.R. 168.

SALE OF IMMOVABLES.

Fortier v. Michaud, 12 Que. P.R. 259.

IV. Claims against and distribution of estate.

(§ IV—15)—ABANDONMENT OF PROPERTY—SMALL ESTATE—APPOINTMENT OF ONE OR SEVERAL CURATORS—MARRIED WOMAN—FILING OF A CLAIM WITHOUT THE AUTHORIZATION OF HER HUSBAND—C.P. 867—C.C. 1422, 1424.

The filing of a claim by a woman separate as to property and the appointment of an attorney to represent her at the meeting of the creditors without the authorization of her husband is valid being a pure act of administration. In the appointment of a curator, unsecured claims should receive more consideration than those secured, even by notes. In the absence of special reasons, only one curator should be appointed to a small insolvent estate, and as far as possible, he should reside in the district of the insolvent.

Re Savard & Gagnon, 15 Que. P.R. 386.

(§ IV—16)—PRIORITIES.

All creditors (apart from privileged creditors) are entitled to share alike in the proceeds of their debtor's property and if some alone receive the proceeds the others are prejudiced, even if the property be sold for its full value, and although a right of redemption has been reserved by the debtor; and the purchaser cannot ask that the objecting creditors exercise this right of redemption on the debtor's behalf.

Landry v. McCall, 6 D.L.R. 793, 21 Que. K.B. 348.

CESSION DE BIENS — CONTESTATION OF SCHEDULE—REPLICATION.

Rasminski v. Wilks, 12 Que. P.R. 375.

CESSION DE BIENS—CONTESTATION OF APPLICATION—DELAY FOR INSCRIPTION.

Dufresne v. Villani, 12 Que. P.R. 160.

SETTLEMENT WITH CONTESTING CREDITOR—INTERVENTION.

Superior v. Hutchins, 12 Que. P.R. 174.

VI. Proof of.

(§ VI—25)—Insolvency is not proved by the opinion of witnesses, but by the filing of a statement verifying the assets and liabilities of the debtor.

Murphy v. Murphy, 23 Que. K.B. 529.

INSPECTION.

Of documents, see Discovery.
Right of, see Sale.

INSTRUCTIONS TO JURY.

See Trial; New Trial.